

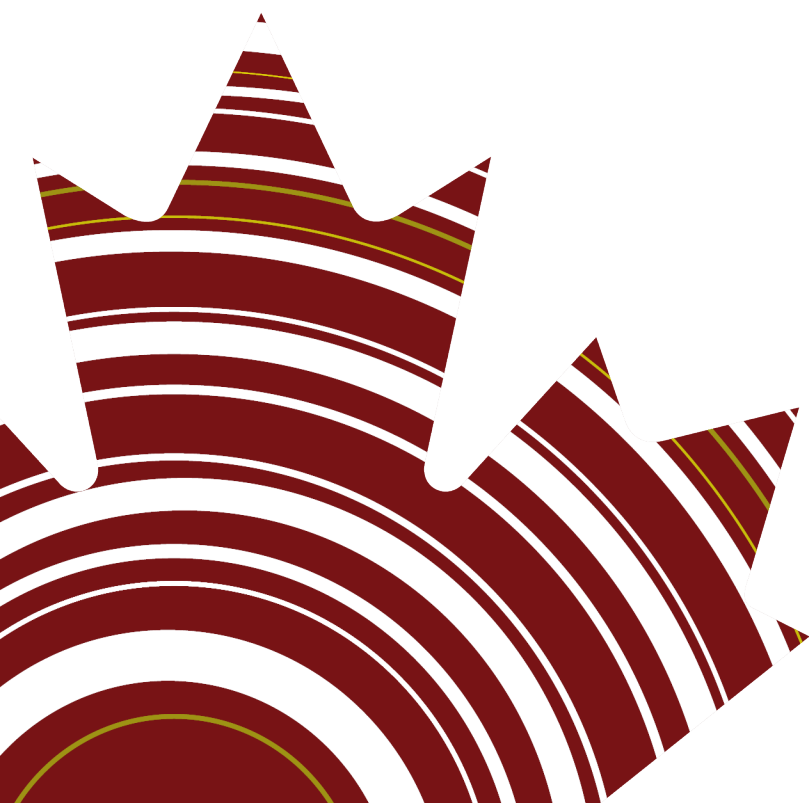


Canadian  
Transportation  
Agency

Office  
des transports  
du Canada

# Consultation with Indigenous Peoples, and the Accommodation of their Rights and Interests, in the Context of Canadian Transportation Agency Determinations

Canadian Transportation Agency



Canada 

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# Introduction

The Crown has a duty to consult Indigenous groups when it contemplates an action, such as a project authorization, that may adversely affect established or asserted Indigenous rights or interests.

Once consultation has taken place, the Crown has a duty, if proceeding with the action, to ensure the implementation of accommodation measures that prevent or mitigate any adverse impacts identified through the consultation process.

These duties are grounded in the honour of the Crown and have been confirmed and elaborated by extensive jurisprudence.

The Canadian Transportation Agency (CTA), as an independent regulatory tribunal, may not be the “Crown” in the strictest sense, and few of the determinations within its jurisdiction would be expected to affect Indigenous rights and interests. Nevertheless, the CTA is a government entity whose authorizations may trigger the Crown’s duties to consult and accommodate, and it has the responsibility and tools to ensure that these duties are fully and honourably discharged before issuing an authorization that would be expected to affect Indigenous rights or interests.

## When consultation and accommodation may be required

The most common CTA activity that might trigger the duties to consult and accommodate is consideration of a [railway company](#) application, under section 98 of the [Canada Transportation Act](#), for authorization to construct a railway line. In some cases, proposed line construction has the potential to adversely affect Indigenous groups’ established or asserted rights or interests.

For more information about our role and the process for construction of a railway line under section 98, please see: [How to Apply for Approval to Construct a Railway Line: A Guide For Federally Regulated Railway Companies](#).

# The CTA's approach

When a potential CTA determination triggers the Crown's duty to consult, the CTA ensures, before making any determination, that this duty has been discharged in a manner consistent with the honour of the Crown and the objectives of reconciliation between Indigenous peoples and other Canadians.

When finalizing its determination, the CTA takes into account all the impacts and effects on Indigenous rights and interests that have been identified through the consultation process, and ensures that accommodation measures are implemented, if and as required.

The CTA's approach reflects the [Updated Guidelines for Federal Officials to Fulfill the Duty to Consult](#) and the [Principles respecting the Government of Canada's relationship with Indigenous peoples](#).

## What is expected from applicants

While the duty to consult with Indigenous groups resides with the Crown, it can be met in part by engagement undertaken by project proponents, who are often in the best position to explain a proposed project and make modifications to plans or other accommodations in the early stages of project planning, in response to issues raised by Indigenous groups.

The CTA recommends that project proponents (typically, in the CTA context, railway companies) engage with relevant Indigenous groups as early as possible, and document all engagement actions and results in their application for a CTA authorization.

Resources are available to help project proponents identify the Indigenous groups that could be affected by a proposed project; for example, the Government of Canada's [Aboriginal and Treaty Rights Information System](#) (ATRIS), a web-based interactive map.

Project proponents are encouraged to seek information from CTA staff, before the filing of an application, on the appropriate Indigenous groups to consult and the scope of

engagement. Later, when a proponent has filed its application and a Panel of CTA Members has been assigned to determine whether an authorization will be issued, formal direction on these issues may be provided.

It is important that project proponents provide relevant Indigenous groups with sufficient information about the project, in appropriate formats, to allow them to understand the potential effects of the project on their rights and interests. Responding to Indigenous concerns may require additional analysis or studies, which are best undertaken before an application is filed with the CTA. Proponents should consider whether to offer financial support to Indigenous groups to facilitate their effective participation in engagement activities related to the project.

If project proponents do not take such steps, beginning well in advance of an application, they may find that determinations regarding their applications are delayed while the CTA undertakes more extensive consultations than would otherwise be necessary to assess potential impacts of the proposed project on Indigenous rights and interests, and to consider accommodation measures if such effects are identified.

The CTA makes every effort to issue determinations in a timely way, but ensuring that the Crown's duties towards Indigenous groups are fully and honourably discharged takes precedence over an applicant's preferred timelines.

## Initial outreach phase

When the CTA is informed that an application that may affect Indigenous rights or interests is likely to be filed, it identifies Indigenous groups whose rights or interests may be affected, using ATRIS and other available information and resources. It considers the proponent's Indigenous engagement activities to date. And it reaches out to Indigenous groups directly, to seek their initial views on possible effects of the potential project on their rights and interests, on their interest in participating in the CTA's proceeding, and on the timing and structure of any formal consultation process.

Such early outreach is preparatory in nature and helps the CTA identify which Indigenous groups wish to participate in its proceeding, whether formal consultation will

be needed once an application is filed and, if so, what form that consultation should take.

The CTA provides Indigenous groups with available information about a project, even if this information is incomplete at the early stages of concept design and development. The CTA works with project proponents to address any commercial confidentiality concerns, with the aim of ensuring that Indigenous groups obtain the information about the project that they need in order to understand potential impacts on their rights and interests.

The CTA will work with Indigenous groups to identify the support they need in order to participate effectively in the CTA proceeding. Support can take many forms, including technical expertise and information provided by CTA staff; translation and interpretation; organizing meetings; and modifying timelines to allow for internal consultations within Indigenous groups. The CTA does not have the power to establish and administer a participant funding program to support consultation with Indigenous groups. Where financial support is requested, the CTA will work with the Indigenous group to identify funding needs and possible sources of funding.

## Formal consultation phase

Once an application is received and a Panel of CTA Members is assigned to consider it, a notice is sent to all Indigenous groups whose established or asserted rights or interests may be affected by the proposed project.

The specific nature and scope of consultation activities are established on an application-by-application basis in discussion with Indigenous groups who wish to participate in the CTA proceeding – and are sometimes differentiated for different Indigenous groups – based on:

- information contained in the application;
- the results of the initial engagement phase, including the views and preferences of different Indigenous groups;

- the strength of each group’s claim to Indigenous rights or interests that might be adversely affected by the proposed project; and
- the severity of possible adverse impacts.

As part of the formal consultation process, the CTA:

- ensures that participating Indigenous groups receive timely access to documents on the application record;
- ensures that the information about the project on the record is sufficient to assess potential effects on those groups’ rights and interests;
- offers to involve those groups in any technical reviews of the application, so that they can benefit from the CTA’s expertise and so that proponents can provide information and respond to concerns or issues;
- provides a reasonable period of time for those groups to prepare views and comments, and informs them of official comment periods;
- considers feedback provided by those groups, and responds to concerns or issues raised, before a final determination is made on the application; and
- engages those groups to identify accommodation measures that may be required to prevent or mitigate adverse impacts identified through the consultation process.

## **Integrated consultation processes**

Sometimes, an application may relate to a proposed project that requires approvals or authorizations from additional federal organizations (e.g., the Impact Assessment Agency of Canada). In such situations, the CTA may cooperate with those organizations and establish a single, integrated consultation process, based on the steps described above.

# Determination

Once the CTA is satisfied that the consultations conducted with Indigenous groups were adequate, it proceeds to issue a final determination in which it:

- provides a summary of the consultations and its assessment of their adequacy;
- determines the likely impacts and effects of the project on established or asserted Indigenous rights and interests; and
- either:
  - declines to issue an authorization for the project if adverse impacts cannot be prevented or sufficiently mitigated, or
  - identifies accommodation measures that will prevent or sufficiently mitigate those impacts, such that the project can proceed. These accommodations may be set out as conditions in the authorization.

The CTA notifies relevant Indigenous groups of its determination and the reasons for its conclusions.