



CLAIHR

Canadian Lawyers for International Human Rights
Juristes canadiens pour les droits internationaux de la personne

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Responsible Business Practices Division
Global Affairs Canada
111 Sussex Drive
Ottawa ON K1A 0G2
RBCconsultationsCRE@international.gc.ca

Re: Responsible Business Conduct for Canadian companies abroad

The Canadian Lawyers for International Human Rights (CLAIHR) appreciates the opportunity to provide feedback on the Canadian government's strategy, Responsible Business Conduct for Canadian companies abroad [hereinafter "RBC strategy"].

CLAIHR is a federally-incorporated registered charity. It is a non-governmental organization of lawyers, law students, and legal academics, among others, founded in 1992 to promote human rights law from a Canadian perspective through education, research, and advocacy.

Canada's RBC strategy is built largely on commitments to international guidelines, voluntary self-regulation, and non-judicial dispute resolution. This voluntary approach fails to fulfill Canada's international human rights obligations, which require Canada to adopt a legal framework that ensures that Canadian corporations do not violate human rights in their overseas operations. If they do, Canada must ensure that victims have access to effective remedies in Canada.

Canadian corporations are associated with reports of human rights violations

The global operations of many Canadian corporations are associated with reports of systematic human rights violations.¹ A study from 2009 found that since 1999, Canadian mining companies have been implicated in the largest portion (34%) of 171 alleged incidents involving

¹ See e.g. Human Rights Watch, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine*, pp. 21, 43-55, 73-81 (Feb. 1, 2011) [hereinafter, "Human Rights Watch, Gold's Costly Dividend"]; International Human Rights Clinic, Harvard Law School and Center for Human Rights and Global Justice, New York University School of Law, *Legal Brief before the Standing Committee on the Foreign Affairs and International Development House of Commons Regarding Bill C-300*, pp. 11-16 (2009), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Harvard-testimony-re-Porgera-Main.pdf>; Porgera Alliance, *Landowners in Porgera Demand Urgent Resettlement* (Oct. 2011), <http://www.porgeraalliance.net/wp-content/uploads/2011/10/Urgent-Resettlement-Porgera-web.pdf>; Mining Watch Canada and RAID, *Violence Ongoing at Barrick Mine in Tanzania: MiningWatch Canada and RAID (UK) Complete Human Rights Assessment*, (Aug. 5, 2014), <http://miningwatch.ca/news/2014/8/5/violence-ongoing-barrick-mine-tanzania-miningwatch-canada-and-raid-uk-complete-human>; MiningWatch Canada, *Anger Boils Over at North Mara Mine – Barrick/Acacia Leave Human Rights Abuses Unaddressed: Field Assessment Brief*, (July 2017), https://miningwatch.ca/sites/default/files/2017_field_report_final_-_anger_boils_over_at_north_mara_mine.pdf;

CLAIHR

Email: president@claihr.ca

Charitable Registration No.: 138620257RR0001

www.claihr.ca

international mining companies in community conflict, human rights abuses, unlawful and unethical practices, or environmental degradation in a developing country.² Of these incidents, 60% involved community conflict, 40% environmental degradation, and 30% unethical behaviour.³ A 2016 report from the Justice and Corporate Accountability Project documented 44 deaths, 15 incidents of sexual violence, and 403 injuries (including brutal physical beatings and shootings), as well as 709 cases of criminalization (including legal complaints, arrests, detentions, and charges) associated with 28 Canadian mining companies operating in 13 countries in Latin America over the last 14 years.⁴ Moreover, according to the Business and Human Rights Resource Centre, Canada is among the top three countries with companies connected to reported cases of threats to human rights defenders.⁵

Canada's international human rights obligations require Canada to prevent corporations within its jurisdiction from violating human rights

Canada's RBC strategy, based largely on voluntary and non-binding commitments, is not in line with Canada's international human rights obligations. Canada is party to seven core international human rights treaties and ratified the eight fundamental conventions of the International Labour Organization.⁶ These treaties require Canada to respect, protect, and fulfill the human rights

Institute for Policy Studies, *OceanaGold in the Philippines: Ten Violations that Should Prompt its Removal*, (Oct. 31, 2018), <https://miningwatch.ca/sites/default/files/oceanagold-report.pdf>.

² Canadian Centre for the Study of Resource Conflict, *Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World*, pp. 6, 16 (Oct. 2009),

http://miningwatch.ca/sites/default/files/CSR_Movements_and_Footprints.pdf. See also Human Rights Watch, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine*, pp. 21, 43-55, 73-81 (Feb. 1, 2011) [hereinafter, "Human Rights Watch, Gold's Costly Dividend"]; International Human Rights Clinic, Harvard Law School and Center for Human Rights and Global Justice, New York University School of Law, *Legal Brief before the Standing Committee on the Foreign Affairs and International Development House of Commons Regarding Bill C-300*, pp. 11-16 (2009), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Harvard-testimony-re-Porgera-Main.pdf> [hereinafter, "Legal Brief Re: Bill C-300"]; Harvard Law School, International Human Rights Clinic and Columbia Law School, Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned*, pp. 23-26 (Nov. 2015),

<http://static1.squarespace.com/static/562e6123e4b016122951595f/t/565a12cde4b0060cdb69c6c6/1448743629669/Righting+Wrongs.pdf> [hereinafter, "Righting Wrongs"]; Porgera Alliance, *Landowners in Porgera Demand Urgent Resettlement* (Oct. 2011), <http://www.porgeraalliance.net/wp-content/uploads/2011/10/Urgent-Resettlement-Porgera-web.pdf> [hereinafter, "Landowners Demand Urgent Resettlement"].

³ Canadian Centre for the Study of Resource Conflict, *Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World*, pp. 6, 16

⁴ Justice and Corporate Accountability Project, *The "Canada Brand": Violence and Canadian Mining Companies in Latin America*, pp. 4, 12 (Nov. 2016), <https://ssrn.com/abstract=2886584> [hereinafter, "JCAP, The Canada Brand"].

⁵ U.N. Office of the High Commissioner for Human Rights, *Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights* (June 1, 2017),

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>

⁶ U.N. Office of the High Commissioner for Human Rights, *Ratification Status for Canada*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=31&Lang=EN; International Labour Organization, *Ratifications for Canada*,

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102582. The seven treaties are: International Covenant of Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination against Women, International Convention on All

guaranteed by the respective treaty.⁷ These obligations apply to situations “outside the national territory in situations over which States parties may exercise control.”⁸ Canada’s obligations to prevent human rights violations include ensuring that corporations under its jurisdiction, including those incorporated, headquartered, or with a principal place of business in Canada, do not violate human rights.⁹

i. Canada’s RBC does not meet international human rights obligations because it is primarily based on voluntary initiatives

Canada cannot meet its international human rights obligations through a strategy primarily built on voluntary actions. In addressing the relationship between voluntary actions and initiatives and a state’s legal obligations, the Committee on the Rights of the Child explains: “States should encourage such voluntary actions and initiatives as a means to create a business culture which respects and supports children’s rights. However, it should be emphasized that such voluntary actions and initiatives are not a substitute for State action and regulation of businesses in line with obligations under the Convention and its protocols... .”¹⁰

Voluntary systems have failed to protect the rights of individuals and communities impacted by transnational corporations. Canada’s RBC promotes participation in industry standards and certification programs governed through multi-stakeholder initiatives (MSIs), such as the Voluntary Principles on Security and Human Rights. However, a recent report, built on a decade of research and analysis into standard-setting MSIs found that they have failed. They are “not

effective tools for holding corporations accountable for abuses, protecting rights holders against human rights violations, or providing survivors and victims with access to remedy. While MSIs

Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.

⁷ See Comm. on Economic, Social and Cultural Rights, *General Comment 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, U.N. Doc E/C.12/GC/24 (23 June 2017) at para. 10 [hereinafter CESCR, *General Comment 24*].

⁸ CESCR, *General Comment 24* at para. 10. See also paras. 26-32. See also Comm. Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28, (Oct. 19, 2010), at para. 36 [hereinafter CEDAW, *General Recommendation 28*].

⁹ See e.g. Human Rights Comm., *General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights on the Right to Life*, U.N. Doc CCPR/C/GC/36 (30 October 2018) at paras 21-22 [hereinafter HRC, *General Comment 36*]; Human Rights Comm., *General Comment 31: the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) at para. 8 [hereinafter, *General Comment 31*]; Human Rights Comm. *General Comment No. 31: Article 19: freedoms of opinion and expression*, U.N. Doc. CCPR.C.GC.34 (Sept. 12, 2011) at para. 7; CESCR, *General Comment 24* at paras 25-28; Comm. on the Elimination of All Forms of Discrimination against Women, *General Recommendation 34 (2016) on the Rights of Rural Women*, U.N. Doc CEDAW/C/GC/34 (4 March 2016) at para 13; CEDAW, *General Recommendation 28* para. 37(b). Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UNCESCR, 46th Sess, U.N. Doc E/C.12/2011/1 (20 May 2011) at paras 4-6; Committee on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights*, U.N. Doc CRC/C/GC/16 (17 April 2013) at paras 44–46 [hereinafter CRC, *General Comment No. 16.*]; Comm. on the Elimination of All Forms of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Sweden*, U.N. Doc CEDAW/C/SEW/CO/8-9 (2016) at para 35.

¹⁰ CRC, *General Comment No. 16* at para. 10.

can be important and necessary venues for learning, dialogue, and trust-building between corporations and other stakeholders—which can sometimes lead to positive rights outcomes—they should not be relied upon for the protection of human rights. They are simply not fit for this purpose.”¹¹ While the Canadian government can support voluntary measures and guidelines, these measures do not remove the need for public regulation. Rather, they highlight the need by showing that “a governance gap exists.”¹²

ii. Canada must adopt a legal framework to ensure corporations under its jurisdiction do not violate human rights

Canada’s strategy must meet its duty to respect, protect, and fulfill its human rights obligations. This requires adopting a legal framework that: (1) regulates the overseas activities of corporations incorporated, headquartered, or with a principal place of business in Canada to ensure they do not violate human rights and (2) ensures victims of human rights violations associated with the activities of these corporations have access to an effective remedy in Canada.

Canada’s duty to respect means it cannot prioritize the interests of businesses over treaty rights without adequate justification, and cannot pursue policies that negatively affect treaty rights.¹³ Canada must ensure that businesses respect the human rights guaranteed by the treaties Canada is party to.¹⁴

Canada’s duty to protect means Canada must “prevent effectively infringements of [human] rights in the context of business activities.”¹⁵ Canada must “take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing” to human rights abuses.¹⁶ To do so, Canada must regulate its corporations in order to prevent them from engaging in human rights abuses and ensure access to effective remedies when they do. Canada must “adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against [treaty] rights violations linked to business activities, and ... provide victims of such corporate abuses with access to effective remedies.”¹⁷

At least five U.N. treaty bodies have all called on Canada to implement a legislative framework to regulate transnational mining companies to ensure that their actions do not negatively impact

¹¹ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, p.4 [hereinafter MSI Integrity, *Not Fit-for-Purpose*].

¹² MSI Integrity, *Not Fit-for-Purpose* at p.4.

¹³ CESCR, *General Comment 24* at para. 12 (“The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights.”)

¹⁴ CRC, *General Comment No. 16* at para. 26.

¹⁵ CESCR, *General Comment 24* at para. 14.

¹⁶ CRC, *General Comment No. 16* at para. 28.

¹⁷ CESCR, *General Comment 24* at para. 14. *See also* HRC, *General Comment 36* at para. 22; HRC, *General Comment 31* at para. 13 (“It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.”); *See also* paras 16, 18; CRC, *General Comment No. 16* at paras 4-5, 28, 30, 46.

peoples' human rights.¹⁸ These calls, and general comments by U.N. treaty bodies, provide a starting point for elements to be included in this framework. These include:

- Requiring businesses to exercise human rights due diligence.¹⁹ In conducting their due diligence, Canada needs to ensure that businesses consider the impacts on Indigenous peoples, which requires them to obtain their free, prior and informed consent before commencing activities.²⁰ The results of the due diligence should be publicly available.
- Requiring companies to conduct human rights and gender impact assessments prior to making investment decisions.²¹
- Making access to public finance and other forms of public support, such as insurance, conditional on a business carrying out a process to identify, prevent, or mitigate negative impacts on human rights in their overseas operations.²²
- Requiring public agencies to take into account a business' prior human rights record in deciding whether to provide public finance or other forms of support.²³
- Requiring state agencies with a significant role regarding business, such as export credit agencies, to take steps to identify, prevent and mitigate any adverse impacts the projects they support might have on human rights prior to offering support to businesses operating abroad. Stipulating that those states agencies will not support activities that are likely to cause or contribute to human rights abuses.²⁴
- Collecting disaggregated statistical data and other information to identify discrimination in the context of business activities.²⁵

Ensuring that trade and investment agreements negotiated by Canada recognize the primacy of its international human rights obligations over investors' interests, so that the introduction of investor-State dispute settlement procedures shall not create obstacles to the full realization of treaty rights.²⁶

In line with the above guidance, it is critical that Canada implement a legal framework that regulates the activities of Canadian corporations operating abroad and the public agencies that support them. Civil society reports show that Export Development Canada, for example, provides significant funding to extractive sector corporations, including those associated with

¹⁸ See Human Rights Comm., *Concluding Observations on the Sixth Periodic Report of Canada*, UN Doc CCPR/C/CAN/CO/6 (2015) at para 6 [hereinafter HRC, *Concluding Observations Canada*]; Comm. on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of Canada*, UN Doc. E/C.12/CAN/CO/6 (2016) at paras 15-16 [hereinafter CESCR, *Concluding Observations Canada*]; Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada*, UN Doc CEDAW/C/CAN/CO/8-9 (2016) at paras 18-19 [CEDAW, *Concluding Observations Canada*]; Comm. on the Rights of the Child, *Concluding Observations: Canada*, U.N. Doc. CRC/C/CAN/CO/3-4 (Dec. 6, 2012) para. 29; CERD, *Concluding Observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD/C/CAN/CO/21-23, Sept. 13, 2017, para. 22.

¹⁹ CESCR, *General Comment 24* at para 16.

²⁰ CESCR, *General Comment 24* at para 17.

²¹ CESCR, *Concluding Observations Canada* at paras. 15-16; CEDAW, *Concluding Observations Canada* at para. 19(a).

²² CRC, *General Comment 16* at para. 45(a).

²³ CRC, *General Comment 16* at para. 45(b).

²⁴ CRC, *General Comment 16* at para. 45(c).

²⁵ CRC, *General Comment 16* at para. 14.

²⁶ CESCR, *Concluding Observations Canada* at paras. 15-16.

alleged human rights violations and corruption.²⁷ Public agencies should have a legal obligation to ensure that human rights are respected prior to providing any kind of support to corporations and should withdraw such support if companies take actions which do not respect human rights. Public agencies should be required to conduct and publicly report on the results of human rights due diligence and environmental assessment processes prior to providing financial or political support to any company.

Canada must also ensure effective remedies for victims when businesses violate human rights.²⁸ Treaty bodies have called on Canada to hold corporations accountable and provide effective judicial and non-judicial remedies for foreign nationals alleging that Canadian extractive companies have violated their human rights.²⁹ Treaty bodies have called on Canada to “develop a legal framework that affords legal remedies to people who have been victims of [human rights abuses by] corporations operating abroad,”³⁰ which should include “legislative measures necessary to facilitate access to justice before domestic courts by victims of the conduct of those corporations.”³¹ Providing access to effective remedies and taking measures to ensure accountability can include imposing administrative sanctions and penalties, criminally prosecuting corporations, ensuring that victims of rights violations have access to judicial remedies (civil and criminal), revoking businesses licenses and subsidies, revising relevant tax codes, public procurement contracts, and export support.³²

Canada’s RBC strategy includes promotion of non-judicial remedies—Canada’s National Contact Point (NCP) and the Canadian Ombudsperson for Responsible Enterprise (CORE). These remedies, as they currently exist, are not effective. The U.N. Working Group on the issue of human rights and transnational corporations and other business enterprises found that the NCP had a lack of trust and perceived independence from civil society. It recommended that the government make the NCP “more independent and vest it with adequate resources to discharge

²⁷ See Letter from Above Ground *et al.*, to Benoit Daignault, President and CEO Export Development Canada, p.1, (Sept. 21, 2016) (re: Query regarding EDC’s support to Ecopetrol and Pacific E&P), <http://www.aboveground.ngo/wp-content/uploads/2016/09/Letter-EDC-Ecopetrol-Pacific-21092016.pdf>; Halifax Initiative *et al.*, *Export Credit Agencies and Human Rights: Failure to Protect*, pp.17-20, (2015), <http://www.aboveground.ngo/wp-content/uploads/2015/06/Failure-to-Protect.pdf>; Letters from Above Ground and Amnesty International to Honourable Mary Ng, MP, Minister of Small Business, Export Promotion and International Trade (June 22 and Aug. 2020) (re remedy harms caused by EDC-finances dam in Colombia), <https://aboveground.ngo/letter-to-minister-ng-remedy-harm-hidroituango/>.

²⁸ CRC, *General Comment 16* at paras 30, 44; HRC, *General Comment 31* at paras. 16, 18; CEDAW, *General Recommendation 28* at para. 32. An effective remedy includes a right to reparations, which can include compensation, restitution, rehabilitation and measures of satisfaction, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

²⁹ CERD, *Concluding Observations Canada 2007* at para. 17; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, U.N. Doc. CERD/C/CAN/CO/19-20, (April 4, 2012) at para. 14; CRC, *Concluding Observations Canada* at paras 28, 29(b); HRC, *Concluding Observations Canada* at para. 6; CESCR, *Concluding Observations Canada* at para. 16; CEDAW, *Concluding Observations Canada* at para. 19(b)(c).

³⁰ HRC, *Concluding Observations Canada* at para. 6.

³¹ CESCR, *Concluding Observations Canada* at para. 16.

³² CESCR, *General Comment 24* at paras 15, 39-40; HRC, *General Comment 36* at para 27; CRC, *General Comment 16* at paras 30, 40, 61(d).

its mandate.”³³ CLAIHR urges the government to also review reports by civil society organizations, for example, MiningWatch Canada, which have participated in the NCP process and documented concerns over its effectiveness and ability to offer an effective remedy.³⁴

Similarly, the CORE lacks the powers to be effective. Civil society and U.N. treaty bodies called on Canada to create an independent ombudsperson with a mandate to investigate human rights complaints against Canadian corporations operating abroad.³⁵ But, the CORE, as it currently exists, does not fulfil these key criteria. CLAIHR urges the government to review the concerns voiced by the Canadian Network on Corporate Accountability (CNCA). CLAIHR shares these views, which include: the “office has not been designed with the needs of impacted communities,” has no power to independently investigate claims or compel evidence from companies under investigation, is not independent from government and may not be independent from businesses, and does not have adequate safeguards to protect complainants.³⁶ While not a substitute for judicial remedies, these non-judicial remedies can be important complements, but only if the government provides proper resources, mandates, and independence.

The Canadian government should strengthen access to judicial remedies. Notably, Canadian courts up to the Supreme Court of Canada have permitted civil actions to proceed against Canadian corporations for allegations of human rights abuses connected to their overseas operations.³⁷ However, earlier cases were dismissed based on *forum non conveniens*, a doctrine which allows a court to decline jurisdiction if there is an alternative adequate forum.³⁸ The respective courts dismiss these cases without considering the merits of the case. In these situations, Canada is not fulfilling its obligations to offer an effective remedy. Canada should

³³Working Group on the issue of human rights and transnational corporations and other business enterprises, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada, U.N. Doc. A/HRC/38/48/Add.1 (Apr. 23, 2018), para. 79(c).

³⁴ See e.g. MiningWatch Canada, *Canada’s National Contact Point: Long Overdue for an Overhaul*, Oct. 2020, https://miningwatch.ca/sites/default/files/brief_on_ncp_reform_october_7_2020.pdf; MiningWatch Canada, *Blog Entry: Canada’s National Contact Point is Long Overdue for an Overhaul*, Oct. 7, 2020, <https://miningwatch.ca/blog/2020/10/7/canada-s-national-contact-point-long-overdue-overhaul> (linking to additional submissions); Above Ground, MiningWatch Canada, and OECD Watch, “*Canada Is Back*” *But Still Far Behind: An Assessment of Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises*, p.19 (Nov. 15, 2016), <http://miningwatch.ca/publications/2016/11/15/canada-back-still-far-behind>,

³⁵ CERD, *Concluding Observations Canada 2017* at para. 22; OHCHR, “Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights,” June 1, 2017; CEDAW, *Concluding Observations Canada* at para.19(b); HRC, *Concluding Observations Canada* at para. 6.

³⁶ Canadian Network on Corporate Accountability, *Canadian Ombudsperson for Responsible Enterprise: Approach with Caution*, April 2020, <http://cnca-rcrce.ca/wp-content/uploads/2020/04/core-caution-E-1.pdf>; Canadian Network on Corporate Accountability, *Letter to Sheri Meyerhooper, Re Civil society confidence in CORE, undermined by absence of powers*, Feb. 13, 2020, <http://cnca-rcrce.ca/wp-content/uploads/2020/05/Letter-to-CORE-Neve.-Dwyer.-Coumans-13.02.2020.pdf>; Canadian Network on Corporate Accountability, *Submissions to the Canadian Ombudsperson for Responsible Enterprise*, July 10, 2020, <http://cnca-rcrce.ca/wp-content/uploads/2020/07/CNCA-letter-to-CORE-re-spring-2020-consultations.pdf>.

³⁷ See, e.g., *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414; *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

³⁸ See *Bil’in (Village Council) v. Green Park Ltd.*, [2009] QCCS 4151, ¶ 145-190, 204-06 (Can. Qué. Sup. Ct.), *aff’d*, 2010 QCCA 1455 (Can. Qué. C.A.); *Recherches Internationales Québec v. Cambior Inc.*, 1998 CarswellQue 4511 (Qc. Sup. Ct.); *Piedra v. Copper Mesa Mining Corp.*, 2010 O.N.S.C. 2421, *aff’d*, 2011 O.N.C.A. 191; *Association Canadienne Contre L’impunité v. Anvil Mining Ltd.*, 2011 Q.C.C.S. 1966, *rev’d*, 2012 Q.C.C.A. 117, *leave to appeal dismissed* [2012] S.C.C.A. No. 128.

pass legislation to ensure that Canadian courts are considered the appropriate venue for cases brought against Canadian corporations for harm that occurred in connection with their foreign operations. One example, which Canada can look to is the EU model, where Article 4 of the Brussels Regulation provides that corporations domiciled in a Member State can be sued in that state³⁹; this bars consideration of *forum non conveniens*.⁴⁰

The civil actions filed allege common law torts. Significantly the Supreme Court of Canada recently allowed a civil action to proceed based on common law tort claims framed in customary international law.⁴¹ However, to fulfill its legal obligations and ensure that Canada is a forum that can offer effective remedies, Canada should pass legislation recognizing a civil cause of action based on international human rights law. Similarly, because Canada is home to more than half of the world's mining corporations, Canada should ensure that legal actions can be brought against the parent company for the harms associated with their subsidiary's operations. Canada should enact legislation affirming parent company liability. This legislation should require Canadian companies and their subsidiaries to respect the international human rights embodied in Canada's treaty obligations. Canada should also affirm, through legislation, corporations' duties to respect the human rights of individuals and communities affected by their activities, including outside Canada.

Litigation can be very costly and Canadian courts generally impose costs – including lawyers' fees – on the losing party.⁴² The possibility that victims may have to pay a company's legal fees can be a huge deterrent. In addition, most provinces can require out-of-province litigants to pay a bond to the court before proceeding with litigation.⁴³ While a court should use its discretion and not require an impecunious litigant to pay a bond, the costs regime can still act as a deterrent.⁴⁴ Moreover, finding legal representation may be a challenge as legal aid is unavailable.⁴⁵ Canada should ensure that impecunious victims are able to bring actions in Canadian courts without the requirement to post a bond for costs and pay the defendant's fees should they be unsuccessful, unless the claim is frivolous or vexatious. Legal aid should also be available to individuals who want to bring civil actions.

Judicial remedies include criminal prosecution.⁴⁶ Canada must make clear to corporations registered, headquartered, or with their principal place of business in Canada that the government

³⁹ Council Regulation 1215/2012, art. 4, 2012 O.J. (L 351) p.1, (EU).

⁴⁰ See *Okpabi v. Royal Dutch Shell Plc*, [2017] E.W.H.C. 89 (TCC), pp. 23-26.

⁴¹ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

⁴² H. Patrick Glenn, Professor of Law, McGill University, *Costs and Fees in Common Law Canada and Quebec*, p.1, http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf; See, e.g., British Columbia Court Rules Act, B.C. Reg. 168/2009, s.14.1(9); Ontario Courts of Justice Act, R.S.O. 1990, c. 43, s.131; Ontario Rules of Civil Procedure, O. Reg. 575/07, s.57.01.

⁴³ All Canadian jurisdictions have express rules except British Columbia and the Yukon. See, e.g., Ontario Rules of Civil Procedure, O. Reg. 575/07, s.56.01.

⁴⁴ See *Lysko v. Maxbeau Company et al.*, 2010 O.N.S.C. 6523 at ¶ 6.

⁴⁵ Legal aid is not available for civil actions. See, e.g., Legal Aid Ontario, *Legal Aid Ontario can Help*, http://www.legalaid.on.ca/en/publications/brochures/LAO_canhelphandout.pdf?t=1475261127575; Legal Services Society, *Legal Representation by a Lawyer*, http://www.lss.bc.ca/legal_aid/legalRepresentation.php.

⁴⁶ See CEDAW, *General Recommendation 28* at para. 34.

will investigate credible allegations of human rights violations connected with their operations and prosecute cases where merited.⁴⁷

Conclusion

Canada's current RBC strategy fails to fulfill Canada's international human rights obligations. Canada cannot rely on voluntary codes of action and behavior; it must adopt legislative and administrative measures to ensure that corporations registered, headquartered, or with a principal place of business in Canada do not violate human rights in their operations outside of Canada. Canada must also ensure that victims of corporate human rights abuses have access to effective judicial and non-judicial remedies in Canada.

⁴⁷ *Crimes against Humanity and War Crimes Act*, S.C. 2000, c. 24 s.6; *Interpretation Act*, R.S.C., 1985 c.I-21, s.35(1)(offences outside Canada can be committed by "every person," which includes corporations); *Criminal Code*, R.S.C., 1985 c.C-26, ss. 22.1-22.2 (setting out offences for organizations for negligence and fault).