

## Regulatory Affairs: Towards an Indigenous Approach to ESG and Climate Change Action

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Welcome back to our *Regulatory Affairs* series, developed to provide timely updates on hot topics across the vast world of regulatory law; strategic insights on regulatory fundamentals; and a look at environmental and Aboriginal law topics, which frequently intersect with regulatory matters. As always, we are here to help.

As climate change dominates the world's headlines, public markets are continually re-evaluating environmental, social, and governance (ESG) standards. As we've previously observed, even institutional shareholders are increasingly [becoming more activist in the public markets](#), and Canadian companies must continue to adapt and respond—or face a material risk to their reputations.

Existing consolidated ESG frameworks largely ignore Indigenous lands and interests. Whether overlooked or misunderstood, Indigenous rights and land stewardship are critical to developing any ESG program, as projects often result in land impacts which, in turn, can have deleterious effects on Aboriginal rights and interests. Since the enactment of the *Constitution Act, 1982*,<sup>1</sup> Canadian courts and regulators have consistently considered and developed constitutional principles of interpretation of Indigenous rights to advance the overarching goal of reconciliation. More recently, Canadian courts have started scrutinizing private initiatives through the goal of protection and recognition of Indigenous rights and interests. Significantly, [a recent decision from the Alberta Court of Appeal](#) suggests that increasing economic activity on Indigenous lands can contribute to the public interest.<sup>2</sup> In turn, the Federal Court found that the economic interests benefitting a First Nation as a result of an impact benefit agreement with a third party are “rights that are closely related to and derivative from Aboriginal rights” and therefore protected by the Crown's duty to consult.<sup>3</sup>

Against this background, the protection and advancement of Indigenous interests should be a key part of any ESG program. A successful ESG program should meaningfully recognize Indigenous rights and traditional knowledge to define what constitutes “sustainable development,” considering globally recognized standards such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and support Indigenous-led projects and Indigenous equity ownership. Ideally, an ESG program should also include performance indicators that can demonstrate a project's sustainability to investors. In our view, emphasizing Indigenous knowledge and participation can both advance reconciliation and anchor a successful ESG program.

# Cassels

## Indigenous Knowledge and Land Stewardship Are an Untapped Resource

Indigenous traditional knowledge and land stewardship have an important role to play in climate change policy. Indigenous peoples have in-depth intergenerational knowledge about their lands and resources. Furthermore, they serve as stewards of the world's most invaluable natural resources. In Brazil, for example, the forests in Indigenous territories contain 14% of the carbon in all tropical forests worldwide.<sup>4</sup> In recognition of this, Crown-Indigenous Relations and Northern Affairs Canada has invested \$134 million in more than 670 unique projects in northern communities for initiatives that monitor and assess climate change impacts, improve green energy infrastructure, and engage Indigenous communities on climate policy.<sup>5</sup>

Furthermore, climate change will have a disproportionate impact on Indigenous peoples, whose identity, culture, and livelihood are dependent upon the sustainability of their lands and resources. Inherent Aboriginal rights are protected in the *Constitution Act, 1982*, requiring the Canadian government to consult with Indigenous peoples to ensure these rights are respected and protected. More recently, Canada passed an act requiring the federal government to prepare an action plan to ensure all its laws are consistent with UNDRIP.<sup>6</sup> These rights include the protection of Indigenous peoples' spiritual connection to their lands.

Unfortunately, Indigenous rights and land stewardship have largely been left out of current ESG standards. The Canadian Securities Administrators' guidance on climate change-related risks failed to make any reference to Indigenous peoples.<sup>7</sup> Blackrock, the world's largest asset manager with US\$2.7 trillion under active management, published an ESG policy that also fails to mention Indigenous peoples.<sup>8</sup> Overall, most ESG standards do not include the rights and interests of Indigenous peoples.<sup>9</sup>

## Canada Can Lead the Way

Canada's process of reconciliation has already laid the groundwork for recognizing Indigenous land rights and stewardship as key components of ESG and effective climate action. In many regulatory schemes, existing frameworks require that a project be in the public interest to proceed. In turn, there is a recognition that projects must provide benefits to local communities to be in the public interest.<sup>10</sup> Project approvals generally require that affected Indigenous communities be consulted with—and, where appropriate, that any impacts on their rights and interests be accommodated—and that Indigenous knowledge be considered.<sup>11</sup> While the duty to consult is owed by the Crown, courts have recognized that regulators may (and often do) delegate procedural aspects of Indigenous consultation aimed at discharging the duty to consult on project developers.<sup>12</sup>

Canadian companies can leverage their existing best practices to attract investors by emphasizing their commitment to Indigenous rights and participation. For example, the following initiatives are, in our view,

consistent with a sustainable and well founded ESG program:

- Indigenous equity participation contributes to a project's social sustainability;
- Passing an Indigenous governing body's environmental review can indicate a project's environmental bona fides;
- Preferential hiring of Indigenous employees and firms increases a project's social benefits; and
- Considering the globally recognized standards mandated by UNDRIP.

Properly utilized, Canadian companies can lead the way in both recognizing the centrality of Indigenous rights and knowledge to ESG and making real contributions to the fight against climate change—all as part of meeting their regulatory obligations.

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<sup>1</sup> *Constitution Act, 1982*, RSC 1985, App. II, No. 44, Sched. B, Pt. II.

<sup>2</sup> *AltaLink Management Ltd. v Alberta (Utilities Commission)*, 2021 ABCA 342.

<sup>3</sup> *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at paras 8-9.

<sup>4</sup> Food and Agricultural Organization of the United Nations, "Forest Governance by Indigenous and tribal peoples" (last accessed 14 November 2021), online: <[fao.org/americas/publicaciones-audio-video/forest-gov-by-indigenous/en/](http://fao.org/americas/publicaciones-audio-video/forest-gov-by-indigenous/en/)>.

<sup>5</sup> Crown-Indigenous Relations and Northern Affairs Canada, "Nunavut communities tackle climate change using Indigenous knowledge and science" (*NewsWire*, 29 June 2021), online: <[newsWire.ca/news-releases/nunavut-communities-tackle-climate-change-using-indigenous-knowledge-and-science-814533708.html](http://newsWire.ca/news-releases/nunavut-communities-tackle-climate-change-using-indigenous-knowledge-and-science-814533708.html)>.

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

<sup>7</sup> Canadian Securities Administrators, "Staff Notice 51-358 Reporting of Climate Change-related Risks" (1 August 2019), online (pdf): <[osc.gov.on.ca/documents/en/Securities-Category5/csa\\_20190801\\_51-358\\_reporting-of-climate-change-related-risks.pdf](http://osc.gov.on.ca/documents/en/Securities-Category5/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf)>.

<sup>8</sup> Blackrock, "Making Sustainability our Standard" (December 2020), online (pdf): <[blackrock.com/corporate/literature/publication/esg-integration-approach.pdf](http://blackrock.com/corporate/literature/publication/esg-integration-approach.pdf)>.

<sup>9</sup> The First Nations Major Projects Coalition, "Indigenous Sustainable Investment: Discussing Opportunities in ESG" (January 2021), online (pdf): <[secureservercdn.net/45.40.145.201/14x.5f4.myftpupload.com/wp-content/uploads/2021/04/FNMPC\\_ESG\\_Primer\\_2021\\_Final.pdf](http://secureservercdn.net/45.40.145.201/14x.5f4.myftpupload.com/wp-content/uploads/2021/04/FNMPC_ESG_Primer_2021_Final.pdf)>.

<sup>10</sup> *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 at para 59.

<sup>11</sup> Impact Assessment Agency, *Practitioner's Guide to Federal Impact Assessments under the Impact Assessment Act*, s. 3.1, online: <[canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/policy-indigenous-participation-ia.html](http://canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/policy-indigenous-participation-ia.html)>.

<sup>12</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53.