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Human Rights and the Impact Assessment Act: Proponents and Consultants as Duty Bearers

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Human Rights and the Impact Assessment Act: Proponents and Consultants as Duty Bearers

1. Introduction

The case for the explicit consideration of human rights in impact assessments was made long before the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) were developed.¹ The UNGPs, in part, confirm that States have a duty to protect human rights from harmful business conduct, and that businesses are expected to respect human rights wherever they operate.² Central to businesses’ fulfilment of their responsibility to respect human rights, is the requirement that they engage in human rights due diligence (HRDD).³ Whereas Human Rights Impact Assessment (HRIA) is not synonymous with HRDD, it has become a common tool deployed to fulfil HRDD’s objectives.⁴ The Framework Principles on Human Rights and the Environment (Framework Principles) confirm that the State duty to protect human rights requires prior assessment of environmental impacts of projects and policies including their potential effects on the enjoyment of human rights.⁵ HRIA is a process for “identifying, understanding, assessing”, preventing, mitigating, and accounting for actual and potential human rights impacts of the activities and operation of businesses.⁶ While some Canadian extractive companies have employed HRIA and other HRDD tools with respect to projects abroad,⁷ the application of these tools has been flawed and controversial,⁸ and these tools have rarely been used in relation to proposed

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¹ United Nations Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, (New York & Geneva: United Nations, 2011). See Nora Gotzmann, “Introduction to the Handbook on Human Rights Impact Assessment: Principles, methods and approaches” in Nora Gotzmann ed, *Handbook on Human Rights Impact Assessment* (Cheltenham: Edward Elgar, 2019) at 5-9 for an overview of the origin and elements of HRIA in relation to business activities.

² UNGPs, Principles 1, 11 & 23.

³ UNGPs, Principle 17.

⁴ Gotzmann, *supra* note 1 at 7. Various tools including the HRIA could be used to achieve the objective of HRDD under the UNGPs. The UNGPs did not explicitly require the conduct of HRIA.

⁵ ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment’ UN Doc A/HRC/37/59 (24 January 2018), *Annex*, principle 8.

⁶ Gotzmann, *supra* note 1 at 4. Gotzmann further notes that an inclusive definition of HRIA encompasses HRIAs commissioned by companies, whether integrated or ‘stand-alone’, as well as those commissioned by communities (which may be led or driven by NGOs), collaborative multi-stakeholder approaches, and sector-wide assessments. Gotzmann, *supra* note 1 at 9.

⁷ See 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; Motoko Aizawa et al, “Financing Human Rights Due Diligence in Mining Projects” in Sumit Lodhia ed., *Mining and Sustainable Development: Current Issues* (Oxon: Routledge, 2018) 99.

⁸ Sanz & Hansen, *ibid*; Aizawa et al, *ibid*; Daniela Chimisso dos Santos & Sara L Seck, “Human Rights Due Diligence and Extractive Industries” in Surya Deva and David Birchell, editors, *Research Handbook on Human Rights and Business* (Edward Elgar, published July 2020);

projects or operations within Canada. There is no law expressly requiring that Canadian companies assess and/or address the human right impacts of their domestic activities, beyond compliance with the limited expectations of national and provincial human rights commissions. And although different jurisdictions now impose human rights due diligence reporting obligations on businesses,⁹ Canada has failed to do likewise.

While the UNGPs reflect States' international human rights law (IHRL) obligations to protect human rights, and the expectation that businesses will respect human rights, the obligations of impact assessment consultants are not as clear. IA consultants have been described as a community of practice, an epistemic community, and administrative entrepreneurs.¹⁰ This community of practice, however, remains largely amorphous. It loosely entails experts and environmental practitioners employed or contracted by participants in an IA (proponent,¹¹ responsible authority, rights-holders, or stakeholders) to carry out an assessment wholly or in part or play an advisory role in an assessment process. The roles of IA consultants in screening, scoping and drafting environmental impact statements are emphasised in the literature.¹² These early phase activities are critical to the IA process. Existing literature has, however, highlighted the problems of corruption and the lack of independence of consultants.¹³ While ethical codes have been proposed to address these problems,¹⁴ the effectiveness of such codes is doubtful.¹⁵ We argue here that consultants have a responsibility to respect human rights under the UNGPs and that states, as part of their obligation to protect human rights under IHRL, must ensure that private actors including consultants adhere to this responsibility. Properly implemented, this framing suggests that States have a duty to impose enforceable human rights obligations on consultants and proponents.

In this chapter, we make a case for a human rights approach to the interpretation and operationalization of the provisions of the IAA, emphasizing the role of IA proponents and consultants as duty-bearers. As recently noted by Gibson, the success of the IAA will be in part dependent on strong elaboration of its

⁹ See for example, France's Corporate Duty of Vigilance Law, Law No. 2017-3999 of 27 March 2017; 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; *Modern Slavery Act 2018* (Austl), 2018/153; *Modern Slavery 2015* (UK).

¹⁰ Richard Morgan, "Conceptualising Best Practice in Impact Assessment" (2017) 66 *Env Impact Assessment Rev* 78 at 82; Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (New York: Cambridge University Press, 2008) 219 – 221.

¹¹ The IAA defines proponent as "a person or entity – federal authority, government or body – that proposes the carrying out of, or carries out, a designated project". See IAA, s. 2. We, however, focus on businesses as proponents in this chapter.

¹² Snell and Cowell note that "planning officers and developers' consultants are key gatekeepers to the relatively closed world of scoping discussions ..." See Tim Snell & Richard Cowell, "Scoping in Environmental Impact Assessment: Balancing Precaution and Efficiency" (2006) 26 *Env Impact Assessment Rev* 359 at 363. See generally Erik Mostert, "Subjective Environmental Impact Assessment: Causes, Problems, Solutions" (1996) 14:2 *Impact Assessment* 191 – 213.

¹³ Aled Williams & Kendra Dupuy, "Deciding Over Nature: Corruption and Environmental Impact Assessments" (2017) 65 *Environmental Impact Assessment Review* 118 - 124

¹⁴ Alvaro Enriquez-de-Salamanca, "Stakeholders' Manipulation of Environmental Impact Assessment" (2018) 68 *Environmental Impact Assessment Review* 10 at 15. See also Tim Richardson, "Environmental Assessment and Planning Theory: Four Short Stories About Power, Multiple Rationality, and Ethics" (2005) 25 *Env Impact Assessment Rev* 341 – 365.

¹⁵ Williams & Dupuy, *supra* note 17 at 121.

innovative provisions in regulations and guidance.¹⁶ We argue that it is both effective and efficient to adopt and adapt existing responsible business guidance tools (many of which the Canadian government has promoted to limited effect to Canadian companies to apply in operations abroad) in designing human rights oriented regulations and guidelines under the IAA. This will also promote reconciliation and rights-respecting projects. Elsewhere, we have identified about one hundred of such relevant tools, including those developed by Indigenous governments.¹⁷ In section 2 of this chapter, we consider IAA's provisions on human rights and the roles of proponents and their consultants. Section 3 focuses on how existing responsible business conduct (RBC) tools can be used in the design of regulations and guidelines to improve the IAA. We conclude in section 4.

2. Human Rights and the Roles of Proponents and Consultants in the IAA

The Impact Assessment Act (IAA) is a marked improvement on previous impact assessment legal regimes as it relates to human rights. One of the major wins for the human rights movement is the requirement in the IAA for businesses to undertake gender-based analysis plus (GBA+) (see chapter 11).¹⁸ The Act also goes further to require the consideration of changes to health, social or economic conditions when assessing projects.¹⁹ However the legislation stops short of explicitly requiring the consideration of human rights impacts when projects are assessed. HRIA entails GBA+ and more. Social or socio-economic impact assessment also differs from HRIA both substantively and procedurally.²⁰ Distinctively, HRIA emphasizes the participation of rights-holders (not just stakeholders), the recognition of duty-bearers, empowerment of rights-holders and duty-bearers, transparency with deference to the security of rights-holders and human rights defenders, and accountability.²¹ HRIA is also benchmarked against internationally recognized human rights standards and principles (not just domesticated rights), its scope includes cumulative human rights impacts, discourages offsets given the inherence of rights, and requires the availability of legal and non-legal grievance mechanisms.²² In this section, we consider the extent to which the human rights-related provisions in the IAA align with HRIA and permit the inclusion of other rights not explicitly covered. We also make a case for a rights-based framing of the responsibilities of proponents and their consultants.

a. The IAA and Human Rights

¹⁶ Robert Gibson, "An Initial Evaluation of Canada's New Sustainability-based Impact Assessment Act" (2020) 33:1 Journal of Environmental Law and Policy 1 at 30.

¹⁷ See Sara Seck et al, "Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: Implications for Human Rights, Gender and Stakeholder Engagement" (Draft Final Report for the SSHRC Knowledge Synthesis Grant: Informing Best Practices in Environmental and Impact Assessments, 13 April 2020).

¹⁸ Impact Assessment Act, SC 2019, c C-28, s. 22(1)(s) (IAA).

¹⁹ IAA, s. 22(1)(a).

²⁰ See generally, Nora Gotzmann et al, "Social and Human Rights Impact Assessments: What Can They Learn From Each Other?" (2016) 34:1 IAPA 14 – 23; Deanna Kemp & Frank Vanclay, "Human Rights and Impact Assessment: Clarifying the Connections in Practice" (2013) 31:2 Impact Assessment and Project Appraisal 86 – 96.

²¹ See Gotzmann, *supra* note 1 at 13 – 14.

²² *Ibid*, 15 – 16.

The IAA's provisions on Indigenous rights, GBA+ and right of access are the most explicit human rights-related provisions in the Act.²³ The Indigenous rights referenced in the IAA are rights "recognized and affirmed by section 35 of the Constitution Act". However, John Borrows has criticized the Supreme Court of Canada's (SCC) narrow interpretation of Section 35 rights²⁴ as solely historical rights instead of being more broadly framed as human rights.²⁵ According to Borrows, the SCC's construction of section 35 rights excludes essential rights like rights to child welfare, education, clean drinking water, health, etc.²⁶ Yet, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms the right of Indigenous peoples to the full enjoyment of all human rights and fundamental freedoms collectively or individually.²⁷ Although the IAA refers to the commitment of the Government of Canada to UNDRIP in its preamble, this commitment was not entrenched in any of the substantive provisions of the Act. It could, however, be argued that other IAA provisions on Indigenous knowledge, Indigenous culture, and the recognition of Indigenous governing bodies,²⁸ to various degrees, embed rights under UNDRIP including cultural rights and the right to self-determination.²⁹

The recognition and consideration of studies and/or assessment by or on behalf of an Indigenous governing body provides an opportunity to bring to the fore rights-based issues not otherwise covered by section 35.³⁰ This potential is confirmed in the interim guidance on collaboration with Indigenous Peoples, which states, in part, that studies (and Indigenous IAs) could cover impacts "on their territory, rights or community wellbeing".³¹ The Guidance of the IA Agency of Canada states that Indigenous communities may participate in the development of conditions at the decision making stage to address "a project's potential impacts on their rights or interests".³² The use of the terms 'rights or interests' in the Guidance appears to appreciate the position of Indigenous people both as rights-holders, with rights, and stakeholders, with interests. Importantly, the rights referenced in the Guidance are not limited to section 35 rights and should be read to include rights under the Charter, UNDRIP, and other sources of IHRL. Yet, while the Minister or Governor in Council is mandated under the IAA to consider section 35

²³ IAA, s. 22(1)(c)(s), 63(d), 104(1)(2). For further exposition on GBA+, Indigenous rights, Indigenous knowledge, and access to information provisions in the IAA, see chapters 11, 17, 19 and 20, respectively.

²⁴ See *Mitchell v. M.N.R.* [2001] 1 SCR 911, para. 63, where the Supreme Court identifies aboriginal rights protected under section 35 as "those practices, customs and traditions integral to the distinctive cultures of aboriginal societies". The court in *R. v. Van der Peet* [1996] 2 SCR 507, para. 63 describes the rights as "practices, customs and traditions that existed prior to contact". More recently, the SCC reaffirmed that "to establish a s. 35 violation, a party must first demonstrate that it holds an Aboriginal right that remains unextinguished as of the enactment of the Constitution Act, 1982 or a treaty right". See *Mikisew Cree First Nation v. Canada (Governor General in Council)* [2018] 2 SCR 765, para. 154.

²⁵ John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: Toronto University Press, 2016) 130; John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 *The Canadian Historical Review* 114 at 115.

²⁶ Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism", *Ibid.*, 116.

²⁷ See the United Nations Declaration on the Rights of Indigenous Peoples, (13 Sept 2007) UNGA 61/295, art. 1.

²⁸ IAA, s. 22(1)(g)(i)(q)(r).

²⁹ UNDRIP, art. 3 – 5, 8, 11 – 15. For more on UNDRIP and the IAA, see chapter 19.

³⁰ IAA, s. 22(1)(q)(r).

³¹ Impact Assessment Agency of Canada, "Interim Guidance: Collaboration with Indigenous Peoples in Impact Assessments" (2019) <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/collaboration-indigenous-peoples-ia.html#a7>>.

³² *Ibid.*

rights in determining public interest,³³ there is no such requirement to consider Indigenous IA and the broader rights recognized in the Guidance.

The requirement for GBA+ provides another vehicle in the IAA for the consideration of human rights. Beyond gender, GBA+ entails the consideration of intersecting identities including race, ethnicity, religion, age, mental or physical ability.³⁴ The interim Guidance on GBA+ describes the latter as an analytical framework which recognizes multiple identity factors “that intersect with sex and gender to affect how people may experience projects differently and be differently impacted by projects”.³⁵ While the IAA’s broad approach to GBA+ is laudable, it seems to have uncoupled the analysis from the human rights framework. The Guidance, for example, makes no reference to human rights. A gender-based analysis must be rights-based and consistent with IHRL.³⁶ This is even more so given the context of a broadly conceived notion of GBA+. A human rights approach premises the consideration of sex, gender, and identity-based issues on the right of all people, regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability or other status, to be treated with equal protection and benefits, without discrimination.³⁷ It is further underpinned by other identity-specific international human rights instruments on the rights of women, workers, children, migrants, and the disabled, among others. The GBA+ provision is an opportunity to consider a vast array of human rights, particularly the rights of the most vulnerable. Requirements and provisions in IHRL should be part of the GBA+ scoping and baseline data collection. When potential human rights related GBA+ impacts are identified and measures are proffered to address the impacts, failure to address them could ground recourse to judicial or non-judicial grievance mechanisms individually and collectively.

The right of access to information is deemed a prerequisite to the meaningful participation that underpins Indigenous rights and rights-based GBA+ as well as procedural environmental rights more generally.³⁸ Transparency within a HRIA framework is ensured, in part, by the right of access.³⁹ The Framework Principles state that “the human right of all persons to seek, receive and impart information includes information on environmental matters” and “supports the rights to expression, association, participation and remedy”.⁴⁰ The IAA guarantees the right of access to the Canadian Impact Assessment (CIA) Registry (internet site and project files) alongside other rights of access under a federal statute.⁴¹ Thus, the right of access also applies to documents that could be obtained under the Freedom of

³³ IAA, s. 63(d).

³⁴ See Women and Gender Equality Canada (WAGE), “Government of Canada’s Approach: Gender-based Analysis Plus” <<https://cfc-swc.gc.ca/gba-acg/approach-approche-en.html?wbdisable=true>>. See also [chapter 11](#).

³⁵ Impact Assessment Agency of Canada, “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>>

³⁶ Christina Hill et al, *A Guide to Gender Impact Assessment for the Extractive Industries* (Melbourne: Oxfam, 2017) 7.

³⁷ Canadian Human Rights Act, RSC 1985 c. H-6, s. 3(1), 5(a)(b).

³⁸ Lisa Odparlik & Johann Koppel, “Access to Information and the Role of Environmental Assessment Registries for Public Participation” (2013) 31:4 *Impact Assessment and Project Appraisal* 324; Framework Principles, *supra* note 5 at Principle 7. See also [chapter 17](#).

³⁹ Nora Gotzmann et al, “Human Rights Impact Assessment: Guidance and Toolbox” (Copenhagen: DIHR, 2016) 14.

⁴⁰ Framework Principles, principle 7.

⁴¹ IAA, s. 104(1)(2).

Information Act (FOIA).⁴² This is important given the previously identified flaws of the Registry (under the 2012 CEAA) including the non-availability of comprehensive documentation and the tendency of proponents and consultants to hold back documents by relying on copyright claims.⁴³ These flaws remain. For example, of the seventeen hydroelectric projects currently listed as completed in the online registry, documents like the environmental impact study, comprehensive study or assessment report and other technical documents were only available in respect of four projects.⁴⁴ Although it is arguable that these projects were commenced under the 2012 CEAA and not the IAA, the CEAA requirement that the impact assessment report and other enumerated project information be made available in the online registry,⁴⁵ have been reproduced in the IAA.⁴⁶ In any case, the Agency (and Panel) retain the same obligations in respect of projects under the 2012 CEAA as though the Act has not been repealed.⁴⁷

The Copyright Act recognizes FOIA disclosure as an exception to copyright infringement claims. The FOIA, however, prohibits disclosures including records containing trade secrets, scientific and technical information treated as confidential, and information that could result in material financial loss or gain.⁴⁸ The subjection of access rights under the IAA to copyright protection and the FOIA's broad prohibitions, considerably incentivizes proponents and consultants to refuse to authorize either the publication or the disclosure of information. Compared to the 2012 CEAA, right of access to information under the IAA is less robust. Under the CEAA, the registry was to facilitate public access to assessment records and provide notice in a timely manner.⁴⁹ This should be distinguished from the obligation of the agency to provide a copy of any record in a timely manner when requested.⁵⁰ The obligation to facilitate public access and provide notice in a timely manner applies, in part, to the actual availability of relevant information in the online registry in a timely manner. Considerable time lag in posting of information has been found.⁵¹ IAA's failure to mandate timely posting will further adversely effect the timeliness of documents provided on the online registry. Taken together, it is difficult to see how the IAA will effectively guarantee the timeliness, accessibility and completeness that are crucial to exercising the right of access in the IA context.⁵²

b. Responsibilities of Proponents and Consultants

⁴² Access to Information Act, RSC 1985, c. A-1, s. 4(1).

⁴³ Kevin Hanna & Bram Noble, "The Canadian Environmental Assessment Registry: Promise and Reality" (2011) 25:4 UVP-report 222 at 225. See generally John Sinclair & Alan Diduck, "Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions" in Kelvin Hanna ed., *Environmental Assessment: Practice and Participation* (Toronto: Don Mills, 2009) 58 - 82.

⁴⁴ See Canadian Impact Assessment Registry, "Hydroelectric Energy" <<https://iaac-aeic.gc.ca/050/evaluations/exploration?showMap=true&search=>> (accessed on 11 June 2020).

⁴⁵ CEAA, s. 79(2)(3).

⁴⁶ IAA, s. 105(2)(3).

⁴⁷ IAA, ss. 179 – 183.

⁴⁸ FOIA, s. 20(1)(a) – (d).

⁴⁹ CEAA, s. 78(1).

⁵⁰ See CEAA, s. 78(3); IAA, s. 104(3).

⁵¹ See Office of the Auditor General, "2009 Fall Report of the Commissioner of the Environment and Sustainable Development: Applying the Canadian Environmental Assessment Act" (2009) <https://www.oag-bvg.gc.ca/internet/English/parl_cesd_200911_01_e_33196.html>.

⁵² Hanna & Noble, *supra* note 41 at 225. See again chapter 17.

The IAA clearly spells out instances when proponents are prohibited from embarking on or doing anything in respect of a designated project, except as permitted after going through prescribed processes in the Act.⁵³ Prohibited acts include acts that may cause change to: aquatic species; fish; fish habitat; change of environment on federal lands, outside the province that the act was committed, or outside Canada; Indigenous peoples; or a health, social or economic matter under federal jurisdiction.⁵⁴ The IAA makes no reference to consultants through whom proponents often fulfil their obligations. The (draft) Practitioner’s Guide, however, does refer to consultants.⁵⁵ The Guide contains a description of processes, required contents of assessment documents, Guidance, and policy contexts.⁵⁶ The extent to which the Guide is binding is unclear. Some of the Guidance contains the cautionary statement that the documents are for “information purposes only”, while also stating that when inconsistent with the IAA and its regulations, the Act and regulations will prevail.⁵⁷

The External Technical Reviews Guide speaks relatively directly to the roles and responsibilities of experts. The Review Guide applies to external technical reviews of complex scientific questions and it is designed to ensure that the evidence used in IAs is “rigorous, credible, and transparent”.⁵⁸ The reviews are to be carried out by independent experts with “no direct conflicts of interest”.⁵⁹ An external technical review is equated to a peer review, which is described as a review of technical merit by individuals with qualifications and expertise “equivalent to those of the researcher whose work they review”.⁶⁰ Technical reviews are framed as dealing with “the most difficult science issues”, with ‘science’ understood as including natural sciences, social sciences, and engineering.⁶¹ However, a rights-compliant framework recognizes that non-mainstream bodies of knowledge like Indigenous knowledge are not less scientific or technological. Hence, UNDRIP recognizes the manifestations of Indigenous sciences and technologies.⁶² Lawrence argues that EIA practitioners should reject the false dichotomy between expert and layperson and recognize the value of local knowledge and experience.⁶³ This is especially true with respect to Indigenous knowledge and laws.

⁵³ IAA, s. 7(1).

⁵⁴ IAA, s. 7(1)(a) – (e).

⁵⁵ See for example, IAAC, “Guidance: Indigenous Knowledge under the Impact Assessment Act”

<<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/indigenous-knowledge-under-the-impact-assessment-act.html>>.

⁵⁶ IAAC, “Practitioner’s Guide to Federal Impact Assessments Under the Impact Assessment Act” (draft)

<<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>>.

⁵⁷ See IAAC, “Interim Guidance: Considering the Extent to which a Project Contributes to Sustainability”

<<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-considering.html>>

⁵⁸ IAAC, “External Technical Reviews” <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/external-technical-reviews.html#_Toc19627763>, para. 2.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, para. 2.

⁶¹ *Ibid.*

⁶² UNDRIP, art. 31(1).

⁶³ David Lawrence, “The Need for EIA Theory-Building” (1997) 17 *Env Impact Assessment Rev* 79 at 92.

While the external technical review Guidance does not directly apply to proponent’s consultants,⁶⁴ its description of technical reviewers as experts with qualifications and expertise equivalent to ‘researchers’ whose work they review suggests an expectation that consultants should have requisite qualifications and expertise. The EU Directive on Environmental Impact Assessment, more explicitly, mandates that “the developer shall ensure that the environmental impact assessment report is prepared by competent experts”.⁶⁵ Codes of Conduct and practice standards promoted by professional associations are the most well known sources of the duties of IA practitioners. Integrity, sustainable practices, competence, continued education, full disclosure when there is conflict of interest, freedom from bias and obligating gratuities, and compliance with the law, are common requirements in Codes of Conduct.⁶⁶ The IAIA and ECO Canada stand out for their requirement that all assessments must be underpinned by respect for human rights and must not violate the human rights of others.⁶⁷ Despite the usefulness of codes of conduct by professional bodies and advanced accreditation programs like the Institute of Environmental Management and Assessment’s (IEMA) Quality mark scheme,⁶⁸ impact assessment consultancy remains an unregulated, loosely bound profession; promoted codes are limited in reach, and their effect on the quality of IA is unknown.

We argue that the UNGPs impose human rights responsibilities on companies and their consultants during IA processes. The recognition of these human rights obligations has informed the increasing number of human rights due diligence laws. France’s Corporate Duty of Vigilance Law requires designated companies to establish and implement an effective human rights vigilance plan for the identification of risks and prevention of the violations of human rights resulting from the operations of the company, its subsidiary companies, subcontractors and suppliers.⁶⁹ There is a complaint process under the law through which individuals or organizations can seek a court order requiring a company to improve and implement its due diligence plan. Canada does not have a human rights due diligence law. Nevertheless, the recent decision of the Supreme Court of Canada (SCC) in *Nevsun Resources Ltd. v. Araya* (Nevsun), held that it was not “plain and obvious” that corporations were not bound by customary international law (CIL), and in particular by *jus cogens norms*, such as forced labour, slavery, torture and crimes against humanity,⁷⁰ and that CIL is automatically part of the law of Canada barring express

⁶⁴ The Guidance states that comments would be sought from project proponents on the science question(s) to be posed to the independent experts and submit written responses to the results of external reviewers. See IAAC, *supra* note 57 at paras 4.3,

⁶⁵ Directive 2014/52/EU amending Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment (16 April 2014), L124/1 Official Journal of the European Union, art. 5(3)(a).

⁶⁶ See generally, Environmental Institute of Australia and New Zealand, “Code of Ethics and Professional Conduct” (2012) <<https://www.eianz.org/document/item/2672>>; National Association of Environmental Professionals, “Code of Ethics and Standards of Practice for Environmental Professionals” <[https://www.naep.org/code-of-ethics#:~:text=Code%20of%20Ethics%20and%20Standards,activities%20in%20an%20ethical%20manner.&text=It%20is%20their%20duty%20to,to%20this%20Code%20of%20Ethics.](https://www.naep.org/code-of-ethics#:~:text=Code%20of%20Ethics%20and%20Standards,activities%20in%20an%20ethical%20manner.&text=It%20is%20their%20duty%20to,to%20this%20Code%20of%20Ethics.;)>; IEMA, “Code of Professional Conduct” (2018) <<https://www.iema.net/iema-code-of-professional-conduct/the-code>>.

⁶⁷ International Association for Impact Assessment (IAIA), “Vision, Mission, Values, Professional Code of Conduct and Ethical Responsibilities” <<https://www.iaia.org/pdf/Code-of-Ethics.pdf>>; ECO Canada, “Environmental Professional: Guidelines for Ethical Practice” (2019) <<https://www.eco.ca/wp-content/uploads/ECO-EP-Guidelines-for-Ethical-Practice-2018.pdf>>.

⁶⁸ IEMA, “EIA Q-Mark” <<https://www.iema.net/eia-quality-mark>>.

⁶⁹ Corporate Duty of Vigilance Law, art. 1.

⁷⁰ *Nevsun Resources Ltd. v. Araya* 2020 SCC 5 at paras 113-114.

legislation to the contrary.⁷¹ The Court also found that “the Canadian government has adopted policies to ensure that Canadian companies operating abroad *respect* these norms”.⁷² These policies include a range of RBC tools, including the UNGPs, the OECD Guidelines,⁷³ and the IFC Performance Standards,⁷⁴ among others.

Within the context of the IAA, human rights must be understood as extending to environmental human rights as articulated in the 2018 Framework Principles on Human Rights. Seck, in a recent work, shows how these mostly state-centric principles apply to businesses.⁷⁵ Further, Boyd observes that the human right to a safe, clean, healthy and sustainable environment is now recognized in law by more than 80% (156 of 193 countries) of the United Nations member states.⁷⁶ Even in the absence of a constitutionally protected substantive right to a healthy environment, it is important to recognize the interdependence of the environment and human rights: without a “safe, clean, healthy and sustainable environment” it is impossible to fully enjoy a vast range of human rights, including rights to life, health, food, and water; yet in order to protect the environment, it is vital to exercise human rights including rights to information, freedom of expression and association, participation and remedy.⁷⁷ The responsibility of proponents and consultants to respect human rights is essential for environmental protection, and the state duty to protect human rights from harmful non-state actor conduct extends to environmental human rights.

The most basic and enforceable duty of proponents and their consultants is the duty to respect human rights both substantively and procedurally in all phases of an assessment process, including post-assessment. For the consultant, this duty includes the prioritization of the rights of rights-holders over the interest of contracting proponents, awareness of and compliance with domestically and internationally recognized human rights, prioritizing human rights when faced with conflicting requirements, timely and transparent communication of prospective and actual human rights infringement to rights-holders, prevention and timely address of infringement, obtaining consent when personal or collective proprietary and privacy rights are involved, clearly identifying rights-holders and engaging them meaningfully all through an assessment process including the follow-up and monitoring phase, and rightly identifying, assessing, advancing measures to prevent or mitigate adverse human rights impacts. All of these components comprise the obligation of proponents and their consultants to, at a minimum, do no harm to individual and collective human rights. Apart from the substantive and procedural implications of this duty, it is also a mindset that should actuate every type of assessment. While a stand-alone Guidance under the IAA detailing the components and processes of HRIA could be

⁷¹ *Ibid*, para. 128.

⁷² *Ibid*, at 115.

⁷³ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011)

⁷⁴ IFC, “Performance Standards on Environmental and Social Sustainability” (2012)

https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Documents.pdf?MOD=AJPERES&CVID=jkV-X6h.

⁷⁵ Sara Seck, “Overarching Concept Memo: Business Responsibilities for Environmental Human Rights” (2020) UN Environment: Environmental Rights Initiative (unpublished).

⁷⁶ *Report of the Special Rapporteur on the Issue of the Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, HRC, 43rd Sess, UN Doc A/HRC/43/53 (2020).

⁷⁷ Knox, “Report of the Special Rapporteur: Framework Principles”, para 4.

useful, the human rights dimension of other factors (e.g. Indigenous governance, GBA+, social, economic and health impacts, access to information etc.) could be addressed through regulations and Guidance.

The case we have made here is that ethical assessment is, fundamentally, an assessment rooted in respect for human rights. Respect for human rights is at the core of responsible business conduct (RBC).⁷⁸ Hence, we argue for the development and/or improvement of IAA regulations and Guidance through the incorporation or adaptation of RBC tools. Although such regulations and Guidance are not in themselves explicit codes of conduct for proponents and their consultants, the responsibility to respect human rights embedded in them has the potential of effectively compelling responsible and human (rights) centric IA practice. Another reason for incorporating RBC tools into IAA regulations and Guidance is the relative familiarity of Canadian multinational companies with these tools as they are expected to adhere to various RBC standards in their operations abroad.⁷⁹ Some of these standards are now understood to apply within Canada. Adapting these existing tools will also reduce the proliferated and at times conflicting standards companies are expected to comply with. We show how RBC tools can be used to improve the IAA regime and the potential effect on the conduct of proponents and their consultants below.

3. IAA Regulations and Guidance: Improving the IAA Regime with RBC Tools

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).⁸⁰ The process that began in 2005 led to the release of Canada’s first CSR strategy in 2009 and a revised policy in 2014.⁸¹ Both documents focus on ensuring that Canadian extractive companies abroad operate in an economically, socially and environmentally sustainable manner.⁸² The 2009 Strategy established the office of the extractive sector CSR counsellor to “assist stakeholders in the resolution of CSR issues” and

⁷⁸ Global Affairs Canada describes RBC as “conduct that demonstrates respect for human rights and is consistent with applicable laws and internationally recognized standards”. 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>>

⁷⁹ GAC, “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>.

⁸⁰ 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 Kamphuis, “Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account” (2012) 13 German Law Journal 1459 at 1466 – 1467. Kamphuis 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 Kamphuis, “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.

⁸¹ For more on the history of CSR in Canada see Sara Seck, “Climate Change, Corporate Social Responsibility, and the Extractive Industries” (2019) 31:3 Journal of Env Law and Practice 271 at 274 – 278.

⁸² Global Affairs Canada (GAC), “Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector” (2009) <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>> (CSR Strategy); GAC, *supra* note 78. (Revised CSR Strategy).

incorporated in the Strategy the already existing office of the OECD National Contact Point (NCP) designed to promote the OECD Guidelines for Multinational Enterprises.⁸³ While the CSR counsellor has now been replaced by the Canadian Ombudsman for Responsible Enterprise (CORE), the focus on the overseas operation of Canadian companies remain.⁸⁴ The 2014 revised CSR strategy refers to the OECD Guidelines for MNEs and UNGPs as “two fundamental documents” to be promoted to Canadian companies.⁸⁵ The CSR implementation Guide, however, lists about 72 CSR standards and tools, with 13 of them described as “endorsed by the Government of Canada”.⁸⁶

Following the endorsement of the UNGPs in 2011, human rights was incorporated into the OECD Guidelines. Contrary to Canada’s focus on overseas operations, the OECD NCP has now recognized that OECD Guidelines apply domestically.⁸⁷ The UNGPs also apply to businesses “wherever they operate”.⁸⁸ Hence, both proponents and their consultants, jointly and severally, have responsibilities under standards like the OECD Guidelines when planning, assessing, and implementing projects. Furthermore, the UNGPs recognize the duty of States to protect human rights.⁸⁹ This duty includes setting out clearly the expectation that all businesses respect human rights and providing guidance to businesses on “how to respect human rights throughout their operations”.⁹⁰ A requirement for the consideration of human rights in the IAA is one way to make this expectation clear. In the absence of such requirement, Guidance and regulations under the IAA should be published under existing provisions. As already noted, the Guidance and regulations would also serve the purpose of setting out human rights-based standards that proponents and their consultants should adhere to in different contexts.

In section 2, we referred to Indigenous rights, GBA+ and the right of access to information to demonstrate opportunities for the consideration of human rights in the IAA despite not being expressly provided for. No doubt, gaps remain. For example, while the Framework Principles require the protection of human rights defenders, and the consideration of rights to freedom of expression and association including peaceful assembly, as well as the right to housing, and children’s rights, there is no readily available provision under the IAA through which these rights are required to be considered.⁹¹ In the absence of an express human rights provision, the new requirement to consider social impacts provides an opportunity for a comprehensive assessment of potential human rights impacts. While social impact assessment (SIA) is considered distinct from HRIA, Vanclay has argued that human rights is one of SIA’s core values and that SIA seeks to defend and uphold human rights.⁹² Requiring the

⁸³ GAC, CSR Strategy, *Ibid.*

⁸⁴ See Office of the CORE, <https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng>.

⁸⁵ GAC, Revised CSR Strategy, 6.

⁸⁶ Industry Canada, “Corporate Social Responsibility: An Implementation Guide for Canadian Businesses” (2014) 67 – 73.

⁸⁷ See GAC, “Canada’s National Contact Point’s Final Statement – Seabridge Gold and the Southeast Alaska Conservation Council” (13 November 2017) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-seabridge-comm_finale.aspx?lang=eng>.

⁸⁸ UNGPs, Principles 11 and 23.

⁸⁹ UNGPs, Principle 1.

⁹⁰ UNGPs, principles 2 and 3(d).

⁹¹ Framework Principles, para. 10 – 11, 13, 21, 45.

⁹² See Frank Vanclay, “International Principles for Social Impact Assessment” (2003) 21:1 Impact Assessment and Project Appraisal (IAPA) 5 – 12.

consideration of human rights impacts in an IA Agency Guidance further to section 22(1)(a) of the IAA could therefore go a long way in integrating human rights into impact assessment practices in Canada.

It is arguable that the Agency could require that a project’s impact on human rights be considered under its omnibus authority in section 22(1)(t) of the IAA albeit, on a case by case basis. This is, however, discretionary. Short of an amendment, one of the most viable options for making the consideration of human rights impact under the IAA mandatory is through the power of the Minister through regulations, to prescribe information that a proponent must provide in the planning phase (e.g. in its project description).⁹³ The current Regulation, however, does not address human rights.⁹⁴ While there is no regulation-making power under section 22 of the Act, the Agency uses Guidance to clarify its expectations on the requirements of the Act. Human rights have, largely, been left out of existing Guidance under the IAA.⁹⁵

While RBC tools are diverse and cover issues ranging from Indigenous relations to water stewardship and are designed by entities including international organizations, Indigenous governments and industry associations, one of their primary objectives is arguably to assist businesses to fulfill their responsibility to respect human rights. Canadian businesses already have responsibilities under a range of sector or place specific RBC tools on subjects covered under the IAA. Rather than further proliferating Guidance, common requirements in various RBC tools, per subject, could be condensed into IAA Guidance. Table 1 shows some subject areas under the IAA and provides examples of existing RBC tools that could be used in designing IAA Guidance and Regulations. While we have included tools in *table 1* to show the relevance of RBC tools to the IAA, further detailed analysis of these tools is needed to identify the best in class and most human rights respecting.

Table 1 – IAA and RBC Tools

IAA Subject Area	RBC Tools
Indigenous Rights, Knowledge, Culture and Governance (IAA, s. 22(1)(c)(g)(l)(q)(r))	Kluane First Nation, Proponents Engagement Guide (2012) Gitanyow Hereditary Chiefs, “Gitanyow Engagement Framework” (2013) Yukon Chamber of Mines, “Yukon First Nations Engagement and Consultation Tool” (2019).
Meaningful Stakeholder Engagement (IAA, s. 11, 27, 99)	OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (Paris: OECD Publishing, 2017).
GBA+ (IAA, s. 22(1)(s))	PDAC, “Gender Diversity and Inclusion: A Guide for Explorers” (July 2019). Global Mining Guidelines Group, “Women in Mining: Steps, Strategies and Best Practices for Gender Diversity” (18 March 2014).

⁹³ IAA, s. 15(1), 112(1)(a).

⁹⁴ See the Information and Management of Time Limits Regulations, SOR 2019-283.

⁹⁵ For current Guidance, see Impact Agency of Canada, “Practitioner’s Guide to Federal Impact Assessment under the Impact Assessment Act” <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>>.

	DIHR, “Towards Gender-Responsive Implementation of Extractive Industries Projects” (2019).
Social, Health and Economic Impact (IAA, s. 22(1)(a))	Mining Association of Canada, TSM Protocols and Framework (2019). UNICEF, Children’s Rights and Businesses Principles (2012). OECD Due Diligence Guidance for Responsible Business Conduct (2018).
Right of Access (IAA, s. 104(2))	IFC, Access to Information Standards (World Bank Group).

Although linked to specific subject areas, RBC tools like the OECD Due Diligence Guidance for Responsible Business Conduct and the OECD Due Diligence Guidance for Meaningful Engagement in the Extractive Sector touch on all the subject areas. The Guidance on Meaningful Engagement, for example, includes annexes on engaging with Indigenous peoples, women, and workers and trade unions.⁹⁶ The Guidance requires, among other things, proper identification and distinguishing of stakeholders and rights-holders, the involvement of stakeholders and rights-holders in the implementation of findings, monitoring and follow-up, and undertaking external verification of engagement activities.⁹⁷ The extensive provisions of the OECD Guidance would further advance the current IAA Guidance on meaningful participation which, among other things, fails to recognize rights-holders and provides no guidelines for meaningful participation at the monitoring and follow-up phases. The extensive recommendations for corporate planning, management and on-the-ground personnel in the OECD stakeholder engagement Guidance would also go a long way in making clear how proponents and consultants should conduct themselves when engaging with rights-holders and stakeholders.⁹⁸

The right of access to information is another example of how RBC tools could improve the IAA regime. The International Finance Corporation (IFC) Access to Information Policy operates on a presumption in favour of disclosure absent a compelling reason not to disclose such information, and considers whether the benefit of disclosure (e.g. for health, safety and the environment) outweighs likely harm to specific parties.⁹⁹ The policy also allows for partial disclosure to balance public and private rights, permits for delayed disclosure considering market, legal or regulatory concerns, requires proponents to disclose information on risks and impacts directly to specific communities that will be affected, and mandates early disclosure and updates throughout the investment lifecycle.¹⁰⁰ These IFC requirements address some of the previously identified flaws of the IAA’s right of access to information provision.

The IAA provides opportunities to ensure that Canada adheres to its duty to respect, protect and fulfil human rights and for businesses to respect human rights by identifying, assessing, preventing and addressing actual and potential human rights impacts. We have briefly discussed how this could be done under the Indigenous rights, GBA+, social impacts, and rights of access provisions of the IAA. There

⁹⁶ OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017) Annexes B, C, D.

⁹⁷ *Ibid*, Annex A.

⁹⁸ *Ibid*, 23 – 83.

⁹⁹ IFC, “Access to Information Policy” (2012) <https://www.ifc.org/wps/wcm/connect/6810c62b-2a5d-47f2-97ba-06193bba4e42/AIP_English_2012.pdf?MOD=AJPERES&CVID=kiIXyKw>.

¹⁰⁰ *Ibid*.

are, however, possible challenges. Within Canada, Wanvik notes that upon completion of EIA processes, the perception of a possible bias in favour of industry development is high.¹⁰¹ HRIA (or HRDD) is, however, not a silver bullet for addressing such bias or the actual or potential risks posed by proponents and/or their consultants.¹⁰² 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.¹⁰³ In the context of Canadian companies abroad, Simons and 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.¹⁰⁴ In lieu of the CSR Agency proposed by Simons and Macklin, the IAA's provision for the involvement of specialist federal authority in possession of expert information or knowledge in respect of a designated project,¹⁰⁵ provides a window for leveraging the expertise of federal and provincial Human Rights Commissions in the consideration of project's human rights impacts.

Other likely roadblocks include the scoping of the human rights to be considered in HRIAs and jurisdictional questions attending the consideration of human rights in impact assessment processes. While we cannot deal with these issues comprehensively here, we make a few general statements. The identification of 'internationally recognized rights' is foundational to HRIA.¹⁰⁶ What constitutes internationally recognized rights is, however, not clear and settled.¹⁰⁷ While *Nevsun* is generally laudable, its emphasis on a particular subset of *jus cogens* customary international law (CIL) human rights norms is unduly narrow. Nevertheless, it is crucial to appreciate that fundamental rights like the rights to life, liberty, security, and equality recognized in the Canadian Charter¹⁰⁸ are more contingent than autonomous. The factors necessary for the enjoyment of these rights must necessarily be read as part of the rights. This is the approach taken in the Framework Principles on Human Rights and the Environment which state that a "safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights including the right to life ..."¹⁰⁹ On the issue of jurisdictional constraints,¹¹⁰ we note briefly that the validity of the exercise of human rights jurisdiction depends on

¹⁰¹ 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 at 524.

¹⁰² See 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) 67; 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 278.

¹⁰³ *Ibid.*, 285.

¹⁰⁴ Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014) 277, 320 - 328.

¹⁰⁵ IAA, s. 23.

¹⁰⁶ Gotzmann, *supra* note 38 at 7.

¹⁰⁷ Arguably, the rights, at the minimum, include those contained in the nine-core international human rights treaties. See UNHR, "The Core International Human Rights Instruments and their Monitoring Bodies" <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>>.

¹⁰⁸ Canadian Charter of Rights and Freedoms, s 7, 15(1) Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

¹⁰⁹ Framework Principles, principle 2.

¹¹⁰ For more extensive consideration of federal IA jurisdiction, see chapter 5.

the whether such exercise falls under an allocated head of power in the Constitution. This also applies to the consideration of human rights in IA.

4. Conclusion

The rights of rights-holders substantially differ from the interests of stakeholders which are the typical focus of Canadian impact assessment processes. Integrating human rights into the impact assessment context would not only help ensure consideration of rights which might otherwise be overlooked, but also may impose enforceable obligations on proponents and their consultants as duty bearers. An expansive understanding of human rights must necessarily include a right to a clean, healthy, and sustainable environment. We do not join the argument on whether a HRIA is best carried out alone or within a comprehensive IA.¹¹¹ Instead, we emphasise that beyond being a mode of IA, human rights is a requirement that must actuate all aspects of an IA process. Consultants play an integral role in IA processes. There are, however, no clear cut, generally applicable and binding obligations or ethical standards that govern these key players. As shown in this chapter, as duty bearers, IA proponents and their consultants are, at the very least, obligated to actively ensure that they do no harm.

¹¹¹ See Gotzmann, *supra* note 38 at 20 – 22.