

ENERGY AND MINING INVESTMENT

ASSESSING
ACCOUNTABILITY
FOR INDIGENOUS
RIGHTS IN COMPLEX
INVESTMENT CHAINS



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INTRODUCTION

As Indigenous rights are increasingly recognized in legislation, court decisions and international standards, they are even more material for companies in the energy and mining sectors. The financial consequences of failing to adequately address Indigenous rights can be substantial. One recent study estimates that a world-class mining operation with \$3 to \$5 billion in capital expenditures could lose roughly \$20 million per week as a result of delayed production because of company-community conflict.¹ Conversely, companies and investors benefit from a mature, respectful and productive relationship with Indigenous governments, communities, businesses and employees.

At the heart of many conflicts is Free Prior and Informed Consent (FPIC), a cornerstone of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).² Opened for adoption in 2007, the Declaration has become a primary reference for Indigenous rights. Canada endorsed it in 2016

and British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act*³ in November 2019, initiating a process to align provincial laws with UNDRIP and establishing a new high water mark for recognition of Indigenous rights and title. The federal government announced it will move ahead with legislation implementing UNDRIP in 2020.⁴

Neither the Act nor UNDRIP create new rights. They simply uphold “*the same human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.*”⁵

Assessing how well investee companies respect those rights and manage relationships with Indigenous governments and communities is a challenge for investment decisionmakers generally.

It is even more challenging when complex financing structures for energy and mining projects extend the distance between investor decisions and management accountability, through mergers and acquisitions, minority shareholdings, joint ventures, royalty arrangements and other complex business relationships.

This investor brief explores how investors can assess the degree to which accountability for Indigenous peoples’ right to FPIC is addressed in those complex investment chains in the energy and mining sectors.

PART 1: RESPONSIBILITY IN A COMPLEX INVESTMENT CHAIN

“THE ABILITY FOR INDIGENOUS PEOPLE

especially in Canada to bring dramatic legal uncertainty to a project through the courts and through other mechanisms is very real.”⁶

– Merle Alexander, a hereditary chief for the Kitasoo Xai'xais First Nation and lawyer specializing in Indigenous resource law

“THE ABILITY FOR A FIRM TO ENGAGE WITH ABORIGINAL AND LOCAL COMMUNITIES

is increasingly being considered by investors... Social licence issues have become increasingly prominent within the last few decades, evolving into a critical factor to business success.”⁷

– Canadian Chamber of Commerce

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INDIGENOUS RIGHTS AND TITLE AS AN INVESTMENT CONSIDERATION

Indigenous rights and title have been recognized in international and Canadian law for decades, yet the lack of clarity about how they are respected and enforced within hundreds of different traditions, land relationships, and Indigenous legal and governance systems, as well as the scarcity of information about relevant practices by companies (generally, and on specific projects) hampers investors' ability to assess risks and opportunities associated with potential investments.⁸

According to First Peoples Worldwide (FPW),⁹ “*Indigenous Peoples are securing unprecedented recognition of their rights from governments, but these impressive legal gains are matched with chronic gaps in implementation, especially as they relate to*

resource extraction.”¹⁰ In 2014, the organization assessed Indigenous rights and social risks to 330 global oil, gas and mining projects and found that 39% of resource production and 46% of resource reserves were on or near Indigenous land, and 35% of projects exhibited a high risk of community opposition or the violation of Indigenous rights.¹¹

Looking at the Indigenous rights and social risk exposure of 52 companies with ownership stakes in the projects studied, FPW found that those scoring well on risk management tended to be large and, consequentially, more susceptible to reputational risk. The study noted, “*Many smaller companies are doing virtually nothing to mitigate their risk exposure to Indigenous Peoples' rights, yet attract minuscule – if*

any – scrutiny from the media and NGOs, compared to their larger counterparts, even when operating in similar contexts.”¹² Disputes based on recognition of Indigenous rights can escalate rapidly and have consequences beyond those immediately involved. For example, in February 2020, solidarity blockades in support of Wet'suwet'en hereditary chiefs' opposition to construction of the Coastal Gas Link pipeline through their traditional territory in northern British Columbia significantly affected rail traffic across the country (see box, on p.8).

FREE, PRIOR AND INFORMED CONSENT

The right of Indigenous peoples to Free Prior and Informed Consent (FPIC) has become a central issue in the approval process for energy and mining projects and for their subsequent operation. First codified in International Labour Organization Convention 169 in Article 16, FPIC addressed the removal of Indigenous people “*from the lands which they occupy*.”¹³ Article 19 of the UN Declaration broadens its application, saying that states shall consult and cooperate in good faith to obtain FPIC “*before adopting and implementing legislative or administrative measures that may affect them*.”¹⁴ More than a dozen countries have strengthened the recognition of Indigenous rights in laws and regulations.

Not surprisingly, much discussion focuses on the meaning of consent in Canada and internationally. Although consent is referred to as the “*formalized and documented social license to operate*,”¹⁵ at present it is not widely interpreted by industry as conferring on Indigenous peoples a right to say “no” to projects. However in practice the circumstances under which projects may proceed in Canada without consent are becoming more limited.

As implementation of British Columbia’s 2019 *Declaration on the Rights of Indigenous Peoples Act*¹⁶ proceeds, the framework for achieving consent may have increasing consequences for investors in the energy and mining sector in that province and beyond, potentially raising the bar for what consent means while at the same time raising the level of certainty for projects once approved.

DUE DILIGENCE RELATED TO FPIC

In light of growing awareness of the materiality of Indigenous rights and of international standards supporting those rights, institutional investors are developing a better understanding of the factors they should look for in investee companies’ direct operations. Leading institutions are asking questions about Indigenous rights and community relations as part of the investor due diligence process for extractive sector company placements.

Although such basic due diligence is a significant step forward, its effectiveness is challenged by the increasingly complex ways in which capital is raised for energy and mining projects.

DUE DILIGENCE AND INDEPENDENTLY MANAGED OPERATIONS

Traditional direct share offerings in the mining sector have declined in recent years. According to the Prospectors and Developers Association of Canada, mining equity raised on Canadian stock exchanges through public offerings dropped from 60% in 2012 to 30% in 2019 with private placements filling the gap.¹⁷ Investment by major mining companies in junior companies has increased steadily.

In the energy sector, pipelines and other infrastructure are often owned through special purpose entities like Master Limited Partnerships (MLPs) for tax reasons, to allow project-level investment consortia, or to spin off infrastructure investment into separate publicly traded entities. Examples of MLPs in the pipeline sector include Energy Transfer

Partners (ETP), Shell Midstream Partners LP (SHLX) and MPLX LP (MPLX). In Canada, the Coastal GasLink pipeline (see box below) is a separate limited partnership owned in part by TC Energy, KKR & Co. and AIMCo, and may eventually include Indigenous investors.

Complex ownership patterns result in gaps in the information investors require to assess accountability. While a publicly-traded company may disclose its own policies and practices related to Indigenous peoples, when business relationships are indirect or practices have been established before an investment decision is made, information about these indirect or “*independently managed*” operations may be inadequate.

Yet the fact that critical decisions are made through independently managed operators does not make this information any less relevant to investors.

LOCAL DISPUTE SPARKS NATIONAL BLOCKADES

COASTAL GAS LINK IS A 670-KILOMETRE GAS PIPELINE PROJECT UNDER CONSTRUCTION BETWEEN DAWSON CREEK AND KITIMAT, BC BY TC ENERGY (FORMERLY TRANSCANADA PIPELINES).

Its purpose is to transport natural gas from BC's northeastern natural gas fields to a liquified natural gas facility under construction at the port of Kitimat. LNG Canada is owned by energy companies from Korea, Japan, the United Kingdom, China and Malaysia.

Although TC Energy negotiated agreements with 20 elected band councils along the pipeline route, it did not negotiate agreements with Hereditary Chiefs in the traditional

territories the pipeline will traverse, resulting in a sharp conflict between the company and Wet'suwet'en Hereditary Chiefs.

A series of court rulings created setbacks for both sides of the dispute. However, recent decisions gave Coastal GasLink the green light for construction through traditional Wet'suwet'en territory. In 2019 and again in 2020 RCMP removed blockades and arrested dozens of people. The actions of

heavily armed police enforcing Coastal GasLink's construction led to protests across Canada.

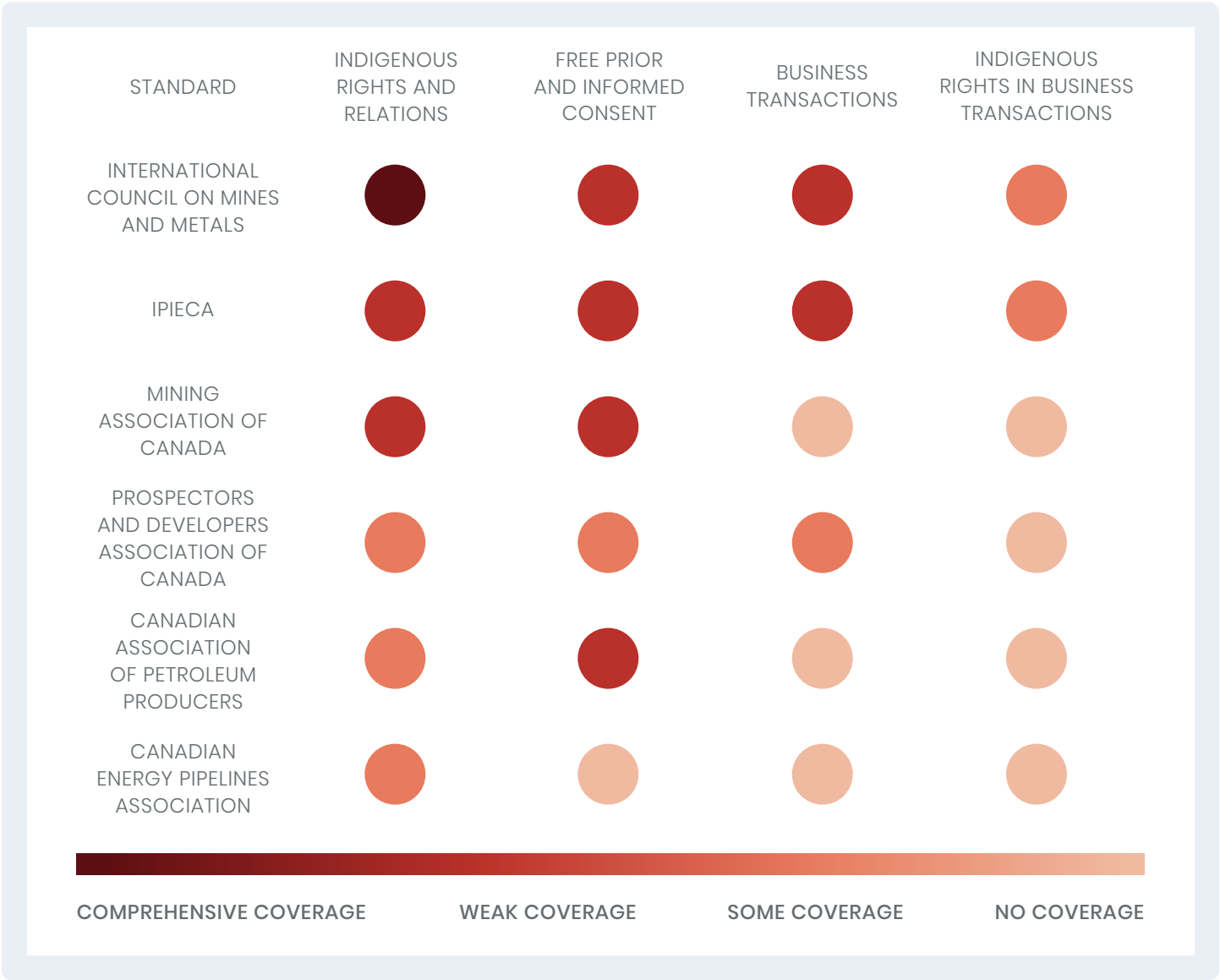
An agreement negotiated by the Hereditary Chiefs, the Government of Canada and the Province of British Columbia in March 2020 set out a framework for negotiating recognition of traditional jurisdiction over Wet'suwet'en territory within six months, bringing protests to an end, but did not address the disputed pipeline route.

GLOBAL GUIDANCE DOES NOT ABSOLVE MINORITY INVESTORS OR PARTNERS

The global *Guidelines for Multinational Enterprises* (Guidelines) issued by the Organization for Economic Cooperation and Development (OECD) make clear that companies are expected to “seek to prevent or mitigate impacts directly linked to their operations, products or services through business relationships,” extending the company’s accountability for responsible business conduct beyond its own operations and activities into its value chains. The Guidelines specify that “this recommendation is not intended to shift responsibility from the entity causing or contributing to an adverse impact to the enterprise with which it has a business relationship [...] but nonetheless [the company] should seek to influence or encourage that entity to prevent or mitigate the adverse impacts.”

Investors, likewise, “are expected to consider [responsible business conduct] risks throughout their investment process and to use their so-called ‘leverage’ with companies they invest in to influence those investee companies to prevent or mitigate adverse impacts.”¹⁸

Company conduct is also often guided by industry-wide standards that reference Indigenous rights. We assessed six such standards published by major Canadian and global energy and mining trade associations for the extent to which they account for Indigenous relations in joint ventures, minority investments, or mergers and acquisitions varies in the table below. The standards are described in Appendix 2.



TYPES OF INDIRECT EXPOSURE TO INDIGENOUS RIGHTS CONCERNS

Given the complexity of energy and mining project finance, what are some ways investors may be exposed to Indigenous rights issues through independently managed operations? We looked at the issues for assessing accountability within the following investment structures:

- Large-cap companies as minority investors in junior companies;
- Non-operating participation in joint ventures;
- Mergers or acquisitions; and
- Royalty and streaming companies.

LARGE-CAP COMPANIES AS MINORITY INVESTORS



Making strategic investments in energy and mining juniors is a way for larger companies in resource sectors to get a foothold in high-potential new projects.²⁰

In mining, the practice is on a steady upward climb: in the Canadian mining sector alone, the total value of such transactions increased fivefold between 2013 and 2017, increasing from \$217 million to nearly \$1.4 billion in the face of an overall “outflow of public investment in junior mineral explorers.”²¹

Typically, a large mining company makes a minority investment in a smaller company with a promising exploration or development project. In 2017, 41 such strategic investments took place involving Toronto Stock Exchange companies.²² Similar circumstances arise when a junior miner is spun out of a senior company. From the junior’s perspective, having such a shareholder offers credibility and an implicit endorsement by the larger company, facilitating access to capital.²³

For the larger company, access to a potentially lucrative development is gained. If the investment is small, however, the larger company will have little influence. This makes pre-investment due diligence essential. If the investment is significant, a board seat may be included, providing greater ability to influence ongoing decisions.

A variation on this model is the Earn-in Agreement: In exchange for an ownership interest, the larger company agrees to advance funds for project development over a set period.²⁴

In each case, the larger firm takes on financial and reputational risks associated with the junior’s environmental and social practices, which may be less rigorous than the larger firm’s approach.

WHEN INVESTORS HOLD OR CONSIDER INVESTING

in a company that is exposed to risks related to Indigenous rights at independently managed operations, due diligence should extend to examination of the policies, practices, and track record of those entities, whether a minority stake, joint venture, royalty stream or acquisition.



ENERGY PIPELINE CASE STUDY: DAKOTA ACCESS PIPELINE

IN AUGUST 2016, ENBRIDGE INC. AGREED TO ACQUIRE A 27.5% STAKE IN THE DAKOTA ACCESS PIPELINE (DAPL) PROJECT IN THE UNITED STATES. ENERGY TRANSFER PARTNERS IS THE OPERATING PARTNER.

Prior to Enbridge's announcement, the Standing Rock Sioux, other Native American tribes, and three US federal departments had raised concerns that Indigenous consultation and environmental assessment of the pipeline proposal was inadequate. The tribes and the departments claimed the environmental assessment failed to address impacts on reservation lands, sacred sites, and drinking water supplies for the Standing Rock Sioux and other communities. Five days before the pipeline deal was announced, the Standing Rock Sioux filed a lawsuit challenging DAPL's approval and sought an injunction preventing further work on the pipeline. The injunction was not granted and construction continued as the lawsuit proceeded. For months, thousands of protestors camped near the construction site, and tensions between DAPL security forces and Native American project opponents intensified. In December 2016, the US government withdrew the permit for the most contentious pipeline section and ordered an environmental assessment. However, in January 2017, the newly-elected Trump administration overturned that decision and construction recommenced. Protesters, who had drawn international attention, were evicted by state and federal law enforcement officials.

The pipeline began operating in June 2017. In the same month, a Federal Court judge struck down its construction permits and

ordered a new environmental assessment, but allowed operation to continue. US Army Corps of Engineers reviewed its consultation process and concluded it was adequate. Again in March 2020 a Federal court denied the permit and ordered preparation of a full Environmental Impact Statement, expected to take up to two years. The Standing Rock Sioux Tribe requested that pipeline operations be halted until this was done. On July 6, 2020 the court agreed with the request and ordered that the pipeline be shut down and emptied of oil within 30 days pending successful completion of the environmental assessment.²⁵ Energy Transfer LP has pledged to fight the ruling.²⁶

The degree to which Enbridge addressed Indigenous rights in its assessment of the DAPL project was unclear at the time the transaction was announced.²⁷ At the 2017 Enbridge annual shareholder meeting, 30% of shareholders voted for a proposal for a report on the due diligence process used to assess the Indigenous rights and other risks when reviewing potential acquisitions.

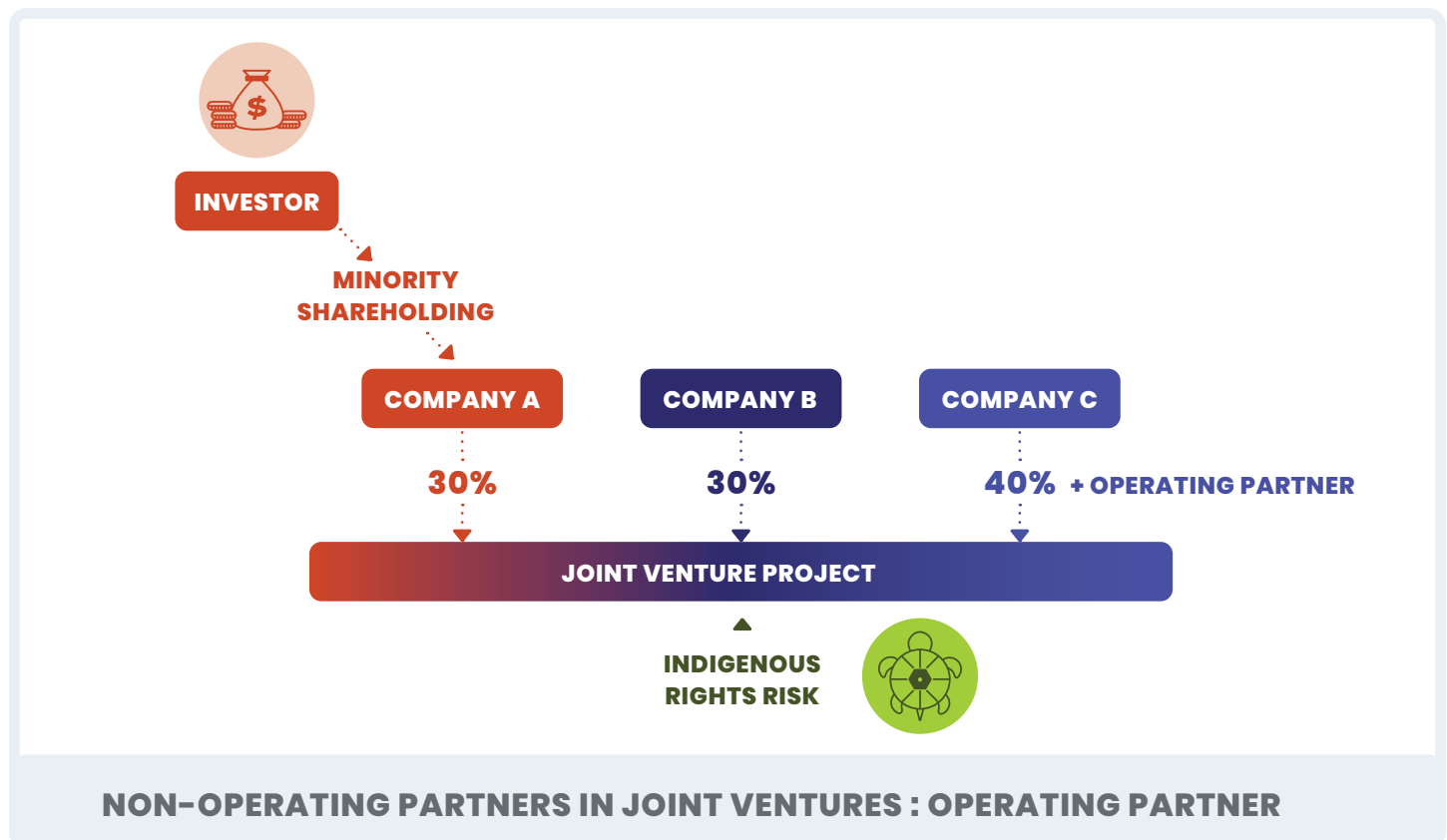
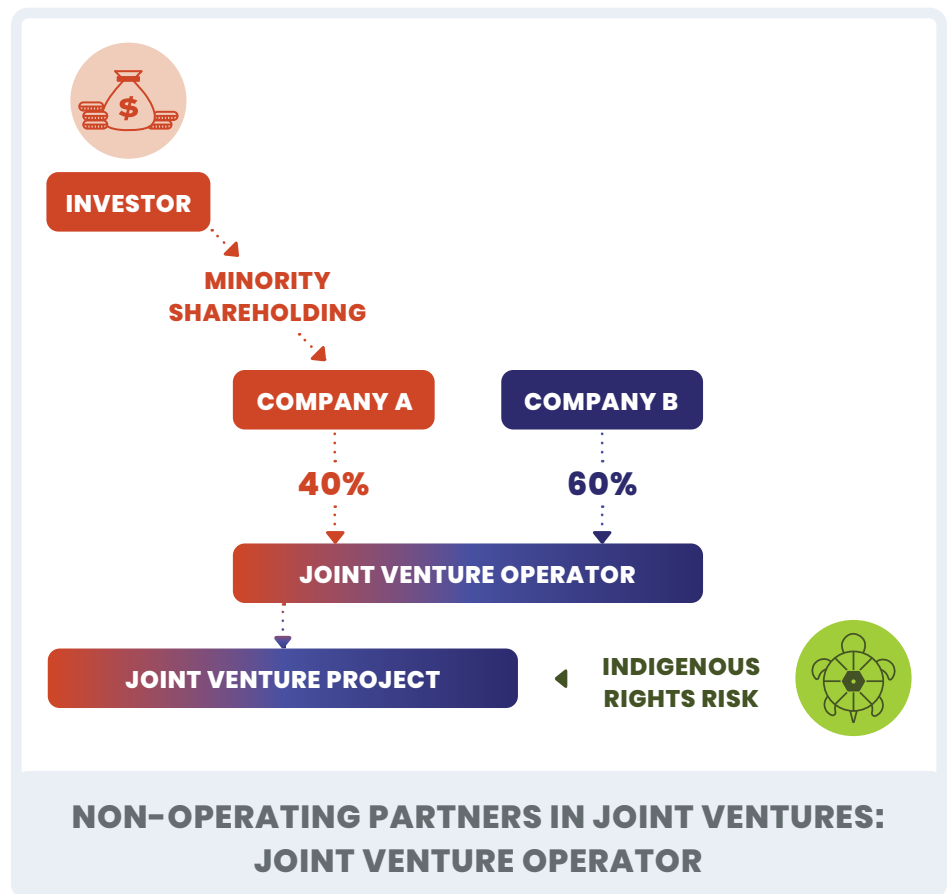
DAPL's continuing legal uncertainty points to the importance of early and adequate Indigenous rights due diligence before investing in energy-sector joint ventures.



NON-OPERATING PARTNERS IN JOINT VENTURES

Project joint ventures are growing in the energy and mining sectors, including among large players. A 2019 study of 365 oil and gas megaprojects found that 71 percent of investment was sourced through formal joint ventures or strategic alliances for asset sharing and development.²⁸

In some instances, a new operating entity is established, but often joint ventures are contractual, and do not create a new distinct legal entity. Instead, the agreement defines rights and responsibilities of majority and minority owners, and operating and non-operating partners. Often, the contractual obligations and due diligence associated with establishment of the joint venture do not account for environmental and social risks presented by an operating partner's weaker practices on the other partner(s), leaving the latter with limited ability to intervene or alter arrangements when something goes wrong, despite sharing in related reputational and financial risks.²⁹



LINEAR INFRASTRUCTURE CASE STUDY: ALBERTA POWERLINE

DIRECTLY AND THROUGH ITS SUBSIDIARY CANADIAN UTILITIES LTD., ATCO INDUSTRIES BUILDS AND OPERATES ENERGY INFRASTRUCTURE IN ALBERTA INCLUDING NATURAL GAS PIPELINES AND ELECTRIC UTILITY TRANSMISSION LINES.

It began construction in 2017 of a 500 kilometre high voltage transmission line from Wabau to Fort McMurray, Alberta and the project was completed two years later. ATCO was 80% owner of the project. Managing director of electricity Wayne Stensby attributed successful on-time, on-budget completion of the project to strong relationships with Indigenous peoples along the transmission line.³⁰

Importantly, ATCO has achieved Gold-level certification in the Progressive Aboriginal Relations program run by the Canadian Council for Aboriginal Business, which independently assesses management systems at member

companies against a range of relevant indicators (see Appendix C).³¹ ATCO has relevant policies and management structures in place across the company. An Indigenous Relations Committee is composed of representatives of each business line and reports to a special executive committee. Indigenous relations at ATCO has four focus areas: employment, education, engagement, and economic participation and development.³² ATCO undertakes Indigenous awareness training courses for employees.³³ *We remain steadfast in our commitment to build long-lasting relationships with Indigenous communities, now in the context of Truth & Reconciliation.*³⁴

Alberta PowerLine project involved consultation with 20 First Nations along the route, demonstrating that FPIC can be achieved even along linear infrastructure affecting multiple communities.³⁵ Discussions with the company and affected First Nations included the possibility of equity participation for those First Nations.³⁶ When the project was completed, it was sold to a fund offered by Greystone Managed Investments (60%) and a consortium of seven First Nations (40%).³⁷ ATCO will operate the transmission line for the next 35 years.

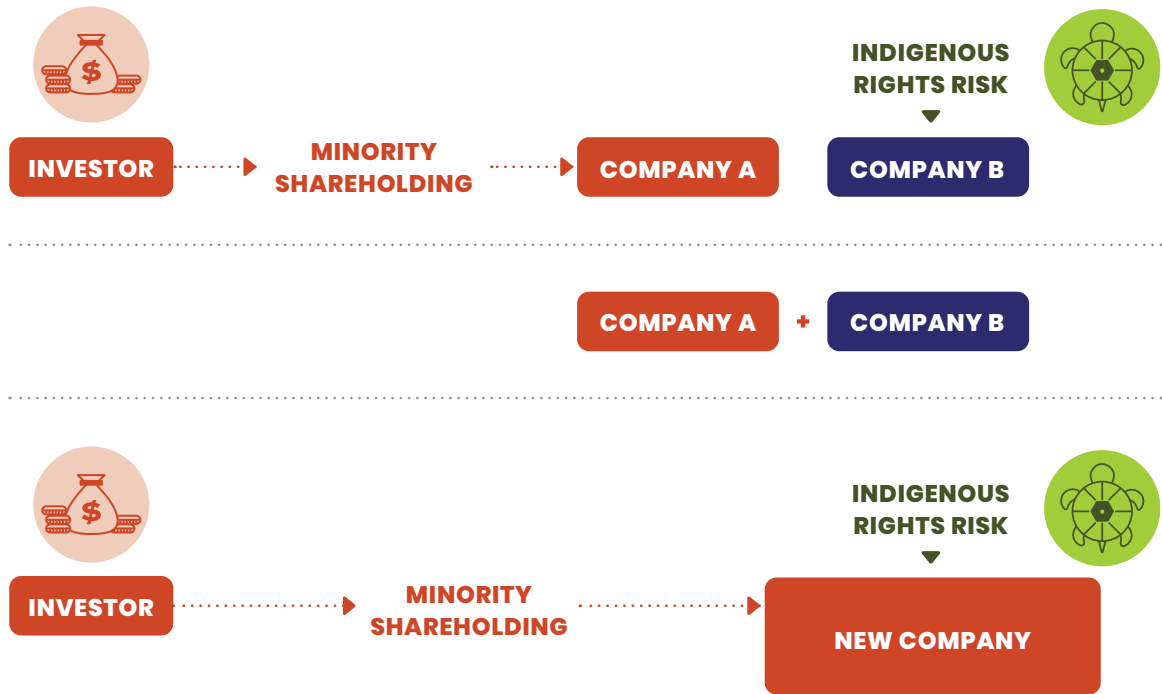
MERGERS AND ACQUISITIONS

Another common model in both energy and mining sectors is growth through acquisition. In 2018, 634 mining mergers and acquisitions worth \$53.4 billion USD were completed around the globe.³⁸ One estimate in the oil and gas sector found approximately 10,000 mergers and acquisitions between November 2013 and November 2018.³⁹

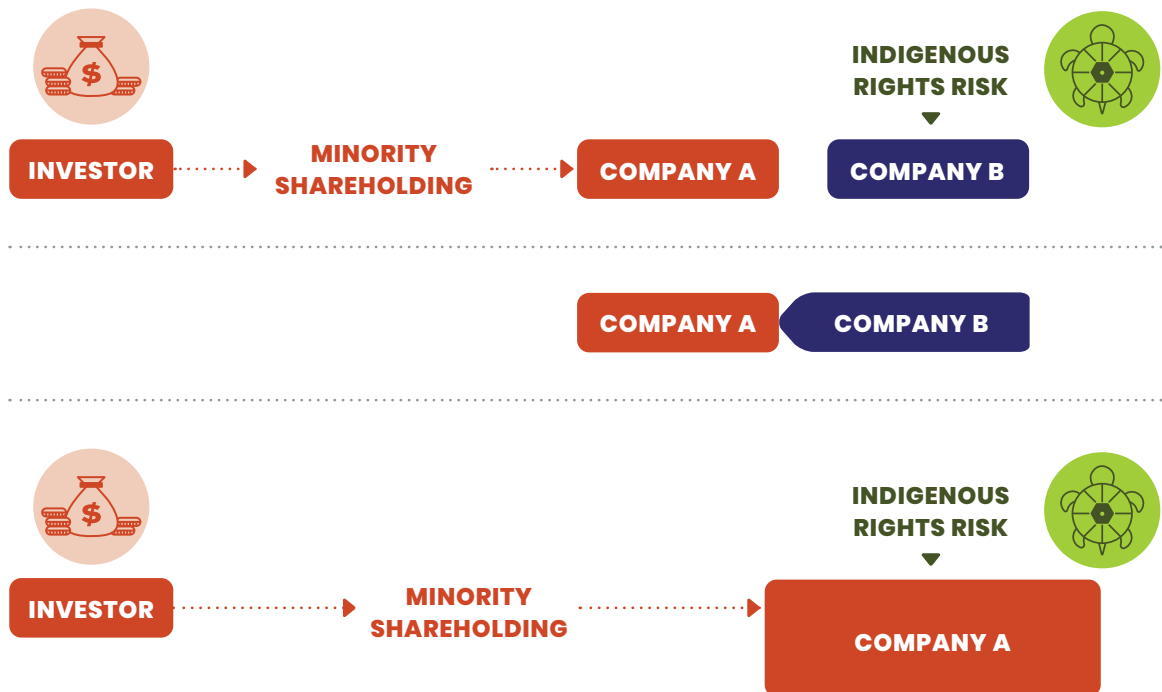
To a greater extent than strategic minority investments, mergers or acquisitions tie a company's future success and its reputation to its partner's past record on environmental and social issues, including Indigenous rights.

When companies conduct thorough human rights due diligence, they lessen the risk of unknowingly being exposed to or being complicit in the adverse human rights impacts of the target entity or merger partner.⁴⁰ In the extreme, what initially appears to be a financially insignificant aspect of the target company's operations may saddle the buyer with festering human rights-related issues caused by a failure to respect Indigenous rights at a project site.

M E R G E R



A C Q U I S I T I O N



MERGERS & ACQUISITIONS

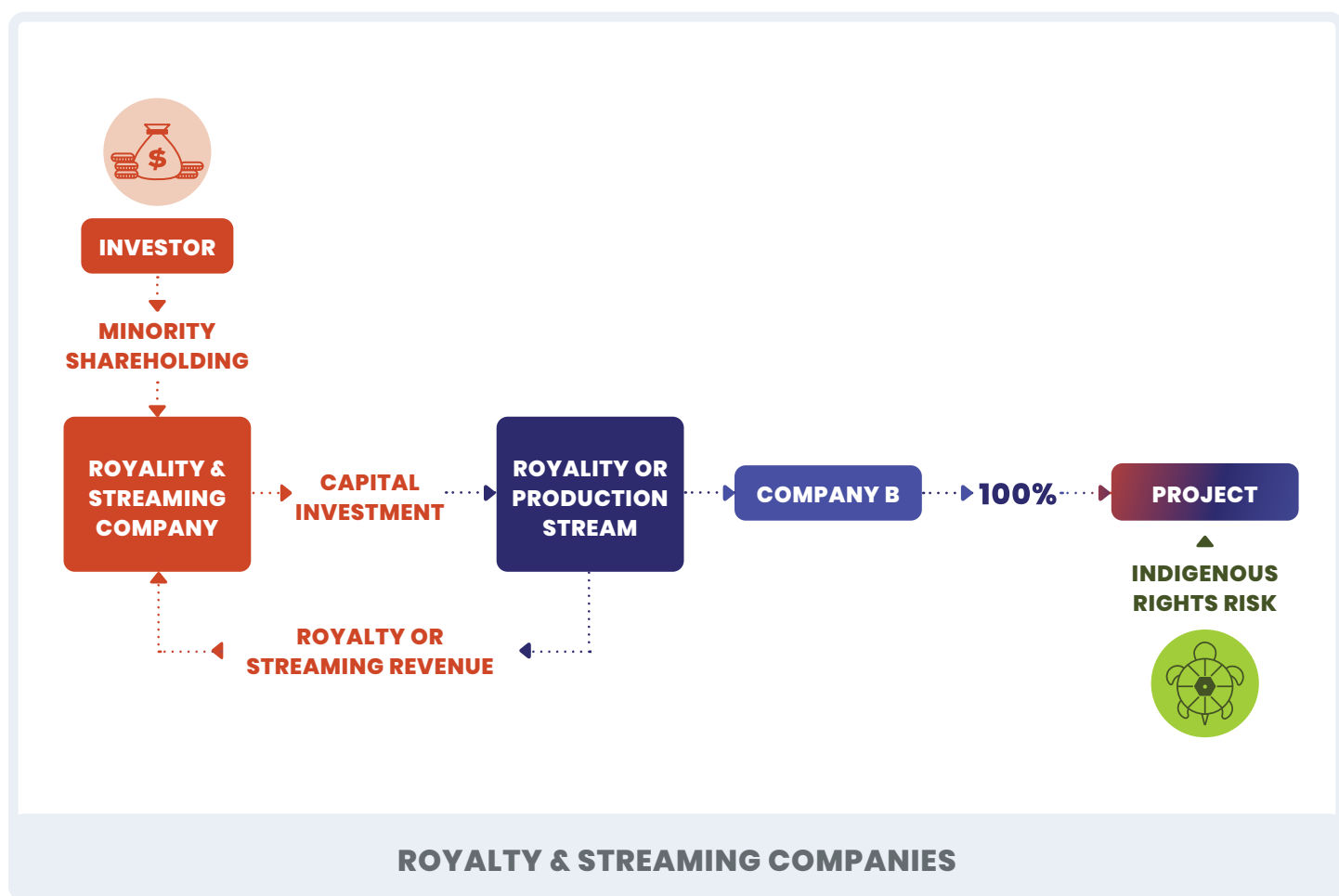
ROYALTY AND STREAMING COMPANIES

Over the past two decades, financing of mines and energy projects through the selling of royalty rights and production streams has grown rapidly. Publicly traded companies have emerged whose sole business model is based on this.

Royalty rights provide for regular payments based on a percentage of returns from the sale of mining or energy production. Streaming, on the other hand, involves an agreement to purchase part of production at a fixed price, with income to the investor dependent upon fluctuating resource prices. Initially focused on precious metals, royalties and streaming are now used to finance other metals as well as fossil fuel production.

The size of deals has also increased significantly, involving majors as well as mid-sized and junior companies.

Royalty and streaming arrangements can involve existing producing assets as well as properties still under construction, in which case payments from royalty and streaming companies may be used to fund development. The company purchasing a royalty or streaming interest has no control over the operating enterprise, but is exposed to risks related to Indigenous rights, making initial due diligence an essential part of risk management.



ROYALTY AND STREAMING CASE STUDY: NEW PROSPERITY

FOR MORE THAN TWO DECADES, TASEKO MINES LTD. HAS PROMOTED DEVELOPMENT OF A LARGE COPPER DEPOSIT IN BRITISH COLUMBIA NOW KNOWN AS NEW PROSPERITY, LOCATED IN THE TRADITIONAL TERRITORY OF THE T'ILHQOT'IN NATION.

Federal and provincial environmental reviews were completed and in January 2010 the BC government approved the mine. In May 2010, Franco-Nevada, Canada's largest publicly traded mineral royalty and streaming company, committed US\$350 million to the mine in return for an agreement to purchase 22% of its gold production. Mine construction was expected to take 2-3 years. Franco-Nevada's commitment was a cornerstone in the \$815 million project finance plan.⁴¹ But New Prosperity faced strong opposition from the T'ilhqot'in Nation and further regulatory hurdles. In November 2010, the Federal government rejected the proposal. Within months Taseko resubmitted a revised plan.

In 2007, Taseko told investors that *"establishing a lasting, respectful and mutually productive relationship with First Nations is an important objective"* and it had a "well established record of dialogue with the T'ilhqot'in National Government".⁴² The T'ilhqot'in Nation consistently opposed the mine proposal. Taseko's CEO complained to the Federal government that the previous environmental review prioritized Indigenous interests and perspectives, potentially creating a perception of bias.⁴³ As the second review proceeded, an injunction sought by the T'ilhqot'in Nation stopping exploration was approved. Then, in 2014, the Federal government again denied Taseko a development permit. The company sought a judicial review.

Within months of the Federal government decision, the Supreme Court of Canada confirmed T'ilhqot'in Nation hunting, trapping and trade rights covering the proposed mine location and title to a large adjacent area. Taseko continued pursuing development of New Prosperity. In July 2017, the departing BC Liberal government approved further exploration activity, setting off a new round of injunctions and blockades by the T'ilhqot'in Nation and counter-injunctions by Taseko. Mounting legal fees added to the more than \$160 million the company by then had spent on New Prosperity. Taseko stock had fallen from more than \$6 per share in late 2010 to below \$0.60 in late 2019.

In December 2019, the T'ilhqot'in Nation and Taseko announced a "standstill" in certain litigation and the initiation of a BC Government-facilitated dialogue aimed at resolving the dispute.⁴⁴ On May 14, 2020, the Supreme Court of Canada dismissed Taseko's leave to appeal an earlier Federal Court denial of a judicial review of the Federal Government's 2014 decision not to issue a permit for the mine.⁴⁵

Since initially committing to New Prosperity, Franco-Nevada has adopted new social and environmental due diligence standards, including assessing *"engagement with Indigenous peoples"* and whether the operator has committed to the principles of the ICMM.⁴⁶ Taseko is not an ICMM member. Franco-Nevada's commitment to New Prosperity remains in place.⁴⁷

PART 2: KEY QUESTIONS ABOUT DUE DILIGENCE FOR INDEPENDENTLY MANAGED OPERATIONS

For an investor considering investing in a company exposed to independently managed operation, assessing the quality of due diligence conducted by the company is challenging. In addition to reviewing public disclosures by the company and its business partners, investors may request specific information about how it incorporates Indigenous rights considerations into due diligence and monitoring of independently managed exploration, development and operations.

First and foremost, investors need to acknowledge and understand that the process of obtaining free, prior and informed consent will vary considerably from nation to nation, just as regulatory approval processes in other countries vary. For that reason, setting out a simple, common standard for FPIC evaluation is not realistic or desirable.

However, investors can assess the extent to which companies have established accountability for the outcomes of those processes across their business, including in independently managed operations. While this does not guarantee

that a company will achieve FPIC in any specific instance, it does demonstrate a commitment to the process of doing so.

So what key questions should guide investors?⁴⁸

The following questions aim to help investors assess company policies and commitments to Indigenous rights due diligence of independently managed operations; how these policies and commitments to due diligence are carried out; and how the results are integrated into transaction agreements and management systems.

QUESTION 1: ARE COMMITMENTS TO LEADING STANDARDS IN PLACE?

UNDRIP, ILO Convention 169 and the UN Guiding Principles (see Appendix A) are widely acknowledged as leading standards for Indigenous rights and international human rights law. Companies and investors do not need to re-invent or re-interpret human rights law when undertaking due diligence on possible business relationships. A caution light should go on when adherence to leading standards is not explicit.

Are investee company policies reviewed for references to UNDRIP and its constituent principles on FPIC? Deviations or qualifications should be examined to ensure they do not undermine the letter or spirit of UNDRIP. Reference to industry association standards or guidelines may be relevant for implementation, but such standards vary in their adherence to UNDRIP (see Appendix B). Does the investee company provide third-party verification of performance?

QUESTION 2: DO COMPANIES POLICIES AND PRACTICES APPLY TO INDEPENDENTLY MANAGED OPERATIONS?

Many corporate policy commitments either apply only to direct operations or are unclear as to the extent of their applicability. The policy or system for due diligence should clearly apply to royalty streams, joint venture operations, minority investments and mergers or acquisitions. Does the company engage with joint-venture partners or other independently managed operations on issues related to Indigenous rights?

QUESTION 3: ARE INDIGENOUS RIGHTS IMPACTS REVIEWED WHEN CONSIDERING INDEPENDENTLY MANAGED OPERATIONS?

Substantial financial due diligence is typically conducted before concluding transactions, and financial expectations and accountability covenants can be built into agreements at this point. However, Indigenous rights regarding reputational, operational, financial and legal risk are not uniformly part of due diligence.⁴⁹

To avoid Indigenous rights-related risks and ensure alignment with international Indigenous rights standards, an investee company should assess actual and potential Indigenous rights impacts when considering royalty and streaming rights, joint venture relationships, investments, or mergers and acquisitions.

How do independently managed operations measure success in community engagement? Are engagement timelines appropriate? Are project partners' previous performance examined? If concerns are identified, does the company have in place a process for escalating that review? Is capacity for post-investment monitoring in place?

The greatest opportunity to obtain relevant information and receive specific commitments related to Indigenous rights is before the deal is completed, particularly when no board or management committee seat is involved. Is Indigenous rights due diligence conducted from the outset?

QUESTION 4: ARE INDIGENOUS RIGHTS CRITERIA AND COVENANTS EXPLICIT IN INVESTMENT OR OPERATING AGREEMENTS?

Including requirements to address Indigenous rights risks as conditions of business relationships – such as conditions precedent to the arrangement, representations, warranties and covenants for completion – provide greater certainty. These early stage covenants should provide recourse to the company in the event of undisclosed or poorly managed risks. Does the independently managed operation have agreements in place with the appropriate Indigenous body documenting its relationship?

QUESTION 5: DOES THE COMPANY HAVE A MECHANISM FOR ADDRESSING GRIEVANCES WITHIN INDEPENDENTLY MANAGED OPERATIONS OR PROJECTS?

What operational-level grievance mechanisms are in place, and to what extent is the investee company informed of operational-level concerns? Effective grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning (as set out in the United Nations Guiding Principles on Business & Human Rights).⁵⁰

QUESTION 6: DOES THE COMPANY PROVIDE RELEVANT DISCLOSURES?

While no single standard for appropriate disclosures exists, investors should expect investee companies to disclose, at minimum, information using a recognized, systematic disclosure standard such as the Sustainability Accounting Standards Board accounting metrics related to Security, Human Rights and Rights of Indigenous Peoples, and Global Reporting Initiative Disclosure 411-1: Incidents of violations involving rights of Indigenous peoples.

CONCLUSION

Indigenous rights are increasingly recognized in law and in practice. Ultimately, where Indigenous communities and rights may be impacted by operations or business arrangements in the energy and mining sectors, investors face the risk of financial loss and reputational damage for breaching internationally accepted standards. In selecting and overseeing relevant investments in the sector, asset managers and asset owners will need to be satisfied that due diligence for Indigenous rights is being adequately applied throughout independently managed operations where risks of violations of the rights of Indigenous peoples are increasingly found.

Investors should start by seeking to understand and incorporate Indigenous perspectives in their decision-making, and apply those perspectives when undertaking their own due diligence with respect to investment decisions. Importantly, they should use their influence to promote best practices and

consistent mechanisms for corporate accountability that demonstrate respect for the fundamental rights of Indigenous peoples.

Doing so within a complex web of business relationships is challenging, but asking the six key questions outlined in this investor brief will help asset managers and asset owners untangle that web and apply consistent expectations within their own investment chain.

These are not easy duties to fulfill, especially in the context of shifting legal and regulatory liabilities, jurisdictional differences, and even conflicts over the scope of jurisdiction within Indigenous territories.

Yet the duty to respect what are now well-defined Indigenous rights in international law still remains, for companies and investors alike.

**Complexity is no
excuse for inaction.**

APPENDIX A: INTERNATIONAL STANDARDS AND THEIR IMPLICATIONS

Widely accepted international legal standards provide guidance to investors on responsible business conduct in relation to Indigenous rights. While primarily addressing the obligations and responsibilities of states, they also set the normative context within which businesses are expected to behave. The following section reviews three authoritative international standards relevant to energy and mining sector business activities and Indigenous rights.

UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in 2007, is the most widely accepted international standard for the protection and respect of the individual and collective rights of Indigenous peoples.¹ Although UNDRIP is directed to states, it sets out principles and norms that if respected by investors and companies reduce risk and ensure compliance with international expectations. By respecting rights set out in UNDRIP, even where local laws may set a lower standard, they lessen chances of future risk or liability. As UNDRIP makes clear *“the rights recognized herein constitute the minimum standards for the survival, dignity, and well-being of the Indigenous peoples of the world.”*⁵²

In part, UNDRIP is a means to protect universal rights set out in the central human rights documents of international law – the core UN treaties. These core treaties form the components of the International Bill of Human Rights: The Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; and the International Covenant on Civil and Political Rights.

UNDRIP describes the unique collective rights of the original peoples of a land area who are often dominated by settler societies.

Articles in UNDRIP define rights that are relevant to the way resource companies interact with Indigenous peoples, including:

- › Self-government (Article 4);
- › Self-determination with respect to legal, social, economic and cultural institutions and development (Articles 3, 5 and 20);
- › Maintain, protect, and access cultural, religious, and historical sites (Articles 11 and 12);
- › Access support to understand and be understood in legal and administrative proceedings (Article 13);
- › Freedom from any discriminatory conditions of labour (Article 17);
- › Participate in decision-making for matters that could affect their rights (Article 18);
- › Protection from violence and discrimination (Article 22);
- › Access and conservation of traditional medicine plants, animals, and minerals (Article 24);
- › Maintain, access and control traditional and otherwise used lands, territories and resources (Articles 25, 26 and 27);
- › Redress where these lands, territories, and resources have been taken (Article 28);
- › Maintain, control and protect traditional knowledge, technology, medicines, and intellectual property over such knowledge (Article 31);
- › Determine their own identity, institutional structures, procedures and membership according to their customs (Articles 33 and 34); and,
- › Recognition and enforcement of treaties and agreements (Article 37).

Situations requiring the free, prior and informed consent of Indigenous peoples are set out in UNDRIP. These include:

- › Relocation of people from their land (and a clear ban on forcible removal) (Article 10);
- › Taking of cultural, intellectual, religious, or spiritual property (Article 11);
- › Adoption and implementation of any law or administrative measure that may affect Indigenous peoples (Article 19);
- › Storage of hazardous waste on Indigenous peoples’ lands or territories (Article 29); and
- › Approval of any project affecting Indigenous lands, territories and other resources (Article 32).

ILO 160

The earliest authoritative international standard for Indigenous peoples' rights is the International Labour Organization Convention 169 concerning Indigenous and Tribal Peoples (ILO 169; 1989).⁵³ ILO 169 is a binding convention of international law. It has been ratified by 23 countries, including most of the resource-rich countries in Central and South America, where it has begun to feature in domestic legal decisions.⁵⁴

Like UNDRIP, ILO 169 recognizes Indigenous peoples' right to self-determination and economic, socio-cultural, and political rights, including the right to a land base. ILO 169 is more reserved than UNDRIP in regard to the scope of situations for which free, prior, and informed consent is required, only requiring consent from Indigenous peoples before they can be relocated.⁵⁵ Elsewhere in ILO 169, consultation – not consent – is required. ILO 169 has weight as an instrument of hard law, particularly in countries where it has been ratified.

UN GUIDING PRINCIPLES

The United Nations Guiding Principles (UNGPs) were unanimously endorsed by the UN Human Rights Council in 2011 as a global standard for business and human rights. The UNGPs provide a framework that, if fully implemented by a company, ensure the company respects human rights, including the collective and individual rights of Indigenous peoples.⁵⁶ While the UNGPs do not set Indigenous rights apart or consider them separately from other human rights, the UNGPs are an authoritative framework for considering rights in business practices. Like UNDRIP and ILO 169, the UNGPs are prepared by and for states, but they also set out principles for what companies ought to do to ensure they respect human rights in their businesses, including (1) “avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur,” and (2) “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, services by their business relationships even if they have not contributed to those impacts.”⁵⁷

When considering Indigenous rights, these principles obligate business to avoid adverse impacts on the rights set out in UNDRIP through both direct operations and business relationships.

Business relationships addressed by the UNGPs include those with “*business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products or services. They include [...] minority as well as majority shareholding relationships in joint ventures.*”⁵⁸ Thus, the UNGPs are relevant to the full scope of energy and mining sector business arrangements discussed here, and due diligence is required regardless of whether a company is the operating entity, the major shareholder, or otherwise.

Guiding Principles 15 to 24 set out the elements of a due diligence process to identify and act on potential human rights impacts and to remedy those that occur. In the case of joint ventures, acquisitions and other partnerships, human rights due diligence can be integrated in part by adopting the following measures:

1. Conducting comprehensive assessment to identify and address any existing and potential impacts caused by, contributed to, or directly linked to one of the parties before entering the relationship;
2. Ensuring that the legal and other agreements forming the transaction include mechanisms and expectations to embed respect for human rights in the operation of the relationship;
3. Setting a clear process for identifying, preventing, and mitigating human rights impacts going forward; and,
4. Establishing grievance and remedy processes for any impacts – past or future.⁵⁹

OTHER SOURCES OF GUIDANCE

Other respected international organizations and associations have prepared resources on practices and standards for implementation of the due diligence envisioned under the UNGPs, in alignment with UNDRIP, in business relationships. These resources include:

- › OECD Guidelines for Multinational Enterprises
- › OECD Due Diligence Guidance for Responsible Business Conduct
- › OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector
- › International Bar Association Handbook for Lawyers on Business and Human Rights
- › International Bar Association Practical Guide on Business and Human Rights for Business Lawyers
- › The International Finance Corporation Performance Standards and the Equator Principles
- › Initiative for Responsible Mining Assurance (IRMA) Standard for Responsible Mining, Chapter 2.2 Free, Prior and Informed Consent (FPIC)

APPENDIX B: INDUSTRY STANDARDS AND FPIC

Industry standards that reference Indigenous rights have been published by several major Canadian and global energy and mining trade associations.

The following section outlines the most prominent policies and standards from the bodies and addresses the extent to which they account for Indigenous relations in joint ventures, minority investments, or mergers and acquisitions.

INTERNATIONAL COUNCIL ON MINES AND METALS

In 2013, the International Council of Mines and Metals (ICMM) established a Position Statement on Indigenous Peoples and Mining. ICMM's 27 member companies are expected to comply with the standards set out in the statement. The standards apply to new projects and changes to existing projects likely to affect Indigenous communities. The statement draws on ILO 169, UNDRIP, and the International Finance Corporation (IFC) Performance Standards to set a standard of practice for member companies' operations. It does not mention expectations for joint ventures, investments, or acquisitions.⁶⁰

The ICMM position statement addresses FPIC, but sets out a weaker commitment than required by UNDRIP. For example, ICMM states that FPIC is a principle to be *"respected to the greatest degree possible in development planning and implementation"* and that companies should *"work to obtain consent."* Where the consent is not obtained and government permits are approved, members have discretion: *"In such circumstances, ICMM members will determine whether they ought to remain involved with a project."*⁶¹ The ICMM statement does not stipulate that, in the absence of FPIC, a company must refrain from activities that impact Indigenous peoples and their land. A Good Practice Guide accompanying

the position statement outlines perspectives on FPIC, some of which align closely to UNDRIP, and showcases examples of business practices that demonstrate respect for Indigenous rights.⁶²

In January 2020, ICMM introduced a new set of performance expectations with which member companies are expected to comply. An assurance system will accompany these in the future.⁶³ The performance expectations include a requirement to *"work to obtain the free, prior and informed consent of Indigenous Peoples where significant adverse impacts are likely to occur, as a result of relocation, disturbance of lands and territories or of critical cultural heritage, and capture the outcomes of engagement and consent processes in agreements."*⁶⁴ This is similar to how FPIC is framed in the position statement and advances towards aligning with international law, though not fully, because discretion is provided in situations where FPIC is not given.

ICMM guidance on how Indigenous rights standards are to be applied in the context of independently managed operations is limited. The ICMM's Position Statement is silent on the issue and the Good Practice Guide only references joint ventures, encouraging companies to address racist language or behaviour by joint venture partners or contractors.⁶⁵ Other Indigenous rights issues are omitted.

The performance expectations document addresses business relationships and transactions more directly, requiring members to: *"Integrate sustainable development principles into corporate strategy and decision-making processes relating to investments,"* and *"Support the adoption of responsible health and safety, environmental, human rights and labour policies and practices by joint venture partners, suppliers, and contractors, based on risk."*⁶⁶ Member companies must also account for impacts they may cause or contribute to in implementing the UNGPs;⁶⁷ Indigenous peoples or rights are not addressed directly in this context.

ICMM is a leader among industry associations in recognizing that companies' human rights and environmental responsibilities extend beyond their own operations. However, ICMM currently does not clearly set out expectations regarding Indigenous rights in independently managed operations. ICMM has committed to providing guidance and an assurance program for the performance expectations. Including reporting on how Indigenous rights and FPIC are addressed in independently managed operations in the new guidance would be a step forward.

IPIECA, an international oil and gas industry association originally established in 1974 as the International Petroleum Industry Environmental Conservation Association, provides guidance documents on Indigenous rights in its “FPIC toolbox.”⁶⁸ These documents include a business case, member survey, key guidance and FPIC fact sheet. Because access is restricted to IPIECA members, investors and others are unable to assess the degree to which the guidance aligns with UNDRIP and the UNGPs and addresses independently managed operations.

IPIECA does make public a general description of its approach, but rather than setting standards for its members, the document describes existing international standards including UNDRIP, IFC performance standards and ILO 169, as well as some member companies’ practices. It concludes with summary recommendations for companies, but notes that it is “*not intended as a comprehensive set of guidelines; rather, it provides general, entry point considerations for companies.*”⁶⁹ The timing and context of FPIC is not discussed but IPIECA recommends that companies “*aim to reach agreements, where relevant, with Indigenous peoples through good faith negotiation.*”⁷⁰ The Good Practice document does not provide guidance on relationships with other companies in joint operations or acquisitions.

IPIECA provides some guidance on Indigenous relations reporting in its publication, “*Oil and Gas Industry Guidance on Voluntary Sustainability Reporting.*” It advises that companies “*describe policies, programs and procedures used for engagement with Indigenous Peoples and for addressing their concerns and expectations.*” This includes processes and mechanisms related to “*information disclosure, consultation, informed participation and mutually acceptable solutions with consent, where appropriate.*”⁷¹ The situations in which consent is not “*appropriate*” are not enumerated or explained.

IPIECA’s Guidance on Voluntary Sustainability Reporting also advises on the scope of business relationships and activity for which a company should report on its environmental and social practices, including Indigenous rights. This guidance focuses on where the company has operational or financial control, and does not extend to business relationships described in guidance to the UNGPs. Consequently, mergers and acquisitions are excluded from the guidance, and joint ventures and equity investments are only partially included. For example, IPIECA suggests that companies report based on those assets for which the company itself is the operator or the proportion of ownership of partially owned assets.⁷²

As noted above, significant risks may arise where control is weak. Such restricted guidance risks providing incomplete information regarding Indigenous rights where a different company is the operating partner of a joint venture, the company only owns a minority stake in an asset, there a royalty or production stream was acquired, or a previous project owner was responsible for initially obtaining and maintaining FPIC before the asset was acquired. In this regard, the IPIECA guidance risks leaving out information relevant to investors.

MINING ASSOCIATION OF CANADA

The Mining Association of Canada (MAC) is Canada's foremost industry association for the mining sector, including oil sands mining operators. MAC addresses Indigenous rights in its voluntary Towards Sustainable Mining (TSM) initiative, which provides tools and indicators for self-reporting and verification. Participating members are expected to abide by TSM guiding principles and implement eight protocols on social and environmental aspects of their operations, including one on Indigenous and community outreach. Participating companies select which facilities will participate and conduct an annual self-assessment at the facility-level against the protocols. External verification is undertaken every three years.⁷³

The TSM guiding principles commit member companies to respect human rights, and "recognize and respect the unique role,

contributions, and concerns of Aboriginal peoples," but do not explicitly commit them to respecting Indigenous rights and related standards.⁷⁴ The TSM Aboriginal and Community Outreach Protocol combines Indigenous peoples and other "communities of interest," despite Indigenous people's specific and distinct rights under international and domestic law. The protocol refers to interests rather than rights. TSM addresses some procedural aspects of FPIC – such as provision of early, timely, and understandable information and two-way culturally appropriate communications – but does not advise on the situations in which FPIC is required.⁷⁵ Updates to the Aboriginal and Community Outreach Protocol to incorporate the Truth and Reconciliation Commission's Call to Action #92, UNDRIP and FPIC are in progress.⁷⁶

A supplementary framework on Mining and Indigenous Peoples includes a commitment to "early, timely, and culturally appropriate engagement with Indigenous peoples" and includes "aiming to obtain" FPIC before proceeding. International laws and standards are not referenced and the language generally is not consistent with UNDRIP or the UNGPs.⁷⁷

The TSM principles and protocols do not address how they are applied to investments through joint ventures, royalties, minority investments and other independently managed operations.

PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA

The Prospectors' and Developers' Association of Canada (PDAC) provides its members with guidance on Indigenous issues through its e3Plus Framework for Responsible Exploration (e3Plus). This is a set of recommended principles for companies. Compliance or verification of members' performance is not required. e3Plus mentions FPIC under the principle, "Commitment to Project Due Diligence and Risk Assessment."⁷⁸ Companies are referred to local laws to guide their approach to consultation and consent with Indigenous peoples: "Some jurisdictions require that projects obtain the free, prior and informed consent of indigenous peoples. Explorers are strongly

advised to consult up-to-date sources of information on the legal requirements of the country, region and local area in which they will be operating."⁷⁹ e3Plus does not refer to UNDRIP and FPIC as standards under international law.

e3Plus addresses the UNGPs and due diligence on the human rights impacts of contractors and suppliers but does not address business relationships such as joint ventures, mergers and acquisitions, royalties and minority investments. The framework recommends human rights due diligence "as part of [a company's] decision to initiate exploration activities," including an assessment of the human rights context of the proposed project.⁸⁰

Assessment of project partners or the state of the Indigenous rights performance of previous project owners and investors, prior to the company's own investment is not specified.

CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

The Canadian Association of Petroleum Producers (CAPP) published a discussion paper on UNDRIP in Canada in 2016. CAPP does not provide guidance or expectations for members on Indigenous rights or other human rights issues. The paper states, “We understand FPIC to mean that decisions by Indigenous communities are made freely and without coercion, in advance of regulatory project decisions, and with appropriate information and consultation about the project or decision.”⁸¹ This position statement addresses some procedural aspects of FPIC, but does not address situations in which consent is not provided. It interprets Canadian law as providing Indigenous communities with limited rights of participation and protection in project impacts.⁸² CAPP does not address how its position on FPIC is to be interpreted in situations of such as joint ventures, mergers, minority interests and royalty streams.

In April 2020, lobbying of the Federal Government by CAPP to delay consultations on implementation of UNDRIP won a sharp rebuke from the Assembly of First Nations and led to an assertion by CAPP that “it remains committed to the implementation of [UNDRIP].”⁸³

CANADIAN ENERGY PIPELINE ASSOCIATION

The Canadian Energy Pipeline Association (CEPA) developed an Indigenous consultation framework in 2014 and encourages members to adopt it. The framework outlines practices around the areas of “mutual recognition and respect,” “early notification,” “meaningful consultation” and “long-term relationships.”⁸⁴ The framework takes note of the Canadian Government’s endorsement of UNDRIP but does not reference it or FPIC in the framework, nor does the framework refer to independently managed operations.⁸⁵

APPENDIX C: PROGRESSIVE ABORIGINAL RELATIONS

The Canadian Council for Aboriginal Business (CCAB) manages a certification program for businesses called the Progressive Aboriginal Relations program, or PAR.

The PAR program is a voluntary verification and certification program that assesses corporate performance on Indigenous relations. After a company works through an internal management and reporting process, a third party verifies company reports on outcomes and initiatives in four performance areas: leadership action, employment, business development, and community relations. Finally, the company material and verifier findings are reviewed by a jury from the Indigenous business community and the company is awarded a certification level.

While the PAR program does not directly assess FPIC as a criteria (given that it is applied to a wide variety of industries with different operational profiles) the standards for leadership and community relations help to promote best practices and PAR certification can be used by investors to identify companies that internalize the objectives of being:

- good business partners;
- great places to work; and
- committed to prosperity in Aboriginal communities

More information is available at:

<https://www.ccab.com/programs/progressive-aboriginal-relations-par/>

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