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Impact Assessment and Responsible Business Conduct Tools in the Extractive Sector: An Environmental Human Rights Toolbox for Government, Business, Civil Society, and Indigenous Groups

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IMPACT ASSESSMENT AND RESPONSIBLE BUSINESS CONDUCT TOOLS IN THE EXTRACTIVE SECTOR

*An Environmental Human Rights Toolbox for Government,
Business, Civil Society, and Indigenous Groups*



*Touquoy Open-Pit Gold Mine in Moose River, Nova Scotia
Photo: Simon Ryder-Burbidge*

***SSHRC Knowledge Synthesis Grant:
Informing Best Practices in Environmental & Impact Assessments***

**Schulich School of Law, Dalhousie University
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Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: An Environmental Human Rights Toolbox for Government, Business, Civil Society, and Indigenous Groups

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ACRONYMS

AHRC	Australian Human Rights Commission
CAO	Compliance Advisor Ombudsman
CEAA	<i>Canadian Environmental Assessment Act</i>
CIA	Canadian Impact Assessment
CORE	Canadian Ombudsperson for Responsible Enterprise
CSR	Corporate Social Responsibility
DIHR	Danish Institute for Human Rights
EDC	Export Development Canada
EIA	Environmental Impact Assessment
EHRD	Environmental Human Rights Defenders
ESIA	Environment & Social Impact Assessment
FNMPC	First Nations Major Project Coalition
FOIA	Freedom of Information Act
FPIC	Free, Prior and Informed Consent
GAC	Global Affairs Canada
GBA Plus	Gender-based Analysis Plus
GHG	Greenhouse Gas
GIA	Gender Impact Assessment
HIA	Health Impact Assessment
HRDD	Human Rights Due Diligence
IA	Impact Assessment
IAA	<i>Impact Assessment Act</i>
IAAC	Impact Assessment Agency of Canada
IACHR	Inter-American Commission for Human Rights
ICMM	International Council on Mining & Metals
IFC	International Finance Corporation
IGF	Intergovernmental Forum on Minerals, Metals & Sustainable Development
ILO	International Labor Organization
IRMA	Initiative for Responsible for Mining Assurance
ISHR	International Service for Human Rights
MAC	Mining Association of Canada
MNE	Multi-National Enterprises
NCP	National Contact Point
NGOs	Non-Governmental Organizations
OECD	Organisation for Economic Cooperation and Development
PDAC	Prospectors & Developers Association of Canada
RBC	Responsible Business Conduct
SDGs	Sustainable Development Goals
SIA	Social Impact Assessment
SSHRC	Social Sciences & Humanities Research Council
TISG	Tailored Impact Statement Guidelines
TSM	Towards Sustainable Mining
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGPs	United Nations Guiding Principles on Business & Human Rights

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GLOSSARY OF KEY TERMS

All definitions are provided from the Impact Assessment Agency of Canada's, "[*Glossary of Terms*](#)" (2021) and "[*Practitioner's Guide to Federal Impact assessment under the Impact Assessment Act*](#)" (2022), unless referenced otherwise.

Accommodation refers specifically to a measure to avoid, minimize, or compensate for adverse impacts on Aboriginal and Treaty rights that is owed based on the Crown's duty to consult under the *Constitution Act, 1982*.

Best available technologies are those techniques for mitigating adverse effects on people and the environment that are economically feasible to implement.

Consultation addresses the potential impacts of a proposed project on the exercise of Aboriginal and Treaty Rights under section 35 of the *Constitution Act, 1982*.

Cumulative effects are changes to the environment that are caused by an action in combination with other past, present, and future human actions, including other projects.

Designated Projects are physical activities that may require an impact assessment that (a) are carried out in Canada or on federal lands; and (b) are designated by the *Physical Activities Regulations* (known as the "Project List") or by a ministerial order.

Effect means changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes.

Effect Pathways a representation, often diagrammatic, of a linked set of cause-and-effect relationships between factors in the impact assessment analysis, such as effects, actions, outputs, and/or outcomes. The purpose is to understand the route by which health, social, and/or economic effects and their interactions occur.

Engagement describes the tools by which public and indigenous consultation will occur, including the knowledge communities may wish to apply when considering impacts and any other considerations that should be taken into account in project decision-making.

Gender Impact Assessment is a process for assessing the differential impacts and effects of resource extraction projects on girls, women, and gender diverse persons, and how projects may alter roles and relationships between these categories of people in affected communities.

Gender Socially- constructed roles, behaviors, expressions and identities of girls, women, boys, men and gender-diverse people. It influences how people perceive themselves and each other, how they act and interact, the distribution of power and resources in society, and people's social, health and economic outcomes.

Gender-based analysis plus (GBA Plus) An analytical framework that guides the assessment of how designated projects may have different positive and negative impacts on diverse groups of people or communities. The "plus" in GBA+ acknowledges the multiple identity factors that intersect with sex and gender to affect how people may experience projects differently and be differently impacted by projects.

Health Impact Assessment is a systematic process that uses specific steps, standards, and principles to examine the possible positive and adverse health impacts to communities, as well as the distribution of those impacts within the population, often including the unintended effects of a designated project.

Human Rights Defenders is a term used to describe people who, individually or with others, act to promote or protect human rights, including civil and political rights as well as the promotion, protection, and realization of environmental, economic, social, and cultural rights.¹

Human Rights Due Diligence the process by which a company identifies and addresses adverse human rights impacts with which it is involved. This is achieved by having in place a policy commitment to respect human rights, assessing impacts, integrating, and acting upon findings, tracking responses and communicating and reporting on impacts and the outcomes of due diligence processes.²

Human Rights Impact Assessment a process for systematically identifying, predicting, and responding to the potential human rights impacts of a business operation, capital project, government policy, or trade agreement. It is designed to complement a company or government's other impact assessment and due diligence processes and to be framed by appropriate international human rights principles and conventions.³

Impact Assessment is a legally mandated process for identifying, predicting, and evaluating the environmental, health, social, and economic impacts of projects, plans, policies, programs, and initiatives before allowing them to proceed.

Indigenous Communities are defined as a group or collective of Indigenous peoples that the Canadian government understands to represent the rights holders affected by a project and has the same meaning as "Indigenous governing body" under the Impact Assessment Act.

Indigenous Governing Body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Indigenous Knowledge an evolving and dynamic body of knowledge built up by a group of Indigenous people through generations of living in close contact with the land.

Mitigation measures to eliminate, reduce, control, or offset the adverse effects of a project, and includes restitution for any damage caused by those effects through replacement, restoration, compensation or any other means.

¹ "About Human Rights Defenders" (2022), online: *Office of the United Nations High Commissioner for Human Rights* <perma.cc/8TXY-BL3H>.

² "Corporate human rights due diligence – identifying and leveraging emerging practices" (2022), online: *Office of the United Nations High Commissioner for Human Rights* <perma.cc/HYV7-Y3HV>.

³ "Human Rights Translated: A Business Reference Guide" (2008) at xvii, online (pdf): *Office of the United Nations High Commissioner for Human Rights* <<https://perma.cc/JDL2-2SF7>>

Responsible Business Conduct 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 and indirect activities.⁴

Sex, gender, and intersecting identity factors are terms that describe people. This terminology is used in the *Impact Assessment Act*. Sex and gender are distinct concepts but are interrelated through complex pathways. Each person identifies differently along the spectrums of sex and gender and in relation to many other identity-related factors such as national or ethnic origin, Indigeneity, age, sexual orientation, religion, socio-economic condition, place of residence, or ability. How people identify, how people express their identity, and how society views their identity affect the way people are treated in society and their relative power (including access to resources and decision-making power).

Social Impact Assessment is the primary approach to a comprehensive assessment of the social effects of a project. A social impact assessment is a systematic process of analyzing, monitoring, and proposing mitigation measures for social effects of projects, including intended and unintended social changes caused by projects.

A social license to operate refers to the perceptions of local stakeholders that a project, company, or an industry that operates in an area or region is socially acceptable or legitimate.⁵

Sustainability means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations.

Valued Components represent environmental, health, social, economic, or additional elements or conditions of the natural and human environment that may be impacted by a proposed project and are of concern or value to the public, Indigenous peoples, federal authorities, and interested parties. Valued components may be identified as having scientific, biological, social, health, cultural, traditional, economic, historical, archaeological and/or aesthetic importance. Once identified, valued components become the focus of an impact assessment.

⁴ Organisation for Economic Co-operation and Development, *Policy Framework for Investment* (Paris: OECD Publishing, 2015) at 57.

⁵ Samuel Idowu et al, eds, *Encyclopedia of Corporate Social Responsibility* (2013), online: *SpringerLink* <link.springer.com/referenceworkentry/10.1007/978-3-642-28036-8_77>.

Introduction to Toolbox

This toolbox provides guidance on how governments, businesses, civil society, and Indigenous groups may encourage and adopt a human rights approach to impact assessment (IA). It forms part of a broader research project aimed at highlighting the interrelationship between IA laws and Responsible Business Conduct (RBC) tools, funded by the Social Sciences & Humanities Research Council (SSHRC) Knowledge Synthesis Grant: *Informing Best Practices in Environmental & Impact Assessments* (the “KSG”).⁶ This project surveyed over 100 RBC tools which form the basis of this toolbox’s content. However, this toolbox resource should be regarded as a living document in that it can be continually updated to capture new instruments as well as legislative changes.

In 2019, Canada amended its federal environmental assessment legislation and renamed it the federal *Impact Assessment Act (IAA)*.⁷ The *IAA* does not explicitly reference human rights as a factor to be considered in an IA despite the interconnectedness and interdependence of the environment and human rights. This toolbox explains how existing RBC tools may inform the design of IAA guidelines and regulations to ensure human rights considerations are adequately integrated into IA practices in Canada.⁸

We describe the federal IAA’s new provisions related to health, economic, and social effects, public participation, gender, Indigenous rights, and sustainability, and argue that these provisions provide opportunities for the incorporation of human rights considerations under the IAA despite not being expressly provided for in legislation. We draw on the Impact Assessment Agency of Canada’s (IAAC, “The Agency”) Practitioner’s Guide⁹ to the *IAA* to demonstrate how specific RBC tools can help fill these gaps, toward an integrated human rights-respecting framework.

Our KSG research identified one hundred RBC tools developed by industry, states, Indigenous governments, international institutions, and non-governmental organizations (NGOs) that are relevant and/or promoted to Canadian extractive companies. We focused on tools that touched on human rights, stakeholder engagement, the rights of women and girls, the rights of Indigenous peoples, and sustainability. We highlight existing good practices from these RBC tools and show how they can be used to improve the *IAA* regime to better align the conduct of governments and businesses with international standards. The tools described herein are not exhaustive, and we acknowledge that there are other non-English, as well as written and unwritten Indigenous and non-Indigenous, guidance not captured.

⁶ 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 SSHRC Knowledge Synthesis Grant: Informing Best Practices in Environmental and Impact Assessments, 13 April 2020), online (pdf): *Marine & Environmental Law Institute* <digitalcommons.schulichlaw.dal.ca/ialawrbrc/1/> [Seck et al, Impact Assessment & RBC Tools]. See also, Adebayo Majekolagbe, Sara Seck, & Penelope Simons, “Human Rights and the Impact Assessment Act: Proponents and Consultants as Duty Bearers” in Meinhard Doelle & John Sinclair, eds, *The Next Generation of Impact Assessment* (Toronto: Irwin Law, 2021) [Majekolagbe, Seck & Simons, 2021].

⁷ *Impact Assessment Act*, SC 2019, c C-28 [IAA].

⁸ Short of an amendment, one of the most viable options for legally mandating the consideration of human rights impacts under the IAA is through the power of the Minister of Environment & Climate Change Canada to enact regulations to prescribe information that a proponent must provide in the planning phase, e.g., in its project description. See, IAA, s 112(1) (“Regulations”).

⁹ Impact Assessment Agency of Canada, “Practitioner’s Guide to Federal Impact Assessments under the Impact Assessment Act” (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html> [Practitioner’s Guide]. Practitioners means individuals engaged in the IA process, including federal or provincial officials, review panel members, proponents, consultants hired by proponents, Indigenous community representatives, or others (Impact Assessment Agency of Canada, “Glossary of Terms” (July 2021), online (pdf): *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/glossary-of-terms.html>.

A human rights-based framing of the responsibilities of businesses and the obligations of governments can help promote reconciliation and sustainable projects. By leveraging existing RBC tools, the IAA regime can become more robust, and businesses and governments can more efficiently and effectively fulfill their domestic and international obligations and commitments to respect and protect human rights.

Impact Assessment

IA is a planning and decision-making process used to assess the positive and negative environmental, economic, health, and social effects of proposed projects, plans, policies, programs, and initiatives.¹⁰ It is a legally mandated process that must be undertaken before *designated* major projects can proceed.¹¹

According to Doelle & Sinclair, the current list of designated projects in the *Physical Activities Regulations* does not capture many activities that warrant a federal assessment.¹² However, section 9(1) IAA provides a discretionary authority that enables the Minister to designate a proposed project that is not on the current list if, in their opinion, (a) the proposed activity may cause adverse effects within federal jurisdiction (such as affects to fish and fish habitat, migratory birds, and indigenous peoples) or adverse direct or incidental effects;¹³ or (b) public concerns related to those effects warrant the designation. Doelle & Sinclair opine that this criterion is not clear. The Alberta Court of Appeal recently declared the IAA and the *Physical Activities Regulations* to be unconstitutional due to federal overreach into areas of exclusive provincial jurisdiction, including provincial control of public lands and resources. This reference is on appeal to the Supreme Court of Canada, providing an opportunity to clarify jurisdictional reach.¹⁴

The IAA also includes provisions for project on federal lands and outside Canada that are not considered “designated projects” under the *Physical Activities Regulations* (known as the “Project List”).¹⁵ These provisions prohibit federal authorities from carrying out or providing financial assistance to such projects *unless* the authority makes a determination that the project is either (a) not likely to cause significant adverse environmental effects, or (b) is likely to cause significant adverse environmental effects, and the Governor in Council decides those effects are justified in the circumstances.

The IAA outlines the process and timelines for assessing the impacts of major projects, including mining, oil, and gas projects. It identifies specific factors that must be considered during the IA and provides opportunities for public and Indigenous engagement, as well as tools to ensure compliance.

¹⁰ Canadian Environmental Assessment Agency (CEAA), “Overview of the *Impact Assessment Act*: Level 1 Training” (Summer 2019) at 4, online: *Government of Canada* <perma.cc/ZE8Q-Q66M> [CEAA, Overview of the IAA].

¹¹ IAA, s 2 (Designated projects are those physical activities that are carried out in Canada or on federal lands and are designated by *Physical Activities Regulations* or by a Ministerial Order). See also, *Physical Activities Regulations*, SOR/2019-285; IAAC, “Operational Guide: Designating a Project under the *Impact Assessment Act*” (2022), online: *Government of Canada* <<https://perma.cc/B6XT-E6QU>>.

¹² Meinhard Doelle & John Sinclair, “The Path Forward,” in Meinhard Doelle & John Sinclair, eds, *The Next Generation of Impact Assessment* (Toronto: Irwin Law, 2021) at 528.

¹³ Direct or incidental effects is defined in section 2 of the IAA as meaning: [...] effects that are linked to a federal authority’s exercise of power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project or to a federal authority’s provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part.”

¹⁴ *Reference re Impact Assessment Act*, 2022 ABCA 165.

¹⁵ IAA, ss 81-91 (“Duties of Certain Authorities in Relation to Projects”). See also, IAAC, “Projects on Federal Lands and Outside of Canada” (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/projects-federal-lands-outside-canada.html>.

Figure 1: Purposes of the IA Process

- To foster sustainability;
- To ensure respect of Canada's commitments with respect to the rights of Indigenous peoples;
- To include environmental, social, health and economic factors within the scope of assessments;
- To establish a fair, predictable and efficient impact assessment process that enhances Canada's competitiveness and promotes innovation;
- To consider positive and adverse effects;
- To include early, inclusive and meaningful public engagement;
- To promote nation-to-nation, Inuit-Crown, and government-to-government partnerships with Indigenous peoples;
- To ensure decisions are based on science, Indigenous knowledge and other sources of evidence;
- To assess cumulative effects within a region.¹⁶

IAs, including engagement and consultation processes, are conducted by the Agency. The Minister may decide to refer the IA to an independent panel of experts known as a Review Panel instead, as opposed to an Agency-led process. A review panel IA is unique in that it involves public hearings which allows all interested participants to provide their views on the record.¹⁷

The IAA also empowers the Minister of Environment & Climate Change Canada ("the Minister") to allow other jurisdictions, including Indigenous groups, to carry out portions of the assessment through delegation, or to substitute an Indigenous jurisdiction's process for the federal assessment process.¹⁸

There are five phases to the IA process:

1. **Planning:** Documents developed during this phase specify information requirements and public and Indigenous engagement opportunities through the IA process;
2. **Impact Statement:** The proponent (the entity that carries out a designated project) outlines and evaluate potential impacts of a designated project and proposed mitigation measures;
3. **Impact Assessment:** The Agency outlines and evaluates potential impacts of a designated project;
4. **Decision-making:** The Minister or Governor in Council makes a decision as to whether the project should proceed based on information in the IA report and the public interest factor;
5. **Post-decision:** The Agency verifies compliance with the IAA and the conditions listed in the Decision Statement through a follow-up and monitoring program.¹⁹

¹⁶ CEAA, Overview of the IAA at 5.

¹⁷ IAA, s 36(1) (an IA conducted by a review panel can take up to 600 days as opposed to 300 days in a regular IA process).

¹⁸ IAA, s 29 ("Delegation"), s 31(1) ("Substitution").

¹⁹ CEAA, Overview of the IAA at 19-44.

The Agency identifies the following participants as involved in the IA process: the proponent, Indigenous groups, the public, federal jurisdictions, other jurisdictions, the Minister, the Governor in Council, and the Review Panel, where applicable.²⁰ The Agency is to work collaboratively with other jurisdictions (provincial, territorial, and Indigenous) and federal authorities to carry out the IA and ensure a “one project, one assessment” process.²¹ The Canadian Impact Assessment Registry (“the Registry”) facilitates a one-window approach to access information related to IAs.²²

Impact Assessment Overview

The Agency’s Website provides a helpful [overview](#) of the IA process, including a step-by-step list of the activities and requirements, the roles and responsibilities of the participants, frequently asked questions, and key documents and terms at each phase.

The IA process is a means to ensure that government decision-makers have sufficient information on the effects of a particular project to decide whether it should be allowed to proceed. At stage four, the Minister or Review Panel must decide on whether the project is in the public interest, based on the IA report and a consideration of the following factors:²³

- The project’s contribution to sustainability;
- The extent to which adverse effects within federal jurisdiction and the adverse direct or incidental effects are significant;
- Associated mitigation measures;
- Impacts on Indigenous groups and adverse impacts on rights; and
- Extent that project’s effects hinder or contribute to Canada’s environmental obligations and climate change commitments.

The Minister also possesses the discretion to authorize Regional Assessments, which assess the effects of existing or future activities in a region, and Strategic Assessments, which consider general policies, plans or programs that are relevant to conducting impact assessment.²⁴ Both types of assessment aim to provide a better understanding of the issues outside of the context of an individual project to inform IA decision-making (see “Regional and Strategic Assessments” subsections in this toolbox).

Human rights-related provisions of the IAA

Under Canada’s previous federal assessment regime, the *Canadian Environmental Assessment Act* (CEAA) 2012, the impacts considered under the regulatory process were primarily project-based and ecological. The new IAA features non-ecological factors prominently and is a marked improvement on CEAA 2012 as it relates to human rights. Although the IAA stops short of explicitly mainstreaming human rights considerations, it goes beyond previous iterations of CEAA by referencing the following as factors to be considered when projects are being assessed: health, social and economic effects; sustainability and climate change; 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.²⁵ Section 22(1)(a) IAA requires a consideration of both the negative *and* positive effects of changes to the environment or to health, social or economic conditions that may be caused by a project.

²⁰ CEAA, Overview of the IAA at 13.

²¹ See, IAAC, “Overview: Cooperation Plan” (2022), online: *Government of Canada* <perma.cc/2F7N-CCG2>.

²² See, IAAC, “Canadian Impact Assessment Registry” (2022), online: *Government of Canada* <iaac-aeic.gc.ca/050/evaluations>.

²³ IAA, ss 63(a-e) “Factors – Public Interest.”

²⁴ IAA, ss 92-93 (“Regional Assessments”), s 95 (“Strategic Assessments”).

²⁵ IAA, s 22(1).

Figure 2: Factors to be considered in an IA
Section 22 of the IAA

- (a) Changes to the environment or to health, social, or economic conditions;
- (b) Mitigation measures;
- (c) Impacts on any indigenous group and on the rights of Indigenous peoples;
- (d) The purpose and need for the project;
- (e) Alternative means of carrying out the project;
- (f) Alternatives to the designated project;
- (g) Indigenous knowledge provided with respect to the designated project;
- (h) The extent to which the designated project contributes to sustainability;
- (i) The extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
- (j) Any change to the designated project that may be caused by the environment;
- (k) The requirements of the follow-up program in respect of the designated project;
- (l) Considerations related to Indigenous cultures raised with respect to the designated project
- (m) Community knowledge provided with respect to the designated project;
- (n) Comments received from the public;
- (o) Comments from a jurisdiction that are received in the course of consultations;
- (p) Any relevant assessment referred to in section 92 (regional assessment on federal lands), 93 (regional assessment on other lands), or 95 (strategic assessment);
- (q) Any assessment conducted by or on behalf of an Indigenous governing body;
- (r) Any study or plan that is conducted or prepared by a jurisdiction – or an indigenous governing body – that is in respect of a region related to the designated project;
- (s) The intersection of sex and gender with other identity factors;
- (t) Any other matter relevant to the impact assessment that the Agency or the Minister requires to be taken into account.

These provisions provide opportunities for identifying, assessing, preventing, and addressing actual and potential human rights impacts. As will be explained in the following sections of this toolbox, the integration of human rights considerations into the IA process is critical to ensuring that the government adheres to its duty to *protect* human rights, and to ensuring that businesses fulfill their independent responsibility to *respect* human rights under domestic and international law. This toolbox outlines how existing RBC tools can reinforce and broaden the IAA's provisions and accompanying guidance on health, social and economic impacts, public participation, Indigenous rights, GBA Plus, and sustainability.

Responsible Business Conduct Guidance

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 and indirect activities. Global Affairs Canada (GAC) frames

RBC as “voluntary activities undertaken by a company, over and above legal requirements.”²⁶ RBC is encoded in diverse guidelines and standards, which we refer to as RBC tools, and while often described as voluntary are better understood as legally relevant in light of their contribution to defining social expectations of reasonable care.²⁷

One of the primary objectives of RBC tools is to assist businesses to fulfill their responsibility to respect human rights. As described by the Organisation for Economic Development & Cooperation (OECD), RBC “sets out an expectation that all businesses – regardless of their legal status, size, ownership or sector – avoid and address negative impacts of their operations.”²⁸ GAC further describes RBC as “conduct that demonstrates respect for human rights and is consistent with applicable laws and internationally recognized standards.”²⁹

Currently, a wide range of RBC tools are promoted to extractive companies by international organizations, governments, industry associations, NGOs, and Indigenous groups. Most tools have a general focus, but some apply to specific subject areas such as gender, security, stakeholder engagement, and Indigenous relations, among others.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) is arguably the most prominent RBC tool globally given its broad acceptance and adoption by countries and businesses worldwide, including Canada and Canadian businesses. The UNGPs provide a framework for the consideration of human rights in the IA process by setting out three pillars: the state duty to protect human rights from harmful business conduct; the independent responsibility of business to respect human rights; and access to remedy for victims of business-related abuses.

Since the adoption of the UNGPs in 2011, the understanding that business enterprises are duty bearers with a responsibility to respect human rights above and beyond compliance with domestic law has become widely accepted. The UNGPs have been incorporated into key RBC tools, such as the OECD Guidelines for Multi-National Enterprises³⁰ and its supplementary due diligence guidance, including the OECD Due Diligence Guidance for Responsible Business Conduct, the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, and the OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas. Businesses are expected to adopt a policy commitment to respect human rights; exercise due diligence to identify, prevent, mitigate, and monitor human rights impacts; and enable access to remedy for adverse human rights impacts caused or contributed to by business operations.

Canada also has specific responsibilities under the OECD Guidelines for Multinational Enterprises given its membership in the OECD. Canada must promote the OECD Guidelines and implement its regime through a National Contact Point (NCP), a state-based, non-judicial, dispute resolution mechanisms designed to

²⁶ Global Affairs Canada, “Responsible Business Conduct Abroad”, online: *Government of Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csrrse.aspx?lang=eng>.

²⁷ *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, District Court, The Hague, Judgment of 26 May 2021, online: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>> [RDS].

²⁸ OECD, “Responsible Business Conduct” (2022), online: *OECD Guidelines for Multinational Enterprises* <[mneguidelines.oecd.org/#:~:text=Responsible%20business%20conduct%20\(RBC\)%20sets,the%20countries%20where%20they%20operate.>](https://mneguidelines.oecd.org/#:~:text=Responsible%20business%20conduct%20(RBC)%20sets,the%20countries%20where%20they%20operate.>)>.

²⁹ *Supra* note 22.

³⁰ OECD Guidelines for Multinational Enterprises (2011), online (pdf):<www.oecd.org/daf/inv/mne/48004323.pdf> [OECD MNE Guidelines].

handle complaints concerning corporations operating from or within their respective jurisdictions.³¹ The following sections of this toolbox elaborate on the obligations and responsibilities created by the OECD guidance for states and businesses alike.

In this toolbox, we explore the relationship between IAA guidance and the good practices of existing RBC tools. Canadian businesses already have responsibilities under a range of RBC tools on human rights-related subjects that are also covered under the IAA. The relative familiarity of Canadian extractive companies with RBC tools is one reason for incorporating them into IAA guidance and regulations. Further, a closer alignment could legally strengthen RBC human rights due diligence processes as IA is mandated by law.

This toolbox seeks to establish a preliminary framework for the application of RBC tools in the IA process. It identifies and analyzes the international standards and good practices of available RBC tools and links these tools to relevant IAA subject areas. Each subsection provides recommendations on how RBC tools can help enhance IAA guidance and/or regulations, towards a human rights-based approach to IA.

Environmental Human Rights Approach³²

An expansive understanding of human rights must necessarily include a right to a safe, clean, healthy, and sustainable environment.³³ This right involves both substantive and procedural components: substantively, the right guarantees access to clean air, a safe climate, clear water, healthy ecosystems and biodiversity, healthy food, and non-toxic places; procedurally, the right involves requirements for prevention, prior assessment, precaution, public participation, access to information and science and access to justice.³⁴ The UN Human Rights Council endorsed this right and its component parts in October 2021.³⁵ Put simply, without a clean, healthy, and sustainable environment, it is impossible to fully enjoy a vast range of human rights, including the rights to life, health, food, and water. The health of humans and the planet are intimately interconnected and interdependent.

Did you know?

The human right to a clean, healthy, and sustainable environment is recognized in law by more than 80% (156 of 193 countries) of the United Nations member states. There is no explicit constitutionally protected right to a healthy environment in Canada.

The 2018 United Nations Framework Principles on Human Rights and the Environment (“The Framework Principles”) provides sixteen principles aimed at clarifying state obligations by drawing on international and regional human rights and environmental law, including civil and political rights, economic, social and

³¹ Scott Robinson, “International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime” (2014) *Utrecht Journal of International and European Law* 30(78): 68-81.

³² This section is adapted from Sara Seck, “Teaching Note: Human Rights & the Environment” in Teaching and Business & Human Rights Handbook (2020), online: *Teaching Business and Human Rights Forum* <teachbhr.org/resources/teaching-bhr-handbook/teaching-notes/human-rights-and-the-environment/>.

³³ John Knox, *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*, UNHRC, 43rd Sess, UN Doc A/HRC/43/53 (2020).

³⁴ OHCHR, “The Right to a safe, clean, healthy, and sustainable environment: Factsheet,” online: <www.ohchr.org/sites/default/files/2022-05/Recognition-Factsheet-FINAL.pdf>.

³⁵ UNGA, Resolution adopted by the Human Rights Council on 8 October 2021, “The human right to a clean, healthy and sustainable environment” A/HRC/ RES/48/13, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement>>.

cultural rights, women's rights, and the rights of the child.³⁶ Principle 8 confirms that the state duty to protect human rights from harmful non-state actor conduct requires prior assessment of environmental impacts of projects and policies, including their potential effects on the enjoyment of human rights. Principle 12 further confirms that "States should ensure environmental standards are effectively enforced against both public and private actors."

With respect to the business responsibility to respect human rights, the Framework Principles clarify that business enterprises must avoid causing or contributing to adverse human rights impacts through environmental harm and address such impacts through mitigation and remediation.³⁷ As such, it is important for businesses to understand the relationship between specific human rights, environmental standards, and environmental harms. Although the environment has long been a subject area in RBC tools, it is generally treated as distinct from human rights. This toolbox aims to link environmental and human rights considerations, seeing them as indivisible, in line with the Sustainable Development Goals (SDGs).³⁸ Pursuant to this objective, the following subsections identify and distinguish between procedural and substantive environmental human rights.

Procedural Environmental Human Rights

It is vital to environmental protection that citizens can exercise their rights to information, freedom of expression and association, participation, and remedy.³⁹ Sources of international environmental law such as Principle 10 of the 1992 *Rio Declaration* and treaties such as the *Aarhus Convention* and the *Escazú Agreement*, together with sources of international human rights law, confirm the following rights:

- Access to information on environmental matters that may undermine rights;
- Prior assessment of possible environmental impacts of proposed projects and policies including effects on human rights;
- Freedom of expression, peaceful assembly, and association with regard to environmental matters, as well as a safe space for environmental human rights defenders that is free from harassment, intimidation, and violence;
- Effective public participation in environmental decision-making for all; and
- Access to effective remedies for violations of environmental human rights, including both violations of procedural rights and substantive rights.

Canada is not a party to the *Aarhus Convention* and justifies its non-participation on the basis that, "Canada maintains a well-established system of engaging the public," citing Canada's *Access to Information Act* (ATIA) as one example of how it complies with the provisions of the Convention.⁴⁰

³⁶ John Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, "Framework Principles on Human Rights and the Environment," UN Doc A/HRC/37/59 (2018), online (pdf): *Office of the UN High Commissioner for Human Rights* <undocs.org/A/HRC/37/59> [Framework Principles].

³⁷ Framework Principles, para 35.

³⁸ *Transforming our World: the 2030 Agenda for Sustainable Development*, UNGA, 17th Sess, UN Doc A/Res/70/1 (2015), online: *United Nations Department of Economic and Social Affairs* <sdgs.un.org/2030agenda>.

³⁹ Framework Principles, paras 15-30.

⁴⁰ "Convention on Access to Information and Public Participation in Decision-Making: Aarhus Convention and Kiev Protocol," online: *Government of Canada* <www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/north-america/plant-protection-cooperative-agreement/access-information-public-participation-decision-making-aarhus-convention-kiev-protocol.html>.

However, Canada's ATIA falls short of international best practices, ranking 57th of the 123 foreign ATI laws in the Global Right to Information Rating.⁴¹

Substantive Environmental Human Rights

The overarching substantive right to a safe, clean, healthy, and sustainable environment may be subdivided into smaller issue areas:⁴²

- The right to breathe clean air;
- The right to a safe climate;
- The right to safe drinking water and sanitation;
- The right to healthy and sustainably produced food;
- The right to non-toxic environments in which to live, work, study or play; and
- The right to healthy biodiversity and ecosystems.

Environmental protections equally arise through the “greening” of other recognized human rights – the recognition that without adequate environmental protection, certain human rights are impossible to fully enjoy, including the right to life, security of the person and equality.

Non-discrimination and Attention to Vulnerability

Environmental harms are distributed unevenly: certain individuals, groups, and communities are disproportionately affected by the negative impacts of resource extraction, environmental degradation, and climate change. The Framework Principles list examples of those who are most vulnerable or at risk, including women, children, older persons, persons with disabilities, persons living in poverty, members of indigenous peoples or traditional communities, displaced persons, ethnic, racial or other marginalized minorities.⁴³

Problems of environmental justice and environmental racism involve violations of human rights, including equality rights. The Framework Principles treat non-discrimination as a cross-cutting theme while Principle 14 elaborates upon the need for “additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm.” This vulnerability may arise due to the unusual susceptibility of some individuals and groups to environmental harm, or due to a denial of their human rights, or both. Both IA guidance and RBC tools prioritize the

The Canadian Environmental Law Association's *“Making the Links: A Toolkit for Environmental Protections, Health, and Equity”* defines:

Environmental Justice as “the principle that environmental benefits and burdens should be equitably distributed among all persons, rather than allowing the majority of adverse impacts to be unfairly impose upon poor people, visible minorities, or marginalized communities.”

Environmental Racism as “the disproportionate proximity and exposure of Indigenous and racialized communities to polluting industries, dangerous projects, and other environmental hazards.”

⁴¹ Max Binks-Collier, “Canada's Access to Information Law Falls Short of International Best Practices”(2019) Ryerson Center for Free Expression, online: <https://cfe.ryerson.ca/sites/default/files/Binks-Collier_ATI%20Report_FINAL_0.pdf>.

⁴² See, “Thematic Reports,” online: *UN Special Rapporteur on Human Rights and the Environment* <www.srenvironment.org/thematic-reports>.

⁴³ Framework Principles, para 41.

participation of those most directly affected and/or negatively impacted by proposed projects. The following sections explain how these varied frameworks correspond with human rights-based approaches, with the aim of integrating the two as applied to the IA process.

Further resources

- “Business & Human Rights” (2022), online: *United Nations Office of the High Commissioner for Human Rights (OHCHR)*: <<https://www.ohchr.org/en/issues/business/pages/businessindex.aspx>>.
- Canadian Environmental Law Association Northern Services, “Making the Links: A Toolkit for Environmental Protection, Health and Equity” (2021), online (pdf): <cela.ca/making-the-links-a-toolkit-for-environmental-protections-health-and-equity/>.
- David Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment (“Special Rapporteur on Human Rights & the Environment”, “Right to a healthy environment: Good Practices,” UNGA, 43 Sess, UN Doc A/HRC/43/53 (2020), online (pdf): *OHCHR* <wedocs.unep.org/bitstream/handle/20.500.11822/32450/RHE.pdf?sequence=1&isAllowed=y>.
- David Boyd, Report of the Special Rapporteur on Human Rights & the Environment, “The Right to Breathe Clean Air,” UNGA, 40th Sess, UN Doc A/HRC/40/55 (2019), online (pdf): *OHCHR* <www.srenvironment.org/sites/default/files/Reports/2019/UN%20HRC%20Right%20to%20clean%20air.pdf>.
- “Environmental Rights and governance” (2022), online: *United Nations Environment Programme* <www.unep.org/explore-topics/environmental-rights-and-governance>
- John Knox, Report of the Special Rapporteur on Human Rights & the Environment, “Framework Principles for Human Rights & the Environment” UN Doc A/HRC/37/59 (2018), online: *OHCHR* <www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>.
- Global Affairs Canada, “Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad” (2014), online: *Government of Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.
- Global Affairs Canada, “Responsible Business Conduct Abroad” (2019), online: *Government of Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>.
- IAAC, “Impact Assessment: Frequently Asked Questions” (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessments-canada-faq.html>.
- IAAC, “Practitioner’s Guide to Federal Impact Assessments under the Impact Assessment Act” (Accessed 1 May 2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>.
- Impact Assessment Act*, S.C. 2019, c. 28, s. 1.
- Information and Management of Time Limits Regulations*, SOR/2019-283.
- Physical Activities Regulations*, SOR/2019-285.
- “Special Rapporteur on the human rights to safe drinking water and sanitation,” *OHCHR*: online: <www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx>.
- “Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes,” *OHCHR*: <www.ohchr.org/EN/Issues/Environment/SRToxicsandhumanrights/Pages/Index.aspx>.

Human Rights

The consideration of human rights impacts, both positive and negative, should be a requirement in any IA process. Proponent companies possess a clear and enforceable duty to respect human rights both procedurally and substantively in all phases of an assessment process. Businesses must comply with domestically and internationally recognized human rights, including by:

- Clearly identifying rights-holders and engaging them meaningfully through an assessment process, including the follow-up and monitoring phase;
- Rightly identifying, assessing, advancing measures to prevent or mitigate adverse human rights impacts;
- Timely and transparent communication of prospective and actual human rights infringements to rights-holders; and
- Prevention and timely address of infringement.⁴⁴

These components comprise the obligations of businesses to, at a minimum, do no harm to individual and collective human rights. Beyond a basic duty, it is a mindset that should actuate every type of assessment. Further, any claims advanced by the proponent or government regarding the potential benefits of projects, such as increased local employment and procurement, should be subjected to the same scrutiny as negative impacts and be reviewed through an intersectional analysis, as described in the “Gender and Intersectionality” section. Failure by extractive companies to adhere to human rights standards and meet promised development benefits has been found to have negative business impacts, including financial loss, loss of social license to operate, and goodwill.⁴⁵

As the UNGPs and OECD Due Diligence Guidance for RBC 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. Canada does not currently legally mandate that businesses comply with international human rights standards. There is no mandatory domestic reporting regime on responsible business conduct,⁴⁶ although the federal government through its Corporate Social Responsibility (CSR) Strategy has promoted RBC tools focused on human rights to Canadian companies operating abroad.

While Canada does not mandate a human rights-based approach to IA, GAC requires such an approach to its international assistance work. GAC defines a human rights-based approach as involving a “recognition that inequality and marginalization deny people their human rights and keep them in poverty.”⁴⁷ The three key principles of GAC’s human rights-based approach are rooted in international human rights law, namely: 1) equality and non-discrimination; 2) participation and inclusion; and 3) transparency and accountability. The principle of “participation and inclusion” requires that the voices and interests of affected individuals are considered on issues that concern them in a meaningful manner. Transparency

⁴⁴ Majekolagbe et al, 2021 at 9.

⁴⁵ See, International Resource Panel, “Mineral Resource Governance in the 21st Century: Gearing Extractive Industries Towards Sustainable Development” (2020), online: <www.resourcepanel.org/reports/mineral-resource-governance-21st-century>.

⁴⁶ There is, however, draft due diligence bills regarding modern slavery and forced labor and child labour, respectively; see, Bill C-423, *An Act Respecting the Fight against Certain Forms of Modern Slavery through the Imposition of Certain Measures and Amending the Customs Tariffs*, 1st Sess, 42nd Parl, 2019 (first reading 13 December 2018) and Bill S-211: *An Act to Enact the Fighting against Forced Labour and Child Labour in Supply Chains Act and to Amend the Customs Tariff*, 1st Sess, 44th Parl, 2021 (third reading April 28, 2022).

⁴⁷ “Human rights-based approach” (2020), online: *Government of Canada* <www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/priorities-priorites/human_rights-droits_personne.aspx?lang=eng>.

and accountability require that individuals have access to information on policies, decisions, and use of funds, and are empowered to hold those who have a duty to act (including state and non-state actors) accountable. These three principles must guide GAC’s development programming.

Environment-rights.org provides a collaborative resource portal for environmental human rights defenders (EHRD). There is an online tool where defenders can read about their rights, including: ⁴⁸	
<ul style="list-style-type: none"> • Children's rights • Land rights • Prohibition of torture, cruel, inhuman or degrading treatment • Rights to adequate housing • Rights to development • Rights to education • Right to effective remedies • Rights to environmental information • Right to equality and non-discrimination • Right to food • Rights to health 	<ul style="list-style-type: none"> • Right to freedom from arbitrary detention • Right to freedom of assembly and association • Right to freedom of expression and opinion • Rights to liberty and security of the person • Right to life • Right to participation in environmental decision-making • Right to safe and clean drinking water and sanitation • Rights of EHRD • Rights of Indigenous peoples • Women's rights

The following sections explain why governments and businesses should and must adopt human rights-based approaches to IA within Canada based on international human rights standards.

Human Rights Due Diligence

Human Rights Due Diligence (HRDD) is a management process that helps companies identify, prevent, mitigate, and account for actual and potential adverse social, environmental, and economic effects that may impact human rights.⁴⁹ It includes four components:

1. Identifying and assessing actual or potential adverse human rights impacts that the company may cause, contribute to, or be directly linked to;
2. Taking appropriate action and integrating findings from impact assessments across relevant company processes;
3. Tracking the effectiveness of measures in order to assess whether they are working; and
4. Communicating with stakeholders about how impacts are being addressed and showing that there are adequate policies and processes in place.⁵⁰

HRDD is central to the fulfillment of the state’s obligation to protect human rights and the independent responsibility of businesses to respect human rights. Unlike other Global North countries, such as France, the United Kingdom, and the European Union, Canada has yet to pass legislation that makes it mandatory

⁴⁸ See, “Your Rights” (2022), online: *Environment-Rights.org* <<https://environment-rights.org/your-rights/>>.

⁴⁹ See, “United Nations Guiding Principles on Business & Human Rights” (2011) at 17-18, online: *Office of the High Commissioner for Human Rights* <www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>; Prospectors and Developers Association of Canada, “e3 Plus: Principles and Guidance Notes” (2014) at 27, online: <www.pdac.ca/docs/default-source/priorities/responsible-exploration/e3-plus---principles/e3-plus-principles-amp-guidance-notes---update-2014.pdf?sfvrsn=8cabd698_2>.

⁵⁰ “Corporate Human Rights Due Diligence – identifying and leveraging emerging practices” (2022), online: *OHCHR* <www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

for businesses to engage in human rights due diligence within or outside Canada.⁵¹ Nevertheless, existing international HRDD standards can create mandatory obligations for companies to comply with human rights by informing an unwritten standard of care, as occurred in the case of *Milieudefensie et al v Royal Dutch Shell* in the Netherlands.⁵² In *Nevsun Resources Ltd v Araya*, the Supreme Court of Canada found that corporate violations of international human rights norms actionable in domestic law.⁵³

Principle 19 of the UNGPs represents legally required IA processes as a component of a broader HRDD framework.⁵⁴ Although both IA and HRDD share the same goal of preventing and mitigating harm to people and the environment, the two are conceptually distinct. For one, the IA process under the federal legislation is only triggered where a proponent seeks to begin construction and usually does not occur prior to project site selection, financing, or the exploration phase, for example.⁵⁵ HRDD and related public engagement and Indigenous consultation activities, however, should occur as early as possible, ideally at the very earliest stages of project planning and development.

The OECD Due Diligence Guidance for RBC further highlights the relevance of different modes of IA, including environmental impact assessment (EIA), environmental and social impact assessment (ESIA), and human rights impact assessment (HRIA) to HRDD, and recommends that proponents use the information from EIA, ESIA or HRIA and other assessments conducted by the companies or third parties in their due diligence process.⁵⁶ The following subsection explains the difference between HRDD and HRIA, followed by an overview of how Canada's federal IA regimes overlap with these various modes of assessment.

Human Rights Impact Assessment

HRIA is a common mechanism deployed to fulfill HRDD's objectives. It is a process for identifying, preventing, mitigating, and accounting for actual and potential human rights impacts of the activities and

⁵¹ Canada's CSR Strategy fails to expressly require extractive companies to undertake HRDD. However, the policy does set out a clear expectation that Canadian companies respect all applicable domestic laws and international standards. Although this falls short of a legally binding requirement, companies are expected to conduct due diligence in assessing and mitigating human rights risks, particularly where local laws are not aligned with "Canadian values." Further, the new Canadian Ombudsperson for Responsible Enterprise (CORE) can recommend the withdrawal of political and economic support from the Canadian government to a business where it fails to meet its human rights responsibilities. See, Global Affairs Canada, "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad" (2014), online: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng [GAC, Canada's Enhanced CSR Strategy]; and "Canadian Ombudsperson for Responsible Enterprise," online: core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng.

⁵² *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, District Court, The Hague, Judgment of 26 May 2021, online: < <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> > [RDS] (The decision is under appeal); See also, Jochem De Hoop, "The Responsibility of Royal Dutch Shell to Comply with Human Rights Obligations and Environmental Law Through the Unwritten Rule Standard of Care" (2 August 2021), online: *Public International Law & Policy Group* <www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2021/8/2/the-responsibility-of-royal-dutch-shell-to-comply-with-human-rights-obligations-and-environmental-law-through-the-unwritten-standard-of-care>.

⁵³ *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

⁵⁴ UNGPs, *supra* note 35 at 20-22.

⁵⁵ See, *Physical Activities Regulations* (SOR/2019-285), Schedule: Physical Activities; However, certain provincial laws require a measure of due diligence prior to the granting of an exploration license, including consultation with Indigenous peoples; see, for example, *Mining Act*, RSO 1990, c M 14 (Ontario).

⁵⁶ "OECD Due Diligence Guidance for Responsible Business Conduct" (2018) at 26, online (pdf): [OECD <mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>](http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf).

operation of businesses.⁵⁷ HRIA occurs at the beginning of a project, whereas HRDD continues throughout the project lifecycle. HRDD, in this way, is a broader management system that is ongoing, iterative, proactive, and reactive in nature. Companies are expected to monitor and continually re-assess compliance and publicly report on mitigation efforts within HRDD processes.

HRIA differs from social or socio-economic impact assessments since it prioritizes the participation and empowerment of *rights*-holders as opposed to stakeholders. It recognizes the obligations of businesses to respect human rights and the duty of governments to protect human rights, particularly where the security of rights-holders, including human rights defenders, may be at risk. Whereas an ESIA approach might not result in any discussion of freedom of expression, for example, a HRIA could envision a community protest being suppressed by state forces.⁵⁸

While there is no requirement under Canadian law for Canadian companies to carry out a HRIA, companies have done so either under the laws of the state in which they are operating, or pursuant to the requirements of the International Finance Corporation (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.⁵⁹ The application of HRIA tools by Canadian companies abroad has been flawed and controversial,⁶⁰ and these tools have rarely been used in relation to proposed projects or operations within Canada.

HRIA processes have been criticized as overwhelmingly focused on managerialism where control from companies over their human rights impacts is key. Company-driven HRIA processes can thwart community agency, co-opt or silence local resistance, and permit a company to delay and avoid necessary action to prevent and address human rights harms.⁶¹

With these critiques in mind, the “Human Rights and RBC” subsection focuses on community-based and participatory HRIA’s that prioritize transparency and accountability. First, we examine how the IAA considers human rights by discussing the IAA Guidance on *Analyzing Health, Social and Economic Effects* and its overlaps with HRDD and HRIA processes.

⁵⁷ 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 7.

⁵⁸ John Ruggie, “Human Rights Impact Assessments: Resolving Key Methodological Questions,” *Report of the Special Representative of the Secretary-General*, UNGA, Un Doc A/HRC/4/74 (2007) at 7.

⁵⁹ International Finance Corporation, *IFC Performance Standards on Environmental and Social Sustainability* (2012), online (pdf): <www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk> [IFC Performance Standards].

⁶⁰ For example, Barrick Gold deployed a ‘collaborative’ HRIA process in respect of its Pascua Lama Project in Huasco Valley in Chile. Its legitimacy was contested due to alleged manipulation and coercion, and the company never addressed any of the findings. There was a separate, community-led HRIA conducted for the same project. 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: Article 30, 2019) at 63 [“Maher, 2019”]; In another example, Goldcorp commissioned a Human Rights Assessment at its Marlin Mine project in Guatemala, however, the initiative was driven by socially responsible investors and did not involve representatives from the community. See, Catherine Coumans, “Do No Harm? Mining Industry Responses to the Responsibility to Respect Human Rights” (2017) *Canadian Journal of Development Studies* 38(2) at 272 [Coumans, 2017].

⁶¹ Maher, 2019 at 68; Coumans, 2017 at 278.

Human Rights and the IAA

KEY DOCUMENT

- [Guidance: Analyzing Health, Social and Economic Effects under the Impact Assessment Act](#)

The federal IAA does not explicitly consider human rights. However, businesses are expected to comply with federal and provincial human rights statutes which require them to treat all those who interact with the business equally regardless of race, gender, age, and religion, among other protected grounds.⁶² Still, human rights commissions in Canada have only just begun to consider promoting responsible business conduct in accordance with international human rights norms.⁶³ Canadian multi-nationals operating abroad have also begun to complete human rights-related reporting to satisfy disclosure requirements under provincial securities law.⁶⁴

In absence of express human rights provisions in the IAA, the new requirement to consider health, social and economic effects under section 21(1)(a) of the IAA provides an opportunity for a substantive assessment of potential human rights impacts. While social impact assessments (SIA) and health impact assessments (HIA) are considered distinct from HRIA, human rights are a core value of SIA and HIA and both approaches seek to defend and uphold human rights.⁶⁵

The Agency's Guidance: Analyzing Health, Social and Economic Effects explains how valued components should be identified, prioritized, and assessed.⁶⁶ Data on "baseline conditions" can then be compared to anticipated impacts and inform mitigation strategies proposed to minimize impacts. Human rights are identified as a "socially valued component," providing an opening for the consideration of both procedural and substantive human rights.⁶⁷ The Guidance notes that the human rights of certain groups, such as Indigenous peoples, children, women, and people of diverse gender identities, may be differentially

Valued Components

Valued components represent environmental, health, social, economic elements or conditions of the natural and human environment that may be impacted by a proposed project and are of concern or value to the public, Indigenous peoples, and other parties. Valued components may be identified as having scientific, biological, social, health, cultural, traditional, economic, historical, archaeological and/or aesthetic importance. Valued components are the focus of an IA.

⁶² See, Canadian Federation of Independent Business, "Human Rights Compliance: the Three Templates Every Small Business Needs" (Accessed June 11, 2022), online: <www.cfib-fcei.ca/en/tools-resources/human-resources/human-rights-compliance-three-templates-every-small-business-needs>.

⁶³ See, Marie-Claude Landry, "The Big Three: Key Inclusion Principles for Canadian Business" (5 October 2021) Speaking Notes for the Making Global Goals Local Business – UN Global Compact Canadian Conference, online: www.chrc-ccdp.gc.ca/en/resources/the-big-three-key-inclusion-principles-canadian-businesses.

⁶⁴ See, Brian Burkett et al, "In Brief: Human Rights Compliance for Businesses in Canada" (2022) Fasken, online: <www.lexology.com/library/detail.aspx?g=181fd777-f7ce-43eb-9775-1eea548fb2cc>.

⁶⁵ International Association for Impact Assessment (IAIA), "Social Impact Assessment: Guidance for assessing and managing the social impacts of project" (2015) at iv, online: <www.iaia.org/uploads/pdf/SIA_Guidance_Document_IAIA.pdf>.

⁶⁶ IAAC, "Guidance: Analyzing Health, Social and Economic Effects under the Impact Assessment Act," online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/analyzing-health-social-economic-effects-impact-assessment-act.html> [IAAC, Guidance: Analyzing Health, Social and Economic Effects].

⁶⁷ The Guidance cites the IAIA's *International Principles for Social Impact Assessment* and its *Social Impact Guidance for Assessing and Managing the Social Impacts of Projects* as tools and recommends that proponents consult them for guiding principles, definitions, and evidence-based tools.

impacted by a project (see “GBA, Intersectionality and the IAA”). Further, the Guidance emphasizes that “health, social, economic and environmental effects are inherently and inextricably.”⁶⁸

The Guidance proposes a determinants of health framework which considers biophysical and social and economic valued components, such as access to clean drinking water and affordable housing. Health includes considerations of physical, mental, emotional, and spiritual health, including Indigenous views of health, and expands outwards beyond the individual to include the land, family, and the broader community.⁶⁹

There can be multiple, interconnected social, health, and economic effects that result from changes to a valued component. For example, non-Indigenous and Indigenous communities may rely on access to specific areas for harvesting (e.g., gathering, fishing, hunting, etc.) The valued components may be parks, lakes or rivers and the resources contained therein. Industrial impacts to these areas can result in social dislocation and loss of access to, or the contamination of, country foods, in addition to mental health effects. These interacting factors impact community health and well-being. This holistic approach avoids a narrow framing of the cause of health outcomes in individual terms.”⁷⁰

Proponents are expected to identify “effect pathways” between project activities and predicted impacts to valued components and consider the differential impact on diverse subgroups such as youth, racialized communities, and persons with disabilities.⁷¹ To do so, they must engage with affected Indigenous and non-Indigenous communities in accessible and culturally relevant ways to receive their input and understand the impacts.⁷² For example, Indigenous knowledge can show how health, social and economic effects intersect with impacts to Indigenous rights and culture.⁷³ The sections on stakeholder engagement, gender and intersectionality, and indigenous rights elaborate on these elements.

Explicitly requiring the consideration of human rights impacts in section 22(1)(a) of the IAA could go a long way in integrating human rights into IA practices in Canada. However, there is no regulation-making power under section 22 of the IAA. Thus, short of an amendment, the Agency can use guidance to elaborate upon and clarify its expectations on the requirements of the IAA.⁷⁴ In the following section, we highlight the international standards contained in prominent human rights-focused RBC tools which can be incorporated into the Guidance.

⁶⁸ IAAC, Guidance: Analyzing Health, Social and Economic Effects.

⁶⁹ IAAC, “Guidance: Assessment of the potential impacts to the rights of Indigenous peoples” (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html>.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.* (practitioners may need to develop novel approaches to data collection such as art or visual methods, Indigenous-language based-tools, interviews, or other forms that ensure accessibility for various groups).

⁷³ *Ibid.* (the Guidance elaborates further: “for Indigenous communities there are distinct determinants of health, such as self-determination, cultural continuity, the legacy of residential schools and language. The health and wellbeing of Indigenous communities are influenced by factors (such as land and the impacts of colonization) that intersect with other determinants in ways that are distinct from non-Indigenous Canadians...Indigenous-specific models of the determinants of health often include emphasis on the interconnections between the land and the spiritual and cultural determinants of health and well-being,”

⁷⁴ The Agency could also require that a project’s impact on human rights be considered under its omnibus authority in section 22(1)(t) on a case-by-case basis. However, this power is discretionary.

Human Rights and RBC

HRDD and HRIA tools have rarely been used in relation to proposed projects or operations within Canada, and there is no tool designed or promoted by the Canadian government to companies operating domestically that focus on HRDD or HRIA. Despite the absence of an express requirement that extractive companies conduct HRDD within or outside Canada, companies are still required to conduct due diligence under the UNGPs and the OECD guidance. Non-compliance with the OECD tools could lead to a company being subject to a specific instance complaint at the Canadian OECD National Contact Point (NCP).⁷⁵ Non-compliance could inform legal liability, as the case of *Milieudefensie et al v Royal Dutch Shell* makes clear.⁷⁶

HRDD management systems and IA are mutually reinforcing. IA involves the screening, scoping and assessment of actual and potential impacts, the consideration of alternatives, mitigation, and follow-up. These elements are consistent with RBC HRDD processes, including identifying, assessing, and mitigating adverse impacts, tracking implementation and results, communicating how impacts are addressed, and cooperating in remediation when appropriate. The IAA's provisions and Guidance on Analyzing Health, Social and Economic Effects must be rooted in the international human rights framework and, most importantly, involve meaningful engagement with stakeholders and rights-holders, as opposed to being a "tick-box" exercise.⁷⁷

This section draws on RBC due diligence tools and explains how they can embed human rights considerations in the IA process. It also identifies RBC tools that are relevant to specific rights-holding groups, including workers, children, and human rights defenders (see also, "Gender, Intersectionality, and RBC" and "Indigenous Rights and RBC" for RBC tools relevant to Indigenous Peoples and women and gender-diverse persons as rights-holders). As explained in the "Stakeholder Engagement" section of this toolbox, the distinction between rights-holders and stakeholders is important to conducting IAs. Whereas all people have human rights, not all stakeholders will have their human rights impacted by a project.

The UNGPs provide a framework for the consideration of human rights in impact assessment. States must clearly set out the expectation that all businesses respect human rights and provide guidance to businesses on how to respect human rights throughout their operations (Principles 2 and 3.d). The inclusion of an explicit provision in the IAA requiring the consideration of human rights in IA is one way to make this expectation clear. In the absence of such a requirement, 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. The Australian Human Rights Commission (AHRC) provides useful guidance on the implementation of the UNGPs, within and outside Australia: it encourages companies to embed human rights into their core practice, conduct HRIAs, 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.⁷⁸

⁷⁵ The OECD NCP has now recognized that the OECD Guidelines apply domestically. See, GAC, "Canada's National Contact Point's Final Statement – Seabridge Gold and the Southeast Alaska Conservation Council" (13 November 2017), online: *Government of Canada* <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_statseabridge-comm_finale.aspx?lang=eng>.

⁷⁶ *Supra* note 38.

⁷⁷ Jonathan Bonnitcha & Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business & Human Rights" (2017) *European Journal of International Law* 28(3) at 910.

⁷⁸ Australian Human Rights Commission, "The Australian Mining and Resource Sector and Human Rights" (2015), online (pdf): <https://www.humanrights.gov.au/sites/default/files/GPGB_mining_resource_sector_and_hr.pdf>.

The OECD Guidelines for Multi-National Enterprises (OECD MNE Guidelines) and the supplementary OECD guidance also provide detailed guidance on due diligence and touches on all subject areas, including the environment. While the guidelines themselves are voluntary for business, adhering states like Canada make a binding commitment to implement them.⁷⁹ The Human Rights Chapter of the OECD MNE Guidelines closely mirrors the business responsibility to respect rights under the UNGPs in that it recommends enterprises prevent, mitigate, and remediate human rights impacts, irrespective of the State's failure to enforce or implement international human rights obligations.⁸⁰

Away from more state-centric instruments like the UNGPs and OECD tools, the IFC Performance Standards are a more specific tool to encourage companies to conduct due diligence, and which have been identified by the Government of Canada as an international standard with which all extractive companies should comply.⁸¹ IFC Performance Standard (PS) 1 identifies the business responsibility to respect human rights, recognizing that due diligence prescribed by each of the Performance Standards will "enable the client to address many relevant human rights issues in its project."⁸² To be eligible for IFC support, the client is required to develop an environmental and social management system to manage risks and impacts through the lifecycle of a project. PS1 draws attention to the direct and indirect impacts on ecosystems on which affected communities' livelihoods may depend, in line with the Agency's Guidance on Health, Social and Economic Effects. Further, the IFC's guidance on health impact assessment under PS4 could be particularly useful in operationalizing the consideration of health and social factors now required by the IAA.⁸³

There are two main limitations of the IFC Performance Standards: 1) they are restricted to companies who need financial support, compared to more broadly disseminated tools like the OECD due diligence tools; and 2) historically, they have only been applied to projects in developing countries due to the mandate of the World Bank, indicating an implicit assumption that domestic law in Canada is sufficient to protect human rights. Some companies and industry associations like MAC and PDAC may also be members of international organizations, such as the International Council on Mining & Metals (ICMM), which provide due diligence standards like the International Council for Mineral & Metals' "Integrating Human Rights Due Diligence into Corporate Risk Management Processes." MAC and PDAC have also published early engagement tools which provide guidance for stakeholder and rightsholder engagement at the exploration stage, including a joint publication produced by PDAC, MAC and the Government of Canada entitled, "Exploration and Mining Guide for Aboriginal Communities: Mining Information Kit."

There are also due diligence standards specific to certain rights-holding groups, such as children. UNICEF's Children's Rights and Business Principles is one of the most comprehensive soft law instruments protecting children in the business and human rights sphere. These Principles were inspired by the UNGPs and the *Convention on the Rights of the Child*. Other RBC tools, like the UNGPs, OECD Guidelines, and UN Global Compact touch on the subject tangentially or are restricted to the child labour or supply chain context.

⁷⁹ OECD MNE Guidelines at 13

⁸⁰ OECD MNE Guidelines at 32.

⁸¹ GAC, Canada's Enhanced CSR Strategy.

⁸² IFC Performance Standards at 5-15.

⁸³ IFC Performance Standards at 27-30.

TABLE 1: HUMAN RIGHTS AND RBC⁸⁴

IAA Subject Area: Social, Health & Economic Impacts Section 22(1)(a) of the IAA	
Focus	RBC Tools
Human Rights Due Diligence	<p>ICMM, Integrating Human Rights Due Diligence into Corporate Risk Management Processes</p> <p>ICMM, Sustainable Development Framework</p> <p>IFC Environmental and Social Sustainability Policy</p> <p>IFC Performance Standards on Social & Environmental Sustainability</p> <p>IFC Performance Standards Guidance Notes</p> <p>Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), Intergovernmental Mining Policy Framework: Mining and Sustainable Development</p> <p>IGF, IGF Guidance for Governments: Improving Legal Frameworks for Environmental & Social Impact Assessment and Management</p> <p>International Organization for Standardization (ISO): Social Responsibility Standard</p> <p>Mining Association of Canada (MAC), TSM Protocols and Framework</p> <p>OECD Due Diligence Guidance for RBC</p> <p>OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas</p> <p>OECD Guidelines for Multinational Enterprises</p> <p>OECD Risk Awareness Tools for Multi-National Enterprises in Weak Governance Zones</p> <p>PDAC, e3 Plus: Principles and Guidance Notes</p> <p>PDAC, Excellence in Social Responsibility e-toolkit</p> <p>UN Global Compact, OECD Guidelines for RBC & Sector-Specific Guidance: A Manual for Canada</p> <p>UN Guiding Principles on Business and Human Rights</p> <p>World Bank Group, Environmental, Health and Safety Guidelines</p> <p>World Bank Group, Environmental and Social Framework</p>
Human Rights Defenders	<p>Business & Human Rights Resource Centre & International Service for Human Rights (ISHR), Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders – Guidance for Companies</p> <p>Global Affairs Canada, Voices at Risk: Canada’s Guidelines on Supporting Human Rights Defenders</p> <p>ISHR, A Human Rights Defender Toolkit for Promoting Business Respect for Human Rights</p> <p>Voluntary Principles for Security & Human Rights</p>
Children’s Rights	<p>MAC, Preventing Child and Forced Labour Protocol</p> <p>OECD, Practical Actions for Companies to identify and address the worst forms of child labour in mineral supply chains</p> <p>UNICEF, Children’s Rights and Business Principles, Engaging Stakeholders on Children’s Rights: A Tool for Companies</p>

Worker's Rights	IFC Performance Standard 2: Labor and Working Conditions International Labour Organization (ILO), ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy MAC, Safety and health Protocol PDAC, Excellence in Health and Safety e-toolkit
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Another key rights-holding group are workers. Considering the relationship between workers' rights and toxic substances is one way in which to explicitly link business, human rights, and environment. The International Labour Organization (ILO)'s Tripartite Declaration of Principles concerning Multinational Enterprises offers guidance to companies, governments, and workers' organizations in areas such as employment, training, conditions of work and life, and industrial relations, and touches on the elements of a safe and healthy working environment. The IFC Performance Standards likewise address worker health and safety when confronted with hazardous substances.⁸⁵ The UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes has also developed useful guidance materials for businesses and states on this topic.⁸⁶

Human rights defenders (HRDs) are an acutely vulnerable group that receive no mention in any of the Agency's guidance. The Framework Principles require the protection of human rights defenders, and the consideration of rights to freedom of expression, freedom of association and freedom of assembly regarding environmental matters, as well as a safe for environmental human rights defenders that is free from harassment, intimidation, and violence.⁸⁷ There is no readily available provision under the IAA through which these rights are required to be considered. GAC recently developed "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders" which is based on key international human rights standards; however, this does not appear to apply domestically.⁸⁸ The International Service for Human Rights' (ISHR) "Human Rights Defender Toolkit for Promoting Business Respect for Human Rights" could provide a useful resource for domestic guidelines, as it considers the specific challenges faced by HRDs with reference to procedural environmental rights. The UN Special Rapporteur for Human Rights and the Environment and the UN Working Group on Business & Human Rights have also written reports which considers the relationship between land rights and Environmental Human Rights Defenders.⁸⁹

The heightened vulnerability of workers, children, and defenders to adverse human rights impacts underscores the importance of conducting an HRIA at the very beginning of a project, prior to the

⁸⁵ See, IFC Performance Standard 4 (Community Health, Safety, and Security); See also International Finance Corporation, "Environmental, Health, and Safety General Guidelines" (2007) online: <www.ifc.org/wps/wcm/connect/29f5137d-6e17-4660-b1f9-02bf561935e5/Final%2B-%2BGeneral%2BEHS%2BGuidelines.pdf?MOD=AJPERES&CVID=nPtguVM>.

⁸⁶ See Baskut Tuncak, "Report on workers' rights and toxic exposures" UNGA, 39th Sess, UN Doc A/HRC/39/48/Add.2 (2018), online: *OHCHR* <documents-dds-ny.un.org/doc/UNDOC/GEN/G18/239/70/PDF/G1823970.pdf?OpenElement>. Baskut Tuncak, "Principles on the protection of workers from exposure to toxic substances," UNGA, 42nd Sess, UN Doc A/HRC/42/41 (2019), online: *OHCHR* <documents-dds-ny.un.org/doc/UNDOC/GEN/G19/217/70/PDF/G1921770.pdf?OpenElement>; Baskut Tuncak, "Report on duty to prevent exposure to toxics," UNGA, 74th Sess UN Doc A/74/480 (2019), online: *OHCHR* <undocs.org/pdf?symbol=en/A/74/480>.

⁸⁷ Framework Principles at paras 10-11, 13, 21, 45.

⁸⁸ GAC, "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders" (2019), online: *Government of Canada* <www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng>.

⁸⁹ John Knox, "Environmental Human Rights Defenders: A Global Crisis" (February 2017), online: *Universal Rights Group* <www.universal-rights.org/wp-content/uploads/2017/03/EHRDs.pdf>; UNWGBHR, Guidance on Ensuring Respect for Human Rights Defenders, (2021) A/HRC/47/39/Add.2, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/161/49/PDF/G2116149.pdf?OpenElement>>.

regulatory IA process, as part of a company's due diligence. The Danish Institute for Human Rights (DIHR) HRIA Guidance and Toolbox provides a comprehensive instruction on the intersection between HRDD and HRIA.⁹⁰ The toolbox spells out the strengths and weaknesses of integrated and dedicated approaches to HRIA and the key criteria of HRIA. It includes guides and practical tools for conducting, commissioning, reviewing, or monitoring HRIA of business projects. Oxfam Australia's "Community-Based Human Rights Impact Assessment: The Getting it Right Tool" also offers a community-based, participatory process and work plan to analyze the human rights impacts of private foreign investments, which focuses on "local communities as experts and human rights advocates."⁹¹

Did you know? Oxfam's Getting it Right Tool...

- was designed by the Canadian organization Rights and Democracy to specifically help local communities identify, analyze, and respond to the positive and negative human rights impacts of public and private investment projects.
- contains six phases: preparation for the HRIA, including by building the assessment team, identifying stakeholders, and developing a work plan; understanding the relevant legal framework; selection of relevant human rights to develop a case-specific assessment model; investigation; analysis and report; and engagement, monitoring, and follow-up.
- focuses on principles such as participation, non-discrimination, accountability, transparency, and access to information.
- has been tested and refined through case studies conducted in a variety of countries, including Argentina, Bolivia, Ecuador, Peru, Philippines, Democratic Republic of Congo, and Cameroon.
- is available on [Oxfam's website](#) in English, French, and Spanish.

Any HRIA or HRDD process should provide for access to remedy, that is, avenues by which rights-holders can raise grievances and seek recourse where harm occurs, including through non-operational level avenues. The UNGPs specify that businesses should account for their human rights harms and provide remedy to victims even if state law does not provide sufficient access to justice. The inherent nature of rights means any violation is unjustifiable, regardless of the economic or political considerations driving a project. The IAA and accompanying guidance should be benchmarked against internationally recognized standards and principles, not just domestic law which may permit rights infringements. The recent criminalization and forced removal of Indigenous human rights defenders in the cases of Alton Gas, Sisson Mine, Coastal Gas Link, and the Transmountain pipeline, among other conflicts, highlights the pressing need to integrate international human rights standards into the IA regime.⁹²

HRDD or HRIA is not a silver bullet for addressing the risks posed by extractive companies, and the perception of a possible bias in favour of industry development is high.⁹³ RBC tools could be captured by companies and used in a manner that may in the end be harmful. For this reason, HRDD and HRIA tools

⁹⁰ Nora Gotzmann et al, "Human Rights Impact Assessment: Guidance and Toolbox" (Copenhagen: DIHR, 2016).

⁹¹ Oxfam Australia, "Community-Based Human Rights Impact Assessment: The Getting it Right Tool," online <https://s3.amazonaws.com/oxfam-us/www/static/media/files/COBHRA_Training_Manual_-_English.pdf>.

⁹² See, Marc Kruse & Carrie Robbison, "Injunctions by First Nations: Results of a National Study" (14 November 2019), online: yellowheadinstitute.org/2019/11/14/injunctions-by-first-nations-results-of-a-national-study/; Kate Gunn, "Injunctions as a Tool of Colonialism" (30 July 2020), online: <www.firstpeopleslaw.com/public-education/blog/injunctions-as-a-tool-of-colonialism>; Sherry Pictou, "Wolastoqiyik and Mi'kmaw Grandmothers – Land/Water Defenders Sharing and Learning Circle: Generating Knowledge for Action" (2021), online (pdf): www.kairoscanada.org/wp-content/uploads/2021/09/Grandmothers_Land_Defense_Report_Pictou_2021.pdf [Pictou, Grandmother's Report].

⁹³ Tarke Wanvik, "Governance Transformed into Corporate Social Responsibility (CSR): New Governance Innovations in the Canadian Oil Sands" (2016) *Extractive Industries and Society* 3: 517 – 526.

should not be used without the prior consent of the affected people and should be designed in collaboration with affected rightsholder and stakeholders. They should be transparent and open (i.e., disclosed), entail external participation and verification, and involve independent monitoring and review.⁹⁴ These recommendations reflect the OECD due diligence guidance, including the environment chapter of the OCED Multinational Guidelines which expect that objectives and performance targets are subject to regular monitoring and verification.⁹⁵

Integrating RBC tools related to HRDD and HRIAs into the IAA regime can help ensure these standards are met, as the Agency and other federal authorities could act as the regulator, empowered to oversee and monitor HRDD/HRIA processes. For example, the Agency could facilitate the involvement and participation of stakeholders and rightsholders in the development of HRIAs and HRRD monitoring and compliance schemes through the designated Monitoring Committees (see “Stakeholder Engagement and the IAA”). At the same time, space should be left open for Indigenous governance arrangements to substitute any federal processes or exercises in jurisdiction, to ensure that approved projects respect and uphold Indigenous laws, customs, and norms (see “Indigenous Rights and RBC”).

In Australian 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 these tools, and extractive companies are mandated to conduct HRDD as in the case of France,⁹⁶ or submit statutory reports on due diligence efforts, particularly on child and modern slavery as in Australia and the UK, and supply chain.⁹⁷ The EU *Conflict Minerals Regulation* requires mineral companies to conduct substantive due diligence on their supply chains to ensure minerals are imported from responsible sources only.⁹⁸ Canada’s Enhanced CSR Strategy compares poorly against these initiatives due to its restriction to Canadian companies operating abroad, the vagueness of its provisions, and its failure to prescribe HRDD. The IAA’s provision for the involvement of a specialist federal authority in possession of expert information or knowledge in respect of a designated project under section 23 provides a window for leveraging the expertise of federal and provincial human rights commissions in the consideration of project’s human rights impacts.⁹⁹

⁹⁴ James Harrison, “Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment” (2013) *Impact Assessment & Project Appraisal* 31(2): 107 – 117.

⁹⁵ OECD MNE Guidelines p42, para 1.

⁹⁶ France’s Corporate Duty of Vigilance Law mandates companies to conduct HRDD in their supply chain and produce a report of the actions taken in this regard (*Corporate Duty of Vigilance Law*, Law No. 2017-3999 of 27 March 2017).

⁹⁷ These 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 (*Modern Slavery Act 2018* (Austl), No 153, 2018; *Modern Slavery 2015* (UK), c 30. See also, Bill C-423, *An Act Respecting the Fight against Certain Forms of Modern Slavery through the Imposition of Certain Measures and Amending the Customs Tariffs*, 1st Sess, 42nd Parl, 2019 (first reading 13 December 2018).

⁹⁸ 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 area*, [2017] OJ, L130/1).

⁹⁹Note: the exercise of human rights jurisdiction will depend on whether such exercise falls under an allocated head of power in the Constitution.

Questions to Consider

1. Could a stand-alone HRIA guidance under the IAA be useful, or is HRIA best carried out within a comprehensive IA, that is, alongside social, economic, and health assessments?
2. What role, if any, could national and provincial human rights commissions play in ensuring companies comply with HRDD standards?
3. What is the relationship between CSR and RBC tools?

Further resources

AHRC and Ernst & Young, “Human Rights in Investment: The Value of Considering Human Rights in ESG Due Diligence” (2017), online (pdf): *National Library of Australia* <nla.gov.au/nla.obj-670433750/view>.

AHRC, “Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement” (2016), online: <humanrights.gov.au/sites/default/files/Implementing%20UNGPs%20in%20Australia%20-%20Joint%20Civil%20Society%20Statement.pdf>.

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Blaise, Kerrie & Nadia Ibrahim, “Worker’s Environmental Rights in Canada: A project with Adapting Canadian Work and Workplaces to Respond to Climate Change” (October 2019), online: *Canadian Environmental Law Association* <cela.ca/wp-content/uploads/2021/07/Workers-Environmental-Rights-in-Canada_Full-Report.pdf>.

Baskut Tuncak, “Report on workers’ rights and toxic exposures,” *Special Rapporteur on toxics and human rights*, UNGA, 39th Sess, UN Doc A/HRC/39/48/Add.2 (2018), online (pdf): *OHCHR* <documents-dds-ny.un.org/doc/UNDOC/GEN/G18/239/70/PDF/G1823970.pdf?OpenElement>.

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Baskut Tuncak, “The Rights of the Child and Hazardous Substances and Wastes” *Special Rapporteur on Toxics & Human Rights*, UNGA, 33rd Sess, UN Doc A/HRC/33/41 (2016), online (pdf): *OHCHR* <daccess-ods.un.org/tmp/2338849.60412979.html>.

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Danish Institute for Human Rights, “Human Rights Impact Assessment: Guidance and Toolbox” (2020), online: <www.humanrights.dk/tools/human-rights-impact-assessment-guidance-toolbox>.

Dutch Ministry of Foreign Affairs, “Government Policy to Stimulate International Responsible Business Conduct” (2018), online: *Business & Human Rights Resource Centre* <media.business-humanrights.org/media/documents/files/government-policy-to-stimulate-international-responsible-business-conduct.pdf>.

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Stakeholder Engagement

A key component of HRDD is meaningful engagement with stakeholders. A major distinction between how stakeholder engagement is treated in the human rights context is the recognition of rights-holders as a specific genre of stakeholder. As described in the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement, all people have human rights and thus all stakeholders are “rights-holders,” however, not all stakeholders will have their human rights put at risk by an extractive project.¹⁰⁰

Whether a person or group of people are classified as rightsholders or stakeholders depends on the context, circumstances, and issues at stake. Both IA Guidance and RBC tools prioritize the participation of those most directly affected and/or negatively impacted by proposed projects, such as communities living near downstream from a project, Indigenous peoples, workers, and local human rights defenders.¹⁰¹ There is a risk that by creating two classes of public, one might be marginalized in the IA process. For example, the emphasis on “directly affected” groups may lead IA practitioners to exclude environmental NGOs, including those representing the collective interest of future generations.

Failure to recognize the distinction between stakeholders and rights-holders considerably impacts how consultation processes are carried out. While such a distinction is considered exclusive to the purview of HRDD, it must be deemed a key component of stakeholder engagement, whether human rights are implicitly or explicitly considered in the IA process.

Thus, while the Framework Principles for Human Rights and the Environment affirm the importance of effective public participation in environmental decision-making for all, special attention should be paid to those who may be most vulnerable to harm such as employees and informal workers, affected communities, and human rights defenders.¹⁰²

Stakeholder Engagement and the IAA

KEY DOCUMENTS
<ul style="list-style-type: none">● Policy Context: Public Participation in Impact Assessment● Guidance: Public Participation in Impact Assessment● Public Participation Plan - Template● Policy Context: Considering Community Knowledge under the Impact Assessment Act● Operational Guidance: Framework for determining whether a Monitoring Committee is warranted for a Designated Project● Policy Context: Public Interest Determination under the Impact Assessment

¹⁰⁰ “OECD Due Diligence Guidance for Meaningful Stakeholder Engagement” (2017) at 10, online: www.oecd.org/development/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement].

¹⁰¹ AAC, “Guidance: Public Participation in Impact Assessment,” *Government of Canada*, online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-public-participation-impact.html> [IAAC, Guidance: Public Participation in IA] (The Agency notes that face-to-face engagement activities will focus primarily on communities near the designated project area); OECD Due Diligence Guidance on Meaningful Stakeholder Engagement at 8.

¹⁰² Framework Principles, paras 23-26.

A stated purpose of the IAA is to ensure that opportunities are provided for *meaningful* public participation during an assessment (see Figure 3).¹⁰³ The substantive provisions on public participation, particularly in the early planning phase of a project, are some of the key new provisions in the IAA.¹⁰⁴ Engagement with Indigenous groups is characterized as distinct and separate from public participation, on account of the special constitutional relationship between the Crown and Indigenous peoples (See “Indigenous Rights and the IAA”).¹⁰⁵

According to the Agency, “meaningful public participation means that members of the public who wish to participate in an impact assessment have an opportunity to do so and are provided with the information and capacity that enables them to participate in an informed way.”¹⁰⁶ It also means that public perspectives influence decision-making, project design, follow-up, and monitoring.¹⁰⁷ The common objectives for public participation are to: 1) inform by providing “balanced and objective information” on the proposed project and the IA process, including how input is to be considered and assessed; 2) to consult by obtaining feedback on the project, including issues of concern, the scope of the assessment, and potential mitigation measures; 3) to involve the public by providing opportunities for dialogue with “interested parties”; and 4) to collaborate through the development of Public Participation Plans.¹⁰⁸

Figure 3: Principles that Define Meaningful Public Participation
<ul style="list-style-type: none"> ● It starts early and continues throughout each step of the process, including timely notification of proposed engagement. ● It is supported with funding made available through the Agency's Participant Funding Program, which will be enhanced to improve public and Indigenous participation in impact assessments. ● It is transparent and information is available and accessible to the public on the proposed Impact Assessment Registry, unless subject to valid exceptions set out in the Act, such as financial information that is consistently treated in a confidential manner. ● It is designed to increase the knowledge of participants and government and foster relationships. Citizens and communities are able to contribute to the science and evidence base for decision-making. ● It is designed to prioritize the participation of those who are most affected by the proposed project, while also ensuring that interested members of the public have an opportunity to share their views. ● Methods are flexible, innovative and consider the assessment context and legislated timelines. It includes a variety of engagement techniques that are appropriate to the circumstances and are accessible to diverse groups, including women, men, gender-diverse people and underrepresented Canadians. ● It influences decision-making and participants see that their input was considered. ● It continually adapts and improves. Each assessment will contribute to a greater understanding of participation practices.¹⁰⁹

¹⁰³ IAA, s 2(h).

¹⁰⁴ IAA, ss 11, 27, 33(e)(f), 51(1)(c-d), 99, 181 (4.1).

¹⁰⁵ IAAC, Guidance: Public Participation in IA.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* (The Agency uses a variety of methods for sharing and gathering information, including: posting information on the Registry, as well as on social media; in-person events, including information sessions, open houses, workshops, technical meetings, focus groups and informal meetings; and plain-language documents and accessible information, including scientific information. When determining which methods to use, the IAAC will consider factors such as the audience, their needs and how they want to be engaged, as well as potential barriers to participation and limitations to accessing digital information).

¹⁰⁹ *Ibid.*

There are five distinct phases in the IA process: Planning (first 180 days), Impact Statement, Impact Assessment (within 300 days if conducted by the Agency, 600 days if conducted by a Review Panel), Decision-Making (within 30 days of the posting of the IA Report), and Post-Impact Assessment. Below, we provide an overview of these phases, their timelines, and their distinct opportunities for public participation and transparency. We also provide a table featuring the relevant IAA provisions.

TABLE 2: PUBLIC PARTICIPATION IN THE IAA

Provision	Legislative Requirements
Preamble	Whereas the Government of Canada recognizes the importance of public participation in the impact assessment process, including the planning phase, and is committed to providing Canadians with the opportunity to participate in that process and with the information they need in order to be able to participate in a meaningful way.
Purposes of the Act	6(1)(h) to ensure that opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment;
Factors to be considered during Impact Assessment	22(1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors: (m) community knowledge provided with respect to the designated projects (n) comments received from the public
Planning Phase	11 The Agency must ensure that the public is provided with an opportunity to participate meaningfully, in a manner that the Agency considers appropriate, in its preparations for a possible impact assessment of a designated project, including by inviting the public to provide comments within the period that it specifies. 14(1) The Agency must provide the proponent of a designated project with a summary of issues with respect to that project that it considers relevant, including issues that are raised by the public or by any jurisdiction or Indigenous group that is consulted under section 12, and with any information or knowledge made available to it by a federal authority that the Agency considers appropriate. 15(1) The proponent must provide the Agency with a notice that sets out, in accordance with the regulations, how it intends to address the issues referred to in section 14 and a detailed description of the designated project that includes the information prescribed by regulations made under paragraph 112(1)(a). 16(2) In making its decision, the Agency must take into account the following factors: (d) any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted under section 12
Impact Assessment by Agency	27 The Agency must ensure that the public is provided with an opportunity to participate meaningfully, in a manner that it considers appropriate, within the time period specified by the Agency, in the impact assessment of a designated project.

	<p>28(1) The Agency must ensure that a draft report with respect to the impact assessment of a designated project is prepared, and must ensure that the following are posted on the Internet site:</p> <ul style="list-style-type: none"> (a) a copy of the draft report or an indication of how a copy may be obtained; and (b) a notice that invites the public to provide comments on the draft report within the period specified.
Impact Assessment by Review Panel	<p>27 A review panel must, in accordance with its terms of reference:</p> <ul style="list-style-type: none"> (b) ensure that the information that it uses when conducting the impact assessment is made available to the public (c) hold hearings in a manner that offers the public an opportunity to participate meaningfully, in the manner that the review panel considers appropriate and within the time period that is specifies in the impact assessment. (d) prepare a report with respect to the impact assessment that: <ul style="list-style-type: none"> iii) sets out a summary of any comments received from the public <p>28 The Agency must ensure that a draft report with respect to the impact assessment of a designated project is prepared, and must ensure that the following are posted on the Internet site:</p> <ul style="list-style-type: none"> (a) a copy of the draft report or an indication of how a copy may be obtained; and (b) a notice that invites the public to provide comments on the draft report within the period specified. <p>(3.2) The report must also set out a summary of any comments received from the public, as well as the Agency's recommendations with respect to any mitigation measures and follow-up program and the Agency's rationale and conclusions.</p>
Participant Funding Programs	<p>75 (1) The Agency must establish a participant funding program to facilitate the participation of the public in:</p> <ul style="list-style-type: none"> (a) the Agency's preparations for a possible impact assessment of — or the impact assessment of and the design or implementation of follow-up programs in relation to — designated projects that include physical activities that are designated by regulations made under paragraph 112(1)(e) or that are part of a class of activities designated by those regulations; (b) the impact assessment of, and the design or implementation of follow-up programs in relation to, designated projects that are referred to a review panel and that do not include physical activities that are designated by regulations made under paragraph 112(1)(e) or that are not part of a class of activities designated by those regulations; and (c) regional assessments and strategic assessments.
Regional & strategic assessments	<p>99 The Agency, or the committee, must ensure that the public is provided with an opportunity to participate meaningfully, in a manner the Agency or committee, as the case may be, considers appropriate in any assessment referred to in section 92, 93 or 95 that it conducts.</p>
Internet site	<p>105 (1) The Agency must establish and maintain an Internet site that is available to the public.</p>

(Registry & Rights of Access)	<p>(2) “The Agency must ensure that the following records and information relating to the impact assessment of the designated project that it conducts are posted and, subject to paragraph (4)(c), maintained on the Internet site:</p> <ul style="list-style-type: none"> (a) any public notice that is issued by the Agency to request the participation of the public in the impact assessment; (b) a description of the factors to be taken into account in the impact assessment and of the scope of those factors; (c) the report with respect to the impact assessment that is taken into account by the Minister under subsection 60(1), or a summary of the report and an indication of how a copy of the report may be obtained; (d) any scientific information that the Agency receives from a proponent or federal authority, or a summary of the scientific information and an indication of how that information may be obtained; (e) a description of the results of the follow-up program that is implemented with respect to that designated project or a summary of the results and an indication of how such a description may be obtained; (f) notice of the Agency’s decision to terminate the impact assessment under s.73; (g) any public comments received during the impact assessment; and (h) any other record or information prescribed by regulations made under paragraph 112(1)(f).”
Administration	<p>114 (3) The Minister must provide reasonable public notice of and a reasonable opportunity for anyone to comment on draft guidelines, codes of practice, agreements, arrangements or criteria under this section.”</p> <p>(4) Any guidelines, codes of practice, agreements, arrangements or criteria must be made available to the public.</p>

During the first 80 days of the planning phase, the Agency and proponent are to engage with Indigenous peoples and the public to identify issues and concerns in response to the initial project description and to help define a Public Participation Plan. The Agency must prepare a Summary of Issues based on the information gathered from stakeholders and rights-holders, after which the proponent is required to release a Detailed Project Description providing information about the possible environmental, social, health and economic effects of the project and detailing how they plan to address the issues described.

During the remaining 100 days of the planning phase, the Agency will develop:¹¹⁰

- an **Impact Assessment Cooperation Plan** describing how the Agency will collaborate with other jurisdictions throughout the IA process;
- a **Public Partnership Plan** to provide clarity around how the public will be meaningfully engaged through the IA process, including participation objectives, opportunities and methods that align with the need of communities;
- an **Indigenous Engagement and Partnership Plan** to describe how Indigenous groups will be meaningfully engaged through the impact assessment process.

¹¹⁰*Ibid* (The Practitioner’s Guide to Federal Impact Assessments under the IAA contains documents describing these plans and provides templates for each. The Summary of Issues, TISG and Public Participation Plan are to be posted on the Registry for public comment, which could result in the identification of additional components or studies to be undertaken and ensuring that appropriate public participation opportunities have been identified. The final documents will also be posted to the Registry with the Notice of Commencement, initiating the impact assessment process).

- a **Permitting Plan** outlining the anticipated permits, licenses and authorizations required for the designed project to proceed; and
- **Tailored Impact Statement Guidelines (TISG)** to identify the studies and information required from the proponent in order for the Agency to conduct the IA (and that must be included in the proponent's Impact Statement).

The Public Participation Plan should outline the various ways a participant may provide input in the process, with the aim of providing proponents and the public with “certainty about how and when public participation [will] occur and to what degree.”¹¹¹ The plan must list the groups and individuals (e.g., communities, associations, other stakeholders) interested in participating in the IA and *how* they wish to participate (i.e., preferred methods of engagement).¹¹²

During the Impact Statement Phase (phase 2), the proponent prepares its Impact Statement based on the TISG. The proponent must gather information through studies, including community and Indigenous knowledge, to inform the Impact Statement. The proponent has three years to submit their impact statement, after which the Agency determines whether the information requirements set out in the TISG. Where information requirements have not been met, the Agency will request this information from the proponent. If all requirements are satisfied, the Agency will accept the Impact Statement and post a Notice of Determination.

During phase 2, the Agency will also implement the Public Participation Plan through the identified engagement methods and gather community knowledge relevant to the “factors to consider” in section 22(1)(m) of the IAA. Community knowledge is distinct from public comments, which also must be considered under section 21(1)(n) of the IAA (see Figure 4). Community knowledge is also different from Indigenous knowledge, which must also be taken into account and involves specific requirements for its use and protection (see “Indigenous Rights and the IAA”).¹¹³

Figure 4: Community Knowledge in the IA Process

Community knowledge is defined as knowledge held by individuals or shared by a community, which is built up over time through direct use of, or interaction with, a resource or environment (natural or social).

Sources of community knowledge can include individuals and organizations such as long-term residents, municipal governments, local associations, NGOs, health and social service providers, trade unions, etc.

Types of community knowledge could include any knowledge related to the assessment of potential environmental, health, social, or economic effects of a proposed project, e.g., land-use studies, wildlife association logbooks, pictures from local historical groups, etc.

¹¹¹ *Ibid.*

¹¹² *Ibid* (The plan may also include information on participant funding, an overview of the potential techniques that will be used to engage participants throughout the review, the dates, time and locations for public engagements, etc.).

¹¹³ *Ibid*

Methods for collecting community knowledge can include qualitative approaches such as interviews, focus groups or written submissions. Adherence to ethical guidelines for collecting information is required.¹¹⁴ Proponents are also expected to apply GBA Plus to the collection and consideration of community knowledge (see, “Gender and the IAA”). Further, the sources and uses of community knowledge should be made public to ensure transparency.

Community knowledge can benefit a project’s impact assessment by identifying existing environmental considerations experienced by the community or baseline conditions (e.g., existing climate pressures); verifying pathways of effects related to value components; and improving monitoring activities by making approaches relevant to local concerns, among other benefits.¹¹⁵

In the Impact Assessment phase (phase 3), the Agency conducts an internal analysis and technical review of the proponent’s Impact Statement.¹¹⁶ The Agency will conduct further engagement with public and Indigenous groups to gather comments on the Impact Statement and will then prepare an Impact Assessment report and draft potential conditions.¹¹⁷ Once complete, there is 30-day long public comment period where stakeholders and rights-holders may provide input on the draft Impact Assessment report.¹¹⁸ After compiling and considering public comments, the finalized Impact Assessment Report is sent to the Minister to inform the public interest decision.

In the Decision-Making Phase (phase 4), the Minister must decide within 30 days of the posting of the Impact Assessment Report whether the adverse effects are in the public interest considering the factors listed in section 63 of the IAA.^{119,120} The decision statement issued by the Minister to the proponent and posted on the Registry must include the rationale for the decision, that is, how the public interest factors were considered by the Minister.¹²¹

Following the issuance of the Minister’s decision, in phase 5, the Agency is to conduct follow-up and monitoring to verify compliance with the IA conditions, and to:

- Verify the accuracy of the predictions laid out in the Impact Assessment Report;
- Verify the effectiveness of the mitigation measures;

¹¹⁴ See, First Nations Information Governance Centre, “First Nations Principles of Ownership, Control, Access and Possession,” (Accessed 1 May 2022), online: <fnigc.ca/ocap-training/>.

¹¹⁵ Adapted from IAAC, “Policy Context: Considering Community Knowledge under the *Impact Assessment Act*” (2021), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/considering-community-knowledge-under-the-impact-assessment-act.html>.

¹¹⁶ IAA, ss 36(1), 51(1)(c) (In the case of a joint review panel, the Minister has 45 days from the notice of commencement to refer an IA to a review panel if they consider it in the public interest. The review panel will hold public hearings and prepare the IA report within 600 days of the Minister’s referral).

¹¹⁷ IAAC, Guidance: Public Participation in IA (The IA Report includes a summary of comments received from the public).

¹¹⁸ IAA, s 86(1); IAAC, Guidance: Public Participation in the IA (The Agency may also conduct additional engagement activities such as a targeted public meeting to invite oral responses depending on the circumstances).

¹¹⁹ Namely, (a) The project’s contribution to sustainability; (b) the extent to which adverse effects within federal jurisdiction and the adverse direct or incidental effects are significant; (c) Associated mitigation measures; (d) Impacts on Indigenous groups and adverse impacts on rights; (e) Extent that project’s effects hinder or contribute to Canada’s environmental obligations and climate change commitments.

¹²⁰ IAAC, Guidance: Public Participation in IA (The IAA provides the Minister with new authority to amend conditions in a Decision Statement “to ensure they remain current with the design of a designated project or to provide for adaptive management.” Draft amendments must be posted on the Registry and the public will be provided with an opportunity to comment on the proposed changes. The Minister must consider these comments in their decision to amend the Decision Statement and must include the rationale).

¹²¹ IAA, ss 104-108.

- Provide opportunities for Indigenous peoples and the public to participate in monitoring; and
- To encourage continuous improvements to impact assessments.¹²²

The Agency is empowered to conduct enforcement, including by issuing orders and correcting non-compliances through a new penalty scheme with increased fines.¹²³ The Agency can also set up an Environmental Monitoring Committee under s.156(2)(e) to assist in the implementation and oversight of follow-up programs and adaptive management plans. According to the Agency, monitoring committees can help “provide additional confidence in the science, Indigenous knowledge and other forms of evidence used in follow-up and monitoring programs, ultimately leading to greater public trust in the assessment process.”¹²⁴ The Agency provides Operational Guidance that includes a “Framework for determining whether a Monitoring Committee is warranted” for a designated project.¹²⁵

Stakeholder Engagement and RBC

Early and ongoing meaningful stakeholder and rights-holder engagement is central to HRDD, as it allows the public to contribute their knowledge on impacts and to participate in environmental decision-making. Meaningful participation must include the involvement of all stakeholders, particularly rights-holders, at all stages of the assessment process.

The OECD Due Diligence Guidance on Meaningful Stakeholder Engagement defines meaningful stakeholder engagement as “ongoing engagement with stakeholder that is two-way, conducted in good faith and response” and which provides that opportunities for stakeholders themselves to drive engagement activities.¹²⁶ Similarly, the IFC Performance Standards characterizes “responsive relationships” as crucial to the successful management of environmental and social impacts.¹²⁷

The current Agency guidance for public participation is limited in its opportunities for both community-driven engagement and two-way dialogue, particularly beyond the initial planning phase. The Agency notes an interactive digital portal will be established to facilitate increased dialogue by allowing for direct public feedback on project specific questions and supporting greater transparency.¹²⁸ The Agency’s

¹²² IAAC, Guidance: Public Participation in IA.

¹²³ IAA, s 155(f)

¹²⁴ IAAC, Guidance: Public Participation in IA.

¹²⁵ See, IAAC, “Operational Guidance: Framework for determining whether a Monitoring Committee is warranted for a Designated Project under the IAA” (2020), online: www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/framework-determining-monitoring-committee.html [IAAC, Operational Guidance: Framework for determining whether a Monitoring Committee is warranted] (The determination is made on a project-by-project basis, based on various criteria, including extent to which the effects are adverse; there is limited experience with successful implementing of the type of project being proposed in the environmental setting under consideration; the nature or scale of the project is such that specific types of environmental effects warrant careful monitoring (e.g. air emissions for impacts on Indigenous health or wastewater discharges for impacts on fish); the proposed project involves technology or mitigation measures that are new or unproven; the scientific or Indigenous knowledge used for predicting effects on value components is limited and where uncertainty remains, among others).

¹²⁶ OECD Due Diligence Guidance on Meaningful Stakeholder Engagement at 8.

¹²⁷ IFC Performance Standards at 12-14 (PS1 provides for an Informed Consultation and Participation process which aims to incorporate affected communities’ views into decision-making “on matters that affect them directly” and which captures the needs of disadvantaged or vulnerable groups).

¹²⁸ IAAC, Guidance: Public Participation in IA (The Agency recognizes the importance of “accessible engagement” and the development of innovate methods of participation to engage more marginalized members of communities, such as elderly people, who may not have access to online forums); See the “Gender, Intersectionality and the IAA” section of this toolbox for more information.

Guidance for Public Participation also proposes the possibility of a “knowledge workshop” where concerns can be addressed collaboratively by participating parties, but no further information is provided. In addition, the timelines delineated for the planning phase of the IA (180 days) is insufficient to ensure fairness and inclusivity in the IA process.¹²⁹ Finally, the only way to challenge the Minister’s discretionary decision to approve a project based on the section 63 determinations is on procedural basis, which limits access to justice and does not provide sufficient accountability. As Unger explains, the IAA does not include an independent statutory review or an appeal mechanism; the only option is to pursue an application for judicial review, the grounds of which are narrow, inefficient, and overly legalistic, contrary to the principles of meaningful participation.¹³⁰

The IFC Performance Standards clarify that where government processes do not meet the accepted standard, businesses must conduct a complementary process to identify supplementary actions where appropriate.¹³¹ As the IAA does not require IA at the exploration stage, companies should undertake stakeholder and rights-holder engagement as early as possible to support due diligence. As stated in the DIHR HRIA Toolbox, “ensuring the meaningful participation of those who are affected should be the prerequisite of a process seeking to assess human rights impact.”¹³²

The Agency’s Template Public Participation Plan provides an easy entry point for incorporating RBC tools.¹³³ The Plan is to include a list of “preferred engagement tools identified by members of the public.”¹³⁴ Civil society advocates could draw on RBC tools on stakeholder engagement and explain how they can enhance the meaningfulness and openness of the public participation process, including the information needed to participate in an informed way. Specific RBC standards could be listed for each phase of the IA. Proponents, too, can integrate the existing RBC tools they already ascribe to into the plan. This approach can enhance the requirements and prescriptions of the IAA guidance related to public participation. Below, we survey recommended RBC tools and highlight how they can help fill in key gaps in the IAA and accompanying guidance.

TABLE 3: PUBLIC PARTICIPATION AND RBC

IAA Subject Area: Public Participation	
Focus	RBC Tools
Stakeholder Engagement	<p>*See RBC Tools listed in Table 1*</p> <p>Industry Canada, Corporate Social Responsibility: An Implementation Guide for Canadian Businesses</p> <p>Inter-American Development Bank (IDB), Operational Policies and Guidelines</p> <p>Natural Resource Canada, Good Practices in Community Engagement and Readiness</p>

¹²⁹ See, “More Guidance, Longer Timelines for Public Input Needed in Environmental Impact Assessments: Report” (12 July 2021), Canadian Lawyer Mag, online: <www.canadianlawyermag.com/practice-areas/esg/more-guidance-longer-timelines-for-public-input-needed-in-environmental-impact-assessments-report/358033>.

¹³⁰ Jason Unger, “Transparency and Accountability in Decision Making: Does the *Impact Assessment Act* Support Credible Decision Making?” in Meinhard Doelle & John Sinclair, eds, *The Next Generation of Impact Assessment* (Toronto: Irwin Law, 2021) at p 433.

¹³¹ IFC Performance Standards, PS 1, s 33.

¹³² DIHR HRIA Toolbox at 90.

¹³³ IAAC, “Impact Assessment Public Participation Plan – Template” (Accessed 1 May 2022), online (pdf): <www.canada.ca/content/dam/iaac-acei/documents/policy-guidance/practitioners-guide/permitting-plan-external-template-inl-eng.pdf>.

¹³⁴ *Ibid.*

	OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector PDAC, First Engagement: A Field Guide for Explorers
Rights of Access & Transparency	Global Reporting Initiative IFC, Access to Information Policy
Dispute Resolution	GAC, Procedures Guide for Canada's National Contact Point for the OCED Guidelines MAC, Crisis management and communications planning Protocol
Follow-up, monitoring & compliance	IFC Performance Standards PS 1 Assessment and Management of Environmental and Social Risks and Impacts Initiative for Responsible Mining Assurance MAC, TSM Protocols and Framework

Stakeholders versus Rightsholders

The idea that local communities have a role to play as both stakeholders and rights-holders is evident in international standards, including the IFC Performance Standards and the OECD Guidance on Meaningful Stakeholder Engagement. There has been little work done in the Canadian extractive sector context on how stakeholders should be classified, and the current IAA guidance fails to recognize rights-holders, and the distinction between the rights of rights-holders and the interests of stakeholders. Currently, the IAA Guidance on Public Participation prioritizes the engagement of those who are “most likely to be impacted by the project.” Without clear criteria to guide this assessment of which populations are most likely to be impacted by a project, there is a risk that certain classes of stakeholders and rightsholders will be marginalized and their participation limited in IA engagement activities.

The OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector clearly distinguishes between stakeholders and rights-holders and requires that both sets of parties be appropriately identified and prioritized. It carefully lays out the relevance of this distinction and includes annexes on engaging with Indigenous peoples, women, workers, and trade unions. The OECD Guidance also distinguishes between informing/reporting, consulting/learning, negotiating, and responding as distinct modes of engagement.¹³⁵ Finally, the OECD Guidance provides extensive recommendations for corporate planning, management, and on-the-ground personnel, which could go a long way in making clear how proponents and consultants should conduct themselves when engaging with rights-holders and stakeholders. The OECD Guidance sets an excellent standard that could be used for the design of a meaningful public participation framework under the Canadian IAA.

The DIHR HRIA Toolbox provides further information on how various stakeholders, including rightsholders, duty bearers, and other relevant parties should be identified.¹³⁶ The toolbox explains 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, 2SLGBTQIA+ individuals, and persons living with HIV & Aids and other diseases should be engaged. These 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.¹³⁷

¹³⁵ OECD Due Diligence Guidance on Meaningful Stakeholder Engagement at 10.

¹³⁶ DIHR Toolbox at 90.

¹³⁷ *Ibid.*

The current IAA Framework for Public Participation and Guidance for Public Participation falls short of the provisions of both the OECD Due Diligence Guidance and the stakeholder engagement section of the DIHR toolbox. Fulfilling the IAA's stated goal of meaningful public engagement requires an appreciation of the human rights issues faced by the distinct groups enumerated above. These various rights-holders could be captured by the 'sex, gender with other identity' factors under the IAA (see "Gender, Intersectionality and the IAA"). Later in this toolbox, we explain how the GBA Plus Guidance and its intersectional approach creates an opening to considering the human rights issues faced by distinct groups.

Right of Access

The right of access to information is a prerequisite to meaningful participation in IA consultation processes and, correspondingly, to the protection and actualization of environmental human rights. Rights-holders and stakeholders must be able to access information on environmental matters that may undermine human rights so that they may advocate for themselves and their communities.

The Agency states that the new IAA will "significantly increase transparency in the assessment process and increase the accessibility and quantity of assessment information available to the public on the Registry."¹³⁸ Currently, the IAA requires transparency through the disclosure of information made publicly available on the Canadian Impact Assessment (CIA) Registry.¹³⁹ Project files, plain language summaries of government documents, and public comments are to be posted on an internet site.¹⁴⁰

The rights of access to information under the IAA are subject to the federal Freedom of Information Act (FOIA).¹⁴¹ There is a tendency for government agencies to hold back documents by exempting records containing trade secrets, scientific and technical information treated as confidential, and information that could result in material financial loss or gain.¹⁴² The subjection of access rights under the IAA to the FOIA's broad prohibitions incentivizes proponents and consultants to refuse to authorize either the publication or the disclosure of information. The FOIA's prohibitions makes it difficult to see how the IAA will effectively guarantee the timeliness, accessibility, and completeness of information that is crucial to exercising the right of access in the IA context.¹⁴³

The right of access to information is a key area where RBC tools could improve the IAA regime. The International Finance Corporation 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 the likely harm to specific parties. The policy also: allows for partial disclosure to balance public and private rights; permits 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

¹³⁸ IAAC, Guidance: Public Participation in IA.

¹³⁹ *The Information and Management of Time Limits Regulations* (SOR/2019-283) (The regulations outline the information that the proponent must provide to support early planning and the documents the Agency must provide to guide the impact assessment. The regulations also provide circumstances in which the Agency may suspend the legislated timelines.

¹⁴⁰ IAA, s 104(1)(2).

¹⁴¹ *Access to Information Act*, RSC 1985, c. A-1, s 4(1).

¹⁴² FOIA, s 20(1)(a) – (d).

¹⁴³ See, Majekolagbe, Seck & Simons at 450 – 452.

and updates throughout the investment lifecycle.¹⁴⁴ The IFC Performance Standards affirm that consultation should be based on the “prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is culturally appropriate.”¹⁴⁵ The IFC’s access to information requirements address some of the previously identified flaws of the IAA.

Follow-up and Monitoring

The current Agency guidance on public participation does not provide meaningful opportunities for the participation of stakeholders and rights-holders at the follow-up and monitoring phases. Though the public is clearly included in the process of early identification of project impacts, this engagement should occur on an ongoing basis as risks and impacts arise.

The Agency has discretion to implement an Environmental Monitoring Committee composed of local community members and other stakeholders, however, it is not clear when and how such committees will be engaged. Although the Operational Guidance indicates that the Agency will make the decision to implement a monitoring committee “in a coordinated manner,” stakeholders and rights-holders do not appear involved in this decision, though they may submit a request for one as an interested party.¹⁴⁶ Aside from Agency-led initiatives, proponents may invite members of the public with community knowledge to participate in follow-up programs, through their CSR programs, for example.

The OECD Due Diligence Guidance for Meaningful Engagement in the Extractive Sector requires the involvement of stakeholders and rights-holders in the implementation of findings, monitoring and follow-up, and undertaking external verification of engagement activities.¹⁴⁷ The IFC Performance Standards also require the involvement of affected communities in environmental monitoring and the ongoing reporting, including communication in case of emergency.¹⁴⁸ Likewise, the MAC Towards Sustainable Mining (TSM) Framework takes a systematic approach to stakeholder participation and emphasizes monitoring, verification and reporting.¹⁴⁹ Finally, the Initiative for Responsible Mining Assurance (IRMA) provides a comprehensive standard on social, environmental, and human rights standards and serves as an independent third-party auditing and certification scheme.¹⁵⁰ The IRMA standard would be of particular interest to civil society advocates looking to verify compliance with IA conditions. These RBC tools could further advance the current IAA guidance on meaningful participation as it relates to follow-up and monitoring in the post-Impact Assessment phase.

Dispute Resolution

There must also be action in response to monitoring and follow-up efforts which reveal significant adverse effects. Rights-holders should be able to seek recourse for violations of both their procedural

¹⁴⁴ IFC, “IFC Access to Information Policy” (2012), online (pdf): <www.ifc.org/wps/wcm/connect/c8a61c48-32c2-49b2-8e46-2ade87f774e0/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES>.

¹⁴⁵ IFC Performance Standards, PS1, s 35.

¹⁴⁶ IAAC, Guidance: Public Participation in IA.

¹⁴⁷ OECD Due Diligence Guidance for Meaningful Engagement, Annex A.

¹⁴⁸ IFC Performance Standards, PS1, ss 22–24.

¹⁴⁹ MAC, “Towards Sustainable Mining Guiding Principles,” (Accessed 1 May 2022), online: <mining.ca/towards-sustainable-mining/protocols-frameworks/>.

¹⁵⁰ IRMA, “IRMA Standard for Responsible Mining: IRMA-STD-001” (June 2018), online (pdf): <responsiblemining.net/wp-content/uploads/2018/07/IRMA_STANDARD_v.1.0_FINAL_2018-1.pdf>.

environmental rights through accessible, efficient, and appropriate grievance mechanisms, including judicial and non-judicial avenues.

The IFC Performance Standards require clients to establish a grievance mechanism to receive and facilitate resolution of affected communities' concerns with regard to environmental and social performance, which "should seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate and readily accessible, and at no cost and without retribution," and which "should not impede access to judicial or administrative remedies."¹⁵¹ Where a company receives funding from the IFC, affected communities may also submit a complaint to the Office of the Compliance Advisor Ombudsman (CAO) which has as its mission to "serve as a fair, trusted and effective independent recourse mechanism and to improve social and environmental accountability."¹⁵² The CAO can address various grievances, including policy compliance, consultation and participation of communities, stakeholder engagement, and environmental and social management systems, among other environmental human rights issues. However, the CAO has faced serious criticisms as ineffective, and implementation of the standards is not guaranteed.¹⁵³ Further, although the IFC Performance Standards are legally binding as a condition of financial support from the IFC, local communities are not parties to these contracts so they cannot directly enforce them in law.¹⁵⁴

The OECD Due Diligence Guidance for Meaningful Engagement in the Extractive Sector also recommends that companies establish operational-level grievance mechanisms, provided such processes are based on dialogue and engagement.¹⁵⁵ Since Canada adheres to the OECD Guidelines, affected communities could submit a complaint to the National Contact Point (NCP), a non-judicial grievance mechanism which has the mandate of resolving issues related to the implementation of the OECD MNE Guidelines in specific instances, including through conciliation or mediation. However, NCP procedures have been criticized as ineffective, under-resourced, and worse.¹⁵⁶ For example, two NGOs submitted a complaint to the Canadian NCP over its alleged improper handling of the Bruno Manser Fonds vs Sakto Group case, including breaches of the OECD procedural requirements and its failure to conduct its review in a transparent manner.¹⁵⁷ The NGO OECD Watch submitted a challenge to the OECD's Investment Committee regarding this case and called on the OECD to condemn undue pressure by corporations on governments and correct Canadian NCP's non-transparent, unpredictable and inequitable handling of the complaint.¹⁵⁸ Canada must address the causes which lead to this complaint and ensure that its NCP is reputable and trustworthy so as to comply with its obligation to the OECD.

¹⁵¹ IFC Performance Standards, PS1, s 35.

¹⁵² Compliance Advisor Ombudsman, "2013 Annual Report" (2013) at 1, online (pdf): <www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf>.

¹⁵³ See, Sara 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 Intl J of Sustainable Dev't Law & Policy at 75-78 [Seck 2016].

¹⁵⁴ *Ibid* at 78.

¹⁵⁵ OECD Due Diligence Guidance for Meaningful Stakeholder Engagement at 34.

¹⁵⁶ Seck 2016 at 84.

¹⁵⁷ OECD Watch and MiningWatch Canada, "Statement from OECD Watch and MiningWatch Canada regarding the Canadian NCP's improper handling of the OECD Guidelines specific instance Bruno Manser Fonds vs Sakto Group" (19 July 2018), online (pdf): <https://miningwatch.ca/sites/default/files/oecdwatch-miningwatch_statement_re_ncp_handling_of_bmf_vs_sakto_case_2018-07-19.pdf>.

¹⁵⁸ OECD Watch, "OECD Watch Challenges Canadian NCP's Failure to Abide by International Commitments" (22 September 2021), online: <www.oecdwatch.org/oecd-watch-challenges-canadian-ncps-failure-to-abide-by-international-commitments/>.

Given the current lack of trust in the Canadian NCP, communities may look to other domestic mechanisms to address their grievances, including the possibility of environmental petitioners submitted to the Commissioner for the Environment and Sustainable Development.

Canada's Commissioner for Environment & Sustainable Development: <i>Environmental Petitions</i>
In Canada, members of the public can submit environmental petitions bringing their concerns and questions to the Commissioner for the Environment & Sustainable Development, on behalf of the Auditor General of Canada. ¹⁵⁹ Existing petitions have addressed a variety of issues concerned, including air quality, biological diversity, climate change, compliance and enforcement, corporate social responsibility, environmental assessment, fisheries, human/environmental health, Indigenous matters, natural resources, toxic substances, waste management, and water, among other issues. ¹⁶⁰

The Agency's Framework for Public Participation notes a more in-depth guide to selecting appropriate engagement tools will be developed. As the public must be consulted in the development of guidelines, this would provide an opportunity for civil society to recommend the incorporation of select RBC standards related to stakeholder engagement, including in the areas of rights of access, follow-up and monitoring, and dispute resolution.¹⁶¹

Questions to Consider

1. What are some potential ways to identify and classify stakeholders and rightsholders, respectively, in the Canadian context?
2. What are the differences between stakeholder engagement in the Indigenous and non-Indigenous context?
3. How can the operation of the Canadian OECD NCP be improved to ensure effectiveness, transparency, and accountability?

Further Resources

IAAC, "Impact Assessment Process Overview," online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview.html>.

IAAC, "Canadian Impact Assessment Registry," online: *Government of Canada* <www.ceaa.gc.ca/050/evaluations/exploration?active=true&showMap=false&document_type=project>.

IAIA, "Public Participation: International Best Practice Principles" (2006), online (pdf): <www.iaia.org/uploads/pdf/SP4.pdf>.

IAIA, "EIA Follow-up" (2007), online (pdf): <www.iaia.org/uploads/pdf/SP6_1.pdf>.

¹⁵⁹ Office of the Auditor General of Canada, "Environmental Petitions" (2022), online: *Government of Canada* <https://www.oag-bvg.gc.ca/internet/English/pet_fs_e_919.html>.

¹⁶⁰ Office of the Auditor General of Canada, "Petitions by Issue" (2022), online: *Government of Canada* <https://www.oag-bvg.gc.ca/internet/English/pet_lp_e_941.html>

¹⁶¹ IAA, s 114.

Gender & Intersectionality

The Intersectional and Gendered Dimensions of Resource Extraction

The adverse and unequal impacts of extractive projects on the human rights of women, girls and gender diverse people is well-documented.¹⁶² Case studies have highlighted the links between resource development projects and gender-based violence for Indigenous, Métis, and Inuit Women in particular.¹⁶³ Man camps, road construction, and “boomtown” expansion pose acute risks to the safety and health of Indigenous women and girls, including increased rates of assault, homicide, human trafficking, and substance abuse.¹⁶⁴ Other gender-related human rights impacts relevant to the IA process include demands on local community resources such as housing and social services, the decreased availability and contamination of country foods, the disruption of cultural practices, and loss of income.¹⁶⁵

Wolastoqiyik and Mi’kmaq Grandmothers – Land/Water Defenders Sharing and Learning Circle¹⁶⁶

The “Grandmothers’ Report” highlights the following adverse impacts to Indigenous women human rights defenders in the cases of Alton Gas (Nova Scotia) and the Sisson Mine (New Brunswick):

- Settler harassment and violence perpetrated by resource industry workers against women, girls, two-spirited and gender diverse individuals;
- Criminalization of land/water defenders (often Indigenous women) by Courts and State actors via injunctions which legitimize their forced removal;
- Patriarchal violence against defenders by Indian Act elected Chief and Councils; and
- Loss of income and time with family to be available for frontline defense work.

Despite their contribution to the survival and well-being of communities, Indigenous women and girls continue to face barriers to participation in the IA process, including the invisibility and undervaluation of their labour, the under-resourcing of their initiatives, and conflicting familial and community demands.¹⁶⁷

¹⁶² See also, Sara Seck & Penelope Simons, “Resource Extraction and the Human Rights of Women and Girls” (2019) 31:1 CJWL i-vii; Stienstra, Deborah et al, “Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada’s North” (2016) Canadian Research Institute for the Advancement of Women, online (pdf): <www.criaw-icref.ca/wp-content/uploads/2021/04/Gendered-and-Intersectional-Implications-of-Energy-and-Resource-Extraction-in-Resource-Based-Communities.pdf>.

¹⁶³ National Inquiry into Missing and Murdered Indigenous Women and Girls, “Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls Volume 1a” (2019), online (pdf): <perma.cc/3793-USA5>; Sarah Morales, “Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?” (2019) 31:1 CJWL 58-90 [Morales].

¹⁶⁴ Dayna Scott et al, “Synthesis Report: Implementing a Reginal, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario’s Ring of Fire” (April 2020) at 20-21, online: <digitalcommons.osgoode.yorku.ca/scholarly_works/2807/> [Scott et al]; The Firelight Group, “Indigenous Communities and Industrial Camps: Promoting healthy communities in settings of industrial change” (2017), online (pdf): <firelight.ca/wp-content/uploads/2016/03/Firelight-work-camps-Feb-8-2017_FINAL.pdf> [Firelight Group].

¹⁶⁵ See, e.g., Pauktuutit Inuit Women of Canada, “Addressing Inuit Women’s Economic Security and Prosperity in the Resource Extraction Industry” (2021), online (pdf): <pauktuutit.ca/wp-content/uploads/Addressing-Inuit-Womens-Economic-Security-Prosperity_Mar302021.pdf>; Elana Nightingale et al, “The effects of resource extraction on Inuit women and their families: Evidence from Canada” (2017) 25:3 Gender and Development 367-385; Sheena Dalseg et al, “Gendered Environmental Assessments in the Canadian North: Marginalization of Indigenous Women and Traditional Economies” (2018) 47 The Northern Review 135.

¹⁶⁶ Pictou, Grandmother’s Report.

¹⁶⁷ Scott et al, 18.

Yet, Indigenous women lead efforts to heal the effects of social trauma, maintain cultural vitality, and fight for the recognition of Indigenous rights.¹⁶⁸ The impacts of resource extraction may further hinder the capacities of women to contribute to community well-being “in a way that upholds their responsibilities to care for water, the environment, and to provide food and sustenance.”¹⁶⁹

Other racialized and non-Indigenous women are distinctly vulnerable to the adverse social, health, economic, and environmental impacts of extractive projects.¹⁷⁰ Two-spirit, lesbian, gay, bisexual, transgender, queer, intersex, asexual and gender-diverse persons (2SLGBTQIA+) may also be less likely to benefit and/or more adversely impacted by projects due to their exclusion from official consultation and IA process and their marginalization within communities.¹⁷¹ The following sections explain how existing IA Guidance and RBC tools attempt to account for and address these diverse and uneven impacts.

Gender, Intersectionality, and the IAA

KEY DOCUMENT
<ul style="list-style-type: none"> Guidance: Gender-based Analysis Plus in Impact Assessment

Section 21(1)(s) of the IAA requires proponents and governments to consider the intersection of sex and gender with other identity factors, such as race, ethnicity, religion, age, and mental or physical ability. The Government of Canada describes GBA Plus as an:

analytical process that provides a rigorous method for the assessment of systematic inequalities, as well as a means to assess how diverse groups of women, men, and gender diverse people may experience policies, programs, and initiatives. The “plus” in GBA+ acknowledges that GBA+ is not just about differences between biological (sexes) and socio-cultural (genders).¹⁷²

Applied to IA, GBA Plus is a tool used to identify “who is impacted by a project and assess how people may experience impacts differently in order to improve project design.”¹⁷³ GBA Plus can help practitioners and decision-makers understand whether a project is likely to have disproportionate effects on diverse subgroups and assist in the development of targeted mitigation measures. It is characterized as an element in early, meaningful engagement and broad-based consultation.

According to the IA Guidance on GBA Plus, “meaningful engagement can start with asking diverse community members how they want to be engaged and what they need for meaningful engagement to occur (e.g., resource, support, time).”¹⁷⁴ The guidance encourages practitioners to strive for “broad participation” by asking “who is at the table and who is missing,” and working “to remove barriers, ensure

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid* at 19.

¹⁷⁰ See, generally, IAAC, “Guidance: Gender-based Analysis Plus in Impact Assessment,” online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/gender-based-analysis.html> [IAAC, Guidance: Gender-based Analysis Plus in Impact Assessment].

¹⁷¹ See, “2021 Missing and Murdered Indigenous Women, Girls, and 2SLGBTQIA+ People National Action Plan: Ending Violence Against Indigenous Women, Girls, and 2SLGBTQIA+ People” (2021), online (pdf): <4c3tru4erdnui9g3ggftji1d-wpengine.netdna-ssl.com/wp-content/uploads/2021/06/NAP_Report_EN.pdf>.

¹⁷² Women & Gender Equality Canada, “What is GBA+?” (2020), online: *Government of Canada* <cfc-swc.gc.ca/gba-acis/index-en.html>.

¹⁷³ IAAC, Guidance: Gender-based Analysis Plus in Impact Assessment.

¹⁷⁴ *Ibid.*

inclusive practices, cultural relevance and cultural humility for those ‘not at the table’ in an effort to fully represent community members.”¹⁷⁵ This approach can help “expose power inequities that limit participation by some individuals or groups.”¹⁷⁶

The Agency’s Guidance on GBA Plus seeks to promote the involvement of diverse community members in data collection and the development of mitigation measures, noting that historically excluded groups such as 2SLGBTQIA+ (Two-Spirit, Lesbian, Gay, Trans, Queer, Intersex, Asexual Plus) people face unique barriers to participating in IA process and may also be more vulnerable to project impacts. The Guidance acknowledges that “structural forms of exclusion like racism, colonialism, sexism and ableism” influence how project impacts are experienced and can explain why some groups are disproportionately affected by projects given power relations within and outside communities.

The Agency requires, at a minimum, that proponents’ IA Statements include sex disaggregated health, social, and economic baseline data, and supporting data by identity factors such as age. Proponents are expected to apply GBA Plus to the collection of community and Indigenous knowledge,¹⁷⁷ and integrate their GBA Plus findings throughout their analysis of the effects in the Impact statement, as opposed to treating it as an “add-on” or an “aside” (e.g., in an annex). Proponents must also provide a rationale for the methodologies they apply, including references to best practices, and use community-developed indicators to describe “community contexts (including history), existing inequalities, and existing gender issues in the community (e.g. gender-based violence, gendered divisions of labour, and gender roles, responsibilities, decision-making/resource control”).¹⁷⁸

Importantly, the Agency recommends that GBA Plus be used within existing standardized assessment methods such as HIA and SIA, noting that GBA Plus “is not a unique set of method in and of itself,” but that it can “refine existing analysis” and help “establish links across environmental, social, health and economic impacts to illustrate intersectional and diverse effects.”

Section 22.1(s) and the application of GBA Plus arguably warrants an HRIA. GBA Plus’ emphasis on an intersectional and diversity-sensitive analysis lends itself to a human-rights based approach, whereby the multiple factors underlying inequality and marginalization are addressed to enhance inclusion.¹⁷⁹ 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.¹⁸⁰ It is further underpinned by other identity-specific international human rights instruments on the rights of women, workers, children, migrants, and the disabled. Although the IAA GBA Plus Guidance makes no explicit reference to human rights, its broad, intersectional approach provides an opening for the consideration of a vast array of human rights, particularly the rights of the most vulnerable.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ IAAC, “Policy Context: Considering Community Knowledge under the Impact Assessment Act” (2021), online: *Government of Canada* <canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/considering-community-knowledge-under-the-impact-assessment-act.html> (The Guidance on GBA Plus recommends that practitioners gather data using culturally appropriate methods, which could include oral communications, artistic means, ceremonies or cultural expressions).

¹⁷⁸ IAAC, Guidance: Gender-based Analysis Plus in Impact Assessment.

¹⁷⁹ “Human rights-based approach” (2017), online: *Government of Canada* <www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/priorities-priorites/human_rights-droits_personne.aspx?lang=eng>.

¹⁸⁰ Majekolagbe, Seck & Simons, 2021 at 449.

Gender, Intersectionality and RBC

RBC tools can help in the development and implementation of a rights-based approach to GBA Plus scoping and baseline data collection, as well as associated prevention, mitigation, and compliance efforts. Before surveying relevant RBC tools, this section takes stock of existing scholarly critiques of GBA Plus.

Stienstra, Manning & Levac argue that international human rights law can create enabling environments for intersectional IAs, if such commitments are meaningfully implemented in domestic contexts through laws, regulations, policies and practices.¹⁸¹

To ensure meaningful implementation of GBA Plus, Hoogeveen et al. emphasize the need for third-party researchers who can facilitate the independent monitoring of gender and diversity factors, beyond employment equity, and beginning in the early planning stages.¹⁸² Increased funding for community-based and Indigenous organizations is also needed to ensure a “bottom-up” approach to GBA Plus as opposed to relying on policy experts.¹⁸³ This accords with the Agency’s recommendation that proponents seek out “trusted community-based groups or experts” to facilitate the involvement of historically excluded groups.¹⁸⁴

Hoogeveen et al. and Stienstra, Manning & Levac both agree that community-informed and community-led practices in IA are most likely to meet the aspirations of GBA Plus and an intersectional approach. Scott et al. further emphasize the need for culturally sensitive analyses of resource extraction in Indigenous communities. For example, Indigenous women are commonly viewed as excluded from negotiations simply because they are not part of the elected leadership. This presumed passivity ignores the deliberative processes that occur with elders and within families.¹⁸⁵ To avoid essentializing or homogenizing the impacts on Indigenous women, and to take into account the special roles and specific vulnerabilities of diverse women and girls, Scott et al. recommend that GBA Plus break down the category of women further by on- or off-reserve status, age, education, socioeconomic status, etc.¹⁸⁶ Indigenous organizations have developed culturally competent and distinctions-based GBA Plus resources and tools to this effect (see Table 4, below).

Blue, Brownson & Lajoie-O’Malley (2020)

Distributive justice refers to the spread within and among people or communities of economic costs and benefits, and environmental harms and hazards.

Representation refers to political dimensions of justice, and includes issues of fairness, legitimacy, inclusivity, and transparency of decision-making.

Recognition refers to cultural dimensions of justice and includes acknowledgement and respect for cultural identity, practices, worldviews, and knowledge.

¹⁸¹ Deborah Stienstra, Susan Manning & Leah Levac, “More Promise than Practice: GBA+, Intersectionality and Impact Assessment” (2020) at vi, online (pdf): <liveworkwell.ca/sites/default/files/pageuploads/Report_Mar31_AODA.pdf>.

¹⁸² Dawn Hoogeveen et al, “A Knowledge Synthesis for the Implementation and Development of Socially Responsible Impact Assessment in Canada” (2020), online (pdf): <ecohealthknowledge.toaction.files.wordpress.com/2020/07/gender-based-analysis-plus-a-knowledge-synthesis-for-the-implementation-and-development-of-socially-responsible-impact-assessment-in-canada.pdf>.

¹⁸³ *Ibid* at 2.

¹⁸⁴ IAAC, Guidance: Gender-based Analysis Plus in Impact Assessment.

¹⁸⁵ Scott et al, 19.

¹⁸⁶ *Ibid* at 21.

A holistic and comprehensive conception of GBA Plus goes beyond the mere identification and mitigation of impacts to gendered lives and livelihoods; as the IAAC notes, “to be rigorous, the application of GBA plus must be integral to all project activities including through its planning, design, implementation, and monitoring phases.” Blue, Brownson & Lajoie-O’Malley argue that the Agency’s conception of GBA Plus is primarily concerned with distributive justice, without sufficient consideration for issues of representation and recognition.¹⁸⁷

With regard to representation, Scott et al. note that it is not clear how or to what extent GBA Plus will influence decision-making by the IAAC and Cabinet.¹⁸⁸ According to the Agency, GBA Plus is integrated into the decision-making stage through the provision of Memoranda to the Minister and Cabinet, in support of their determination of whether projects are in the public interest.¹⁸⁹ However, the Minister is not specifically required to consider gender or other identity factors and does not need to provide reasons to this effect. Certain designated considerations, such as the impacts to Indigenous groups, could include GBA Plus factors.

**National Inquiry into Missing & Murdered Indigenous Women and Girls
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Call 1.7 recommends the establishment of a National Indigenous and Human Rights Ombudsperson, with authority in all jurisdictions, and a National Indigenous and Human Rights Tribunal. The Ombudsperson and tribunal should be independent of governments and have the authority to receive complaints from Indigenous individuals as well as Indigenous communities in relation to Indigenous and human rights violations, and to determine compliance with human and Indigenous rights laws.

Further, currently, the mitigation measures raised through GBA Plus are implemented voluntarily as part of “good practice” and the proponent may elect to conduct follow-up programs to assess their effectiveness. However, the Agency also monitors compliance with conditions set out in the decision statement, which could include conditions associated with GBA Plus-related adverse effects. The Agency can elect to set up monitoring committees composed of local community members to provide oversight for follow-up and adaptive management. Where committees are established, the leadership of women and other marginalized groups should be prioritized. Further, where human rights-related GBA Plus impacts are identified and measures proffered to address the impacts, failure to adequately address them could ground recourse to judicial and non-judicial grievance mechanisms individually and collectively (see “Stakeholder Engagement and RBC”). This requirement is consistent with international human rights law.

Regarding the recognition of the cultural dimensions of justice, the Agency’s Guidance on GBA Plus falls short. The examples provided in the Guidance focus on underemployment in the resource sector, particularly the structural barriers that may be faced by diverse groups and actions to increase in their employment participation. There is little direction as to how government and business can create space

¹⁸⁷ Gwendolyn Blue, Kelly Brownson, & Alana Lajoie-O’Malley, “Beyond participation and distribution: a scoping review to advance a comprehensive justice framework for impact assessment” (2020) at 8, online (pdf): prism.ucalgary.ca/bitstream/handle/1880/112213/Report_Blue_Bronson_LajoieOMalley%5b1%5d.pdf?sequence=1&isAllowed=y.

¹⁸⁸ Scott et al, 21.

¹⁸⁹ IAAC, “2020-2021 Departmental Plan: GBA+ ” (2020), online: www.canada.ca/en/impact-assessment-agency/corporate/transparency/accountability-performance-financial-reporting/2020-2021-departmental-plan/gender-based-analysis-plus.html.

for Indigenous women to bring forward the understanding of ecological destruction *as violence*, including how their traditional laws and customs inform their perspectives.¹⁹⁰

Scott et al. note that both “IA criteria and IA decisions should protect and enhance the status of women’s knowledge, take account of their expressed priorities and the gender-specific impacts, in line with the specific governing Indigenous social, political, and legal orders.”¹⁹¹ The fulfillment of these recommendations can help ensure a context-specific and equity-informed approach to the implementation of GBA Plus. The potential subsumption of human rights-based approaches by GBA Plus risks disregarding the issue of meaningful inclusion. If people are treated as mere data, and not empowered to become informed, active decision-makers in their communities, then GBA Plus will represent a “checkbox” exercise rather than a rights-enabling tool. These gaps suggest the necessity of grounding GBA Plus in international human rights standards.

The Agency’s GBA Plus Guidance specifically references PDAC’s “Gender Diversity and Inclusion: A Guide for Explorers” and Rio Tinto International’s “why Gender Matters: A Resource Guide for Integrating Considerations in Communities work at Rio Tinto” as international best practice documents. Both documents address the human rights obligations of companies to female employees and women in communities, however, they focus narrowly on women and girls to the exclusion of gender-diverse people.¹⁹² The same critique applies to a lesser degree to the UN Working Group on Business & Human Rights’ “Gender Lens to the UNGPs” tool.¹⁹³

The DIHR 2019 report on gender-responsive due diligence is one of the most comprehensive resources on considering gender in HRDD.¹⁹⁴ The report notes that extractive companies have generally taken a gender-neutral approach to HRDD and proposes a gender-response approach focusing on community relations, land acquisition and resettlement, security, local content, grievance resolution and strategic social investments. The report provides a useful framework for grounding GBA Plus in a human rights-based approach. The DIHR HRIA Toolbox also provides an adaptable mechanism to conduct GBA Plus through an intersectional approach. The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement also has a dedicated annex on Engaging with Women that is helpful for proponents when assessing the gendered implications of extraction.¹⁹⁵

Oxfam’s Gender Impact Assessment (GIA) Guide is one of the most comprehensive stand-alone tools for GIA in the extractive sector and is cited in the Agency’s GBA Plus Guidance. GIA is referred to as a “vital component” of the due diligence process set out in the UNGPs.¹⁹⁶ The GIA Guide requires that the GIA

¹⁹⁰ Scott et al, 19.

¹⁹¹ Scott et al, 21-22.

¹⁹² PDAC, “Gender Diversity & Inclusion: A Guide for Explorers” (2019) at 9, online: <www.pdac.ca/docs/default-source/priorities/responsible-exploration/gender/pdac-report-gender-diversity-and-inclusion-2019-final_june-14-2019-for-web.pdf?sfvrsn=aa908c98_4>; Rio Tinto International’s “Why Gender Matters: A Resource Guide for Integrating Considerations in Communities” (2009), online: *Business & Human Rights Resource Center* <www.business-humanrights.org/en/latest-news/why-gender-matters-a-resource-guide-for-integrating-gender-considerations-into-communities-work-at-rio-tinto/>.

¹⁹³ See, UN Working Group on Business & Human Rights, “Gender Lens to the UNGPs,” online: *OHCHR* <www.ohchr.org/en/special-procedures/wg-business/gender-lens-ungps>. On intersectionality in BHR, including an assessment of the UNWGBHR gender lens tool, see Melisa Handl, Sara L Seck, & Penelope Simons, “Gender and Intersectionality in Business and Human Rights Scholarship” (2022) *Business and Human Rights Journal* 1-25. doi:10.1017/bhj.2022.12

¹⁹⁴ DIHR, “Towards Gender-Responsive Implementation of Extractive Industry Projects” (2019), online: *The Danish Institute for Human Rights* <www.humanrights.dk/publications/towards-gender-responsive-implementation-extractive-industries-projects>

¹⁹⁵ OECD Due Diligence Guidance for Meaningful Stakeholder Engagement, Annex C.

¹⁹⁶ Christina Hill, et al, “A Guide to Gender Impact Assessment for the Extractive Industries” (Melbourne: Oxfam, 2017).

process be participatory, focused on the most marginalized, human rights compatible, transparent, and the findings therefrom should inform overall project outcomes. In line with GBA Plus' intersectional approach, the Guide 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. Oxfam's GIA Guide 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.

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. They can also improve the design and practice of IA by ensuring the meaningful inclusion of women, girls, and gender-diverse persons through an equity-informed, human-rights based approach.

TABLE 4: GENDER, INTERSECTIONALITY AND RBC

IAA Subject Area: GBA Plus Section 22(1)(s) of the IAA	
Focus	RBC Tool
Gender Impact Assessment	DIHR, Towards Gender-Responsive Implementation of Extractive Industries Projects European Institute for Gender Equality, Gender Impact Assessment: Gender Mainstreaming Toolkit Gender Analysis and Impact Assessment: Canadian and International Experiences, Canadian International Resource and Development Institute Gender Dimensions of the Extractive Industries: Mining for Equity", World Bank, Extractive Industries and Development Series # 8 OECD Due Diligence Stakeholder Engagement Guidance, Engaging with Women (Annex C) Oxfam Australia, A Guide to Gender Impact Assessment for the Extractive Industries PDAC, Gender Diversity and Inclusion: A Guide for Explorers World Bank, Gender Dimensions of Artisanal and Small-Scale Mining: A Rapid Assessment Toolkit
Gender Mainstreaming	Gender Lens to the UNGPs Global Affairs Canada, Canada's Feminist International Assistance Policy Global Affairs Canada, Policy on Gender Equality IFC, Embedding Gender in Sustainability Reporting: a Practitioner's Guide ILO, A Manual for Gender Audit Facilitators, the ILO Participatory Gender Audit Methodology Rio Tinto, Why Gender Matters: A Resource Guide for Integrating Gender Considerations into Communities Work at Rio Tinto World Bank Gender Action Plan 2012 World Bank, Mainstreaming Gender into Extractive Industries Projects; Guidance Note for Task Team Leaders, World Bank Extractive Industries and Development Series #9
Gender & Employment	ILO, Women in Mining: Towards Gender Equality

Questions to Consider

1. Is gender-responsive, rights-based due diligence approach to IA preferable to a stand-alone GIA?
2. Could the new Canadian Commissioner for Environment & Sustainable Development play a role in monitoring the implementation of GBA Plus in IA through performance audits?

Further Resources

Canadian Institutes of Health Research (CIHR), “Meet the Methods series: ‘What and who is Two-Spirit?’ (2020), online: <perma.cc/F2DU-NYA7>.

Canadian Research Institute for the Advancement of Women, “Strengthening Impact Assessments for Indigenous Women” (2018), online: <perma.cc/3JY8-T9AN>.

CIHR, “Meet the Methods series: Quantitative intersectional study design and primary data collection” (February 2021) Issue 3, Part I, online: *Government of Canada* <perma.cc/4RS2-QCPY>.

KAIROS, “Mother Earth and Resource Extraction Hub,” online: <scalar.usc.edu/works/mere-hub/index>.

National Inquiry into Missing & Murdered Indigenous Women & Girls, “Reclaiming Power and Place: Final Report” (2019), online: <perma.cc/VD3F-3PHM>.

Native Women’s Association of Canada, “A Culturally Relevant Gender Application Protocol” (2010), online: <perma.cc/5UP2-BFQA>.

Office of the Auditor General of Canada, “Implementing Gender-Based Analysis” (2015), online: *Government of Canada* <perma.cc/2CTN-SUBX>.

Statistics Canada, “Gender, Diversity and Inclusion Statistics Hub,” online: *Government of Canada* <www.statcan.gc.ca/eng/topics-start/gender_diversity_and_inclusion>.

WAGE, “Apply Gender-based Analysis Plus to your work,” online: *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-analysis-plus/apply-to-work.html>.

WAGE, “Gender-based Analysis Plus Checklist,” online: *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-analysis-plus/resources/research-checklist.html>.

WAGE, “Gender-based Analysis Plus Research Guide,” online: *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-analysis-plus/resources/research-guide.html>.

WAGE, “Government of Canada’s Approach on Gender-based Analysis Plus,” online: *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-analysis-plus/government-approach.html>.

WAGE, “Making Gender-based Analysis Plus sustainable,” online: *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-analysis-plus/making-sustainable.html>.

WAGE, “Take the Gender-based Analysis Plus course,” online: *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-analysis-plus/take-course.html>.

Walker Heidi, Maureen Reed and Bethany Thiessen, “Gender and Diversity Analysis in Impact Assessment” (2019), online: <perma.cc/X7LE-EZ8D>

Women & Gender Equality Canada (WAGE), “What is Gender-based Analysis Plus?” online: *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-analysis-plus/what-gender-based-analysis-plus.html>.

Women of the Métis Nation, “Métis-Specific Gender-based Analysis Plus (GBA Plus+) Tool,” online: <perma.cc/Z6MM-CSJN>.

Indigenous Rights

Indigenous peoples hold inherent rights that are sourced or grounded in traditional laws and customs, and that are recognized in international human rights law. Governments bear an obligation to uphold and protect these rights, while businesses possess an independent responsibility to respect Indigenous peoples' rights under international RBC standards, including the UNGPs.

Indigenous engagement in IA is unique given the constitutionally enshrined inherent Aboriginal and Treaty rights of Indigenous people and the judicially affirmed mandatory requirement to consult and accommodate under section 35 of the *Constitution Act, 1982*. Indigenous engagement extends beyond the general principles and requirements of public participation.

There is a need to measure the Canadian IAA laws up against internationally recognized human rights principles on account of the deficits in the section 35 framework as it pertains to the scope of Aboriginal treaty rights and the requirements of consultation and accommodation, discussed below. We first highlight a few international standards which can be used to evaluate the effectiveness of IA law and guidance in upholding Indigenous rights, including the rights to self-determination and self-governance.

Indigenous Rights in International Law

International law's recognition of the rights of Indigenous peoples is evident in many sources, including the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).¹⁹⁷ UNDRIP is the most referenced international instrument on Indigenous engagement. UNDRIP affirms the rights of Indigenous peoples to the full enjoyment of all human rights and fundamental freedoms collectively or individually, and constitutes the *minimum standards* for the survival, dignity, and well-being of Indigenous peoples. In June 2021, Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* requiring the federal government to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP, and to prepare and implement an action plan to achieve UNDRIP's objectives.¹⁹⁸

Several Articles in UNDRIP affirm the rights of Indigenous peoples to the management of their traditionally owned, occupied or used lands, territories, and resources (see Articles 25-30). According to the former UN Special Rapporteur for the Rights of Indigenous Peoples, James Anaya, the preferred model of resource extraction is for the development of projects to be undertaken by indigenous peoples themselves as an exercise of their rights to self-determination and self-governance; However, the most common scenario today is one in which states or businesses promote extraction within Indigenous territories.¹⁹⁹

An essential Indigenous right in the context of state and/or business-led resource development is the right to free, prior, and informed consent (FPIC).²⁰⁰ Article 32(2) of UNDRIP provides that:

¹⁹⁷ *The United Nations Declaration on the Rights of Indigenous Peoples* (2008), online (pdf): *United Nations* <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

¹⁹⁸ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

¹⁹⁹ James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples," UNGA, 21st Sess, UN Doc A/HRC/21/47 (2012) at para 8-18 [Anaya 2012].

²⁰⁰ See, Sarah Morales, "Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?" (2019) *CJ of Women & the Law* 31(1) at 58.

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Indigenous peoples right to FPIC is also affirmed in ILO Convention 169, though Canada is not a party to this treaty.²⁰¹ Jurisprudence of the Inter-American Commission for Human Rights (IACHR) places the obligation to conduct consultations and obtain consent squarely on State governments.²⁰² As a member of the Organisation of American States, Canada is required to align its laws with the decisions of the IACHR, including the obligation to obtain the FPIC of Indigenous people before granting concessions to exploit the resources of Indigenous territories.²⁰³

Extractive companies also bear independent responsibilities to respect Indigenous peoples' right to FPIC under international RBC guidelines, irrespective of a state's compliance with its own duties. Both the World Bank and IFC due diligence standards require companies to first identify the existence of Indigenous peoples who may be affected, and to not accept permits from States in violation of duties of consultation and consent.²⁰⁴

Although the procedural right to FPIC is often given preeminence, there are other substantive rights of Indigenous peoples implicated by resource extractive projects, including "rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue priorities for development, including development of natural resources, as part of fundamental rights to self-determination."²⁰⁵

Where projects proceed without Indigenous consent, the state and business must still respect the procedural and substantive rights of Indigenous peoples and implement safeguards to protect them, including through impact assessments, consultation, mitigation measures, compensation, and benefit sharing.²⁰⁶ Further, Indigenous peoples still have the right to "oppose and actively express opposition to extractive projects" due to their firmly established rights of freedom of expression and to participation.²⁰⁷

The following section considers how the IAA and accompany guidance treats Indigenous rights and outlines the Agency frameworks for Indigenous engagement, participation, and inclusion.

²⁰¹ ILO, *C169 – Indigenous and Tribal Peoples Convention, 1989* (No 169) at Art 6, online:

<www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document>

²⁰² Isabel Madariaga Cuneo, "ILO Convention 169 in the inter-American human rights system: consultation and consent" (2019) 24:2-3 *IJ of Human Rights* 257-264.

²⁰³ Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 37-2, (May 2003), online: *Senate of Canada* <sencanada.ca/Content/SEN/Committee/372/huma/rep/rep04may03-e.htm#B.%20Canada%E2%80%99s%20entry%20into%20the%20OAS>.

²⁰⁴ See, World Bank, *Environmental and Social Framework* (2016) at para 55, online (pdf):

<thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf>; IFC Performance Standards, PS1, a 32.

²⁰⁵ Anaya 2012, para 28.

²⁰⁶ Anaya 2012, para 38.

²⁰⁷ Anaya 2012, para 18 (Anaya refers to Articles 19, 22 and 25 of the *International Covenant of Civil & Political Rights*).

Indigenous Rights and the IAA

KEY DOCUMENTS: INDIGENOUS PARTICIPATION AND GUIDANCE
<ul style="list-style-type: none">• Policy Context: Indigenous Participation in Impact Assessment• Guidance: Indigenous Participation in Impact Assessment• Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples• Guidance: Assessment of Potential Impact on the Rights of Indigenous Peoples• Guidance: Collaboration with Indigenous Peoples in Impact Assessment• Guidance: Indigenous Knowledge under the <i>Impact Assessment: Procedures for Working with Indigenous Communities</i>• Guidance: Protecting Confidential Indigenous Knowledge under the <i>IAA</i>• Overview: Indigenous Engagement and Partnership Plan• Indigenous Engagement and Partnership Plan - Template

The IAA seeks to fulfill the Government of Canada’s commitment to advancing reconciliation through a “renewed, nation-to-nation, Inuit-Crown, and government-to-government relationship.”²⁰⁸ The Preamble of the IAA notes Canada’s commitment to ensuring respect for the constitutionally affirmed rights of Indigenous Peoples and to implementing UNDRIP. As part of this commitment, the Agency, under the new IAA, aims to provide greater opportunities for Indigenous peoples to *meaningfully* participate, collaborate, and partner in the IA process.²⁰⁹

This section first provides an overview of Indigenous engagement in the IA process, followed by more detailed subsections on 1) consultation and consent, 2) Aboriginal and Treaty Rights, and 3) Indigenous-led assessments and projects.

The Indigenous Engagement & Partnership Plan is the Agency’s primary tool in supporting the participation of Indigenous peoples in the IA process.²¹⁰ It is developed collaboratively during the planning phase and outlines opportunities and methods for meaningful consultation and engagement with affected Indigenous communities throughout the IA process.²¹¹ Both Indigenous communities who are directly affected by a project (i.e., there is an impact to the exercise of their Aboriginal and/or Treaty rights) and

²⁰⁸ IAAC, “Policy Context: Indigenous Participation in Impact Assessment” (2021), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/policy-indigenous-participation-ia.html> [IAAC, Policy Context: Indigenous Participation].

²⁰⁹ IAAC, “Guidance on Collaboration with Indigenous Peoples in Impact Assessments” (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/collaboration-indigenous-peoples-ia.html> [IAAC, Guidance: Collaboration with Indigenous Peoples] (The term ‘Indigenous peoples’ represents the Aboriginal peoples of Canada, which includes Indian, Inuit and Metis peoples as defined in section 35(2) of the *Constitution Act, 1982*).

²¹⁰ IAAC, “Overview: Indigenous Engagement and Partnership Plan” (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/overview-indigenous-engagement-partnership-plan.html>

²¹¹ IAAC, “Guidance: Indigenous Participation in Impact Assessment” (2021), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-indigenous-participation-ia.html> [IAAC, Guidance: Indigenous Participation] (Multi-party meeting between the federal and provincial governments, proponents, and Indigenous communities may occur. The Plan should outline at a high level the groups who will participate and provide information on proponent-led engagement activities).

those communities with an “interest” in engagement may be involved in the IA process.²¹² The use of the terms rights or interests appears to appreciate the position of Indigenous people both as rights-holders, with rights, and stakeholders, with interests.

Consultation addresses the potential impacts of the project on the exercise of Aboriginal and Treaty rights (i.e., section 35 rights)

Engagement describes the tools by which consultation will occur, including the knowledge communities may wish to apply when considering impact and any other cultural considerations and customs that should be taken into account in project decision-making.²¹³

Indigenous communities are defined as a group or collective of Indigenous peoples that the Canadian government understands to represent the rights holders that could be affected by a project and has the same meaning as “Indigenous governing body” under section 2 of the IAA.

Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.²¹⁴

Indigenous engagement is referred to as a spectrum, defined on a continuum of involvement from participation, to collaboration, and finally partnership.²¹⁵ According to the Agency, the level of engagement of an Indigenous group can depend on a number of factors, including the community’s level of interest and capacity, preferred practices for consultation, the degree to which they will be impacted, the type and seriousness of potential impacts or cumulative impacts on rights, and the nature of the community’s interest in lands, water, or resources that may be potentially affected.²¹⁶ The number of impacted groups may also affect the form of engagement.²¹⁷

**First Nations Major Projects Coalition:
Guide to Effective Indigenous
Involvement in Federal IA**

This Guide presents and discusses tools to help Indigenous Nations realize the opportunities for effective involvement in the new IA process, including how to prepare for, and contribute to, an IA. The Guide provides helpful checklists for Nations when reviewing project and IA documents (see Appendices D-F).

1. Participation: Studies by or with Indigenous Peoples

At a minimum, Indigenous peoples must be given opportunities to participate in the identification of valued components and potential project impacts on Aboriginal and Treaty Rights. Indigenous communities must be consulted on the TISG, which will identify how Indigenous knowledge should be

²¹²See, IAAC, “Template: Indigenous Engagement & Partnership Plan” (2022), online (pdf): *Government of Canada* <www.canada.ca/content/dam/iaac-acei/documents/policy-guidance/practitioners-guide/indigenous-engagement-partnership-plan-external-template-en.pdf> [IAAC, Template: Indigenous Engagement & Partnership Plan].

²¹³ IAAC, Guidance: Collaboration with Indigenous Peoples.

²¹⁴ *Ibid* (the Agency further notes that communities “refers to Indigenous peoples connected by Nation, Band, geographical location, community roles and other shared values and identities”).

²¹⁵ See, IAAC, Policy Context: Indigenous Participation.

²¹⁶ IAAC, Guidance: Indigenous Participation.

²¹⁷See, IAAC, Guidance: Collaboration with Indigenous Peoples in Impact Assessments (“For example, it may be the preference of certain Indigenous communities to self-organize as a collective, drawing from traditional governance and Indigenous laws or customs”).

considered, as well as the studies to be undertaken *with or by* Indigenous communities or organizations on the potential impacts of a project to their territory, rights, and community well-being, including environmental, economic, social, gender and cultural impacts.²¹⁸ These studies bring Indigenous knowledge into the IA process, as required by section 21(g) of the IAA. The Agency is also required to work with Indigenous communities on a Crown Consultation and Accommodation Report to provide to the Minister.

Accommodation refers to measures to avoid, minimize or compensate for adverse impacts on Treaty & Aboriginal rights that is owed to Indigenous peoples based on the Crown's duty to consult.

Mitigation refers to modifications or additions to a project that are proposed in the course of an IA in order to avoid or reduce potential adverse impacts.

2. Collaboration: Co-Assessment

The Agency and Indigenous groups may formally collaborate in conducting the IA, including through the development of consultation protocols, the design of mitigation and accommodation measures, and the co-drafting of parts of key Agency documents.²¹⁹ Indigenous communities may also participate in the development of conditions at the decision-making stage to address a project's potential impacts on their rights or interests. Finally, Indigenous communities may work with the Agency to establish monitoring committees.

3. Partnership: Indigenous-Led Assessments

Partnership provides Indigenous communities with more authority and control over the impact process, including by leading portions of the Agency's assessment through delegation, or substituting an Indigenous jurisdiction's process for the federal IA process.²²⁰ A Cooperation Plan can identify ways an Indigenous jurisdiction can "contribute to the results of an assessment conducted under their own Indigenous laws, processes, or cultural protocols into the impact assessment process."²²¹ A Cooperation Agreement allows Indigenous governing bodies to exercise powers, duties or functions under the IAA. Cooperation Agreements are not project-specific, but rather enable Indigenous governments to lead their own assessments by providing them with jurisdictional powers in Canadian law to conduct those assessments. Canada has yet to enact regulations defining the circumstances under which an Indigenous governing body could enter into such a cooperation agreement with Canada. The Agency has indicated that specific guidance on Crown-Indigenous Partnership in IA will be provided once regulations are in place.

Consultation and Consent

The Crown has a legal duty to consult and accommodate when the government contemplates conduct that might adversely impact potential or established Aboriginal and Treaty Rights. The Government of Canada relies on the IA process to fulfill its duty to consult and accommodate under section 35 of the

²¹⁸ IAAC, "Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples" (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html> [IAAC, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples].

²¹⁹ IAAC, Guidance: Collaboration with Indigenous Peoples.

²²⁰ IAAC, Guidance: Collaboration with Indigenous Peoples.

²²¹ IAAC, Guidance: Collaboration with Indigenous Peoples.

Constitution, the purpose of which is promote reconciliation.²²² The Crown may delegate procedural aspects of consultation to industry proponents, however, the federal and provincial government retain the substantive obligation of ensuring that consultations are adequate.²²³ The Crown may be required to provide accommodation above and beyond the proponent's proposed measures for the prevention, minimization, and compensation for adverse impacts (see next section, "Aboriginal and Treaty Rights").²²⁴ The Agency leads the consultation team by coordinating the participation of other federal authorities to enable a "one window" point of contact for Indigenous groups.²²⁵ Community-specific consultation protocols may be developed to complement the broader Indigenous Engagement & Partnership Plan and to describe a community's specific objectives or unique features for consultation (see Table 8). The Agency's states that it will work with Indigenous communities to find "innovative engagement practices that reflect the needs of communities and respect Indigenous cultures, traditions, customary laws and protocols."²²⁶ In other cases, there are existing agreements between Canada, the Provinces and specific Indigenous communities that provide consultation protocols which define the requirements in the conduct of an IA.

Existing agreements between Canada, the Provinces, and Indigenous Communities providing consultation protocols
<ul style="list-style-type: none"> • The Terms of Reference for a Mi'kmaq-Nova-Scotia Canada Consultation Process • Mi'gmaq Wolastoqiyik / New Brunswick / Canada Umbrella Agreement • The Mi'kmaq-Prince Edward Island-Canada Consultation Agreement • The Mi'gmaq-Quebec-Canada Interim Tripartite Agreement on Mi'gmaq Consultation and Accommodation (Gaspé region) • Huron-Wendat Nation Consultation and Accommodation Protocol • Abenaki Consultation and Accommodation Protocol • The Algonquin-Ontario-Canada Consultation Process Interim Measures Agreement • Mississaugas of the new Credit First Nations: Consultation Protocol Agreement • Consultation Agreement between the Métis Nation of Ontario and Canada • Métis Nation of Alberta: Consultation Agreement • The Federal Authorizations Consultation Protocol (Dene Tha' First Nation) • The Mackenzie Gas Pipeline Consultation Protocol (Dene Tha' First Nation) • STÓ:LŌ Protocol²²⁷

In its 2018 "Principles Respecting Canada's Relationship with Indigenous Peoples" and the 2011 "Updated Guidelines for Federal Officials to Fulfill the Duty to Consult," Canada recognizes that meaningful engagement with Indigenous peoples aims to secure FPIC whenever the government proposes to take

²²² The Supreme Court has repeatedly emphasized reconciliation as the purpose of section 35. See, *R v Van der Peet*, [1996] 2 SCR 507 at 535; *R v Gladstone*, [1996] 2 SCR 723 at 774; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 1065; *Mitchell v MNR*, [2001] 1 SCR 911 at 928; *Haida Nation v British Columbia (Minister of Forest)*, [2004] 3 SCR 511 at 523; *Taku River Tlingit v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 at 563; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at 393; *R v Sappier*; *R v Gray*, [2006] 2 SCR 686 at 700.

²²³ *Haida Nation v British Columbia (Minister of Forest)*, [2004] 3 SCR 511 at paras 53–54.

²²⁴ IAAC, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples

²²⁵ IAAC, "Crown consultation with Indigenous Peoples in federal impact assessment" (2022), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/programs/aboriginal-consultation-federal-environmental-assessment.html>>.

²²⁶ IAAC, Policy Context: Indigenous Participation in Impact Assessment

²²⁷ For links to these agreements, see "Government of Canada and the duty to consult" (2022), online: *Crown Indigenous Relations & Northern Affairs Canada and Indigenous Services* <www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810>.

actions which have an impact on Indigenous rights, including their lands, territories and resources.²²⁸ The government describes this commitment as going beyond a legal duty to consult, although this falls short of an explicit requirement for Indigenous consent and still allows for infringement when justified under section 35(1) of the Constitution.²²⁹ Further, the duty to consult jurisprudence focuses mostly on the infringement of Indigenous peoples procedural rights under section 35, as opposed to addressing substantive concerns regarding environmental human rights harms more generally.²³⁰

Canada’s “Guiding Principles and Consultation Directives” confirm that, where possible, federal authorities and proponents are to work in partnership with the affected rights-holding group, *through their representative body or through a collective whose legitimacy is recognized by rightsholders*, with the aim of reaching *consensus* on both the process and content of the assessment.²³¹ The Agency states that it “encourages the active participation of a diversity of Indigenous community members beyond Chief and Council and other administrative bodies.”²³²

TABLE 5: CONSULTATION AND CONSENT IN THE IAA

Provision	Legislative Requirements
Agency’s Object	The Agency’s objects are 155(b) to coordinate — during the period that begins on the day on which a copy of the description of the project referred to in subsection 10(1) is posted on the Internet site, and that ends on the day on which the decision statement in respect of the project is issued — consultations with Indigenous groups that may be affected by the carrying out of a designated project.
Agency’s Obligation	Offer to Consult 12 For the purpose of preparing for a possible impact assessment of a designated project, the Agency must offer to consult with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project and any Indigenous group that may be affected by the carrying out of the designated project.
Agency’s Decision	Whether an IA is required – Factors 16(2) In making its decision, the Agency must take into account the following factors: (c) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; (d) any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted under section 12;

²²⁸ “Principles respecting the Government of Canada’s relationship with Indigenous peoples” (2018), online: *Department of Justice Canada* <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>; “Updated Guidelines for Federal Officials to Fulfill the Duty to Consult” (2011), online: *Indigenous Relations & Northern Affairs Canada and Indigenous Services* <www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729>.

²²⁹ see, *R v Sparrow*, [1990] 1 SCR 1075; *Tsilhqot’in Nation v British Columbia*, [2014] SCC 44; *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447.

²³⁰ See, for example, *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 ; *Coldwater et al v Canada (Attorney General) et al*, 2020 FCA 30.

²³¹ See, IAAC, Policy Context: Indigenous Participation in Impact Assessment.

²³² IAAC, Guidance: Assessment of Potential Impacts.

	(f) any study that is conducted or plan that is prepared by a jurisdiction — in respect of a region that is related to the designated project — and that has been provided to the Agency.
Consultation & Cooperation with Certain Jurisdictions	Agency's or Minister's obligations 21 The Agency — or the Minister if the impact assessment of the designated project has been referred to a review panel — must offer to consult and cooperate with respect to the impact assessment of the designated project with (b) any jurisdiction referred to in paragraphs (c) to (i) of section 2
Definition of jurisdiction	2 (f) an Indigenous governing body that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project (i) under a land claim agreement referred to in section 35 of the <i>Constitution Act</i> (ii) under an Act of Parliament or an Act of the legislature of a province, including a law that implements a self-government agreement (g) an Indigenous governing body that has entered into an agreement or arrangement referred to in paragraph 114(1)(e)

Aboriginal and Treaty Rights

Indigenous rights are explicitly included as a factor to consider in an IA. The rights referenced in section 22(1)(c) of the IAA are those rights “recognized and affirmed by section 35 of the Constitution Act,” inclusive of all Aboriginal and treaty rights, including Aboriginal title and self-governance. UNDRIP informs the interpretation and application section 35 rights.²³³

The IAA requires that any adverse impacts on rights be assessed and addressed at key decision points, including the Minister's decision to require an impact assessment and allow a project to proceed.²³⁴ Further, the Minister may also consider the adverse impacts of a proposed project on the rights of Indigenous when deciding whether to designate a physical activity not prescribed by the *Physical Activities Regulations*.

In addition to assessing the impacts to Indigenous peoples' rights, governments and businesses must consider Indigenous knowledge, cultures, Indigenous-led assessments, and studies or plans prepared by Indigenous governing bodies under section 22 of the IAA.

TABLE 6: ABORIGINAL & TREATY RIGHTS IN THE IAA

Provision	Legislative Requirements
Designation of Physical Activity	Factors to be taken into account 9(1) The Minister may, on request or on his or her own initiative, by order, designate a physical activity that is not prescribed by regulations... (2) before making the order, the Minister may consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada – including Indigenous women – recognized and affirmed by section 35...

²³³ See, *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families* [2022] (QCCA) at paras 506-513.

²³⁴ IAA, ss 9(2), 16(1)(c), 63(d), respectively.

Factors to be considered	Factors – impact assessment 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors: (c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i> ; (g) Indigenous knowledge provided with respect to the designated project; (l) considerations related to Indigenous cultures raised with respect to the designated project; (q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project; (r) federal impact assessment of a project must take into account any assessment of the effects of the designated project conducted by an Indigenous governing body and any study or plan that is conducted or prepared by a jurisdiction or an Indigenous governing body; (s) the intersection of sex and gender with other identity factors;
Referral to review panel	Public interest 36 (2) The Minister’s determination regarding whether the referral of the impact assessment of the designated project to a review panel is in the public interest must include a consideration of the following factors: (d) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35...
Decision-making	Factors – public interest 63 The Minister’s determination under paragraph 60(1) (a) in respect of a designated project ... must be based on the report with respect to the impact assessment and a consideration of the following factors: (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>

The Agency’s Policy Context: Assessment of the Potential Impacts on the Rights of Indigenous Peoples provides Guiding Principles for the assessment of the potential impacts on the rights of Indigenous peoples.²³⁵ Guiding Principle 5 recognizes that the exercise of rights may be affected by intersecting contextual factors, including baseline environmental, health, social, and economic conditions. Guiding Principle 6 recommends that government and proponents take a “broad and holistic” approach to understanding how Indigenous groups view their rights, how they prefer to exercise them, and their actual ability to exercise them, as informed by the customs, practices, cultural beliefs, and traditions of communities, as well as biophysical conditions.

The Agency’s Guidance for the Assessment of Potential Impacts on the Rights of Indigenous Peoples provides a detailed methodology, informed by the Guiding Principles, for federal authorities and

²³⁵ IAAC, “Policy Context: Assessment of the Potential Impacts on the Rights of Indigenous Peoples” (2020), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/assessment-potential-impacts-rights-indigenous-peoples.html>.

proponents to follow.²³⁶ Where an Indigenous community has its own protocols for knowledge gathering, engagement and consultation, including unwritten rules or oral traditions, the Guidance should be adapted to reflect those protocols. In either case, the proponent's role is to provide information about their project and to participate in the assessment of impacts on rights. Where studies are conducted by proponents, they must abide by the Agency's Guidance, "Procedures for Working with Indigenous Communities: Protecting Indigenous Knowledge under the IAA."²³⁷ However, it is best practice for proponents to fund Indigenous communities to undertake their own knowledge studies or to hire their own third-party consultant to ensure data collection is culturally appropriate and that information is not taken out of context.²³⁸

The Agency expects proponents to consider Indigenous knowledge "alongside Western scientific knowledge [...] to provide evidence and understanding related to the physical environment; to social, cultural, economic, and health issues; as well as to Indigenous governance, traditional laws, customs, and use of resources."²³⁹ It is best practice for proponents to engage Indigenous communities *prior* to submitting the initial project description, including by spending time on the land and walking with knowledge holders. The Agency emphasizes that "proponents should not be seeking Indigenous knowledge separately from relationship building and engagement," and must receive explicit consent from knowledge holders and community leadership to include Indigenous knowledge in the IA process.²⁴⁰

Indigenous Knowledge
<p>Indigenous knowledge is often associated with the exercise and protection of Aboriginal and treaty rights, which is supported by the continued accumulation of Indigenous knowledge through the use of lands and resources for traditional purposes. The Agency uses the term Indigenous knowledge to recognize that the knowledge system evolves and is not set in the past as the word "traditional" may imply.</p> <p>Indigenous knowledge may provide insights related to:</p> <ul style="list-style-type: none"> • project design (e.g., are there important sites within the project footprint that should be avoided? Are there alternative approaches to project design?); • baseline data collection (e.g., environmental, social, health, economic and cultural, land use, traditional place names); • identification of valued components, indicators or measurement methods; • identification of appropriate spatial and temporal boundaries; • identification of potential mitigation measures; and • identification of considerations for, and development of, follow-up and monitoring procedures.²⁴¹

²³⁶ IAAC, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples.

²³⁷ IAAC, "Interim Guidance: Indigenous Knowledge under the *Impact Assessment Act*: Procedures for Working with Indigenous Communities" (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/indigenous-knowledge-under-the-impact-assessment-act.html> [IAAC, Indigenous Knowledge]; See also, IAAC, "Guidance: Protecting Confidential Indigenous Knowledge under the *Impact Assessment Act*" (2022), online: *Government of Canada* <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/protecting-confidential-indigenous-knowledge-under-the-impact-assessment-act.html>.

²³⁸ IAAC, Indigenous Knowledge.

²³⁹ IAAC, Indigenous Knowledge.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

The purpose of the assessment is to identify: 1) the nature, scope and content of each right; 2) the environmental and socioeconomic conditions that support the community's meaningful exercise of each rights; and 3) how historic, existing, and reasonably foreseeable future activities have cumulatively affected or could adversely affect these conditions. The Agency and proponent must work with the affected Indigenous groups to identify valued components associated with community well-being. The IA should consider impacts to traditional territory and places of cultural importance, including harvesting areas, sacred sites, archeological sites or burial grounds, travel routes, among others.

Cultural well-being is defined as the ability of a group to continue customs, traditions, and practices integral to their distinct culture, which are often based on a unique relationship to the landscape that cannot be replicated elsewhere. Factors such as continuity of traditions, safe access to travel routes and safety in areas for practicing rights, transmission of language and knowledge, and Indigenous laws are identified as being helpful to understanding impacts.

Figure 5: Conditions required to support the meaningful practice of Aboriginal and Treaty Rights

- the state of the land base (including biodiversity, ecosystem health, connectedness of tracts of land or waterways, etc.);
- ancestral connection, a feeling of historical or spiritual connection to the area;
- confidence in and sufficiency of resources (including higher weighting for preferred places, resources and times to access them);
- data on wildlife and vegetation baseline (abundance, distribution, population health) data;
- sense of place (e.g., sense of solitude and ability to peacefully enjoy territory in preferred manner);
- customs for transfer of knowledge (including language) to future generations;
- access and patterns of occupation and cultural practice (including community constraints and differential cultural practices by age and/or gender);
- stewardship norms and laws;
- social value of the area to practice culturally significant activities;
- cultural landscape and keystone cultural place delineation; and
- community health indicators using a social determinants of health approach.²⁴²

The Agency and proponent must also identify the pathways from project-related activities to the biophysical environment that may affect the conditions needed to exercise rights, such as access, quality and quantity of resources, or the quality of experience of exercising the rights (e.g. preferred locations, times and means of exercising rights).²⁴³ The Crown and proponent must evaluate the severity of the adverse impact (low, moderate or high), ideally on the basis of criteria that is co-developed with the community and based on community thresholds, laws and norms.²⁴⁴

²⁴² *Ibid.*

²⁴³ IAAC, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples.

²⁴⁴ *Ibid* (the Agency proposes the criteria of likelihood; geographic extent; frequency, duration, and reversibility; cultural well-being; cumulative impacts; governance; impact inequity; and health).

The *Yahey* Decision on Cumulative Impacts

The present ability of a community to exercise their rights may be hindered by past industrial activities on a regional or historic basis. *Yahey v British Columbia*, 2021 BCSC 1287 was the first case to consider the infringement of Aboriginal rights resulting from the cumulative effects of multiple major projects as well as the provincial regulatory regime that authorized them.

The Agency suggests “impact inequity” as a factor in evaluating the severity of impacts, as “project activities resulting in changes to quality and quantity of resources or access to resources may cause impacts to specific resource uses and could be more acute for vulnerable population within an Indigenous community,” including women, elders, youth, and particular family groups.²⁴⁵ Project impacts could also be disproportionately experienced between different Indigenous communities, or between past, present or future generations. Impact Benefit Agreements may also not benefit the entire community equally. GBA Plus fits within the “impact inequity” criterion (see “Gender, Intersectionality and the IAA”).

The Agency also suggests that the Crown and proponent should evaluate the extent of a project’s effects on a community’s ability and systems for self-governance and self-determination, including potential impacts to Indigenous laws. As stated by the Agency:

Project-related decisions by a proponent or governments during pre-impact assessment or impact assessment phases that do not acknowledge or seek to incorporate Indigenous customs, laws, and practices may affect stewardship and nationhood. They may also contravene Indigenous laws and jurisdiction. Indigenous communities may have land and water use plans, and specific protocols outlining how consultation, environmental studies, use of traditional knowledge or resource development should occur. Project planning, data collection and subsequent decision-making that do not consider relevant land use plans and protocols developed by Indigenous communities may be viewed as disrespectful of Indigenous governance, and may result in changes that compromise the goals and objectives of Indigenous communities related to resource management, health and safety, economic development and spiritual practices. If this occurs repeatedly, both Indigenous and non-Indigenous communities may lose appreciation for Indigenous laws and practices resulting in impacts to stewardship and nationhood.²⁴⁶

Figure 6: Potential Impacts to Indigenous Self-Governance – Considerations²⁴⁷

- Who is/are the appropriate rights-holder(s) with whom to consult (e.g., hereditary chiefs with governance responsibilities over different parts of an Indigenous territory)?
- To what extent does the project impact or process weaken the Indigenous community’s authority over its territory?
- What is the capacity for federal/provincial/municipal government, Indigenous communities, and the proponent to manage the impacts once the project begins? Was the Indigenous community involved in, or have confidence in, the risk modelling for the likelihood of impact and effectiveness of mitigation and accommodation?
- Are there safety concerns that would prevent members of the Indigenous community from accessing and harvesting resources?
- How could the project change the Indigenous community’s ability to derive future economic

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

benefits from or maintain an ongoing relationship with the land or water?
<ul style="list-style-type: none"> • What is the portion or percentage of the territory that the project could alienate from the Indigenous community's occupancy and use? • Are the decisions of a proponent or government, or an impact from a project, in contravention of Indigenous laws and jurisdiction (from the Indigenous community's perspective)? • How does the project change or restrict future land and water uses by the Indigenous community? • What is the current land ownership arrangement (e.g., Crown land, private land, treaty)? • Does the Indigenous community claim title to any area that could be impacted by the project? • How does the Indigenous community believe its claim to title could be impacted by the project? • Is the Indigenous community currently negotiating agreements under the Comprehensive Land Claims or Inherent Right policies, or through Recognition of Indigenous Rights and Self-Determination discussion tables? How could these negotiations inform the assessment? • Could the project impact the Indigenous community's relationship to the land or water, in a way that is incompatible with aspects of its title claim? • Will the project have an impact on the Indigenous community's planning, management or stewardship of traditional lands and resources? • Will the project or process impact the exercise of the Indigenous community's governance rights? • Has the Indigenous community provided their free, prior and informed consent for the project?

Once the rights assessment is complete, the proponent should engage in dialogue with the community to develop measures to avoid, mitigate, and/or compensate for identified impacts. Such measures can include project design changes, federal conditions, economic benefits, land offsets, wildlife protection, the involvement of Indigenous communities in monitoring and follow-up, and restitution where damage occurs.²⁴⁸ The Agency's Guidance notes that "solutions proposed by the Indigenous communities should be explored first, and if they are not possible, reasons should be provided to the Indigenous community."²⁴⁹ The Crown must then evaluate whether it can rely on the proponent's mitigation and accommodation to fulfill the Crown's duty to consult, in whole or in part.

Prior to finalizing the IA report, the Indigenous community should be given the opportunity to comment on its contents, particularly the application of Indigenous knowledge, values, and thresholds. If there are disagreements between the parties, these perspectives should be documented in the IA report.²⁵⁰ The Agency emphasizes that the IA is not a "rights determination process," and that while an analysis of the strength of claim by the Crown may be required when developing accommodation measures in accordance with the duty to consult, the rights described by Indigenous communities can be accepted for the purpose of the IA analysis.²⁵¹

Figure 7: Degree of Severity for Adverse Impacts on Rights of Indigenous Peoples²⁵²	
Low	Impacts are likely to be minor in scale, short duration, infrequent, small in spatial extent, reversible or readily avoided or reduced; cultural well-being is minimally disrupted; no or few effects to health and/or country foods; few (or no) existing or proposed developments or historic impacts in group's territory; project and activities in alignment with group's development, land or water use plans; sub-groups of the population are resilient enough

²⁴⁸ IAAC, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

	to sustain impacts and maintain exercise of rights; mitigation should allow for the practice of the right to continue in the same of similar manner as before any impact.
Moderate	Impacts are likely to be medium in scale, moderate duration, occasionally frequent, possibly/partially reversible, spatial extent affects preferred use areas or disrupts interconnectedness and/or knowledge transfer; cultural well-being is impeded or altered; impacts to individual and/or community holistic health, including perceptions of impacts; project interacts with a few preferred areas where rights can be practiced, and some historic, existing or proposed development and/or disturbance; project may not be compatible with aspects of land use plans or application of traditional laws and governance; vulnerable subgroups are likely to experience higher impact on ability to exercise rights; mitigation may not fully ameliorate impact but should enable the Indigenous group to continue exercising its rights as before, or in a modified way.
High	Impacts are likely to be major in scale, permanent/long-term, frequent, possibly irreversible and over a large spatial extent or within an area of exclusive/preferred use; cultural well-being is disrupted, impeded or removed; project interacts with only area where a right may be exercised and many historic, existing or proposed developments and/or disturbance; decision-making associated with governance and title adversely affected; sub-groups will be disproportionately impacted by the project and experience no to little benefit; mitigation is unable to fully address impacts such that the practice of the right is substantively diminished or lost.

Indigenous-led Assessments

The Principles Respecting Canada's relationship with Indigenous Peoples and the recently passed *United Nations Declaration on the Rights of Indigenous Peoples Act* affirm the right of indigenous peoples to self-determination, including the inherent right to self-government. As elaborated upon by the Agency:

Indigenous communities have governance responsibilities to their membership (including to future generations) for strategic planning, management, and stewardship of their traditional lands and resources. Indigenous governance and decision-making authority may be expressed through a community's specific laws, norms, power, language, and how members of the group are held accountable for their actions. Governance is related to self-determination, jurisdiction, stewardship, and nationhood. Indigenous communities have the right to choose how they are governed, and by whom, in accordance with their laws, customs, structures, and other relevant matters as identified by that community according to their own processes and traditions.²⁵³

Recognition and respect for Indigenous self-determination and self-governance is a necessary condition to actualizing the procedural and substantive rights affirmed in UNDRIP. The IAA allows the Minister to either delegate the carrying out of any part of the impact assessment to an Indigenous jurisdiction, or to substitute the process of an Indigenous jurisdiction for the federal process entirely.²⁵⁴

The IAA further permits the Minister to enter into agreements with Indigenous governing bodies, including Indigenous governments not recognized as jurisdictions under the Act *if authorized by*

²⁵³ *Ibid.*

²⁵⁴ IAA, ss 29, 31, respectively.

regulations, to permit them to exercise powers on lands over which those governments do not otherwise have powers.²⁵⁵

These provisions create space for Indigenous communities to lead IA process through representatives chosen by themselves, including traditional governance structures, as opposed to Indian Act-created Chief and Councils. Such an approach seems to acknowledge the rights of Indigenous peoples to participate in decision-making matters that affect their rights and territories, in accordance with UNDRIP. However, it falls short of recognizing the *inherent* jurisdiction of Indigenous peoples to make decisions regarding their land and territories, as self-government is constrained by legislative requirements and the unilateral jurisdiction of the Minister.²⁵⁶

Where Indigenous-led assessments occur in parallel or in cooperation with the federal IA, the Agency is to recognize and incorporate the results of the Indigenous-led assessment in the development of its IA Report and proposed conditions, as well as provide the outcome of the Indigenous-led assessment to the Minister for consideration in the federal decision.²⁵⁷ The Minister may address the Indigenous-led assessment in their reasons for decision or, where a cooperative review has been undertaken, provide a direct response to the Indigenous community, “reflecting areas of agreement, modification, or divergence in the federal decision.”²⁵⁸

Table 7: Indigenous-Led Assessments in the IAA

Provision	Legislative Requirements
Delegation	29 The Agency may delegate to any person, body or jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction in section 2 the carrying out of any part of the impact assessment of the designated project and the preparation of the report with respect to the impact assessment of the designated project.
Substitution	31(1) Subject to sections 32 and 33, if the Minister is of the opinion that a process for assessing the effects of designated projects that is followed by a jurisdiction referred to in any of paragraphs (c) to (g) of the definition jurisdiction in section 2, that has powers, duties or functions in relation to an assessment of the effects of a designated project would be an appropriate substitute, the Minister may, on request of the jurisdiction and before the expiry of the time limit referred to in subsection 18(1), or any extension of that time limit, approve the substitution of that process for the impact assessment.
Minister’s Powers	(d) if authorized by the regulations, enter into agreements or arrangements with any jurisdiction referred to in paragraph (e) or (f) of the definition jurisdiction in section 2 to (i) authorize the jurisdiction, on lands with respect to which it already has powers, duties or functions in relation to an assessment of the environmental effects of a

²⁵⁵ IAA, s 114(1)(d)(e).

²⁵⁶ See, generally, Sara Mainville & Renée Pelletier, “UNDRIP, Decision Making, and the Role of Indigenous Peoples” (116-139) in Meinhard Doelle & John Sinclair, *the Next Generation of Impact Assessment* (Toronto: Irwin Law, 2021) [Mainville & Pelletier, 2021]

²⁵⁷ IAAC, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples.

²⁵⁸ IAAC, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples (“This would align with some modern treaties and land claim agreements, whereby Ministers are required to respond to recommendations from review boards or committees, indicating reasons for accepting, rejecting or modifying recommendations, and providing opportunities for the committees to reply”).

	<p>designated project, to exercise powers or perform duties or functions in relation to impact assessments under this Act — except for those set out in section 16 — that are specified in the agreement or arrangement, or</p> <p>(ii) in relation to lands, specified in the agreement or arrangement, with respect to which it does not already have powers, duties or functions in relation to an assessment of the environmental effects of a designated project,</p> <p>(A) provide that the jurisdiction is considered to be a jurisdiction for the application of this Act on those lands, and</p> <p>(B) authorize the jurisdiction, on those lands, to exercise powers or perform duties or functions in relation to impact assessments under this Act — except for those set out in section 16 — that are specified in the agreement or arrangement;</p> <p>(e) if authorized by the regulations, enter into agreements or arrangements with any Indigenous governing body not referred to in paragraph (f) of the definition jurisdiction in section 2 to</p> <p>(i) provide that the Indigenous governing body is considered to be a jurisdiction for the application of this Act on the lands specified in the agreement or arrangement, and</p> <p>(ii) authorize the Indigenous governing body, with respect to those lands, to exercise powers or perform duties or functions in relation to impact assessments under this Act — except for those set out in section 16 — that are specified in the agreement or arrangement;</p>
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Indigenous Rights and RBC

The IAAC Template Indigenous Engagement and Partnership Plan provides an easy entry point for incorporating RBC Tools. The Plan must include a list of “preferred methods and tools for engagement identified by Indigenous communities.”²⁵⁹ Communities could draw on their own internal protocols and/or national, regional, or international RBC tools on Indigenous engagement.

Given the uniqueness of Indigenous communities, 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. The following subsections address the deficiencies of the IA regime in the areas of consultation and consent, Aboriginal and Treaty Rights, and Indigenous-led assessment, and reflects on how select RBC tools may fill in the gaps to ensure a human-rights respecting framework.

Consultation and Consent

Article 32(2) of UNDRIP pertaining to consultation and the requirement for FPIC is incorporated the Agency’s guidance on Indigenous rights, however, it is often not upheld to since there is no explicit requirement in Canadian law that the government obtain the consent of Indigenous groups before development activities take place (though the domestic implementation of UNDRIP will require this status quo to change). As it stands, the Crown only bears a duty to commit to meaningful process and can make the final regarding project approval, resulting in infringements to the procedural and substantive rights of Indigenous peoples who are adversely affected by industrial development. The federal Guidance notes

²⁵⁹ IAAC, Template: Indigenous Engagement & Partnership Plan.

that “collaboration with Indigenous peoples may not be possible,” in which case the Crown will seek to consult right-holding groups as a minimum requirement.²⁶⁰ The provincial RBC tools related to Indigenous engagement referenced in Table 8 are also consultation-centric and do not endorse FPIC.

Existing literature indicates that engagement does not mean the same thing to Indigenous peoples, industry, or government. There are different perceptions of what consent means (consent means consensus to Indigenous peoples, but veto to industry and government), motives for consulting (autonomy/sovereignty for Indigenous peoples, adherence to law for government, and economic benefits for businesses), and reasons for desiring early engagement (increased involvement in decision making for Indigenous peoples, meeting timelines for government, and cost effectiveness for industry).²⁶¹ These differences in understanding underscore the importance of developing an integrated IA-RBC framework for Indigenous consultation and consent under Canada’s regime. A rights-based model which prioritizes the self-determination and self-governance Indigenous communities is key to reconciliation.

The IFC Performance Standards, the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement, and the International Council on Mining and Metal’s Indigenous Peoples Mining Good Practice Guide all require consultation on a standard of FPIC.²⁶² The OECD Guidance specifies that consent can be indicated in many ways, including “majority vote from the community, approval of a traditional decision-making body such as a council of elders, organised regional referendum or other forms determined by regulation or other mechanism defining the requirement for consent, or by agreement between the enterprise and the affected persons themselves.” These positions go beyond the more formally recognized duty to consult in Canada.

The IFC Performance Standards notes that consultations should be “free of external manipulation, interference, coercion, or intimidation.”²⁶³ This requirement accords with UN Special Rapporteur Anaya’s statement that indigenous peoples “should be freedom from State or extractive company agents to compel them to accept extractive projects.”²⁶⁴ Critically, the IAA Guidance does not provide concrete direction to federal authorities or proponents where projects may face differing positions among and between Indigenous groups, including Indian Act-created Chief & Councils, hereditary chiefs, and rights-holders. Indigenous groups are not homogenous, and governments and extractive companies may perpetuate divide-and-conquer tactics.²⁶⁵

There are still significant gaps in the recognition and protection for Indigenous Peoples in Canadian law, including no guarantee of security of the person and freedom of expression for Indigenous human rights defenders who may protest resource extractive projects. This underscores the importance of implementing international human rights principles in domestic IA law. The ISHR’s Human Rights Defender Toolkit addresses the particular issues confronting Indigenous peoples and women who take on the responsibility to defend the environment and references the international standards business and government must uphold in these contexts.

²⁶⁰ IAAC, Policy Context: Indigenous Participation.

²⁶¹ Brendan Boyd & Sophie Lorefice, “Understanding Consultation and Engagement with Indigenous Peoples in Resource Development” 12:22 (2019) SPP Communique 1, online (pdf): <www.policyschool.ca/wp-content/uploads/2019/07/Indigenous-Consultation-Boyd-Lorefice-final2.pdf>

²⁶² OECD Due Diligence Guidance on Meaningful Stakeholder Engagement at 50.

²⁶³ IFC Performance Standards, PS 1, s 32.

²⁶⁴ Anaya 2021, para 25.

²⁶⁵ See, Grandmother’s Report at 2.

Where partnership and collaboration with the affected rights-holding group is not possible, this heightens the potential that the Indigenous knowledge required for the IA process will be “extracted” in a non-consensual way, for the ultimate benefit of proponents seeking regulatory approval. Although the IAA provides guidance for the collection, ownership, control, use and safeguarding of Indigenous knowledge, this does not address the larger structural problems where consent is not forthcoming. As stated by former UN Special Rapporteur Anaya, “neither States nor companies need or should insist on consultations” where indigenous peoples have “affirmatively withheld their consent.”²⁶⁶ Article 8(b) of UNDRIP further affirms that states shall provide effective mechanisms to prevent and redress any action which has the aim or effect of dispossessing Indigenous Peoples of their lands, territories, or resources.

Further, neither the IAA nor the Agency’s guidance recognizes the iterative nature of consent as an ongoing process that must be achieved *before* exploration as well throughout the lifecycle of a project. The Agency recognizes that disagreements may arise during the conduct of the IA or during decision-making, and that “existing dispute resolution processes under other mechanisms may be looked to as examples,” such as the British Columbia *Environmental Assessment Act*.²⁶⁷ However, there is no guidance pertaining to engagement and conflict resolution in the post-impact assessment phase (i.e., during operations, closure and post-closure), nor a consideration of potential co-governance arrangements between Indigenous nations and the Crown. Although proponents and federal authorities are to collaborate on the development of mitigation and accommodate measures, there is little mention of Indigenous participation in the follow-up, monitoring, compliance, and enforcement phases.

Claims for Damage against Third Parties

In *Thomas and Saik’uz First Nation v Riot Tinto Alcan Inc.*, 2022 BCSC 15, the Court recognized that First Nations can make claims for damages against private companies for adverse effects stemming from breaches of Aboriginal rights. The Nations alleged that a dam built by Rio Tinto Alcan negatively impacted fish stocks critical to community well-being.

The Indigenous Guardians Network could provide a promising avenue for Indigenous leadership in the monitoring of potential impacts on rights and the efficacy of mitigation and accommodation measures.²⁶⁸ Guardians could assess the accuracy of assessment conclusions and help align follow-up efforts with Indigenous laws and self-governance rights. A rights-compliant framework recognizes that non-mainstream bodies of knowledge like Indigenous knowledge are not less scientific or technological. Hence, Article 31(1) of UNDRIP recognizes the manifestations of Indigenous sciences and technologies. However, the Agency’s Guidance on External Technical Review seems to reinforce the Western science–Indigenous knowledge dichotomy by focusing on natural sciences and engineering to the exclusion of Indigenous laws and worldviews.

Regarding access to remedy, the International Bar Association’s Model Mining Development Agreement requires the affected community and extractive company to develop a community development agreement which, among other things, require companies to submit to local jurisdiction for dispute resolution. This tool could provide a model for third-party, bilateral agreements between Indigenous communities and proponents. Former UN Special Rapporteur James Anaya notes that these agreements

²⁶⁶ Anaya 2012 Report, para 25.

²⁶⁷ IAAC, Guidance: Collaboration with Indigenous Peoples.

²⁶⁸ BC First Nations Energy & Mining Council and the UVIC Environmental Law Centre, “The Case for a Guardian Network Initiative” (July 2020), online (pdf): <<https://elc.uvic.ca/wordpress/wp-content/uploads/2020/08/2020-01-01-Case-for-a-Guardian-Network-Initiative-compressed-for-email.pdf>>.

should address impact mitigation and provide for genuine partnership, sharing of benefits, and grievance mechanisms.²⁶⁹ Further, Indigenous peoples must be able to exercise their own laws in the implementation of any company-level grievance mechanism or HIRA for that matter.

The systematic flaws in Canada's IA regime discussed above underscore the importance of deploying the consultation tools developed by Indigenous governments themselves (see Table 8, "Self-Governance" tools). Some Indigenous RBC tools may be embedded within an Indigenous community's broader framework of environmental management, stewardship, and protection plans and strategies, or within Indigenous peoples' written Constitutions and other Indigenous laws, as well as unwritten traditions (e.g., Constitution of the Haida Nation). Of the 12 identified Indigenous Nation tools in Table 8, only 3 are applicable Canada-wide. Other Indigenous RBC tools are peculiar to jurisdictions or Indigenous communities.

Aboriginal and Treaty Rights

There is no requirement in the IAA that governments or business consider the broader rights of Indigenous peoples recognized in international law. Although the IAA refers to the Government of Canada's commitment to UNDRIP in its preamble, this commitment is not entrenched in any of the substantive provisions of the Act. Indigenous scholars have criticized the Supreme Court's narrow interpretation of section 35 rights. John Borrows, for example, critiques the Supreme Court of Canada's view of section 35 rights as historical or traditional rights to hunt, fish and gather.²⁷⁰ The SCC's interpretation, Borrows argues, excludes broader and essential human rights like rights to child welfare, education, clean drinking water, and health.

The Agency's Guidance does suggest health as a criterion for the evaluation of project impacts on Indigenous rights, including varied considerations such as: community infrastructure, access to health and social services; connections between health and socio-economic conditions; consultation fatigue and stress; racism and social exclusion; project impacts on quality, abundance and access to country foods and traditional diets; and health and mobility of Elders and cultural knowledge holders.²⁷¹ Overall, however, the Agency's guidance is disproportionately focused on impacts caused by changes to *quality and quantity of resources*, as opposed to broader social and economic effects of resource extraction.

The recognition and consideration of studies by or on behalf of an Indigenous governing body and the involvement of Indigenous peoples in project conditions create opportunities to bring to the fore rights-based issues not otherwise covered by section 35 and Agency guidance. The "rights" referenced in the Agency's guidance are not limited to section 35 rights but should also be read to include rights under the Charter, UNDRIP, and other sources of international human rights law.

In this regard, IFC Performance Standard 7 on Indigenous Peoples mandates that the "development process [should] foster full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous peoples."²⁷² In 2013, the UN Global Compact developed specific guidance for the private sector in its Business Reference Guide to UNDRIP, with the purpose of helping

²⁶⁹ Anaya Report 2012, paras 72-78.

²⁷⁰ John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Canadian Historical Review at 116.

²⁷¹ IAA, Assessment of Potential Impacts on the Rights of Indigenous Peoples.

²⁷² IFC Performance Standards, PS 7, s 2.

businesses to “understand, respect and support the rights of Indigenous peoples by illustrating how these rights are relevant to business activities.”²⁷³ This could serve as a useful starting for proponents and governments alike.

A report by the Firelight Group, “Indigenous Communities and Industrial Camps: Promoting Healthy Communities in Settings of Industrial Change,” conducted in collaboration with Lake Babine Nation and Nak’azdli Whut’en, provides thorough recommendations aimed at fulfilling the human rights of Indigenous peoples, including in the areas of: sexual assault, sex trafficking and substance abuse; child care; transportation; health; cultural continuity; cultural continuity at the industrial site; and infrastructure, and clearly delineates the roles and responsibilities of industry, the Agency, and community in leading mitigation strategies.²⁷⁴ The report offers a comprehensive and culturally relevant framework for addressing the diverse and interconnected human rights and environmental impacts of resource extraction on northern, rural, and remote Indigenous communities. This is another great resource which can help government and business understand the links between resource extraction and cultural well-being and survival.

Indigenous-led Assessments

Indigenous-led assessments can also bring other rights-based issues not otherwise covered by section 35 to the forefront. Blue, Brownson & Lajoie-O’Malley describe Indigenous-led IAs as based on holistic and integrative approaches to assessment that reject state-based categories (such as “valued components” and “significance”) and instead orchestrate assessment based on Aboriginal rights and title.²⁷⁵

In this regard, Indigenous-led assessments can overcome some of the key systemic flaws of the section 35 framework, which is based on the exclusive and unilateral jurisdiction of the colonial state. The current framework in Canadian law does not conform with Article 26 of UNDRIP, which legally recognizes the self-governing rights of Indigenous peoples to lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.

Indigenous-led assessments can engage the inherent rights, legal orders, and knowledge systems of Indigenous groups, and provide communities with a viable avenue by which they can exercise their rights to self-determination and self-governance over their lands, territories, and resources.

The IFC Performance Standards, among other RBC tools, note the importance of allowing sufficient time for Indigenous decision-making processes. The current IA process presents critical challenges for Indigenous leadership and participation in IA processes, including restricted legislated timelines and the limited financial and human resources available to certain Indigenous communities facing other priorities and community pressures.²⁷⁶ These factors constrain the capacity of certain communities to carry out Indigenous-led assessments or otherwise collaborate and/or partner in IA processes. An Indigenous-led

²⁷³ UN Global Compact, “the Business Reference Guide to the United Nations Declaration on the Rights of Indigenous Peoples” (2013), online: <www.unglobalcompact.org/library/541>.

²⁷⁴ Firelight Group, “Industrial Camps and Indigenous Communities: Promoting Healthy Communities in Settings of Industrial Change” (2018), online (pdf): <firelight.ca/wp-content/uploads/2016/03/Firelight-work-camps-Feb-8-2017_FINAL.pdf>.

²⁷⁵ Gwendolyn Blue, Kelly Bronson & Alana Lajoie-O’Malley, “Beyond Participation and Distribution: A Scoping Review to Advance a Comprehensive Justice Framework for Impact Assessment” (2020) at 27, online: University of Calgary <prism.ucalgary.ca/handle/1880/112213>.

²⁷⁶ Mainville & Pelletier, 2021 at 126–127.

Assessment may allow Nations to set their own terms and timelines, with financial support from the Agency where such a process is substituted for the federal IA.

The First Nations Major Projects Coalition has also published several resources on First Nation project ownership, which go well beyond the mere consultation and inclusion of Indigenous peoples in IA to considering Indigenous-held equity stakes and Indigenous led-investment decisions.²⁷⁷ Further, to honour Canada's commitments to reconciliation and its obligations under UNDRIP, it is critical to resist mere incorporation of Indigenous knowledge in the assessment process in favor of restoring Indigenous jurisdiction over decision-making in their traditional homelands.²⁷⁸

TABLE 8: INDIGENOUS RIGHTS AND RBC

IAA Subject Area: Indigenous Rights, Knowledge, Culture & Governance	
Focus	RBC Tools
Self-Governance	<p>Agreement between the Inuit of Nunavut Settlement Area and Her Majesty the Queen in Right of Ontario</p> <p>Gitanyow Hereditary Chiefs, Gitanyow Engagement Framework</p> <p>Haida Nation, Constitution of the Haida Nation</p> <p>Hupacasath First Nation, Hupacasath Land Use Plan Phase 2</p> <p>Kluane First Nation, Proponents Engagement Guide</p> <p>Tsleil-Waututh Nation, The Stewardship Policy</p> <p>Wet'suwet'en First Nation, Natural Resource Project Development Protocol</p>
Consultation & Consent	<p>Assembly of First Nations, Environmental Assessments and Major Projects Policy Considerations</p> <p>Association for Mining Exploration British Columbia, Aboriginal Engagement Guidebook: A Practical and Principled Approach for Mineral Explorers</p> <p>B.C. First Nations Energy and Mining Council, Mining and Mineral Exploration Plan (2008)</p> <p>Canada, Government of, Prospectors and Developers Association of Canada, The Mining Association of Canada, and Canadian Aboriginal Minerals Association, Exploration of Mining Guide for Aboriginal Communities: Mining Information Kit</p> <p>Canadian and Indigenous Boreal Leadership Council, Understanding Successful Approaches to Free, Prior and Informed Consent in Canada</p> <p>Canadian Association of Petroleum Producers, Developing Effective Working Relationships with Aboriginal Communities</p> <p>Government of Alberta, Consultation Guidelines and Policy</p> <p>Government of British Columbia, Building Relationships with First Nations: Respecting Rights and Doing Good Business</p>

²⁷⁷See, e.g., First Nations Major Projects Coalition (FNMPC), "Ownership Model Handbook: First Nations Project Ownership and Access to Capital for Investment in Major Infrastructure Projects" (2019), online (pdf): secureservercdn.net/45.40.145.201/14x.5f4.myftpupload.com/wp-content/uploads/2021/04/FNMPCOwnershipModelHandbookFebruary2019.pdf; FNMPC, "Improving Access to Capital for Indigenous Groups to Purchase Equity Stakes in Major Resource Projects" (2021) online: secureservercdn.net/45.40.145.201/14x.5f4.myftpupload.com/wp-content/uploads/2021/04/FNMPC_Reviewing_Access_final.pdf.

²⁷⁸ Dayna Scott et al 2020 at 27,41.

	<p>Government of British Columbia, Guide to involving proponents when consulting First Nations</p> <p>Government of Canada, Department of Fisheries and Oceans Consultation with First Nations: Best Practices</p> <p>Government of Nova Scotia Office of Aboriginal Affairs, Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia</p> <p>Government of Ontario, Environmental assessments: consulting Indigenous communities</p> <p>Government of Saskatchewan, Proponent Handbook: Voluntary Engagement with First Nations and Métis Communities to Inform Government's Duty to Consult Process</p> <p>ICMM, Good Practice Guide: Indigenous Peoples and Mining, 2015</p> <p>IFC Performance Standards</p> <p>MAC, Indigenous and community relationships Protocol</p> <p>Mining Association of Manitoba, 2016 Aboriginal Engagement Handbook</p> <p>National Centre for First Nations Governance, Crown Consultation Policies and Practices Across Canada</p> <p>New Relationship Trust, Best Practices for Consultation and Accommodation</p> <p>OECD Guidelines for MNEs</p> <p>OECD Stakeholder Engagement Guidance, Annex B: Indigenous Peoples</p> <p>The Plan Nord: Toward 2035, 2015-2020 Action Plan, Gouvernement du Québec</p> <p>Truth and Reconciliation Commission of Canada Final Report, Calls to Action</p> <p>UN Global Compact, Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples</p>
Indigenous human rights	<p>Firelight Group, Indigenous Communities and Industrial Camps: Promoting healthy communities in settings of industrial change</p> <p>United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)</p>
Indigenous Knowledge & Culture	<p>Candler, Craig, and David Thompson, Firelight Group, Indigenous Traditional Knowledge Framework: Principles for the Inclusion of Indigenous Traditional Knowledge in Environmental Decision-Making for North East Alberta</p>
Revenue-sharing and Community Development	<p>Alberta Chamber of Resources, Learning from Experience: Aboriginal Programs in the Resource Industries</p> <p>B.C. First Nations Energy and Mining Council, Sharing the Wealth: First Nation Resource Participation Models</p> <p>Canadian Council for Aboriginal Business, Progressive Aboriginal Relations</p> <p>International Bar Association, Model Mining Development Agreement: A Template for Negotiation and Drafting</p> <p>PDAC, Government Resource Revenue Sharing with Aboriginal Communities: A Jurisdictional Review</p>

Questions to Consider

1. How should pan-Indigenous tools (such as provincial frameworks for consultation and accommodation) be applied, if at all?
2. What is the role of Indigenous governance and law in the application of HRDD?
3. How should governments and proponents identify and differentiate between Indigenous peoples as stakeholders and Indigenous peoples as rights-holders?

Further Resources

Assembly of First Nations of Quebec and Labrador, “First Nations of Quebec and Labrador Research Protocol” (2014), online (pdf): <achh.ca/wp-content/uploads/2018/07/Protocol_FN-Research-Protocol-in-Labrador-and-Quebec.pdf>

Asia Pacific Forum & OHCHR, “The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions” (2013), online: *OHCHR* <www.ohchr.org/documents/issues/ipeoples/undripmanualforhris.pdf>.

Centre for International Governance Innovation, “UNDRIP Implementation on the Braiding of International, Domestic and Indigenous Laws” (2018), online: <perma.cc/68XS-RQVU>.

British Columbia First Nations Energy & Mining Council, “Indigenous Sovereignty: Consent for Mining on Indigenous Lands – Final Report” (2022), online: <perma.cc/S3LU-2XAG>.

Department of Justice Canada, “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples” (2018), online (pdf): *Government of Canada* <perma.cc/Y3VK-74QF>.

Department of Justice Canada, “Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act” (2022), online: *Government of Canada* <www.justice.gc.ca/eng/declaration/index.html>.

First Nations Environmental Assessment Technical Working Group, “First Nations Environmental Assessment Toolkit” (2004), online (pdf): <fnhpa.ca/_Library/KC_BP_3_Mgmt_Pro/FN_Environmental_Assessment_Toolkit.pdf>.

First Nations Information Governance Centre, “The First Nations Principles of Ownership, Control, Access, and Possession,” online (pdf): <fnigc.ca/ocap-training/>.

First Nations Major Project Coalition, “Guide to Effective Involvement in Federal Impact Assessment” (2020), online: <perma.cc/FU3C-3QCF>

Government of the Northwest Territories, “Traditional Knowledge Policy Implementation Framework” (2009), online (pdf): <www.enr.gov.nt.ca/sites/enr/files/gnwt_traditional_knowledge_implementation_framework_-_2009.pdf>.

Gwich’in Social and Cultural Institute, “Working with Gwich’in Traditional Knowledge in the Gwich’in Settlement Region” (2014), online (pdf): <gwichin.ca/sites/default/files/gtc_final_tk_policy_2004.pdf>.

IAIA, “Respecting Indigenous Peoples and Traditional Knowledge: International Best Practices” (2012), online: <perma.cc/TRG9-AUWL>.

Northwest Territories Métis Nation (NWTMN), “NWTMN Traditional Knowledge Policy” (2016), online (pdf): <nwtmetisnation.ca/wp-content/uploads/2016/02/TKpolicy.pdf>.

Nova Scotia Mi’kmaq Chiefs, “Mi’kmaq Ecological Knowledge Study Protocol,” online (pdf): <novascotia.ca/abor/aborlearn/docs/MEK%20Protocol%20Second%20Edition.pdf>.

The Triple Planetary Crisis: Climate Change, Biodiversity Loss, Pollution and Waste

The climate crisis cannot be understood or addressed in isolation from the crises of biodiversity loss and pollution and waste. Increased greenhouse gases in the atmosphere as well as pollution and waste drive ecosystem degradation and nature loss. Changes in biodiversity in turn negatively impact the capacity of the ecosystem to adapt to climate change and store carbon.²⁷⁹ These reciprocal interactions accelerate irreversible, cascading effects such as melting sea ice, thawed permafrost, forest degradation, and other global processes where “tipping points” are breached.²⁸⁰ The Intergovernmental Panel on Climate Change (IPCC)’s Sixth Assessment Report on “Impacts, Adaptation, and Vulnerability” confirms that patterns of human and ecosystem vulnerability are intersecting and interdependent.²⁸¹ Driven by unsustainable resource-intensive models of development, the three interconnected planetary crises can cause severe harm to the biosphere and threaten a wide range of human rights.²⁸²

Climate change is expected to have profound effects on the enjoyment of human rights across the planet, particularly for those most vulnerable or at risk to climate harms, including children and future generations. As explained by Parker, “changes in temperature, precipitation, ice, permafrost, and freshwater availability prompt increased extreme weather worldwide and can lead to widespread death injuries and other human rights infringements, like the right to food, water, health, sanitation, housing, etc.”²⁸³ These harms are disproportionately borne by poor and racialized communities who are acutely vulnerable to environmental insecurity.²⁸⁴ Biodiversity degradation and loss can also directly harm Indigenous peoples, forest-dwellers, fisher-folk and others who depend on nature for their economic, social, and cultural survival.²⁸⁵ Marginalized groups are also especially vulnerable to the effects of hazardous wastes, jeopardizing rights to a safe, clean, healthy, and sustainable environment.²⁸⁶

Considering the interdependencies between each crisis, actions to address climate change must account for impacts on nature, waste, and human rights. The transition from fossil fuels to renewables is expected

²⁷⁹ UN Environment Programme, “Making Peace with Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies” (2021), online: <wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/34948/MPN.pdf> [UNEP 2021]; See also, The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and the Intergovernmental Panel on Climate Change (IPCC), “Scientific outcome of the IPBES-IPCC co-sponsored workshop on biodiversity and climate change” (10 June 2021), online: <ipbes.net/events/ipbes-ipcc-co-sponsored-workshop-report-biodiversity-and-climate-change> [IPBES & IPCC 2021]; Yadvinder Malhi et al, “Climate change and ecosystems: threats, opportunities and solutions” (2020) 375:1794 Philosophical Transactions of the Royal Society.

²⁸⁰ Lenton et al, “Climate tipping points – too risk to bet against” (27 November 2019) *Nature*, online: <www-nature-com.ezproxy.library.dal.ca/articles/d41586-019-03595-0>.

²⁸¹ IPCC, “Climate Change 2022: Impacts, Adaptation and Vulnerability” Sixth Assessment Report at SPM.B.1, online: <www.ipcc.ch/report/sixth-assessment-report-working-group-ii/>.

²⁸² IPBES & IPCC 2021.

²⁸³ Larissa Parker, “Let Our Living Tree Grow: Beyond Non-Justiciability for Public Interest Environmental Claims” (13 September 2021), online: *Canadian Bar Association* <www.cba.org/Sections/Public-Sector-Lawyers/Resources/Resources/2021/PSLEssayWinner2021>.

²⁸⁴ See, for example, Ingrid Waldron, “Environmental Racism and Climate Change: Determinants of Health in Mi’kmaq and African Nova Scotian Communities” (2021) Climate Institute, online: <climateinstitute.ca/publications/environmental-racism-and-climate-change/>.

²⁸⁵ UNEP & OHCHR, “Human Rights and Biodiversity: Key Messages” (2021), online: <www.unep.org/resources/report/human-rights-and-biodiversity-key-messages>.

²⁸⁶ UNEP & OHCHR, “Human Rights and Hazardous Substances: Key Messages” (2021), online: <www.unep.org/resources/report/human-rights-and-hazardous-substances-key-messages>.

to greatly increase the demand for critical minerals and metals needed to construct renewable energy infrastructure, including electric vehicles, wind turbines and solar panels.²⁸⁷ Expanding terrestrial and seabed mining multiplies the potential risks and impacts to people and ecosystems, including water contamination, the disruption of traditional livelihoods and sacred places, and habitat degradation.²⁸⁸

Fossil fuel production continues despite ongoing transition efforts. In this context, states and businesses alike are reliant on nature-based solutions to reach climate goals, such as sequestering carbon in protected forests or planting trees. However, the massive amount of land required for carbon removal could potentially lead to large reductions in the land available for agriculture.²⁸⁹ Large-scale tree and bioenergy plantations often worsen ecosystem degradation, increase water scarcity, and heighten the risks of vulnerable communities losing access to their land and being subject to forced evictions.²⁹⁰ Increasing attention to ocean-based carbon dioxide removal technologies, both nature and technology-based, also carry risks and uncertainties.²⁹¹

Moving towards a “circular economy” model that maximizes material and energy efficiency through reduce, reuse and recycle strategies is key to lessening resource demand and thus the negative impacts of climate action.²⁹² The degrowth movement addresses unsustainable production and consumption patterns in the Global North which exceed planetary boundaries and promotes the “release [of] communities in the [Global] South from the pressures of atmospheric colonization and material extractivism.”²⁹³ Such an approach envisions absolute emissions reductions and the rapid downscaling of fossil fuels, as opposed to “offsetting” continued fossil fuel extraction with speculative promises of carbon removal technologies and expanding harmful forest carbon plantations.

The impacts of the triple planetary crisis interfere with the enjoyment of human rights. At the same time, the exercise of human rights can help protect the environment and promote sustainable development.²⁹⁴ A rights-based approach to sustainability is premised on the understanding that the promise of human rights can only be realized within safe planetary boundaries since humans are part of nature.²⁹⁵ By exercising procedural environmental human rights, including “rights to freedom of expression and association, to education and information, and to participation and effective remedies,” rightsholders and

²⁸⁷ International Energy Agency (IEA), “The Role of Critical Minerals in Clean Energy Transitions” (2021), online: <www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions> [IEA 2021] (The IEA estimates that in order to reach the goals in the Paris Agreement on climate change, the extraction of metals and minerals would have to be quadrupled between 2020 and 2040).

²⁸⁸ Yannick Deniau, Viviana Herrera Vargas, Mariana Walter, 2nd Ed, “Mapping community resistance to the impacts and discourses of mining for the energy transition in the Americas” (2021) EJAtlas/MiningWatch Canada, online: <miningwatch.ca/sites/default/files/2022-03-04_report_in_english_ejatlasc-mwc.pdf>.

²⁸⁹ IPCC, “Climate Change and Land: Summary for Policymakers” (2019), online (pdf): <www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM_Approved_Microsite_FINAL.pdf> (Large-scale bioenergy carbon capture and storage has large carbon removal potential but would require an area up to twice the size of India to grow bioenergy crops).

²⁹⁰ Oxfam, “Tightening the Net: Net zero climate targets – implications for land and food equity” (August 2021), online (pdf): <oxfamlibrary.openrepository.com/bitstream/handle/10546/621205/bp-net-zero-land-food-equity-030821-en.pdf>.

²⁹¹ David L VanderZwaag, Kevin P Berk, & Sara L Seck, “The Canadian Legal Framework Governing Ocean Carbon Dioxide Removal Technologies” in Romany B Webb, Korey Silverman-Roati, and Michael B Gerrard, eds, *Ocean Carbon Dioxide Removal for Climate Mitigation: The Legal Framework* (forthcoming 2022).

²⁹² See, generally, “What is a Circular Economy” (Accessed 1 May 2022), online: *Ellen Macarthur Foundation* <ellenmacarthurfoundation.org/topics/circular-economy-introduction/overview>.

²⁹³ Jason Hickel, “What Does Degrowth Mean? A Few Points of Clarification” (2021) 18:7 *Globalizations* 1105–1111.

²⁹⁴ Framework Principles, Commentary 1 at 5.

²⁹⁵ *Ibid*; Rockstrom et al, “Planetary Boundaries: Exploring the Safe Operating Space for Humanity” (2009) 14:2 *Ecology & Society* Art 32.

stakeholders may unlock new effective avenues for environmental protection.²⁹⁶ Promoting the rights of nature is also necessary to shifting from anthropogenic understandings of human rights to culturally-informed visions.²⁹⁷ For example, the Innu Council of Ekuanitshit and the Minganie Regional County Municipality declared the Muteshekau Shipu (Maggie River) in Northern Quebec a legal person according to principles of Innu law, thus safeguarding it from development for future generations.²⁹⁸ Holistic approaches to sustainability emphasize the interconnectedness and interdependence of all living beings and instill a sense of human stewardship and responsibility.²⁹⁹

The Office of the High Commissioner for Human Rights (OHCHR) highlights the essential obligations of states to take action on climate change to prevent negative human rights impacts. These include duties to: mitigate climate change by reducing greenhouse gas emissions; ensure meaningful and informed participation in climate change decision-making; provide accountability and remedy for human rights harms caused by climate change; and protect against climate change-related human rights abuses by business.³⁰⁰ The business responsibility to respect human rights set out in the UNGPs has legal relevance in shaping standards and expectations of business conduct. This responsibility exists independently of the state duty to protect human rights; applies to all enterprises regardless of size or sector; encompasses all internationally recognized human rights; and involves compliance over and above national laws and regulations.³⁰¹ There is a clear expectation that businesses “conduct human rights due diligence to identify, prevent, and mitigate climate-related human rights impacts.”³⁰²

In Canada, there has been an upsurge of climate change litigation alleging that government’s approach to climate change has violated Charter rights, including the rights to life, liberty, and security of the person as well as equality rights.³⁰³ These Canadian challenges arise in the context of a wave of landmark litigation in other jurisdictions.³⁰⁴ Claimants have deployed constitutionally enshrined human rights related to the environment to advance climate justice. Various court decisions have imposed more ambitious climate targets towards the fulfillment of states’ human rights obligations.³⁰⁵ Unfortunately, none of the Canadian cases have been heard on their merits, as all but *Mathur v Ontario*, 2020 ONSC 6918 were dismissed on

²⁹⁶ Framework Principles, Commentary 4, at 6.

²⁹⁷ See, Stefan Knaut, “Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India” (2018) 31 J of Agricultural & Enviro Ethics 703-722.

²⁹⁸ Justine Townsend et al, “Why the first river in Canada to become a legal person signals a boon for Indigenous Rights” The Narwhal (11 June 2021), online <thenarwhal.ca/opinion-muteshekau-shipu-maggie-river-personhood/>.

²⁹⁹ See, Chapin et al, “Earth Stewardship: Science for Action to Sustain the Human-Earth System” (2011) 2:8 Ecological Society of America at 1-20.

³⁰⁰ OHCHR, “Key Messages on Human Rights and Climate Change” (2016), online (pdf): <www.ohchr.org/Documents/Issues/ClimateChange/materials/KMClimateChange.pdf>; OHCHR, “Key Messages on Human Rights, Climate Change and Business” (Accessed 1 May 2022), online (pdf): <www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>.

³⁰¹ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UNHRC GAOR, 17th Sess, Annex, Agenda Item 3, A/HRC/17/31 (2011), online: Office of the High Commissioner for Human Rights [UNGPs], commentary to Principle 11.

³⁰² OHCHR, “Key Messages on Human Rights, Climate Change and Business” (Accessed 1 May 2022), online (pdf): <www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf> at 4.

³⁰³ See, for example., *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885; *La Rose v Canada*, 2020 FC 1008 [La Rose], *Mathur v Ontario*, 2020 ONSC 6918 [Mathur]; *Misdzi Yikh v Canada*, 2020 FC 1059 [Misdzi Yikh]

³⁰⁴ See, Climate Change Litigation Initiative, “Cases,” online: <www.c2li.org/cases/> (This platform allows users to explore cases in three scenarios in over 30 countries involving cases against the state challenging national climate policy, cases against the project-specific litigation, and cases against private actors).

³⁰⁵ Joanna Setzer & Catherine Higham, *Global trends in climate change litigation: 2021 snapshot* (London: Grantham Research Institute on Climate Change & the Environment and Center for Climate Change Economics & Policy, London School of Economics and Political Science, 2021) at 32-33.

procedural grounds or for lack of justiciability. For example, in *La Rose v Canada*, 2020 FC 1008, fifteen youth challenged the Canadian government’s overall conduct with respect to GHG Emissions and its longstanding failure to meet targets. The Federal Court of Canada found the claim to be non-justiciable because the plaintiffs did not “plead identifiable law or state action in issue.”³⁰⁶ The Court also found that the declaratory remedies sought posed “an incursion into the policy-making functions of the executive and legislative branches by requiring specific standards that the climate recovery plan must meet.”³⁰⁷ The youth claimants in *Mathur* overcame similar hurdles by challenging specific pieces of law and state action, namely the Ontario Government’s cancelling of the provincial *Climate Change Act* and the setting of inadequate targets.³⁰⁸ The Ontario Supreme Court dismissed Ontario’s motion to strike the claim on the ground it had no reasonable prospect of success. The case is set to be heard on its merits.

This rights-based turn in climate change litigation has implications for corporations, as seen in the Hague District Court’s decision in *Milieudefensie et al v Royal Dutch Shell*. The Court grounded Shell’s obligation to reduce its global emissions in an unwritten standard of care pursuant to the Dutch Civil Code. In interpreting the standard, the Court relied on the independent business responsibility to respect human rights recognized in the UNGPs, the UN Global Compact, and the environmental chapter of the OECD Guidelines.³⁰⁹ A similar approach was taken in a 2015 petition before the Commission on Human Rights of the Philippines requesting an investigation into the responsibility of Carbon Major companies for human rights violations arising from the impacts of climate change.³¹⁰

Sustainability and the IAA

KEY DOCUMENTS
<ul style="list-style-type: none"> • <u>Guidance: Considering the Extent to which a Project Contributes to Sustainability</u> • <u>Framework: Implementation of the Sustainability Guidance</u> • <u>Policy Context: Addressing “Need for”, “Purpose of”, “Alternatives to” and “Alternative Means”</u> • <u>Guidance: “Need for”, “Purpose of”, “Alternatives to” and “Alternative Means”</u> • <u>Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change</u> • <u>Regional Assessments under the <i>Impact Assessment Act</i></u> • <u>Strategic Environmental Assessment</u> • <u>Strategic Assessment of Climate Change</u>

A sustainability assessment of a project under the IAA must account for the impacts of the triple planetary crisis on human rights if states are to fulfill their obligations and businesses meet their independent responsibilities under domestic and international law. This section will first lay out the sustainability considerations under the IAA, followed by an exploration of how RBC tools could help fill in prevailing gaps to enhance the assessment process.

³⁰⁶ *La Rose*, para 46.

³⁰⁷ *La Rose*, para 55.

³⁰⁸ *Mathur*, para 71.

³⁰⁹ RDS, Sec 4.4.11.

³¹⁰ Greenpeace Southeast Asia & Philippine Rural Reconstruction Movement, “Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change” (22 September 2015), online: <climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150512_Case-No.-CHR-NI-2016-0001_petition.pdf>; See also, Sara Seck, “Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty” (2017) 26:2 *Transnational Law & Contemporary Problems* at 383.

A stated purpose of the IAA is to foster sustainability, defined as the ability to protect the environment, contribute to the social and economic well-being, and preserve the health of Canadians in a manner that benefits present and future generations.³¹¹ The IAA now recognizes a project's contribution to sustainability as one of the factors to be considered when assessing a project.³¹² The Minister's public interest determination must also take into account sustainability and the extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.³¹³

TABLE 9: SUSTAINABILITY IN THE IAA

Provision	Legislative Requirements
Preamble	Whereas the Government of Canada is committed to fostering sustainability;
Purposes of the Act	<p>6(1)</p> <p>(a) to foster sustainability;</p> <p>(b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;</p> <p>(d) to ensure that designated projects [...] are considered in a careful and precautionary manner to avoid adverse effects within federal jurisdiction and adverse direct or incidental effects;</p> <p>(k) to ensure that an impact assessment takes into account alternative means of carrying out a designated project, including through the use of best available technologies;</p> <p>(l) to ensure that projects, as defined in section 81, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;</p> <p>(m) to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the consideration of those assessments in impact assessments.</p>
Mandate	(2) The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the Government's commitments with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle.
Factors to be considered during Impact Assessment	<p>22(1)</p> <p>(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including</p> <p style="padding-left: 40px;">(i) the effects of malfunctions or accidents that may occur in connection with the designated project,</p> <p style="padding-left: 40px;">(ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and</p>

³¹¹ IAA, ss 2, 6(a).

³¹² IAA, s 22(h).

³¹³ IAA, ss 63(a),(e).

	<ul style="list-style-type: none"> (iii) the result of any interaction between those effects; (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project; (d) the purpose of and need for the designated project; (e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means; (f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project; (h) the extent to which the designated project contributes to sustainability; (i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; (j) any change to the designated project that may be caused by the environment;
Decision-making Factors – Public Interest	<p>The Minister's determination [...] must be based on the report with respect to the impact assessment and a consideration of the following factors:</p> <ul style="list-style-type: none"> (a) the extent to which the designated project contributes to sustainability; (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects [...] of the designated project are significant; (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate; (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

The Agency characterizes sustainability as a “contextual” factor, in the sense that it is tied to the local perspectives and values of affected Indigenous groups and communities as well as to human-ecological systems.³¹⁴ The proponent and federal authorities must engage with Indigenous groups and the public to identify valued components related to inform the sustainability assessment.³¹⁵

The Agency recommends practitioners analyze the potential effects of a project through the application four sustainability principles derived from best practices, namely: 1) consider the interconnectedness and interdependence of human ecological-systems; 2) consider the well-being of present and future generations; 3) consider positive effects and reduce adverse effects of the designated project; and 4) apply the precautionary principle and consider uncertainty and the risk of irreversible harm. The precautionary principle states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”³¹⁶ In practice, this principle requires proponents and decision-makers to assume that adverse effects are more, rather than less.³¹⁷

³¹⁴ IAAC, “Guidance: Considering the Extent to which a Project Contributes to Sustainability” (2020), online: *Government of Canada* < www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-considering.html > [IAAC, Guidance: Sustainability]; See also, IAA, s 6(1)(b).

³¹⁵ IAAC, Guidance: Sustainability.

³¹⁶ IAAC, Guidance: Sustainability; see also, IAA, ss 6(1)(d),(l).

³¹⁷ *Ibid* (These considerations should be described in the proponent's Impact Statement; the Impact Assessment Report written by the Agency would then characterize the level of uncertainty and risks of irreversible harm).

Figure 7: Sustainability Principles in the IA Process

Principle 1: Consider the interconnectedness and interdependence of human ecological-systems.

Principle 2: Consider the well-being of present and future generations.

Principle 3: Consider positive effects and reduce adverse effects of the designated project.

Principle 4: Apply the precautionary principle and consider uncertainty and risk of irreversible harm.³¹⁸

Related to the factor of sustainability, the IA process must consider: the purpose of and need for the designated project; the alternative means of carrying out the project that are technically and economically feasible, including the through the use of best available technologies and the effects of those means; and any alternatives to the project that are technically and economic feasible and are directly related by the project.³¹⁹ Indigenous groups, civil society organizations and local communities can raise issues related to the “need for”, “purpose of”, “alternative to” and “alternative means” during the consultation that occurs planning phase, which will be subsequently synthesized in the Summary of Issues that the proponent must respond to in the Impact Statement (see “Stakeholder Engagement and the IAA”).³²⁰

The scope of “alternatives to” the project can vary based on the nature of the project. For example, in the case of a hydro-electric dam proposed to meet the future energy demand of a region, “alternatives to” the project may include different ways of generating electricity such as wind and solar. In another example, gold mining projects which are arguably unnecessary from a climate and community perspective have limited “alternatives to” that achieve the “need for” and “purpose of” the project.³²¹ In such cases, the Agency may require that proponents describe the “no-action” (null) alternative and highlight the benefits of the project as compared to not proceeding with the project at all.³²² Assessing no-action alternatives aligns with a sustainability approach. Not only does the no-action scenario serve as a benchmark for comparison, but it may reveal the lack of need for the project and encourage circular economy solutions focused on optimizing existing resources and reducing and recovering waste.³²³

Cumulative Effects

One of the stated purposes of the IAA is “to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the

³¹⁸ IAAC, Guidance: Sustainability.

³¹⁹ IAA, ss 22(1)(d),(e),(f); see also, IAAC, “Policy Context: Addressing ‘Need for,’ ‘Purpose of,’ ‘Alternatives to’ and ‘Alternatives Means’” (2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/need-for-purpose-of-alternatives-to-and-alternative-means.html> [IAAC, Guidance: “Need for,” “Purpose of,” “Alternatives to” and “Alternative Means”] (The “purpose of” is what to be achieved by carrying out the project, including any objectives of the proponent, whereas the “need for” is the opportunity that the project is intended to satisfy, i.e., the fundamental justification or rationale for a project; “Alternatives to” are the functionally different ways to meet the need for the project and achieve its purpose, whereas “alternatives means” are the various ways which would allow a project and its physical activities to be carried out).

³²⁰ *Ibid.*

³²¹ See, Alastair Bland, “The Environmental Disaster That is the Gold Industry” (14 February 2014) *Smithsonian Magazine*, online: <www.smithsonianmag.com/science-nature/environmental-disaster-gold-industry-180949762/>.

³²² IAAC, Guidance: “Need for,” “Purpose of,” “Alternatives to” and “Alternative Means.”

³²³ *Ibid.*; see, for example, Circular Economy Leadership Canada, “Circular Economy Solutions Series,” online: <<https://circulareconomyleaders.ca/solutions-series/>>.

consideration of those assessments in impact assessments.”³²⁴ To this end, cumulative effects are listed as a factor to consider in IA.³²⁵ The Agency defines cumulative effects as “changes to the environment that are caused by an action in combination with other past, present and future human actions.”³²⁶

Figure 8: Considering Cumulative Effects Assessment in the IA Process

The Agency’s *Cumulative Effects Assessment Practitioners’ Guide* notes that cumulative environmental assessment is “environmental assessment as it should always have been: an Environmental Impact Assessment done well.” A cumulative effects assessment should:

- assess effects over a larger, regional area that may cross jurisdictional boundaries;
- assess effects during a longer period of time into the past and future;
- consider effects on Valued Ecosystem Components due to interactions with other actions, and not just the effects of the single action under review;
- include other past, existing and future (e.g., reasonably foreseeable) actions; and
- evaluate significance in consideration of other than just local, direct effects.³²⁷

Regional and Strategic Assessments

Regional and strategic assessments are effective tools to consider broader sustainability outcomes and cumulative effects. Though the scope and ambition of regional assessments under the IAA can vary, they can inform future project decisions and help identify necessary mitigation measures and impacts on the rights and interests of Indigenous peoples. On the low end, regional assessments could take the form of data gathering to better understand the regional context and can focus on a specific sector or activity within a region. More fulsome and complex assessments may involve regional development planning, setting targets, and identifying future alternative development scenarios.³²⁸ Strategic assessments may be used to assess and mitigate the impacts of proposed and existing policies, plans or proposals related to specific issues or a class of projects.³²⁹ The Agency’s Strategic Assessment on Climate Change will be discussed in the next section.

Regional and strategic assessments are a multi-jurisdictional process. Unlike private sector proponents who rarely have the capacity, motivation, and credibility to carry out meaningful cumulative impact

³²⁴ IAA, s 6(m).

³²⁵ IAA, s 22(1)(a)(ii) (The IA must consider the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the designated project, including any cumulative effects).

³²⁶ IACC, “Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012” (2018) Interim Technical Guidance, V2, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/cumulative-effects-assessment-practitioners-guide.html#s2-1> (This guidance applied to environmental assessments conducted under CEAA 2012, however, it is retained for transitional environmental assessments).

³²⁷ *Ibid.*

³²⁸ IAAC, “Guidance: Regional Assessments under the *Impact Assessment Act*” (2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-assessment-impact-assessment-act.html>.

³²⁹ IAA, s 95(1).

assessments, a regional assessment led by provincial, territorial, and federal governments in partnership with Indigenous communities can deliver more credible, authoritative results.³³⁰

Two key components of effective regional assessments identified by Scott et al. are tiering and substantive Indigenous participation in the assessment and decision-making.³³¹ “Tiering” refers to the integration in law among different levels of assessment and planning to ensure that guidance from one level to the next is authoritative.³³² Without binding regional and strategic assessments, subsequent project-level assessments may ignore or overlook risks and impacts identified in the broader assessment and undermine long-term sustainability. The IAA falls short in this key respect. While relevant regional and strategic assessments must be considered in the impact assessment phase, the Minister is not required to consider these assessments when making decisions on individual projects.³³³

The scope of Indigenous participation in regional and strategic assessments can vary. There is no specific requirement for Indigenous participation in strategic assessments, beyond the general obligation on the Agency or committee to take Indigenous knowledge, including the knowledge of Indigenous women, into account.³³⁴ With regard to regional assessments, the Minister may authorize the Agency or establish a committee to conduct an assessment over a region entirely on federal lands.³³⁵ A regional assessment over non-federal lands may be led by joint committee composed of the Agency and representatives from affected jurisdictions, or by the Agency alone.³³⁶ This opens the door for partnerships and joint decision-making with affected Indigenous peoples. At the very least, the Agency has an obligation to offer to “consult and cooperate” with any jurisdiction which has powers, duties, or functions in relation to the physical activities being assessed.³³⁷

The Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador was the first of its kind under the IAA.³³⁸ The assessment has been sharply criticized by environmental groups and the Innu of Ekuanitshit. A judicial review application challenging the Final Report and a federal regulation exempting exploratory drilling from project-specific assessment³³⁹ on grounds of reasonableness and procedural fairness was dismissed by the Federal Court.³⁴⁰ The decision is currently

³³⁰ Dayna Scott et al, “Synthesis Report: Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario’s Ring of Fire” (2020) at 40, online: <digitalcommons.osgoode.yorku.ca/scholarly_works/2807/> [Scott et al 2020].

³³¹ *Ibid* at 39-41.

³³² Jos Arts, Paul Tomlinson & Henk Voogd, “EIA and SEA tiering: The missing link?” Position Paper, Conference on International Experience and Perspectives in SEA, International Association of Impact Assessment, Prague, 26-30 September 2005 cited in Scott et al, *supra* note 294 at 40.

³³³ IAA, s 22(p); see also, Jill Blakely, Bram Noble & Jason MacLean, “The Scope and Focus of Cumulative Effects and Regional Assessment” in Meinhard Doelle & John Sinclair, eds, *The Next Generation of Impact Assessment* (Toronto: Irwin Law, 2021) at 251.

³³⁴ IAA, ss 96(2), 102(2).

³³⁵ IAA, s 92.

³³⁶ IAA, s 93.

³³⁷ IAA, s 94.

³³⁸ IAAC, “Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador: Final Report” (29 February 2020), online (pdf): <iaac-aeic.gc.ca/050/documents/p80156/134068E.pdf>.

³³⁹ *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)*, online: <www.canada.ca/en/impact-assessment-agency/corporate/acts-regulations/legislation-regulations/regulations-respecting-excluded-physical-activities.html>.

³⁴⁰ *Ecology Action Centre v Canada (Environment and Climate Change)*, 2021 FC 1367. For further reading, see Elaine Anselmi, “Inside the Trudeau government’s decision to weaken oversight of Newfoundland oil and gas exploration” (10 March 2022) *The Narwhal*, online: <thenarwhal.ca/newfoundland-oil-gas-federal-oversight/>.

under appeal.³⁴¹ A finding that Regional Assessments and regulations made pursuant to the IAA are reviewable could be an important step towards improving the credibility and robustness of regional assessments in future.

The IAA does not establish a triggering mechanism to undertake regional and strategic assessments. Rather, the IAA grants considerable discretion to the Minister to decide to establish a committee or authorize the Agency to conduct assessments under the relevant sections of the Act.³⁴² The public can submit requests for regional and strategic assessments to the Minister and the Agency.³⁴³ For regional assessments, the recommendation is informed by many considerations, including whether:

- the regional assessment could inform future federal impact assessment decisions;
- there is the potential for effects from development within federal jurisdiction, including cumulative effects, in the region;
- there are opportunities for collaboration with jurisdictions in the region;
- there is the potential for impacts, including cumulative impacts, to the rights of Indigenous people in the region; and
- there has been considerable public interest related to development or cumulative effects in the region.

For strategic assessments, considerations include whether:

- the strategic assessment could inform, or improve the efficiency of, future federal impact assessments;
- the policy, plan, program or issue is related to an area of federal jurisdiction;
- the strategic assessment could address impacts, including cumulative impacts, to the rights of Indigenous people; and
- there has been considerable public interest related to the policy, plan, program or issue.³⁴⁴

The Minister must respond to the request with reasons within 90 days of receipt and post the decision and reasons on the Canadian Impact Assessment Registry.

Climate Change

Canada has committed to achieving net-zero emissions by 2050 and meeting its Nationally Determined Contribution under the Paris Agreement by 2030 (40-45% emissions reductions below 2005 levels).³⁴⁵ Although project emissions were often considered on a case-by-case basis under the CEAA 2012 regime, robust analysis of federal and provincial policies and programs to meet GHG targets were beyond the

³⁴¹Ecojustice, “Environmental groups launch appeal to protect Newfoundland offshore waters from fossil fuel expansion” (12 January 2022), online: <ecojustice.ca/pressrelease/environmental-groups-launch-appeal-to-protect-newfoundland-offshore-waters-from-fossil-fuel-expansion/?utm_source=Twitter&utm_medium=Organic&utm_campaign=Content&utm_id=Twitter>.

³⁴² IAA, ss 92, 95.

³⁴³ IAAC, “Operational Guide: Requesting a Regional or Strategic Assessment under the *Impact Assessment Act*” (2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/requesting-regional-strategic-assessment-iaa.html>.

³⁴⁴ IAAC, “Operational Guide: Requesting a Regional or Strategic Assessment under the *Impact Assessment Act*” (2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/requesting-regional-strategic-assessment-iaa.html> (See specifically Annexes I & II which provide helpful guiding questions for formulating requests).

³⁴⁵ *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22.

scope of assessment.³⁴⁶ One of the major promises of the IAA is the requirement to consider whether and the extent to which proposed projects “hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and commitments in respect of climate change” (see Figure 9).³⁴⁷

Figure 9: Considering Climate Change in the IA Process

The Agency may consider several factors in determining whether and to what extent a project’s effects will hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and commitments with respect to climate change, including:

- the nature and extent of effects (e.g., whether the effects are positive or adverse; the ecological and social context including cumulative effects; and applicable criteria: magnitude, geographic extent, timing, frequency, duration, reversibility);
- indicators or mechanisms that can be used to measure the extent of effects (e.g., if specific targets for emissions have been set);
- interplay between the obligations and commitments impacted by the project's effects (e.g., effects may contribute to one obligation but hinder another);
- links to other decision-making factors (e.g., sustainability); and
- local and regional context (e.g., planning priorities, environmental sensitivities, status of protected habitat).³⁴⁸

A comprehensive strategic assessment of climate change could lay important groundwork for the implementation of the purposes of the IAA and the transition to net zero. There is a need for clear guidance on which projects ought to be assessed under the IAA as well as a ‘climate test’ that a project must satisfy to be approved considering the carbon budget and international and domestic climate commitments.³⁴⁹ Unfortunately, the first Strategic Assessment of Climate Change (SACC)³⁵⁰ is a “‘strategic assessment’ in name only.”³⁵¹ The Assessment was carried out by Environment and Climate Change Canada prior to the IAA coming into force. It does not contain a comprehensive review of climate policies,

³⁴⁶ Westcoast Environmental Law, “A strategic assessment, a climate test, and the spaces in between: who is left holding the SACC?” (19 August 2020), online: <www.wcel.org/blog/strategic-assessment-climate-test-and-spaces-in-between-who-left-holding-sacc> (“In the environmental assessment of the Teck Frontier tar sands mine, which would have emitted over 4 megatonnes of carbon dioxide equivalent per year, the review panel noted that the emissions were “large” and that the project may make it more difficult for Canada to reach its GHG reduction targets. However, it did not determine the significance of the project’s emissions (as it did for other effects) and stated that reviewing federal and provincial policies and programs to meet those targets was outside of the assessment’s scope”).

³⁴⁷ IAA, s 22(1)(i).

³⁴⁸ IAAC, *Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change*

³⁴⁹ Westcoast Environmental Law, “A strategic assessment, a climate test, and the spaces in between: who is left holding the SACC?” (August 19, 2020), online (blog): <www.wcel.org/blog/strategic-assessment-climate-test-and-spaces-in-between-who-left-holding-sacc>; David Wright, “Final Strategic Assessment on Climate Change: Zero Net Effect?” (10 August 2020), online (blog): ablawg.ca <ablawg.ca/2020/08/10/final-strategic-assessment-on-climate-change-zero-net-effect/> [Wright 2020]; see also, Meinhard Doelle, “Integrating Climate Change Mitigation into the *Impact Assessment Act*” (277-300) in Meinhard Doelle & John Sinclair, eds, *The Next Generation of Impact Assessment*, (Toronto: Irwin Law, 2021).

³⁵⁰ Environment & Climate Change Canada, “Strategic Assessment of Climate Change” (Revised October 2020), online: <www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html> [SACC].

³⁵¹ Wright 2020.

plans, and programs.³⁵² The SACC scope is restricted to information gathering: it describes the information proponents must provide at each step of the assessment, requires proponents of projects with a lifetime beyond 2050 to provide a “credible” net zero plan, and explains how the Agency or lifecycle regulators will take that information into account.³⁵³ The principles and objectives outlined in the SACC apply to designated projects under the IAA and are meant to be built into guidance for the review of non-designated projects on federal lands and outside Canada under the IAA.³⁵⁴

The quality of GHG information and net zero plans required of proponents under the SACC is insufficient to make an informed assessment of a projects’ climate impacts and undermines the contribution the IAA can make to achieve Canada’s climate commitments. The quantification of net GHG emissions is problematic in several respects.³⁵⁵ First, only direct and upstream emissions (above certain thresholds) over the project lifetime are included in the calculation. Downstream emissions, often the largest source of emissions, are excluded.³⁵⁶ For instance, it is difficult, if not impossible, to assess the contribution of an oil sands expansion project to Canada’s climate change commitments without considering the cumulative impact of increased fossil fuel production in all its applications, from tail pipe emissions to plastics production.

Second, emissions reductions and offsets are baked into the quantification of net GHG emissions and emissions intensity, distorting the climate impact of the project. Proponents must estimate “avoided domestic GHG emissions,” defined as “emissions reduced or eliminated in Canada as a result of the project” by comparing their project emissions to a similar, real, project.³⁵⁷ There are no limits on the amount of third-party domestic offsets or emissions reductions achieved in other projects taken at the corporate level. The Technical Guidance related to the SACC goes so far as to encourage the use of enhanced oil recovery to store emissions, a practice which enables further extraction of fossil fuels.³⁵⁸ This liberal approach to emissions quantification will likely incentivize proponents to invest heavily in offsets over real reductions at the project-level.

All proponents are required to choose mitigation measures based on a Best Available Technologies/Best Environmental Practices (BAT/BEP) determination. Mitigation measures are guided by the principles of early reductions of GHG emissions, ongoing mitigation over the project lifetime, and improving energy efficiency.³⁵⁹ A “credible Net-Zero plan” is largely based on the BAT/BEP determination, however, it is only applicable to projects with a lifetime beyond 2050.³⁶⁰ Foreign offsets compliant with the Internationally Transferred Mitigation Outcomes Rules of the Paris Agreement may in time be counted towards achieving the net zero plan.³⁶¹

³⁵² Government of Canada, “Strategic Assessment of Climate Change: A New Impact Assessment System” (Accessed 1 May 2022), online, <www.strategicasessmentclimatechange.ca/> (The SACC was later deemed a strategic assessment such under s 95 of the IAA).

³⁵³ SACC, i.

³⁵⁴ SACC, 1.

³⁵⁵ SACC, 5 (Equation 1: Net GHG Emissions = Direct GHG emissions + Acquired energy GHG emissions – CO2 captured and store – Avoided domestic GHG emissions – Offset measures).

³⁵⁶ *Ibid* at 5.

³⁵⁷ *Ibid* at 6.

³⁵⁸ Environment & Climate Change Canada, “Draft Technical Guide Related to the Strategic Assessment of Climate Change” (2021) at s 2.1.4.2, online: www.canada.ca/en/environment-climate-change/corporate/transparency/consultations/draft-technical-guide-strategic-assessment-climate-change.html [SACC Technical Guidance].

³⁵⁹ *Ibid* at s 3.

³⁶⁰ *Ibid* at s 3.5.

³⁶¹ SACC, at 2.1.4.1.

Overall, human rights are not well-integrated into the SACC but there are some opportunities for stakeholder engagement. Participation from the public and Indigenous peoples is required in the Planning Phase for feedback on the Initial Project Description, which contains only an estimate of GHG emissions, and, “if applicable and available,” details on offset measures, avoided emissions, acquired energy emissions, and a breakdown of direct emissions.³⁶² When undertaking the BAT/MEP determination to select mitigation measures at the Impact Statement Phase, proponents must assess additional human rights-related considerations of the technologies or practices that are technically and economically feasible, including: social, health, and any additional environmental aspects, such as increases in air pollution emissions, or significant adverse impacts on demographics, employment, quality of life, impacts on Indigenous rights, etc. Proponents must provide detailed justification for excluding a technology/practice based on these considerations.³⁶³ However, proponents are not required to carry out engagement on key aspects such as mitigation measures and carbon offsets. This is a key oversight, as the operation of the project and mitigation measures have a more direct impact on stakeholders, rightsholders, and the environment than GHG emissions in the abstract.

While proponents must assess impacts of potential mitigation measures on the environment, health, and social aspects (including the impacts to Indigenous rights) in the Impact Statement Phase, the same is not true for offset measures. Given that the proposed projects may spawn corporate emissions reductions projects with similar social and ecological footprints (e.g., large-scale afforestation), those impacts ought to be accounted for during the IA process.

In sum, it is unclear precisely how the Agency will assess project contributions to climate change beyond the information supplied by the proponent.³⁶⁴ The SACC states: “decision-makers will be provided with analysis, including but not limited to, the project’s GHG emissions in the context of Canada’s emissions targets and forecasts, such as Canada’s commitments under the Paris Agreement, Canada’s 2030 emissions targets, Canada’s Mid-Century Long-Term Low-Greenhouse Gas Development Strategy, and Canada’s goal for achieving net-zero emissions by 2050.”³⁶⁵ Regardless of the method the Agency chooses (e.g., carbon budgets, emissions pathways, or other), it is unlikely that any determination based on proponent information will be meaningful given the exclusion of downstream emissions and unlimited offsets.

A major positive aspect of the SACC is the attachment of enforceable conditions on project approvals. These enforceable conditions may refer to “mitigation measures and other requirements to reduce or control a project’s GHG emissions.” Proponents may also be required to participate in a reporting program, allowing the Agency to track progress on implementing mitigation measures and reaching net zero plans.³⁶⁶ These follow-up measures may serve to accelerate the uptake of efficient technologies and renewable energy, which is necessary to drive the net zero energy transition.³⁶⁷ The following section aims to build upon these positive aspects while also filling-in the critical gaps outlined in this section by describing RBC best practices related to sustainability.

³⁶² SACC, 10 & SACC Technical Guidance at s 2.4

³⁶³ SACC Technical guidance at s 3.2

³⁶⁴ See, Doelle, *supra* note 347.

³⁶⁵ SACC at 18.

³⁶⁶ SACC at 18.

³⁶⁷ IEA 2021.

Sustainability and RBC

The sustainability assessment provides an inroad for the application of environmental human rights considerations in the IAA. Currently, the federal IAA guidance focuses disproportionately on climate change impacts to the exclusion of biodiversity and pollution issues. This gap is likely rooted in the fact that climate change is the only issue to have undergone a strategic assessment, in addition to the overall anthropogenic lens from which sustainability is approached in the IA legislation and guidance. Changes to the ecological environment are narrowly viewed through the health, social and economic effects they cause to humans, as opposed to analyzing general environmental effects and biodiversity connectivity (e.g., loss of habitat).³⁶⁸

RBC tools which take a holistic view of environmental and social issues can improve approaches to other aspects of the triple planetary crisis, such as climate adaptation, biodiversity loss, and pollution and waste. For instance, the IFC Performance Standards provide detailed standards on environmental and social matters, resource efficiency and pollution prevention, biodiversity conservation and the sustainable management of living natural resources.³⁶⁹ MAC has also published protocols for biodiversity conservation and water stewardship, in addition to industry-specific guidance such as mine closure and tailings management. PDAC's "Excellence in Environmental Stewardship E-Toolkit" contains thorough guidance on issues such as land disturbance, air management, water use and conservation, fish and wildlife management, hazardous material, waste and spill management, reclamation and closure, among others.

These RBC standards could help elaborate upon and fulfill Canada environmental commitments and obligations. Canadian businesses have an independent responsibility to respect the human rights in accordance with the UNGPs, above and beyond the requirements of the IAA and other national laws and regulations. In the TISG, the Agency should identify the international and/or domestic instruments containing environmental obligations or climate change commitments that require consideration in the IA, which federal authorities and proponents must subsequently evaluate in the effects analysis.³⁷⁰ More broadly, Canada should develop a national action plan on Business & Human Rights which integrates environmental dimensions and aligns with nationally determined climate actions for mitigation and adaptation under the Paris Agreement.³⁷¹

Fulfilling Canada's climate commitments under the Paris Agreement requires more than reliance on the SACC. The unrestricted access to offsets will make it difficult to accurately account for whether a project helps or hinders Canada's progress on emissions targets. Comparing proponent disclosures to leading RBC standards can help demystify these complex yet critical issues. Widely used carbon accounting standards such as the ISO-14064 and the Greenhouse Gas Protocol Corporate Standard provide a more consistent and clearer picture of a project's GHG impact because they do not permit such broad reliance on offsets.³⁷²

³⁶⁸ IAAC, Guidance: Analyzing Health, Social and Economic Effects.

³⁶⁹ IFC Performance Standards, 1, 3, and 6, respectively.

³⁷⁰ IAAC, "Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change under the Impact Assessment Act" (2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/considering-environmental-obligations.html>.

³⁷¹ Paris Agreement, 22 April 2016, UN Framework Convention on Climate change, Conference of the Parties 21, 22st Sess (entered into force 4 November 2016), online: <unfccc.int/sites/default/files/resource/parisagreement_publication.pdf>.

³⁷² International Organization for Standardization, "ISO Standard 14064: Greenhouse gases – Part I: Specification with Guidance at the Organization Level for Quantification and Reporting of Greenhouse Gas Emissions and Removals" (2018), online (pdf): <www.iso.org/standard/66453.html>; World Business Council for Sustainable Development & World Resources Institute, "Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard" (2015), online (pdf): <ghgprotocol.org/corporate>.

The SACC invites proponents to show how a project net-zero plan fits with corporate commitments, including corporate net-zero plans.³⁷³ The credibility of these corporate plans can be measured against the Science Based Target's initiative's Net Zero Standard, a stringent, science-based framework for corporate net zero target setting.³⁷⁴ The TSM Climate Change Protocol also provides detailed guidance on climate mitigation and adaptation strategies, targeting, and reporting tailored to the mining context.³⁷⁵

The OECD Guidelines also possess a chapter on the environment, and although there is no explicit mention of climate change, its endorsement of the precautionary principle among other aspects have been found relevant to climate change in litigation such as *Milieudéfensie* and NCP decisions.³⁷⁶ Grounding its reasons in part on the UNGPs, the district court of the Hague in *Milieudéfensie et al v Royal Dutch Shell* found that Shell's corporate climate plans were insufficient to prevent adverse human rights impacts from climate change and ordered a more stringent reduction obligation.³⁷⁷ Affected communities could also engage the Canadian NCP where a business is failing to meet its environmental responsibilities by filing a specific instance that details alleged violations of the OECD Guidelines. The advantage of this process is that chapters of the Guidelines are thematically broad and impose a due diligence obligation on business to prevent adverse environmental human rights impacts. Specific instances can encompass collective harms such as greenhouse gas emissions.³⁷⁸ For example, a group of NGOs submitted a recent complaint to the UK NCP that Drax Group's claims that biomass energy generation is carbon neutral is misleading to consumers and breaches the Consumer Interests and Environment chapters of the Guidelines.³⁷⁹ While the Canadian NCP has been criticized for a lack of transparency and accessibility,³⁸⁰ this mechanism is a potentially effective means of garnering media attention, naming and shaming proponents, and drawing attention to the inadequacies of the IAA.

Finally, the Agency directs proponents implement follow-up programs to verify the accuracy of its sustainability analysis and assess the effectiveness of the mitigation measures included in the Decision Statement.³⁸¹ There is no mention of the potential role of stakeholders and rightsholders in this process,

standard>; see also, David Wright, "Final Strategic Assessment on Climate Change: Zero Net Effect?" (10 August 2020), online: ablawg.ca/2020/08/10/final-strategic-assessment-on-climate-change-zero-net-effect/.

³⁷³ SACC Technical Guide at s 3.5.

³⁷⁴ Science Based Targets initiative, "The Next-Zero Standard" (2021), online: sciencebasedtargets.org/net-zero. See also, UNFCCC, "Race to Zero Campaign" (Accessed 1 May 2022), online: unfccc.int/climate-action/race-to-zero-campaign#eq-3.

³⁷⁵ MAC, "Towards Sustainable Mining: Climate Change Protocol" (2021), online: mining.ca/towards-sustainable-mining/protocols-frameworks/climate-change/#:~:text=The%20TSM%20Climate%20Change%20Protocol,target%2Dsetting%2C%20and%20reporting; See also, MAC, "Guide on Climate Change Adaptation for the Mining Sector" (2020), online: mining.ca/wp-content/uploads/2021/10/MAC-Climate-Change-Guide-June-2021.pdf.

³⁷⁶ See, OECD Guidelines, "Chapter VI - Environment," online (pdf): mneguidelines.oecd.org/2011environment.pdf. The OECD's supplementary due diligence guidance does address greenhouse gas emissions, observing that for issues such as GHG emissions it may be more appropriate to consult with 'credible stakeholder representatives or proxy organisations (e.g. NGOs, representative public bodies, etc).' OECD Due Diligence Guidance for RBC at 50-51. For an overview of the environmental relevance of diverse OECD guidance, including their relevance to climate change, see OECD (2021), *The role of OECD instruments on responsible business conduct in progressing environmental objectives*, <https://mneguidelines.oecd.org/The-role-of-OECD-instruments-on-responsible-business-conduct-in-progressing-environmental-objectives.pdf>

³⁷⁷ RDS, ss 4.4.39, 5.3.

³⁷⁸ OECD Due Diligence Guidance for RBC at 50.

³⁷⁹ "Complaint submitted to the UK OECD National Contact Point under the OECD Guidelines for Multinational Companies in relation to Statements Made by Drax Group PLC" (21 October 2021), online: www.oecdwatch.org/complaint/lifescape-et-al-vs-drax/

³⁸⁰ See, OECD Watch "NCP Canada" (Accessed 1 May 2022), online: www.oecdwatch.org/ncp/ncp-canada/.

³⁸¹ IAAC, Guidance: Sustainability.

aside from the discretionary Monitoring Committee.³⁸² The IFC provides that proponents should consider involving representatives of affected communities to participate monitoring activities related to environmental and social impacts.³⁸³ Proponents should further consider how affected communities can help identify corrective and preventive actions to ensure the meaningful participation of rightsholders, as discussed in the stakeholder engagement section.

In conclusion, effective climate change mitigation and adaptation strategies require participatory processes which include those most directly and disproportionately impacted by the environmental harms of business activities. Due diligence is informed by engagement with rightsholders and stakeholders, without which important issues can be missed and overlooked.

Table 10: Sustainability and RBC

IAA Subject Area: Sustainability	
Focus	RBC Tools
Sustainable Development	<p>Equator Principles III</p> <p>Export Development Canada, Environmental and Social Risk Management Policy</p> <p>Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, Intergovernmental Mining Policy Framework: Mining and Sustainable Development</p> <p>ICMM Sustainable Development Framework</p> <p>IFC Performance Standards on Social & Environmental Sustainability</p> <p>PS1 Assessment and Management of Environmental and Social Risks and Impacts</p> <p>PS3 Resource Efficiency and Pollution Prevention</p> <p>PS6 Biodiversity Conservation and Sustainable Management of Living Resources</p> <p>IFC Environmental and Social Sustainability Policy</p> <p>IFC Performance Standards Guidance Notes</p> <p>MAC, TSM Guiding Principles</p> <p>OECD MNE Guidelines for Multinational Enterprises</p> <p>OECD Due Diligence Guidance for Responsible Business Conduct</p> <p>OECD Due Diligence Guidance For Meaningful Stakeholder Engagement In The Extractive Sector</p> <p>PDAC, Excellence in Environmental Stewardship E-toolkit</p> <p>UN Sustainable Development Goals</p> <p>UN Global Compact</p> <p>UN Principles for Responsible Investment</p> <p>UNEP Finance Initiative</p> <p>WEO, Columbia Centre on Sustainable Investment, Sustainable Solutions Network, UND, World Economic Forum, White Paper: Mapping Mining to Sustainable Development Goals: An Atlas</p>
Climate Change and GHG Emissions	<p>MAC, TSM Climate Change Protocol</p> <p>MAC, Guide on Climate Change Adaptation for the Mining Sector</p>

³⁸² See, IAAC, Operational Guidance: Framework for determining whether a Monitoring Committee is warranted.

³⁸³ IFC PS 1, para 23.

	ISO-14064: Greenhouse Standards GHG Protocol, Corporate Standard Science Based Targets initiative Net Zero Standard UNFCCC, Race to Zero Campaign Minimum Criteria
Mine Decommissioning	MAC, Mine Closure Framework MAC, Tailings Management Protocol
Biodiversity	MAC, Biodiversity Conservation Management Protocol
Water Stewardship	MAC, Water stewardship Protocol

Questions to Consider

1. Could an environmental human rights approach to climate change, with particular attention to the intergenerational equity, help ensure sustainable business practice?
2. How can lifecycle assessments and circular economy solutions help advance the fight against climate change in respect of prevention, mitigation, and adaptation?

Further Resources

Canadian Climate Law Initiative, “Knowledge Hub,” online: <ccli.ubc.ca/knowledge-hub/>.

David Boyd, Report of the Special Rapporteur on Human Rights and the Environment, “A Safe Climate: Human Rights and Climate Change” (2019), online (pdf): *OHCHR* <ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Report.pdf>.

Global Biodiversity Information Facility & IAIA, “Best Practices for Publishing Biodiversity Data from Environmental Impact Assessments” (Copenhagen: GBIF Secretariat, 2020).

IAIA, “Strategic Environmental Assessment: Performance Criteria” (2002) International Best Practices Principles, online (pdf): <iaia.org/uploads/pdf/sp1.pdf>.

IAIA, “Biodiversity and Ecosystem Services in Impact Assessment” (2018) International Best Practices Principles, online (pdf): <www.iaia.org/uploads/pdf/SP3-Biodiversity-Ecosystem-Services.pdf>

IAIA, “Climate in Impact Assessment” (2018) International Best Practices Principles, online (pdf): <www.iaia.org/uploads/pdf/SP8%20Climate%20Change%202018.pdf>.

IAIA, “Resilience Assessment” (2021) International Best Practices Principles, online (pdf): <www.iaia.org/uploads/pdf/SP11%20Resilience.pdf>.

“Indigenous Centre for Cumulative Effects,” online: <www.icce-caec.ca/>.

OECD, “Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-Operation” (Paris: OECD Publishing, 2006), online (pdf): <www.oecd.org/environment/environment-development/37353858.pdf>.

Statistics Canada, “Sustainable Development Goals Data Hub,” online: <www144.statcan.gc.ca/sdg-odd/index-eng.htm>.

Sustainable Minerals Institute, “Mine Closure Hub – Resources for Communities,” online: *The University of Queensland Australia* <stories.uq.edu.au/smi/2022/csr-mine-closure-hub/index.html>.

UN, “Transforming our World: the 2030 Agenda for Sustainable Development” (2015) online (pdf): <sdgs.un.org/sites/default/files/publications/21252030%20Agenda%20for%20Sustainable%20development%20web.pdf>.

UN, “Sustainable Development Goals Knowledge Platform” online: <sustainabledevelopment.un.org>.

“UN Global Compact Network Canada,” online: <globalcompact.ca>.

“World Business Council for Sustainable Development,” online: <www.wbcsd.org>.

Conclusion

This toolbox has shown how RBC tools can be used to improve the IAA regime and consequently the conduct of business and governments as it relates to the respect for, and protection of, human rights. Integrating human rights into the IA context can help ensure the consideration of rights which might otherwise be overlooked and may impose enforceable obligations on proponents as duty bearers.

Good practices from existing RBC tools can help operationalize the IAA's specific provisions on social, economic & health impact, public participation, Indigenous rights, gender, and sustainability. RBC tools can enhance Canada's IA regime by filling in critical gaps related to transparency and timely disclosure, participatory monitoring, and access to judicial and non-judicial grievance mechanisms. RBC, in this way, can broaden the traditionally narrower IA regime while the good practices of typically non-binding RBC standards could be applied to develop guidelines and/or regulations under a binding IA regime. While further reforms might be needed to make the Canadian IA regime more consistent with RBC standards, the IAA provides ample openings for the application of select RBC tools.

Contributions of this Toolbox

There has been a proliferation of RBC tools promoted by international organizations, industry, government, and other entities. This arsenal of tools could lead to inefficiency, confusion or induce corporate fatigue and public cynicism. This toolbox makes the case for the integration of RBC tools into Canada's IA regime, towards a more coherent and rights-respecting framework. It makes a first attempt at organizing and promoting the good practices of RBC tools so that they may be efficiently and effectively applied by Canadian extractive companies both within and outside Canada.

The lack of laws on HRDD strengthens the case for an alignment of RBC tools and IA. The domestic "grounding" of international human rights law and the integration of RBC due diligence standards has the potential of effectively compelling human rights-centric IA practice. The IAA's direct reference to factors like sustainability, gender, Indigenous rights, and social, economic and health impacts make the use or application of RBC tools in the IA context viable and necessary. The recommendations of this toolbox 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.

RBC tools can be employed by governments, proponents, stakeholders, and rightsholders to enact human rights-respecting IA practice immediately, regardless of whether legislative reforms ensues or not. Practitioners and advocates should use them as a basis for dialogue with proponents and explain why it is "good business" to meet international standards where domestic law falls short. In time, regulators and courts will follow suit by drawing upon these RBC tools to inform legal duties and the standard of care owed by Canadian corporations.³⁸⁴

³⁸⁴ See, *RDS & Nevsun*.

Questions for future research

There still need for further research on how RBC tools intersect with the practice of IA, specifically how RBC tools can aid the operationalization of the IAA or necessary reforms to the current IA regime to make it consistent with RBC tools. Common requirements in various RBC tools, per subject, could be condensed into the existing *IAA* guidance and future regulations. To avoid the possibility of cherry-picking tools, using a particular tool with the least stringent requirements, or interpreting or applying tools in ways that may be averse to the interests of impacted communities, the final framework should establish minimum RBC standards which are drawn from common requirements in endorsed shortlisted RBC tools. Such a framework will foster a human rights-based approach to IA and enable business and government to fulfill their international obligations.

Conversely, there is a need to consider the potential adverse effects of using Canada's IA framework to meet the due diligence obligations of companies and how such effects can be addressed. Below, we highlight a few areas for future research that merit further consideration.

Application of the IAA within Canada

There is a need for more research on the application of RBC tools within Canada, particularly with respect to HRDD by Canadian extractive companies within Canada. The previous understanding of RBC as being solely externally relevant informed the central promotional role played by the GAC and Export Development Canada (EDC). It is now clear that Canadian extractive companies have RBC obligations within Canada. This obligation requires government agencies with more domestic remit to take on the responsibility of actively promoting and monitoring the implementation of RBC guidance within Canada.

The Australian and Danish examples suggest that human rights commissions are important institutions for ensuring RBC and HRDD. This practice has yet to gain traction in the Canadian context. Most of the RBC literature focuses on the role of the Canadian NCP, the former CSR Counsellor, and the newly established Canadian Ombudsperson for Responsible Enterprise (CORE). These dispute settlement bodies are primarily focused on Canadian companies abroad (although the NCP has jurisdiction over companies within Canada). Federal and provincial human rights commissions could play a vital role for RBC in Canada. Commissions could offer a pool of human rights experts to serve on assessment teams. There is a need for research on how federal and provincial HRCs could work to promote RBC tools and adherence to HRDD standards by Canadian extractive companies, particularly within Canada.

Application of the IAA outside Canada

Another outstanding question is how the IA laws apply to Canadian mining companies operating outside Canada. The IAA mandates federal agencies not to carry out a project or provide financial assistance to projects carried outside Canada unless the federal authority determines the project is not likely to cause adverse environmental effects or that such adverse effects are justified under ss.83(a)(b) of the *IAA*. The Agency is not required to consider Indigenous rights where the project is to be wholly undertaken outside of Canada, as per sections 84(1)(2). Community knowledge and public comments are, however, factors to be considered under sections 84(1)(c)(d). This provision is consistent with the policy of GAC and EDC making support for companies abroad contingent.

There is no indication that sections 83 and 84 of the IAA have been applied with respect to the activities of Canadian extractive companies abroad. A minimal amendment to sections 83 and 94 tying support (not just financial support) to IA and taking into consideration, among other things, Indigenous rights within and outside Canada, would make these provisions more consistent with the RBC instruments. Although the EDC is excluded from being considered a ‘federal authority’ under IAA, other relevant non-excluded agencies such as GAC and the 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. Compliance with the IAA and its RBC-compliant guidance could be promoted by GAC to companies operating abroad, to help address the discordance between the practices of companies operating within and outside the country.³⁸⁵

Supply Chain Due Diligence

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, the link to 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.” The OECD is also currently developing guidance on environmental due diligence in mineral supply chains to support the implementation of the OECD Due Diligence Guidance for Responsible Business Conduct and the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risks Areas³⁸⁶

There is a need more for research on the relevance of the IA framework to supply chain impacts in the extractive sector, as well as research on the difference between a HRDD approach and an environmental management approach to supply and value chain responsibilities.

³⁸⁵ See, Sara Seck, “Strengthening Environmental Assessment of Canadian Supported Mining Ventures in Development Countries” *JELP* 11(1).

³⁸⁶ OECD, “Session 5: Identifying Best Practices for Environmental Due Diligence and Other Emerging Risks” (4 January 2022), online: <oecd-events.org/responsible-mineral-supply-chain/en/session/3480e1c4-cf84-ec11-a507-a04a5e7d20d9>; see also, Umwelt Bundesamt, “OECD Tool on Environmental Due Diligence in Mineral Supply Chains” (23 March 2021), online: <www.umweltbundesamt.de/en/oecd-tool-on-environmental-due-diligence-in-mineral>.

Annex

Annex I: RBC Tools

**These RBC tools are living documents which evolve over time. The hyperlinks will be periodically updated as new editions of the tools are published.*

Indigenous governance

1. [Agreement between the Inuit of Nunavut Settlement Area and Her Majesty the Queen in Right of Ontario](#)
2. [Assembly of First Nations, Environmental Assessments and Major Projects Policy Considerations \(2011\)](#)
3. [B.C. First Nations Energy and Mining Council, Mining and Mineral Exploration Plan \(2008\)](#)
4. [B.C. First Nations Energy and Mining Council, Sharing the Wealth: First Nation Resource Participation Models \(2010\)](#)
5. [Canadian Council for Aboriginal Business, Progressive Aboriginal Relations \(PAR\) \(2001\)](#)
6. [Hupacasath First Nation, Hupacasath Land Use Plan Phase 2 \(2006\)](#)
7. [Kluane First Nation, Proponents Engagement Guide \(2012\)](#)
8. [National Centre for First Nations Governance, Crown Consultation Policies and Practices Across Canada \(2009\)](#)
9. [Wet'suwet'en First Nation, Natural Resource Project Development Protocol](#)
10. [Haida Nation, "Constitution of the Haida Nation" \(2018\)](#)
11. [Gitanyow Hereditary Chiefs, "Gitanyow Engagement Framework" \(2013\)](#)
12. [Tsleil-Waututh Nation, "The Stewardship Policy" \(2009\).](#)

Industry

13. [Canadian Association of Petroleum Producers, Developing Effective Working Relationships with Aboriginal Communities \(2006\)](#)
14. [Prospectors and Developers Association of Canada \(PDAC\), "Gender Diversity and Inclusion: A Guide for Explorers" \(July 2019\)](#)
15. [\(PDAC, "Government Resource Revenue Sharing with Aboriginal Communities: A Jurisdictional Review" \(PDAC GRRS Position Statement\) \(2014\)](#)
16. [PDAC, "e3 Plus: Principles and Guidance Notes" \(2014\)](#)
17. [PDAC, "First Engagement: A Field Guide for Explorers" \(2015\)](#)
18. [PDAC, "Excellence in Environmental Stewardship e-toolkit" \(2009\)](#)
19. [PDAC, "Excellence in Health and Safety e-toolkit" \(2009\)](#)
20. [PDAC, "Excellence in Social Responsibility e-toolkit" \(2009\)](#)
21. [The Mining Association of Canada \(MAC\), "Towards Sustainable Mining \("TSM"\) Guiding Principles" \(2004\)](#)
22. [MAC, Indigenous and community relationships Protocol \(2019\)](#)
23. [MAC, Energy and GHG emissions management Protocol \(2019\)](#)
24. [MAC, Tailings Management Protocol \(2019\)](#)
25. [MAC, Biodiversity Conservation Management Protocol \(2019\)](#)
26. [MAC, Safety and health Protocol \(2016\)](#)
27. [MAC, Crisis management and communications planning Protocol \(2018\)](#)

28. [MAC, Preventing child and forced labour Protocol \(2019\)](#)
29. [MAC, Water stewardship Protocol \(2019\)](#)
30. [Mining Association of Manitoba, 2016 Aboriginal Engagement Handbook \(2016\)](#)
31. [MAC, Mine closure framework \(2008\)](#)
32. [Association for Mining Exploration British Columbia, Aboriginal Engagement Guidebook: A Practical and Principled Approach for Mineral Explorers \(2015\)](#)
33. [Alberta Chamber of Resources, "Learning from Experience: Aboriginal Programs in the Resource Industries" \(2006\)](#)
34. [Yukon Chamber of Mines, "Yukon First Nations Engagement and Consultation Tool" \(2019\)](#)

International Organizations

35. [International Bar Association, "Model Mining Development Agreement: A Template for Negotiation and Drafting" \(2011\)](#)
36. [UN Global Compact, "Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples" \(2013\)](#)
37. [International Labour Organization, ILO Tripartite Declaration](#)
38. [UN Global Compact, OECD Guidelines for RBC & Sector-Specific Guidance: A Manual for Canada \(2017\)](#)
39. [UNICEF, Children's Rights and Businesses Principles](#)
40. [Equator Principles III \(London: Equator Principles, 2013\)](#)
41. [Global Reporting Initiative \(GRI\)](#)
42. [IFC Access to Information Standards \(World Bank Group, January 1, 2012\)](#)
43. [IFC Environmental and Social Sustainability Policy \(Washington: IFC 2012\)](#)
44. [IFC Performance Standards Guidance Notes 2012](#)
45. [IFC Performance Standards on Environmental and Social Sustainability \(World Bank Group, January 1, 2012\)](#)
46. [Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development \(IGF\), Intergovernmental Mining Policy Framework: Mining and Sustainable Development](#)
47. [IGF, IGF Guidance for Governments: Improving Legal Frameworks for Environmental & Social Impact Assessment and Management \(2020\)](#)
48. [International Council on Mining and Metals \(ICMM\), Good Practice Guide: Indigenous Peoples and Mining, 2015](#)
49. [International Council on Mining and Metals Sustainable Development Framework](#)
50. [International Organization for Standardization \(ISO\): Social Responsibility Standard](#)
51. [Organization for Economic Co-Operation and Development Guidelines for Multinational Enterprises \(OECD Guidelines\)](#)
52. [UN Guiding Principles on Business and Human Rights \(UNGPs\)](#)
53. [UN Working Group on Business & Human Rights, Genders Lens to the UNGPs](#)
54. [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector \(Paris: OECD Publishing, 2017\)](#)
55. [OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas](#)
56. [OECD Due Diligence Guidance for Responsible Business Conduct](#)
57. [ICMM, Integrating Human Rights Due Diligence into Corporate Risk Management Processes \(2012\)](#)

58. [OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones](#)
59. [OECD, Practical actions for companies to identify and address the worst forms of child labour in mineral supply chains \(2017\)](#)
60. [UNEP Finance Initiative and United Nations Global Compact, UN Principles for Responsible Investment \(2016\)](#)
61. [United Nations Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#)
62. [United Nations Global Compact](#)
63. [United Nations Sustainable Development Goals](#)
64. [Voluntary Principles on Security and Human Rights](#)
65. [World Bank, "Mainstreaming Gender into Extractive Industries Projects; Guidance Note for Task Team Leaders," World Bank Extractive Industries and Development Series #9 \(August 2009\)](#)
66. ["Gender Dimensions of Artisanal and Small-Scale Mining: A Rapid Assessment Toolkit", World Bank Gender Action Plan 2012](#)
67. ["Gender Dimensions of the Extractive Industries: Mining for Equity", World Bank, Extractive Industries and Development Series # 8 \(August 2009\)](#)
68. [International Labour Organization, "Women in Mining: Towards Gender Equality" \(2021\)](#)
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70. [WEO, Columbia Centre on Sustainable Investment, Sustainable Solutions Network, UND, World Economic Forum, "White Paper: Mapping Mining to Sustainable Development Goals: An Atlas" \(July 2016\)](#)
71. [Inter-American Development Bank \(IDB\), Operational Policies and Guidelines](#)
72. [International Service for Human Rights \(ISHR\), "A Human Rights Defender Toolkit for Promoting Business Respect for Human Rights" \(2015\)](#)
73. [Business & Human Rights Resource Centre & ISHR, "Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders – Guidance for Companies" \(2018\)](#)

Federal Government

74. [Industry Canada, "Corporate Social Responsibility: An Implementation Guide for Canadian Business" \(2014\)](#)
75. [Department of Justice, Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" \(2017\)](#)
76. [Export Development Canada \(EDC\), "Environmental and Social Risk Management Policy"](#)
77. [Global Affairs Canada, "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad" \(January 17, 2018\)](#)
78. [Global Affairs Canada, "Canada's Feminist International Assistance Policy" \(2017\)](#)
79. [Global Affairs Canada, "Responsible Business Conduct Abroad" \(26 November 2018\)](#)
80. [Global Affairs Canada, "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders" \(2019\)](#)
81. [Global Affairs Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad \(2014\)](#)
82. [Global Affairs Canada, Procedures Guide for Canada's National Contact Point for the Organization of Economic Co-operation and Development \(OECD\) Guidelines for Multinational Enterprises](#)
83. [Government of Canada, Department of Fisheries and Oceans Consultation with First Nations: Best Practices \(2006\)](#)
84. [Global Affairs Canada, "Policy on Gender Equality" \(June 7, 2017\)](#)

85. [Truth and Reconciliation Commission of Canada Final Report, Calls to Action \(2015\)](#)

Provincial Government

86. [Government of Alberta, Consultation Guidelines and Policy \(2014\)](#)
87. [Government of British Columbia, Building Relationships with First Nations: Respecting Rights and Doing Good Business](#)
88. [Government of British Columbia, Guide to involving proponents when consulting First Nations \(2014\)](#)
89. [Government of Nova Scotia Office of Aboriginal Affairs, Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia \(2012\)](#)
90. [Government of Ontario, Environmental assessments: consulting Indigenous communities \(First published July 2013; updated December 2016\)](#)
91. [Government of Saskatchewan, Proponent Handbook: Voluntary Engagement with First Nations and Métis Communities to Inform Government's Duty to Consult Process \(2013, amended 2016\)](#)
92. [Newfoundland and Labrador, "Guidebook to Exploration, Development and Mining" \(2010\)](#)
93. [The Plan Nord: Toward 2035, 2015-2020 Action Plan, Gouvernement du Québec](#)

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94. [New Relationship Trust, Best Practices for Consultation and Accommodation \(prepared by Meyers Norris Penny LLP for NRT, 2009\)](#)
95. [The Firelight Group, "Indigenous Communities and Industrial Camps: Promoting healthy communities in settings of industrial change" \(February 2017\)](#)
96. [Candler, Craig, and David Thompson, \(The Firelight Group\) "Indigenous Traditional Knowledge Framework: Principles for the Inclusion of Indigenous Traditional Knowledge in Environmental Decision-Making for North East Alberta" \(Fort McMurray, AB: Cumulative](#)

Multi-stakeholder

97. [Canadian and Indigenous Boreal Leadership Council's "Free, Prior, Informed Consent in Canada" and "Understanding Successful Approaches to Free, Prior and Informed Consent in Canada"](#)
98. [Joint Publication: Canada, Government of, Prospectors and Developers Association of Canada, The Mining Association of Canada, and Canadian Aboriginal Minerals Association, "Exploration and Mining Guide for Aboriginal Communities: Mining Information Kit" \(](#)
99. [National Orphaned/Abandoned Mines Initiative \(Guiding Principles\)](#)
100. [Initiative for Responsible Mining Assurance, IRMA Standard for Responsible Mining \(2018\)](#)