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

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IMPACT ASSESSMENT & RESPONSIBLE BUSINESS CONDUCT TOOLS IN THE EXTRACTIVE SECTOR



Tailings Impoundment at the Touquoy Gold Mine, Nova Scotia
Credit: Simon Ryder-Burbridge

ISSUE BRIEF: AN ENVIRONMENTAL HUMAN RIGHTS TOOLBOX FOR GOVERNMENT, BUSINESS, CIVIL SOCIETY & INDIGENOUS GROUPS

08.2022

OVERVIEW:

In 2019, Canada amended its federal environmental assessment legislation and renamed it the federal *Impact Assessment Act* (IAA).¹ 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. However, existing Responsible Business Conduct (RBC) tools could inform the design of IA guidance² and regulations³ to ensure environmental human rights considerations are adequately integrated into IA practices in Canada.

This Issue Brief provides a summary of the Environmental Human Rights Toolbox developed to provide guidance on how governments, businesses, civil society, and Indigenous groups may encourage and adopt an environmental human rights approach to impact assessment (IA).⁴ The toolbox describes the federal IAA's new provisions related to health, economic, and social effects, public participation, gender and intersectionality, Indigenous rights, and sustainability, and argues that these provisions provide opportunities for the incorporation of human rights considerations under the IAA despite not being expressly provided for in legislation. This Issue Brief and the Environmental Human Rights Toolbox are 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*.⁵

AN ENVIRONMENTAL HUMAN RIGHTS APPROACH:

The human right to a clean, healthy, and sustainable environment was endorsed by the United Nations Human Rights Council in October 2021.⁶ In July 2022, the right was recognized in a resolution adopted by the United Nations General Assembly with 161 votes in favour including Canada.⁷ A comprehensive understanding of human rights must necessarily include the right to

¹ *Impact Assessment Act*, SC 2019, c C-28 [IAA].

² See, 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>.

³ 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).

⁴ Sara Seck et al, "Impact Assessment & Responsible Business Conduct Tools in the Extractive Sector: An Environmental Human Rights Toolbox for Government, Business, Civil Society, and Indigenous Groups" (2022), online: <<https://digitalcommons.schulichlaw.dal.ca/ialawrbrc/4/>>.

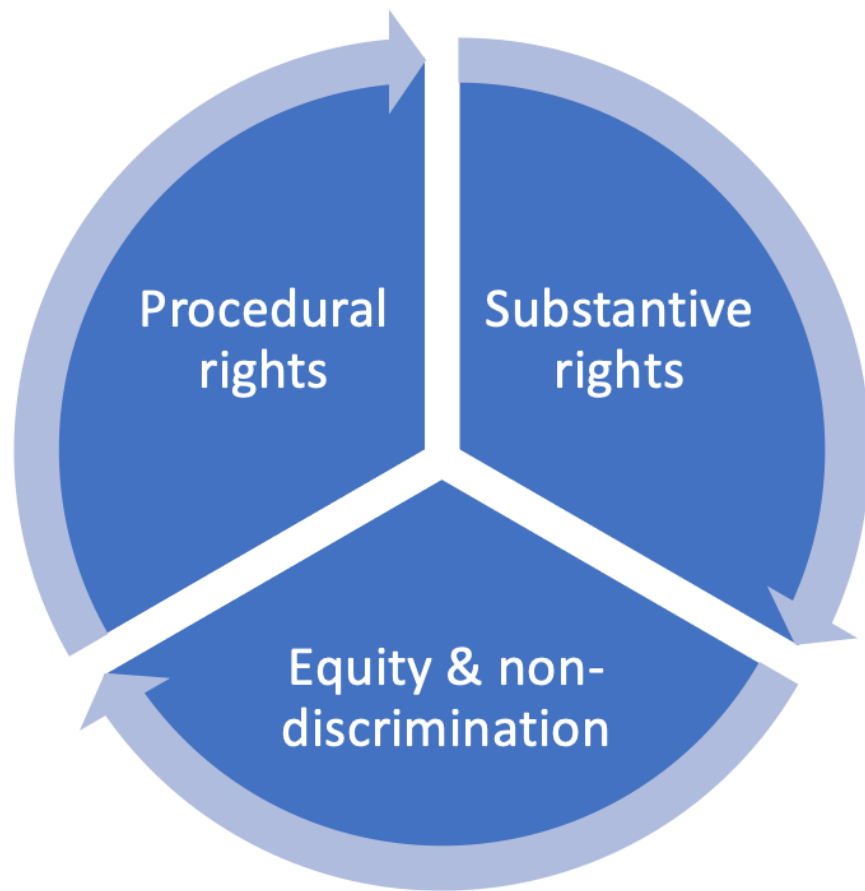
⁵ See, Sara Seck et al, "Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: Implications for Human Rights, Gender and Stakeholder Engagement" (Draft Final Report for SSHRC Knowledge Synthesis Grant: Informing Best Practices in Environmental and Impact Assessments, 13 April 2020), online (pdf): *Marine & Environmental Law Institute* <digitalcommons.schulichlaw.dal.ca/ialawrbrc/1/>. For further details on the different deliverables associated with this project, see Responsible Business Conduct and Impact Assessment Law, online: *Marine & Environmental Law Institute* <<https://digitalcommons.schulichlaw.dal.ca/ialawrbrc/>>.

⁶ UNGA, Resolution adopted by the Human Rights Council on 8 October 2021, "The human right to a clean, healthy and sustainable environment" UN Doc A/HRC/ RES/48/13, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement>>.

⁷ UNGA, Resolution adopted by the General Assembly on 28 July 2022, "The human right to a clean, healthy and sustainable environment" UN Doc A/RES/76/300, online: <<https://digitallibrary.un.org/record/3983329?ln=en>>; United Nations, "With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as

a clean, healthy, and sustainable environment and its component parts. Substantively, the right guarantees access to clean air, a safe climate, clean water, healthy ecosystems and biodiversity, healthy and sustainably produced food, and non-toxic places.⁸ Procedurally, the right guarantees access to information and science, prior assessment, freedom of expression and association, public participation, and access to justice.⁹ Non-discrimination and vulnerability cut across both substance and procedure, so that the voices and needs of individuals and groups that are disproportionately and/or differentially affected by environmental harms are centred in decision-making. 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 Right to a clean, healthy and sustainable environment



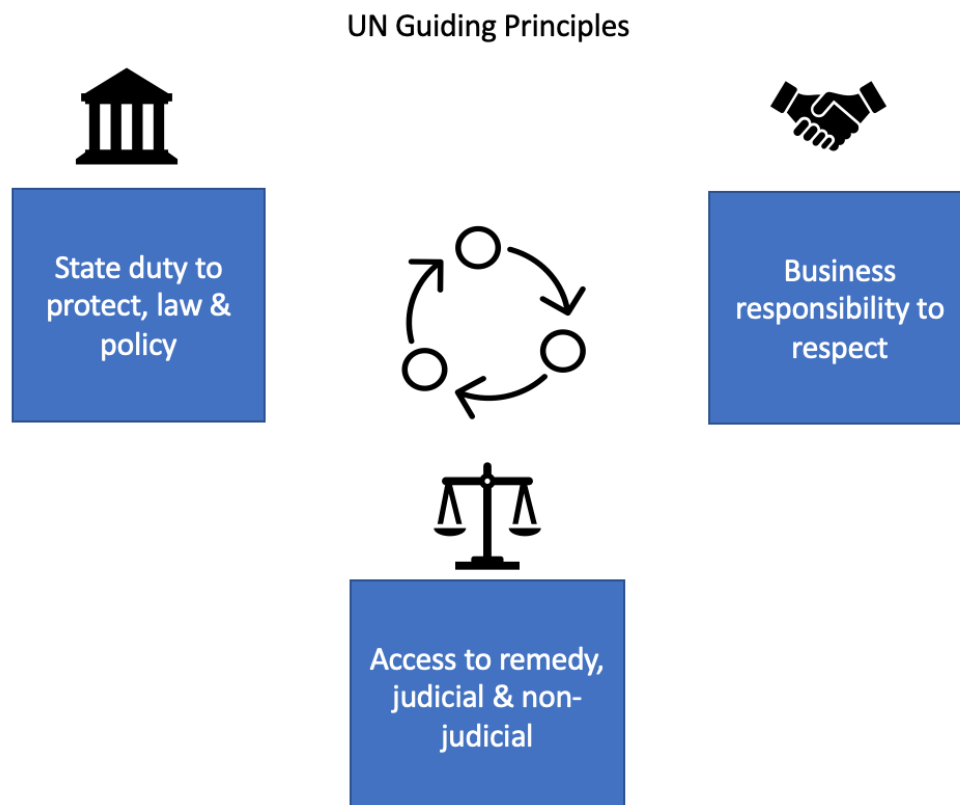
Human Right" (28 July 2022), online: <<https://press.un.org/en/2022/ga12437.doc.htm>> (There were no votes against the resolution).

⁸ 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>.

⁹ Ibid; OHCHR, Special Rapporteur on the Issues of Human Rights and the Environment, Framework Principles on Human Rights and the Environment, 2018, UN Doc A/HRC/37/59. User friendly version online: <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf> [Framework Principles].

HUMAN RIGHTS:

As states are the primary duty bearers under international human rights law, attention to human rights impacts should be a requirement in any IA process even if not explicitly identified as such in the legislative scheme. As reflected in the three-pillar framework of the 2011 United Nations Guiding Principles on Business & Human Rights (“UNGPs”),¹⁰ states have a duty to protect human rights from adverse impacts of business conduct, while business enterprises have an independent responsibility to respect human rights. The third pillar of the UNGPs highlights the state duty and business responsibility to ensure those affected have access to effective remedies, both judicial and non-judicial. All three pillars are interdependent and mutually reinforcing. The UNGPs were endorsed by the UN Human Rights Council in 2011, and Canada’s 2022 RBC Strategy for Canadian companies operating abroad explicitly identifies the UNGPs among key RBC tools.¹¹



¹⁰ United Nations Guiding Principles on Business & Human Rights” (2011), online: *Office of the High Commissioner for Human Rights* <www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf>.

¹¹ Government of Canada, “Responsible Business Conduct Abroad: Canada’s Strategy for the Future” (June 2022), online: <https://www.international.gc.ca/trade-commerce/assets/pdfs/rbc-cre/strategy-2021-strategie-1-eng.pdf> (Moreover, the introductory message from the Honourable Mary Ng explicitly indicates that the government of Canada expects companies operating within and outside of Canada to respect human rights and to engage in the highest standards of RBC, see page 1).

The business responsibility to respect human rights is also incorporated into the Organisation for Economic Cooperation & Development (OECD)'s Guidelines for Multinational Enterprises,¹² which the government of Canada is obligated to promote to Canadian companies together with the National Contact Point, a non-judicial grievance mechanism.¹³ The OECD's risk-based due diligence approach aligns with the UNGPs by focusing the attention of businesses on their risks to people and planet: that is, "the likelihood of adverse impacts on people, the environment and society, that enterprises cause, contribute to or to which they are directly linked."¹⁴

In the 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 human rights due diligence (HRDD), human rights are a core value of SIA and HIA and both approaches seek to defend and uphold human rights.¹⁵

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.¹⁶

Early and ongoing meaningful stakeholder and rights-holder engagement is central to HRDD, as it allows the public to contribute their knowledge on potential impacts and to participate in environmental decision-making. 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.¹⁷

CONCRETE ACTIONS FOR BUSINESSES TO UPHOLD THE RESPECT PILLAR OF THE UNGPS

The responsibility of business enterprises to respect human rights requires:

1. the adoption of a policy commitment to respect human rights;
2. the exercise of human rights due diligence to:
 - i. identify and assess actual and potential human rights risks
 - ii. prevent and mitigate identified adverse impacts
 - iii. track the effectiveness of responses over time, and
 - iv. communicate to account for how actions taken address impacts; and
3. enabling access to remedy for adverse human rights impacts caused or contributed to by business operations.

Credit: Dalhousie/UNEP, 2022

¹² OECD Guidelines for Multinational Enterprises (2011), online (pdf): <www.oecd.org/daf/inv/mne/48004323.pdf>.

¹³ Global Affairs Canada, "Canada's National Contact Point for the Organisation for Economic Co-operation & Development Guidelines for Multinational Enterprises" (2022), online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R>.

¹⁴ OECD Due Diligence Guidance for Responsible Business Conduct" (2018) at 15, online (pdf): *OECD* <mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

¹⁵ 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>.

¹⁶ "OECD Due Diligence Guidance for Meaningful Stakeholder Engagement" (2017) at 10, online: *OECD* <www.oecd.org/development/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm>.

¹⁷ IAA, ss 11, 27, 33(e)(f), 51(1)(c-d), 99, 181 (4.1).

The Impact Assessment Agency of Canada's (IAAC) Guidance for Public Participation in IA is limited in its opportunities for community-driven engagement and two-way dialogue, particularly beyond the initial planning phase.¹⁸ However, IAAC's Template Public Participation Plan provides an easy entry point for incorporating RBC tools; the plan is to include a list of "preferred engagement tools identified by members of the public."¹⁹ 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, such as the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement.

GENDER & INTERSECTIONALITY:

The adverse and unequal impacts of extractive projects on the human rights of women, girls and persons of diverse genders is well-documented. 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 physical ability. 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."²⁰

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 measures. The Danish Institute for Human Rights (BIHR) 2019 report on gender-responsive due diligence offers one of the most comprehensive resources on considering gender in HRDD.²¹



Credit: Women & Gender Equality Canada, 2021

¹⁸ IAAC, "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>>.

¹⁹ 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-in-al-eng.pdf>.

²⁰ IAAC, Guidance: Gender-based Analysis Plus in Impact Assessment.

²¹ 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>.

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 the UNGPs and international RBC standards. This includes rights clarified in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).²²

Article 32(2) of UNDRIP pertaining to consultation and the requirement for free, prior, and informed consent is incorporated into IAAC's Guidance on the Assessment of the Potential Impacts to the Rights of Indigenous Peoples.²³ In practice, the expectation that governments obtain the consent of Indigenous groups before development activities take place has generally not been met, although the domestic legislative implementation of UNDRIP will in theory require this status quo to change.

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."²⁴ Indigenous communities and nations could draw on their own internal protocols, laws, and customs 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 with respect to obtaining communities' free, prior, and informed consent.

SUSTAINABILITY:

The climate crisis cannot be understood or addressed in isolation from the crises of biodiversity loss and pollution and waste. Driven by unsustainable resource-intensive models of development, the three interconnected planetary crises cause severe harm to the biosphere and threaten a wide range of human rights, including, but not only, the rights of Indigenous peoples.²⁵

The IAA now recognizes a project's contribution to sustainability as one of the factors to be considered when assessing a project.²⁶ Sustainability is defined as 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.²⁷ The Minister's

²² *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>.

²³ 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>.

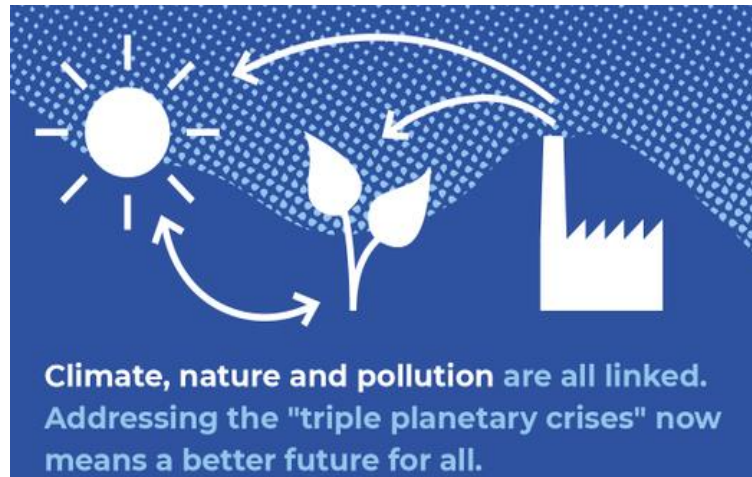
²⁴ IAAC, "Template: Indigenous Engagement & Partnership Plan" (2022), online (pdf): *Government of Canada* <www.canada.ca/content/dam/iaac-acei/documents/policy-guidance/practitioners-guide/indigenous-engagement-partnership-plan-external-template-en.pdf>.

²⁵ 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>.

²⁶ IAA, s 22(h).

²⁷ IAA, ss 2, 6(a).

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.²⁸ Currently, the federal IAA guidance focuses disproportionately on climate change impacts to the exclusion of biodiversity and pollution issues.²⁹



Credit: United Nations Environment Programme, 2021

RBC tools which take a holistic view of environmental and social issues can improve approaches to other aspects of the triple planetary crisis which impact environmental human rights, such as biodiversity loss and pollution and waste. For instance, the IFC Performance Standards provide detailed standards on environmental and social matters, biodiversity conservation, the sustainable management of living natural resources, and resource efficiency and pollution prevention.³⁰

CONCLUSION:

The toolbox demonstrates how RBC tools can be used to improve the Canadian IA regime and consequently the conduct of business and governments as it relates to the respect for, and protection of, environmental human rights. Integrating environmental 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.

Further, good practices from existing RBC tools can help operationalize the IAA's specific provisions on social, economic and health impact, public participation, Indigenous rights, gender and intersectionality, and sustainability while also filling in critical gaps. RBC, in this way, can broaden the traditionally narrower IA regime while the good practices of RBC standards could be applied to develop guidelines and/or regulations under a binding IA regime.

²⁸ IAA, ss 63(a),(e).

²⁹ 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 >.

³⁰ 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>.