CNCA submission to the Standing Committee on Foreign Affairs and International Development's study of Bill S-211, *Fighting Against Forced Labour and Child Labour in Supply Chains Act*. *November 2022*

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Introduction

Canada's Standing Committee on Foreign Affairs and International Development (FAEE) is currently studying bill S-211 Fighting Against Forced Labour and Child Labour in Supply Chains Act.

This submission outlines the essential minimum elements of an effective supply chain law, explains how bill S-211 entirely misses the mark and urges Canadian members of Parliament to pursue a different law that would be fit for purpose.

Bill S-211 does not fulfil any part of the Government of Canada commitment to "introduce legislation to eradicate forced labour from Canadian supply chains and ensure that Canadian businesses operating abroad do not contribute to human rights abuses."

The annex includes selected CNCA and CNCA member organization publications.

About the CNCA

Our network unites 40 human rights, labour, international development, environmental and faith-based organizations from across Canada that collectively represent the voices of millions of Canadians.

Together we call for measures to ensure that

1. impacted communities can access remedy in Canada if they are harmed by Canadian business activity abroad or by practices in Canadian supply chains;
2. Canadian companies[1] respect human rights in their global operations; and,
3. if they are involved in abuses abroad, Canadian companies face real consequences in Canada.

Our member list is in the Annex.

Many of our members have decades-long relationships with people who have been negatively affected by Canadian businesses overseas, especially in the extractive sector. We are subject matter experts on corporate accountability and on business and human rights. Examples of our members' work to put an end to forced labour include Above Ground's 2021 report *Creating Consequences: Canada's Moment to Act on Forced Labour*; the 2020 report by the Centre international de solidarité ouvrière on preventing forced labour in Canadian food supply chains; submissions by the Canadian Labour Congress, Amnesty International Canada and Human Rights Watch Canada to the House of Commons Subcommittee on International Human Rights' 2017 study on child labour and modern slavery; and CNCA member interventions in the Supreme Court of Canada case involving Canadian Nevsun Resources' links to forced labour in Eritrea (see, for example, here and here).

The CNCA's reform proposals focus on preventing and remedying corporate abuse that occurs outside of Canada, which is under the jurisdiction of the federal government.

[1] Canadian companies include those that are incorporated in Canada, have a place of business in Canada, or sell goods or services and have either a physical presence or otherwise carry out business in a jurisdiction in Canada.

Why Canada needs a mandatory human rights and environmental due diligence law

Far too often, Canadian companies operating abroad fail to deliver on their responsibility to respect human rights and protect the environment. Ten years after the unanimous endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs), there continue to be widespread reports of serious human rights abuses and environmental damage linked to the overseas activities of Canadian companies and supply chains. Communities and workers who suffer harm are often unable to access justice and remedy. Human rights and environmental defenders who stand up to powerful corporations frequently face violence, intimidation or criminalization.[2] The risks and vulnerabilities they face have worsened with the global COVID-19 health crisis.[3] The gendered and racialized impacts of these harms are well-documented.

While Canadian companies have a responsibility to respect human rights, they can often avoid fulfilling that responsibility because binding rules do not exist, are not enforced, or because companies structure their global operations to avoid liability.[4] Mandatory human rights and environmental due diligence legislation would change that.

Canadian mining abroad linked to serious abuses

In 2016 the Justice and Corporate Accountability Project at Osgoode Hall Law School published the report *The 'Canada Brand': Violence and Canadian Mining Companies in Latin America*. The report found that from 2000 to 2015, in only 13 Latin American countries, 28 different mining companies were associated with over 1,000 human rights violations, including:

- 44 deaths related to opposition to mining projects;
- 403 injuries, of which 363 were sustained during protests; and
- 709 cases of criminalization of human rights and community groups, including arbitrary use of legal complaints, arrests, detentions and charges.[5]

To date, Canada has relied almost exclusively on voluntary approaches to prevent, address and remedy serious harms. Globally, voluntary approaches have proven to be ineffective at curbing corporate abuse.[6]

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[2] For example, Global Witness recorded that 227 land and environmental defenders were killed in 2020 – an average of more than four people a week. Over a third of the incidents were linked to natural resource extraction.

[3] For more on why building back better requires action on corporate accountability, see CNCA's 2020 letter to Minister Ng here. For examples of the increased impact on the women who make our clothes see here, and on those working or impacted by the mining sector see here.

[4] This can be done by outsourcing production, using complex supply chains and subsidiaries, or turning a blind eye to the human rights practices of their business relationships. Worse still, some companies use their influence to ensure that laws that would protect human rights and the environment are not passed, are watered down, or are not enforced. No Canadian legislation currently articulates a company's obligation to avoid, address and prevent human rights abuse. Also, barriers continue to exist for foreign plaintiffs seeking to access Canadian courts.

[5] To see the full report, which is just the "tip of the iceberg", see: https://justice-project.org/the-canada-brand-violence-and-canadian-mining-companies-in-latin-america/

[6] For example: A 2020 study commissioned by the European Commission established that voluntary measures have had only a limited impact. A 2022 report by Know the Chain "exposes the **glacial rate of** progress **on due diligence** by the world's largest companies over the last five years. On average, the 129 companies benchmarked by

Four Reasons Why Bill S-211 Misses the Mark

It is imperative that the Government of Canada move quickly to address the widespread reports of forced labour, child labour and other human rights abuses in the global operations of Canadian companies and in Canadian global supply chains. It is equally imperative that the measures implemented by the Government of Canada be effective in preventing and remedying harms. Unfortunately, the bill currently under review by the Committee will not help address these abuses and could do more harm than good.

#1 Bill S-211 only requires that companies report, it does not require any action

Bill S-211 only requires companies to report on what steps, if any, they have taken to prevent and reduce the risk of forced or child labour in their supply chains. *It does not require companies to stop using child or forced labour. It does not require companies to conduct human rights due diligence (HRDD).* As long as the company reports on what risks of forced labour they identified and any steps they took to address those risks – no matter how inadequate those steps were – the company would be in full compliance with the law. The law's reliance on consumers as enforcers of the law is unreasonable.[7]

KnowTheChain score a mere **29%** for their human rights due diligence efforts. Key findings include:

- Over a third of benchmarked companies (36%) do not show any evidence they are **assessing human rights risk** in their supply chains.
- Four out of five provide no evidence they are adopting **responsible purchasing practices** to mitigate the risk of forced labour in their supply chains.

A 2021 Responsible Mining Foundation report highlights that "the vast majority of companies assessed in the RMI Report 2020 show no evidence of translating their corporate commitments into action plans, thorough due diligence processes, and tracking the effectiveness of implementation. On average the set of large mining companies assessed in the RMI Report 2020 achieve a low 19% score on human rights-related issues."

Finally, a 2015 report Remedy Remains Rare analyzes 15 years of NCP cases and outlines the failure of the NCP system to provide relief for victims of corporate misconduct.

Employment and Social Development Canada's 2022 report *Labour Exploitation in Global Supply Chains: What We Heard Report* makes reference to several voluntary initiatives that are "relevant to tackling labour exploitation in global supply chains." None of the initiatives reduce the need for Canada to introduce comprehensive human rights and environmental due diligence legislation. Shortcomings in some of the listed initiatives are outlined in the following CNCA and member documents on:

- the introduction of the ban on the importation of goods produced with forced labour[6] (see See also CNCA's submission to the Senate at page 5, available at: https://cnca-rcrce.ca/2022/03/31/cnca-submission-to-the-senate-human-rights-committee-on-bill-s-211/)
- Canada's National Contact Point for Responsible Business Conduct for the Organization for Economic Co-operation and Development
- Canadian Ombudsperson for Responsible Enterprise[6] (Our analysis of the serious deficiencies of the CORE's mandate are available here and here. The Government of Canada's own external expert report confirming the need for the CORE to have the power to compel is available here), and
- The renewed Responsible Business Conduct (RBC) Strategy for Canadian companies

[7] Bill S-211 *does* include important investigatory powers and an offence with a fine for failure to report or for knowingly publishing a false report. However, these apply only when ascertaining whether the company accurately reported on the steps they took. Neither the investigatory powers nor the offence help to establish whether there is actually child or forced labour in company supply chains or punish companies that are profiting from abuse. Bill S-211 also does not provide for liability for harm or access to remedy for impacted people.

In addition, concerned consumers wishing to purchase goods not made by forced labour would be required to proactively look up the reports of every company they wish to purchase from to verify whether the companies are taking steps on forced labour. This is highly unreasonable.

#2 Bill S-211's enforcement mechanisms are inadequate

The bill does not help improve access to remedy nor provide any role or agency for those harmed by corporate abuse.[8] Furthermore, the fines and investigatory powers in the bill apply only to the requirement to report. There is no fine for using forced labour and no fine for failing to take any steps to identify the use of forced labour.

In addition, bill S-211 will not help ramp up enforcement of Canada's inadequately enforced import ban on goods produced by forced labour.[9] The bill only requires companies to report on what steps they are taking, it does not require them to ascertain and report on whether they are making use of forced or child labour. In other words, the reports will not help authorities to identify the presence of forced or child labour in Canadian supply chains.

#3 Bill S-211 fails to address other egregious and interrelated human rights abuses

Modern slavery cannot be looked at in isolation. The UN Guiding Principles on Business and Human Rights (UNGPs) clearly stipulate that human rights are interrelated, interdependent and indivisible. It is impossible to effectively prevent forced labour, without also protecting other human rights, like the right to non-discrimination or to organize collectively. The violation of one right often contributes to the violation of another. While it is vital that Canada take action to address forced and child labour, our actions should not exclude other prevalent human rights violations.

#4 Bill S-211 will quash momentum towards an effective government response

By creating the appearance of government action to end modern slavery, the evidence is that S-211 will dampen calls for an effective, meaningful response. To date, in jurisdictions where modern slavery reporting laws exist, effective corporate accountability legislation has not followed. Civil society actors report that government willingness to discuss needed corporate accountability reforms has been tempered by such "symbolic" laws.

[8] The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the UN Guiding Principles on Business and Human Rights (UNGPs). Several UN treaty monitoring bodies have called on Canada to do more to facilitate access to judicial remedy in Canada for victims of Canadian corporate abuse abroad. Bill S-211 does not provide any role for those harmed by corporate abuse, require companies to consult with rights-holders or help eliminate the barriers faced by foreign plaintiffs seeking to access Canadian courts.

[9] Since July 2020 and the coming into force of the Canada-United States-Mexico Agreement (CUSMA), Canada's Customs Tariff Act prohibits the import of goods made, manufactured or produced in whole or in part by forced labour. Bill S-211 proposes the extension of the import ban to goods made with child labour. However, there is evidence that only a single shipment has been excluded from import as a result of the ban, that that shipment was subsequently released, and that enforcement remains a challenge.
Furthermore, even if effectively enforced, the import ban would not address the mining sector, which is linked to serious human and labour rights violations and environmental damage worldwide. Canadian mining companies operating overseas do not generally import the minerals they extract into Canada. This is corroborated by the testimony of Ben Chalmers of the Mining Association of Canada, at the February 7, 2022 hearing of the Senate Standing Committee. An import ban would have no impact on the global operations and supply chains of those Canadian companies.

As currently drafted, S-211 advances none of the essential elements of an effective supply chain law. It requires only that companies report *whether* they have tried to reduce or prevent forced and child labour. At best, the bill is meaningless as it will not improve the situation for those harmed in Canadian supply chains. At worst, the bill is damaging because it creates the appearance of action to end modern slavery, without actually having any such effect.

Furthermore, because it is already well-known that modern slavery reporting laws are ineffective, Canadian businesses will not benefit from reduced reputational risk and the level playing field that accompanies *effective* regulation - like that advanced in France, Germany and the Netherlands.

Canada's import ban is not enforced, and S-211 won't help improve enforcement

While the U.S. Customs and Border Protection (CBP) banned goods produced in some of Top Glove's Malaysian subsidiaries in July 2020, under the suspicion that goods were being made by forced labour,[10] and in March 2021 found that Top Glove was indeed using forced labour,[11] Canada never followed suit. Canadian companies have continued to import gloves from at least one Malaysian Top Glove factory.[12] Since 2018, at least 18 companies, including Medline Canada and Superior Glove,[13] have imported into Canada goods from Top Glove and its subsidiaries.[14]

Canada has also continued to allow the importation of goods from Supermax Corporation, another Malaysian manufacturer alleged to use forced labour despite the U.S. enforcing the ban on imports for the same factory.[15]

[10] Lee, Liz. Amid virus crisis, U.S. bars imports of Malaysia's Top Glove over labour issues. *Reuters*, July 16, 2020. https://www.reuters.com/article/us-top-glove-usa/amid-virus-crisis-us-bars-imports-of-malaysias-top-glove-over-labor-issues-idUSKCN24H0K2 Accessed January 22, 2022

[11] Reuters. U.S. Customs says forced labour used at Malaysia's Top Glove, to seize gloves. *Reuters*, March 29, 2021. https://www.reuters.com/world/asia-pacific/us-customs-determines-forced-labour-malaysias-top-glove-seize-gloves-2021-03-30/Accessed January 22, 2022.

[12] A review of U.S. import database Panjiva shows various Canadian companies importing from Top Glove Sdn Bhd, whose parent company is Top Glove Corporation Bhd, according to Panjiva. (see Panjiva.com.)

[13] CBC Marketplace. The truth about your lifesaving PPE. January 15, 2021. See list at 15 minutes 16 seconds. https://www.cbc.ca/news/marketplace/the-truth-about-your-lifesaving-ppe-1.5874589 Accessed January 22, 2022. Above Ground. Creating Consequences: Canada's moment to act on slavery in global supply chains. June, 2021. P. 10. https://aboveground.ngo/wp-content/uploads/2021/06/Above-Ground-forced-labour-report-June-2021.pdf Accessed January 4, 2022. Also see Above Ground. Report finds high risk of slavery in Canadian supply chains, calls for stricter import controls and new due diligence law. Press release, June 2021. https://aboveground.ngo/report-finds-high-risk-of-slavery-in-canadian-supply-chains/ Accessed January 4, 2022

[14] Above Ground. Creating Consequences: Canada's moment to act on slavery in global supply chains. June, 2021. P. 10. https://aboveground.ngo/wp-content/uploads/2021/06/Above-Ground-forced-labour-report-June-2021.pdf

[15] Ananthalakshmi, A. U.S. bars Malaysian glove maker Supermax over alleged labour abuses. *Reuters*. October 21, 2021. https://www.reuters.com/world/us-bars-malaysian-glove-maker-supermax-over-alleged-labour-abuses-2021-10-21/

Detailed analysis of the key elements of effective supply chain legislation

Element 1. Prevention: Canadian supply chain legislation should require companies to prevent human rights and environmental harms and to undertake due diligence. Global evidence demonstrates that legislation that only requires company reporting does not work.

➔ It is long past time for Canada to require companies to prevent profiting from harm

It has been thirteen years since Canada introduced its first Corporate Social Responsibility Strategy, and ten years since the unanimous endorsement of the UNGPs, yet there continue to be widespread reports of serious human rights abuses and environmental damage linked to the overseas activities of Canadian companies and supply chains.

For at least a decade multiple UN bodies have been calling on Canada to act to address these harms. So has the Inter-American Commission on Human Rights, which has held special hearings on the impacts of Canadian mining companies in Latin America.[16] Canadian parliamentarians have heard from numerous people harmed by Canadian corporate abuse[17] and have issued important recommendations.[18] Furthermore, Latin American organizations and partners have repeatedly called on Canada to move beyond voluntary measures to ensure their rights are respected.[19] To respond to serious human rights and environmental harms with anything short of a duty to prevent is unreasonable. Measures that require companies to report, without also requiring that they take steps to prevent harm, are patently inadequate.

➔ Experience shows that legislation centred on reporting fails to curb abuse

"Public disclosure is critical, but on its own it is not sufficient to drive meaningful, broad and lasting change, as evidenced from other jurisdictions."

➔ - 2019 Canadian Civil Society Consensus Starting Points

The UK's 2015 *Modern Slavery Act*, which centers on reporting requirements, failed in its objective to protect victims of forced labour. When it closed its Modern Slavery Registry in 2020, the Business & Human Rights Resource Centre reported on the impact of five years of company reporting under the UK Act. The registry "revealed no significant improvements in companies' policies or practice,"

[16] http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=137&page=2

[17] CNCA members have organized speaking tours and MP meetings, and human rights defenders impacted by Canadian businesses have testified before multiple international human rights parliamentary subcommittees between 2005 and 2021.

[18] Many of the 2005 recommendations from the international human rights subcommittee found in this report https://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14 remain relevant today. This includes the recommendation to such as to "Establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies." In 2020 and 2021, the subcommittee has recommended that Canada introduce comprehensive mandatory human rights due diligence legislation, including in response to the situation of the Uyghurs in Xinjiang.

[19] For some of these letters see: https://cnca-rcrce.ca/campaigns/ombuds-power2investigate/calls-to-action-from-around-the-world/

and that the Act had "failed to be an effective driver of corporate action to end forced labour, even in high-risk sectors and regions."

Similarly, Australia's 2019 *Commonwealth Modern Slavery Act* established a national Modern Slavery Reporting Requirement. The 2022 Human Rights Law Centre's report *Paper Promises? Evaluating the Early Impact of Australia's Modern Slavery Act* provides an in-depth review of the first modern slavery reports published by 102 Australian companies sourcing from four sectors with known modern slavery risks and found that:

- 77% of companies failed to comply with the mandatory reporting requirements;
- 52% of companies failed to identify obvious modern slavery risks in their operations or supply chains; and
- a mere 27% of companies appear to be taking any effective action to address modern slavery risks.

Requiring companies to report, but not requiring them to undertake due diligence nor provide access to remedy to impacted communities is also inconsistent with the UNGPs.

United Nations Working Group on the failure of modern slavery reporting laws

"There is significant evidence that both (the Australian and UK modern slavery laws) have really failed to address this gross situation of modern slavery. There is plenty of evidence and research indicating that. So why should any country at this point of time in 2022 follow a very defective model of regulation when far superior models of regulation are emerging out of Europe in terms of comprehensive human rights due diligence."[20]

➔ Comprehensive human rights and environmental due diligence legislation is the better path forward

The CNCA recommends that Canada introduce legislation that will help to prevent, address, and remedy adverse human rights and environmental impacts connected to the business activities of Canadian companies abroad. The legislation should create an obligation on companies to prevent harm and to implement human rights due diligence procedures. It should also provide for liability – and access to remedy – if a company fails to fulfil those obligations. In May 2021 the CNCA published model legislation that provides Canadian lawmakers with a blueprint for writing into Canadian law precisely such legislation.[21] For the CNCA, strong legislation must:

1. establish a corporate duty to prevent adverse human rights impacts and environmental damage outside Canada, throughout their business relationships.

[20] Surya Deva, UN Working Group on Business and Human Rights, March 28 2022 testimony at the Senate Standing Committee on Human RIghts study on bill S 211. Free transcription from video.

[21] The model legislation, *The Corporate Respect for Human Rights and the Environment Abroad Act (Corporate Respect for Human Rights Act),* is available here and the executive summary here.

This means that a company would need to proactively ensure it is neither encouraging human rights abuse or environmental damage in its supply chains, nor turning a blind eye to negligent or harmful practices of its business relationships. Companies would no longer be able to avoid their responsibility to respect human rights by outsourcing, operating through subsidiaries or remaining wilfully blind to the human rights and environmental impacts of their supply chains.

As a result, companies would be required to ensure that they – along with their affiliates (e.g. controlled subsidiaries) – *avoid* causing adverse human rights and environmental impacts in their overseas operations. In addition, companies would be required to take steps to *prevent* adverse human rights and environmental impacts caused or contributed to by their business relationships (e.g. their subcontractors or suppliers). They would be required to address any impacts they failed to avoid or prevent.

2. establish a corporate duty to develop, implement, consult and report on adequate human rights and environmental due diligence procedures.

The purpose of human rights and environmental due diligence is to prevent and avoid adverse human rights and environmental impacts. Canadian legislation should require companies to develop and implement adequate due diligence procedures, consult with rights-holders in the development and implementation of these procedures, and report annually. Companies should be required to develop and implement due diligence procedures with respect to their own activities, as well as with respect to their affiliates and business relationships.

Canadian legislation should make clear the minimum due diligence procedures that a company is required to undertake while also making reference to the extensive due diligence guidance that has been developed to assist companies in fulfilling their responsibilities.[22] The legislation could indicate that further direction may be articulated through regulations – such as with respect to auditing procedures; applicable standards applying to specific sectors, or to entities of particular sizes. The legislation should stipulate that the regulations will be subject to committee review in both Houses of Parliament.

Required minimum due diligence procedures should include:

- identifying and assessing real and potential adverse impacts;
- ceasing and remedying existing adverse impacts;
- mitigating risks of adverse impacts;
- monitoring the implementation and effectiveness of the measures adopted to address adverse human rights impacts;
- a mechanism to provide an alert to the entity of possible adverse effects on or risks to human rights; and
- documenting due diligence efforts.

[22] For example, from the United Nations and the OECD Guidelines for MNEs. Further, Canada's National Contact Point for the OECD Guidelines, Global Affairs Canada's Responsible Business Conduct Unit and the Canadian Ombudsperson for Responsible Enterprise are all tasked with supporting and advising companies regarding this guidance.

➔ **Corporate duty to prevent legislation will help Canada fulfil the UNGPs**

Canadian supply chain legislation that includes the elements proposed by the CNCA would help Canada fulfil its international human rights obligations.

For over a decade, Canadian companies have been expected to respect human rights throughout their global operations.[23] It is time for that expectation to be translated into an enforceable legal obligation. Transformation of the expectation that companies will voluntary respect human rights and undertake due diligence into a binding obligation is not onerous for businesses. Those companies who are already taken steps to respect human rights will welcome such legislation. Those who are seeking to profit off of abuse may not, as effective legislation could mean an end to impunity for involvement in abuses.

The corporate responsibility to respect human rights is outlined in principle 13 of pillar 2 of the UNGPs.

The UN Working Group explains the significance of the UNGPs and due diligence

"The unanimous endorsement of the Guiding Principles on Business and Human Rights by the United Nations Human Rights Council in 2011 represented a watershed moment in efforts to tackle adverse impacts on people resulting from globalization and business activity in all sectors. They provided, for the first time, a globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address such impacts.

The UNGPs clarify that all business enterprises have an independent responsibility to respect human rights, and that in order to do so they are required to exercise human rights due diligence to identify, prevent, mitigate and account for how they address impacts on human rights.

Human rights due diligence is a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved. It involves four core components:

(a) Identifying and assessing actual or potential adverse human rights impacts that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
(b) Integrating findings from impact assessments across relevant company processes and taking appropriate action according to its involvement in the impact;
(c) Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working; and
(d) Communicating on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place…

The prevention of adverse impacts on people is the main purpose of human rights due diligence.

[23] See, for example, Canada's Corporate Social Responsibility Strategy at https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng.

It concerns risks to people, not risks to business. It should be ongoing, as the risks to human rights may change over time; and be informed by meaningful stakeholder engagement, in particular with affected stakeholders, human rights defenders, trade unions and grassroots organizations. Risks to **human rights defenders** and other critical voices need to be considered.[24]

Due diligence is the primary expectation of behaviour for any business with respect to its responsibilities concerning the adverse impacts on human rights that it causes, contributes to or to which it is directly linked … (and) …. is therefore fundamental as a way of informing what any business enterprise should do to meet its responsibility to respect human rights. It goes well beyond the idea of doing no harm. The concept of corporate respect, as set forth in the Guiding Principles, requires proactive steps to prevent and address harmful impacts.[25]"

Element 2. Enforcement and Remedy: Canadian legislation should include meaningful consequences for companies that fail to prevent human rights violations and should help ensure access to remedy for impacted communities and workers.

The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the UNGPs. Several UN treaty monitoring bodies have called on Canada to do more to facilitate access to judicial remedy in Canada for victims of Canadian corporate abuse abroad.[26] Canadian supply chain legislation should establish meaningful consequences for failure to prevent serious human rights impacts and/or failure to undertake adequate due diligence. It should also assist impacted communities and workers to access effective remedy in Canadian courts.

This requires that the legislation include the following two mechanisms:

- civil liability for harms and/or the failure to do due diligence; and
- a commissioner empowered to enforced the production of due diligence reports

The legislation should establish a statutory right of action to bring a suit to a Canadian court. It should ensure that if a company, its subsidiary, its subcontractor or its supplier causes a serious adverse human rights impact, the company could be sued in a Canadian court. The legislation should empower the court to order an injunction, payment for damages/losses, punitive damages, rehabilitation or specific performance, legal costs, or a combination thereof. Impacted communities should have a statutory right to file a motion for the company to be ineligible for future government supports, or for existing supports to be withdrawn.[27]

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[24] https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx

[25] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement

[26] See Appendix A, page 9, in the CNCA's Submission to the Senate Standing Committee on Human Rights, available at: https://cnca-rcrce.ca/2022/03/31/cnca-submission-to-the-senate-human-rights-committee-on-bill-s-211/

[27] Section 27 of CNCA's model law outlines that this could include "eligibility for support, subsidy, promotion or protection by any or all government agencies or departments" and it provides that the court could order the withdrawal of support or disallowance of future support for a stipulated period, or until specified conditions are met.

The CNCA's model legislation included a limited defence that would allow a company to seek to avoid a court order by establishing they have developed and implemented effective due diligence procedures to prevent harm. The CNCA's model sets out factors for the court to consider in making this determination.[28] These factors would incentivize companies to undertake effective due diligence procedures. The inclusion of this limited defence emphasizes the prevention of harm objective of such legislation.

Additionally, the Canadian supply chain legislation should provide that interested parties – such as civil society organizations – could file suit against a company in Canadian court if the company failed to develop and implement adequate due diligence procedures. This will help ensure that interested parties do not need to wait for harm to occur, but could instead take pre-emptive action to prevent harm from occurring.

These mechanisms would ensure that the Canadian supply chain legislation overcomes shortcomings in such proposals as Senate Bill S-211, which the CNCA has criticised for not providing any agency to those harmed by corporate abuse, not requiring companies to consult with rights-holders and not helping eliminate the barriers faced by foreign plaintiffs seeking to access Canadian courts.[29]

Finally, the Canadian supply chain legislation should create a commissioner role to enforce the publication of annual reports. The Commissioner should be mandated to maintain a website where the annual reports are published and to ensure that the reports include content relating to all of the required business relationships. Investigatory powers pursuant to the *Inquiries Act* would be required to fulfil this aspect of the Commissioner's mandate. Interested parties should be able to submit commentary to these company reports and request the commentary be published on the Commissioner website.

[28] The model law states that "In determining whether an entity exercised effective due diligence the court may consider the extent of adherence to relevant standards of conduct (set in regulations or outlined in the entity's public communications); whether the impact was or should have been identified as a risk in due diligence procedures, adequacy of steps taken (having regard to company's size), history of adverse impacts (and any subsequent due diligence procedure improvements), any incentives the company created for improving human rights standards in its supply chains."

[29] Some of the existing barriers are outlined here: https://cnca-rcrce.ca/2019/03/26/why-is-it-difficult-for-victims-to-access-canadian-courts/

How civil liability helps prevent harm and ensure access to remedy

Risk management is an important business practice taken very seriously by corporate management, governance bodies and investors. When anti-bribery and corruption legislation was first introduced around the world, many corporations moved to significantly more robust corruption risk identification and mitigation strategies. In the same way, establishing civil liability in Canada for human and environmental harms primarily acts as a concrete incentive for a business to internalize its responsibility to prevent harm, and to put adequate procedures in place. The expected response to Canadian supply chain legislation is that companies will enhance their attention to such risks of harm and change their behaviour without rights-holders having to regularly seek recourse in Canadian courts.

When companies are aware that they *could* be held liable, management, boards and investors are incentivized to pay attention to such risks, and to ensure steps are taken to prevent adverse human rights and environmental impacts. The requirement to consult with rights-holders on an ongoing basis means that significant risks are more likely to be identified, and companies are alerted early on if their mitigation measures are inadequate. A provision in the legislation that can defend against liability by demonstrating adequate due diligence, enhances the incentive to ensure such diligence is undertaken.

All of these factors help ensure that communities and workers are not harmed in the first place. They would also help ensure access to remedy if harm does occur.

Element 3. Human Rights: The scope of Canadian supply chain legislation should cover all human rights and not be limited to forced labour.

Canada's supply chain legislation should not be limited in scope to a specific human right. The legislation should articulate companies' responsibility to respect all human rights. Human rights should be defined in the legislation by reference to internationally-recognized human rights instruments. These include the nine core international human rights treaties[30], the eight core international labour conventions[31] and the United Nations Declaration on the Rights of Indigenous Peoples. Furthermore, the legislation should make specific reference to the human right to a healthy, safe and sustainable environment.

[30] These are: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities, and the International Convention for the Protection of All Persons from Enforced Disappearance.

[31] These are: the Freedom of Association and Protection of the Right to Organise Convention 1948, the Right to Organise and Collective Bargaining Convention 1949, the Forced Labour Convention 1930, the Abolition of Forced Labour Convention 1957, the Minimum Age Convention 1973, the Worst Forms of Child Labour Convention 1999, the Equal Remuneration Convention 1951, and the Discrimination (Employment and Occupation) Convention 1958.

Forced labour cannot be looked at in isolation. The UNGPs clearly stipulate that human rights are interrelated, interdependent and indivisible. It is impossible to effectively prevent forced labour, without also protecting other human rights, like the right to non-discrimination or to organize collectively. The violation of one right often contributes to the violation of another.

While it is vital that Canada take action to address forced labour, our actions should not exclude other prevalent human rights violations. Allegations of sexual violence, bodily harm and killings linked to the operations of Canadian mining companies are widespread and several lawsuits have been filed in Canadian courts.[32] The collapse of the Rana Plaza garment factory in Bangladesh killed 1,132 people and brought to light the occupational health and safety violations that injure and kill workers on a daily basis. Several Canadian brands sourced from the factory.[33]

Legislation that covers all human rights would be consistent with emerging international best practice. For example, the French, German and Norwegian laws, as well as the Dutch, Austrian and Belgian law proposals, all apply to human rights broadly and are not limited to forced labour.[34] Importantly, there are several examples of countries with laws focused solely on modern slavery or child labour that are now expanding to these laws to include other rights. This is the case in the Netherlands, where the Dutch Foreign Trade and Development Minister announced that the Dutch government will propose a national law on mandatory human rights and environmental due diligence to replace its child labour due diligence law.[35] In the UK, there is an active campaign which has been endorsed by nearly 40 companies and investors including Microsoft, Nestlé and Unilever, calling for a UK mandatory human rights due diligence law, a tacit acknowledgement that the UK modern slavery reporting law is ineffective. In his March 28, 2022 testimony to the Senate Standing Committee on Human Rights, Surya Deva of the United Nations Working Group on Business and Human Rights confirmed this would also be necessary for Canada's future supply chain law to be consistent with the UNGPs.[36]

This approach would also be consistent with the Canadian Minister of Labour's mandate letter which directs the minister to "introduce *legislation* to eradicate *forced labour* from Canadian supply chains *and* ensure that Canadian businesses operating abroad do not contribute to *human rights abuses*." (emphasis added)

Finally, this approach is consistent with Canada's feminist foreign policy goals. A country's foreign policy is not limited to the actions of state institutions, such as its embassies and armed forces. The international operations and business dealings of Canadian companies have a significant impact on Canada's efforts to advance its interests and feminist values in the world. Canada's mining sector is active in at least 100 countries, and Canadian retailers and manufacturers import apparel, footwear

[32] For more on this see https://aboveground.ngo/wp-content/uploads/2021/02/Cases_12Jan2021.pdf.
[33] For more on links to Canadian brands see: https://www.business-humanrights.org/en/latest-news/what-have-canadian-firms-done-since-rana-plaza/
[34] The European Coalition on Corporate Justice's comparative chart of mHREDD laws in Europe is available at: https://corporatejustice.org/wp-content/uploads/2022/03/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-March-2022.pdf
[35] On November 1, 2022 six political parties in the Netherlands submitted such a bill to the Dutch House of Representatives. https://www.mvoplatform.nl/en/six-political-parties-in-the-netherlands-submit-corporate-accountability-bill/
[36] https://www.ohchr.org/sites/default/files/2022-03/Statement_Bill_S211_Deva.pdf

and other consumer products from every continent, from a workforce largely dominated by women. Without proper oversight of private sector activities and incentives to advance gender equality throughout global operations, the Canadian government risks policy incoherence, dissonance and sets back its feminist foreign policy objectives.

Addressing corporate abuse is a feminist issue

Canadian companies are heavily invested in Peru's mining and oil and gas sectors. However, research[37] by Oxfam and the national Indigenous women's organization of Peru, ONAMIAP, reveals that Indigenous women are often excluded from important decisions over natural resources that affect their lives and rights. Canada's reliance on voluntary corporate social responsibility measures have proven ineffective and contrary to the advancement of feminist natural resource governance internationally.[38] Women's rights organizations and land defenders are also too often excluded or marginalized and in the worst cases, face grave risks and threats to their lives or those of their family members and colleagues for their work.

The purchasing practices of Canadian and global fashion brands are also important to consider. Unfair purchasing practices such as aggressive price negotiations on cost and schedules have a direct and disproportionate impact on women by keeping wages low and forcing factories to cut corners therefore placing workers at risk.[39] High impact sectors must identify all risks, especially those where adverse impacts are highest, where marginalized groups, such as women, are most present, such as the garment sector, and where the need for intervention is greatest.

Furthermore, beyond Canada's self-declared goal of applying feminist approaches to policy and governance, Canada has international human rights obligations, such as before the UN Committee on the Elimination of Discrimination against Women (CEDAW). During Canada's most recent review, experts charged that Canada has been supporting and financing mining companies facing allegations of links to discrimination, rape and violence against women in their operations abroad.[40] The CEDAW 8th and 9th periodic reports concluded that Canada must strengthen legislation to ensure Canadian corporations operating abroad do not negatively impact women's human rights and undertake gender based impact assessments, facilitate access to remedy and justice and ensure primacy of human rights over investor interests.[41]

[37] ONAMIAP. (2018). *Consulta Previa: una demanda de las mujeres indígenas del Perú*. http://onamiap.org/wp-content/uploads/2019/01/CP-Una-demanda-de-las-Mujeres-indigenas.pdf

[38] Oxfam, et al. (2020). *Articulating Feminist Natural Resource Governance to Herald a Just Transition.* https://www.pwyp.org/wp-content/uploads/2020/10/ENDORSED_Feminist-Natural-Resource-Governance-Agenda-for-the-Action-Coalition-on-Economic-Justice.pdf

[39] For more on this see Oxfam Australia's Report on the impact of purchasing practices on women workers in Bangladesh: https://www.oxfam.org.au/shoppingforabargain/.

[40] For example, see MiningWatch Canada's submission: https://miningwatch.ca/news/2016/10/4/report-un-committee-canada-complicit-mining-companies-pervasive-abuses-against-women

[41] These reports are available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2f8-9&Lang=en

Element 4. Broad scope: Canadian companies of all sizes from all sectors should be required to respect human rights in their global operations. Any flexibilities for small businesses in low-risk contexts should be outlined in regulations.

Internationally recognized guidelines, including the UNGPs and the OECD Guidelines for Multi-National Enterprises Due Diligence Guidance for Responsible Business Conduct (OECD Guidance for RBC) clearly stipulate that all companies, regardless of size, sector, or where the company operates, have a responsibility to respect human rights and to implement human rights due diligence.

For example, the OECD Guidance for RBC acknowledges the challenges that may be experienced by small and medium sized enterprises, while acknowledging their responsibilities: "the size or resource capacity of an enterprise does not change its responsibility to conduct due diligence commensurate with the risk, but may affect how an entity carries it out."[42]

The Government of Canada has an opportunity to demonstrate global leadership by establishing measures that capture companies of all sizes. Many European jurisdictions are advancing due diligence laws with thresholds that observers have criticised as too high. For example, the UN Working Group on Business and Human Rights recently criticised the threshold in the February 2022 draft European Union directive on corporate sustainability due diligence: "[T]he blanket exclusion of a large proportion of business entities, means that there is not as of yet a full ambition of levelling the playing field. To exclude key actors, and to not approach this in a way that will include all businesses within a foreseeable time, means that this endeavour becomes incomplete and may encourage other jurisdictions to follow suit."[43]

The Canadian context provides a further rationale for obligations to apply to companies of all sizes. More than 50% of mining companies in the world are headquartered in Canada. There are high risks of human rights and environmental harms associated with the mining sector.[44] Junior mining and exploration companies can be small operations, yet they can have significant impacts on rights-holders.[45] According to the UN's 2016 figures, extractive projects, including mining, generate by far the largest proportion of claims of business-related human rights violations against human rights defenders.[46]

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[42] https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf

[43] Remarks on behalf of the Working Group by UNWG member Anita Ramisastry, March 2 2022, available at https://www.ohchr.org/sites/default/files/2022-03/20220302-WG-remarks.pdf.

[44] In his first interim report to the Commission on Human Rights, John Ruggie, then UN Special Representative on Human Rights and business, recognized that "The extractive sector is unique because no other has so enormous and intrusive a social and environmental footprint." http://hrlibrary.umn.edu/business/RuggieReport2006.html

[45] For example, the Due Process of Law Foundation's report on the impact of Canadian mining in Latin America highlights that there were more than 100 Canadian headquartered junior mining companies operating in Peru in 2012 and that those companies are often involved in exploration. https://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf. Risks in the exploration phase are also highlighted here: https://www.ihrb.org/uploads/reports/2013%2C_IHRB_Report%2C_Human_Rights_Risks__Responsibilities_of_Oil__Gas_Exploration_Companies_in_Kenya.pdf

[46] Michel Forst, Report of the Special Rapporteur on the situation of human rights defenders, 3 August 2016, p. 9. Available at: undocs.org/A/71/281.

The CNCA recommends that Canadian supply chain legislation apply to:

- companies domiciled in Canada; and
- companies that sell goods or services in Canada if they also have a physical connection to Canada.

The CNCA further recommends that Canadian supply chain legislation should not have a size threshold. Instead, it could provide that regulations may exempt certain companies (based on revenue, number of employees or sector) from the application of the legislation. This approach, which relies on sector-specific size thresholds rather than a single size threshold, recognizes the particularities of the Canadian context, while also recognizing that it would be reasonable to exempt small businesses from some low-risk sectors from all or part of the law's application, without undermining the principle that all companies must respect human rights.

The CNCA does not recommend that Canada take a phased-in approach. Canadian companies have been receiving guidance on how to respect human rights for many years. Canadian offices have been mandated to provide guidance to companies operating outside Canada since 2000,[47] to Canadian extractive sector companies since at least 2009,[48] and to the garment sector since at least 2019.[49] Given the particular risks of harm in the mining sector, and the extensive government guidance and support to this sector, a phased-in approach to the legislation's application to that sector would be particularly difficult to justify.

5. Additional element to complement legislation: Canada should provide financial and other supports to assist impacted communities and workers in knowing and defending their rights, and in accessing remedy.

In line with CNCA's recommendations for the 2020 consultation on Canada's Corporate Social Responsibility Strategy, we recommend that funding envelopes be made available to enable human rights defenders, workers and community leaders to effectively document corporate human rights abuse and make use of available grievance mechanisms, including in Canada. The money generated from fines issued to companies for their failure to report should be directed to these envelopes.

The funding envelopes should be used to

- provide trainings to human rights defenders and impacted communities on how to effectively document corporate human rights abuse, ensuring a significant portion of those trainings are led by other rights-holders:
- enable rights-holders to document human rights abuses, including through the hiring of technical experts; and
- enable rights-holders to bring complaints in national and international fora.[50]

[47] E.g. this is part of the mandate of the National Contact Point for the OECD -- established in Canada in 2000.
[48] Guidance to companies on mitigating risks and enhancing CSR performance are central features of Canada's CSR Strategy, which was first introduced in 2009 https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng.
[49] The Canadian Ombudsperson for Responsible Enterprise is also tasked with advising companies in the garment, mining, oil and gas sectors.
[50] These and other recommendations are outlined in CNCA's 2020 submission to Canada's CSR strategy consultations.

Annex 1:

United Nations commentary calls on Canada to facilitate access to remedy

Canada's failure to regulate and ensure access to remedy for harms associated with Canadian business activity overseas is inconsistent with Canada's international human rights obligations and has attracted the attention of the United Nations. For example, from 2007 to 2016, at least four United Nations treaty monitoring bodies called attention to human rights violations by Canadian extractive companies overseas and called on the Canadian government to take steps to prevent abuses and facilitate access to justice and remedy.

In **November 2016, the International Committee on the Elimination of Discrimination Against Women,** at paragraphs 18 and 19, expressed concern about violations of the rights of women and girls by Canadian mining companies operating abroad and recommended that Canada "strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in relation to their activities abroad, including by requiring those corporations to conduct human rights and gender impact assessments before making investment decisions" and "adopt measures to facilitate access to justice for women who are victims of human rights violations and ensure that judicial and administrative mechanisms put in place take into account a gender perspective." CEDAW concluding observations.

In **March 2016, the International Committee on Economic, Social and Cultural Rights**, at paragraphs 15 and 16, highlighted the need for Canada to introduce an independent mechanism for complaints, to facilitate access to Canadian courts, and to ensure trade and investment agreements recognize the primacy of human rights. ICESC concluding observations.

In **July 2015, the United Nations Human Rights Committee** Report, at paragraph 6, called on Canada to: "enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad." UNHRC report.

In **2007 and 2012 the United Nations Committee on the Elimination of All Forms of Racial Discrimination** recommended that Canada "take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of Indigenous peoples outside Canada, and hold them accountable." In 2012, the Committee expressly stated that Canada's CSR Strategy did not fulfill this recommendation: CERD concluding observations.

Annex 2:

Additional materials and previous submissions

- CNCA's model legislation full text and executive summary
- 2019 Civil society consensus starting points on possible supply chain legislation
- CNCA submission to the Senate Standing Committee on Human Rights' study of Bill S-211
- CNCA member submissions to the House of Commons Subcommittee on International Human Rights' 2017 study on child labour and modern slavery
    - Canadian Labour Congress
    - Amnesty International Canada and
    - Human Rights Watch Canada
- CNCA member reports on forced labour:
    - Above Ground's 2021 report *Creating Consequences: Canada's Moment to Act on Forced Labour*
    - Centre international de solidarité ouvrière 2020 report on preventing forced labour in Canadian food supply chains
- Canadian Parliamentary (sub) Committees recommendations that Canada introduce comprehensive human rights due diligence legislation
    - June 2021. Report of the Standing Committee on Foreign Affairs and International Development, *MANDATE OF THE CANADIAN OMBUDSPERSON FOR RESPONSIBLE ENTERPRISE.*
    - March 2021. Report of the Standing Committee on Foreign Affairs and International Development, *THE HUMAN RIGHTS SITUATION OF UYGHURS IN XINJIANG, CHINA*
    - October 2020. *STATEMENT BY THE SUBCOMMITTEE ON INTERNATIONAL HUMAN RIGHTS CONCERNING THE HUMAN RIGHTS SITUATION OF UYGHURS AND OTHER TURKIC MUSLIMS IN XINJIANG, CHINA*
- List of CNCA Member Organizations, March 2022

CNCA member organisations

Above Ground

Africa-Canada Forum

Americas Policy Group

Amnesty International Canada

Amnistie international Canada francophone

Asia-Pacific Working Group

Association Québécoise des organismes de cooperation international

British Columbia Teachers' Federation

Canada Tibet Committee

Canadian Jesuits International

Canadian Union of Public Employees

Canadian Journalists for Free Expression

Canadian Labour Congress

Centre de solidarité ouvrière (CISO)

CoDevelopment Canada

Committee for Human Rights in Latin America

Cooperation Canada

Development and Peace – Caritas Canada

Friends of the Earth Canada

Grandmothers' Advocacy Network

Human Rights Watch

Inter Pares

KAIROS: Canadian Ecumenical Justice Initiatives

Maritimes-Guatemala Breaking the Silence Network

Maquila Solidarity Network

Mennonite Central Committee Canada

Mining Injustice Solidarity Network

Mining Justice Action Committee

MiningWatch Canada

Nobel Women's Initiative

Oxfam Canada

Peace Brigades International – Canada

Project Accompaniment Quebec Guatemala

Public Service Alliance of Canada

Regroupement pour la responsabilité sociale des entreprises

Steelworkers Humanity Fund

Social Justice Connection

Solidarité Laurentides-Amérique Centrale

Unifor

United Church of Canada