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# Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: Implications for Human Rights, Gender and Stakeholder Engagement

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# **Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: Implications for Human Rights, Gender and Stakeholder Engagement**

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Final Report for the SSHRC Knowledge Synthesis Grant:  
Informing Best Practices in Environmental and Impact Assessments

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## EXECUTIVE SUMMARY

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### **Introduction**

Extractive companies (mining, oil & gas) play a major role in the Canadian economy, and their actions have multi-faceted effects on the communities in which they operate, whether extractive activity takes place within or outside Canada. Currently, a wide range of Responsible Business Conduct (RBC) guidance tools are promoted to extractive companies. Most extractive companies are also obligated to comply with Impact Assessment (IA) laws whether operating within or outside Canada. While the legal framework of IA and the various RBC guidance tools have some obvious overlaps, their interrelationship has been understudied in the literature. This knowledge synthesis project is an attempt to highlight this intersection and encourage the development of scholarship in the field. We believe that this study will aid in the formation of a more effective framework for the efficient and effective use of RBC tools and facilitate the complementary and/or integrated operation of IA and RBC regimes in Canada.

### **Objectives**

This report aims to identify RBC tools referenced in the literature as relevant and/or promoted to Canadian extractive companies operating within and outside Canada. While not appraising or pronouncing on the quality of RBC tools, we consider the different actors that promote these diverse tools and whether there is a coherent framework for the efficient and effective application of current and future tools. We focus on RBC tools on human rights, stakeholder engagement, the rights of Indigenous peoples, and the rights of women and girls. Further, we review the position of scholars on the relationship between RBC and IA.

### **Methodology**

This knowledge synthesis was carried out in phases. We first collected and reviewed published and publicly available literature available to Canadian companies to guide RBC and, developed a preliminary list of relevant RBC tools. We then identified literature that expanded on how these RBC tools have been used in IA by Canadian extractive companies, especially with regard to Indigenous relations, stakeholder participation, gender, and human rights. We drew primarily from materials published between 2009 and 2019. Materials from other jurisdictions were examined in order to identify global best practices, with a focus on Australia and Europe.

### **Results**

The key findings have been captured under four sub-headings:

#### **1. *RBC tools available to the Canadian extractive sector***

From the literature, we identified ninety-nine RBC tools directly or indirectly relevant to Canadian extractive companies. The top promoters of the tools include international organizations (37), industry (23) and the Canadian government (13). Indigenous governments (12), Provincial governments (8), NGOs (3), and multi-stakeholder initiatives (3) are other identified promoters. While international organizations promoted the highest number of tools, industry-promoted tools are the most widespread covering 10 of the 13 identified thematic areas. All categories of promoters provided guidance tools on the participation of Indigenous peoples, whereas only half provided guidance tools in relation to gendered impacts. Fewer still provided guidance on human rights due diligence, and only a small number provided guidance on addressing climate change. Our findings show a proliferation of RBC tools promoted to the Canadian extractive sector, yet, at the same time, a lack of any coherent framework for effective and efficient application of existing and future tools.

#### **2. *Relationship between RBC tools and the Canadian extractive sector and how the RBC tools address human rights, gender and stakeholder engagement***

While due diligence is a central theme in most RBC tools on stakeholder and Indigenous engagement, human rights, and gender, we identified only four tools explicitly focused on due diligence. None of the due diligence tools are promoted by Canadian institutions (government, industry, Indigenous governments and NGOs) and the Canadian government has not mandated compliance with due diligence tools promoted by international organizations. The need for Canadian legislation mandating human rights due diligence (HRDD) has been emphasised in the literature. Failure by extractive companies to adhere to the prescriptions of HRDD tools has been found to have adverse implications for extractive companies including financial loss and loss of social licence to operate (SLO) and goodwill. Despite the connection between HRDD and SLO, none of the four direct due

diligence tools made specific reference to SLO. Also worth noting is the recognition of rights holders and stakeholders in HRDD tools. While stakeholder engagement is a common subject in the Canadian literature, the distinction between stakeholders and rights holders is rarely made. Within Canada, stakeholder engagement and gender analysis are primarily discussed in relation to Indigenous peoples. With respect to operations outside Canada, Canada's Feminist International Assistance Policy (FIAP) is the only identified gender-related federal government promoted tool, yet, it makes no reference to the effects of resource extraction on the human rights of women and girls.

3. **What is the intersection between RBC Tools promoted by the Canadian Government, due diligence, and IA, and what are the implications of this intersection for stakeholder engagement?**

While IA and HRDD share similar objectives, their relationship is understudied in the literature. The 2018 OECD Due Diligence Guidance for Responsible Business Conduct, exceptionally, highlights the relevance of different modes of impact assessment (environmental impact assessment (EIA), environmental and social impact assessment (ESIA), and Human Rights Impact Assessment (HRIA)) to RBC and their respective due diligence processes. RBC due diligence literature, however, commonly references human rights impact assessment either as a component, equivalence or instrument of HRDD. While a small amount of non-Canadian literature explores the intersection between IA modes like HRIA, social impact assessment and HRDD, we found no such literature in the Canadian context. There are opportunities to operationalize the IAA provisions on stakeholder engagement, Indigenous relations, gender-based analysis plus, and social effects using existing RBC and due diligence tools.

4. **What are the Global Best Practices?**

In Australia and European countries, governments are more involved in mandating extractive companies to adhere to RBC standards, Human Rights Commissions are involved in the promotion of tools, and extractive companies in most of the countries surveyed are mandated to either conduct HRDD as in the case of France or submit statutory reports on due diligence efforts particularly on child and modern slavery as in Australia and the United Kingdom, although these are largely with regard to companies operating internationally or linked to supply chain responsibility. Australia, primarily through its Human Rights Commission, has also released detailed reports (*qua* Guidance) on the effective application of the UN Guiding Principles on Business and Human Rights and other RBC tools. The Danish Institute of Human Rights' (DIHR) Guidance on Gender-responsive implementation of Extractive Industries projects is one of the most comprehensive tools dealing with the gendered impacts and dimensions of the extractive sector. The DIHR's toolbox on HRIA also provides a comprehensive instrument on the intersection between HRDD and IA. Oxfam's Gender Impact Assessment Guide also provides useful guidance for assessing the effects of extractive projects on women and girls.

**Key Messages**

1. There is a proliferation of RBC guidance tools promoted to extractive sector companies by international organisations, federal, provincial, and Indigenous governments, as well as industry, non-governmental and multi-stakeholder initiatives. Yet there is no framework for the coherent application these tools, nor do all tools provide guidance on respecting human rights to ensure support and respect for the rights of Indigenous peoples, women and girls, among other key rights-holders.
2. Different RBC tools are promoted to companies operating within Canada, and to Canadian companies operating internationally, with some overlap. There is a need for coherence and clarity on the application of international RBC tools to extractive operations within Canada, and, in particular, expectations surrounding HRDD. Federal and provincial Human Rights Commissions could be important institutions for intra-Canada application, however attention to the role of Indigenous governance and law is crucial.
3. IA and RBC can be mutually reinforcing with RBC broadening the traditionally narrower IA regime while the best practices of typically non-binding RBC standards could be applied to develop Guidelines and/or Regulations under a binding IA regime.
4. There is need for more research on the application of RBC tools by extractive companies operating within Canada, particularly in respect of HRDD, and implications for the human rights of Indigenous peoples. There is need for research on how federal and provincial Human Rights Commissions can facilitate adherence to HRDD standards.
5. There is need for further research on how RBC, due diligence and IA intersect in the Canadian context and how the best practices of existing RBC tools and especially HRDD could be used to improve Canadian IA regimes, including federal, provincial, territorial, and Indigenous assessment processes.

## ACRONYMS

ACCR	Australasian Centre for Corporate Responsibility
AHA	Aboriginal Heritage Act
AHRC	Australian Human Rights Commission
CAO	Compliance Advisor Ombudsman
CEAA	Canadian Environmental Assessment Act
CSR	Corporate Social Responsibility
DFAT	Australian Department of Foreign Affairs and Trade
DIHR	Danish Institute of Human Rights
EDC	Export Development Canada
ESIA	Environmental and Social Impact Assessment
FIAP	Feminist International Assistance Policy
FPIC	Free, Prior and Informed Consent
GAC	Global Affairs Canada
GBA +	Gender-based Analysis Plus
GHG	Greenhouse Gases
GIA	Gender Impact Assessment
GRI	Global Reporting Initiative
HRC	Human Rights Commission
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
IA	Impact Assessment
IAA	Impact Assessment Act
ICMM	The International Council on Mining and Metals
IFC	International Financial Corporation
MAC	Mining Association of Canada
NCP	National Contact Point
NGO	Non-governmental Organisation
NNTT	National Native Title Tribunal
NOAMI	National Orphaned/Abandoned Mines Initiative
NTA	Native Title Act
OECD	Organisation for Economic Co-operation and Development
PDAC	Prospectors and Developers Association of Canada
RBC	Responsible Business Conduct
SIA	Social Impact Assessment
SLO	Social License to Operate
SRI	Socially Responsible Investors
TSM	Towards Sustainable Mining
UNDRIP	UN Declaration on the Rights of Indigenous People
UNGP	United Nations Guiding Principles on Business and Human Rights
UNICEF	The United Nations Children's Fund
WMI	Whitehorse Mining Initiative

## 1. Introduction

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The Canadian extractive sector (mining, oil and gas) has interests in over 8000 properties in Canada and more than 100 other countries.<sup>1</sup> Canada hosts the largest number of the world's top 50 mining companies,<sup>2</sup> outperforms any other country in terms of profitability in the global mining sector,<sup>3</sup> and it contributes about 40% of the country's total domestic exports.<sup>4</sup> The extensive reach of Canadian extractive companies is not just global. From aluminum to zinc, every Canadian province and territory hosts major extractive projects.<sup>5</sup> This extensiveness, however, also informs the far-reaching effects of the operations of the companies on peoples and communities. Unfortunately, these impacts have often been less than positive.<sup>6</sup> Evidence abounds as to the complicity of Canadian mining companies and governments in causing, contributing to and/or perpetuating social conflicts, corruption, outright human and Indigenous rights abuse, gender inequality and gender-based discrimination and other violence, environmental degradation, and loss of biodiversity in extractive host communities within and outside Canada.<sup>7</sup> Governmental and non-governmental initiatives to address the negative impacts of Canadian extractive companies have been proposed over the years, focused primarily on the importance of promoting responsible business conduct (RBC).

RBC guidance is contained in both legal and non-legal instruments which encourage and/or mandate businesses to make positive contributions economically, environmentally, and socially, and to avoid or address adverse impacts caused by their direct or indirect activities.<sup>8</sup> These tools are, however, mostly framed as voluntary measures. Our focus in this study is, primarily, on these voluntary measures or

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<sup>1</sup> Government of Canada, "Extractive Industries: The Canadian Advantage at Home and Abroad" <<https://www.canada.ca/en/news/archive/2014/11/extractive-industries-canadian-advantage-home-abroad.html>>.

<sup>2</sup> Frick Els, "Top 50 Biggest Mining Companies" (3 January 2020) MINING[DOT]COM <<https://www.mining.com/top-50-biggest-mining-companies/>>.

<sup>3</sup> PWC Canada, "Mine 2019: Resourcing the Future of Canadian Mining" <<https://www.pwc.com/ca/en/industries/mining/mine-2019.html>>.

<sup>4</sup> OEC, "Canada" <<https://oec.world/en/profile/country/can/>>.

<sup>5</sup> The Canadian Minerals and Metals Plan, "Mining in Canada" <<https://www.minescanada.ca/en/content/mining-canada-0>>

<sup>6</sup> This, however, does not mean that mining cannot be done right. When approached respectfully, local and Indigenous communities are more likely disposed to supporting projects. There is a growing record of well executed mining projects in Canada which also benefit host communities. The point has been made, for example, that although concerned about the potential impacts of mining on their way of life, "Northerners ultimately hope to benefit from mining activity through well-paying jobs, support for local businesses, and the development of vibrant and healthy communities". See Centre for the North, "The Future of Mining in Canada's North: Economic Performance and Trends" (2013) <[http://www.miningnorth.com/wp-content/uploads/2013/01/Final-13-201\\_FutureofMining\\_CFN.pdf](http://www.miningnorth.com/wp-content/uploads/2013/01/Final-13-201_FutureofMining_CFN.pdf)> 43. See also Natural Resource Canada, "Good Practices in Community Engagement and Readiness" (2016) 2<sup>nd</sup> ed. <[https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/files/pdf/rmd-rrm/GoodPractices2ed\\_En.pdf](https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/files/pdf/rmd-rrm/GoodPractices2ed_En.pdf)>.

<sup>7</sup> CCSRC, "Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World" (2009) <[https://justice-project.org/wp-content/uploads/2017/08/csr\\_movements\\_and\\_footprints20091.pdf](https://justice-project.org/wp-content/uploads/2017/08/csr_movements_and_footprints20091.pdf)>; Working Group on Mining and Human Rights in Latin America, "The Impact of Canadian Mining in Latin America and Canada's Responsibility" (2014) <[http://www.dplf.org/sites/default/files/report\\_canadian\\_mining\\_executive\\_summary.pdf](http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf)>; Shin Imai et al, "The "Canada Brand": Violence and Canadian Mining Companies in Latin America" (2017) 17 Osgoode Legal Studies Research Paper; WILPF, "Impacts of Canadian Mining Companies: Canada's Extraterritorial Obligations (Universal Periodic Review of Canada)" (2018) Joint Submission to the UPR Working Group 30<sup>th</sup> Session; Paul Haslam et al, "Do Canadian Mining Firms Behave Worse than Other Companies? Quantitative Evidence from Latin America" (2018) 51:3 Canadian Journal of Political Science 521 – 551; Allard International Justice and Human Rights Clinic, "Deviations and Double Standards: Canadian Mining Practices at Home and Abroad" (2019) Allard School of Law.

<sup>8</sup> OECD, *Policy Framework for Investment* (Paris: OECD Publishing, 2015) 75.



tools. For example, equating RBC to Corporate Social Responsibility (CSR), Global Affairs Canada (GAC) describes RBC as “voluntary activities undertaken by a company, over and above legal requirements”.<sup>9</sup> Although deemed voluntary, these requirements are encoded in diverse guidelines and standards; instruments described here as RBC tools. While the GAC lists about twenty-two such tools, it highlights about five as instruments endorsed for Canadian extractive companies operating abroad.<sup>10</sup> Our research, however, identifies ninety-nine RBC tools referenced in the literature as relevant or promoted to Canadian companies, particularly the extractive sector. Key subjects covered by these tools include Indigenous relations, stakeholder participation, gender, and human rights. To serve as a viable tool to proactively address the adverse effects of the activities of businesses, risk-based due diligence has been referenced as an essential component of RBC.<sup>11</sup> Such due diligence helps to identify, prevent and mitigate actual and potential negative effects.<sup>12</sup>

While RBC tools are represented in the literature as the primary vehicle for responding to human rights and environmental abuses by extractive companies, the role of impact assessment (IA) in the responsible business context, is less discussed. Apart from its impact identification, effects appraisal, alternatives consideration, and sound decision-making functions, IA also plays an important regulatory role. It is a legally required process that must be undertaken before prescribed major projects can proceed. While impacts considered under this process have primarily been project based and ecological, non-ecological factors are beginning to feature prominently. This is exemplified by the transition from earlier versions of the Canadian Environmental Assessment Act (CEAA) to the Impact Assessment Act (IAA). The IAA, going beyond previous iterations of the CEAA, references health, social, or economic conditions, impacts on Indigenous groups, their rights, and cultures, community and Indigenous knowledge, comments received from the public, and “the intersection of sex and gender with other identity factors” as factors to be considered when projects are being assessed.<sup>13</sup> While the IAA stops short of explicitly mainstreaming human rights considerations, it potentially strengthens IA as a RBC tool. This is of relevance to the extractive industry as over 75% of assessments conducted between 2017 and 2019 under the federal IA process involved the extractive sector.<sup>14</sup>

Although the due diligence component of RBC tools aligns with the objectives of IA, they are two streams which rarely intersect in practice. The 2018 OECD Due Diligence Guidance for Responsible Business Conduct, exceptionally, highlights the relevance of different modes of impact assessment (environmental impact assessment (EIA), environmental and social impact assessment (ESIA), and Human Rights Impact Assessment (HRIA)) to RBC and their respective due diligence processes.<sup>15</sup> In conducting due diligence, proponents are encouraged to, where available, use information from EIA, ESIA or HRIA and other relevant assessments conducted by the company or any other third-party.<sup>16</sup> Framed this way, IA is an optional component of a broader RBC framework. A closer look at the

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<sup>9</sup> Global Affairs Canada, “Responsible Business Conduct Abroad” <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng#RBCGuidelines>>

<sup>10</sup> *Ibid.*

<sup>11</sup> OECD, *supra* note 8 at 75.

<sup>12</sup> *Ibid.*

<sup>13</sup> Impact Assessment Act, SC 2019, c C-28, s. 22(1)(a)(g)(l)(m)(n)(s).

<sup>14</sup> See Canadian Impact Assessment Registry, <[https://www.ceaa.gc.ca/050/evaluations/exploration?active=true&showMap=false&document\\_type=project](https://www.ceaa.gc.ca/050/evaluations/exploration?active=true&showMap=false&document_type=project)>

<sup>15</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD, 2018) 26.

<sup>16</sup> *Ibid.*

elements of the OECD Guidance, however, suggests that other than this element of embedding RBC into policies and management systems (which could be considered an aspect of strategic assessment), the other steps in the due diligence process are consistent with IA processes.<sup>17</sup> There are various arguments in favour of a closer and better alignment of IA and RBC processes. Apart from the efficiencies that such alignment might bring, both processes could be enriched by such intersection and alignment. For example, a closer alignment could legally strengthen RBC due diligence processes as IA is mandated in law. Again, the relative extensiveness of RBC due diligence could potentially expand the narrow ambit of IA.

Despite the common relevance of RBC and IA to the responsible operation of the Canadian extractive sector, there is a dearth of literature on the relationship and how both regimes can work together to maximize their potentials. This knowledge synthesis report focuses on this subject. We examine existing literature on the RBC Guidance tools promoted to the Canadian extractive sector within and outside Canada, the extent to which such tools inform stakeholder engagement and the consideration of Indigenous, gender and human rights issues, and how the subject of the RBC-IA intersection has been explored. We also consider international practices on the integration of RBC-IA processes, and highlight current gaps and necessary future research for the Canadian context. This knowledge synthesis report will potentially facilitate a more efficient, integrated, and effective approach to due diligence and IA processes in the extractive sector. Rather than being considered as inconvenient duplicative processes, this study could help to jumpstart a conversation on how the various RBC instruments and the due diligence processes they require can play essential roles in IA processes. Such a dialogue would help strengthen the operationalization and actualization of the potential of Canada's new IAA, particularly its provisions on gender, Indigenous relations, social consideration and meaningful stakeholder participation.

The findings in this knowledge synthesis report are laid out in three main parts. First, we identify key RBC guidance tools promoted to Canadian companies within and outside Canada and relevant commentaries in the literature. Second, we consider the extent to which the literature has captured how extractive companies have taken gender and human rights issues into account and how they conceptualize and foster stakeholder participation in their operations through the application of the promoted RBC Guidance tools. Third, we review the current literature on the intersection of RBC-IA in Canada and the implications for gender, human rights, and stakeholder engagement. We

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<sup>17</sup> Essentially, IA process includes screening, scoping, assessment, consideration of alternatives, mitigation, and follow up. These are consistent with RBC due diligence processes including identifying and assessing adverse impacts, mitigating adverse impacts, tracking implementation and results, communicating how impacts are addressed, and cooperating in remediation when appropriate. OECD, *ibid*, 21. Although strategic assessment is traditionally viewed as the environmental assessment of government policies, plans and programmes, it has been argued that such narrow conception is unhelpful. Rather Strategic Assessment should be viewed as a catalyst for generating organizational long-term cultural effects and strengthening environmental management and planning. If this view is accepted, then it is arguable that SEA is not just a government concern; that industry also has a part to play. In this sense, strategic assessment is relevant to industry and their policies and management systems. See Victor Lobos & Maria Partidario, "Theory versus Practice in Strategic Environmental Assessment (SEA)" (2014) 48 *Env Impact Assessment Review* 34 at 45. See also Maria do Rosário Partidário, *Strategic Environmental Assessment Better Practice Guide – Methodological Guidance for Strategic Thinking in SEA* (Portuguese Environmental Agency, 2012) 14; and Morten Bidstrup & Anne Merrild Hansen, "The Paradox of Strategic Environmental Assessment" (2014) 47 *Env Impact Assessment Review* 29 at 30.

subsequently consider best practices, particularly, in the area of RBC-IA intersection, identify gaps and scope for future research.

## **2. Methodology**

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This study is a two-part qualitative systematic review of published scholarly literature and publicly available grey literature written primarily in English. In both phases, we followed an incremental research approach and except for landmark publications, we reviewed literature published between 2009 and 2019. First, we focused on the question of the responsible business guidance tools promoted to Canadian extractive companies within and outside Canada as captured in the literature. This phase of the research began with the identification of background materials. Background materials included relevant materials published by team members, previous synthesis reports and other relevant academic and grey literature. We also contacted experts, particularly in the field of IA, to recommend background texts. We proceeded in this manner given the considerable extensive research portfolio of team members (particularly on responsible business conduct and Canadian extractive companies (RBC)) and considering that previous knowledge synthesis reports have been produced on the Canadian extractive sector and their engagements with Indigenous and gender issues. In all, we reviewed sixteen background articles and reports - ten publications by team members and six previous knowledge synthesis reports (see appendix 1). Close to one hundred responsible business guidance instruments relevant and/or promoted to Canadian extractive companies were identified, some of which were referenced in these sixteen background materials (see appendix 2). To ensure that only tools relevant to this research are listed, two research assistants included tools pertaining to Indigenous rights, gender and gender-based analysis, human rights, and stakeholder engagement. The list was subsequently reviewed by the principal authors, whose observations on relevance were applied to generate a final list of apt RBC tools.

In the second part of the study, we expanded the search of RBC tools to other academic and grey literature outside background texts, considered how RBC tools are used in IA processes by Canadian extractive companies and considered global best practices on how IA and RBC are deployed by extractive companies. We sourced academic literature from Novanet, Google scholar, SSRN, ISI Web of Science, EBSCO, Scopus, and Proquest Database, while the grey literature was found through searches on Google, Proquest, and EBSCO. Research assistants kept note of key words and search paths. We also used a snowball approach by considering references in sourced primary materials. Literature considered in this knowledge synthesis report includes academic and grey literature on RBC, IA and stakeholder engagement by Canadian extractive companies.

Canadian extractive companies are defined, for the purposes of this research, as any extractive company (mining, oil and gas) operating within Canada whether or not its parent company is incorporated or headquartered in Canada, and operating outside Canada where the parent company is

incorporated or headquartered in Canada, or listed on a Canadian stock exchange. We paid particular attention to literature on gender impact assessment, gender-based analysis, Indigenous impact assessment, benefit sharing agreements, impact benefits agreement, social impact assessment, human rights impact assessment, sustainability assessment, and meaningful participation by Canadian extractive companies. Literature not relating to Canadian extractive companies, except under the section on global best practices, was excluded. To understand the context in which RBC tools were referenced, we shortlisted, and sample-read at least three articles per instrument and where relevant, research assistants provided a summary. In other instances where search terms generated a large volume of materials (e.g. for global best practices, extractive sector + responsible business conduct + stakeholder engagement + impact assessment generated about 16,900 results within the 2009 – 2019 timeframe), we streamlined the findings by countries in the European Union, the United States of America, Australia, and New Zealand. While the initial focus on Europe was due to the preliminary finding that a considerable number of sourced literature were published in the jurisdiction, Australia was included given the similarities with Canada, particularly the history, Indigenous populations, and the prevalence of extractive companies.

A three-level writing process was undertaken, including a synthesis and analysis of initial findings and summaries, from which a draft report was produced and circulated to collaborators whose feedback was incorporated into a revised draft. The report will be disseminated to stakeholders including sectoral policy users, community and Indigenous stakeholders, women’s rights, environmental and human rights NGOs, IA responsible authorities, industry associations and scholars. The findings of the study will further be disseminated and explored further at a workshop to be held in the second half of 2020. Further findings from the workshop will be incorporated into an updated final report.

### 3. Results

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The synthesized findings and analysis below are a product of a joint consideration of literature on RBC and IA, two areas of research which are, generally, considered to be in different siloes. From a review of the literature, it became evident that RBC tools have proliferated, particularly, in respect of Indigenous consultation. While the proliferation of RBC tools is not in itself negative, the absence of a framework for a coherent application of such tools at best leads to inefficiency and at worst provides a justification for extractive companies' failure to adopt and apply such tools or to cherry-pick and use the least rigorous of available tools. In contrast, despite the considerable number of RBC tools on issues like Indigenous engagement, gender and human rights, climate change was not comprehensively treated in any of the tools, including those promoted by the Organization for Economic Cooperation and Development (OECD). While climate change has received more attention in IA regimes, key questions about how it applies at the project level remain.<sup>18</sup> Consequently, neither RBC tools nor IA regimes provide adequate guidance to the Canadian extractive sector on how to deal with the varying dimensions of climate change in their assessment and due diligence processes. While the above points are key general findings, we lay out more specific results and analysis below.

#### ***3.1 What are the Responsible Business Guidance Tools Promoted to the Canadian extractive sector?***

We identified ninety-nine responsible business guidance tools which are directly and/or indirectly relevant and promoted to the Canadian extractive sector. As shown in *table 1*, while the instruments originate from diverse sources, a significant number of them are sourced from international organizations, particularly the OECD (5), the World Bank (International Finance Corporation) (7), and the United Nations (8). The origin of RBC tools informs both their primary subject matter and their scope of application. RBC tools designed and promoted by Indigenous nations in Canada are focused on Indigenous consultation and consent processes. Of the 12 identified Indigenous nation tools, only 3 are applicable Canada-wide. Other tools are peculiar to jurisdictions (e.g. British Columbia First Nations Energy and Mining Council: First Nation Resource Participation Models) or Indigenous communities (Kluane First Nation Proponents Engagement Guide).

*Table 1 – RBC Instruments for the Canadian Extractive Sector*

	<i>Origin of RBC Tool</i>	<i>Number of Tools</i>
1.	International Organizations	37

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<sup>18</sup> For some of these issues see Robert Gibson et al, “The Key Components and Provisions that need to be Incorporated into Impact Assessment Legislation to Ensure that Assessed Undertakings Help Meet Canadian Climate Change Mitigation Commitments and Duties” (2018) The Paris to Projects Research Initiative Discussion Paper.

2.	Industry	23
3.	Canadian Government (Federal)	13
4.	Indigenous Government	12
5.	Provincial Governments	8
6.	Non-Governmental Organizations (Domestic)	3
7.	Multi-stakeholder Initiatives	3

Like the RBC tools by Indigenous nations, industry RBC tools also deal, considerably, with stakeholder participation and engagement. The Prospectors and Developers Association of Canada (PDAC) (7) and the Mining Association of Canada (MAC) (10) are the leading industry organizations which have developed RBC tools. Consistent with its more extensive remit,<sup>19</sup> the MAC boasts of a broad array of RBC tools, with the Towards Sustainable Mining (TSM) Guiding Principles as its flagship.<sup>20</sup> The TSM Guiding Principles are operationalized through 9 protocols and frameworks. Exceptionally, the TSM has a protocol on energy and greenhouse gas (GHG) emissions management, making it one of the two identified RBC guidance tools that directly addresses climate change (with the second being the GRI Standard on emissions reporting; it has therefore been classified as a reporting tool in *table 2*). Although pre-dating the 2019 Canadian IAA, the protocol on energy and GHG management could be instructive in the design of guidelines for the implementation of the IAA’s provisions on the consideration of climate change in project assessment. Also, worth highlighting is PDAC’s recent Guide on Gender Diversity and Inclusion as part of its framework for responsible exploration (e3 plus). Again, the Guide is potentially useful for the consideration of “the intersection of sex and gender” as a factor when assessing projects under the IAA.

International organizations, including State and non-State based institutions, are the most prolific source of RBC Guidance tools. While most instruments are general, a few focus on specific subjects including information standards, Indigenous people and meaningful stakeholder engagement, supply chain management, security and gender. The UN Guiding Principles on Business and Human Rights (UNGPs) is arguably the most prominent RBC tool given broad acceptance and adoption by countries and businesses worldwide, including Canada and Canadian businesses. Importantly, the UNGPs emphasize the duties of States and responsibilities of businesses to, respectively, mandate and conduct human rights due diligence (HRDD) to address businesses’ impacts on human rights.<sup>21</sup> Providing more detailed guidance on due diligence are the OECD’s Due Diligence Guidance for Responsible Business Conduct (2018), Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector (2017) and Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas (2016). Canada’s extractive companies have (non-binding) obligations under these guidance tools given Canada’s membership of the OECD and its adherence to the OECD

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<sup>19</sup> The MAC describes itself as the “national voice of the Canadian mining industry”. Its membership, which is made up largely of Canada’s metals and industrial materials output, includes companies involved in mineral exploration, mining, smelting, refining and semi-fabrication. See Mining Association of Canada, <<https://mining.ca/>>; MAC, “A Report on the State of the Canadian Mining Industry” (2009) <<https://mining.ca/wp-content/uploads/2019/03/FactsandFigures2009.pdf>>

<sup>20</sup> MAC, “TSM Guiding Principles” <<https://mining.ca/towards-sustainable-mining/tsm-guiding-principles/>>.

<sup>21</sup> UN Guiding Principles on Business and Human Rights, paras. 4, 15 & 17.

Guidelines for Multinational Enterprises.<sup>22</sup> Among the identified international institutions, the World Bank appears to have paid the most attention to gender issues.<sup>23</sup>

On Indigenous engagement, the UN General Assembly's UN Declaration on the Rights of Indigenous People (UNDRIP) is frequently referenced. In 2013, the UN Global Compact developed specific guidance for the private sector in its Business Reference Guide to the UNDRIP, with the purpose of helping businesses to “understand, respect, and support the rights of Indigenous peoples by illustrating how these rights are relevant to business activities”.<sup>24</sup> The International Council on Mining and Metals' Indigenous Peoples and Mining Good Practice Guide is another frequently referenced source.<sup>25</sup> The World Bank and the IFC require consultation with Indigenous peoples where Indigenous peoples or communities stand to be affected. Specifically, the World Bank's Environmental and Social Framework requires consultation on a standard of free, prior, and informed consent (FPIC) where Indigenous peoples in historically underserved traditional local communities are affected.<sup>26</sup> Further on FPIC, particularly in the contexts of sacred sites and cultural rights, Butzier and Stevenson note that the International Bar Association's Model Mining Development Agreement (MMDA) requires a social impact assessment and action plan to address the impacts of mining on affected communities.<sup>27</sup> The MMDA also requires that the affected community and extractive company develop a Community Development Agreement, which among other things, require companies to submit to local jurisdiction for dispute resolution.<sup>28</sup>

Other guidance tools on engagement and consultation have been developed by Indigenous governments and/or affiliated bodies. Specific consultation guidelines or policy documents may be provided, usually available on Indigenous government websites. Where multiple Indigenous communities are involved, more extensive and coordinated guidance are designed and promoted.<sup>29</sup> Indigenous RBC tools identified elsewhere are in some cases included within an Indigenous communities' broader framework of environmental management, stewardship, and/or protection plans, policies, and strategies; either self-governed, or, in some cases, developed in co-operation with Canadian governments (provincial and/or federal).<sup>30</sup> Other RBC guidance tools from Indigenous governments may be found within natural

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<sup>22</sup> See generally Scott Robinson, “International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime” (2014) 30(78) *Utrecht Journal of International and European Law* 68.

<sup>23</sup> See also Global Mining Guidelines Group, “Women in Mining: Steps, Strategies and Best Practices for Gender Diversity” (2014). The 2018 OECD RBC Due Diligence Guidance also contains a short question and answer section on how gender issues can be integrated into companies' due diligence processes. See OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) 41 – 42.

<sup>24</sup> See Ursula Wynhoven and Michelle Lau, “Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples” (New York: United Nations Global Compact Office, 2013).

<sup>25</sup> International Council on Mining and Metals, “Good Practice Guide: Indigenous Peoples and Mining” 2<sup>nd</sup> Edition (London: Office of the ICMM, 2013).

<sup>26</sup> World Bank, *Environmental and Social Framework* (Washington, DC: World Bank, 2016) at p 10, para 55.

<sup>27</sup> Stuart R Butzier & Sarah M Stevenson, “Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent” (2014) 32:3 *J of Energy & Natural Resources L* 297 at 322.

<sup>28</sup> *Ibid.*

<sup>29</sup> For example, the Yukon First Nations Engagement and Consultation Tool Website provided by the Yukon Chamber of Mines. See Yukon Chamber of Mines, “Yukon First Nations Engagement and Consultation Tool,” Online: <<https://www.yukonminers.org/index.php/all-news/41-yukon-first-nations-engagement-and-consultation-guidebook-is-live-online> > [<https://perma.cc/WLT3-NH69>].

<sup>30</sup> See Clogg, et al, “Indigenous Legal Traditions and the Future of Environmental Governance in Canada” (2016) 29 *J Envtl Law & Prac* 227, for case study examples from Gitanyow *Huwilp*, the Yinke Dene Alliance of First Nations, and the Tsleil-Waututh Nation at 235-252; with further analysis of the Tsleil-Waututh Nation's 2015 Environmental Assessment of the Transmountain pipeline expansion project.

or constitutional Indigenous laws, or Indigenous peoples' written Constitutions.<sup>31</sup> Given the uniqueness of Indigenous communities, and that Indigenous RBC tools may reflect Indigenous law, preference should be given to tools promoted by local communities over more general instruments or pan-Indigenous tools, particularly in respect of obtaining communities' FPIC.

RBC Instruments designed and promoted by the Canadian government draw, largely, from international RBC tools. Most of the instruments are promoted to extractive companies operating outside Canada by government agencies with global focus. Global Affairs Canada (GAC) and Export Development Canada are the authorizing agencies of nine of the thirteen identified federal RBC tools. Specifically, the GAC has released the Guidelines on supporting Human Rights Defenders. On gender, the GAC has also promoted Canada's Feminist International Assistance Policy (2017) and the Policy on Gender Equality (2017). Three of the four identified federal RBC tools promoted within Canada focus on participation of and relationship with Indigenous peoples. Particularly, the Canadian government in conjunction with the PDAC and the Canadian Aboriginal Minerals Association developed the Mining Information Kit for exploration in Aboriginal communities. Provincial RBC tools are also participation centric, as six out of eight identified tools deal with consultation and participation of Indigenous people. Similarly, Canadian NGOs have mostly proposed tools for the effective integration of Indigenous peoples into decision making processes (the three identified NGO tools focus on Indigenous relations).

*Table 2 – RBC Tools, Focus Areas and Promoters*

<i>Key Focus Areas</i>	<i>Number of Tools</i>	<i>Major Promoters</i>
General	37	International org. (18), Indigenous Govt. (6), Fed. Govt. (6), Industry (5), Prov. Govt. (2)
Indigenous Relations	30	Industry (8), Prov. Govt. (6), Indigenous Govt. (5), Fed. Govt. (3), NGO (3), International org. (3), Multi-stakeholder Initiatives (2)
Gender	7	International org. (4), Fed. Govt. (2), Industry (1)
Human Rights & Due Diligence	5	International org
Mine Decommissioning/Tailings Management	3	Industry (2), Multi-stakeholder Initiatives
Security, safety and health	3	Industry (2), International org.
Human Rights Defenders	3	International org (2), Fed. Govt.
Child and forced labor	3	International org (2), Industry
Resource Revenue Sharing	2	Industry, Indigenous Govt.
Reporting/Access to information	2	International org.
Dispute/Crisis Resolution	2	Industry, Fed. Govt.
GHG Emissions	1	Industry
Water stewardship	1	Industry

<sup>31</sup> For a written example see, e.g., the Constitution of the Haida Nation, online: < <http://www.haidanation.ca/wp-content/uploads/2018/10/Constitution-2018-10-signed.pdf>> [<https://perma.cc/ZA5Z-W74V>]. We recognize that there are other uncaptured guidance and standards in unwritten Indigenous traditions, laws, and Constitutions.



While *Table 2* does not include all RBC tools relevant to the Canadian extractive sector, since tools were generally identified from existing literature, some tentative conclusions can be drawn as to the current landscape of promoted RBC tools. Whereas international organizations have the highest number of RBC tools (many of which are general) promoted by a variety of institutions, industry, although with fewer instruments, has the widest spread in respect of focus areas. Industry-promoted RBC tools are on ten of the thirteen focus areas, with industry (Mining Association of Canada) promoting the only tools on child and forced labor, water stewardship, and GHG emissions. Indigenous participation is the only thematic area on which each of the seven categories of institution advanced RBC instruments.

The above analysis of promoted RBC tools stops short of a detailed qualitative appraisal of the content, quality and effectiveness of the tools. The active and robust involvement of industry in designing and promoting tools does not necessarily translate into a positive contribution of industry in the various focus areas. We found no in-depth study of how these industry RBC tools are promoted and their effects so far. Nevertheless, *Tables 1 and 2* map thematic areas covered by existing RBC tools in Canada, the major promoters, and could help discern issues which have not been addressed. Again, the analysis here could be helpful in designing a framework for the coherent and efficient administration of RBC tools. In designing such framework, the manual on RBC Guidelines and industry practice aids compiled by the UN Global Compact (Network Canada) and Canadian CSR Implementation Guide are helpful starting points.<sup>32</sup>

### ***3.2 What is the Relationship Between the Canadian Extractive sector and RBC Due Diligence Guidance Tools and How do they Address Human Rights, Gender, and Stakeholder Engagement?***

While only four international RBC instruments provide explicit guidelines on human rights due diligence (HRDD), due diligence is an intrinsic feature of most RBC tools.<sup>33</sup> We have not included the UNGPs as one of these tools as while it sets out general HRDD principles, due diligence is not its sole focus. Our focus here is to lay out the trends identified in the literature on policies and practices within the Canadian extractive sector on the consideration of human rights, gender, Indigenous and stakeholder engagement in due diligence processes. Cumulatively, there are forty-two instruments on these thematic areas in *Table 2*. As also shown in *Table 2*, the four identified HRDD instruments are solely promoted by international organizations (the OECD (3) and ICMM (1)). We have not identified any tool designed or promoted by the Canadian government (and Provincial governments) explicitly on HRDD. In her analysis of the 2014 Canadian CSR Strategy, Simons assesses the 2014 Strategy against the requirements UNGPs of which HRDD is a central aspect. She points out that the CSR

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<sup>32</sup> UN Global Compact Network Canada, “OECD Guidelines for Responsible Business Conduct and Sector-specific Guidance: A Manual for Canada” (2017) <<http://www.globalcompact.ca/wp-content/uploads/2018/04/GCNCOECDToolGuideFinal.pdf>>. The Implementation Guide lists a broad range of about 72 CSR standards and tools. Only 13 of these tools are, however, classified as having been “endorsed by the Government of Canada”. While some of the tools are specifically tailored for the extractive sector, the compilation is not extractive sector specific. Further, being a 2014 publication, the Implementation Guide does not cover post-2014 tools. See Industry Canada, “Corporate Social Responsibility: An Implementation Guide for Canadian Businesses” (2014) 67 – 73.

<sup>33</sup> OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (Paris: OECD Publishing, 2017); OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas; OECD Due Diligence Guidance for Responsible Business Conduct; ICMM, Integrating Human Rights Due Diligence into Corporate Risk Management Processes.

Strategy fails to require or compel extractive companies to undertake HRDD.<sup>34</sup> This, however, is not to be read as meaning that there is no expectation for Canadian extractive companies to comply with due diligence requirement. As Simons further notes, the 2014 CSR Strategy encourages Canadian companies to align their practices to intergovernmental initiatives including the UNGPs and the various OECD Due Diligence Guidance RBCs.<sup>35</sup> However, the GAC, elsewhere, notes in an updated website that “companies should be prepared with appropriate due diligence in assessing and mitigating risks”, particularly, in instances where “local laws are not aligned with Canadian values”.<sup>36</sup> This appears to be the closest the Canadian government has come to ‘requiring’ Canadian extractive companies to undertake HRDD, albeit in the context of transnational extractive activity and where laws of host countries are not in line with so-called “Canadian values”.

The absence of an express requirement that extractive companies conduct HRDD within or outside Canada notwithstanding, the argument has been made that companies are still required to conduct such due diligence both under the UNGPs and the OECD Guidance.<sup>37</sup> Away from the more State-centric instruments like the UNGPs and OECD due diligence tools, the IFC Performance Standards and the ICMM have been referenced as more specific tools to encourage companies to conduct due diligence.<sup>38</sup> IFC Performance Standard (PS) 1 suggests that businesses respect human rights, recognizing that due diligence prescribed by the Performance Standards will “enable the client to address many relevant human rights issues in its projects”.<sup>39</sup> More concretely, to be eligible for IFC support, the client is required to develop an environmental and social management system to manage social risks and impacts throughout the lifecycle of the project.<sup>40</sup> Members of the ICMM (e.g. Barrick Gold and Teck) are also covered by the ICMM’s “Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes”.<sup>41</sup> The restriction of their use to companies which are either in need of financial support (e.g. IFC) or are members of an international organization (e.g. ICMM) is an obvious disadvantage of these institutional instruments compared to more broadly disseminated tools like the OECD due diligence tools. Again, non-compliance with the

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<sup>34</sup> Penelope Simons, “Canada’s Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses” (2015) 56:2 *The Canadian Business Law Journal* 167 at 179 – 180. The CSR Strategy, however, recognizes the need for companies to obtain “fulsome risk assessments” by, among other things, seeking to understand how projects affect “customs, culture, and expectations”, working with stakeholders to determine and communicate environmental, social and economic impact solutions etc. See Global Affairs Canada, “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad” (2014) <[https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced\\_CS\\_Strategy\\_ENG.pdf](https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf)>. While noting that elements of the “fulsome risk assessments” in the enhanced CSR Strategy are vital components of HRDD, Simons note that they fall short of the “assessment of the impact of a project on the human rights of individuals and local communities and addressing any adverse impacts on an ongoing basis”. See Simons, *Ibid* at 185.

<sup>35</sup> *Ibid*, 180.

<sup>36</sup> Global Affairs Canada, “Responsible Business Conduct Abroad” (31 July 2019) <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>>.

<sup>37</sup> Sara L. Seck, “Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights” (2016) 12:1 *McGill Journal of Sustainable Development* L 57 at 66 – 67. See also James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UNHRCGAOR, 21st Sess, UN Doc A/HRC/21/47, (2012) at paras. 52 – 57.

<sup>38</sup> Simon, *supra* note 34 at 186; Sara Seck, “Business, Human Rights, and Canadian Mining Lawyers” (2015) 56 *Canadian Business Law Journal* 208 at 226 – 227.

<sup>39</sup> IFC, “Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts” (1 January 2012) 3.

<sup>40</sup> *Ibid*, para. 5.

<sup>41</sup> ICMM, “Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes” (2012) <<https://www.icmm.com/website/publications/pdfs/social-and-economic-development/3308.pdf>>

OECD due diligence tools could lead to a company being subject to a Specific Instance complaint at the Canadian OECD National Contact Point (NCP).<sup>42</sup>

McKnight's trilogy of research papers on HRDD provides some of the most recent consideration of the subject.<sup>43</sup> Like other RBC literature, McKnight highlights issues including responsibility and liability, direct liability, the centrality of stakeholder participation, the connection between HRDD and the Social License to Operate, and supply chain due diligence. As the UNGP and OECD due diligence guidance make clear, the responsibility of companies to respect human rights should not be equated with the primary obligation of States to protect human rights and regulate liability domestically.<sup>44</sup> The decision of the Ontario Superior Court in *Choc v. Hudbay Minerals* is an often-referenced authority on the exercise of jurisdiction by a home State court to prima facie impose direct liability on a parent corporation for acts that caused harm in another country.<sup>45</sup> This type of litigation arguably brings to the fore the disadvantage of failing to conduct effective HRDD and consequently failing to respect the human rights of host communities.

The failure of extractive companies to comply with international RBC due diligence soft laws can have significant consequences for their bottom line,<sup>46</sup> goodwill, and SLO. Particularly, the loss of SLO is a recurrent theme in Canadian scholarship.<sup>47</sup> However, despite the apparent connection between human rights concerns and the failure to give or withdraw social licence, most literature on social licence does not reference human rights or HRDD. Equally, social licence is rarely mentioned in human rights due diligence instruments. Of the four identified direct HRDD instruments, the OECD Guidance on Meaningful Stakeholder Engagement is the only tool that made (tangential) reference to social licence.<sup>48</sup>

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<sup>42</sup> The complaint process has, however, been critiqued as ineffectual given the non-consideration of the substance of claims, inadequately resourced, untransparent, inaccessible, and undermined by the non-cooperation of Canadian companies. See Seck, *supra* note 37 at 80 – 82. See also Penelope Simons, “The Governance Gap: Multistakeholder and Intergovernmental Initiatives” in Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014) 106 – 113.

<sup>43</sup> Zoe McKnight, “Human Rights Due Diligence: International Instruments” (2018) 53 Research Paper Canadian Labour Congress; Zoe McKnight, “Human Rights Due Diligence: Legislative Scan” (2018) 54 Research Paper Canadian Labour Congress; Zoe McKnight, “Human Rights Due Diligence: Recommendations for a Canadian Approach” (2018) 55 Research Paper Canadian Labour Congress.

<sup>44</sup> McKnight, “Human Rights Due Diligence: International Instruments”, *Ibid* at 9.

<sup>45</sup> *Choc v. Hudbay Minerals* 2013 ONSC 1414. See McKnight, “Human Rights Due Diligence: International Instruments”, *supra* note 33 at 12; McKnight, “Human Rights Due Diligence: Recommendations for a Canadian Approach”, *supra* note 43 at 5; Simons, *supra* note 34 at 203; Seck, *supra* note 38 at 232. Direct liability connotes that the parent company has de facto control over the operations of a subsidiary or was closely involved in the operations of the subsidiary which caused harm. This, consequentially, imposes a duty of care on the parent company. See further *Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415.

<sup>46</sup> Rachel Davis & Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector* (Cambridge, Massachusetts, Harvard Kennedy School, 2014) 19; Simons, *supra* note 34 at 206; Sara Seck, “Business, Human Rights, and Canadian Mining Lawyers” (2015) 56 Canadian Business LJ 208 at 233.

<sup>47</sup> See generally Olivier Boiral et al, “Corporate Sustainability and Indigenous Community Engagement in the Extractive Industry” (2019) 235 J of Cleaner Production 701 – 711; Raphael Heffron et al, “The Emergence of the “Social Licence to Operate” in the Extractive Industries?” (2018) Resources Policy 1 – 16; John Colton et al, “Energy Projects, Social Licence, Public Acceptance and Regulatory Systems in Canada: A White Paper” (2016) 20:9 SPP Research Papers (University of Calgary); Jason Prno, “An Analysis of Factors Leading to the Establishment of a Social Licence to Operate in the Mining Industry” (2013) 38 Resources Policy 577 – 590.

<sup>48</sup> The Guidance notes that it is prudent to engage with stakeholders as such engagement can contribute to “attaining and retaining a “social licence to operate” facilitating current and potential future operations and expansions”. OECD, *supra* note 33 at 14. Ruggie also made a tangential reference to ‘social licence’ in his 2008 report to the UN Human Rights

The literature consistently demonstrates that early and ongoing meaningful stakeholder and rights-holder engagement is central to RBC and human rights due diligence.<sup>49</sup> As noted in the OECD Due Diligence Guidance on RBC, “due diligence is informed by engagement with stakeholders”.<sup>50</sup> McKnight notes that stakeholder engagement is “predicted throughout the (due diligence) process”.<sup>51</sup> On the whole, Canadian extractive companies have been scored low in respect of their engagement in meaningful stakeholder engagement. For example, Haslam et al, note that Canada’s regulatory environment focuses on responsibilities to shareholders rather than stakeholders.<sup>52</sup> They further describe Canada’s stakeholder engagement orientation as being within the “Anglo-American tradition of “explicit” stakeholder relations”.<sup>53</sup> Explicit stakeholder relations refer to voluntary corporate CSR strategies and the exercise of corporate discretion in companies’ engagement with the public.<sup>54</sup> Such discretionary approach, however, is problematic and this appears to be a global problem. Citing a 2015 report of the IFC’s Office of the Compliance Advisor Ombudsman (CAO), Seck notes that 62% of the 150 cases brought from 46 countries pertained to stakeholder engagement, and 43% of all cases concerned extractive industries domiciled and/or operating in different parts of the world.<sup>55</sup> On the other hand, UNICEF gave the example of a “broad-based community outreach initiative, targeting the general population, including children” by Canadian extractive Sherritt in its work on engaging stakeholders on children’s rights, with respect to its Ambatovy nickel mine in Madagascar.<sup>56</sup>

Paré and Chong identify the UNICEF Children’s Rights and Business Principles as the most comprehensive soft law instrument protecting children in the business and human rights sphere.<sup>57</sup> Other RBC tools like the UNGPs, OECD Guidelines, and UN Global Compact either touch on the subject tangentially or restrict same to the child labour context.<sup>58</sup> In their review of four Canadian mining companies’ (Agrium, Randgold Resources, Goldcorp and Barrick Gold) internal codes of conduct, Paré

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Council. See John Ruggie, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development” (2008) A/HRC/8/5, 17.

<sup>49</sup> Travis Mathieson, *Managing Stakeholder Ambiguity in the International Mining Sector: The Case of Goldcorp Inc. in Guatemala* (Master of Arts Thesis, Simon Fraser University, 2015) (Unpublished); Adrienne Berchtold, et al, “Responsible Mining in British Columbia: Guidelines Towards Best Practice” (2018) SkeenaWild Conservation Trust; Aloysius Newenham-Kahindi, “Managing Sustainable Development through People: Implications for Multinational Enterprises in Developing Countries” (2015) 44:3 Personnel Review 388 – 407; Chris Eaton, “Building Social License to Operate through Community Engagement: The WUSC-Rio Tinto Alcan Partnership in Ghana” *Field Actions Science Reports* [Online], Special Issue 14 | 2016, Online since 29 August 2016, connection on 19 April 2019. URL : <http://journals.openedition.org/factsreports/4037>; Lilia Granillo Vazquez & Robert White, “Can Mining be Sustainable? ISO 2600 SR for Responsible Exploration and Sustainable Mining” (2012) 81:7 *Ide@s CO CYTEG*, 323-341; Seija Tuulentie, “Local Community Participation in Mining in Finnish Lapland and Northern British Columbia, Canada – Practical Applications of CSR and SLO” (2019) 61 Resources Policy 99 – 107.

<sup>50</sup> OECD, *supra* note 33 at 18.

<sup>51</sup> McKnight, “Human Rights Due Diligence: Recommendations for a Canadian Approach”, *supra* note 43 at 2.

<sup>52</sup> Haslam et al, *supra* note 7 at 526.

<sup>53</sup> *Ibid.*

<sup>54</sup> This is different from implicit CSR engagement which refers to “corporations’ role within the wider formal and informal institutions for society’s interests and concerns”. See Dirk Matten & Jeremy Moon, “‘Implicit’ and ‘Explicit’ CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility” (2008) 33:2 *Academy of Management Review* 404 at 409 – 410.

<sup>55</sup> Seck, *supra* note 37 at 76

<sup>56</sup> UNICEF, “Engaging Stakeholders on Children’s Rights: A Tool for Companies” (2014) 1<sup>st</sup> edition <[https://www.unicef.org/csr/css/Stakeholder\\_Engagement\\_on\\_Childrens\\_Rights\\_021014.pdf](https://www.unicef.org/csr/css/Stakeholder_Engagement_on_Childrens_Rights_021014.pdf)> 12.

<sup>57</sup> Mona Pare and Tate Chong, “Human Rights Violations and Canadian Mining Companies: Exploring Access to Justice in Relation to Children’s Rights” (2017) 21:7 *Intl Journal of Human Rights* 908 at 911.

<sup>58</sup> There are, however, other children-specific instruments like the ILO Minimum Age Convention (No. 138), Worst Forms of Child Labour Convention (No. 182) and the most comprehensive instrument on children the Convention on the Rights of the Child.

and Chong find that, similar to the RBC tools, companies (with the exception of Barrick Gold's more extensive code of conduct) have tended to focus on child labour as opposed to other children's rights.<sup>59</sup> Specifically, children's rights are mostly considered in the context of supply chains.<sup>60</sup> Hence, the OECD published a set of guidelines on how to identify and address worst forms of child labour in mineral supply chains. Additionally, the issue of child labour is the centrepiece of the proposed Modern Slavery legislation on reporting, Bill C-423, and the supply chain consultations undertaken by the Canadian government.<sup>61</sup> The need for a mandatory domestic reporting regime on responsible business conduct, which Canada currently lacks, is the central recommendation in the identified literature.

A major distinction between how stakeholder engagement is treated in the human rights context vis-à-vis other contexts, is the recognition of rights holders as a specific genre of stakeholders under HRDD. Indeed, while the UNGPs made reference to rights holders (apart from stakeholders), it is the OECD Guidance for Meaningful Engagement in the Extractive Sector that has done the more robust work of clearly distinguishing between stakeholders and rights-holders, carefully laying out the relevance of this distinction.<sup>62</sup> Literature on stakeholder engagement in the Canadian context, has, however, been largely silent about this important distinction.<sup>63</sup> Failure to recognize this distinction considerably impacts how analysis in the stakeholder engagement sphere is done. In their Guidelines for Responsible Mining in British Columbia, for example, Berchtold et al while commenting relatively extensively on the need for meaningful stakeholder engagement,<sup>64</sup> did not examine in any depth the need to consider the existence of rights in understanding the concept of stakeholders and determine appropriate engagement. Similarly, in their analysis of "... 4,623 stakeholders from 19 gold-mining companies operating 26 mines in 20 countries" and in drawing conclusions on stakeholder engagements depending on the institutional environment of host States, Nartey et al only considered two categories of stakeholders which they described as high-status and low-status stakeholders.<sup>65</sup> While emphasizing the

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<sup>59</sup> Paré and Chong, *supra* note 57 at 913.

<sup>60</sup> See generally House of Commons, "A Call to Action: Ending the Use of all Forms of Child Labour in Supply Chains" (2018) <<https://www.ourcommons.ca/Content/Committee/421/FAAE/Reports/RP10078750/faaerp19/faaerp19-e.pdf>>; World Vision, "Supply Chain Risk Report: Child and Forced Labour in Canadian Consumer Products" (2016) <[https://www.worldvision.ca/getattachment/No-Child-For-Sale/Resources/Supply-Chain-Risk/Risk-report-Child-and-forced-labour-report\\_jun-08.pdf.aspx?lang=en-CA](https://www.worldvision.ca/getattachment/No-Child-For-Sale/Resources/Supply-Chain-Risk/Risk-report-Child-and-forced-labour-report_jun-08.pdf.aspx?lang=en-CA)>; Elise Dueck et al, "The Rise of Supply Chain Transparency Legislation: What is at Stake for Canadian Investors?" (2017) Shareholders Association for Research and Education; Global Compact Network Canada, "Embedding the 10 Principles into Supply Chain Management: Reflections from the Global Compact Network Canada" (2019) <<https://www.globalcompact.ca/embedding-the-10-ungc-principles-into-supply-chain-management/>>; Kam Phung et al, "The Straight Goods: Canadian Business Insights on Modern Slavery in Supply Chains" (2019) <<http://schulich.yorku.ca/wp-content/uploads/2019/05/Canadian-Business-Insights-on-Modern-Slavery-in-Supply-Chains-Full-Report.pdf>>.

<sup>61</sup> See generally OECD, "Practical Actions for Companies to Identify and Address the Worst Forms of Child Labour in Mineral Supply Chains" (2017); Bill C-423, "An Act Respecting the Fight against Certain Forms of Modern Slavery through the Imposition of Certain Measures and Amending the Customs Tariff" 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, 2018; Government of Canada, "Supply Chain Consultations: Issue Paper" (2019) <<https://www.canada.ca/en/employment-social-development/programs/international-affairs/consultation-supply-chains/issue-paper.html>>.

<sup>62</sup> OECD, *supra* note 33 at 19 – 20.

<sup>63</sup> Seck, however, commented on this distinction in her work. See Seck, *supra* note 37 at 90 – 91. See also McKnight, "Human Rights Due Diligence: International Instruments", *supra* note 43 at 24.

<sup>64</sup> Berchtold et al, *supra* note 49 at 9 – 10. They, however, note that "Additionally, mine operators should respect internationally recognized rights of Indigenous peoples by obtaining FPIC from First Nations and other Indigenous Peoples wherever mine-related activities could affect their rights or intersects".

<sup>65</sup> Lite Nartey et al, "Status Climbing v. Bridging: Multinational Stakeholder Engagement Strategies" (2018) 3:2 Strategy Science 367 – 392.

centrality of “the rule of law”, the authors did not consider the relevance of ‘rights’ as a key variable.<sup>66</sup> One explanation for the limited focus on rights-holders could be the fact that the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement which deals extensively with the subject is a relatively recent document and further that most Canadian RBC tools fail to consider rights-holders.

Despite the paucity of stakeholder engagement literature dealing directly with the concerns of rights-holders, the literature does engage with a broad range of other important issues. Newenham-Kahindi explore how multinational companies (in this case a Canadian gold mining company operating in Tanzania) use their employees as “internal stakeholders” to engage with external stakeholders (local communities).<sup>67</sup> Using Rio Tinto Alcan’s operation in Ghana as case study, Eaton demonstrates how a multi-stakeholder approach (company, NGO, governmental development agency, and municipal government) to stakeholder engagement can be successfully implemented.<sup>68</sup> Wanvik shows that resource management in Canada has evolved, with government giving way to the emergence of “governance as corporate stakeholder management”.<sup>69</sup> In lieu of the more dominant bipartite approach to engagement, Wanvik proposes a tripartite arrangement involving the community, municipality responsible for local service delivery, and the company to address, among other things, power imbalance.<sup>70</sup> The relationship between corporate social responsibility and social license to operate (SLO) was considered by Tuulentie et al. They highlight the fluidity of the SLO concept, the importance of defining ‘local community’ clearly, and the need for national or administrative guidelines for company-community agreements.<sup>71</sup> What is clear is that, apart from the literature that considers resource extraction and Indigenous peoples, a considerable amount of Canadian research on stakeholder engagement is focused on operations of Canadian companies outside Canada.<sup>72</sup>

Within Canada, most of the literature on stakeholder engagement focuses on engagement with Indigenous peoples.<sup>73</sup> Indigenous engagement is, however, unique given the constitutionally enshrined inherent Aboriginal and Treaty rights of Indigenous people and the judicially affirmed mandatory

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<sup>66</sup> Nartey et al argue that “... where the rule of law is weak, the strategy of status climbing appears favourable as compared to bridging ... The impact of accessing information for enhancing cooperation and reducing conflict with stakeholders is only evident in countries with strong rule of law, where we also observe a moderating role of firm and stakeholder centrality”. The authors supported this position, in part, by referring to Canada’s Rosia Montana Gold Corporation’s failed attempt to build a gold mine in Romania, *Ibid* at 385, 371.

<sup>67</sup> Newenham-Kahindi, *supra* note 49 at 398 – 399.

<sup>68</sup> Eaton, *supra* note 49, 12 – 17.

<sup>69</sup> Tarke Wanvik, “Governance Transformed into Corporate Social Responsibility (CSR): New Governance Innovations in the Canadian Oil Sands” (2016) 3 *The Extractive Industries and Society* 517 – 526.

<sup>70</sup> *Ibid* at 524.

<sup>71</sup> Tuulentie et al, *supra* note 49 at 106.

<sup>72</sup> Jacob Damstra, “Heroic or Hypocritical: Corporate Social Responsibility, Aboriginal Consultation, and Canada’s Extractive Industries Strategy” (2015) 25 *Transnational Law & Contemporary Problems* 153 at 154.

<sup>73</sup> See generally Viviane Weitzner, “Indigenous Participation in Multipartite Dialogues on Extractives: What Lessons Can Canada and Others Share?” (2010) 30:1/2 *Canadian J of Dev Studies* 87 – 109; Andre Xavier et al, “Mining for First Nations in Canada” (2015) 15:1 *Global Journal of Mgt and Business Research (G)* 31 – 43; Shin Imai, “Consult, Consent, and Veto: International Norms and Canadian Treaties” in John Borrows ed., *The Right Relationship* (Toronto: Toronto University Press, 2017) 370 – 408; Leah Horowitz et al, “Indigenous Peoples’ Relationships to Large-scale Mining in Post-Colonial Contexts: Toward Multidisciplinary Comparative Perspectives” (2018) 5 *The Extractive Industries and Society* 404 – 414; Brendan Boyd & Sophie Lorefice, “Understanding Consultation and Engagement with Indigenous Peoples in Resource Development” (2019) 12:22 *SPP Communique* 1 – 12; Terry Mitchell, “Realizing Indigenous Rights in the Context of Extractive Imperialism: Canada’s Shifting and Fledgling Progress Towards the Implementation of UNDRIP” (2019) 12:1 *Intl J of Critical Indigenous Studies* 1 – 15.

requirement to consult and accommodate.<sup>74</sup> However, the argument has been made that the constitutionally enshrined and judicially affirmed notion of consultation is narrow, hence, necessitating the application of international RBC instruments, which as Damstra points out, have not been applied by the Canadian government to Canadian extractive companies within Canada.<sup>75</sup> The United Nations Declaration on the Rights of Indigenous People (UNDRIP) is the most referenced international instrument in the identified literature on Indigenous engagement. In the extractive sector context, literature on Indigenous engagement, frequently references the concept of free, prior, and informed consent, which is one of the UNDRIP's key provisions.<sup>76</sup> Other RBCs considered relevant for Indigenous engagement include the UNGPs and OECD Guidelines for Multinational Enterprises (MNEs). In addition to these tools, Seck considers the provisions and implications of IFC Performance Standards, the OECD Stakeholder Engagement Guidance, and the reports and decisions of the IFC's Compliance Advisor Ombudsman (CAO) and OECD National Contact Point (NCP).<sup>77</sup>

Referencing the Stakeholder Engagement Guidance, Seck notes that if a company concludes through its due diligence processes that a project requires consent and such consent has not been given, "activities should not proceed unless FPIC is subsequently forthcoming".<sup>78</sup> This position goes beyond the more formally recognized government endorsed duty to consult in Canada, suggesting the need to mainstream RBC tools for Indigenous engagement. However, in its 2018 Principles Respecting Canada's Relationship with Indigenous Peoples, the government of Canada recognizes that meaningful engagement with Indigenous peoples entails aiming to secure FPIC whenever the government proposes to take actions which have an impact on Indigenous rights.<sup>79</sup> The government describes the commitment as going beyond the legal duty to consult,<sup>80</sup> although this falls short of an explicit requirement for Indigenous consent and still allows for infringement when justified.<sup>81</sup> Elsewhere, Simons and Collins highlight the obligation of the Canadian government to align its laws with the decision of the Inter-American Commission on Human Rights in the case of Maya Indigenous Communities of the Toledo District (Belize),<sup>82</sup> which, in interpreting articles XVIII and XXIII of the American Declaration of the Rights and Duties of Man, recognized the obligation to obtain the free prior and informed consent of Indigenous people before the "granting of concessions to exploit the natural resources of Indigenous territories".<sup>83</sup>

Stakeholder engagement, however, does not mean the same thing to Indigenous people, industry, or government. Boyd and Lorefice, through an analysis of 75 publicly available documents on consultation, identified some of these differences to include different perceptions of what consent

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<sup>74</sup> See Constitution Act, 1982, s. 35; *Delgamuukw v. British Columbia* [1997] 3 SCR 101; *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 511; *Mikisew Cree First Nation v. Canada (Minister OF Canadian Heritage)* [2005] 3 SCR 388; *Rio Tinto Inc. cv. Carrier Sekani Tribal Council* [2010] 2 SCR 650; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 2 SCR 257.

<sup>75</sup> Damstra, *supra* note 72 at 154 – 155.

<sup>76</sup> See UNDRIP, Art. 35(2); Penelope Simons & Lynda Collins, "Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective" (2010) 6:2 *Journal of Sust Dev Law and Practice* 178 – 216; Seck, *supra* note 37 at 67; Damstra, *Ibid* at 161 – 162; Boyd & Lorefice, *supra* note 69 at 5; Mitchell, *supra* note 73; Weitzner, *supra* note 73 at 89.

<sup>77</sup> Seck, *supra* note 37, 71 – 94.

<sup>78</sup> *Ibid* at 94. See also OECD Due Diligence Guidance for Meaningful Engagement, *supra* note 33 at 98.

<sup>79</sup> Department of Justice Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (2018) <<https://www.justice.gc.ca/eng/csj-sjc/principles.pdf>>, principle 6.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* at principle 7.

<sup>82</sup> *Maya Indigenous Communities of the Toledo District (Belize)* (2004), Inter-Am CHR No 40/04, para. 142.

<sup>83</sup> Simons & Collins, *supra* note 76 at 195.

means (consent means consensus to Indigenous people, but veto to industry and government), motives for consulting (autonomy/sovereignty for Indigenous people, adherence to the law for government, and economic benefits for businesses), and reasons for desiring early engagement (increased involvement in decision making for Indigenous people, meeting timelines for government, and cost effectiveness for industry).<sup>84</sup> They argue that understanding these differences are first steps to dealing with conflict over consultation.<sup>85</sup> The use of developmental gaps in Indigenous communities and the promise to ‘address’ those gaps as leverage by extractive companies during consultation has been highlighted as contrary to the notion of ‘free consent’.<sup>86</sup>

In what she describes as ‘extractive imperialism’, Mitchell notes that extractive companies engage in ways steeped in (subtle) coercion and inconsistent with Indigenous cultural frameworks and worldviews.<sup>87</sup> She argues that a rights-based resource development model is the “essential pathway to reconciliation and sustainable development for Canada”.<sup>88</sup> Weitzner draws out lessons for Indigenous engagement from the MAC-initiated Whitehorse Mining Initiative (WMI). She highlights flaws including lack of grassroots Indigenous involvement, limited human and financial resources, the absence of Indigenous led multipartite dialogues, and the exclusion of Indigenous women.<sup>89</sup> In reviewing subsequent multipartite initiatives including the National Orphaned/Abandoned Mines Initiative (NOAMI), Mining Sector Sustainability Table, MAC’s Community of Interest and the TSM, Weitzner argues that systemic flaws have been replicated and that “there is very little evidence to suggest that institutional learning has taken place or progress has been made in Indigenous participation”.<sup>90</sup> Fitzpatrick et al, however, seem to conclude differently as they argue that the lessons learnt from the WMI have informed the TSM’s more systematic approach to stakeholder participation during implementation, as well as the premium the TSM places on monitoring, verification, and reporting.<sup>91</sup>

Weitzner’s reference to the non-involvement of Indigenous women in 2010 has been reiterated in recent years by scholars who argue that both international and Canadian CSR laws and policies are largely ‘gender blind’.<sup>92</sup> There is, however, a growth in the literature on gendered dimensions of the

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<sup>84</sup> Boyd & Lorefice, *supra* note 73 at 3. See also Brendan Boyd & Sophie Lorefice, “Understanding Consultation and Engagement of Indigenous Peoples in Resource Development: A Policy Framing Approach” (2018) 61:4 Canadian Public Administration 572 – 595 (Policy Framing Approach). Imai also drew the distinction between consent and veto emphasizing that whereas veto is absolute, consent is not. He further proposed a consent standard based on three building blocks – continuing Indigenous interest in traditional lands despite the “surrender clause”, need to identify land needed for a meaningful right to harvest, and the requirement for Indigenous consent for “further taking up of lands”. See Imai, *supra* note 73 at 386 – 389, 395 - 406.

<sup>85</sup> Boyd & Lorefice, “Understanding Consultation and Engagement with Indigenous Peoples in Resource Development”, *supra* note 73 at 6.

<sup>86</sup> Mitchell, *supra* note 73 at 1 – 11.

<sup>87</sup> *Ibid*, 10 – 11.

<sup>88</sup> *Ibid*, 11.

<sup>89</sup> Weitzner, *supra* note 73 at 94 – 95.

<sup>90</sup> *Ibid* at 94.

<sup>91</sup> Patricia Fitzpatrick et al, “From Whitehorse Mining Initiative Towards Sustainable Mining: Lessons Learned” (2011) 19 Journal of Cleaner Production 376 at 379 – 380.

<sup>92</sup> Sara L. Seck, “Climate Change, Corporate Social Responsibility, and the Extractive Industries” (2019) 31:3 Journal of Env Law and Practice 271 at 273. See also Glevys Rondon, “Canadian Mining in Latin America: Corporate Social Responsibility and Women’s Testimonies” (2009) 27:1 Canadian Women Studies 89 – 96; Sara L. Seck & Penelope Simons, “Resource Extraction and the Human Rights of Women and Girls” (2019) 31:1 Canadian Journal of Women and the Law (CJWL) iv, v.



extractive sector,<sup>93</sup> with most of the identified literature published between 2017 and 2019. The 2017 Due Diligence Guidance for Meaningful Engagement, which has a dedicated annex (annex C) on ‘Engaging with Women’, is currently the singular international RBC tool to address the gendered implications of extraction frontally and extensively.<sup>94</sup> In the Canadian context, Simons and Seck highlight Canada’s Feminist International Assistance Policy (FIAP) as an “important step forward”.<sup>95</sup> They note, however, that the FIAP does not address the effect of resource extraction on the rights of women and girls, or socio-environmental and human rights implications of the Canadian extractive sector in host states.<sup>96</sup> Morales, also highlights these shortcomings in the FIAP. Further, referencing the report of the 2014 KAIROS symposium, she points to the distinct and immense vulnerability of Indigenous women to the social, health and environmental impacts of extractive projects, the connection between such projects and violence against women, limited benefits to women, and women’s exclusion from official consultation and IA processes.<sup>97</sup> Morales argues that the most effective way to protect Indigenous women and girls from the adverse effects of extractive projects through the human rights framework, is to provide a space for Indigenous women to participate in consultation and decision-making processes, include them in negotiations concerning benefit sharing, and provide opportunities for them to “bring forward their own understandings of the laws that govern them”.<sup>98</sup>

Using the example of violence against women in the context resource extraction, Simons and Handl, engage in a feminist critique of the UNGPs and show how this important RBC tool fails to address women’s experiences or to protect women’s rights.<sup>99</sup> Among other things, they point to the UNGPs’ the treatment of women as monolithic, one-dimensional victims,<sup>100</sup> and of sexual violence as something that happens only in exceptional circumstances such as armed conflict, rather than it being treated as a pervasive issue across all business sectors.<sup>101</sup> The argument against considering women solely as agentless ‘victims’ and on the contrary understanding the various diverse contexts in which women engage with, or are affected by the extractive sector is one of the key emerging trends in RBC scholarship.<sup>102</sup> Gendered analyses of the extractive sector are considerably more theoretical than applied, with a seeming preference for feminist-based analysis.<sup>103</sup> Only a few of the identified articles

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<sup>93</sup> Penelope Simons & Melisa Handl, “Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction” 2019 31:1 CJWL 114.

<sup>94</sup> Seck, *supra* note 92 at 289.

<sup>95</sup> Sara L. Seck & Penelope Simons, “Resource Extraction and the Human Rights of Women and Girls: Policy Recommendations Associated with the Feminist International Assistance Policy” DOI: [10.13140/RG.2.2.19594.31680](https://doi.org/10.13140/RG.2.2.19594.31680)

<sup>96</sup> *Ibid* at 3.

<sup>97</sup> Sarah Morales, “Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?” (2019) 31:1 CJWL 58 at 62. See also KAIROS, “Gendered Impacts: Indigenous Women and Resource Extraction” (Executive Summary for Kairos Symposium, Ottawa, 20 November 2014) 6 – 7.

<sup>98</sup> *Ibid* at 61 – 62, 86 – 89. The involvement of women in the Voisey’s Bay project by the Voisey’s Bay Nickel Company (VBNC) (owned by INCO Ltd.) was highlighted by Morales. She notes that the Tongaminut Inuit Annait (TIA) which represents women in Northern Labrador lobbied the Labrador Inuit Association on the need of including gender equality provisions in mining agreements. While initially rejected by INCO, the provision eventually made it into the agreement.

<sup>99</sup> Simons and Handl, *supra* note 93 at 128.

<sup>100</sup> *Ibid* at 130.

<sup>101</sup> *Ibid* at 122 – 128.

<sup>102</sup> See Kuntala Lahiri-Dutt, “Do Women Have a Right to Mine?” (2019) 31:1 CJWL 1 – 23; Katy Jenkins, “Women, Mining and Development: An Emerging Research Agenda” (2014) 1 *The Extractive Industries and Society* 329 – 339.

<sup>103</sup> See Sara O’Shaughnessy, “Gender as Contradiction: From Dichotomies to Diversity in Natural Resource Extraction” (2011) 27 *Journal of Rural Studies* 134 – 143; Sara L. Seck, “Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty” (2017) *Transnational Law & Contemporary Problems* 383 – 413; Simons & Handl, *supra* note 93; Seck, (CJWL?)*Ibid*; Koutouki, *Ibid*;

and reports considered case studies in their analysis.<sup>104</sup> The human rights analytical framework has also been used (to varying extents) in all the identified literature, apart from one article.<sup>105</sup> Similar to the Indigenous relations centrality of stakeholder engagement discourse in the Canadian context, Canadian literature on gender and the extractive sector is also mostly focused on Indigenous women.<sup>106</sup> While this focus is justified given that extractive projects in Canada are overwhelmingly undertaken on Indigenous lands,<sup>107</sup> mining projects also have implications for non-Indigenous people. We found no literature in the Canadian context which has considered the distinct implications of mining projects for non-Indigenous women.<sup>108</sup>

In all, while there are considerable international RBC due diligence tools with guidance on stakeholder engagement, gender, and human rights, there is no domestic policy or law in Canada mandating human rights due diligence by companies. Few RBC scholars have made a case for such law or policy. McKnight, for example, referenced seven jurisdictions with actual or prospective mandatory human rights due diligence and/or reporting laws.<sup>109</sup> However, the lack of laws on human rights due diligence in Canada strengthens the case for an alignment of due diligence and IA. Thereby, due diligence could benefit from the statutory and peremptory nature of IA. It is worth noting that the language of human rights due diligence is less common in the literature compared to the language of IA. This is, more so, in the literature on stakeholder engagement and gender. We turn more specifically to the question of the intersection between due diligence and IA in the next section.

### ***3.3 What is the Intersection between Responsible Business Conduct Guidance Tools, Due Diligence, and Impact Assessment, and what are the implications for stakeholder engagement?***

Different modes of IA are referenced in RBC literature focused on the Canadian extractive sector. While Human Rights Impact Assessment (HRIA) is most commonly discussed, Social Impact Assessment (SIA) and Gender Impact Assessment (GIA) are also referenced. None of the identified sources spoke expressly to the distinction between IA and due diligence, as RBC scholars tend to approach the relationship between both concepts differently. RBC literature either refers to IA as a “component” of due diligence or as a “tool” of due diligence. For example, in proposing a Canadian approach to HRDD, McKnight argues that “human rights impact assessments should be seen as integral

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<sup>104</sup> See Morales, *supra* note 97.

<sup>105</sup> O’Shaughnessy made no reference to human rights. See O’Shaughnessy, *supra* note 103.

<sup>106</sup> See generally Adam Bond and Leah Quinlan, “Indigenous Gender-based Analysis for Informing the Canadian Minerals and Metals Plan” (2018) Native Women’s Association of Canada Policy Paper; Elena Nightingale et al, “The Effects of Resource Extraction on Inuit Women and their Families: Evidence from Canada” (2017) 25:3 Gender & Development 367 – 385; Konstantia Koutouki, “A Rights-based Approach to Indigenous Women and Gender Inequities in Resource Development in Northern Canada” (2018) 27:1 RECIEL 63 – 74; Sara L. Seck, “Relational Law and the Reimagining of Tools for Environmental Justice” (2019) 31:1 CJWL 151 – 177; Morales, *supra* note 82; Raywat Deonandan et al, “Mining the Gap: Aboriginal Women and the Mining Industry” (2016) <<https://ruor.uottawa.ca/handle/10393/35187>>; Deborah Stienstra et al, “Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada’s North” (2016) <<http://fnn.criaw-icref.ca/en/product/gba-energy-resource-extraction#.Xlg5M2hKhEY>>.

<sup>107</sup> Approximately 180 producing mines and more than 2500 active exploration properties are within 200 kilometers of about 1200 Indigenous communities in Canada. MAC, “Facts and Figures 2019: The State of Canada’s Mining Industry” (2019) <<https://mining.ca/wp-content/uploads/2020/01/FF-English-Web-1.pdf>>.

<sup>108</sup> But see Simons & Handl, *supra* note 93 where they discuss the intersectional impacts of violence against women in the context of resource extraction, at 121 - 122.

<sup>109</sup> France, Switzerland, United Kingdom, California, Australia, Netherlands and Germany. See McKnight, *supra* note 33 at 5.

... in a deeper process that is ongoing, iterative, proactive and reactive”.<sup>110</sup> The UNGPs and OECD RBC Due Diligence Guidance also seem to represent IA as a “component” of the HRDD process.<sup>111</sup> Salcito and Wielga, however, have suggested that the definition of due diligence in the UNGPs parallels that of HRIA, and that one reason for not using the term HRIA in the UNGPs was because of the absence at the time of an accepted HRIA methodology.<sup>112</sup>

Other scholars have described HRIA as “a means by which business may meet their social obligation to perform their human rights due diligence”<sup>113</sup> or as a preventative tool which “offers a mechanism for undertaking human rights due diligence as urged by the UN Guiding Principles on Business and Human Rights”.<sup>114</sup> Coumans has also suggested that the “evolving expectations on corporations to be able to demonstrate due diligence led to the development of human rights impact assessment”.<sup>115</sup> These representations have different implications. To describe impact assessment (e.g. HRIA) as a component of HRDD suggests that HRDD is broader than HRIA. It, therefore, becomes important to identify other dimensions of HRDD that do not fall within HRIA’s remit. On the other hand, representing HRIA as a ‘means’ or ‘tool’, implies that HRDD is an end to be met rather than a process to be followed. HRIA, therefore, becomes the process through which HRDD is fulfilled. In any case, what is clear from the literature is that IA, particularly, HRIA, is an essential component of HRDD, and by extension, the responsible business conduct of extractive companies.

According to Coumans, the idea of using HRIA as a mechanism through which Canadian extractive companies meet “corporate social responsibility and human rights standards” was proposed as far back as 2005 by the Parliamentary Standing Committee on Foreign Affairs and International Trade (SCFAIT).<sup>116</sup> While this recommendation was not implemented and there is no requirement under Canadian law for Canadian companies to carry out HRIA, companies have done so either under host State laws, or pursuant to the requirements of the IFC Performance Standards when seeking funding from the IFC or an export credit agency, or in a bid to obtain a social license to operate (SLO). The conduct and effectiveness or otherwise of these HRIAs have been considered in the literature. Maher compares Barrick Gold’s ‘collaborative’ due diligence (used interchangeably with HRIA) process in

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<sup>110</sup> McKnight, *supra* note 43 at 2. Similarly, Simons argue that due diligence under the Guiding Principles should include human rights impact assessment (HRIA). See Simons, *supra* note 34 at 183.

<sup>111</sup> See UNGP, principle 19; OECD Due Diligence Guidance on Responsible Business Conduct, para. 2.2.

<sup>112</sup> Kendyl Salcito and Mark Wielga, “Due Diligence in the Mining Sector: An Expanding Concept” in Sumit Lodhia ed., *Mining and Sustainable Development: Current Issues* (Oxon: Routledge, 2018) 90.

<sup>113</sup> Penelope Sanz and Robin Hansen, “The Political Life of a Human Rights Impact Assessment: Canadian Mining in the Philippines” (2018) 7 *Canadian Journal of Human Rights* 97 at 101.

<sup>114</sup> Columbia Center on Sustainable Investment, Danish Institute for Human Rights, and Sciences Po Law School Clinic, *A Collaborative Approach to Human Rights Impact Assessments*, March 2017, 13 – 14. See also Rajiv Maher, “Managerialism in Business and Rights: Lessons on the Social Impacts of a Collaborative Human Rights Impact Assessment of a Contested Mine in Chile” in Matthew Mullen et al (eds.), *Navigating a New Era of Business and Human Rights Institute of Human Rights and Peace Studies* (Mahidol University and Article 30, 2019) 63; Holly Cullen, “The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond” (2012) *George Washington Intl Law Rev* 743 at 749.

<sup>115</sup> Catherine Coumans, “Do No Harm? Mining Industry Responses to the Responsibility to Respect Human Rights” (2017) 38:2 *Canadian Journal of Development Studies* 272 at 277.

<sup>116</sup> Catherine Coumans, “Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms” (2012) 45 *UBC Law Review* 651 at 669. See also Charis Kamphius, “Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account” (2012) 13 *German Law Journal* 1459 at 1466 – 1467. Kamphius also refers to various recommendations for the Canadian government to monitor the human rights impacts of Canadian companies abroad and require them to undertake HRIA of proposed projects. Charis Kamphius, “Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement” in Isabel Feichtner et al, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Switzerland: Springer, 2019) 486 – 488.

respect of its Pascua Lama Project in the Huasco Valley in Chile, to the separate community led HRIA conducted for the same project.<sup>117</sup> The ‘collaborative process’ was mired in controversy due to the alleged manipulation and coercion, and the company never addressed any of the findings.<sup>118</sup> Maher concludes that the RBC HRIA process has been “captured by the overwhelmingly dominant ideology of managerialism, where control from companies over their human rights impacts is key” and that this process has the “ability to co-opt, silence local resistance and further entrench internal community fissures whilst giving the illusion of democratic structures and processes”.<sup>119</sup> Coumans reached a similar conclusion in her consideration of Goldcorp’s Marlin gold mining project in Guatemala. She noted that despite years of opposition to the project, the company with some socially responsible investors (SRIs) commenced an HRIA process in 2008 without involving any representatives from the community.<sup>120</sup> Like the Pascua Lama HRIA process, the recommendations from the Marlin gold process were not implemented. Coumans concluded that human rights tools should not be used without the prior consent of the affected people and such tools can be used by companies to “delay and avoid necessary action to prevent human rights violations and/or address the harm, and to thwart community agency, resulting in a continuation of human rights abuses”.<sup>121</sup> She also notes that there is higher risk when the process is controlled by “corporations whose interests would be affected by the outcome”.<sup>122</sup> Within Canada, Wanvik notes that upon completion of EIA processes, the perception of a possible bias in favour of industry development is high among the Indigenous communities.<sup>123</sup>

From the above examples, it is clear that voluntary HRIA (or broader HRDD) is not a silver bullet for addressing actual or potential abuses by extractive companies. As suggested by Coumans and Maher, RBC guidance tools could in fact be captured by companies and used in a manner that may in the end be harmful. To reduce the likelihood of corporate capture and the self-serving interpretation and application of such tools, Coumans argues that human rights tools should be incorporated into legislation.<sup>124</sup> Simons & Macklin propose the establishment of an independent expert-led Corporate Social Responsibility (CSR) Agency, as part of a comprehensive regulatory framework, which would have the mandate of overseeing and assessing pre-investment HRIAs and monitoring post-investment conduct.<sup>125</sup> They suggest that one option would be to have the HRIA conducted by a team commissioned by the CSR agency in accordance with a format developed in consultation with stakeholders and the company and approved by the agency.<sup>126</sup> If the project were to be designated as high risk, in that its impacts would not be amenable to mitigation, it would be considered ineligible for government support.<sup>127</sup> It is doubtful if this consequence is sufficient to deter a company from

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<sup>117</sup> Maher, *supra* note 114 at 67.

<sup>118</sup> *Ibid.* The community led HRIA found that “Barrick Gold’s corporate practices destabilised the organizations of the Diaguaita people and contributed to disintegrating their social cohesion”. *Ibid.*

<sup>119</sup> *Ibid* at 68.

<sup>120</sup> Coumans, *supra* note 115 at 278.

<sup>121</sup> *Ibid* at 279.

<sup>122</sup> *Ibid.* Coumans also referred to Barrick’s operation-level grievance mechanism at the Porgera Joint Venture mine in Papua New Guinea. *Ibid* at 279 – 283.

<sup>123</sup> Wanvik, *supra* note 69 at 524.

<sup>124</sup> *Ibid* at 285.

<sup>125</sup> Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014) 277, 320 - 328.

<sup>126</sup> *Ibid* at 321. Macklin, however, recognizes instances where the agency could delegate specific components of the HRIA process to the applicants or their consultants on “mutual consent” where anticipated risks are low. Such assessments will be subject to subsequent verification of the agency.

<sup>127</sup> *Ibid* at 327.

proceeding with a project with potential high returns.<sup>128</sup> While briefly alluding to the potential illegitimacy or imperialistic connotation of a home state exercising unilateral jurisdiction,<sup>129</sup> Simons and Macklin do not sufficiently consider this very important objection to an home state's exercise of IA jurisdiction.

Although recognizing the existence of other “practical tools”, Aizawa et al suggest that companies often implement the “specific methodology of HRDD” through a HRIA process.<sup>130</sup> The recognition that HRIA could either be standalone or conducted alongside more conventional EIA or SIA,<sup>131</sup> raises the question of why the identified Canadian RBC literature, despite referring to HRIA (or ESIA) copiously, in most cases fails to reference IA laws (the former Canadian Environmental Assessment Act or more recent Impact Assessment Act).<sup>132</sup> While the argument could be made that Canadian IA laws have not explicitly referenced human rights as a factor to consider, it has been referenced in few cases (although tangentially) in IA reports.<sup>133</sup> More commonly, IA reports have highlighted potential impacts of projects on Indigenous rights as a factor to consider in the IA process.<sup>134</sup> The relevance of IA law to Indigenous rights is even more apparent now given its explicit inclusion in the Impact Assessment Act.<sup>135</sup> Although it has been argued that HRIA is different from ESIA,<sup>136</sup> ESIA can be extended to address human rights issues. In fact, in Vanclay in proposing core values and fundamental principles for Social Impact Assessment (SIA) focused on the consideration of human rights, arguing that SIA seeks to defend and uphold human rights.<sup>137</sup>

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<sup>128</sup> It is worth noting that government support has previously been tied to company's cooperation with voluntary dispute resolution mechanisms like Canada's NCP Contact Point for the OECD Guidelines for MNEs and the Canadian Ombudsman for Responsible Enterprise. Despite this, companies are known to have refused to cooperate with these mechanisms. See Global Affairs Canada, *supra* note 9.

<sup>129</sup> For more on unilateral jurisdiction, see Sara L Seck, “Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance” (2008) 46 *Osgood Hall Law Journal* 565 at 603.

<sup>130</sup> Motoko Aizawa et al, “Financing Human Rights Due Diligence in Mining Projects” in Lodhia ed., *supra* note 112 at 101.

<sup>131</sup> *Ibid* at 101.

<sup>132</sup> One exception is Harding's recent unpublished paper which considers extensively how the IAA can be interpreted alongside the UNGPs, OECD Guidance and other international standards. See Moira Harding, “International Guidance for Canadian Extractive Industry Proponents: How OECD Guidelines, the UNGPs, and the UNDRIP can Inform Gender-based Analysis, Indigenous Rights, and Human Rights in Domestic Policy and Guidelines under the Canadian Impact Assessment Act” Major Paper, Business and Environment, Dalhousie University (Fall 2019).

<sup>133</sup> See for example, the Lower Churchill Project IA report which notes that “Nalcor also stated that it would consider using “name-hire” as an approach to increasing female participation in the work force, and the use of the Human Rights Chapter H-14 article 19.1, which would allow an employer to give an advantage to groups that are traditionally disadvantaged”. Joint Review Panel, *Report of the Joint Review Panel: Lower Churchill Hydroelectric Generation Project*, 2011 CEAA Reference No. 07-05-26178 at 201, 206.

<sup>134</sup> See generally, Bram Noble, “Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment” (Macdonald-Laurier Institute, 2016).

<sup>135</sup> IAA, ss. 16(1)(c), 22(1)(c), 36(2)(d), 63(1)(d). The 2012 CEAA provides that environmental assessment “may take into account community knowledge and aboriginal traditional knowledge” (CEAA, s. 19(3)). Further, effects (health and socio-economic, physical and cultural heritage etc.) of designated projects on aboriginal people are considered as environmental effects that should be taken into consideration under the CEAA (CEAA, s. 5(c)). The IAA, however, mandates that the responsible authority “must” take into account “considerations related to Indigenous cultures raised with respect to the designated project” and “any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body ...” (IAA, s. 22(1) (l)(q)).

<sup>136</sup> Simons, *supra* note 34 at 187.

<sup>137</sup> See Frank Vanclay, “International Principles for Social Impact Assessment” (2003) 21:1 *Impact Assessment and Project Appraisal (IAPA)* 5 – 12. Vanclay has, however, since acknowledged SIA, as practised, often does not consider human rights sufficiently and that there are significant divergences between SIA and HRIA (standards applied, relevance of project benefits and recognition of stakeholders as rights-holders and duty-bearers). See Nora Gotzmann, Frank Vanclay, and Frank

Expanding SIA to include HRIA provides an inroad for the application of the new IAA given that the Act now explicitly recognizes the consideration of social effects.<sup>138</sup> Another inroad is through sustainability assessment. In the sustainability criteria proposed for the MacKenzie Gas Project, Gibson suggests the consideration of the effects of projects on “rights and entitlements”.<sup>139</sup> This is relevant, as the IAA now recognizes contribution to sustainability as one of the factors to be considered when assessing a project.<sup>140</sup> The argument is that although the explicit incorporation of human rights in IA law would be more ideal, the current legislative framework (IAA) could be applied. However, while this might apply to mining companies within Canada, there remains the question of how the IA laws apply to Canadian mining companies outside Canada. Apart from Simons and Macklin’s recommendation for the establishment of a CSR Agency, not much has been done on this question. The IAA (and, previously, the CEAA) mandates federal agencies not to carry out a project or provide financial assistance for projects carried out outside Canada unless the federal authority determines the project is not likely to cause adverse environmental effects or that such adverse effects are justified.<sup>141</sup> Indigenous rights are to be considered except where the project is to be wholly undertaken outside of Canada.<sup>142</sup> Community knowledge and public comments are, however, factors to be considered.<sup>143</sup> This provision is consistent with the policy of Global Affairs Canada (GAC) and Export Development Canada (EDC) making support for Canadian companies abroad contingent. A minimum amendment to sections 83 and 84 tying support (not just financial support) to IA taking into consideration, among other things, Indigenous rights within and outside Canada, would make these provisions more consistent with RBC instruments. Although the EDC is excluded from being considered a ‘federal authority’ under the IAA, other relevant non-excluded agencies of government (e.g. Global Affairs Canada; Trade Commissioner Service) can demand that extractive companies commit to conducting IAs satisfying the basic conditions of meaningful consultation and undertaking mitigation measures in respect of significant adverse effects, to be eligible for government support abroad.<sup>144</sup> There is, however, no indication in the literature or in GAC policy documents, that sections 83 and 84 of the IAA (or its earlier iteration in the CEAA) have been explored or applied in respect of Canadian extractive companies abroad.<sup>145</sup>

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Seier, “Social and Human Rights Impact Assessments: What Can They Learn From Each Other?” (2016) 34:1 IAPA 14 – 23. It was noted elsewhere that “early signs point to HRIA and SIA co-existing, with HRIA being conducted primarily to demonstrate due diligence”. See Ana Esteves, Daniel Franks and Frank Vanclay, “Social Impact Assessment: The State of the Art” (2012) 30:1 IAPA 34 at 38.

<sup>138</sup> IAA, s. 22(1)(a).

<sup>139</sup> Robert Gibson, “Sustainability-based Assessment Criteria and Associated Criteria and Associated Frameworks for Evaluations and Decisions: Theory, Practice and Implications for the Mackenzie Gas Project Review” (26 January 2006) Report Prepared for the Joint Review Panel for the Mackenzie Gas Project.

<sup>140</sup> IAA, s. 22(1)(h).

<sup>141</sup> IAA, s. 83(a)(b).

<sup>142</sup> IAA, s. 84(1)(2).

<sup>143</sup> IAA, s. 84(1)(c)(d).

<sup>144</sup> See generally Sara Seck, “Strengthening Environmental Assessment of Canadian Supported Mining Ventures in Developing Countries” (2001) 11 Journal of Env Law and Practice 1 – 62 for an early history of the CEAA regulations on projects outside of Canada regulations.

<sup>145</sup> The EDC Environmental Advisory Services, however, considers the environmental and social impacts of projects using the IFC Performance Standards on Environmental and Social Sustainability. See EDC, “Managing Environmental and Social Assessment” <<https://www.edc.ca/en/about-us/corporate/corporate-sustainability-responsibility/environment-people/environment-social-assessment.html>>. See Seck, *ibid.*; see further Sara L Seck & Daniela Chimento dos Santos, “Export Credits, Sovereign Debt, and Human Rights” in Illias Banketas & Cephas Luminia, eds, *Sovereign Debt & Human Rights* (OUP, 2018) 84-105.

Other themes in the literature include the centrality of the issues of positionality and power to mandate HRIA and by extension HRDD.<sup>146</sup> These themes surface quite evidently in the gender context. Seck argues that embedding gender-based analysis into environmental IA processes of the extractive industry is precisely the kind of tool needed to support respect for the human rights of women and girls.<sup>147</sup> Through a gender analysis of three IAs (Voisey’s Bay Mine, Meadowbank Gold Project, and MacKenzie Valley Gas Project), Dalseg et al find that the IA processes failed to account for “the totality of northern livelihoods” (rather focusing more on gender and employment), privileged resource extraction, entrenched gender hierarchies and undermined Indigenous mixed economies.<sup>148</sup> The inclusion of gender in the 2019 IAA further reinforces the case for integrating IA and RBC, as existing RBC tools could be used to design guidelines and/or regulations on gender. Existing RBC tools can also be incorporated by reference in Regulations or Guidelines to the IAA.<sup>149</sup> These are ways through which RBC tools, which are generally non-binding, could be given a force of law without directly legislating them into law. There is no shortage of research on gender impact assessment/gender-based analysis.<sup>150</sup> There is also a steady growth in gender-based analysis plus (GBA+) research on how the IAA’s provision on gender can be operationalized.<sup>151</sup> Despite GBA+ being described as a “common internationally recognized best practice”,<sup>152</sup> post-IAA GBA+ literature fail to reference these international practices, some of which are contained in RBC tools.<sup>153</sup> Similarly, the draft interim guidance on GBA plus appears not to have drawn from any international gender focused RBC tool.<sup>154</sup>

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<sup>146</sup> Sans and Hansen, *supra* note 113 at 99 - 131.

<sup>147</sup> Seck, “Relational Law and the Reimagining of Tools for Environmental Justice”, *supra* note 106 at 166.

<sup>148</sup> Sheena Dalseg et al, “Gendered Environmental Assessments in the Canadian North: Marginalization of Indigenous Women and Traditional Economies” (2018) 47 *The Northern Review* 135 at 156 – 160.

<sup>149</sup> The Statutory Instruments Act provides that “the power to make a regulation includes the power to incorporate in it by reference a document – or a part of a document – as it exists on a particular date or as it is amended from time to time”. Such incorporation is allowed if the document contains elements that are incidental to or elaborate on rules, reproduced or translated from a document produced by a person or body other than the regulation-making authority or is a regulation. See Statutory Instruments Act, RSC, c. S-22 (1985) s. 18.1 (1)(2).

<sup>150</sup> See generally Arn Sauer, *Equality Governance via Policy Analysis? The Implementation of Gender Impact Assessment in the European Union and Gender-based Analysis in Canada* (Bielefeld: Transcript Verlag, 2018); Barbara Clow et al, “Gender-based Analysis Meets Environmental Assessment: Aligning Policy Mechanisms to Address the Resource Development in Canada’s North” (2016) <[http://fnn.criaw-icref.ca/en/product/gba-meets-environmental-assessment#\\_Xl6uqWhKhEY](http://fnn.criaw-icref.ca/en/product/gba-meets-environmental-assessment#_Xl6uqWhKhEY)>; Indigenous and Northern Affairs Canada, “Working Guide on Gender-based Analysis” <<https://www.aadnc-aandc.gc.ca/eng/1100100028541/1100100028545>>; Kathleen McNutt, “An Integrated Approach to Gender Equality: From Gender-based Analysis to Gender Mainstreaming” (2010) 2 JSGS Working Paper Series.

<sup>151</sup> See Nicole Peletz and Kevin Hanna, “Gender Analysis and Impact Assessment: Canadian and International Experiences” (2019) Canadian International Resources and Development Institute; Heidi Walker et al, “Gender and Diversity Analysis in Impact Assessment” (February 2019) Prepared for the Canadian Environmental Assessment Agency.

<sup>152</sup> Government of Canada, “Gender-Based Analysis Plus in Impact Assessment” (2019) <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/gender-based-analysis-plus-impact-assessment-fact-sheet.html>>

<sup>153</sup> Examples of RBC tools on Gender – OECD, OECD Due Diligence Stakeholder Engagement Guidance, Engaging with Women (Annex C); IFC, “Embedding Gender in Sustainability Reporting: A Practitioner’s Guide” (2009) <[https://www.ifc.org/wps/wcm/connect/ffb87b47-4375-4b6c-8ad4-41dc4a71a9c9/GRI-IFC\\_Full\\_Gender.pdf?MOD=AJPERES&CVID=jkC.9VB](https://www.ifc.org/wps/wcm/connect/ffb87b47-4375-4b6c-8ad4-41dc4a71a9c9/GRI-IFC_Full_Gender.pdf?MOD=AJPERES&CVID=jkC.9VB)> World Bank, “Mainstreaming Gender into Extractive Industries Projects; Guidance Note for Task Team Leaders,” World Bank Extractive Industries and Development Series #9 (August 2009); “Gender Dimensions of Artisanal and Small-Scale Mining: A Rapid Assessment Toolkit”, World Bank Gender Action Plan 2012; Global Mining Guidelines Group, “Women in Mining: Steps, Strategies and Best Practices for Gender Diversity” (18 March 2014); European Institute for Gender Equality, “Gender Impact Assessment: Gender Mainstreaming Toolkit”.

<sup>154</sup> CEAA, “Gender-based Analysis Plus in Impact Assessment (Interim Guidance)” (2019) <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/gender-based-analysis-plus.html>>

While there is relative experience in GBA (and GBA+) analysis in Canada,<sup>155</sup> the effective operationalization of the GBA+ provision in the IAA could benefit from existing RBC tools on gender.

As reflected in the RBC scholarship, public participation is a considerably well-developed theme in Canadian IA literature. However, this literature has not sufficiently considered the meaning of “meaningful participation”.<sup>156</sup> The substantive provisions on meaningful participation, particularly, in the planning phase of a project, are some of the key new provisions in the IAA.<sup>157</sup> While proposals have been made on what this meaningful participation could look like and there is an interim framework,<sup>158</sup> existing RBC tools on meaningful stakeholder engagement (taking into cognizance criticisms of these tools in RBC literature) will be helpful in designing the final framework.<sup>159</sup> Other tools promoted by international organizations which, according to Mitchell, have taken the lead in ‘regulating’ how to assess social and health impacts,<sup>160</sup> could also be useful in operationalizing the consideration of health and social factors as now required by the IAA.<sup>161</sup>

### ***3.4 Global Best Practices***

Given Australia’s similarity to Canada in terms of its colonial history, Indigenous population and large extractive sector, we primarily consider Australian literature in this section. We, also, draw lessons from European jurisdictions considering their comparatively more developed RBC practices. We lay out the findings under two sub-parts. First, we consider the RBC tools promoted to Australian and European extractive companies and how they are deployed. In the second part, we consider how the selected jurisdictions apply IA and RBC tools.

#### ***i. RBC Tools in Australia and Europe***

Australian and European companies are covered by most of the international RBC tools referenced in part 3.1. The modes of application, however, differ. In all, Australian and European States appear to be more involved in ensuring their extractive sector’s compliance with responsible business norms. The summarized findings below support this conclusion.

##### **(a) Responsible Business Conduct Relevant Reports**

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<sup>155</sup> In the extractive sector, examples of impact assessment processes where gender was considered explicitly include the Voisey’s Bay Nickel Mine project (1999) and the Red Mountain Gold Mine (2019).

<sup>156</sup> For the few identified literature on meaningful participation in IA, see Meinhard Doelle and A. John Sinclair, “Time for a New Approach to Public Participation in EA: Promoting Cooperation and Consensus for Sustainability” (2006) 26 *Env Impact Assessment Rev* 185 – 205; Gary Schneider et al, “Environmental Assessment Process Substitution: Is Meaningful Public Participation Possible?” (2009) Canadian Environmental Network; A. John Sinclair & Alan Diduck, “Reconceptualizing Public Participation in Environmental Assessment as EA Civics” (2017) 62 *Env Impact Assessment Rev* 174 – 182.

<sup>157</sup> See IAA, ss. 11, 27, 33(e)(f), 51(1)(d), 99, 181 (4.1). The only substantive provision previously under the CEAA was in respect of the IA substitution provision. CEAA, s. 34(c).

<sup>158</sup> See Meinhard Doelle and A. John Sinclair, “The Proposed Federal Impact Assessment Act: Assessment and Reform Proposals” (2018) <[https://sencanada.ca/content/sen/committee/421/ENEV/Briefs/MeinhardDoelle\\_Brief\\_e.pdf](https://sencanada.ca/content/sen/committee/421/ENEV/Briefs/MeinhardDoelle_Brief_e.pdf)>; Government of Canada, “Interim Framework: Public Participation under the Impact Assessment Act” (2019) <<https://www.canada.ca/content/dam/iaac-acei/documents/policy-guidance/pp-pp/public-participation-framework-en.pdf>>.

<sup>159</sup> See OECD, *Due Diligence Guidance on Meaningful Stakeholder Engagement*, *supra note 25*; Inter-American Development Bank, “Meaningful Stakeholder Engagement” (2019).

<sup>160</sup> R.E. Mitchell, “Comparing EIA and ESHIA for Evaluating Mining Projects” (2012) 64:8 *Mining Engineering* 87. An example of such tool is the IFC’s guidance on Health Impact Assessment. See IFC, “Introduction to Health Impact Assessment” (2009).

<sup>161</sup> IAA, s. 22(1)(a).



We identified four Australia-specific reports on business and human rights.<sup>162</sup> The reports were published between 2016 and 2017 by different bodies including the Australian Human Rights Commission (AHRC), the Australasian Centre for Corporate Responsibility (ACCR), and a law firm (Allens Linklaters) commissioned by the Australian Department of Foreign Affairs and Trade (DFAT). The four reports copiously reference the UNGPs and the OECD RBC tools. The evaluation commissioned by the DFAT is particularly commendable, as it entailed a principle-by-principle analysis of the UNGPs, highlighting current laws and policies in Australia that could satisfy the principles and how Australian companies have performed. In a separate fact sheet by the AHRC for the Australian mining and resource sector, basic Guidance on how Australian companies should operate both within and outside Australia was concisely spelt out.<sup>163</sup> Referencing the UNGPs, Australian mining companies were encouraged to embed human rights into their core practice, conduct HRIAs, comply with local laws and relevant RBC tools, implement credible and transparent systems of monitoring and reporting, communicate externally on human rights impacts and performance, and establish accessible and appropriate systems to address grievances.<sup>164</sup> Canada's Enhanced CSR Strategy compares poorly against the Australian Guidance due to its restriction to Canadian companies operating abroad, the vagueness of its provisions and specifically its failure to prescribe HRDD. Further, the Canadian Human Rights Commission has not been involved in the responsible business practices of Canadian businesses. Lessons can be drawn from the important role of the AHRC in the Australian RBC practices.

In 2018, the Dutch government commissioned a review of the RBC policies of the EU, Netherlands, France, Germany, United Kingdom, and Switzerland.<sup>165</sup> The study found that all the identified countries actively encourage international responsible business conduct and the main tools promoted are the OECD Guidelines, UNGPs, the UN Global Compact, Global Reporting Initiative, and ISO 26000. It further finds that all countries have well established awareness-raising programs and there are a growing number of domestic hard and soft instruments on due diligence. Germany, for example, plans to legislate HRDD if less than 50% of large companies do not voluntarily adopt and adhere to due diligence obligations by the end of 2020.<sup>166</sup>

#### **(b) Responsible Business Conduct Relevant Legislation**

Australia and some European countries have begun to transition from soft RBC instruments to passing laws on RBC. This is mostly done in the supply chain context and both Australia and the United Kingdom have now passed anti-modern slavery laws.<sup>167</sup> The laws only require that companies report on risks of modern slavery in their operations and supply chain rather than obligating companies to exercise due diligence to prevent slavery in supply chains. France has the most rigorous rules to date

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<sup>162</sup> AHRC, "Implementing the UN Guiding Principles on Business and Human Rights in Australia" (2016) Joint Society Statement; ACCR, "Human Rights and Australian Listed Companies" (2017); Allens Linklaters, "Stocktake on Business and Human Rights in Australia" (2017); AHRC and Ernst & Young, "Human Rights in Investment: The Value of Considering Human Rights in ESG Due Diligence" (2017).

<sup>163</sup> AHRC, "The Australian Mining and Resource Sector and Human Rights" (2015) <[https://www.humanrights.gov.au/sites/default/files/GPGB\\_mining\\_resource\\_sector\\_and\\_hr.pdf](https://www.humanrights.gov.au/sites/default/files/GPGB_mining_resource_sector_and_hr.pdf)>.

<sup>164</sup> *Ibid.*

<sup>165</sup> Ministry of Foreign Affairs of the Netherlands, "Government Policy to Stimulate International Responsible Business Conduct" (2018) <<https://www.business-humanrights.org/sites/default/files/government-policy-to-stimulate-international-responsible-business-conduct.pdf>>.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Modern Slavery Act 2018* (Austl), 2018/153; *Modern Slavery 2015* (UK).

on due diligence under its Corporate Duty of Vigilance Law,<sup>168</sup> which mandates companies to conduct due diligence in their supply chain and produce a report of the actions they have taken in this regard. Switzerland and the Netherlands are at different stages of introducing mandatory due diligence laws. All EU countries now require large companies (with over 500 employees) to report on non-financial issues. The EU's new Conflict Minerals Regulation which comes into force on 1 January 2021 is another instrument that Canada could learn from. The Regulation mandates mining, raw material traders, smelters and refiners of tin, titanium, tungsten and gold to carry out due diligence on their supply chain to ensure that minerals are imported from responsible sources only.<sup>169</sup>

### (c) **Stakeholder Engagement, Indigenous People, and Social License to Operate**

Considerable work has been done by the Australian government on Indigenous relations, particularly, in the resource sector. The 1993 Native Title Act (NTA) is a key piece of the Australian federal regulatory framework. Fordham and Robinson describe the NTA as affording Indigenous people the rights to say no or negotiate in respect of resource development and receive compensation for impacts.<sup>170</sup> Horowitz et al refer to Indigenous peoples' 'right to negotiate' with government and proponent and approach the National Native Title Tribunal (NNTT) if agreement is not reached within six months.<sup>171</sup> While this regime has been criticized for its failure to provide Indigenous Peoples with a veto power and for the limited power of the NNTT, the power to veto exists in the Northern Territory.<sup>172</sup> South Australia has also enacted the Aboriginal Heritage Act (AHA). The Guidelines to the AHA mandates the integration of aboriginal heritage into project assessment and management system throughout the project lifecycle, encourages the conduct of due diligence to ensure compliance with the AHA, and states that "gender sensitivity may also be a consideration depending on the nature of survey work".<sup>173</sup> Before a mining operator can undertake mining operations on native land in South Australia, such operations must be authorized by a native title mining agreement, Indigenous land use agreement registered under the NTA, or a determination of the Environment Resources and Development Court.<sup>174</sup> In the light of the above and other initiatives, Indigenous engagement in Australia is said to have improved considerably.<sup>175</sup> Particularly, the interpretation of the provisions of the NTA as permitting Aboriginal communities to choose the practitioners that conduct IA so as to avoid bias in the process, has been internationally applauded.<sup>176</sup> The EU has also funded several

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<sup>168</sup> Corporate Duty of Vigilance Law, Law No. 2017-3999 of 27 March 2017.

<sup>169</sup> EC, *Commission Regulation (EC) 2017/821 OF 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas*, [2017] OJ, L130/1 at 5.

<sup>170</sup> Anne Fordham and Guy Robinson, "Mapping Meanings of Corporate Social Responsibility: An Australian Case Study" (2018) *Intl J of CSR* 1 at 7.

<sup>171</sup> Leah Horowitz et al, "Indigenous Peoples' Relationships to Large-scale Mining in Post/Colonial Contexts: Towards Multidisciplinary Comparative Perspectives" (2018) 5 *The Extractive Industries and Society* 404 at 405.

<sup>172</sup> *Ibid.*

<sup>173</sup> Department of the Premier and Cabinet, "Aboriginal Heritage Guidelines for Resource Projects in South Australia" (2017, South Australia) 15, 18 - 19.

<sup>174</sup> South Australia, "Native Title and Aboriginal Land" (2020) <[http://www.energymining.sa.gov.au/minerals/land\\_access/native\\_title\\_and\\_aboriginal\\_land](http://www.energymining.sa.gov.au/minerals/land_access/native_title_and_aboriginal_land)>.

<sup>175</sup> See Geordan Graetz, "Energy for Whom? Uranium Mining, Indigenous People, and Navigating Risk and Rights in Australia" (2015) 8 *Energy Research and Social Science* 113 at 116; Tapan Sarker, "Voluntary Codes of Conduct and their Implementation in the Australian Mining and Petroleum Industries: Is There a Business Case for CSR?" (2013) *Asian J of Business Ethics* 205 at 211.

<sup>176</sup> See Jennifer Loutit, et al, "Emerging Practices in Community Development Agreements", *Columbia Center on Sustainable Development* (February 2016) 3; DIHR, "Human Rights Impact Assessment Workshop – Summary Report", (November 2016) 7.

research projects and training programs aimed at exploring new models of stakeholder engagement in the mining industry that go beyond traditional industry-community relations.<sup>177</sup>

#### (d) **Gender**

In 2019, the Danish Institute of Human Rights (DIHR) published a report on gender responsive due diligence.<sup>178</sup> The report notes that extractive companies have, generally, taken a gender-neutral approach to HRDD. To address this, a gender-responsive approach focusing on community relations, land acquisition and resettlement, security, local content, grievance resolution, and strategic social investment, was proposed. While there are various gender-based RBC tools, the DIHR is one of the most comprehensive State based resources on considering gender in HRDD. It could, therefore, be a very useful reference in developing the framework for operationalizing the GBA+ provision of the Canadian IAA. In 2018, the Australian Government produced a detailed statement on women’s economic security, accepting that the mining industry tends to be particularly discriminatory, and pledging to implement better policies to protect women impacted by or working in mining industries.<sup>179</sup>

### **ii. IA and RBC Tools in Australia and Europe**

Under this sub-heading, we consider replicable practices on the intersection between RBC and IA, gender in impact assessment, and, more generally, the meaningful participation rights-holders and stakeholders.

#### (a) **Responsible Business Conduct, Due Diligence, and Impact Assessment**

The link between RBC and IA is considered more extensively in non-Canadian literature. Three of which are particularly relevant.<sup>180</sup> Kemp and Vanclay argue that IA is integral to any human rights due diligence process and “human rights offers a powerful pathway to renew and rejuvenate the very meaning of impact assessment”.<sup>181</sup> They identify how IA can be used to meet duties under the UNGPs and the possible challenges including the difficulty of the IA community to comprehensibly communicate human rights impacts to businesses and the challenge of deciding whether human rights should be considered as an issue-specific or integrated subject in IA processes.<sup>182</sup> Bice also considers how SIAs can be bridged with CSR, which she argues share the foundational values of addressing the social effects of corporate activities on human rights, livelihoods, ethical behavior, community

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<sup>177</sup> CORDIS, “Innovation through co-creation in contemporary mining relations: a new paradigm for stakeholder engagement at resource extraction project”, *European Union*, online: < <https://cordis.europa.eu/project/id/753272>>; “The future of mineral exploration in the EU – The INFACT project”, *INFACT*, online: < <https://www.infactproject.eu/about-the-project/>>

<sup>178</sup> DIHR, “Towards Gender-Responsive Implementation of Extractive Industries Projects” (2019).

<sup>179</sup> Australian Government, “Greater Choice for Australian Women”, (2018) at 22, online: <<https://www.pmc.gov.au/sites/default/files/publications/womens-economic-security-statement-2018.pdf>>.

<sup>180</sup> Sara Bice, “Bridging Corporate Social Responsibility and Social Impact Assessment” (2015) 33:2 *Impact Assessment and Project Appraisal* 160 – 166; James Harrison, “Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment” (2013) 31:2 *Impact Assessment and Project Appraisal* 107 – 117; Deanna Kemp and Frank Vanclay, “Human Rights and Impact Assessment: Clarifying the Connections in Practice” (2013) 31:2 *Human Rights and Impact Assessment* 86 – 96.

<sup>181</sup> *Ibid* at 90, 94.

<sup>182</sup> *Ibid* at 90 – 91.

engagement, and the environment.<sup>183</sup> Bice references how the BHP Billiton-Mitsubishi Alliance, in Queensland, Australia, through its regular socio-economic IAs became aware that the local small to medium businesses lacked the experience and resources to tender successfully against larger mining contractors. This finding assisted it to design and establish the BMA Local Buying Program to meet its local content CSR commitment. She also makes the point that the proliferation of voluntary tools (which encourages cherry-picking by companies) could be addressed through the bridging of CSR and the more mandatory SIA regime.

While affirming that HRIA is the most likely mechanism for fulfilling the due diligence provision of the UNGPs, Harrison warns of the risks of uncritical integration in the light of divergencies in HRIA practice, difficulties in translating human rights obligations into analytical tools, failed attempts in jurisdictions like the United Kingdom and the failures of self-regulatory processes.<sup>184</sup> To address these risks, he proposes a mechanism for meaningful HRIA which must be credible and should be linked to “harder forms of State-based conditionality”.<sup>185</sup> Such hard conditionality is, however, not sufficient to ensure a meaningful assessment process, he proposes that if the HRIA is to be “an effective mechanism for the successful institutionalization of human rights due diligence”, it must be transparent and open (HRIAs should be disclosed), entail external participation and verification and involve independent monitoring and review.<sup>186</sup>

The HRIA Guidance and Toolbox designed by the Danish Institute for Human Rights (DIHR) is the most comprehensive State supported instrument considering the intersection of RBC, due diligence and HRIA.<sup>187</sup> The toolbox spells out the strengths and weaknesses of integrated and dedicated approaches to HRIA and the key criteria for HRIA.<sup>188</sup> With the exception of independent monitoring and verification criterion, the toolbox appears to have satisfied Harrison’s criteria. One could, however, argue that the toolbox’s access to remedy criterion which requires that impacted rights-holders have avenues to raise grievances include non-operational level avenues, to some extent, opens the possibility of the involvement of an independent arbiter.<sup>189</sup> While not expressly referencing HRDD or any RBC tool, New South Wales’ SIA Guideline for State significant Mining, Petroleum Production and Extractive Industry Development is an example of regulatory tool mandating the consideration of human rights (property, personal, and Indigenous) in an SIA.<sup>190</sup> This underpins the point made above that Canada’s IAA’s inclusion of the consideration of social and economic effects in IA gives an opening for the assessment of human rights under an legally enforceable SIA.

## **(b) Gender in Impact Assessment**

Oxfam’s Gender Impact Assessment (GIA) Guide is one of the most comprehensive stand-alone tools for Gender Impact Assessment in the extractive sector.<sup>191</sup> According to the Guide, GIA is a “vital

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<sup>183</sup> Bice, *supra* note 180 at 160.

<sup>184</sup> Harrison, *supra* note 180 at 109 – 111.

<sup>185</sup> *Ibid*, 111 – 112.

<sup>186</sup> *Ibid*, 112 – 115.

<sup>187</sup> Nora Gotzmann et al, “Human Rights Impact Assessment: Guidance and Toolbox” (Copenhagen: DIHR, 2016).

<sup>188</sup> *Ibid*, 22 – 30.

<sup>189</sup> *Ibid* at 29.

<sup>190</sup> NSW Government, “Social Impact Assessment Guideline for State Significant Mining, Petroleum Production and Extractive Industry Development” (2017), 5, 13, 34. For an analysis of the Guidelines see, Richard Parsons et al, “Developing Social Impact Assessment Guidelines in a Pre-existing Policy Context” (2019) 37:2 Impact Assessment and Project Appraisal 114 – 123.

<sup>191</sup> Christina Hill, et al, “A Guide to Gender Impact Assessment for the Extractive Industries” (Melbourne: Oxfam, 2017).

component” of the due diligence process set out in the UNGPs.<sup>192</sup> The GIA Framework requires that the GIA process be participatory, focused on the most marginalized, human rights compatible, transparent, and the findings therefrom should inform overall project outcomes.<sup>193</sup> Importantly, the Framework cautions proponents from viewing women (or men) as a homogenous group, since Indigenous women or women with assets will face different forms of discrimination to non-Indigenous women or women without assets.<sup>194</sup> Oxfam’s GIA Framework has four steps: baseline information collection, discussion and analysis of baseline information with community members, planning and agreeing to actions to avoid risk and ensure positive impact, and reviewing and undertaking ongoing consultation.<sup>195</sup> Together the GIA Guide and the DIHR Gender-Responsive Due Diligence Framework could provide the Canadian extractive sector with effective tools to ensure that they pay adequate attention to the gender impacts and dimensions of their operations.

### (c) **Meaningful Participation**

The DIHR HRIA toolbox provides that “ensuring the meaningful participation of those who are affected should be the prerequisite of a process seeking to assess human rights impact”.<sup>196</sup> Such meaningful participation must include the involvement of all stakeholders, particularly, rights-holders, at all stages of the assessment process.<sup>197</sup> Rights-holders must be enabled to access information, understand the project, learn about their rights, as well as understand the responsibilities of the duty-bearers to uphold the rights.<sup>198</sup> The HRIA Toolbox explains in detail how stakeholders should be identified and how various stakeholders (rights-holders, duty bearers and other relevant parties) should be engaged. It further provides guidance on how specific rights-holders including children and young people, women and girls, Indigenous peoples, workers and trade unions, minorities, people with disabilities, elderly people, migrants, refugees and displaced persons, LGBTI individuals and persons living with HIV & Aids and other diseases should be engaged. These various rights-holders are captured by the ‘sex, gender with other identity’ factors under the IAA. Arguably, therefore, s. 22(1)(s) of the IAA transcends a provision which barely calls for a GIA or a gender-based analysis, the provision would inevitably warrant an HRIA and the toolbox provides an adaptable mechanism to do this. Indeed, it is difficult to imagine how stakeholders can be meaningfully engaged without ample distinction between stakeholders and rights-holders and engaging them accordingly. While such distinction is considered the exclusive preserve of HRIA, it must be deemed a key component of stakeholder engagement whether human rights is explicitly or implicitly considered. It is this sense that the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement distinguishes between both stakeholders and rights-holders and requires that both sets of parties be “appropriately identified and prioritized”.<sup>199</sup> While the OECD Due Diligence Guidance is not flaw-free, it sets a standard for the design of the meaningful public participation framework under the Canadian IAA. Although the current interim IAA participation Framework is a step-forward, it falls far short of the provisions of the both

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<sup>192</sup> *Ibid* at 6.

<sup>193</sup> *Ibid* at 6 – 7.

<sup>194</sup> *Ibid* at 7.

<sup>195</sup> *Ibid* at 8 – 20.

<sup>196</sup> Gotzmann et al, *supra* note 187 at 90.

<sup>197</sup> *Ibid*.

<sup>198</sup> *Ibid*.

<sup>199</sup> OECD Due Diligence Guidance for Meaningful Stakeholder Engagement, para. 2(2).

the OECD Due Diligence Guidance and the stakeholder engagement section of the DIHR HRIA toolbox.<sup>200</sup>

### 3.5 Research Gaps and Further Research

In this knowledge synthesis project, we set out to identify literature on the promotion of responsible business conduct tools in the Canadian extractive sector and how the tools are considered or applied in the practice of IA. We find that there is a considerable amount of academic and grey literature on RBC and the Canadian extractive sector. However, the RBC literature is mostly focused on the operation of Canadian extractive companies outside Canada. Within Canada, the literature on RBC is mostly focused on resource extraction that has implications for Indigenous peoples. *There is need for more research on the application of RBC tools within Canada. This need is even more evident with respect to human rights due diligence by Canadian extractive companies within Canada.* We found no literature wholly on human rights due diligence (HRDD) within Canada.<sup>201</sup> Further, we found that there has been a proliferation of RBC tools promoted by international organizations, industry, government and other entities. This ‘crowded toolbox’ could lead to inefficiency, confusion or induce corporate fatigue and cynicism.<sup>202</sup> *There is, therefore, need for research on how RBC tools can be organized, promoted and used efficiently and effectively by Canadian extractive companies within and outside Canada.*

We found a small amount of non-Canadian scholarly articles and grey literature exploring the link between RBC, due diligence and IA, making evident the importance of such connection. *There is, however, a need for further research on how RBC tools intersect with the Canadian Impact Assessment Act. Similar to Harrison’s analysis of challenges leading to the cancellation of UK’s Equality Impact Assessment requirement (as a HRDD mechanism), there is need to consider the likely adverse effects of using Canada’s IA framework to meet the due diligence obligation of companies and how such effects can be addressed. More work could also be done on how RBC tools can aid the operationalization of the Impact Assessment Act or necessary reforms to the current IA regime to make it consistent with RBC tools.* Again, there is an efficiency case to be made for an alignment of regimes considering that external financial institutions (e.g. World Bank, IADB, etc.) are increasingly making RBC due diligence requirements core to their facility approval process. An aligned domestic process makes it easier for Canadian extractive companies to access RBC tools and is more likely to further aid the fulfilment of their human rights obligations.

One area in which the connection between IA and RBC is less clear is supply chain due diligence. While IA modes like life cycle IA and cumulative effects assessment might be relevant,<sup>203</sup> the link to

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<sup>200</sup> The key provisions of the interim Framework include that participation should start early, funded, transparent with available and accessible information, increase knowledge of participants, prioritize the most vulnerable, flexible, influences decision making and continually adapt. It, however, fails to include proper identification of stakeholders, distinguish between stakeholders and rights-holders, and involve the stakeholders/rights-holders in implementation, monitoring and follow-up. These elements are extensively considered in both the OECD Guidance and the HRIA toolbox.

<sup>201</sup> The only work found on extractive sector relevant due diligence within Canada does not relate to HRDD and did not reference any RBC tool. See Sidney Schafrik and Vassilios Kazakidis, “Due Diligence in Mine Feasibility Studies for the Assessment of Social Risk” (2011) 25:1 Intl J of Mining, Reclamation and Environment 86 – 101.

<sup>202</sup> Bice notes that “firms may be confounded by an ever-growing plethora of guidelines and initiatives from which to choose”. See Bice, *supra* note 180 at 163.

<sup>203</sup> See for example Yong Shin Park et al, “Emergy and End-point Impact Assessment of Agricultural and Food production in the United States: A Supply Chain-linked Ecologically-based Life Cycle Assessment” (2016) 62 Ecological Indicators 117 – 137; Geoffrey Hagelaar and Jack van der Vorst, “Environmental Supply Chain Management: Using Life Cycle Assessment to Structure Supply Chains” (2002) 4 Intl Food and Agribusiness Mgt Rev 399 – 412.

supply chain due diligence is still not evident. The most direct connection seems to have been drawn by the Global Reporting Initiative, which requires a reporting organization to report its management approach for “supplier environmental assessment”.<sup>204</sup> However, we found no literature exploring this subject in the extractive sector context. *There is, therefore, a need for research on the relevance of the IA framework to supply chain impacts in the extractive sector.*

Although climate change has become one of the most pressing issues in recent years, there is very little Canadian scholarly or grey literature explicitly exploring the relevance of RBC tools to climate change in the extractive sector.<sup>205</sup> As Seck contends, this is consistent with, the climate blindness of most international CSR standards.<sup>206</sup> *There is a need for further research on how RBC tools can help advance the fight against climate change in respect of prevention, mitigation, adaptation, and loss and damage.*

The Australian and Danish examples suggest that human rights commissions are important institutions to for ensuring RBC and HRDD. This is, however, a practice yet to gain traction in the Canadian context. This is relevant in the IA sphere where more human rights issued begin to be integrated into it. As Kemp and Vanclay suggest, in order to embed HRIA into integrated IA process, it is essential to include human rights experts on the assessment team.<sup>207</sup> The Canadian Human Rights Commission (CHRC) is a potential pool for such experts. Most of the RBC literature in the Canadian context focuses on the role of Canadian NCP, former CSR Counsellor or the newly established Canadian Ombudsman for Responsible Enterprise. While these dispute settlement bodies are primarily focused on Canadian companies abroad (although at least the OECD NCP has jurisdiction over companies within Canada),<sup>208</sup> the HRC could play a vital role on RBC within Canada. However, we found no research on the role of the HRCs (both federal and provincial) in ensuring RBC by companies. *There is need for research on how both federal and provincial HRCs can facilitate the promotion of RBC tools and adherence to HRDD standards by Canadian extractive companies, particularly, within Canada.*

There is considerable RBC and IA literature on stakeholder engagement and the Canadian extractive sector. However, what meaningful participation in the Canadian context means seems to be still unclear. The danger of homogenous classification of ‘stakeholders’ has been referenced in existing guides on stakeholder engagement. There is, albeit, little work done in the Canadian extractive sector context on how stakeholders should be classified and/or identified. *There is need for research on stakeholders’ classification and identification in Canada. There is also need for clear distinction between stakeholder engagement in the Indigenous and non-Indigenous context. Attention should also be paid to the effectiveness of pan-Indigenous tools vis-à-vis Indigenous community specific tools.* While Indigenous engagement has been considerably discussed in the literature, stakeholder engagement in other contexts (e.g. non-Indigenous women in Canada) is rarely explicitly attended to.

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<sup>204</sup> GRI, “GRI 308: Supplier Environmental Assessment” (2016).

<sup>205</sup> Seck’s work on climate change, CSR and the extractive sector appears to be the only literature on this subject. See Seck, *supra* note 92.

<sup>206</sup> The OECD RBC tools, for example, do not mention climate change, with the only relevant reference being a tangential reference to ‘greenhouse gas emissions’. See OECD, OECD Due Diligence Guidance for RBC, *supra* note 25 at 50. GRI’s standard on emissions reporting is, however, an explicit climate change relevant tool. see GRI, GRI 305: Emissions 2016. There, however, appears to be no relevant tool on climate change adaptation and loss and damage.

<sup>207</sup> Kemp and Vanclay, *supra* note 180 at 91.

<sup>208</sup> See Global Affairs Canada, *Canada’s National Contact Point’s Final Statement: Seabridge Gold and the Southeast Alaska Conservation Council* (2017), para. 33. See also Seck, “Relational Law and the Reimagining of Tools for Environmental Justice”, *supra* note 106 at 166 – 167.

#### 4. Implications

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We have summarized some of the key findings of this research in the final section of the preceding chapter. Worth noting are the findings on the diverse and numerous RBC tools promoted by different bodies ranging from international organizations to Indigenous governments, the absence of a coherent framework for an efficient application of these tools, and the relevance of RBC and Human Rights Due Diligence tools to the IA processes of the extractive sector although research is lacking in the Canadian context. These findings are relevant to the rethinking of Canada's approach to, and policies on, responsible business conduct, the practices of extractive companies, and the future research focus of RBC and IA scholars.

While Canadian RBC literature has overwhelmingly focused on the operations of Canadian extractive companies outside Canada, it is now clear that Canadian extractive companies also have RBC obligations within Canada. The previous understanding of RBC as being solely externally relevant informed the central promotional role played by the GAC and the EDC. Understanding that RBC is equally domestically relevant, necessitates other agencies of government with more domestic remit to take on the responsibility of actively promoting and monitoring RBC within Canada. The Australian and Danish examples suggest that federal and provincial Human Rights Commissions could be some of the key domestic RBC responsible agencies. The internal relevance of RBC tools further makes a coherent framework for the application of the various RBC tools necessary. *Tables 1 and 2*, while mostly representative rather than exhaustive, could be used to develop such coherent framework.

Such a framework would need to distinguish between externally and internally relevant tools; sectoral tools, and place-based tools (e.g. tools specifically designed by certain Indigenous communities or



provinces). To avoid the possibility of cherry-picking tools, using one with the least requirements, or interpreting or applying tools in ways adverse to the interest of communities, the framework should establish minimum RBC standards which could potentially be drawn from common requirements in endorsed shortlisted RBC tools (see appendix 2 for an example of such shortlist). Such framework would also assist companies in fulfilling their RBC requirements efficiently. For example, an extractive company which has already met global best standards promoted by the framework will find it easier to meet the requirements of bodies like the IFC or World Bank if the services of such bodies were to be needed. This also applies to when RBC tools are used in the context of IA. This way, companies can efficiently, yet properly, satisfy IA and due diligence requirements.

Further, this study has potential implications for IA policies and practices. We have shown that scholars have drawn links between human rights, responsible business conduct, due diligence, and IA. Such link is, albeit, largely absent in the Canadian context. The IAA's direct reference to factors like sustainability, gender, Indigenous, social, and economic impacts makes the use or application of RBC tools in the IA context even more viable and necessary. RBC tools on issues like human rights, gender, stakeholder engagement, and Indigenous relations can be used to develop guidance under the IAA. We have already pointed out a few loopholes in existing interim guidance (e.g. Guidance on Stakeholder engagement) under the Impact Assessment Act. These loopholes could be addressed using relevant RBC tools taking into cognizance the already highlighted weaknesses of the tools in the literature. Compliance with the IAA and its RBC-compliant Guidance could also be promoted by government agencies like Global Affairs Canada to Canadian extractive companies operating abroad. This will considerably help address the discordance between the practices of companies operating within and outside the country.

## **5. Conclusion**

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This knowledge synthesis report has focused on RBC and human rights due diligence tools promoted to Canadian extractive companies within and outside Canada as contained in the literature, how the tools intersect with IA, and global practices on the promotion of RBC tools and the application with the IA context. The tools identified in this work (appendix 2) are not represented as exhaustive. They are drawn primarily from academic and grey literature. Again, we recognize that there are other non-English and unwritten (or written) Indigenous and non-Indigenous guidance not captured here. In compiling the tools from the literature, we focused on the themes of stakeholder relations, Indigenous engagement, human rights, and gender. These inclusion criteria inform the type of tools we have identified here. This, however, also means that tools on issues like bribery, corruption, consumer protection, cooperatives, employee engagement, and governance have not been included in appendix 2. Despite these limitations, we consider the tools contained in appendix 2 as representative of relevant RBC tools on the themes we have focused on. On the key question of the intersection between RBC tools and IA, we find both regimes mutually reinforcing. We recommend that scholars consider the complementarity of RBC and IA practices. While further reforms might be needed to make the Canadian IA regime more consistent with RBC standards, we have noted that the Canadian Impact Assessment Act provides ample opening for the application of select RBC tools. Future research could focus on how this alignment should be operationalized.

## 6. Knowledge Mobilization

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This knowledge synthesis targets a wide range of research users including local and Indigenous communities, women, environmental and human rights NGOs, government policy makers, extractive industries and industry associations, international RBC policy makers, and IA, RBC, and Indigenous scholars. We recognize that this report will apply differently to potential users. To effectively communicate these findings, it will be necessary to communicate the report's findings differently for the diverse knowledge users. At the same time, the concept of participation in RBC/IA processes inherently mandates the coming together of various stakeholders.

A draft of this report will be shared with a cross-cultural user and collaborators, whose feedback will be incorporated into the final draft. Findings of the study will also be disseminated at SHRRC/Impact Assessment Agency of Canada forum on Informing Best Practices on EIA and at a workshop at Dalhousie University. The workshop will provide a platform not only for reviewing the findings of the study, but to engender interaction among a cross-section of stakeholders in the extractive sector many of whom will be from Nova Scotia and the Atlantic region. Ideas on how some of the report's recommendations, particularly on the integrated application of IA and RBC tools, can be operationalized will also be discussed at the workshop. The final synthesis report will be posted in open access format on the Schulich School of Law digital commons. In addition, stakeholder specific versions of the report will be prepared and shared with the different research users. This will include:

**Non-technical summary report:** designed for local and Indigenous community and women stakeholders, and human rights and environmental NGOs, this version will highlight issues raised during the Halifax workshop and will be presented and shared electronically with groups including PIWC, AFN, MiningWatch Canada, the Firelight Group, ECELAW, Ecology Action Centre, etc. Blog posts or online platforms like the Conversation will be used to further generate awareness.

**Policy recommendations:** Policy recommendations will be developed pertaining to meaningful public participation and respect for human rights and the how RBC stakeholder engagement and IA processes can be improved and/or engaged complementarily. These will be shared with relevant bodies, including the MIAC as well as provincial IA responsible agencies, Canada's National Contact Point for the OECD MNE Guidelines, and other international RBC policy makers, to initiate a dialogue on the effective integration of IA and RBC processes in Canada and beyond.

**Industry recommendations:** A summary of the implications of the synthesis report and recommendations for extractive industries will be prepared and discussed with industry associations, particularly the MAC and PDAC. The report and industry recommendations will also be electronically shared with law firms advising extractive industries and through meetings in Toronto, Ottawa, and Halifax.

**Academic publications:** Academic articles will be developed from the findings made in the synthesis report and will include proposals for future research agenda(s). Open access journals favoured by RBC scholars and IA scholars will be sought out in order to target different academic audiences. Results will also be shared in scholarly conferences and meetings.

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## Appendix 2

### List of Responsible Business Conduct Tools

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