



# SEA and Indigenous Peoples' Rights

## Challenges with SEA in Canada

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# Presentation Premise

- Indigenous rights add layer of substantial complexity to government planning and policy-making in Canada
- Governments should engage in their SEA's after the consideration of proposed PPP impacts on Indigenous rights
  - Timing, capacity needs, information issues, and need for long-term relationships are key issues to explore



# Indigenous Rights in Canada

- Canadian Constitution recognises and affirms Indigenous rights
  - Called “Aboriginal or treaty rights”
  - *s.35 Constitution Act, 1982*
- Creates a fiduciary obligation (ie. trust-like relationship) upon governments to act “honourably” and in the best interests of Indigenous peoples



# Indigenous Rights in Canada

- Aboriginal title to lands and waters
- Inherent right to self-government
- Hunting, fishing, trapping, gathering
- Many incidental rights
  - Water use, access, habitat protection
- Land Claim Agreements
- Self-Government Agreements
- Historic treaties (colonisation treaties)



# Protection of Indigenous Rights

- Canadian law requires Canadian and provincial governments to avoid or minimise infringement of Indigenous rights before they make decisions
  - Not only project-related decisions
  - Possible impacts of government decisions is key
  - Regardless of level of decision-maker or source of authority for decision
    - Strategic level
      - Policy, program, plan, strategy development and delivery
    - Project level



# Policy and Planning Decisions are Included!

*...the Province has a duty to consult and perhaps accommodate on T.F.L. [forestry license] decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title.*

- Haida Nation v. British Columbia (Minister of Forests)  
2004





# Process to Protect Indigenous Rights

- Governments must take into account Indigenous rights before making their final decisions
- In law, called “consultation and accommodation”
  - Talk and meet with Indigenous peoples to understand their concerns, needs, etc.
  - Take these concerns into account in their decision-making
  - Be able to demonstrate that they have taken these concerns into account
- Purpose?
  - Minimise infringement of indigenous rights that may be impacted by the proposed PPP or project



# What is “Consult & Accommodate”?

- Governments must talk and meet with Indigenous peoples to negotiate
  - Which issues might exist regarding the proposed policy, plan, program, project
  - Determine which rights may be impacted
  - Engage in good faith negotiations to resolve issues
  - Ensure necessary information, resources available to engage in meaningful decision-making process
  - Reach agreements on approach, limits, timeframes
  - Ongoing discussions, partnership





# Process to Protect Indigenous Rights

- Often, not a negotiation, rather the final decision-making occurs internally within governments
  - No government-published criteria for “consultation and accommodation” process
  - Uncertain how internal “trade-offs” decision-making occurs
    - i.e. PPP benefits vs. indigenous rights impacts
  - Inconsistently applied, even in project situations
    - Frequently involves provincial level government decisions
      - No uniform approach or minimum standards across provinces



# Indigenous Rights and EIA

- Indigenous rights questions inevitably arise in project EIA's, with limited or no redress
  - Project EIA's cannot meet the legal obligation to protect indigenous rights
    - Government responsibility only
  - Project EIA's are proponent-driven
    - No legal burden on proponent to avoid impacting indigenous rights
  - At the stage of the EIA it is too late to dramatically change the project scope etc to protect Indigenous rights



# Indigenous Rights and SEA

- SEA not directed at reviewing indigenous rights issues possibly impacted by PPP
  - Even though they are land-based rights
- SEA “public consultation” is inadequate process to resolve indigenous rights issues
  - Subjects legal (constitutional rights) to same consultation level as “public interests”
  - Allows public scrutiny of indigenous rights-related negotiated solutions
  - Public consultation in government SEA is optional



# Can SEA, EIA, Indigenous Rights Consultation Work Together?

- SEA could illuminate questions of potential infringement of Indigenous rights so governments could prevent or minimise impacts, but...
  - When is best time in SEA process to consider Indigenous rights issues?
  - With what implications for long-term relationships?
  - What capacity do Indigenous peoples have?
  - What information issues arise?

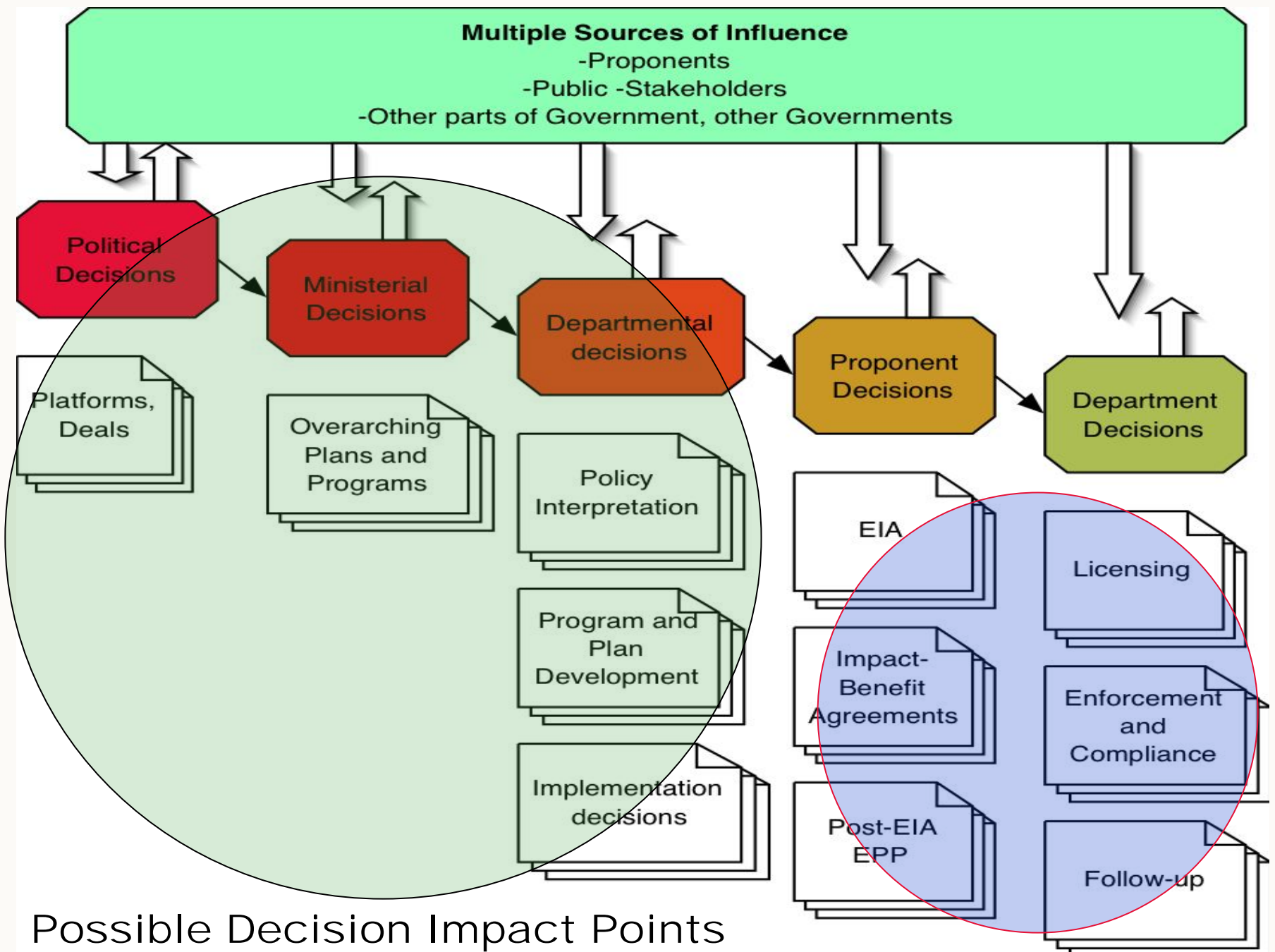


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## Timing: Before Decision

- Numerous possible PPP decisions occur that may impact indigenous rights and interests
  - **Must be before decision made**
    - Before “set in motion”
    - Must still be opportunity to change outcome to reduce or eliminate impact







# Timing: Before, During, After

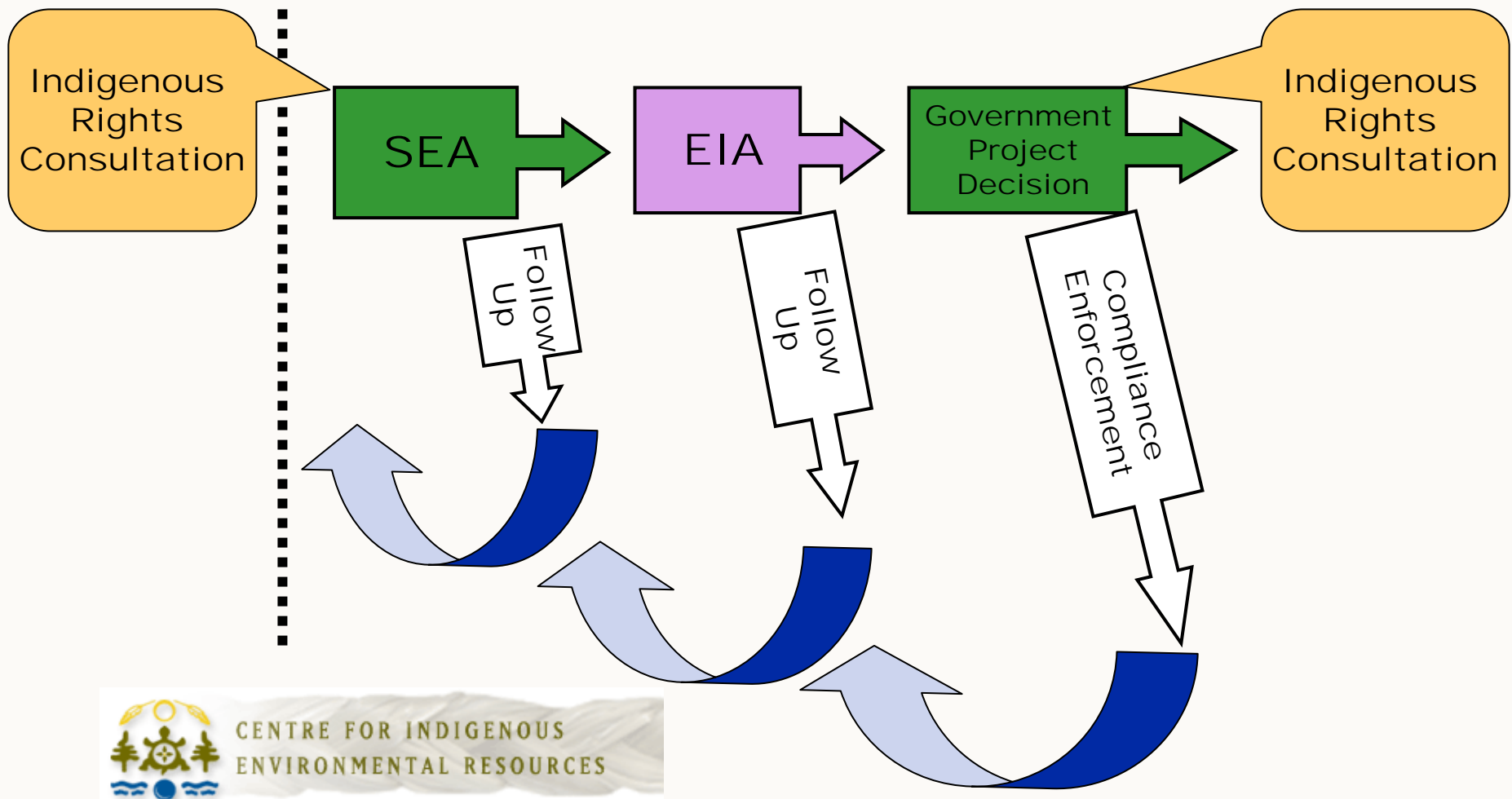
- SEA must include “consultation and accommodation” before, during, after PPP decision
  - Before SEA
    - Political discussions and agreements
    - Exploratory discussion processes, focus groups, strategy tables
  - During SEA
    - “Government-to-government” negotiations
    - Potentially impacted community negotiations re their rights
  - After SEA
    - Potentially impacted community follow up to confirm “minimal or no impact” on indigenous rights



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# Timing: SEA = relationship





# Benefits to SEA and EIA of Ongoing Consultation Relationship

- Indigenous peoples meaningfully engaged in policy-making that affects them
- Government fulfilling its fiduciary responsibility
- Long-term relationships help with determining potentially affected peoples in subsequent policy or project initiatives
- Geographical scope of rights understood and protected by government before proponent's EIA commences
  - Proponent aware, before commencing design or planning stage, the indigenous rights constraints
    - Is a limitation on project to be respected in EIA process



# Indigenous Capacity Issues

- Poor policy-development tools in Indigenous communities
  - Lack of research, monitoring tools to inform policy
  - Few Indigenous planners or trained policy-makers
  - Limited links between external (government) and internal (Indigenous) policy frameworks
  - Limited ability to respond to government's "consultation" requests



# Information Concerns

- Aspects of SEA negotiations must have confidentiality maintained
  - Cabinet Minister or Chief level
  - Reliance upon indigenous knowledge
    - Location of burial sites, sacred sites, medicinal plants locations
- Public scrutiny of indigenous rights negotiated solutions (SEA, EIA, etc)
  - Not currently, but what if there are environmental implications?





# Information Concerns

- Indigenous communities need information management structures / networks
  - At local, regional, national levels
  - Need way to link levels of information
- Aboriginal communities and Fed/Prov need to “de-bottleneck” their communications and enhance their communication capacities
  - Similar and high capacities for data transmission
  - Common graphics software packages, GIS systems
  - Abilities to archive large quantities of information
  - Automated file searching, or data source searching
- Establish joint communications and information-sharing protocols, and permanent bi-lateral structures to accomplish protocol goals
  - Aboriginal-focussed information registry
  - “Strategy groups” creation and coordination



# Closure

- SEA, EIA, and Indigenous rights consultation can be linked (or “tiered”), assuming:
  - Government acknowledgement that Indigenous rights must have highest priority
  - Government commitment to long-term relationship
  - Multiple feedback loops in place
  - Multiple information needs (from confidentiality through to information access) are addressed
- Involve Indigenous peoples and organisations in further exploring this issue



# Thank You

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