

CROWN DUTY TO CONSULT GUIDELINES For CIB to Discharge the Crown's Duty to Consult

1. Introduction

1.1 Purpose

1.1.1 The Canada Infrastructure Bank (“**CIB**”) is a federal Crown corporation established by the *Canada Infrastructure Bank Act*¹ (the “**CIB Act**”). Pursuant to Section 6 of the CIB Act:

The purpose of the Bank is to invest, and seek to attract investment from private sector investors and institutional investors, in infrastructure projects in Canada or partly in Canada that will generate revenue and that will be in the public interest by, for example, supporting conditions that foster economic growth or by contributing to the sustainability of infrastructure in Canada.

1.1.2 In carrying out its mandate, the CIB is responsible for meeting all of its legal obligations, including responding to the Crown's Duty to Consult with Indigenous groups and ensuring that projects have met environmental assessment and other regulatory requirements.²

1.1.3 Failure to conduct meaningful Indigenous consultation and, where appropriate, accommodation represents a material risk for any proposed Infrastructure Project that involves federal funding.

1.1.4 The Duty to Consult Guidelines (the “**Guidelines**”) describe how the CIB will discharge its independent obligations to respond to the Crown's Duty to Consult with Indigenous groups in executing its mandate and core functions set out in subsection 7(1) of the CIB Act, namely the following:

- structure proposals and negotiate agreements, with the proponents of infrastructure projects and with investors in infrastructure projects, with regard to the Government of Canada's support of those projects;
- invest in infrastructure projects, including by means of innovative financial tools, and seek to attract investment from private sector investors and institutional investors in infrastructure projects;
- receive unsolicited proposals for infrastructure projects that come from private sector investors or from institutional investors.

1.2 Scope

1.2.1 The Guidelines are intended to support Employees within the Investments team in meeting the CIB's legal obligations in responding to, and providing assistance, in fulfilling the Crown's Duty to Consult

¹ S.C. 2017, c. 20, s. 403.

² [Statement of Priorities and Accountabilities – Canada Infrastructure Bank](#), February 3, 2021.

by providing guidance, as well as setting out a recommended due diligence process, for evaluating the discharge of the Crown's Duty to Consult for each infrastructure project under review.

- 1.2.2 The Guidelines are issued under the Investment Policy approved by the Board of Directors and will evolve over time as the organization and its activities mature.

2. Legal Authorities

2.1 *The Constitution Act, 1982*³

2.1.1 The Crown's Duty to Consult is based on judicial interpretation of the obligations of the Crown (federal, provincial and territorial governments) in relation to existing Aboriginal or Treaty rights of the Indigenous peoples of Canada, recognized and affirmed in section 35 of the *Constitution Act, 1982*.⁴ The Crown's Duty to Consult cannot be delegated to third parties.

2.1.2 Section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal rights, but does not define them. Aboriginal rights have been interpreted to include a range of cultural, social, political, and economic rights including the right to land, as well as to fish, to hunt, to practice one's own culture, and to establish treaties.

2.1.3 The Duty to Consult is triggered when the Crown has the knowledge, actual or constructive, of the potential existence of Indigenous or Treaty rights, and the Crown is contemplating conduct that might negatively affect such rights. The duty is rooted in the honour of the Crown – the constitutional principle that the Crown must act honourably in its dealings with Indigenous peoples.⁵ The courts have explained that it will look at how the Crown manages its relationships with Indigenous groups and how it conducts itself when making decisions that may adversely impact the rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. The context will inform what is required to meet the duty and demonstrate honourable dealings with Indigenous groups.

2.1.4 The Duty to Consult is defined in the specific factual context of each case. A key question regarding the duty is what constitutes an Adverse Impact for the purpose of triggering the Crown's Duty to Consult. The jurisprudence has clarified the following:

- There must be a direct link between the proposed Crown conduct or decision and a potential for Adverse Impacts on the Indigenous rights; and
- While the courts will apply a generous and purposive approach towards Adverse Impacts, (i) there must be a potential for an "appreciable" adverse effect on the ability to exercise the Indigenous rights; and (ii) speculative impacts or past wrongs (including previous breaches of the Duty to Consult) do not suffice.

³ Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁴ While the term "Aboriginal" (as opposed to Indigenous) is often used to be consistent with section 35, these Guidelines use the term Indigenous as the collective name for the First Nations, Inuit and Métis peoples.

⁵ See, for example, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

2.1.5 Finally, the courts have generally held that the threshold for triggering the Crown's Duty to Consult is low. If the Crown conduct "might" affect the Indigenous rights, the Crown must consult; however, the depth of the consultation and the extent of accommodation required at law is a function of the strength of the claim regarding the Indigenous rights and the evidence of the potential infringement of the Indigenous rights in question. In cases where the claim is weak or the Adverse Impact minimal, mere notification to the affected Indigenous peoples may be sufficient to satisfy the Crown's Duty to Consult.

2.2 *Impact Assessment Act*⁶

2.2.1 The *Impact Assessment Act* ("**IAA**") outlines a process for assessing the impacts of major projects⁷ and projects carried out on Federal Lands.⁸

2.2.2 As a Crown corporation, the CIB is included within the definition of Federal Authority in the IAA. As a Federal Authority, the CIB has independent obligations with respect to Designated Projects and non-designated projects on Federal Lands:

- a) **Designated Projects:** Federal Authorities are prohibited from making any decision that would enable a Designated Project to be carried out unless:
- No Impact Assessment is required, or
 - The effects of the Designated Project are in the public interest (as determined in the decision statement with respect to the Designated Project).

Moreover, a Proponent is prohibited from carrying out a Designated Project, in whole or in part, if it may cause effects that are within federal jurisdiction unless:

- No Impact Assessment is required;
- The Proponent complies with the conditions of the decision statement; or
- The Impact Assessment Agency of Canada ("**IAAC**") permits the Proponent to carry out an act or thing, subject to any conditions in order to provide the necessary information required for a possible Impact Assessment.

⁶ SC 2019, c 28, s 1.

⁷ These projects are described in the IAA's Physical Activities Regulations or projects that are designated by way of an order issued by the federal Minister of the Environment and Climate Change.

⁸ Federal Lands is defined by the IAA to include reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the Indian Act, and all waters on and airspace above those reserves or lands.

- b) **Non-designated projects on Federal Lands:** Federal Authorities must not carry out projects on Federal Lands, or provide financial assistance⁹ to any person for the purpose of enabling that project to be carried out on Federal Lands unless
- the Federal Authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or
 - the Federal Authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides that those effects are justified in the circumstances (collectively, the “**Determination**”).

The Determination must be based on the following factors:

- Adverse Impacts on the rights of the Indigenous peoples of Canada (including whether the project is likely to have a direct or indirect adverse effect on the claims, treaty rights or practices, of Indigenous peoples);
- Indigenous knowledge provided with respect to the project;
- Community knowledge provided with respect to the project;
- Comments received from the public under subsection 86(1) of the IAA; and
- Mitigation measures that are technically and economically feasible.

Prior to making the Determination, the Federal Authority must post a notice on the Impact Assessment Registry of the Federal Authority’s intention to complete a Determination and invite the public to provide comments. Thirty days must elapse between when the notice is posted in the Impact Assessment Registry, and when the Federal Authority posts a notice of its Determination (including any mitigation measures taken into account by the Federal Authority).

3. Roles and Responsibilities

3.1 Three Lines of Risk Governance

- 3.1.1 To meet the CIB’s responsibilities described in these Guidelines, the CIB has adopted the Three Lines of Risk Governance Model designed to ensure a balance between those involved in taking and managing risk (1st Line), those responsible for risk policy setting and independent oversight (2nd Line) and those providing assurance (3rd Line).

⁹ The CIB has taken the position that simply entering into a credit agreement (with no advance) would not trigger the CIB’s statutory obligation under the IAA to complete a Determination with respect to non-designated projects on Federal Lands. However, the CIB would be required to complete a Determination prior to making any financing advances with respect to the Infrastructure Project.

In *Lavoie v. Canada (Minister of the Environment)*, [2000] F.C.J. No. 1238, the Federal Court of Canada considered a similar provision under the former Canadian *Environmental Assessment Act, 1992*, and confirmed that the required assessments need only be completed prior to funds changing hands, not prior to the commitment to make such funding.

a) **1st Line: Investments Team**

The Investment lead for the Infrastructure Project is accountable for (i) ensuring that an initial assessment of the risks of the Infrastructure Project is completed (see “Determination Form, Appendix A); and (ii) determining the Lead Agency that will conduct the procedural aspects in discharging the Duty to Consult and the Determination under the IAA, and working with the Lead Agency to meet the requirements set out in these Guidelines.

b) **2nd Line: Legal Team**

The legal team assists the Investments team by providing advice and reviewing compliance with these Guidelines and the Compliance Annex (Tab 3) included in Investment Memoranda recommending that the CIB finance the infrastructure project.

3.2 Reliance on Existing Processes and Cooperation with Lead Agency (One Project, One Assessment)

3.2.1 As part of our project due diligence, the Investments team will work in cooperation with FPTMIs to confirm that the honour of the Crown is upheld. Crown Indigenous Relations and Northern Affairs Canada (“**CIRNAC**”) guidelines provide that the CIB may rely on existing regulatory processes, consultation processes and expertise as part of an Impact Assessment, and other provincial, territorial or municipal Environmental Assessment legislation which integrates the Crown’s Duty to Consult.

3.2.2 Where there are existing or planned consultation processes led by: (i) the Public Sponsor delivering the project (e.g., another federal or provincial government department or agency); (ii) a regulatory body (e.g., the National Energy Board, Fisheries and Oceans Canada); or (iii) another Federal Authority (together, a “**Lead Agency**”), the CIB will in the first instance rely on these processes managed by the Lead Agency. This policy approach is reasonable and appropriate as the Lead Agency will have a proximate relationship to the Infrastructure Project (either as the Public Sponsor, project developer, or the body responsible for providing a permit or approval) and will have the expertise to determine adverse effects and, if necessary, will be in a better position to provide accommodation (through an accommodation agreement) with the Indigenous groups.

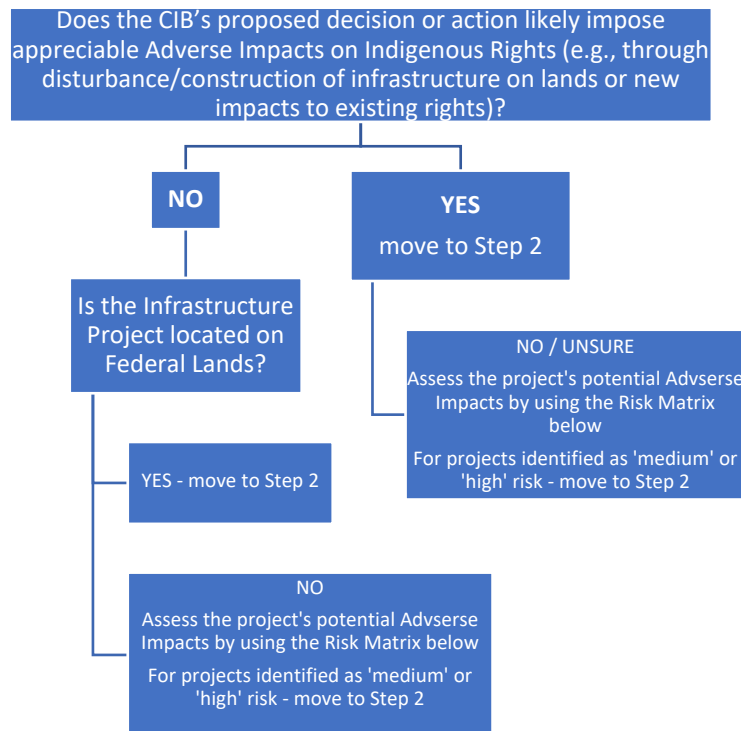
3.2.3 However, despite the policy approach taken in Section 3.2.2 above, the CIB cannot fully delegate nor abdicate its responsibilities to respond to the Duty to Consult. In doing so, the CIB must monitor the discharge of the procedural aspects of the Duty to Consult by the Lead Agency as part of its due diligence activities to ensure the Duty to Consult was adequately discharged, meaningful consultation was conducted and the concerns expressed by any Indigenous groups were properly addressed and/or mitigated, including through accommodation, if appropriate.

4. Activities

4.1 Step One: Initial Assessment

4.1.1 During the Project Appraisal Stage, the Investments lead must complete an initial assessment of the Infrastructure Project, including the potential for the Infrastructure Project to have Adverse Impacts

on Indigenous Rights and therefore impose an obligation on the Crown to consult Indigenous groups impacted by the Infrastructure Project. The initial assessment will be completed by using the **decision tree** and **risk matrix** below and will be documented in the Project Appraisal Memo (PAM) for the Infrastructure Project. The Investment lead may need to seek additional information from the Proponent to complete the Initial Assessment.



	<p>HIGH RISK <i>Project involves risks of notable physical adverse effects with respect to infrastructure (e.g., increased risk to treaty territories due to climate change) or significant new construction</i></p>	<p>MEDIUM RISK <i>Project involves moderate appreciable physical adverse effects, and these adverse effects are manageable (e.g., construction is located primarily on existing right of ways and environmental effects are minimal)</i></p>	<p>LOW RISK <i>Project is located in urban area already developed and does not involve new construction or construction outside existing footprint (i.e., little or no appreciable physical adverse effects)</i></p>
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4.1.2 If the Investments lead determines the Infrastructure Project has the potential for Adverse Impacts, the Investments lead will need to confirm the existence (claimed or established) of indigenous and/or treaty rights in the Infrastructure Project area. The Investment lead may rely on information provided by the Proponent from the Federal Aboriginal and Treaty Rights Information System (ATRIS) to determine if any Indigenous groups may potentially be adversely impacted by the Infrastructure Project and should be consulted.

4.2 Step Two: Determining Who Will Lead the Discharge of the Duty to Consult

4.2.1 If an initial assessment cannot be completed or the Investments lead has determined that there is a potential for Adverse Impacts on Indigenous Rights, the Investments lead will need to assess how

the Crown's Duty to Consult will be appropriately discharged for the Infrastructure Project. The Investments lead will consult with the Project Sponsor or Proponent to confirm the following:

- a) Whether the Infrastructure Project is a Designated Project (and will be subject to an Impact Assessment under the IAA) or whether a provincial/territorial Environmental Assessment will be required in respect of the Infrastructure Project; or
- b) Whether the Infrastructure Project is located on Federal Lands and, therefore, will be subject to an environmental effects review and Determination under the IAA.

In each case, the Investments lead will work with the Project Sponsor or Proponent to identify the Lead Agency (please refer to section 4.3 below).

- 4.2.2 If there is no Public Sponsor or other Federal Authority involved in the Infrastructure Project, the CIB will conduct an **independent review** (per section 4.4 below) of the potential of Adverse Impacts for the Infrastructure Project to determine whether the CIB has an obligation to respond to the Duty to Consult Indigenous peoples impacted by the project, as well as determining the level and extent of consultation required, and how the consultation should be undertaken, including delegating certain procedural aspects of the consultations to the Proponent. The Investments lead may need to retain external advisors to assist with the assessment of the potential Adverse Impacts and, if necessary, developing the consultation approach with impacted Indigenous communities.

4.3 Coordinating with the Lead Agency

- 4.3.1 The Investment lead will identify early on the Lead Agency by confirming with the Public Sponsor or Proponent the Lead Agency to undertake the review of obligations pertaining to the Duty to Consult or the Determination under the IAA. The Investment lead will confirm in writing and file in the Closing Folder the respective roles between the CIB and the Lead Agency (in the form of a Memorandum of Understanding with the Lead Agency or other equivalent document), and the extent of consultation given the rights or claims of the impacted Indigenous Groups, to ensure consultation is done early and often, and to confirm that the Lead Agency will be the party to enter into an accommodation agreement, if required.
- 4.3.2 If the requirement for an Impact Assessment is triggered or the Infrastructure Project is located on Federal Lands, the CIB will cooperate with the Lead Agency (and other members of the federal review team) to advance the consultation and discharge the Crown's Duty to Consult. The Lead Agency will provide to the CIB the outcome of the Duty to Consult, either a positive decision statement from IAAC or their own Determination that the Infrastructure Project is not likely to cause significant adverse environmental effects (or those effects are justified in the circumstances).

4.4 Independent Review

- 4.4.1 If there is no Lead Agency, the Investments lead will perform an **independent review** to assess the adverse effects of the Infrastructure Project and whether the project engages the Crown's Duty to Consult.

- 4.4.2 If the Infrastructure Project might adversely impact one or more Indigenous groups, the CIB has an independent obligation to respond to the Crown's Duty to Consult. The Investment lead may delegate procedural aspects of the Duty to Consult to the Proponent, including consultations with Indigenous groups, determining whether there are any adverse effects and how these adverse effects will be mitigated, or determining accommodations as appropriate. and advise the CIB of how the Duty to Consult has been discharged.
- 4.4.3 The steps described in these Guidelines will be recorded using the **Determination Form** set forth in **Appendix A**, which the Investments lead will file in the Closing Folder. The Determination Form should be supported by documentation received from the Proponent, in the form of consultation records, issues tracking tables, and letters to Indigenous groups (e.g., notification letters that solicit a response, responses to letters received from Indigenous groups, etc.), which will be used to inform the assessment as to whether the Duty to Consult has been discharged.

4.5 Conditions Precedent for CIB Financing

- 4.5.1 It is a condition in all CIB transactions to ensure the Duty to Consult has been discharged adequate consultation have completed, and accommodation has been agreed as appropriate. Evidence that the Duty to Consult has been discharged will include a positive decision statement from an Impact Assessment, a final decision from a provincial Environmental Assessment or a positive determination by a Lead Agency that the Infrastructure Project does not cause significant adverse environmental effects. Any ongoing conditions or accommodation will be included in the Closing Memo.
- 4.5.2 If a positive decision statement is outstanding, the financing documentation will provide a condition that no financial disbursements will made until the positive decision statement or determination of no significant adverse effects is made.
- 4.5.3 **Appendix B** sets out **Model Legal Clauses** (as applicable) that must be included in legal financing agreements with Proponents in relation to the CIB's financing to the Infrastructure Project. The model legal clauses are in addition to the standard borrower covenants with respect to compliance with environmental laws, regulations and permits to carry out the Infrastructure Project.

5. Definitions

Adverse Impacts: means changes to the environment, such as changes to surface water, groundwater, and land resources that may impact fishing, hunting, and habitat practices in the project's geographic area and/or in neighboring communities.

CIB Act: means the [Canada Infrastructure Bank Act \(S.C. 2017, c. 20, s. 403\)](#).

Designated Project: is defined in section 2 of the IAA. In general, it includes one or more physical activities that (a) are carried out in Canada or on federal lands; **and** (b) are designated in the [Physical Activities](#)

[Regulations](#) (Project List)¹⁰ or by ministerial order. It also includes any physical activity that is incidental to those physical activities.

Determination: is defined in section 2.2.2 b) of these Guidelines.

Environmental Assessment: means the assessment of the effects of a project at the provincial, territorial or municipal level.

Environmental Review: means the assessment led by the Public Sponsor as Lead Agency to determine the effects of a project on the environment and if any mitigations or accommodations are required, resulting in a decision to proceed with the project.

Federal Authority: is defined in section 2 of the IAA. It includes:

- a Minister of the Crown in right of Canada;
- an agency of the Government of Canada or a parent Crown corporation, as defined in subsection 83(1) of the *Financial Administration Act*, or any other body established by or under an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs;
- any department or departmental corporation that is set out in Schedule I, I.1 or II of the *Financial Administration Act*; and
- any other body that is set out in Schedule 1 to the IAA.

Federal Lands: is defined in section 2 of the IAA. It includes:

- lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut; and
- reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the Indian Act, and all waters on and airspace above those reserves or lands.

FPTMI: means a Federal, Provincial, Territorial, Municipal or Indigenous party, in this context sponsoring an Infrastructure Project.

Impact Assessment: means an assessment of the positive and negative environmental, economic, health and social effects of a Designated Project that is conducted in accordance with the IAA and led by the Impact Assessment Agency of Canada (IAAC) to determine if the positive effects of the project outweigh the adverse effects.

Indigenous Rights: means Aboriginal or Treaty rights, claimed or established, as set out in section 35 of the *Constitution Act, 1982*.

Infrastructure Project: means projects described in section 6 of the CIB Act.

¹⁰ The Project List focuses on projects that have the most potential for adverse environmental effects in areas of federal jurisdiction. Major projects within the following sections or groups can be found on the Project List in the *Physical Activities Regulations*: renewable energy; oil and gas; linear and transportation-related; marine and freshwater; mining; nuclear; hazardous waste; Federal Lands and protected areas.

Lead Agency: means the FPTMI sponsor, government agency or body that is most proximate to the Infrastructure Project who will lead the conduct and review of the project’s compliance with the Impact Assessment, Environmental Assessment and Duty to Consult obligations pursuant to a memorandum of understanding with the CIB.

Permit: means a regulatory process or application to obtain a permission for works or a physical activity.

Non-Designated Project: means a physical activity that is carried out on Federal Lands in relation to a physical work that is not a Designated Project or a physical activity under the IAA nor a physical activity that is classified as a Designated Project by the Minister.

Proponent: means the person or entity – federal authority, government or body – that proposes the carrying out of, or carries out, an Infrastructure Project.

Public Sponsor: means a public sector FPTMI that approves or supports the advancement of the Infrastructure Project.

6. Additional Resources

These Guidelines provide an overview and general advice on the CIB’s obligations to respond to the Crown’s Duty to Consult, including the requirements under the IAA. Additional resources to support the advice provided in these Guidelines are set out below:

- **Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011.** [Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011 \(rcaanc-cirnac.gc.ca\)](https://www.rcaanc-cirnac.gc.ca/14961311-1026-4980-9101-478414744571)
- **Draft Consultation and Accommodation Advice for Proponents – June 2015.** [Consultation and Accommodation Advice for Proponents \(rcaanc-cirnac.gc.ca\)](https://www.rcaanc-cirnac.gc.ca/14961311-1026-4980-9101-478414744571)
- **Practitioner’s Guide to Federal Impact Assessments under the Impact Assessment Act – March 2021.** [Practitioner’s Guide to Federal Impact Assessments under the Impact Assessment Act](https://www.rcaanc-cirnac.gc.ca/14961311-1026-4980-9101-478414744571)

7. Questions

All questions with regards to these Guidelines should be referred to a member of the Legal team.

8. Review and Most Recent Approval

The Guidelines are an evolving document and will be reviewed, as appropriate, to reflect the CIB’s evolving activities and new legal requirements. They were last reviewed and approved by General Counsel and Corporate Secretary on April 1, 2022.

Revision History Table

Version	Author/Reviewer	Comments	Date
1.0	Frédéric Duguay	Inaugural version adopted in response to external legal advice received and engagement with other federal government institutions, including Infrastructure Canada and ISED.	April 2022

**APPENDIX A
DETERMINATION FORM**

This Determination Form is used to complete independent review of the potential of Adverse Impacts for the Infrastructure Project to determine whether the CIB has an obligation to respond to the Duty to Consult Indigenous peoples impacted by the project.

Note, this activity may be delegated to the Proponent. In effect, the Proponent attests to the CIB that the Duty to Consult has been discharged and CIB verifies same.

This form is filed by the Investment Lead to document the due diligence and compliance activities described therein and, if applicable, to record how the Duty to Consult was discharged. Note it may also be used as part of the closing checklist. It may be updated from time to time as the project evolves throughout its lifecycle.

PART A: PROJECT DETAILS	
Project Name:	Project Location:
Proponent Name:	Investment Lead:
<p>Project Description: <i>description should reference the scope of work (i.e. all physical works and physical activities) proposed by the project, as well as indicate the project location (with reference to an applicable figure and details on location if available i.e. within an existing right-of-way etc.), and the anticipated construction schedule (i.e. anticipated site preparation date, anticipated construction start date, and anticipated completion date).</i></p>	

PART B: ANALYSIS OF ADVERSE IMPACTS		
Project Impacts Checklist	Yes	No
Project involves works or activities in, on, under, or over a water body such as a wetland, stream or lake.	<input type="checkbox"/>	<input type="checkbox"/>
Project includes an activity that would adversely impact the environment (e.g., disruption of waterway, releasing of pollutants etc.).	<input type="checkbox"/>	<input type="checkbox"/>
Project may have upstream or downstream impacts on any hydrologically connected water bodies (i.e., wetlands, streams, rivers, lakes, etc.)	<input type="checkbox"/>	<input type="checkbox"/>
Project involves deforestation or clearing of vegetation.	<input type="checkbox"/>	<input type="checkbox"/>
Project (including construction and excavation works) will occur on land that has yet to be developed or disturbed (i.e., forest, wetland, fallow field, etc.).	<input type="checkbox"/>	<input type="checkbox"/>
Project may have Adverse Impacts to a species at risk	<input type="checkbox"/>	<input type="checkbox"/>

Project is not located in a region subject to any other ongoing consultation discussions, legal assertions or other court cases.	<input type="checkbox"/>	<input type="checkbox"/>
Project is situated beyond 100 km radius from a reserve or the closest Indigenous community to the Project is determined to be too far for impact (approximate distance: ____ km).	<input type="checkbox"/>	<input type="checkbox"/>
Project is located within an urban area and in an area that has been developed (e.g., road clearance or right-of-way) and Adverse Impact is unlikely.	<input type="checkbox"/>	<input type="checkbox"/>
Project requires no new construction or is within an existing footprint (e.g., attaching an antennae is an existing structure) and Adverse Impact unlikely.	<input type="checkbox"/>	<input type="checkbox"/>
The proponent is an Indigenous organization proposing a project largely for the benefits of Indigenous communities).	<input type="checkbox"/>	<input type="checkbox"/>

No impact or low degree of potential adverse impact	L	Moderate degree of potential adverse impact	M	High degree of potential adverse impact	H
	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>

Provide a brief description of your analysis to support your assessment:

PART B: IDENTIFICATION OF INDIGENOUS RIGHTS							
<p>Below, identify the existence of the potential or established Aboriginal and Treaty rights in the area of the project.</p> <p><i>It will be necessary to import the Proponent's project map to the Aboriginal and Treaties Rights Information Systems (ATRIS). Proponent project maps can be found by search for the relevant App ID at: Environmental Review and Duty-to-Consult Maps.</i></p>							
Nature of Assertion							
Possibility of historical rights; no clear rights assertion							<input type="checkbox"/>
Rights asserted by Indigenous group only							<input type="checkbox"/>
External corroboration of rights asserted by Indigenous group							<input type="checkbox"/>
Recognition of rights in legislation, treaty or land claims agreement							<input type="checkbox"/>
Nature of Rights							
<ul style="list-style-type: none"> • Intermittent, discontinuous or very small scale resource use directly impacted by the Project • Harvesting rights impacted at a distance • Project activities are to take place in areas where landscape has been developed or significantly altered 							<input type="checkbox"/>
<ul style="list-style-type: none"> • Moderate level of harvesting rights relating to land directly impacted by the Project • Substantial level of harvesting rights on area adjacent to the Project • Presence of culturally modified landscape of moderate cultural or archaeological significance to the Indigenous group 							<input type="checkbox"/>
<ul style="list-style-type: none"> • Substantial level of harvesting rights relating to land directly impacted by the Project • Sacred site • Presence of culturally modified landscape of significant cultural or archaeological significance to the Indigenous group • Established exclusive use of land or resource 							<input type="checkbox"/>
Indicate the extent of Indigenous rights in the project area below:							
Anticipated negligible/very weak rights claim	<input type="checkbox"/>	Anticipated minor rights claim	<input type="checkbox"/>	Anticipated moderate rights claim	<input type="checkbox"/>	Definitive strong rights claim	<input type="checkbox"/>
<p>Provide a brief description of your analysis to support your assessment:</p> 							

PART D: LEVEL OF CONSULTATION				
	Anticipated Negligible/Very Weak Rights Claim <input type="checkbox"/>	Anticipated Minor Rights Claim <input type="checkbox"/>	Anticipated Moderate Rights Claim <input type="checkbox"/>	Anticipated Strong Rights Claim <input type="checkbox"/>
Low Degree of Potential Adverse Impact <input type="checkbox"/>	Nothing Required – opportunity to participate through public consultations	Nothing Required – opportunity to participate through public consultations	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct
Moderate Degree of Potential Adverse Impact <input type="checkbox"/>	Nothing Required – opportunity to participate through public consultations	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Input Welcomed on Project	Letter, Info, Consultation
High Degree of Potential Adverse Impact <input type="checkbox"/>	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Input Welcomed on Project	Letter, Info, Consultation
<i>Provide a brief summary of your analysis to support your overall assessment:</i>				

PART E: RECORD OF CONSULTATION, MITIGATION AND ACCOMODATION
<i>*Complete only if applicable</i>

PROJECT DETERMINATION	
<i>Project does not involve conduct that would cause Adverse Impacts to Indigenous Rights and, there, consultation with Indigenous communities is not necessary.</i>	<input type="checkbox"/>
<i>Meaningful consultation have occurred, and impacted Indigenous communities have not raised significant concerns, or concern raised in relation to potential Adverse Impacts have been satisfactorily mitigated, as further described herein.</i>	<input type="checkbox"/>
Report recommended by:	Date
Report reviewed by:	Date

APPENDIX B

MODEL LEGAL CLAUSES FOR LEGAL FINANCING AGREEMENTS

1. Impact Assessment

[Option A – if the Infrastructure Project is not a Designated Project and is not carried out on Federal Lands]

The [Borrower] represents that the Project is not a “designated project” as defined in the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (“**IAA**”) and is not being carried out on “federal lands” as defined in the IAA.

If as a result of changes to the Project or otherwise, an impact assessment is required in accordance with the IAA for the Project, the CIB and the [Borrower] agree that the CIB’s obligations under this Agreement will be suspended from the moment the Minister has designated the Project under subsection 9(1) of the IAA, until (a) a decision statement has been issued to the [Borrower] or, if applicable, the Minister has decided that the Project is not likely to cause significant adverse environmental effects or the Governor in Council has decided that the significant adverse environmental effects are justified in the circumstances, and (ii) if required, an amendment to this Agreement has been signed, setting out any conditions included in the decision statement.

[Option B: if the Infrastructure Project is a Designated Project, however the impact assessment has been completed and a positive decision statement, with or without conditions, has been obtained. If there are conditions, the proponent covenants that it will fulfill them.]

The [Borrower] represents proponent has completed an impact assessment required under *the Impact Assessment Act*, S.C. 2019, c. 28, s. 1 and received a positive decision statement from the Impact Assessment Agency of Canada. The [Borrower] shall comply in all material respects with the conditions required to be performed by and complied with by the [Borrower] prior to the Closing Date.

[Option C: If the Infrastructure Project is not a Designated Project but is located on Federal lands and the Federal Authority has determined that the project is unlikely to cause significant adverse environmental effects.]

The parties agree that the Federal Authority has determined that the Project is carried out on “federal lands” as defined in the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (“**IAA**”) and [that the carrying out of the Project is not likely to cause any significant adverse environmental effects] or [the Governor in Council has decided, under subsection 90(3) of the IAA, that the significant adverse environmental effects are justified in the circumstances.

2. Indigenous consultation

[Option A: If the Duty to Consult is triggered in respect of the Infrastructure Project and the review of the Duty to Consult is ongoing]

The [Borrower] acknowledges that the [CIB/Lender's] obligation to finance the Project is conditional upon the [CIB/Lender] satisfying any obligation that the Crown may have to consult with or to accommodate any Indigenous groups that may be adversely impacted by the Project. The [Borrower] agrees that:

- a) no construction of the Project will occur and the [CIB/Lender] has no obligation to reimburse Eligible Costs until the [CIB/Lender] is satisfied that any legal duty to consult with, and where appropriate, to accommodate Indigenous groups has been met and continues to be met;
- b) if information becomes available or a change is proposed for, or made to the Project or otherwise, which would trigger consultation, the [Borrower] will work with the [CIB/Lender] to ensure that the legal duty to consult, and where appropriate, to accommodate Indigenous groups, is met and continues to be met to the [CIB/Lender's] satisfaction; and
- c) it will consult with Indigenous groups that might be affected by the Project, explain the Project to them, including the [CIB/Lender's] role, and will provide a report to the [CIB/Lender], which will include:
 - i) a list of all Indigenous groups contacted;
 - ii) a summary of all communications to date with the Indigenous groups, indicating which groups support or object to the Project, and whether their positions are final, preliminary or conditional in nature;
 - iii) a summary of any issues or concerns that the Indigenous groups have raised and an indication of how the [Borrower] has addressed or proposes to address those issues or concerns; and
 - iv) any other information the [CIB/Lender] may deem appropriate.

[Option B: If the Duty to Consult is not triggered in respect of the Infrastructure Project]

The parties agree that the legal duty to consult does not arise for the Project upon execution of the Agreement. If, as a result of changes to the Project or otherwise, the [CIB/Lender] determines that consultations with Indigenous groups are required, the [Borrower] shall work with the [CIB/Lender] to ensure that the legal duty to consult with Indigenous groups, and, where applicable, any duty to mitigate or accommodate identified adverse effects on Indigenous groups, is met and continues to be met to the satisfaction of the [CIB/Lender].