

ESG NOT JUST ESG

Posted on July 25, 2023

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Although certainly not without controversy, environmental, social and governance (“**ESG**”) practices have become a priority for companies and stakeholders today. As a set of considerations, ESG has come to encompass a wide variety of different subject matters including environmental, ethics, human rights, corporate social responsibility, diversity, equity and inclusion. Discussions around the *explicit* inclusion of Indigenous considerations (hence “**ESGI**”) have resulted in a vigorous debate as to whether existing ESG frameworks^[1] fail to meaningfully incorporate Indigenous considerations^[2] even in contexts where the well established constitutional duty to consult and, where appropriate, accommodate, Indigenous interests is in play.

The reality often is that existing ESG frameworks are not developed with Indigenous peoples’ input and fail to adequately consider the need for meaningful consultation or to fully take account of the broad spectrum of rights held by, and the potential for impacts on, Indigenous communities. For example, under the GRI’s standard, Indigenous issues are considered important for the disclosing company only when a court action or formal complaint is initiated by Indigenous people against the disclosing company^[3]. At other times, such frameworks limit their sphere of action to those aspects of an entity’s activities that are subject to the duty to consult. To this extent, ensuring that ESG in appropriate contexts means in practice ESGI is to pay heed to both the political *milieu* of the country and the developing demands of stakeholders.

Doing so by the private sector would also be in line with the Truth and Reconciliation Commission’s Call to Action #92^[4]:

92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework *and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.*^[5]

Efforts to adequately incorporate Indigenous considerations into ESG frameworks require the partnership of Indigenous communities. In that regard, a number of Indigenous organizations in Canada, including the First Nations Major Project Coalition, have taken the lead defining what the “I” should entail^[6]. The Coalition has put forth a series of risks (infringements of Indigenous rights, legal, reputational and financial as well as project

delays) and opportunities (notably Indigenous impact finance) as well as a set of reporting criteria related to employment and advancement, training and education, Indigenous rights and community investments.

The Coalition also teamed up with the Shareholder Association for Research and Education and their joint effort led to the adoption of a shareholder's proposal at the 2021 TMX Group Limited annual general assembly, which reads^[7]:

Rights [granted / recognized] under The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which Canada supports since 2016 and aim at implementing through the United Nations *Declaration on the Rights of Indigenous Peoples Act*^[8], should also be considered.

So far, only the federal government^[9] and the province of British Columbia^[10] have adopted legislation aiming at implementing UNDRIP. More recently, the federal government released its United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan^[11].

While ESGI would be currently more commonly adopted within government^[12], we can expect all manner of stakeholders to also pay increasing attention to Indigenous considerations within their ESG approaches, particularly as government shifts its expectations of industry. As a notable example, advancing reconciliation with Indigenous peoples is one of the six focus areas of Canada's Critical Minerals Strategy^[13] announced at the end of 2022.

The government is also increasingly tying federal funding and procurement to Indigenous engagement. On August 6, 2021, the Government of Canada announced that it would implement a mandatory requirement for federal departments and agencies to ensure a minimum of five percent of the total value of federal contracts are held by Indigenous businesses (the 5% target is calculated as a percentage of the aggregated value of contracts awarded and not as a percentage of the value of each individual contract awarded). While the federal government has begun to implement this requirement, with full implementation expected by 2024, Indigenous participation and partnership are now routinely included as requirements in federal procurements. As government requirements cascade through Canada's supply chains, industry will be increasingly called upon to develop meaningful partnerships with Indigenous peoples. A notable number of energy and resources projects in Canada are now structured as joint ventures, whose partners include a first nation or first-nation owned entity.

These approaches are also making their way into federal policy across departments and agencies. For example, the Canada Infrastructure Bank has established a target of \$1 billion to invest in Indigenous infrastructure projects in partnership with and for benefit of Indigenous communities across their five priority sectors. Depending on project particulars, the CIB expects a minimum of 25% percent Indigenous ownership as a minimum, with a preference of 51% to maximize CIB's investment potential. Projects that demonstrate tangible

benefit to Indigenous communities have a higher likelihood of consideration and a higher level of funding.

As Indigenous considerations are increasingly woven into different aspects of public, political and economic life, the success of many public as well as private initiatives and projects may well come to depend on how Indigenous considerations are integrated into ESG approaches and on how well those considerations are actually put into practice, regardless of the requirements of the law. Indigenous representation on boards or directors with an indigenous background, in particular, remains low^[14]. While approaches to ESG are about mitigating risk to organizations and the lack of meaningful engagement with Indigenous peoples, as much as the difficulties that can arise when dealing with Indigenous peoples in specific contexts, represent a significant ongoing business and reputational risk for many companies.

For practical advice on implementing a sensible ESGI approach, advancing the principles of UNDRIP and implementing the recommendations of the Truth and Reconciliation Commission in your company's activities, McMillan and its public affairs colleagues at McMillan Vantage stand ready to help you.

More on McMillan ESG initiative [here](#).

[1] Including those developed by the Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB) and the Task Force on Climate-related Financial Disclosure (TCFD).

[2] See in particular Anna Abramova, Khaled Khadam, Nabil Anouti, and Tom Berger (Marcel Desautels Institute for Integrated Management Desautels Faculty of Management, McGill University Integrated Management Student Fellowship, Cohort 2021-2022), *ESG: The Case for an Indigenous Perspective*, 2022.

[3] [Disclosure 411-1 Incidents of violations involving rights of indigenous peoples](#).

[4] Truth and Reconciliation Commission, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015.

[5] The call for action continues as follows: "This would include, but not be limited to, the following: 1) Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects. 2) Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects. 3) Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism."

[6] Mark Podlasly, Max Lindley-Peart and Suzanne von der Porten (commissioned by The First Nations Major Project Coalition), *Indigenous Sustainable Investment. Discussing Opportunities in ESG*, January 2021: [Online](#).

[7] Shareholder Association for Research and Education, [Press Release: TMX Group Limited shareholders vote](#)

in favour of company-supported shareholder proposal on Indigenous inclusion, May 12, 2021.

[8] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14: [online](#).

[9] *Ibid.*

[10] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44 : [online](#).

[11] [United Nations Declaration on the Rights of Indigenous Peoples Act Implementation Secretariat, Department of Justice](#).

[12] *ESG: The Case for an Indigenous Perspective*, 2022. For example, in Canada, Indigenous considerations are embedded in the [Impact Assessment Act](#). The Canadian Energy Regulator is also considering regulatory changes around indigenous involvement : [online](#).

[13] Government of Canada, [The Canadian Critical Minerals Strategy](#), December 2022.

[14] The Globe and Mail Editorial Board, *There are scarcely any Indigenous directors on the boards of Canada's big companies. That needs to change* (December 23, 2022) : [online](#).

by [Ralph Cuervo-Lorens](#), [Martin Thiboutot](#), Jessica Brandon-Jepp, and [Ravipal Bains](#)

A Cautionary Note

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