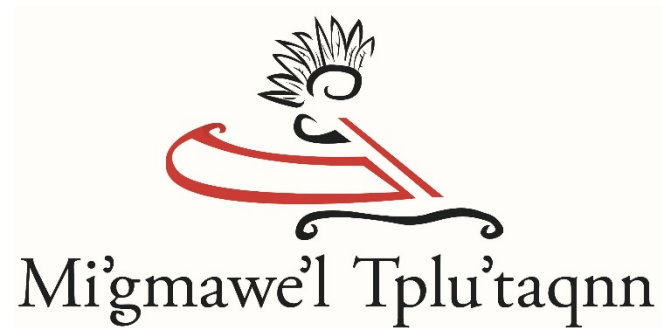


# **MI'GMAQ RIGHTS IMPACT ASSESSMENT FRAMEWORK<sup>1</sup>**

Version 1.0



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<sup>1</sup> This document was ratified by the Mi'gmaq Chiefs on November 24, 2020. It is a living document and will be updated on an ongoing basis.

## **Statement of Purpose and Introduction**

The ultimate purpose of this Mi'gmaq Rights Impact Assessment ("MRIA") Framework is for the Mi'gmaq to have a self-determining, Mi'gmaq-led process for assessing the potential impacts of proposed activities on Mi'gmaq Aboriginal and Treaty Rights and Title, and for determining if Mi'gmaq consent for a project will be granted.

When Proponents are considering activities in New Brunswick, such as resource development projects, the proposed activity will be required to undergo a MRIA. To achieve the objective of this MRIA Framework, all proposed projects and expansions of existing projects will be subject to the Mi'gmaq-led process and methodology as set out in Steps 1 through 8 of this document. A MRIA will be carried out whether or not a provincial Environmental Impact Assessment ("EIA") or federal Impact Assessment ("IA") is required for the proposed project.

A MRIA may be undertaken in conjunction with, concurrently, or separately, from a provincial EIA or federal IA, but will always be Mi'gmaq-led. If Proponents wish to obtain consent for their project to proceed, the Proponent must adhere to its obligations as set out in Steps 1 through 8 of this document. To ensure the MRIA for a project is not delayed, the Proponent should ensure that it meets its obligations set out in Step 1 as early as possible.

This Framework lays out the steps in the MRIA process, so that other governments and proponents can better understand the process. However, Proponents and the Crown must understand that the Steps set out in this MRIA Framework are not a 'tick-the-box' process, and that the completion of Steps 1 through 6 of this MRIA does not guarantee Mi'gmaq consent will be granted for a project. An overarching objective of this MRIA Framework is to ensure that Mi'gmaq Aboriginal and Treaty Rights and Title are respected and protected for future generations.

## **Mi'gmawe'l Tplu'taqnn**

Mi'gmawe'l Tplu'taqnn is an Indigenous rights organization that exists to promote and support the recognition, affirmation, exercise and implementation of the inherent Aboriginal and Treaty Rights of its member First Nations, including the right of self-determination. For the purposes of this MRIA framework and its application, Mi'gmawe'l Tplu'taqnn represents eight Mi'gmaq communities in New Brunswick: Amlamgog (Fort Folly) First Nation, Natoagaeg (Eel Ground) First Nation, Oinpegitjoig (Pabineau) First Nation, Esgenoôpetitj (Burnt Church) First Nation, Tjipôgtôtjg (Buctouche) First Nation, L'nui Menikuk (Indian Island) First Nation, Ugpi'ganjig (Eel River Bar) First Nation and Metepenagiag Mi'kmaq Nation (collectively, the "Mi'gmaq in New Brunswick").

## Context for this Mi'gmaq Rights Impact Assessment Framework

The Wabanaki Nations (the Mi'gmaq, Wolastoqiyik and Peskotomuhkati) are the original inhabitants of what is now known as the Province of New Brunswick. Long before Europeans settled in New Brunswick, the Wabanaki Nations occupied these lands and waters, and for that reason they have a unique legal status. The Wabanaki Nations have never ceded their Aboriginal Title of control and ownership over the lands of New Brunswick to the Crown. All of New Brunswick is part of unceded Wabanaki territory.

Along with their Wabanaki brothers and sisters, the Mi'gmaq entered into sacred, constitutionally protected Treaties of Peace and Friendship with the Crown, on a Nation-to-Nation basis.<sup>1</sup> The Peace and Friendship Treaties are commonly referred to as the Covenant Chain of Treaties. The Peace and Friendship Treaties were a recognition of the Wabanaki Nations Aboriginal Title, and the Treaties placed limitations on Crown settlement on their Territory. The Peace and Friendship Treaties were not Treaties of surrender or cession of land, but were drafted in broad language intended to facilitate non-conflictual interactions between the Crown and the Wabanaki Nations in their Territories.

These various Treaties which were signed, beginning in 1726 and ending in 1779 define the relationship between the Wabanaki Nations and the Crown, including that the nations would co-exist in a peaceful manner, that the Crown would not interfere with the Mi'gmaq, Wolastoqiyik and Peskotomuhkati way of life, that the Mi'gmaq, Wolastoqiyik and Peskotomuhkati would continue to exercise all of their hunting, fishing, gathering, and other inherent rights of their nations, and that the Crown would not unlawfully occupy or possess Mi'gmaq, Wolastoqiyik or Peskotomuhkati Territory without their agreement.

The Mi'gmaq have occupied and cared for the lands and waters in their Territory since time immemorial and entered into the Treaties with the Crown by which they agreed to *share* the lands, waters and resources within their Territories. The Supreme Court of Canada has upheld the continuing validity of the Treaties. The Treaties are the foundation of the relationship between the Mi'gmaq, the Crown (provincial and federal governments) and settlers (non-Indigenous inhabitants of New Brunswick).

The Treaty rights of the Mi'gmaq are quite broad, and include, amongst others, the right to hunt, fish and gather natural resources for food, social and ceremonial purposes, as well as for trade. The Mi'gmaq continue to exercise Aboriginal and Treaty rights, including the rights to hunt, fish and gather throughout their Territory up to the present day. These Rights have been repeatedly proven and affirmed by the Supreme Court of Canada and the Courts of New Brunswick. Section 35 of the *Constitution Act, 1982*, recognizes and affirms the Aboriginal and Treaty rights of the Mi'gmaq.

Consultation and accommodation is only one facet of the Treaty relationship between the Mi'gmaq and the Crown. The Mi'gmaq of New Brunswick are self-determining peoples and have the right to be fully involved in decisions that affect the lands and waters in New Brunswick. The Mi'gmaq have the responsibility as stewards of their lands and waters to ensure that they take no more than they need, and that enough is left for future generations to live and prosper.

All proponents in New Brunswick should make a good faith effort to educate themselves on who the Mi'gmaq are and the importance of their Rights. Mi'gmawe'l Tplu'taqnn is willing to provide such educational sessions to proponents. Proponents are required to adequately fund for any education session.

The Crown should also be educated on who the Mi'gmaq are and the importance of their Rights; and the Crown should ensure that all Crown employees involved in EIAs are adequately educated. Such education must come from the Mi'gmaq.

Any proposed activity taking place in Mi'gmaq Territory that has the potential to infringe or impact Mi'gmaq Aboriginal or Treaty rights requires the consent of the Mi'gmaq. This requirement of consent is rooted in the Peace and Friendship Treaties, the Supreme Court of Canada's decision in *Tsilhqot'in Nation*<sup>ii</sup> and the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").<sup>iii</sup>

The UNDRIP is a comprehensive instrument that clarifies the nature and scope of Indigenous peoples' rights regarding their lands and resources. Article 26 of the UNDRIP states that Indigenous peoples, including the Mi'gmaq, have the right to the lands and resources which they have traditionally occupied, used or owned; and that they have the right to use, develop and control their territories and its resources. Further, Article 37(1) of the UNDRIP speaks in language similar to the Crown promises made in the Treaties to not interfere with the Mi'gmaq way of life and decision-making:

*Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.*

Canada has accepted the UNDRIP, without qualification, and the Prime Minister has called for its implementation.<sup>iv</sup>

The Mi'gmaq in New Brunswick will require a MRIA to be conducted for activities whether or not a provincial Environmental Impact Assessment ("EIA") or federal Impact Assessment ("IA") is required for the proposed project. A MRIA may be undertaken in conjunction with, or separately, from a provincial EIA or federal IA, but will always be Mi'gmaq-led. If the Proponent and the Mi'gmaq both perform separate effects assessments, then both must be included in the provincial EIA or federal IA process. A MRIA will also be required for a proposed project even if a regional assessment carried out pursuant to the federal *Impact Assessment Act* has concluded that the project can, where pre-specified mitigation and monitoring conditions are in place, avoid going through an IA.

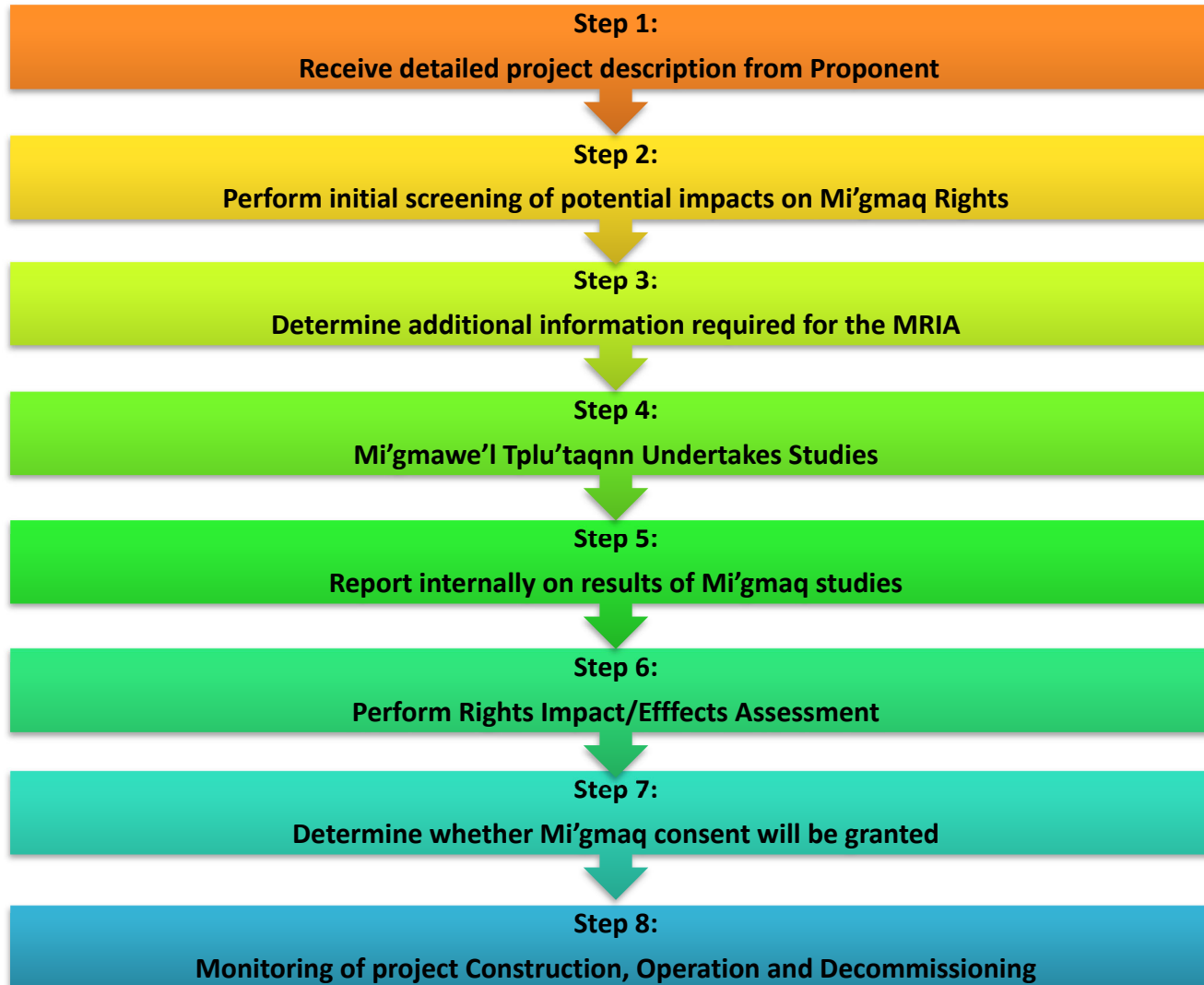
## **Fundamental Principles**

A MRIA will be conducted in accordance with the Engagement Principles set out in Schedule "A".

## **Process and Methodology: Mi'gmaq Rights Impact Assessment**

The Mi'gmaq have the responsibility as stewards of their lands and waters to ensure that they take no more than they need, and that enough is left for future generations to live and prosper. The objective of the process set out in this MRIA framework document is to ensure Mi'gmaq Rights are protected, and to provide the next seven generations with healthy lands, waters and resources in order to maintain their culture and our Mi'gmaq way of life. For all proposed activities in or near Mi'gmaq Territory that may potentially impact or infringe Mi'gmaq Aboriginal or Treaty Rights or Title, the following process will apply for assessing the potential impacts on the exercise of Mi'gmaq Rights and to assist in determining whether Mi'gmaq consent will be granted for the activity:

## Overview of the MRIA Methodology



## STEP 1: Mi'gmawe'l Tplu'taqnn receives detailed project description from Proponent

- a. Early/Timely Information\*: as early as possible, the Proponent must provide Mi'gmawe'l Tplu'taqnn with the detailed project description, inclusive of the information requirements set out in this Step 1.
- i. If the proposed activity is a “designated project” under the federal *Impact Assessment Act*, then the Proponent must provide Mi'gmawe'l Tplu'taqnn with the initial project description at the same time as submitting it to the Impact Assessment Agency. Ideally, the Proponent will provide Mi'gmawe'l Tplu'taqnn with the initial project description in advance of submitting it to the Agency, even if it's not in the final form that will be submitted to the Agency.
  - ii. If the proposed activity is listed as an Undertaking in Schedule A of the New Brunswick *Environmental Impact Assessment Regulation*, then the Proponent must provide Mi'gmawe'l Tplu'taqnn with the initial project description at the same time as submitting the registration document to the provincial EIA branch. Ideally, the Proponent will provide Mi'gmawe'l Tplu'taqnn with the initial project description well in advance of submitting its registration document to the EIA branch.
  - iii. When submitting an application for any Crown regulatory approval, licence or permit, the Proponent is to provide a copy of the application to Mi'gmawe'l Tplu'taqnn Inc. as well. This applies even if no EIA or IA are contemplated. This form of early engagement will benefit all parties involved by building relationships with the Mi'gmaq and will assist with streamlining any provincial or federal regulatory review process of the project.
- b. If the proposed project is not required to be registered for review under an EIA or IA process, Mi'gmawe'l Tplu'taqnn may submit a request to the relevant Minister and assessment agency, to have the proposed project listed / designated as a project and be subject to an EIA or IA. Mi'gmawe'l Tplu'taqnn will make such a request if the proposed project:
- i. is near or in an environmentally, cultural, spiritual or otherwise sensitive location, as determined by the Mi'gmaq;
  - ii. involves new technology or a new type of activity not readily understood;
  - iii. has the potential to have adverse effects on the Mi'gmaq and/or their Rights.
- c. If the Crown is contemplating any activity or conduct that has the potential to impact or infringe Mi'gmaq Aboriginal or Treaty rights or Title (whether or not an EIA or IA is contemplated), a MRIA will be required and the Crown is to engage with Mi'gmawe'l Tplu'taqnn early in the planning process, well before a decision has been made. Such Crown activity or conduct includes but is not limited to:

\* In project assessment processes, one of the past problems that have been a common experience and complaint of Indigenous peoples throughout Canada has been the continued involvement of Indigenous people in a manner inconsistent with their constitutional Rights. This includes Consultation that occurs so late in a project assessment that it is almost impossible for the concerns of Indigenous peoples to be considered, implemented or accommodated. Early engagement at the beginning of the process and continued engagement throughout the process can begin to address this flaw.

- The creation, amendment or implementation of regulations, policies, procedures or operating plans that may adversely impact Mi'gmaq Rights;
- Change in access to Crown land(s) and resources;
- Disposal / sale of Crown lands;
- Approval / issuance of a license, lease or permit providing access to forests, minerals, wildlife, fish, or the development of a project that may adversely impact natural resources.

d. The initial project description letter from the Proponent must include the following:

- The name(s) of the Proponent and key contacts along with their contact information;
- The name of the project and the type of industry;
- Details on the purpose / rationale and need for the project;
- Clear and concise details of the project, including its size, scope, location, and projected environmental impacts;
- Description of all direct and ancillary physical works and activities related to the project, including transportation routes into and out of the project area;
- Available project plans, designs and site maps (even if in draft form);
- Any known archeological sites within the proposed project area;
- Any federal, provincial, and municipal involvement;
- Any known project and Crown regulatory timelines;
- Geographic Information System ("GIS") data;
- Available data, reports and studies that have been prepared for the proposed project, even if in draft form (if any studies have been carried out, identify the Indigenous experts / participation used in the conduct of data collection and effects estimation);
- A brief overview of alternatives to the project that could fulfill the same purpose / objective of the project, including the potential environmental impacts of the alternative (i.e., a windfarm instead of a hydroelectric project);
- A brief overview of the technically and economically feasible alternative means of carrying out the project, including the potential impacts of carrying out the project by the alternative means (i.e., a windfarm could be located onshore, offshore, and/or could have more small structures or few larger structures to generate the same amount of electricity);
- Information on any known or potential cumulative effects that may result from the proposed project: this includes information regarding any other projects / activities, existing or planned, in or near the proposed project area. If the proposed project is part of a larger plan, or is linked to other projects whether already existing or contemplated for the future, that information is to be included in the initial letter.

All of this information should be summarized in plain English.

e. Mi'gmawe'l Tplu'taqnn will acknowledge that it has received the detailed project description and advise whether the letter contains sufficient information to perform an initial screening of the project. Proponents and the Crown must understand that the MRIA will not

proceed to Step 2 until Mi'gmawe'l Tplu'taqnn has received a detailed project description sufficient to perform an initial screening / assessment.

- f. Proponents and the Crown should be proactive and share new information with Mi'gmawe'l Tplu'taqnn as it becomes available. Proponents should make it a best practice to establish a positive working relationship with the Mi'gmaq, well ahead of filing any required project plans or approval requests with the Crown. As a best practice, Proponents should be prepared to discuss and enter into a Relationship Agreement, to guide the engagement that is required for the MRIA process. A Relationship Agreement may include funding and protocols for achieving the steps outlined in this MRIA process.

## **STEP 2: Perform initial screening / assessment of potential impacts on Mi'gmaq Rights\***

- a. The initial screening / assessment of potential impacts will be guided by the information provided under Step 1, and the following:
  - i. The historical context, assisted by any historical records, of the project area and the exercise of Mi'gmaq Rights in and around the project area;
  - ii. Readily available Mi'gmaq Indigenous Knowledge, including existing Indigenous Knowledge Land Use and Occupancy Studies (IKLUOS), relevant to the project and Mi'gmaq land use and occupancy in the project area;
  - iii. The current environmental condition of the project area and the surrounding area.

In New Brunswick, because the Mi'gmaq have never ceded Title to their Territory, and because the courts have repeatedly affirmed Mi'gmaq Aboriginal and Treaty rights, Proponents should always assume that any Aboriginal or Treaty rights at issue are proven.

- b. After receiving the project description, the first task under this Step is to develop a preliminary understanding of the project and its potential impacts on Mi'gmaq Rights. This initial assessment will include, but is not limited to:
  - i. Ensuring there is an accurate and adequate understanding of the project, including: its operations, the current condition of the geographic area in and around the project, the duration (temporal aspect of the project), the purpose of the project, and how the project will likely interact with the human, social, economic, physical and biophysical environment. This requires a preliminary understanding of:
    - The project footprint: the geographical area covered by all physical works and activities required to carry out the project; and
    - The local study area: the area where direct and indirect environmental effects might be expected to occur from the project.

\* The initial screening / assessment is based on available information and is necessarily limited due to the absence of a baseline Indigenous Knowledge ("IK") study for our Territory. Mi'gmawe'l Tplu'taqnn has been calling on the Crown to provide capacity funding to carry out a province-wide baseline study, but that has yet to happen. Until then, any initial screening of potential impacts of a project will be limited; as such, under Step 3 it will likely be determined that an Indigenous Knowledge Land Use and Occupancy Study, and possibly other studies, will be required. Mi'gmawe'l Tplu'taqnn has the capacity to use a GIS to document land use information provided by its community members. A baseline IK study for our Territory would facilitate a streamlined process of project reviews and regulatory processes moving forward, as the Mi'gmaq would have a solid IK database from which to work.



- ii. With the information / data available, identify potentially impacted Mi'gmaq Rights;
- iii. Compile a list of Value Components (VCs) that will need to be considered in the assessment of the potential impacts on Mi'gmaq Rights;
  - For each VC, identify the past, present and desired future use for the Mi'gmaq;
  - Identify whether the project area holds traditional, cultural or other importance for the Mi'gmaq;
  - Identify the priority VCs that the Mi'gmaq want to protect (in other words, what matters most to the Mi'gmaq communities. Priority VCs for communities may change from project to project). Community scoping meetings can be held in order to identify what matters most;
  - The key combination here is that for a VC to be included in the MRIA, the issue or VC must: 1) be of importance to the Mi'gmaq or ecosystem function; and 2) have some plausible interaction with a change that could be caused by the proposed project.
- iv. Some questions that can be posed to determine what matters most / priority VCs, includes but are not limited to:
  - What are the most important values for Mi'gmaq community well-being?
  - What do communities and individual members want to protect the most?
  - Are there key VCs that need protection? (such as key animals, plants or other valuable resources, preferred places where fish, game or birds are harvested from)
  - What changes have been seen on the land in the project area already?
  - What are the most important concerns about potential impacts from the project on Mi'gmaq way of life?
- v. Identify baseline conditions that support, or do not support, the exercise of the Rights identified. This involves an initial overview of the current baseline condition of the environment (in and near the project area), and the health, social and economic condition of the Mi'gmaq communities that stand to be impacted. Identifying baseline conditions includes assessing the pre-industrial baseline of the area, to have an understanding of what the area was like prior to any resource / development projects. Determining the baseline conditions also involves conducting a preliminary assessment of the cumulative effects research to date, to develop an understanding of the existing impacts on Mi'gmaq communities and the ability to exercise Mi'gmaq Rights. Information sources that may assist in describing the baseline conditions, includes:
  - field studies, including site-specific survey methods
  - Mi'gmaq, Crown and Municipal database searches;
  - protected areas, watershed and coastal management plans;
  - natural resource management plans (i.e., forestry management strategies);
  - species recovery and restoration plans;
  - published literature;
  - EIA / IA documentation, including monitoring reports, from prior projects in or near the proposed project area;
  - Existing regional studies and strategic assessments carried out under the *Impact Assessment Act*;
  - Mi'gmaq Indigenous knowledge;
  - community engagement, including workshops, meetings and surveys;
  - census data;
  - community and regional economic profiles; and

- statistical surveys, as applicable

Depending on the nature and location of the project, separate baselines may be required for individual Mi'gmaq communities.

- vi. Identify trends from the past to understand the current state of VCs, and then compare a future with the proposed project (including cumulative effects from other projects) to a future without the proposed project.
  - vii. Thresholds: If the proposed project would put too much risk / harm on the ability to exercise a certain Right, or if the project would put a culturally important area, sacred site or a valuable VC at risk of exceeding an identified impact threshold, then it may not be necessary to continue with the MRIA if there are no mitigation measures that can be implemented to avoid impacts surpassing the permitted threshold (Proponents must understand that there may be existing impacts, and infringements, on Mi'gmaq Rights that are significant even without considering the impacts of the proposed project).
  - viii. Consider alternative means of carrying out the project: The Proponent must provide Mi'gmawe'l Tplu'taqnn with information regarding alternative means for carrying out the project, so that it can be determined what the effects on Rights would be under an alternative approach.
- c. The actual decision-makers within Proponent organizations, including the Crown, must be willing to meet and discuss the project and any concerns or questions raised by Mi'gmawe'l Tplu'taqnn or its member communities. If requested by Mi'gmawe'l Tplu'taqnn, the Proponent must meet with Mi'gmawe'l Tplu'taqnn and/or attend community meetings to discuss any community concerns.
- i. Respect for Mi'gmaq Territory and Culture: any meetings between the Mi'gmaq and the Proponent must happen in a spirit of respect. Wherever possible, meetings should take place in Mi'gmaq Territory, in Mi'gmaq communities, to put the discussions in the appropriate social and cultural context. Mi'gmawe'l Tplu'taqnn will organize and attend meetings and information sessions with Proponents.
- d. If required, Mi'gmawe'l Tplu'taqnn will request funding from the Proponent to assist with the initial assessment of the technical details for the project. In order to carry out the steps in the MRIA process, the Mi'gmaq may require Proponents to enter into a Relationship Agreement, to guide the relationship between the parties during the assessment process. Mi'gmawe'l Tplu'taqnn will notify the Proponent as soon as possible if it is determined that a Relationship Agreement is required. A Relationship Agreement should include funding and protocols for achieving the steps outlined in the MRIA process, and a Relationship Agreement can assist with facilitating the following:
- i. Mi'gmawe'l Tplu'taqnn consulting with its member communities;
  - ii. Scientific, technical and legal review of the proposed project; and
  - iii. Identification and understanding of the potential impacts of the project on Mi'gmaq Rights and appropriate measures for minimizing or avoiding those impacts.
- e. Identify and compile a list missing information / details that would assist in providing a further understanding of the nature and scope of the project and to adequately carry out an assessment of the potential impact on Mi'gmaq Rights.

- f. It is important for private industry Proponents to understand that even when they have been delegated procedural aspects of Consultation from the Crown, it is inappropriate for the Proponent to try and unilaterally determine whether the proposed project has the potential to adversely impact Mi'gmaq Rights. The same applies if the Proponent is the Crown; as the Crown is ill-equipped to make an assessment as to whether and to what extent the proposed project may adversely impact Mi'gmaq Rights.
- g. Where it is determined by Mi'gmawe'l Tplu'taqnn that the project will have a negligible impact on Mi'gmaq rights, the MRIA may not need to continue beyond this point.

### **STEP 3: Determination of additional information required for performing a Rights Impact Assessment**

- a. When performing the initial screening / assessment of potential impacts under Step 2, a lack of or absence of necessary information to carry out a MRIA will be identified. At this Step of the MRIA process, Mi'gmawe'l Tplu'taqnn will determine what further information / details is required to fully understanding the proposed project and assess the potential impacts on Mi'gmaq communities and their ability to exercise their Rights.
- b. This Step may involve identifying studies that would assist in providing a further understanding of the nature and scope of the project and to adequately carry out an assessment of the potential impact on Mi'gmaq Rights.
- c. As part of its ongoing engagement requirement, the Proponent is to notify Mi'gmawe'l Tplu'taqnn of any new/updated information for the project and any studies / reports that have been conducted since providing the initial project description.

### **STEP 4: Mi'gmawe'l Tplu'taqnn Undertakes Studies**

- a. The main goal of this Step is to gather important information, data, Indigenous Knowledge, and other evidence needed in order to fully understand the impacts of the project, which is required for determining whether Mi'gmaq consent will be granted.
- b. Identify to the Agency and the Proponent the studies that the Mi'gmaq require for assessing the impacts of the project. This will involve determining the role the Mi'gmaq want to play in carrying out those studies, including whether the Mi'gmaq will lead or co-lead a study, as well as the costs required to undertake the studies. The required studies will depend on the project.
- c. Depending on the nature of the project, any of the following studies may be required (which may be in addition to any similar study or report prepared by the Proponent):
  - i. Indigenous Knowledge Land Use and Occupancy Study (IKLUOS)
  - ii. Ecological Study
  - iii. Harvest and Food Security Study
  - iv. Archaeological and Heritage Study

- v. Health Impact Study (examines the direct and indirect human health effects tied to the impacts of the project);
- vi. Socio-Economic Impact Study (examines the direct and indirect community, housing, social, and economic effects tied to the impacts of the project);
- vii. Cumulative Effects Study (examines how past, present and likely future activities/projects have and will combine to impact an area and/or specific VCs);
- viii. Gender Based Study (includes a detailed examination of any vulnerable sub-population within Mi'gmaq communities. This includes an examination of any differential impacts that may occur to women, 2SLGBTQIA, and other potentially vulnerable sub-populations);
- ix. Accident and Malfunctions Study (includes an examination of the potential risks for project accidents, spills, and malfunctions, and the impact of these on the Mi'gmaq and their Rights. This involves an analysis of all possible kinds of accidents/malfunctions, including worst-case scenarios).

Except for an IKLUOS, any of these studies may be carried out by Mi'gmawe'l Tplu'taqnn in partnership with the Proponent, Crown or other party. Mi'gmawe'l Tplu'taqnn may, in its discretion, decide that it is necessary to retain a third party to carry out or assist with any of these studies.

- d. If an IKLUOS is required, the Proponent will be required to enter into an Indigenous Knowledge Study Agreement with Mi'gmawe'l Tplu'taqnn, which outlines the terms and conditions for completing the IKLUOS, including:

- i. Funding the Proponent will be required to provide Mi'gmawe'l Tplu'taqnn to complete the IKLUOS;
- ii. The timing, process and execution for the IKLUOS;
- iii. How the Mi'gmaq Indigenous Knowledge gathered as part of the study may be used, shared and applied to assessing the impacts of the project.

Proponents should review and be familiar with the [New Brunswick Mi'gmaq Indigenous Knowledge Study Guide](#), which guides the timing, process and execution of a Mi'gmaq Indigenous Knowledge Land Use and Occupancy Study in New Brunswick.

- e. The process for an IKLUOS is spelled out in detail in the [New Brunswick Mi'gmaq Indigenous Knowledge Study Guide](#) ("NBMIKS Guide"). Mi'gmawe'l Tplu'taqnn is responsible for the administration of funding and financial oversight of an IKLUOS.
- f. An IKLUOS will be required the moment the Crown contemplates a decision that may impact the Rights of the Mi'gmaq under domestic and international law. Prior to submitting applications to the Crown for approvals, permits, licences or leases, the Mi'gmaq may require the Proponent to undertake an IKLUOS. For every new project and / or regulatory decision, Mi'gmaq Indigenous Knowledge must be included and meaningfully considered. Similarly, if there is a proposed expansion or addition to an existing project, the Mi'gmaq must be given the opportunity to review the changes and provide any new or updated Indigenous Knowledge. Crown and Proponents must not rely on previous Indigenous Knowledge submitted or considered in prior projects or review processes, unless the Mi'gmaq thinks it appropriate and consents in writing.

- g. It is likely that an IKLUOS will be required to commence before other studies, so that Mi'gmaq Indigenous Knowledge can inform the other required studies. Indigenous Knowledge supports a more comprehensive understanding of the potential impact of a project on the environment and provides Indigenous people with the ability to understand the potential impacts of a project on their Rights, lands and resources.
- h. When undertaking an IKLUOS or any other required study:
  - i. Reasonable Timeframes: The Mi'gmaq require adequate time to gather necessary information, respond to the information received regarding the proposed project, and to undertake any necessary studies identified by the Mi'gmaq;
  - ii. The OCAP® Principles of ownership, control, access and possession apply, which are discussed further in the NBMIKS Guide.⁷ OCAP® provides a prescribed approval process for the collection, analysis and reporting of research data generated from Indigenous communities. The principles of OCAP® apply to research, monitoring and surveillance, surveys, statistics, cultural knowledge, storage and archiving, and dissemination. The Crown and Proponents must respect and adhere to these principles.
- i. Adequate Resources: The Mi'gmaq must be given adequate resources in order to obtain the input of their communities, to properly study and review the plans, and to gather Indigenous Knowledge with respect to the Rights impacted.

#### **STEP 5: Report internally on results of Mi'gmaq studies**

- a. After undertaking the studies identified in Step 4, the relevant Mi'gmawe'l Tplu'taqnn staff members(s) and/or consultant will internally report to Mi'gmawe'l Tplu'taqnn and its member communities on the results of the studies. This will provide an opportunity for questions to further understand the nature and scope of the project, as well as the Mi'gmaq Rights and VCs that should be considered in the impact assessment.
- b. At this Step of the MRIA, Mi'gmawe'l Tplu'taqnn will decide if further information is required to adequately assess the level and scope of impact the project would have on the Mi'gmaq and their Rights. This may require engaging with the Crown or Proponent to exchange information to further inform / understand the results of the Mi'gmaq studies carried out under Step 4.

#### **STEP 6: Perform Rights Impact Assessment**

- a. This critical step of the MRIA process involves assessing the project's positive and negative effects and the severity of these effects, on the Mi'gmaq, identified VCs, and the exercise of Mi'gmaq Rights. A combination of quantitative and qualitative methods may be necessary for a comprehensive and meaningful assessment of potential impacts; this will include considering and applying the results and recommendations of the studies carried out under Step 4. The impact assessment (prediction) is informed by the baseline and trend over

time conditions identified in previous Steps in the MRIA process. The impact assessment is achieved through determining the ways in which the project, including its operations and various components, may impact the human, social, economic, physical and biophysical environment.

- b. Except for assisting with performing the initial screening / assessment, previous Indigenous Knowledge Land Use and Occupancy Studies, or any other study undertaken for a previous activity / project, will not be relied on in assessing the impacts of a new activity / project, unless it is determined by the Mi'gmaq that doing so is appropriate.
  - i. Complete information: The Mi'gmaq require complete and timely disclosure to the Mi'gmaq of all information required to understand the impacts of a project on the Mi'gmaq and their Rights.
- c. The assessment of impacts on Mi'gmaq Rights must be informed by Mi'gmaq Indigenous Knowledge gathered as part of the project-specific MRIA. The assessment of the effects of each project component on each VC is based upon a comparison of the baseline conditions and the predicted future conditions with the project.
- d. Identify the importance of the proposed project's location in relation to the exercise of Mi'gmaq Rights, while being very careful about assumptions as to whether those Rights could be practiced elsewhere. In other words, the 'go elsewhere' argument for exercising Rights must not be considered or included in the assessment of cumulative effects, or the MRIA in general.
- c. The effects assessment for each VC will include an analysis of the magnitude/severity, geographic extent, temporal, frequency, and whether the effects are reversible or irreversible. The assessment of the effects of each project component on each VC is based upon a comparison of the baseline conditions and the predicted future conditions with the project. Key factors (VCs) that will be considered in assessing the impacts of the project, includes but is not limited assessing the impacts on the following:
  - i. Physical environment, including: land, water, fish, vegetation, wildlife, birds, etc.;
  - ii. Human health;
  - iii. Economy;
  - iv. Climate change (including the greenhouse gas emissions);
  - v. Sustainability (lands, waters and other natural resources are integral to the well-being of the Mi'gmaq, their culture and Rights. Natural resources must be managed carefully to provide benefits today, while guaranteeing the Rights and needs of future generations. The needs of future generals must be placed on equal footing with present needs).

#### Cumulative Effects

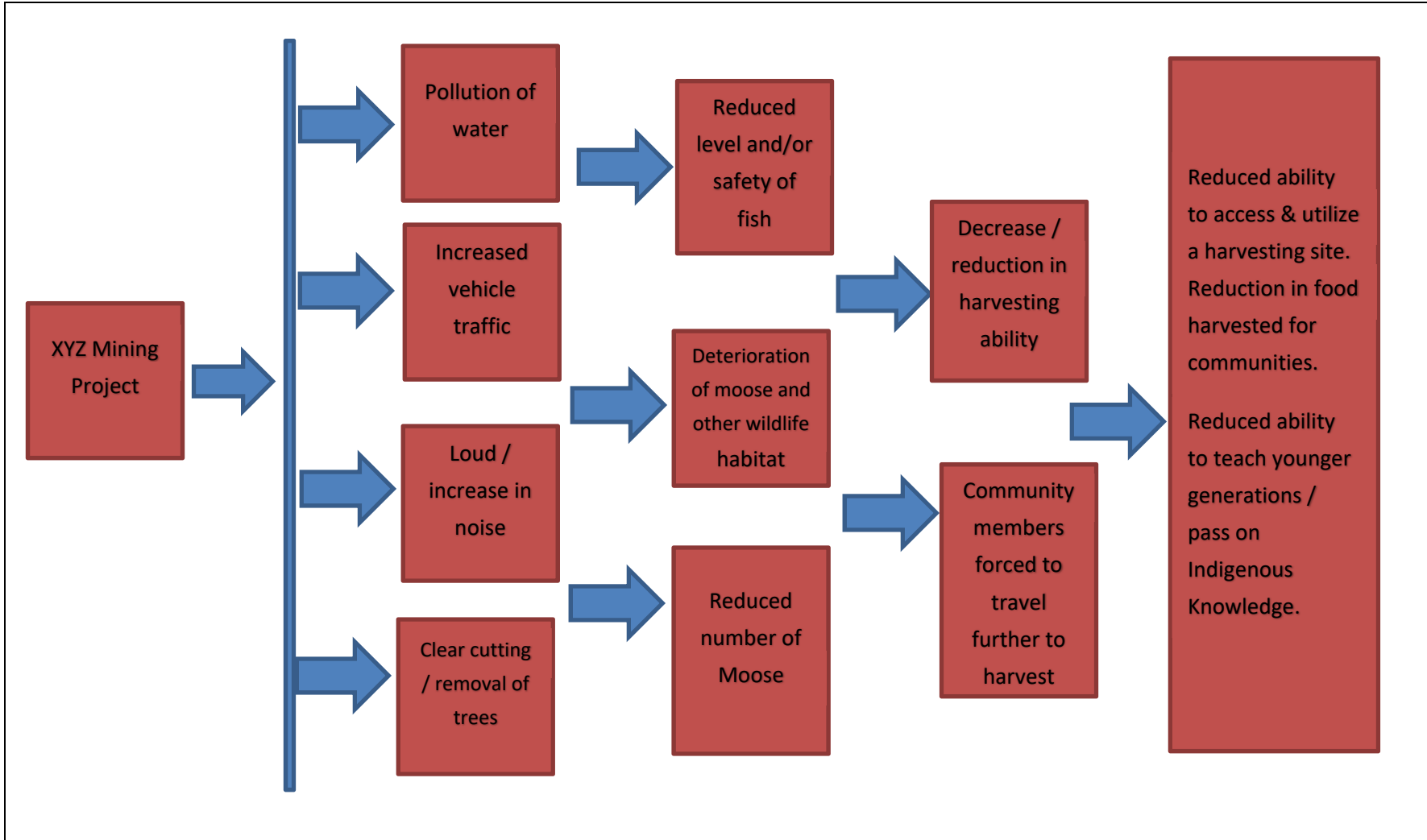
- e. Establish the degree of cumulative effects to date that have occurred for each VC. A cumulative effect on an environmental, health, social or economic VC may be important even if the project's effects to a VC by themselves are minor. VCs important to the Mi'gmaq, even if

only marginally effected by the project, will included in the assessment of cumulative effects. There will be a heavy focus on establishing a realistic portrait of total cumulative effects influencing Rights, prior to the consideration of project-specific effects.

- f. Include a consideration of the potential for project-specific and future cumulative effects on future generations' ability to meaningfully exercise their Aboriginal and Treaty rights.

#### Impact Pathway

- d. Identify and describe the Pathways by which the project may affect the Mi'gmaq and the exercise of the Rights. When developing impact Pathways, tangible and intangibles VCs will be considered. This includes an understanding of the effects from the project that may be expected to interact with other cumulative effects on the same VCs. For example, the following flow-chart identifies potential impacts on Mi'gmaq Rights flowing from a mining project:





- e. Assess the level / severity of the impacts: when assessing the overall level/severity of impacts, the highest degree of severity will be used. This means that if the adverse impact on one identified VC, or aspect of a Right, is determined to be high/severe, then the overall impact on the exercise of Mi'gmaq Rights will be deemed to be high / severe. A series of 'low severity' impacts from the project, when considered as a whole, may also result in a high/severe level of impact on Mi'gmaq Rights. A list of questions and criteria to assist with determining whether an impact is low, moderate or high is in Schedule "B".
- f. Consider alternative means of carrying out the project: The Proponent must provide Mi'gmawe'l Tplu'taqnn with information regarding alternative means for carrying out the project, so that it can be determined what the effects on Rights would be under an alternative approach.
- g. Determine the likelihood of an infringement of or impact on a Mi'gmaq Right.

Identify necessary accommodation measures

- a. The Supreme Court of Canada has confirmed that where First Nations have proven their rights the Crown has a further obligation to take steps to minimize impacts on Aboriginal and Treaty Rights and ensure that the benefits of a project outweigh the negative impacts on Aboriginal and Treaty Rights. This applies to the Mi'gmaq and the MRIA process.
- b. The Duty to Consult may also trigger a duty to accommodate.
- c. Meaningful accommodation measures are those that mitigate, minimize or avoid any impacts on Mi'gmaq Aboriginal and Treaty rights and Title, and compensate for any impacts that cannot be minimized. Proponents may be required to accommodate Mi'gmaq rights and interests. As the Proponent usually knows the proposed project best, the Proponent will be best suited to work with the Mi'gmaq to mitigate and/or avoid potential adverse impacts on Mi'gmaq Rights.
- d. Accommodation can take many forms, and within the provincial EIA or federal IA process may include the Crown placing terms and conditions in licences, permits, or other Crown authorizations, as well as other avoidance, minimizing or mitigation measures. Mitigation measures should be specific to the impacts of the proposed project and linked to thresholds identified earlier in the MRIA process. Mitigation should avoid compensation-focused measures in favor of measures that avoid or greatly reduce project impacts.
- e. After carrying out the assessment of impacts under this Step 6, Mi'gmawe'l Tplu'taqnn will then identify any necessary accommodation measures required. Any required accommodation measures will be determined by the Mi'gmaq, in consultation with the Proponent and/or Crown. The objective here is to work towards mutually agreeable measures to address adverse impacts that would allow for the continued exercise of Rights, should the project proceed. Such accommodation measures may include, for example:

The Treaty rights of the Mi'gmaq are quite broad, and include, amongst others, the right to hunt, fish and gather natural resources for food, social and ceremonial purposes, as well as for trade. The Mi'gmaq continue to exercise Aboriginal and Treaty rights, including the rights to hunt, fish and gather throughout their territory up to the present day. These Rights have been repeatedly proven and affirmed by the Supreme Court of Canada and the Courts of New Brunswick. Section 35 of the *Constitution Act, 1982*, recognizes and affirms the Aboriginal and Treaty rights of the Mi'gmaq.

- i. Altering/changing the project location;
  - ii. Adjust timing of construction;
  - iii. Carrying out habitat restoration plans (commit to the rehabilitation of habitat and species that have been damaged by current and past natural resource extraction practices);
  - iv. Requiring the proponent to carry out a plan to protect certain resources
- f. Depending on the circumstances, where mitigation or avoidance is not possible, accommodation may take the form of compensation to the Mi'gmaq. The Mi'gmaq will assess whether proposed accommodation measures are adequate, including whether compensation is acceptable if it is not possible to avoid or minimize the impact of the project on Mi'gmaq Rights. Where it is not possible to avoid, minimize or mitigate the impacts on Mi'gmaq Rights, accommodation to the Mi'gmaq may be required in the form of one or more of the following:
- i. Direct financial payment;
  - ii. Profit / resource sharing;
  - iii. Scholarships;
  - iv. Skills training.

#### Residual Effects

- g. Identify any residual effects on Mi'gmaq Rights. Residual effects refer to the effects predicted to remain/subsist even after the application of accommodation measures. An analysis of the residual effects is performed for each identified VC as well as for the project's contribution to cumulative effects in the study area. The determination of the residual project-specific and cumulative effects is made by considering the following factors:
- i. Magnitude of the impacts
  - ii. geographic extent of the impacts
  - iii. reversibility of the impacts / harm
  - iv. frequency of the impacts
  - v. duration (time frame) of the impacts
  - vi. probability of impact occurrence

#### MRIA Report

- h. Mi'gmawe'l Tplu'taqnn will prepare a report that includes:
- i. A detailed description of the Mi'gmaq and their Rights in the project area;

- ii. An effects assessment, which includes:
  - a. an analysis of any potential positive effects of the project;
  - b. an analysis of the potential adverse effects on the Mi'gmaq and their Rights, as well as the severity of the impacts / how significant the effects are;
- iii. A description of how Mi'gmaq Indigenous Knowledge, and any other Mi'gmaq led studies undertaken for the project, have been included in the effects assessment;
- iv. A summary of required accommodation measures and the follow-up programs (as determined pursuant to Step 7);
- v. Whether Mi'gmaq consent is given for the proposed project (as determined pursuant to Step 7).

### **STEP 7: Determination of whether Mi'gmaq consent to the project will be granted**

- a. The objective of this Step is to determine whether Mi'gmaq consent for the project will be granted, which is a decision that is based on whether the proposed project is in the best interest of the Mi'gmaq, including Title to their Territory, and their ability to exercise their constitutionally protected Aboriginal and Treaty Rights. Determining if consent will be granted for a project is a discretionary decision that will be made by the Mi'gmaq. Proponents and the Crown must understand that even if Steps 1 through 6 of the MRIA are completed, that does not necessarily mean that Mi'gmaq consent will be granted.
- b. If consent is granted, there may be conditions that the Proponent will have to adhere to in order. Any such conditions will be included in the report prepared by Mi'gmawe'l Tplu'taqnn.
- c. Accommodation commitments: if the Mi'gmaq determine that the impacts of the proposed activity / project can be appropriately addressed, Mi'gmawe'l Tplu'taqnn or its member communities may be prepared to enter into one or both of the following agreements with the Proponent, as a condition for granting consent of the project:
  - An **Environmental Protection Agreement**: which sets out the measures that will limit and mitigate any environmental impacts, and in particular, any impacts on Mi'gmaq Aboriginal and Treaty Rights and provide for Mi'gmaq involvement in environmental protection and monitoring;
  - An **Impact and Benefits Agreement**: which provide for Mi'gmaq community benefits to compensate for any impacts that cannot be mitigated. Benefits may include job/employment creation, ownership interest in the project, profit sharing, and other compensation measures. Impact and Benefits Agreements can establish good will and grow positive relationship between the Mi'gmaq and proponents.

The goal of these types of agreements is to ensure that Mi'gmaq Rights are respected and protected, and that the Mi'gmaq get an adequate share of the benefits of projects taking place in their Territory.

- d. Securing Mi'gmaq consent is more likely to result in the following benefits for proponents:
  - i. Build and strengthen relationships with the Mi'gmaq communities;
  - ii. Create certainty in the status of a project; and
  - iii. Simplify and speed up the provincial or federal regulatory review process of a project.
- e. There may be projects that the Mi'gmaq cannot consent to. This could occur for example, where a proposed project would result in irreversible harm on a Mi'gmaq Right. In such a case, no form of accommodation would likely be adequate for the Mi'gmaq to consent. The effects assessment carried out under Step 6 will determine the severity of the impact.
- f. Even if the provincial or federal Crown grants approval for a project, that does not mean that Mi'gmaq consent will be granted. Proponents, including the Crown, are required to adhere to this MRIA process, and are required to obtain Mi'gmaq consent before any project will be permitted to proceed in the unceded Territory of the Mi'gmaq.
- g. At the end of this Step, the following should have been completed:
  - i. Conducted, and reported on, the necessary studies identified in Step 4;
  - ii. Assessed the potential impacts of the project on the Mi'gmaq and their Rights;
  - iii. Identify any accommodation measures required to avoid, mitigate or minimize the project impacts (and enter into any required agreements with the Proponent, i.e., Environmental Protection Agreement, Impact and Benefits Agreement);
  - iv. Determine if Mi'gmaq consent for the project will be granted.

All of this information will be included in a report prepared by Mi'gmawe'l Tplu'taqnn.

### **STEP 8: Project Construction, Operation and Decommissioning (if Mi'gmaq consent is granted)**

- a. If Mi'gmaq consent has been granted, subject to any necessary provincial or federal approvals that may also be necessary, the construction of the project may begin.
- b. If the proposed project would occur on one of the Mi'gmaq communities reserve land, the proponent will be required to comply with that community's laws, land codes, by-laws or administrative procedures that may be in effect.
- c. Mi'gmaq monitors will monitor the project during its construction. When project construction is completed, that does not end the potential impact on Mi'gmaq Rights, or Mi'gmaq involvement. As such, Mi'gmaq monitoring of the project / the environment, will likely be required to continue into the operation phase of the project. Depending on the nature of the project, Mi'gmaq monitors may also be required for the decommissioning of the project. Terms and funding for Mi'gmaq monitoring will be set out in either an Environmental Protection Agreement or an IKLUOS agreement.

d. The objectives of this Step in the MRIA process are to:

- i. Make sure the project / Proponent is meeting any conditions included as part of Mi'gmaq consent;
- ii. Verify whether the mitigation measures are working (in other words, confirm the effectiveness of the mitigation measures);
- iii. Make sure the project is being constructed and operating in accordance with the information provided by the Proponent (for which the MRIA is based on);
- iv. Provided follow-up information to Mi'gmaq communities on the status of the project and its impacts.

Mi'gmaq participation in monitoring, compliance and enforcement roles is critical, as it is the Mi'gmaq that often have to live with the adverse impacts of a project long after an EIA or IA is done, and long after the project is decommissioned

## Appendix A: Glossary of Terms

“**Aboriginal peoples**” is a term used in the *Constitution Act, 1982*, that refers to the Indian (First Nation), Inuit and Métis peoples of Canada.

“**Aboriginal rights**” refers to the activities, practices, traditions and customs of Aboriginal peoples in Canada that are integral to their distinctive cultures. Aboriginal rights are inherent rights which Aboriginal peoples have practiced and enjoyed since before European contact. Asserted and proven Aboriginal rights are constitutionally protected, under section 35 of the *Constitution Act, 1982*.

“**Aboriginal Title**” is a form of Aboriginal right and is a unique and beneficial interest in the land. Aboriginal title confers ownership rights, including the rights of enjoyment and occupancy of the land and the right to decide how the land will be used and managed. Mi’gmaq Aboriginal Title to their Territories (New Brunswick) is unceded, and the Mi’gmaq have ever ceded Title to their Territory.

“**accommodation**” means avoiding, minimizing, offsetting and / or compensating Aboriginal peoples for adverse impacts to their Aboriginal and Treaty Rights. In some cases, reasonable accommodation may require rejection of a proposed project.

“**baseline**” refers to what the environment, or a specific VC, was like before the proposed project. The baseline condition is compared to what the area would be like after the project in order to help determine the project impacts.

“**Consultation**” and “**Consultation process**” refers to the consultation, engagement, dialogue and joint decision-making process required of the Crown to fulfill its constitutional obligation of the Duty to Consult. Consultation depends on the circumstances, but it must always be meaningful. Depending on the nature of the Right and potential impact on the Right, Consultation may include: involvement in the early planning stages of a proposed project; the opportunity of the Mi’gmaq to make formal submissions to the Crown and/or Proponent; Mi’gmaq formal participation in the Crown’s decision-making process.

“**Engagement Principles**” refers to the engagement principles developed by the Mi’gmaq, which are rooted in a vision of collaboration and consent based decision-making. In order for consultation to be adequate and meaningful, the Mi’gmaq require that consultation and accommodation adhere, at a minimum, to the Engagement Principles, a copy of which is attached as Schedule “A” to this MRIA framework document.

“**Crown**” refers to the provincial or federal government, including their departments, agencies, corporations, boards, Ministers, commissions and representatives.

“**engagement**” refers to the procedural aspects of Consultation, such as meaningful dialogue and interaction between the Proponent and the Mi’gmaq. Examples of engagement include discussion groups, in-person meetings, exchanging information, sharing knowledge, conducting studies, relationship building, and seeking input from each other on a project and its related impacts on Rights.

“**Duty to Consult**” means the Crowns constitutional obligation to adequately and meaningfully consult, and where required, accommodate, Aboriginal peoples when the Crown contemplates actions or decisions that have the potential to impact their asserted or proven Aboriginal

or Treaty rights or Aboriginal Title. The Duty to Consult requires the Crown to consult with Aboriginal peoples before the Crown makes a decision or takes any action that might adversely impact those rights.

**“impacts”** for the purposes of this Mi’gmaq Rights Impact Assessment framework, unless otherwise specified, refers to potential impacts that may result from a proposed project or physical activity. Impacts may be tangible and intangible.

**“Indigenous Knowledge”** is a living and continuously evolving cultural imperative. It is at the heart of and reflective of the Mi’gmaq as a people and embodies cultural and spiritual values, and Indigenous science. In part it encapsulates Mi’gmaq oral history, practices, customs, and traditions regarding a certain area of lands and waters, and it is not static.

**“Indigenous Knowledge Land Use and Occupancy Study” or “IKLUOS”** is a study carried out by a Mi’gmawe’l Tplu’taqnn that identifies areas of historical and current Mi’gmaq land use in a proposed project area pertaining to lands, water and natural resources.

**“Indigenous peoples”** is a term that refers to the original peoples / inhabitants of a territory or geographical area and their descendants. For the purpose of this MRIA framework document, Indigenous peoples refers to the collective Mi’gmaq peoples, who have occupied and cared for their Territory since time immemorial, long before the arrival of non-Indigenous settlers.

**“Mi’gmaq”** and **“Mi’gmaq in New Brunswick”** refers to the collective Mi’gmaq peoples and their communities in New Brunswick, as represented by Mi’gmawe’l Tplu’taqnn. For the purposes of this MRIA framework and its application, Mi’gmawe’l Tplu’taqnn represents eight Mi’gmaq communities in New Brunswick: Amlamgog (Fort Folly) First Nation, Natoaganeg (Eel Ground) First Nation, Oinpegitjoig (Pabineau) First Nation, Esgenoôpetitj (Burnt Church) First Nation, Tjipôgtôtjig (Buctouche) First Nation, L’nui Menikuk (Indian Island) First Nation, Ugpi’ganjig (Eel River Bar) First Nation and Metepenagiag Mi’kmaq Nation.

**“meaningful consultation”** means carrying out consultation and accommodation in accordance with the Engagement Principles.

**“Mi’gmawe’l Tplu’taqnn”** means the Mi’gmaq organization that represents eight of the Mi’gmaq First Nation communities in New Brunswick in consultation matters that may affect the Aboriginal rights and Title and Treaty Rights of the Mi’gmaq.

**“NBMIK”** and **“MIK”** refer to Indigenous Knowledge of the New Brunswick Mi’gmaq. This includes the collection and adaptation of knowledge that Mi’gmaq hold in accord with all components of the natural environment and the interrelationships that exist between all Creation (animate and inanimate matter).

**“NBMIKS”** and **“New Brunswick Mi’gmaq Indigenous Knowledge Study”** mean all components of an Indigenous Knowledge Land Use and Occupancy Study, which includes the planning, collection, analysis, protection, reporting and distribution of Mi’gmaq Knowledge in New Brunswick.

**“Pathway”** is an impact pathway, which can be in the form of a flow-chart or diagram, of a linked set of cause-and-effect relationships between factors in the impact assessment analysis. A Pathway represents the relationship between the project or an aspect of the project, its effects, and the outcome or impact on Mi’gmaq Rights.

**“Proponent”** means a company, corporation, individual, or a Crown agency that is developing, proposing or contemplating a project in the Province of New Brunswick.

**“Rights”** refers to any and all Aboriginal rights, Aboriginal Title and Treaty Rights, whether asserted or proven.

**“Territory”** means the unceded land, water and air of the Mi’gmaq in what is now known as New Brunswick. The Mi’gmaq have used and occupied their Territory since time immemorial.

**“Treaty rights”** are rights that are defined by the terms of the historic Treaties of Peace and Friendship. In New Brunswick, Treaty rights include, amongst others, the right to hunt, fish and gather for food, social and ceremonial purposes, as well as for trade.

**“Valued Components” or “VCs”** are components or attributes of the physical / natural and human environment, that are determined by the Mi’gmaq to have intrinsic, legal, Indigenous, socio-cultural, economic, or scientific value, and which are considered in the Mi’gmaq Rights Impact Assessment to determine the potential impact of a project on Mi’gmaq Rights. VCs may include, but are not limited to, components of the environment such as: fish and fish habitat, species at risk, birds (including migratory) and their habitat, human health of Mi’gmaq community members, land and resource use, economic well-being of Mi’gmaq communities / members, and archaeological, historical and spiritual sites of importance to the Mi’gmaq. VCs, and the indicators that are used to measure them, are key things against which project-specific and cumulative effects are assessed during a MRIA.



## Schedule “A”

### Engagement Principles

The Mi’gmaq in New Brunswick have a vision of a collaborative process of consent-based decision-making within the context of projects in their Territory and the related Consultation process. This collaborative process based on consent-based decision-making requires the Crown, and the Proponent when having delegated Consultation responsibilities, to seek Mi’gmaq consent before making any decisions that have the potential negatively impact on their Aboriginal and Treaty Rights and Title.

The Crown must understand and work on the basis that Consultation with the Mi’gmaq is a government-to-government relationship and recognize that this relationship is based upon a shared stewardship of the land and its resources. In order for Consultation to be adequate and meaningful, the Mi’gmaq require that consultation and accommodation adhere, at a minimum, to the following principles:

**Early/Timely Engagement:** Consultation must be timely, and must take place at the earliest possible opportunity, and well before any final decisions are made regarding approval and implementation of a project;

**Complete information:** Consultation must involve full, complete and timely disclosure to the Mi’gmaq of all information required to understand the impacts of a project on the Mi’gmaq and their Rights;

**Reasonable Timeframes:** The Mi’gmaq must be given adequate time to respond to the information;

**Transparency:** Crown and Proponent decision-making must be transparent and understandable;

**Clear Delegation:** Where any procedural aspects of Consultation are delegated to the Proponent, this must be done clearly, in writing, and with notice to the Mi’gmaq;

**Real Dialogue:** Crown representatives must approach Consultation with open minds and in a spirit of two-way dialogue, which takes Mi’gmaq input seriously, and allows for real discussion and consideration of decisions, and not just an explanation of decisions which are already set in stone;

**Access to decision-makers:** The Mi’gmaq must have the opportunity to meet directly with those within the Crown and Proponent organizations who have the actual authority to make decisions;

**Meaningful Accommodation:** Consultation must result in meaningful accommodation measures to mitigate or minimize any impact on Aboriginal and Treaty rights and Title, and compensate for any impacts that cannot be minimized;

**Adequate Resources:** The Mi’gmaq must be given adequate resources in order to obtain the input of their communities, to properly study and review the plans, and to gather Indigenous Knowledge with respect to the Rights that could be impacted;

**Respect for Mi'gmaq Territory and Culture:** Consultation meetings must happen in a spirit of respect. Wherever possible, meetings should take place in Mi'gmaq Territory, and in their communities, to put the discussions in the appropriate social and cultural context; and

**Consent:** Mi'gmaq consent to projects in their Territory is required, and Consultation should be undertaken with that understanding.

## Schedule “B”

### Assessing the Severity of Impacts

Projects generally result in more than one impact (in other words, projects generally impact more than one VC or aspect of a Right). To rate the overall severity of impacts on Mi’gmaq Rights, the highest degree of severity is used. If one adverse impact is determined to be high in severity, then the overall impact of the project on Rights is determined to be high in severity. The evaluation of severity should include an assessment of the likely severity of impacts without any mitigation measures, as well as with proposed mitigation measures.

The following are some criteria and questions that can be considered when analyzing the severity of impacts on each VC and Right that is being assessed (Community scoping meetings may result in further criteria / questions to consider in the assessment of severity):

- Nature of impacts:
  - what is the spatial extent, likelihood, certainty, duration/frequency and reversibility of the project impacts on the exercise of Mi’gmaq Rights?
  - Consider the geographic extent of the impacts in relation to the geographic extent / exercise of a Right.
  - Health: consider impacts from the project on the health of the Mi’gmaq, or specific Mi’gmaq communities. Health includes considerations of physical, mental, emotional, and spiritual health.
- Cultural landscape:
  - will the project have an impact on the a Mi’gmaq community’s planning, management or stewardship of their lands and resources?
- Regional/Historic/Cumulative impacts:
  - is there an impact from past, existing, and future projects or activities on a VC and/or a Mi’gmaq Right?
- Thresholds:
  - are there applicable community thresholds that have already been crossed or that would be surpassed by the proposed project?
- Distribution of any benefits/ impacts:
  - does the project provide an acceptable level of mitigation and benefits from the Mi’gmaq perspective to justify the impacts on their Rights?
  - are the impacts disproportionately experienced by a sub-population within the Mi’gmaq, such as women, elders, 2SLGBTQQIA, and youth?
- Future generations:
  - do the project-specific mitigation measures and any benefits preserve the ability of future generations to exercise their Rights?

The severity of impacts on Mi'gmaq Rights may be low, moderate or high:

<b>Low Severity</b>	<b>Moderate Severity</b>	<b>High Severity</b>
<ul style="list-style-type: none"> <li>• project impacts may be low, or minor in scale, if the impacts:               <ul style="list-style-type: none"> <li>○ are short in duration</li> <li>○ infrequent</li> <li>○ easily reversible</li> <li>○ do not affect the exercise of Rights</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• project impacts may be moderate in scale, if the impacts:               <ul style="list-style-type: none"> <li>○ are moderate in duration</li> <li>○ are partially reversible</li> <li>○ disrupt the ability to exercise a Right, but which can be off-set by mitigation measures</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• project impacts will likely be high in scale, if they:               <ul style="list-style-type: none"> <li>○ are permanent/long-term</li> <li>○ possibly irreversible</li> <li>○ are within a preferred area of exercise for a Right(s)</li> <li>○ interact with existing impacts from past or existing projects (cumulative effects)</li> <li>○ disproportionately impact sub-groups within the Mi'gmaq population</li> </ul> </li> </ul>



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<sup>i</sup> A helpful background to the Treaties by Prof. William Wicken, PhD, found online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100028599/1539609517566>; See also Francis, R. (2003) "The Mi'kmaq nation and the Embodiment of Political Ideologies: Ni'kmaq, Protocol and Treaty Negotiations in the Eighteenth Century," M.A. Thesis, Saint Mary's University.

<sup>ii</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

<sup>iii</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

<sup>iv</sup> See Government of Canada website, found online at: <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958> [accessed October 15, 2019]

<sup>v</sup> OCAP® is a registered trademark of the First Nations Information Governance Centre (FNIGC). See: [www.FNIGC.ca/OCAP](http://www.FNIGC.ca/OCAP)