

Canadian Network on Corporate Accountability submission to the Government of Canada's online consultation: "We want to hear from you: CSR Strategy Review"

Submitted via email: January 8, 2014

Introduction:

The Canadian Network on Corporate Accountability (CNCA) brings together 25 environmental and human rights NGOs, religious organizations, labour unions, and solidarity groups¹ from across Canada who are advocating for federal legislation to establish mandatory corporate accountability standards for Canadian extractive companies operating abroad, especially in developing countries. Formed in 2005, our network seeks to ensure that the fundamental rights of all peoples are respected by Canadian mining and oil and gas corporations, no matter where they operate. Many of our member organizations have been working on the issue of corporate accountability for decades and have longstanding relationships with communities, workers, Indigenous peoples, environmental and human rights defenders from around the world. The CNCA coordinated the participation of Canadian civil society organizations and individuals at the (federal government convened) 2006 *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries*.

Summary of recommendations:

Canada's CSR strategy must:

1. Provide an effective means for victims of corporate abuse relating to Canadian extractive companies operating overseas to seek redress in Canada, including by creating an independent extractive-sector Ombudsman, legislating access to Canadian courts and ensuring respect of the right of Indigenous peoples to free, prior and informed consent;
2. Include mandatory accountability mechanisms, such as the recent commitment by the federal government to institute mandatory disclosure requirements for payments to governments by extractive companies;
3. Include robust and transparent mechanisms that condition Canadian government support received by extractive companies on respect for human rights and environmental sustainability;
4. Ensure that Canadian extractive companies pay their fair share of taxes and royalties (both in Canada and abroad) and include a commitment to combatting the financial secrecy afforded by tax havens, which are used extensively by Canadian extractive companies;
5. Incorporate a real commitment to instituting multi-stakeholder dialogue initiatives on corporate accountability issues and include meaningful opportunities for Canadian civil society organizations and the Canadian public to provide input into Canadian policy on CSR.

¹ Amnesty International Canada, Amnistie internationale Canada francophone, Africa-Canada Forum, Americas Policy Group, Asia Pacific Working Group, Canada Tibet Committee, Canadian Council for International Co-operation, Canadian Labour Congress, Committee for Human Rights in Latin America, Development and Peace, Entraide Missionnaire, Friends of the Earth Canada, Halifax Initiative Coalition, Inter Pares, KAIROS: Canadian Ecumenical Justice Initiatives, Maritimes-Guatemala Breaking the Silence Solidarity Network, MiningWatch Canada, Projet Accompagnement Québec-Guatemala, Public Service Alliance of Canada, Publish What You Pay-Canada, Social Justice Committee of Montreal, Solidarité Laurentides Amérique central, Steelworkers Humanity Fund, Unifor and the United Church of Canada.

1. Canada’s CSR strategy must provide an effective means for victims of corporate abuse relating to Canadian extractive operations overseas to seek redress in Canada, including by creating an independent, extractive-sector Ombudsman, legislating access to Canadian courts and ensuring respect of the right of Indigenous peoples to free, prior and informed consent.

Canadians expect that their government will institute measures that ensure a) that Canadian corporations operating internationally respect internationally-recognized human rights, labour rights and environmental standards and b) that non-compliant companies will face real consequences. However, Canadian companies operating internationally face few human rights and environmental requirements under Canadian law. The “host countries” in which these companies operate often lack the capacity or the political will to enforce environmental protections or protect the rights of workers and local Indigenous populations. Where they exist, such protections are vulnerable to the undue influence that natural resource companies often wield. With few exceptions, those who suffer corporate abuse are unable to access recourse in domestic courts or in international courts or tribunals. That leaves only one option – seeking justice in those countries where multinationals are incorporated and/or controlled (home states). However, in Canada, as in many home states, out-of-court mechanisms are ineffective and foreign citizens face difficulties initiating legal claims regarding overseas transgressions.

Home states have a legal obligation to respect human rights and to protect against human rights violations by third parties, including companies. While offering considerable support to Canadian extractive companies, the Canadian government has not provided comparable support to ensure corporations respect human rights. Over the past decade, the government has repeatedly been offered expert testimony about the negative impacts of unregulated Canadian extractive operations overseas.² On more than one occasion, the United Nations Committee on the Elimination of All Forms of Racial Discrimination has informed Canada that its inaction amounts to a violation of Canada’s international human rights commitments.³ The United Nations ‘Protect, Respect, and Remedy’ Framework on Business and Human Rights, and the Guiding Principles to that framework, confirm the legal obligations of states to respect human rights. This duty includes the obligation to provide access to remedy for the victims of human rights abuse.⁴ Further, the UN Guiding Principles identify effective judicial and non-judicial grievance mechanisms as the centerpiece of an effective system for remedying human rights abuse.

Canada needs an independent, extractive-sector Ombudsman :

In 2006, the Government of Canada undertook a comprehensive consultation process, the *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries*. Industry and civil society representatives reached an unprecedented consensus around public policy recommendations, including the creation of an extractive-sector ombudsman to

² For example, the Standing Committee on Foreign Affairs and International Development’s 2005 hearings on *Mining in Developing Countries* and 2011 hearings on the role of the private sector in development as well as the 2006 *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries*.

³ See, for example, the Concluding Observations of the United Nations Committee on the Elimination of all forms of Racial Discrimination of May 25, 2007, CERD/C/CAN/CO/18, at para 17 and of March 9, 2012, CERD/C/CAN/CO/19-20, at para 14.

⁴ For more on this see the Business and Human Rights Resource Centre at <http://www.business-humanrights.org/SpecialRepPortal/Home>.

investigate complaints and the development of human rights guidelines for Canadian companies. However, the Government of Canada's 2009 CSR Strategy failed to implement key recommendations.

There are significant problems with existing non-judicial grievance mechanisms in Canada. Canada's Office of the Extractive-Sector Corporate Social Responsibility Counsellor does not provide a useful means to access justice for victims of overseas abuse. A central flaw with the Office of the CSR Counsellor is that participation in the review process is voluntary – to date, in almost all cases brought to the Office of the CSR Counsellor, the companies refused to participate or withdrew from the process. Were a complaint to proceed through the review process, the possibility of achieving effective remedy is remote. The CSR Counsellor is not mandated to investigate complaints, or determine whether companies have caused harm or breached the Government of Canada's guidelines for extractive companies. The Counsellor does not make binding recommendations. Nor is the office independent from the Government of Canada. The Counsellor reports directly to the Minister of Trade. The guidelines for extractive companies promoted by the CSR Counsellor's office are weak on Indigenous rights, including the right to free, prior and informed consent.

Canada's National Contact Point for the OECD Guidelines does not provide a better means for victims to access remedy. The NCP is mandated to promote awareness of the OECD Guidelines and ensure they are implemented effectively. The Guidelines include voluntary principles and standards that are recommended in order to encourage more responsible corporate conduct. Unlike its counterparts in the UK and the Netherlands, Canada's NCP does not undertake investigations and site visits and only offers mediation between companies and complainants. It does not make public determinations about whether guidelines have been breached. Neither the CSR Counsellor nor the NCP can provide, or recommend that the Canadian government order, any form of sanction or remedy for harm that has been inflicted.

Canada needs to create an extractive-sector Ombudsman in Canada. This mechanism needs to have the power to receive complaints, undertake independent investigations to determine if a company has acted inappropriately and, if so, to make recommendations to the company and to the Canadian government in order to remedy the situation. The Ombudsman should make its findings public and should be able to recommend the suspension or cessation of political, financial and diplomatic support by the Government of Canada. Unlike the Office of the CSR Counsellor, the Ombudsman needs to be mandated to perform these functions regardless of a company's willingness to participate.

Canada needs to legislate access to Canadian courts for those who suffer corporate abuse overseas by Canadian companies :

Canada is the home state to a large number of mining, oil and gas companies that operate in developing and emerging economies. However, non-Canadians are effectively barred from accessing remedy in this country. There have been very few court cases in Canada concerning Canadian companies and overseas human rights abuse, despite a growing number of allegations. Generally, Canadian courts have declined to hear cases brought by foreign plaintiffs, arguing that other jurisdictions are more appropriate venues to adjudicate such claims (the legal principle of *forum non conveniens*). Plaintiffs also face significant financial and logistical hurdles when considering Canadian courts.

To date, there have been six attempts to bring cases of corporate abuse relating to Canadian extractive operations overseas. In the one instance in which the lower court was prepared to accept jurisdiction (despite hearing arguments relating to forum), the decision was overturned on appeal. As a result, there is no Canadian precedent ruling that Canada is an appropriate venue to hear such claims.

Canada should enact legislation that would provide access to Canadian courts for people who have been seriously harmed by the international operations of Canadian companies. Federal legislation should be adopted in Canada that allows non-Canadians who are affected by the overseas operations of extractive companies to bring civil lawsuits before Canadian courts. The statute should clarify that Canadian courts are an appropriate forum to hear claims against extractive companies that are registered in Canada.

2. Canada's CSR strategy must include mandatory accountability mechanisms, such as the recent commitment by the federal government to institute mandatory disclosure requirements for payments to governments by extractive companies.

The Canadian Network on Corporate Accountability (CNCA) welcomed Prime Minister Harper's June 12, 2013 announcement that the Government of Canada will establish new mandatory reporting standards for Canadian extractive companies. This is the first time the Prime Minister has voiced support for mandatory corporate accountability measures in Canada that would apply to the international and domestic operations of Canadian extractive sector companies. CNCA members constantly interact with organizations, communities and governments affected by extractive sector development. For these stakeholders, transparency is one tool by which they can hold their governments to account for resource revenue management, improve resource mobilization and public investment, deter corruption and mismanagement, and support informed public debate.

Mandatory reporting of payments to governments represents one important tool citizens and governments in resource endowed countries can use to improve revenue management. When complemented with other tools (see discussion in point 5) and a more comprehensive approach to corporate accountability, detailed here, mandatory reporting of payments can have significant impacts on sustainable development. The CNCA welcomes the federal government's commitment to develop mandatory reporting standards because it indicates a growing awareness of the importance of mandatory corporate accountability measures.

3. Canada's CSR strategy must include robust and transparent mechanisms that condition Canadian government support received by extractive companies on respect for human rights and environmental sustainability.

The Canadian government actively promotes and supports Canadian extractive companies in their international operations, including through the provision of financial and political backing. Currently there are not robust and transparent mechanisms that condition government support received by extractive companies on respect for human rights and environmental sustainability. One mechanism that would assist in this is the creation of a public, independent extractive-sector Ombudsman, who could make recommendations to both companies and governments.

The case of Export Development Canada (EDC)⁵ is illustrative. The need for enhanced transparency and accountability measures concerning EDC has long been acknowledged by parliamentarians, industry representatives and civil society organizations. In 2005, a subcommittee of the Parliamentary Standing Committee on Foreign Affairs and International Trade (SCFAIT) held hearings on the activities of Canadian mining companies in developing countries. SCFAIT subsequently recommended that Canadian government support, including export and project financing, be made conditional on corporate compliance with human rights standards. In 2007, a multi-stakeholder Advisory Group concluded a year-long public consultation process on the overseas extractive sector by calling on EDC to make client compliance with human rights and other standards contractually binding and to significantly improve its disclosure practices. However, Canada's CSR strategy has not taken these recommendations into account and remains silent on the issue of conditioning government support to extractive companies on their human rights and environmental practices.

To avoid complicity in the environmental and human rights abuses that are common in these contexts, Export Development Canada must apply robust and transparent environmental, social and human rights standards to its clients. Canada should adopt legally-binding provisions that make the receipt of government support by extractive companies contingent on continued compliance with robust corporate accountability standards. Such standards should be based on international labour and human rights norms, should ensure environmental sustainability and should include the internationally recognized right of free, prior and informed consent for Indigenous peoples.

4. Canada's CSR strategy must ensure that Canadian extractive companies pay their fair share of taxes and royalties (both in Canada and abroad) and include a commitment to combatting the financial secrecy afforded by tax havens, which are used extensively by Canadian extractive companies.

Extractive companies are among the biggest users of tax havens, which can be used to shift profits and avoid taxation. In order for resource extraction to have any possibility of contributing to developing country economic growth, Southern countries need to be able to retain a fair proportion of tax revenues. Currently, many Southern countries face major challenges in retaining tax revenues, losing almost \$1 trillion a year in unscrupulous financial outflows. More than half of these outflows are due to commercial tax avoidance, largely by multinational corporations, most particularly extractive corporations. The recent Development Initiatives report on "Investments to End Poverty" noted that "of the US\$472 billion in foreign direct investment into developing countries, US\$420 billion flowed out as repatriated profits."⁶ One can only imagine the potential for democratic

⁵ In 2011, EDC provided the extractive sector with over CDN\$17 billion in finance and insurance, making it the corporation's single greatest beneficiary. The agency has provided backing for mining projects associated with serious environmental and social impacts, for which affected individuals and communities have been unable to achieve justice. EDC continues to support extractive companies that invest in countries with weak regulatory frameworks, inadequate institutional capacity and poor law enforcement. For more on this see "Government support to extractives companies: the role of Export Development Canada", <http://cnca-rcrce.ca/wp-content/uploads/cnca-government-support-to-extractives-cos-EDC1.pdf>

⁶ "Investments to End Poverty: Highlights", p.4, http://devinit.org/wp-content/uploads/2013/09/Investments_to_End_Poverty_Highlights.pdf

development, services, infrastructure etc. that could be achieved if local and regional governments were able to harness a fair proportion of these revenues through taxation and royalties.

In June 2013, the High Level Panel on Illicit Financial Flows from Africa, chaired by former South African President Thabo Mbeki, reported that illicit financial outflows constitute the single largest impediment to Africa's development.⁷ Africa is a net creditor to the rest of the world, having lost \$1.3 trillion in illicit outflows over the last three decades due to crime, corruption and tax evasion. Countries dependent on resource extraction are particularly vulnerable to these outflows. Between 1970 and 2008, oil-rich Nigeria lost \$296 billion in illicit outflows; Angola lost \$71 billion between 1985 and 2008.⁸ Sub-Saharan Africa, home to some of the world's poorest people, lost more than \$700 billion between 1980 and 2008, an amount far in excess of the region's external debts of \$175 billion.⁹

Canada is an important player with respect to tax havens. Canadians for Tax Fairness note that "24% of Canadian direct investment overseas in 2011 went to the top twelve tax havens, up from 10% in 1987. This totals more than \$170 billion. In fact, tax havens of the Barbados, Cayman Islands, Ireland, Luxembourg, and Bermuda were five of the top eight national destinations of total Canadian investment abroad."¹⁰ Shell companies add a complicating veil to financial transparency, and Canada is also an important contributor in that respect. A study done by Griffith University in Australia found that Canada is second only to the US in ease of setting up an anonymous shell company: Professor Jason Sharman, who headed the study, said "If you start looking for a shell company at breakfast, you can usually have one before lunch."¹¹

In addition to mandatory disclosure rules (discussed in point 2 above) G8 leaders recently proposed tougher action on tax havens. While Canada took a first step in the right direction with its commitment to Automatic Tax Information Exchange, for such a measure to be meaningful Canada needs to more proactively support the G8 move to curb tax havens, including requiring banks in tax havens to publish the names of the real owners (beneficial owners) of their secret accounts. Tackling this problem of the use and abuse of tax havens by Canadian extractive companies will benefit both Canada and developing countries by having those companies pay their fair share of taxes.

5. Canada's CSR strategy must incorporate a real commitment to instituting multi-stakeholder dialogue initiatives on corporate accountability issues and include meaningful opportunities for Canadian civil society organizations and the Canadian public to provide input into Canadian policy on CSR.

⁷ "High level Panel on Illicit Financial Flows Meets in Lusaka", June 19, 2013, published on United Nations Economic Commission for Africa at: <http://www.uneca.org/media-centre/stories/high-level-panel-illicit-financial-flows-meets-lusaka#.Us2LpZ5dWa8>

⁸ Peter Gillespie, "Tax troubles: How TNCs enhance profits by avoiding taxes", *Third World Resurgence*, No. 268, Dec. 2012, pp 14-17, <http://www.twinside.org.sg/title2/resurgence/2012/268/cover01.htm>

⁹ Oygunn Sundsbo Brynildsen, "Exposing the lost billions", *Third World Resurgence*, No. 268, Dec. 2012, pp 21-22, <http://www.twinside.org.sg/title2/resurgence/2012/268/cover03.htm>

¹⁰ Dennis Howlett, *Presentation to the House of Commons Finance Committee*, Canadians for Tax Fairness, February 14, 2013,

<http://tackletaxhavens.ca/sites/tackletaxhavens.ca/files/attach/brief%20to%20FINA%20on%20tax%20havens.pdf>

¹¹ Mark-André Séguin, "Shell companies: Blinders on", *National Magazine*, June 2013, http://www.nationalmagazine.ca/Articles/Recent4/Shell_companies_Blinders_on.aspx

Multi-stakeholder dialogue initiatives :

Initiatives that provide for multi-stakeholder dialogue, and get key government departments, industry and civil society organizations to the table are key to finding ways to institute urgently needed mandatory corporate accountability measures. One of the four pillars of Canada's CSR strategy, the Centre for Excellence in Corporate Social Responsibility, became a multi-stakeholder space that brought together mining companies, Canadian civil society groups and government representatives from Foreign Affairs and International Trade Canada, Natural Resources Canada and the Canadian International Development Agency (CIDA). Due to our commitment to multi-stakeholder dialogue, several members of the CNCA joined the Centre for Excellence's Executive Committee. These organizations actively participated on the Centre's Executive Committee because they felt the Centre was the only promising element in the government's CSR strategy. As noted by former Executive Committee members, "it offered a space for frank exchanges of perspectives and the potential to launch projects that might benefit mining affected communities, as well as other stakeholders. The three other pillars of the CSR strategy – endorsement of voluntary CSR guidelines, the creation of a new grievance process without any real powers, and new CIDA programming in the extractive sector – do not address the very real problems associated with Canadian mining overseas."¹² However, in March 2012 the federal government terminated funding to the Centre and failed to renew its Memorandum of Understanding with the Centre's secretariat. After almost a year of trying to make this space work without committed government funding, CNCA members participating in the Centre's Executive Committee reluctantly announced their resignation.

Canada's CSR strategy must incorporate a real commitment to instituting multi-stakeholder dialogue initiatives on corporate accountability issues and provide funding for and a commitment of federal government departments to participate in dialogue spaces with industry and civil society.

The need for meaningful consultation on Canada's CSR Strategy :

We are pleased that the federal government has opened a space to consult with Canadian civil society and the Canadian public at large by holding an in-person meeting on December 12th 2013 and opening up this online consultation process on the review of Canada's CSR strategy. We trust that, as is good practice with respect to government consultation processes, a report summarizing the inputs and recommendations received, as well as the actions to be taken by various government departments, will be prepared and made public by the Government of Canada. We believe it is essential for government policy to take into account the perspectives of the Canadian public and that of Canadian civil society, many of whom have decades of experience working with communities in the global south who are impacted by Canadian extractive sector operations overseas. However, there are several aspects of the current consultation that limit both the quantity and quality of input received, jeopardizing the process's credibility.

The current consultation process has not provided a meaningful space in which Canadians can share their views on issues of critical importance to Canadians and the world. Deficiencies in this consultation process include the following:

¹² Doug Olthius and Ian Thomson, Op Ed: "Room for Dialogue on Mining Ethics" *Ottawa Citizen*, March 10, 2013, <http://cnca-rcrce.ca/room-for-dialogue-on-mining-ethics-ottawa-citizen-op-ed/>

Online consultation:

1. *The timing of the consultation, from December 12, 2013 to January 8, 2014, makes consultation with our member bases very challenging:*
 - a. Most Canadians spend the weeks of December 23 and December 30 with their families and/or on holidays. As a result, during two weeks of the consultation period it is virtually impossible to consult with organizational staff and Canadians.
2. *Too short a time period given for the consultation:*
 - a. The online consultation was open for just under 4 weeks. Especially when one takes into account the winter holiday break discussed above, this is a very short window of time to enable meaningful consultation.
 - b. We note that for a similar consultation aimed at receiving input from Canadian extractive companies, a much longer period – over twice as long – that did not run over traditional extended holiday periods was provided (September 18 to November 15— for more, see <http://www.international.gc.ca/commerce/visite-visite/extractive.aspx?lang=eng>)
3. *An apparent lack of publication of the consultation and lack of advance notice of the consultation:*
 - a. To our knowledge, apart from a press release issued on December 12th, no efforts have been made to reach out to civil society organizations to invite them to participate in this process. The CNCA Coordinator provided contact information for all members of our network, and requested that the organizers of this consultation formally invite Canadian civil society organizations to the present consultation. We have been given no indication that this has been done.
 - b. The timing of the consultation makes significant input difficult. This could have been mitigated in some ways if Canadians and civil society organizations had been provided some advance notice of the impending consultations.

In-person consultation:

1. *Too short a time for the meeting:*
 - a. Providing only one hour in one city does not seem to provide a sufficient amount of time or geographical breadth to truly gather input from civil society organizations.
 - b. We note, again, that consultations with Canadian extractive companies mentioned above seemed to be more broad-based.
2. *Lack of advance notice of the consultation:* To our knowledge, invitations were issued mere days prior to the consultation session. For most organizations with limited resources, this is inadequate time to prepare meaningful input. We are aware of at least one organization that declined to participate for this reason.
3. *Selective consultation and exclusion of key voices:* Many organizations who work closely on corporate accountability issues in developing countries were excluded from the December 12 consultation. In fact, while the Canadian Network on Corporate Accountability (CNCA) (whose members have been working on the issue of Canadian companies operating overseas

for several decades, and who coordinated civil society participation in the National Roundtables in 2006) was contacted in order to provide contact information for our member organizations, neither the CNCA nor the vast majority of its membership were permitted to attend the December 12 in-person session. As a result, many crucial, knowledgeable and experienced perspectives were missing from the consultation process.

Conclusion:

Canada is a global leader in mineral exploration, with over sixty per cent of the world's mining and mineral exploration companies headquartered here. Forty per cent of the world's mineral exploration capital is raised on Canadian stock exchanges. Given the concentration of the global mining industry in this country, Canada is uniquely positioned to become an international leader in corporate accountability.

Canada needs to implement a comprehensive corporate accountability framework. The recommendations outlined in the preceding document outline the crucial elements that would need to be included in such a framework. Binding regulations are the only way to deal with the worst offenders in the industry. Access to Canadian civil courts and an independent extractive-sector Ombudsman for those who have been harmed in the most egregious cases is urgently needed, particularly for abuses committed in countries with no rule of law or weak judiciaries. Institution of mandatory transparency mechanisms, robust and transparent mechanisms to condition government support to extractive companies on respect for human rights and environmental sustainability and a commitment to combatting the financial secrecy afforded by tax havens which prevents both Canada and developing countries from receiving their fair share of taxes and royalties, are all crucial to an effective CSR strategy. Initiatives that provide for multi-stakeholder dialogue with key government departments, industry and civil society organizations are key to finding ways to institute mandatory corporate accountability measures. Frequent and meaningful consultation with the Canadian public and Canadian civil society organizations is essential.

We look forward to future opportunities to discuss these issues of vital importance to Canadians and the world.

Sincerely,



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