

Indigenous-Led Impact Assessment, An Introduction

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Case Studies and Experiences in Indigenous-led Impact
Assessment



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This series provides examples, experiences, and information about Indigenous-led impact assessment. The information is presented for Indigenous organizations and communities, environmental impact assessment practitioners, academics, and students alike. Importantly, the case study examples can be useful to Indigenous governing bodies (IGBs) interested in developing an environmental impact assessment process.

The individual case studies (accessed through the CEAR website) describe some of the ways Indigenous Nations and governing bodies in western Canada have implemented their own environmental impact assessment processes. This *Introduction* provides an overview of general concepts and approaches for Indigenous-led impact assessment.

What is Indigenous-led Impact Assessment?

Environmental impact assessment (EIA) is a tool widely used around the world for assessing the impacts of projects, such as mines, dams, pipelines and other forms of development). EIA helps to guide decisions about if and how projects should proceed.

It provides information to regulators and the public about the impacts of development and how they can be managed and mitigated. EIA is typically conducted by project proponents and is overseen by a government assessment agency.

Indigenous-led impact assessment (ILIA) is a process designed and conducted by **Indigenous governing bodies (IGBs)** for evaluating potential land use impacts of a proposed development. IGBs determine what and how impacts are assessed and do this according to their own values, concerns, and priorities. For example, IGBs may choose to focus an ILIA on specific cultural, traditional use, or social values and the associated impacts of a project on their peoples and communities.

In practice, ILIA has generally incorporated similar stages that we see in state-led EIA -- such as screening, scoping, assessment, review, decision-making, and follow-up and monitoring. But ILIA differs from other types of EIA because it is designed to reflect the unique locations, histories, natural resource issues, governance systems, and, very

Cover photo credit: Dr. Kevin Hanna. Cover image: Part of the frontal pole from a house at K'uuna Village, Haida Gwaii. Belonging to the Qagials qe'gawa-I Raven family, this pole and its house named Na a'oga or House Mother were owned by a brother of the village chief. Now in the Museum of Anthropology at UBC.

importantly, the place-based knowledge of the Indigenous peoples undertaking the assessment.

Indigenous-led Impact Assessment: A Tool for Overcoming the Challenges and Limitations of State-led Environmental Impact Assessment

In most EIA processes it is a proponent¹ who will prepare the assessment of their proposed project and outline ways that they will mitigate negative project impacts².

The role of the government agency is to manage the EIA process, verify that information requirements have been met, timelines are being followed, set the conditions for approval, and provide recommendations to help make a decision.

The decision recommendation is provided to the decision-making authority (e.g., provincial, federal, or other officials or agencies), which are responsible for deciding whether a project should proceed.

When operating within EIA processes managed by government agencies there are several key challenges which can limit Indigenous participation and acceptance of EIA. Three such limitations stand out:

- The scope of the EIA is too narrowly defined. For example, it may focus primarily on biophysical impacts while ignoring Indigenous cultural values and place-based relationships.
- EIA agencies often fail to provide adequate funding and time to facilitate effective and meaningful Indigenous participation.
- State-led EIA processes and their associated decision-making have generally not provided opportunities for IGBs to provide their consent for decisions about project approval or rejection with respect to potential impacts on Indigenous rights or values.

Dissatisfaction with the conventional approaches of state-led EIA, have moved some IGBs to develop their own

1 Proponent is the party proposing a development project which is required to prepare an EIA report, outlining the proposed project design and anticipated impacts.

2 In EIA, impact is defined as the environmental, economic, social, and Indigenous rights, effects of an activity, including those that are anticipated.

processes for assessing proposals, and making decisions about projects within their territories.

ILIA processes have sought to overcome some of the limitations of EIA (with varying degrees of success), by applying a process that is controlled (in-part or fully) by the IGB, rather than proponents or assessment agencies.

The Emergence of Indigenous-led Impact Assessment through the Exercise of Indigenous Legal Systems and Political Rights

ILIA is one way that Indigenous peoples can articulate their interests, while also asserting their jurisdictional capacity and authority to influence resource and land use decisions that affect them. ILIA can also be designed and implemented to reflect Indigenous laws and obligations to their territories.

ILIA connects to a growing international movement to recognize the rights of Indigenous peoples articulated by the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**, which includes the principles of **Free Prior and Informed Consent (FPIC)** (Box 1).

In the absence of a clear legal framework for ensuring and requiring that Indigenous consent is secured, some IGBs have begun asserting their own understandings of UNDRIP and FPIC. Implementing UNDRIP and FPIC require proponents, governments, and assessment bodies to seek out, learn, and respond to consent-based processes articulated by Indigenous peoples through their representative governments.³

BOX 1: UNDRIP and FPIC

SPECIFIC RIGHTS INCLUDED IN UNDRIP

- Rights to self-determination.
- Rights to autonomy and self-government.
- Rights to the lands, territories, and resources which they have (Indigenous peoples) have traditionally owned, occupied, or otherwise used or acquired.

Included within UNDRIP, is adherence to the concept of FPIC, which flows from the right to self-determination.

To be true to its definition, FPIC must be obtained¹

- Free: Without force, coercion, intimidation, manipulation, or pressure from the government or company seeking consent.
- Prior: With sufficient time to review and consider all relevant factors, starting at the inception stage, in advance of any authorization for- and continuously throughout the planning and implementation of- activities.
- Informed: Based on an understanding of adequate, complete, understandable, and relevant information relative to the full range of issues and potential impacts that may arise from the activity or decision (informed); and,
- Consent: Only from the legitimate representatives of the people affected, with any caveats or conditions stipulated by the people whose consent is given.

¹ Gibson, G., Galbraith, L., and MacDonald, A. (2016). "Towards Meaningful Aboriginal Engagement and Co-Management: The Evolution of Environmental Assessment in Canada". In *Environmental Impact Assessment: Practice and Participation*, edited by Hanna, K. Don Mills, Ontario: Oxford University Press

In countries such as Canada, there is a slow but growing recognition of Indigenous legal systems and rights in domestic jurisdictions and international law. For example, in Canada the recently updated federal and British Columbia (BC) EIA laws have created opportunities for ILIA in coordination with their respective review processes which is part of government initiative to advance reconciliation with Indigenous peoples (Box 2). BC has also committed to bringing provincial laws

into alignment with UNDRIP, which has been ratified through the **Declaration on the Rights of Indigenous Peoples Act**.

However, putting such policies into action is a slow process, and not every Canadian province has taken similar steps.

Indigenous-led Impact Assessment Process Models

There are three different process

³ For a further description, see: Papillon, M., and Rodon, T. (2019). The Transformative Potential of Indigenous-Driven Approaches to Implementing Free, Prior and Informed Consent: Lessons from Two Canadian Cases. *International Journal on Minority and Group Rights*, 27(2), 314–335

BOX 2: Recognition of Indigenous Legal and Political Rights within EIA Legislation in Canada¹

Opportunities for ILIA are outlined in Canada's federal **Impact Assessment Act, 2019** in section 31(1), which explains that under the Responsible Minister's² discretion, they may substitute an Indigenous 'jurisdictions' assessment process (i.e., ILIA) for the Impact Assessment Agency of Canada's process. It is stated again in section 29, explaining that the Impact Assessment Agency of Canada may delegate any part of the assessment to an Indigenous jurisdiction.

In British Columbia, the **Environmental Assessment Act, 2018** outlines opportunities for ILIA in section 41, which explains that the Responsible Minister has the authority to enter into agreement with Indigenous jurisdictions to substitute ILIA for part, or all the BC Environmental Assessment Office process.

1 Each of the ILIA case studies included within this series have all been conducted and completed outside of the updated BC and Canada EIA laws. Therefore, this series does not provide insight into the effectiveness of the updated BC and Canada EIA laws in adequately considering ILIA and the associated consent mechanisms IGBs may choose to utilize.

2 Within the political context of BC, the Responsible Minister is the one with responsibilities for activities of the project being reviewed. For example, for a mine the Responsible Minister would be the Minister of Energy, Mines, and Petroleum Resources.

models commonly utilized for ILIA, which are categorized according to who the Indigenous group partners with for the purpose of the assessment, including Co-managed ILIA, Co-developed ILIA, and Independent ILIA

CO-MANAGED

With co-managed ILIA, an IGB will assess the proposed activity in coordination with the state EIA agency. Within the co-managed model, Indigenous-state coordination for the purpose of an assessment may range

from set points of interaction for certain deliverables (e.g., selection of valued components⁴) to full integration of the Indigenous and state-led processes (e.g., collaborative screening, scoping, assessment, review, decision-making, and follow-up and monitoring).

Co-managed ILIA is usually associated with a formal agreement between the IGB and state for the purpose of the assessment (Box 3) which sets out their respective roles and responsibilities for the purpose of the assessment. When IGBs partner with a state agency for

an assessment, there are increased opportunities to leverage funding, expertise, and timelines.

Co-management can play out in multiple ways, from collaboration between IGBs and the state EIA agency on each step of an EIA, to nation-to-nation decision-making.

Co-managed processes are the most likely model to occur if IGBs choose to utilize the *doorway* for ILIA provided through the updated BC and Canada EIA laws (Box 2).

4 Valued components can include aspects of the environment, society, culture, rights, economy, etc., that are of significance. In EIA, valued components are commonly used to assess the effects of a proposed activity, including anticipated impacts.

BOX 3: Formal Agreements in ILIA

Formal agreements within ILIA usually take form as **co-management and joint-management framework agreements**. Implementing an ILIA process that is assured meaningful consideration within the state-led EIA activities require a formal agreement with proponents and/or the state government, prior to the start of the assessment. The degree to which power and responsibility is established through such agreements guides many aspects of the ILIA, including the ILIA process model, assessment funding, scope, and how it will be considered by proponents and the state assessment agency. A framework agreement may be used to establish consent-based decision-making mechanisms between IGBs and state governments or proponents for projects. For example, the **BC Declaration on the Rights of Indigenous Peoples Act** creates opportunities for consent-based decision-making through agreements made through Section 7 of the Act- which can be used to set out a framework for joint decision-making between IGBs and the government of BC for the purpose of an EIA¹.

1 For a more in-depth example of a consent-based decision-making agreement see: Tahltan Central Government and Government of British Columbia. (2022). Declaration Act Consent Decision-Making Agreement for Eskay Creek Project. Retrieved from https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration_act_consent_decision-making_agreement_for_eskay_creek_project.pdf

CO-DEVELOPED

In a co-developed ILIA, the IGB collaborates with the proponent to assess some or all the project impacts.

Depending on the scope of agreements between the IGB and proponent, the IGB may work with the proponent from the start of project on planning, including project layout, design of technical studies, analysis of results of those studies, design of mitigation, enhancement, and accommodation measures, and submitting a co-developed assessment report. IGBs may also choose to undertake specific studies for the proponent which are then included in the project application - such as those related to Indigenous rights, title, and values.

When partnering with proponents, there can be opportunities to secure funding to support the completion of the ILIA, include Indigenous inputs within a proponent's project application, or even shape the project's design at the early planning stage.

Collaborating with proponents may also provide opportunities for an IGB to negotiate an Impact and Benefit Agreement, which can be used to set out what benefits Indigenous communities may receive in return for their support for the project.

INDEPENDENT

Independent ILIA is where an IGB conducts the assessment independent of state agencies and proponents.

Independent ILIA is a fully Indigenous controlled process based within

the governance structures of a Nation- including formal decision-making and any condition-setting requirements. Independent ILIA provides IGBs with a high degree of control over what valued components are being assessed, how impacts and significance are defined, study topics and designs, and interpretation of assessment findings.

An independent process may use and consider the information provided by the proponent and EIA agencies, in addition to an IGB's own studies and analysis. However, the degree to which independent ILIA is used or accepted by the state or proponents is variable. In the absence of a clear agreement (see Box 3) on how an Independent ILIA will be interpreted and linked to decision-making by either agencies or proponent, the ILIA may not be used in a meaningful way to inform the decisions made by others (e.g., a provincial or federal agency).

Key Features of Indigenous-led Impact Assessment

ILIA approaches and practices will reflect the unique locations, histories, natural resource issues, and governance systems of the IGBs who are undertaking an assessment. While there is no one size fits all approach to ILIA, there are key features which can be tailored to reflect the values of IGBs who are undertaking an assessment.

Seven Key features of ILIA

1. **Indigenous values and interests** are forefront. A process defined by the IGB and community undertaking the assessment and based on Indigenous values, interests, and priorities.

2. **Interdisciplinary and holistic.**

It will use methods and information provided by Indigenous knowledge systems⁵ and western science⁶.

3. **Comprehensive.** It can encompass a range of assessment methods and tools, such as cumulative effects, regional, strategic, risk, disaster, and health assessments.

4. **Values-based triggers.** The triggers (requirements) for conducting an assessment are values-based and use criteria that reflect community values and needs, and the cultural use of places and resources.

5. **Control over process.** It provides IGBs with control over how the assessment is conducted, including over what is being assessed, how it assessed, what information and knowledge is used, and who undertakes the assessment and its related activities.

6. **Control over the use of findings.** IGBs apply their own interpretations of ILIA findings, including community-defined interpretations of what are significant impacts.

7. **Supports sustainability.** It will be inter- and multi- generational in its perspective on change, its attention to impacts and benefits, and use of land and resources.

Indigenous led impact assessment can be an important and useful tool for Indigenous communities and governments as they work to manage development impacts, protect important values and places, and secure benefits and opportunities from projects in their territories.

5 Indigenous knowledge refers to the understandings, explanations, skills, and philosophies developed by Indigenous peoples through interactions with their traditional territories.

6 Western science refers to the system of generating knowledge through the application of a scientific method.



First level title: Where to Learn More About Indigenous-led Impact Assessment

First Nations Energy and Mining Council. (2019). Recent Experiences with Indigenous-Led Assessments: A BC Perspective. Available from <https://fnemc.ca/wp-content/uploads/2015/07/Recent-Experience-With-Indigenous-Led-Assessments-A-BC-Perspective.pdf>

Gibson, G., Hoogeveen, D., MacDonald, A., and The Firelight Group. (2018). Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review. Available from https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf

Morales, S. (2019). Indigenous-led Assessment Processes as a Way Forward. Centre for International Governance Innovation. Available from <https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward/>

Nishima-Miller, J. (2021). Indigenous-led Impact Assessment: Approaches, Requirements, and Degrees of Control. Available from <https://open.library.ubc.ca/soa/cIRcle/collections/ubctheses/24/items/1.0397493>

O'Faircheallaigh and MacDonald, A. (2022). Indigenous Impact Assessment, In the Handbook of Environmental Impact Assessment, Hanna, K. Ed. Routledge. Available from <https://www.routledge.com/Routledge-Handbook-of-Environmental-Impact-Assessment/Hanna/p/book/9780367244477>

Case studies and resources in the series

The Squamish Nation Process for the Woodfibre Liquified Natural Gas Plant and Export Terminal Proposal

The Stk'emlu'psemc te Secwepemc Nation Assessment Process and the Ajax Mine Proposal

The Tsleil-Waututh Nation Assessment for the Trans Mountain Pipeline and Tanker Expansion Proposal

The Mikisew Cree First Nation Culture and Rights Assessment for the Frontier Oil Sands Mine Project

The Ktunaxa Nation Rights and Interests Assessment and the Fording River Operations Swift Coal Mine Expansion

FOR MORE INFORMATION:

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