

CNCA submission to the International Assistance Review

July 28, 2016

A. Introduction

Formed in 2005, the Canadian Network on Corporate Accountability (CNCA) unites 30 environmental and human rights NGOs, religious organizations, labour unions, and solidarity groups¹ who have joined together to ensure that the fundamental rights of all peoples are respected by Canadian mining, oil and gas companies, 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, and environmental and human rights defenders from around the world.

We welcome the Government of Canada's International Assistance Review and the opportunity to make a submission. We are among the groups that advocate policy coherence around a rights agenda and Canada's international human rights obligations. We see this review as a critical opportunity for Canada to move beyond a narrow focus on international assistance to a whole-of-government approach that places priority on development goals and champions human rights across all of Canada's global engagements, commitments, and agreements. Although largely absent from the Minister of International Development's Discussion Paper, corporate accountability for Canada's extractive sector operating abroad is a necessary complement to a Canadian human rights based approach to international assistance. Below we make the case for corporate accountability measures to be included in Canada's international development policy. Several of our member organizations are also making submissions that will more fully explore related issues such as beneficial ownership, development-deficits associated with mineral exploration and the gendered impacts of mining.

It's important to note that the policy and legal reforms described below would have important long term benefits for Canadian extractive companies. Extractive projects frequently create conflict and result in community grievances. When the underlying issues are not addressed fairly and quickly, conflict escalates and companies risk significant operating delays and interruptions with serious financial repercussions. Conflicts that create negative images and publicity for companies become significant liabilities not only for the companies involved but for the entire industry as it seeks to negotiate with rights holders for access to new raw material deposits. A robust system of corporate accountability would contribute to a more stable and predictable operating environment where the responsible business practices of Canadian companies are recognized and rewarded.

B. Summary of recommendations to the Government of Canada

- 1. Advance new corporate accountability mechanisms in Canada** to prevent harm and offer remedy to foreign victims of rights violations. Specifically, Canada should create an independent Ombudsperson for the extractive sector and facilitate access to Canadian courts for those who have been harmed by the international operations of Canadian companies.

¹ See a complete list of our members on our website: www.cnca-rcrce.ca.

2. **Develop a human rights and Indigenous rights centred Corporate Accountability Strategy for Canada.** Unlike the Corporate Social Responsibility (CSR) Strategy created by the previous government in 2009 and updated in 2014, a *Corporate Accountability Strategy* would focus on the rights of vulnerable individuals and communities and promote the long term success of Canadian companies in their overseas operations. The Corporate Accountability Strategy must prioritize prevention of harm, the right of Indigenous peoples and affected communities to determine their own development strategies, the creation of effective accountability mechanisms, and access to remedy for those who have been harmed.

C. Canada’s International Assistance Review must be concerned with corporate accountability

Canadian firms dominate the global extractive sector, with over fifty percent of mining companies worldwide headquartered in Canada. These firms operate more than 8,000 projects in over 100 countries, many of which have notoriously weak human rights and environmental protections. In this context, Canadian companies’ overseas operations are too often associated with credible accusations of human rights abuse including forced labour, sexual violence, forced displacement and failure to respect the right of Indigenous peoples to free, prior and informed consent.

Minister Bibeau’s International Assistance Review Discussion Paper highlights that Canada’s international assistance policy needs to prioritize governance and human rights, and pay particular attention to the rights of women, Indigenous peoples and the most vulnerable populations. It also identifies water as a key element in environmental sustainability and climate change. The extractive sector impacts all of the aforementioned rights directly and has a significant effect on local water resources (access, quality and usage).² Effective accountability mechanisms for Canadian extractive companies are indispensable instruments for creating and maintaining an enabling environment for sustainable development.

Canadian companies operate within an international accountability gap. Corporate actors routinely enjoy impunity for their wrongdoing, including in cases of serious harm. Over the past decade, the Government of Canada has repeatedly been offered expert testimony about the negative impacts of unregulated Canadian extractive operations overseas. The United Nations High Commission on Human Rights (2015), the United Nations Committee on Economic, Social and Cultural Rights (2016) and the United Nations Committee on the Elimination of All Forms of Racial Discrimination (2007 and 2012) have informed Canada that its inaction amounts to a violation of Canada’s international human rights commitments.

Canada has a legal obligation to respect human rights and to protect against human rights violations by third parties, including companies. Canada has yet to implement mechanisms that fulfill this duty. Canadians expect their government to fulfill its international human rights commitments by putting in place effective measures to ensure that Canadian companies operating overseas will respect internationally-

² “Indigenous peoples around the world have suffered negative, even devastating consequences from extractive industries.” — UN Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*, 1 July 2013, A/HRC/24/41, available at: <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>.
 KAIROS, *Gendered Impacts: Indigenous Women and Resource Extraction*, 20 November 2014, available at: http://www.kairoscanada.org/wp-content/uploads/2015/05/KAIROS_ExecutiveSummary_GenderedImpacts.pdf.
 Friends of the Earth Europe, *Environmental Impacts of Mining*, September 2007, available at: http://www.foeeurope.org/sites/default/files/publications/foee_blessing_or_curse_mining_impacts_1007.pdf

recognized human rights, labour and environmental standards and that non-compliant companies will face real consequences. Maintaining the status quo in Canada undermines our nation's genuine interest in creating a world where human rights are protected for all.

Canada's International Assistance Review is the perfect opportunity to show leadership in governance of a sector that has come to be seen as the face of Canada in many parts of the world and to demonstrate Canada's fulfilment of its commitment to prioritize Indigenous rights, human rights and the rights of the most vulnerable populations. Given the prominence of the Canadian extractive sector overseas, any action we take in Canada will have a significant impact around the world.

Recommendation 1. Advance new corporate accountability mechanisms in Canada to prevent harm and offer remedy to foreign victims of rights violations, including an independent Extractive Sector Ombudsperson and access to Canadian courts.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) and Goal 16 of the 2030 Sustainable Development Agenda prioritize access to justice. Often, the only recourse for victims of overseas corporate abuse is to seek redress in the company's 'home country'. Extractive sector operations are particularly prone to business and human rights conflicts³. More often than not the home country of an extractive company is Canada.

Canada's current policy on extractives, *Doing Business the Canadian Way*, does not afford the victims of overseas corporate abuse access to effective grievance mechanisms in Canada.

1.1) Canada needs an independent Extractive Sector Ombudsperson

Existing out-of-court (i.e. non-judicial) mechanisms in Canada, such as Canada's Office of the Extractive Sector CSR Counsellor and the National Contact Point (NCP) for the OECD Guidelines, are entirely ineffective in meeting the needs of victims of corporate abuse. Canada's CSR Counsellor has failed to successfully mediate a single review and currently operates in complete opacity. Nor does Canada's NCP provide meaningful remedy for communities that have been negatively impacted by Canadian companies. Neither of these mechanisms is able to offer anything more than a chance to sit down at the table to talk with the company. When it comes to human rights abuses, talk is not enough.⁴

An independent Extractive Sector Ombudsperson must have the power to receive complaints, undertake independent investigations to determine if a company has acted inappropriately and, if so, make recommendations to the company and the Canadian government in order to remedy the situation. The

³ UN Commission on Human Rights, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 22 February 2006, E/CN.4/2006/97, available at: <http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>.

UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, 28 April 2015, A/HRC/29/25, paragraph 12, available at:

http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_25_en.doc

⁴ For further information, see our website: www.cnca-rcrce.ca, including correspondence between the CNCA and Minister Dion: <http://cnca-rcrce.ca/wp-content/uploads/2016/05/Correspondence-between-the-CNCA-and-Minister-Dion-January-to-May-20161.pdf>

Ombudsperson should make its findings public and should have the power to recommend the suspension or cessation of political, financial and diplomatic support by the Government of Canada.

Civil society organizations have noted that the operations of extractive sector companies have specific impacts on the rights of women and children. Women and children are particularly vulnerable when community conflict associated with extractive projects breaks down social cohesion and widens inequalities. The limited employment opportunities that extractive projects create are normally closed to women, while the negative impacts of such projects are disproportionately felt by women. Sexual violence has also frequently been associated with such projects and/or the conflicts they create. Consequently, the Ombudsperson must be mandated to undertake gender-based analysis.

An Ombudsperson with the powers outlined above will make a concrete and important contribution to advancing Canada's commitment to protect the rights of all, especially women and children.

1.2) Canada needs to facilitate access to Canadian courts for those who suffer corporate abuse overseas by Canadian companies

Foreign plaintiffs are generally unable to access remedy in Canada due to significant barriers to accessing Canadian courts. Despite a growing number of allegations, there have been very few court cases in Canada concerning Canadian companies and overseas human rights abuse. Plaintiffs face significant financial and logistical hurdles when considering Canadian courts. Furthermore, Canadian courts have declined to hear cases brought by foreign plaintiffs.⁵

Canada should facilitate access to Canadian courts for people who have been seriously harmed by the international operations of Canadian companies and it should be clarified that Canadian courts are an appropriate forum to hear claims against extractive companies that are registered in Canada.

Policy initiatives supporting access to courts would speak loudly on the world stage and be an important contribution to advancing Canada's commitment to promoting human rights.

Recommendation 2. Canada's International Assistance Review should lead to the development of a progressive Corporate Accountability Strategy to ensure that Canadian business activity overseas does not undermine development goals.

To meet our international human rights obligations, show leadership on the global stage and advance our development goals, Canada must replace its *CSR Strategy*, which is focussed on support for companies, with a progressive *Corporate Accountability Strategy* that centres on the prevention of harm, rights-based decision-making around natural resource governance, accountability for human rights violations and access to remedy for impacted individuals and communities.

⁵ See, for example, the November 2015 BC Supreme Court decision involving the company Tahoe Resources (<http://www.ccij.ca/cases/tahoe/>). Note that this can be distinguished from the three related suits brought by Guatemalan plaintiffs against HudBay Resources in Ontario, as HudBay Resources withdrew its arguments on forum non conveniens. As a result, there is no Canadian precedent ruling that Canada is an appropriate venue to hear such claims. Further information can be found here: http://www.aboveground.ngo/wp-content/uploads/2016/02/Cases_Feb2016_LO.pdf

Canada's Corporate Accountability Strategy must include the following elements:

2.1) Establish an independent Extractive Sector Ombudsperson office and increase access to Canadian courts for victims of corporate abuse

The cornerstone of any progressive Corporate Accountability Strategy is the establishment of an independent Extractive Sector Ombudsperson office as well as the removal of barriers to ensure that victims of corporate abuse have access to Canadian courts⁶.

2.2) Effectively regulate Canadian companies and their subsidiaries

Canada's reliance on voluntary CSR guidelines and codes of conduct has been entirely ineffective in ensuring Canadian companies respect Indigenous and human rights overseas.⁷ Regulations need to be put in place that require Canadian companies and their subsidiaries to respect internationally-recognized human rights, labour and environmental standards in their global operations, including respect for the right of Indigenous peoples to free, prior and informed consent.

Several jurisdictions, including France, Switzerland, the European Union and the Council of Europe⁸, are exploring legal reforms or have adopted policy recommendations to lift obstacles that victims face in accessing justice, to establish parent company liability and to mandate human rights due diligence. The UNGPs define due diligence as the process by which companies assess actual and potential human rights impacts, integrate and act upon the findings, track responses and communicate how impacts are addressed. Law reform initiatives in Europe would establish legal requirements that parent companies undertake due diligence regarding the adverse human rights and environmental risks associated with global operations. Proposals also include repercussions for those companies that fail to comply, and permit parties who are harmed by a transnational company that fails to undertake effective due diligence to sue the company for damages in the home state.

Canada must adopt similar initiatives to ensure that it fulfills its international obligation to protect against human rights violations by corporate actors.

2.3) Capacity building of local communities and civil society

In order to maximize the effectiveness of a Canadian Extractive Sector Ombudsperson and to truly facilitate access to justice in Canadian courts, the Government of Canada must complement these policy initiatives with opportunities for funding from the International Assistance Envelope. Community groups, women's

⁶ See more detailed discussion above at Recommendation 1

⁷ CNCA, *Submission to the Economic, Social and Cultural Rights Unit of the Inter-American Commission on Human Rights*, 26 January 2016, available at: <http://cnca-rcrce.ca/wp-content/uploads/2016/05/CNCA-Submission-IACHR-ESCR-Unit-Jan-2016.pdf>

⁸ Above Ground, *Coming soon in Europe: laws requiring corporate due diligence on human rights?*, 7 July 2016, available at: <http://www.aboveground.ngo/recent-works/coming-soon-europe-laws-requiring-corporate-due-diligence-human-rights/>

De Schutter, O., Ramasastry, A., Taylor, M., Thompson, R., *Human Rights Due Diligence: The Role of States* (CNCA, ICAR, ECCJ), December 2016, available at: <http://icar.ngo/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>

rights groups, local trade unions, and Indigenous groups must have access to the resources they require to undertake rights awareness and education, gather information on abuses and violations of rights, and take advantage of judicial and non-judicial instruments.

In the context of extractive sector projects, those most vulnerable and most likely to experience negative human rights impacts are women and children, especially Indigenous women and children. Funding opportunities for capacity building must therefore be gender sensitive and prioritize women and children.

2.4) Institute mechanisms to condition government support to companies on respect for human and Indigenous rights and the environment

The Canadian government actively promotes and supports Canadian extractive companies in their international operations, including through the provision of financial and political backing. Yet Canada lacks transparent, robust mechanisms that condition this support on corporate respect for human rights and environmental sustainability. Nor do mechanisms exist to withdraw government support from companies that fail to live up to international human rights and environmental standards.⁹

To avoid complicity in the environmental and human rights abuses associated with its clients' operations, the Canadian government must implement binding mechanisms to withdraw government support from companies that do not respect internationally-recognized human rights and environmental norms. Mechanisms should be adopted to require all government agencies to conduct and publicly report on the results of human rights due diligence and environmental assessment processes prior to supporting any company (Canadian or otherwise) and to monitor compliance. A public, independent Extractive Sector Ombudsperson would complement these mechanisms by making recommendations to both companies and governments for remedy when a company has acted inappropriately.

2.5) Ensure that Canadian extractive companies pay their fair share of taxes and royalties (both in Canada and abroad) and include a commitment by the Canadian government to combat the financial secrecy afforded by tax havens, which are used extensively by Canadian extractive companies

⁹ While Canada's NCP and CSR Counsellor can recommend the removal of Trade Commissioner Support for companies that do not participate in good faith in mediation or review processes with those entities, these recommendations are not binding with respect to all government support. Moreover, under the current policy, Trade Commissioner Support would not be removed from a company that breaches, or even continues to breach, human rights standards but shows willingness to talk to aggrieved community members.

There is currently no obligation that Export Development Canada (EDC) withdraw support from a company on the recommendation of either the NCP or CSR Counsellor. 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.

Extractive companies are among the biggest users of tax havens, which can be used to shift profits and avoid taxation¹⁰. 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. The 2013 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.”¹¹ One can only imagine the potential for democratic 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.

2.6) Institute mechanisms that promote transparency and access to information, including with respect to corporate ownership, financial flows, tax payments, and disclosure of information on human rights impacts

The CNCA welcomed the December 2014 coming into force of the *Extractives Sector Transparency Measures Act (ESTMA)*, which established new mandatory reporting standards for Canadian extractive companies. Transparency measures are a tool by which communities and civil society organizations can hold their governments to account for resource revenue management, to improve resource mobilization and public investment, to deter corruption and mismanagement, and to support informed public debate. The CNCA applauded the Government of Canada’s recognition, in adopting *ESTMA*, that regulation of the Canadian extractive sector overseas cannot rely exclusively on voluntary measures. We encourage the expansion of mandatory reporting obligations to other areas (e.g. disclosure of information on human rights impacts, financial flows, corporate ownership, etc.) and an overall shift in direction from voluntary initiatives to legally-binding corporate accountability mechanisms.

D. Conclusion

Canada is a global leader in mineral exploration, with over fifty 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. Our ability to be seen as a leader in international human rights depends on decisive and immediate action in this area.

Canada must implement a comprehensive Corporate Accountability Strategy. The recommendations outlined here are the essential elements of such a framework. Binding regulations are required to prevent the most serious offences. Access to both Canadian courts and an independent Extractive Sector Ombudsperson is an urgent priority, particularly for abuses committed in countries with weak judicial systems. Institution of robust and transparent mechanisms to condition government support to extractive companies on respect for human rights, labour and environmental standards, as well as a withdrawal of

¹⁰ ActionAid, *Addicted to Tax Havens: The Secret Life of the FTSE 100*, October 2011, available at: https://www.actionaid.org.uk/sites/default/files/doc_lib/addicted_to_tax_havens.pdf

¹¹ Development Initiatives, *Investments to End Poverty*, 2013, p.4, available at: <http://devinit.org/wp-content/uploads/2013/09/Investments-to-End-Poverty-full-report.pdf>

existing support from non-compliant companies, is crucial for the Government of Canada to avoid complicity in abuses associated with its clients. Capacity building of local communities and civil society is a necessary complement to promote and protect rights. Mandatory transparency mechanisms 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 crucial to an effective Corporate Accountability 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 throughout the development and implementation of a Corporate Accountability Strategy.

An essential first step and bold move for Canada in 2016 to proclaim its respect for human rights is the establishment of an independent Extractive Sector Ombudsperson office and increased access to Canadian courts for foreign victims of corporate abuse.

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

Sincerely,



Emily Dwyer
Coordinator
Canadian Network on Corporate Accountability

coordinator@cnca-rcrce.ca • 613-731-6315, ext. 31 • www.cnca-rcrce.ca
280 Albert Street, suite 100, Ottawa, ON, K1P 5G8