

November 5, 2018

Stephanie Bachand,
Deputy Director, Human Rights & Indigenous Affairs Policy Division
Global Affairs Canada
Government of Canada

Dear Stephanie Bachand:

RE: Consultation RE Revision of Voices at Risk Guidelines

We are writing on behalf of the Justice & Corporate Accountability Project (JCAP), in response to your invitation to concerned groups to provide input to Global Affairs Canada on how to best strengthen the 2016 *Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders* (“the Guidelines”). JCAP is a volunteer-driven transnational, collaborative, community-based legal clinic that assists in holding corporations and states to account by offering legal knowledge to communities that are negatively affected by natural resource extraction. JCAP has cultivated specific expertise in supporting Indigenous and Campesino communities in the Americas and has also supported communities in Africa.

A considerable portion of JCAP’s work is dedicated to supporting human rights defenders (HRDs). For example, in 2018 we made legal submissions to Peruvian courts in support of Canadian and HRD Jen Moore, who in 2017 was banned from Peru by the Peruvian government as retaliation for her work supporting Campesino and Indigenous communities affected by the operations of Canadian mining company Hudbay Minerals in Cuzco, Peru. We have also provided legal support to organizations concerned with the 2009 murder of Mariano Abarca, a Mexican activist and vocal critique of Canadian mining company Blackfire Resources. Our support in this case includes representing Abarca’s family members in a 2018 complaint to the Canadian Public Service Integrity Commissioner (PSIC) about the conduct of Canadian officials in relation to Abarca’s criminalization and murder. In 2016 we published the *Canada Brand* report, documenting and analyzing many instances of criminalization and violence associated with 28 Canadian mining operations in Latin America between 2000 and 2015. In 2017 we discussed our findings in separate hearings convened by the Inter-American Commission on Human Rights and by the Canadian Parliamentary Committee on Canadian Mining & Human Rights in Latin America. These are some recent examples of the legal work and research we have undertaken over the last 10 years in support of HRDs in countries in the Global South that are impacted by extractive industries.

We welcome this opportunity to offer our feedback on the effectiveness of the Guidelines in achieving their objectives. However, we are compelled to preface our comments with an explanation of our serious concerns about the consultation process as envisioned. On October 11 Global Affairs Canada invited civil society organizations to provide input on how to strengthen the Guidelines with a deadline of October 25. This timeframe allowed only 14 days (including weekends) to make submissions. Although Global Affairs Canada indicated by email that late submissions would be accepted, we were cautioned that late remarks may not be fully taken into account in the revisions of the Guidelines. This very limited timeframe to accept and process input does not afford us the time necessary to fully develop and express our considerations nor to properly consult with our partners and HRDs who are directly affected. With all due respect, such a cursory process gives the impression that Canada is not serious about receiving feedback about needed protections for HRDs that is well-informed, thoughtful and inclusive. For these reasons, we hope that you will consider this submission as preliminary input, upon which you might consider developing a more meaningful and robust engagement process.

We commend the 2016 Guidelines as an important first step toward full recognition of Canada's duty in international law to respect and protect human rights and HRDs wherever it has jurisdiction and influence. However, in our experience, the Guidelines in their current form have not ensured that Canadian officials achieve the stated objective of effectively supporting HRDs. In this letter we take a legal approach, outlining three key areas for improvement: transparency, norms, and oversight. We believe that the legal approach proposed here complements the broader educational, social and policy approach set out in the letter entitled "Civil Society Feedback on updates to Canada's Guidelines on Supporting Human Rights Defenders, October 2018" that you received from 24 Canadian organizations, many of whom are JCAP partners and collaborators.

1. Transparent Implementation

The 2016 Guidelines contemplate some form of record-keeping under section 3.2:

3.2. Gathering information and reporting

...

Missions are encouraged to report regularly on relevant developments in their countries of accreditation. This information will be maintained in a manner that respects confidentiality, so it neither adds to the risks faced by human rights defenders nor diminishes Canada's ability to provide support....

We observe that while the Guidelines encourage Missions to keep records and report, as set out above, they are not required to do so. We submit that record-keeping of the implementation of the Guidelines should be mandatory, standardized and comprehensive. If records are not kept, Canadian officials have no way of evaluating the effectiveness of the Guidelines and their implementation.

Recommendation 1.1: Comprehensive and standardized record-keeping of the implementation of the revised Guidelines should be mandatory for all Canadian diplomatic missions.

The current Guidelines emphasize that confidentiality may be essential to protecting the privacy and security of HRDs. We strongly support an approach that prioritizes the privacy and security of HRDs above all other concerns. However, we have observed a number of occasions since 2016 where HRDs have requested support from Canadian Missions and received little or no response. We have also observed that on some occasions HRDs may explicitly request that Canadian Missions publicize their cases and the nature of the support offered. Indeed, the Guidelines themselves recognize that public expressions of support by Canadian officials can be an effective or even essential means for increasing the protection of HRDs.

We submit that the lack of public transparency with respect to the implementation of the Guidelines has deprived civil society groups of the information base required to accurately evaluate their effectiveness. This problem has also undermined public confidence in the Guidelines and their very credibility. In situations of crisis, HRDs should not lose precious time seeking Canadian support if it is unlikely to be afforded.

Recommendation 1.2: Where a diplomatic mission chooses not to support a HRD, the revised Guidelines should require that reasons for that decision be provided directly to the HRD, and or their chosen representative, in a timely manner.

Recommendation 1.3: The revised Guidelines should require public transparency with respect to their implementation. Transparent reporting can be achieved while also protecting the confidentiality and privacy of HRDs where requested and/or appropriate. As such, confidentiality and privacy should not be used as a pretext to avoid transparent reporting. Transparency and reporting will enhance the credibility of the Guidelines and may increase HRDs' security.

2. Clear, Mandatory Duties & Norms

Section 3 of the 2016 Guidelines offers a variety of tools that Canadian Missions may employ to assist and protect HRDs. This includes gathering and reporting information, exchanging information with HRDs, building HRD capacity, engaging with local authorities, cooperating with regional and international actors, enhancing the visibility of HRDs, and making public statements.

While the Guidelines articulate many important tools whereby Canadian Missions may support HRDs, the language used is vague and fails to establish clear obligations. We certainly accept and support an approach that allows for sufficient flexibility such that supports for HRD may be adapted to a variety of circumstances. However, we submit that the revised Guidelines should clearly recognize and set out Canada's international duty to support HRDs wherever Canada has jurisdiction and exercises influence. With more time, we would happily provide you with a longer legal brief setting out the foundation of this duty in international law. As such, the revised Guidelines should ground discretionary tools for supporting HRDs in a mandatory obligation to protect and promote human rights and support HRDs.

Recommendation 2.1: The revised Guidelines should include mandatory language that reflects Canada’s duty in international law to protect human rights and to support HRDs wherever it has jurisdiction and/or influence.

The 2016 Guidelines specify in section 4 that support for HRDs should be provided even where their work focuses on the activities of a Canadian company. However, the current Guidelines make no reference to a related government policy, the Global Markets Action Plan, in place since 2007. This latter policy states that “all Government of Canada diplomatic assets are harnessed to support the pursuit of commercial success by Canadian companies and investors.”¹ In combination, these two policies produce a situation where a Canadian Mission may be offering political support to a Canadian company that is in conflict with local communities, and where the nature of this conflict – and even the political support itself – puts HRDs at risk.

Before the 2016 Guidelines were put into place, Canada had a more general policy of support for HRDs, reflected in statements to the media, to parliamentary committees, to international human rights organizations, on government websites, and in internal government documents.² However, there are many publicly documented examples of Canadian embassy officials during this period continuing to support Canadian companies in spite of direct expressions of concern from affected communities and HRDs, and in some cases, refusing to independently investigate or verify allegations of human rights abuses by Canadian corporate actors.³ JCAP has directly contributed to some of this research and is leading a number of research projects in this area. In an early case, a Canadian HRD won a defamation suit against a former Canadian Ambassador to Guatemala when he defended a Canadian company and stated that a documentary film recording human rights abuses was fabricated.⁴ As mentioned earlier, the conduct of Canadian officials in Mexico in the case of Blackfire is presently subject of a complaint to the PSIC.⁵ Upon request, we would willingly provide more detailed examples of these and other conflicts.

1. Government of Canada, “Global Markets Action Plan and Market Access Plans” (9 June 2015) online: <<https://www.canada.ca/en/news/archive/2015/06/global-markets-action-plan-market-access-plans.html>>

2. Note that the legal status of some of these government statements is at issue in JCAP’s complaint to the PSIC, referred to above.

3. Moore and Colgrove (2013) “Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy” MiningWatch Canada, United Steelworkers & Common Frontiers, online: <https://miningwatch.ca/sites/default/files/blackfire_embassy_report-web.pdf>; Moore (2015) “Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy, and the Violation of Land and Labour Rights in Durango, Mexico. MiningWatch Canada & United Steelworkers”, Online: <https://miningwatch.ca/sites/default/files/excellon_report_2015-02-23.pdf>

4. Voices-Voix, Steven Schnoor, “Schnoor v Canada” (July 2013) Online: <<http://voices-voix.ca/en/facts/profile/steven-schnoor>> <<http://www.schnoorversuscanada.ca/>>.

5. MiningWatch Canada, “Canadian Embassy in Mexico Subject to Complaint to Public Sector Integrity Commissioner” (5 Feb 2018) online: <https://miningwatch.ca/blog/2018/2/5/canadian-embassy-mexico-subject-complaint-public-sector-integrity-commissioner>; MiningWatch Canada, “Integrity Commissioner’s Refusal to Investigate Canadian Embassy Prompts Application to Federal Court of Canada”. (17 May 2018) Online: <<https://miningwatch.ca/news/2018/5/17/integrity-commissioner-s-refusal-investigate-canadian-embassy-prompts-application>>.

We provide the examples above to substantiate our concern that there is a serious risk that, when the two policies come into conflict, embassies will give priority to economic diplomacy over support for HRDs. At the minimum, this will be the perception among HRDs and the credibility of the Guidelines will suffer. As a result, the revised Guidelines should directly address the potential conflict between economic diplomacy and support for HRDs. Moreover, the Guidelines should clearly establish that the fulfilment of Canada's human rights obligations must be prioritized over promoting the economic interests of Canadian companies.

Recommendation 2.2: The revised Guidelines should directly address the potential conflict between economic diplomacy and support for HRDs and should oblige Canadian missions to prioritize Canada's duty to protect human rights and support HRDs in these circumstances. Moreover, they should specify that Canada's diplomatic support for Canadian companies must not put HRDs at greater risk, either directly or indirectly.

3. Independent Oversight of Implementation

The 2016 Guidelines do not specifically name the government officials who are responsible for decision-making and ensuring their effectiveness. They similarly neglect to establish any clear system of oversight to ensure that the Guidelines are meaningfully followed by those responsible for their implementation. Moreover, they fail to create a clear mechanism by which civil society organizations and HRDs might raise concerns with government officials regarding the implementation of the Guidelines in general or in specific cases, or how other acts or omissions of Canadian officials as a result of policies such as 'economic diplomacy' might be heightening the risk they face. Without these structures in place, all information regarding government adherence to the Guidelines rests solely with the government. (Above we noted our related concern that the 2016 Guidelines do not include the reporting obligations necessary to accurately evaluate implementation.)

This lack of clearly defined responsibility and oversight, in combination with a lack of transparency and unclear discretionary norms (see themes 1 and 2 above), has significantly undermined the credibility of the 2016 Guidelines. Whenever the government creates a policy with human rights impacts and in accordance with its human rights obligations, independent and transparent mechanisms should be in place to ensure that it is accountable for fulfilling and complying with the policy. This is all the more necessary when the beneficiaries of the policy, as in this case, are by definition vulnerable and far-removed from government decision-makers.

Recommendation 3.1: The revised Guidelines should clearly identify those who are responsible for their implementation. They should also establish transparent mechanisms for independent oversight of implementation. This should include avenues whereby civil society organizations and HRDs can raise concerns about perceived implementation failures.

The need for independent oversight is further supported by the widely recognized fact that when a government body is charged with both promoting an economic activity, as well as regulating social or environmental impact, a conflict of interest can arise. This is the conclusion reached by

two high-level independent audits/commissions in Canada in recent years. A 2016 report of the BC Auditor General found that the BC Ministry of Mines should not continue with a mandate to both promote and regulate mining.⁶ The report found that these two interests will inevitably conflict with one another, and as such recommended that the regulation of mining in BC occur through an integrated and independent compliance and enforcement unit, housed in a separate ministry.⁷ Similarly, in 2012 a federal public inquiry into the decline of the Fraser river sockeye salmon (the “Cohen Inquiry”) determined that the Department of Fisheries and Oceans (DFO) should not continue to promote industrial salmon farms because this generates a conflict of interest with the DFO’s mandate to protect wild salmon.⁸

These examples are clearly analogous to Canadian Missions’ current mandate to protect HRDs while also engaging in economic diplomacy. We submit that these circumstances require, at a minimum, special oversight mechanisms to ensure that economic interests do not trump the protection of the environmental or human rights (see Recommendation 3.1 above). We also note that the BC Auditor General and the Cohen Inquiry strongly recommended structural changes to government in these circumstances, as well as strengthening regulatory oversight.

Recommendation 3.2: Global Affairs Canada should undertake further consultation with civil society groups in order to review GAC’s economic diplomacy in light of the conflict of interest described here. The objective of this review should be to ensure that any support offered to Canadian companies aligns with Canada’s obligations to respect and protect human rights and HRDs. Relevant areas of inquiry, among others, would be conditioning support for companies on mandatory human rights due diligence and respect for human rights.

Conclusion: Strengthening the Legal Framework for Canada’s Support for HRDs

The 2016 Guidelines represent a first step toward Canada’s fulfillment of its obligation to protect and respect human rights and support HRDs wherever it exercises jurisdiction, power and influence. Yet all countries must strive to develop new and better approaches to supporting HRDs who continue to suffer alarming levels of risk and violence in many countries around the world. The 2017 OECD yearbook published the remarks of the Secretary General of Amnesty International, Salil Shetty: “In backing the Declaration on Human Rights Defenders, governments promised to support human rights defenders and enable them to work free from obstacles and without fear of reprisals. Two decades later, the letter and the spirit of this UN

6. The Auditor General of BC, “An Audit of Compliance and Enforcement in the Mining Sector” (May 2016) at p 45, online: <<https://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf>>.

7. *Ibid.*

8. The Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, “Uncertain Future of Fraser River Sockeye” (2012) 3 at p 90, online: <https://www.watershed-watch.org/wordpress/wp-content/uploads/2013/02/CohenCommissionFinalReport_Vol03_Full.pdf>.

declaration are being openly flouted.”⁹ Just last month, the UN Special Rapporteur on the rights of Indigenous peoples reported to the UN General Assembly:

It seems that once more, indigenous peoples have ended at the forefront as targets of persecution. The rapidly intensifying competition over natural resources on their traditional lands and territories is driving this violence. Indigenous leaders and communities who object to the negative impacts of large-scale projects on their rights, livelihoods and the environment are being targeted and killed, forcibly evicted, threatened and subjected to insidious harassment in the form of criminal charges which are often nebulous, grossly inflated or fictitious. The aim of these attacks, whether violent or legal, is to silence any opposition by indigenous peoples to business interests and to prevent indigenous peoples from exercising their rights.¹⁰

We share this grave concern for HRDs and in particular we are concerned for those who focus on the activities of Canadian resource companies abroad, as documented in JCAP’s 2016 *Canada Brand* report.

This letter has offered some preliminary input and recommendations that would strengthen Canada’s policy framework for fulfilling its human rights obligations in relation to HRDs. With more time, we would more fully develop our proposal, include a full analysis of how our recommendations align with established and emerging international law, in the treaties and declarations of the United Nations and the Organization of American States, along with their interpretation by competent human rights bodies. We have described how the revised Guidelines should reflect stronger provisions for reporting and transparency, stronger norms that clearly set out the primacy of human rights, and clear lines of responsibility and oversight. International human rights bodies are sending a strong message that they are keen to interpret states’ extra-territorial human rights obligations in light of the challenges associated with economic globalization.¹¹ This proposed revision of the 2016 Guidelines gives Canada an opportunity to follow suit.

We would be happy to engage in further discussion or offer further details with respect to any of the matters and recommendations that we put forward in this letter.

9. Salil Shetty, “Protecting human rights and the spirit of justice” (2017) OECD, online: <<http://www.oecd.org/forum/oecdyearbook/protecting-human-rights-and-the-spirit-of-justice.htm>>.

10. Statement of Ms. Victoria Tauli-Corpuz Special Rapporteur on the rights of indigenous peoples to the General Assembly 73rd Session, (12 October 2018), online: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23723&LangID=E>>.

11. See for example: UN Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, at paras 25-37, online: <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en>.

Sincerely,



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Appendix: Summary of All Recommendations

1. Transparency

Recommendation 1.1: Comprehensive and standardized record-keeping of the implementation of the revised Guidelines should be mandatory for all Canadian diplomatic missions.

Recommendation 1.2: Where a diplomatic mission chooses not to support a HRD, the revised Guidelines should require that reasons for that decision be provided directly to the HRD, and/or their chosen representative, in a timely manner.

Recommendation 1.3: The revised Guidelines should require public transparency with respect to their implementation. Transparent reporting can be achieved while also protecting the confidentiality and privacy of HRDs where requested and/or appropriate. As such, confidentiality and privacy should not be used as a pretext to avoid transparent reporting. Transparency and reporting will enhance the credibility of the Guidelines and may increase HRDs' security.

2. Norms

Recommendation 2.1: The revised Guidelines should include mandatory language that reflects Canada's duty in international law to protect human rights and to support HRDs wherever it has jurisdiction and/or influence.

Recommendation 2.2: The revised Guidelines should directly address the potential conflict between economic diplomacy and support for HRDs and should oblige Canadian missions to prioritize Canada's duty to protect human rights and support HRDs in these circumstances. Moreover, they should specify that Canada's diplomatic support for Canadian companies must not put HRDs at greater risk, either directly or indirectly.

3. Oversight

Recommendation 3.1: The revised Guidelines should clearly identify those who are responsible for their implementation. They should also establish transparent mechanisms for independent oversight of implementation. This should include avenues whereby civil society organizations and HRDs can raise concerns about perceived implementation failures.

Recommendation 3.2: Global Affairs Canada should undertake further consultation with civil society groups in order to review GAC's economic diplomacy in light of the conflict of interest described here. The objective of this review should be to ensure that any support offered to Canadian companies aligns with Canada's obligations to respect and protect human rights and HRDs. Relevant areas of inquiry, among others, would be conditioning support for companies on mandatory human rights due diligence and respect for human rights.