

**What are IBAs, Designation Orders, and the Duty to Consult?**  
**An explanation of relevant Aboriginal law topics through the case study of**  
***Ermineskin Cree Nation v Canada (Minister of Environment and Climate Change)***

## Introduction

A recent federal court case, *Ermineskin Cree Nation v Canada (Minister of Environment and Climate Change)* (shortened to “*Ermineskin*”) is an excellent case study to examine a few relevant topics in Canadian Aboriginal law. The key concepts that will be covered in this blog post are: Impacts and Benefits Assessments, Designation Orders under the *Impact Assessment Act*, and the duty to consult. Each of these topics will be discussed generally, and then more clearly illustrated using the case study of *Ermineskin*. Before we jump into these topics, it will be useful to have the background story on what happened in *Ermineskin*.

## CASE STUDY:

Ermineskin Cree Nation (shortened to “*Ermineskin*”) is a member of the Four Nations of Maskwacis which is Alberta’s largest Indigenous Nation and is an Indian band under the Indian Act. Ermineskin has treaty rights under Treaty 6 (a treaty to which both Canada and Ermineskin uphold) and Aboriginal rights under their Traditional Territory. Ermineskin entered an Impacts and Benefits Agreement with Coalspur Mining before the Minister of Environment and Climate Change made a designation order without consulting Ermineskin. Ermineskin put forward that this order would adversely impact their Aboriginal and treaty rights by diminishing their economic interest secured through the agreement with Coalspur Mining and that the Minister had a duty to consult with them as a result. The Minister put forward that there was no duty to consult Ermineskin.

## What are Impacts and Benefits Agreements?

Sometimes, natural resource development companies (for example, coal mining companies) want to move forward with a project on Indigenous land that could impact the treaty rights, claims, or interests of the Indigenous group(s) to whom the land is trusted. In those cases, an Indigenous group can choose to enter into an written agreement with the company so that the company can move forward with their project on Indigenous land in

### Possible Benefits to Indigenous Communities from IBAs:

- Financial compensation
- Preferential hiring
- Education and training
- Environmental protection
- Social support
- Cultural support

exchange for any number of potential benefits for the community (see the box to the left for some examples). These agreements are called Impacts and Benefits Agreements (shortened to “IBAs”).

IBAs allow Indigenous communities to benefit from the development that they approve and promote respectful partnerships with mining companies that have historically exploited Indigenous lands.

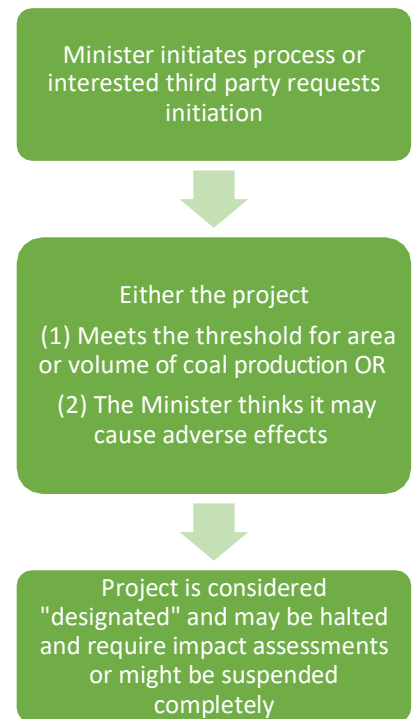
## CASE STUDY

Ermineskin entered into an IBA with Coalspur Mines which is a company already operating one coal mine on Ermineskin territory and hoping to open and operate two more. Under this agreement, Ermineskin would be compensated for the potential negative impacts the coal mine may have on Ermineskin members to exercise their Aboriginal rights within their own traditional territory. Additionally, Coalspur Mines would provide economic, community, and social benefits to Ermineskin (like those described above).

## What is a Designation Order?

The *Impact Assessment Act* is a piece of federal legislation that outlines the process for impact assessments while promoting sustainability, meaningful public engagement, and respect for the rights of Indigenous Peoples. The Minister of Environment and Climate Change has the responsibility of assessing projects; if a project is in the public interest and contributes to sustainability and Canada's ability to meet its climate change goals, the project is more likely to move forward than if it does not do these things.

Under the *Impact Assessment Act*, an activity or project may be "designated" which could result in the project being halted and subjected to federal impact assessments, or suspended altogether. The Minister can initiate the designation process or a third party, such as an impacted or interested Indigenous group, can request the initiation of the designation process. In the context of coal mining and the particular case we will discuss, a project is considered "designated" when it either meets a threshold for the area or volume of coal production or the Minister thinks the activity may cause adverse effects.



Under the *Impact Assessments Act*, the designation order immediately stalled all work on both mines for almost a full year. The order already delayed the economic and social benefits that Ermineskin would gain from the IBA and, because of the designation order, there could be continued delays or even a complete end to those benefits. Ermineskin was given no notice and was not consulted in the consultation process leading to the designation order being issued by the Minister.

**CASE STUDY**

## What is the Duty to Consult?

Constitutional protection is afforded to Aboriginal and treaty rights, including the right to hunt, trap, fish, and gather on unoccupied Crown land and other Indigenous land. Economic benefits that result from an IBA are also protected because they are closely linked to underlying Aboriginal and treaty rights. This means these rights cannot be interfered with by any level of government in Canada without valid reason. To maintain these rights, the government has a duty to consult with Indigenous communities when planned or proposed government activity might interfere with those rights. Where appropriate, the government should also accommodate the interests of Indigenous communities. This duty serves to protect Aboriginal rights and promote ongoing reconciliation between Canada and Indigenous groups.



The duty to consult is triggered when three elements are present (*shown above*).

Element 1 (the Crown has knowledge of a potential Aboriginal claim or right) is satisfied whenever a treaty right is involved because the Crown always has knowledge of the treaties that it is a party to. Element 2 (the Crown is planning or proposing an activity) refers to any activity or conduct that has either an immediate impact or may have a future impact on lands, resources, or Aboriginal rights. Element 3 (the activity might adversely affect the Aboriginal claim or right) is met where the conduct of the Crown might have adverse effects on Aboriginal rights or claims. These adverse effects can be physical, having a more immediate impact, or can be policy decisions which may not have an immediate impact on the lands or resources in question.

Each specific case that triggers the duty to consult requires a contextual analysis and the Crown cannot decide that the land should be maintained in its current state as a reason to avoid its duty to consult with impacted Indigenous groups. The duty to consult is engaged when those rights listed above (hunt, trap, fish, and gather) are impacted and/or where the economic interests of an Indigenous community may be negatively impacted.

**Element 1** - Ermineskin is a signatory to Treaty 6 to which Canada is also a party, so the Crown has knowledge of Aboriginal claims or rights in question. Ermineskin's Treaty rights cover the right to hunt, trap, fish, and gather, and broader economic interests like the social, economic, and community benefits that Coalspur Mines guaranteed to Ermineskin under the IBA.

**Element 2** - The Minister was contemplating issuing the designation order which would have the immediate impact of halting resource development in the area and may have the future impact of stopping the project altogether.

**Element 3** - Issuing the designation order would have the effect of delaying and possibly lessening or eliminating Ermineskin's economic interests under the IBA. This amounts to the Crown's proposed activity (the issuance of the designation order) adversely impacting the economic rights of Ermineskin which are protected as treaty rights.

**Was there a duty?** Because the three elements triggering the duty to consult were met and the designation order would "delay, lessen, or eliminate" Ermineskin's economic interests, the Crown had a duty to consult before making the order. Ermineskin was not consulted at all, so the Crown failed in its duty.

## CASE STUDY

# MAIN TAKE-AWAYS:

→ Indigenous groups can negotiate IBAs with private companies to be compensated for their

Aboriginal and treaty rights

→ Because a designation order has the effect of pausing or ending resource development, the duty to consult may be triggered prior to the issuing of the order if that order would

negatively impact Aboriginal and treaty rights

→ The Crown has a duty to consult that extends to broader economic interests including where an Indigenous community has negotiated and agreed to an Impact and Benefits Assessment

with a private company

→ The Crown must fulfill its duty to consult by consulting both those in favour of and those

opposed to a project if their rights might be adversely impacted

**Cases:**

*Athabasca Chipewyan First Nation v Alberta*, 2019 ABCA 401.

*Ermineskin Cree Nation v Canada (Minister of Environment and Climate Change)*, [2021] FCJ No 756, 2021 FC 758.

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

*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

*Royal Bank of Canada v Sparrow Electric Corp*, [1997] SCJ No 25, 1997 1 SCR 411.

**Legislation:**

*Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

*Impact Assessment Act*, SC 2019, c 28, s 1

**Secondary Sources:**

Environment and Climate Change Canada, “Government of Canada releases Policy Statement on future thermal coal mining projects and project expansions” (11 June 2021), online: *Government of Canada* <[www.canada.ca/en/environment-climate-change/news/2021/06/government-of-canada-releases-policy-statement-on-future-thermal-coal-mining-projects-and-project-expansions.html](http://www.canada.ca/en/environment-climate-change/news/2021/06/government-of-canada-releases-policy-statement-on-future-thermal-coal-mining-projects-and-project-expansions.html)> [perma.cc/S8F7-JKL7].

“Operational Guide: Designating a Project under the *Impact Assessment Act*” (9 December 2021), online: *Government of Canada* <[www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html](http://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html)> [perma.cc/Z5MG-G6HR].

“Statement by the Government of Canada on thermal coal mining” (11 June 2021), online:

*Government of Canada* <[www.canada.ca/en/environment-climate-change/services/managing-pollution/energy-production/electricity-generation/statement-government-canada-thermal-coal-mining.html](http://www.canada.ca/en/environment-climate-change/services/managing-pollution/energy-production/electricity-generation/statement-government-canada-thermal-coal-mining.html)> [perma.cc/LEY6-MCAR].