

## Business and Human Rights: Responsibility of Canada for Actions of Canadian Companies in Latin America

**Submission to**

Soledad García Muñoz,  
Special Rapporteur on Economic, Social, Cultural and Environmental Rights  
of the Inter-American Commission on Human Rights

**Submitted by**

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## The Justice and Corporate Accountability Project

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The Justice and Corporate Accountability Project is a volunteer organization of law professors, lawyers and law students, based at Osgoode Hall Law School in Toronto and Thompson Rivers Law School in Kamloops. We have ten years of experience working with Indigenous and campesino communities in conflict with mining companies, mostly in Latin America. Our work includes:

- Representing communities in human rights and environmental cases
- Cases in front of the IACHR, amicus curiae in cases in Peru
- Accountability of the government of Canada through research, publications and support to judicial quasi-judicial and non-judicial complaints.
- Reports, such as the Canada Brand: Violence and Canadian Mining Companies in Latin America (2016)
- Analysis of the conduct of the Canadian embassies in relation to human rights defenders
- Corporate Accountability through reports, publications, research and both domestic and regional (IACHR) litigation.
- Representing NGO's and organizations in shareholder motions and letters to the Securities and Exchange Commission

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## INTRODUCTION

Our expertise is limited to the conduct of Canadian mining companies abroad, and our comments are made in that context. We are not commenting on the problems of mining companies operating within Canada.

The Special Rapporteur's report of 2017<sup>1</sup> points out that transnational businesses have had a detrimental impact on the enjoyment of human rights and its Annual Report of 2018 highlighted the importance of issues around business and human rights and a state's obligation to oversee dangerous corporate activities<sup>2</sup>. Based on our research and the cases we have managed, particular attention must be paid to extractive corporations in the hemisphere, which have several times been the cause or have worsened violations and impacts to ESCER. Canadian mining companies are the most significant private players in this industry in Latin America, with high presence in Mexico and Guatemala, countries in which there have been a series of human rights violations linked to the extraction of natural resources.

The Canadian mining industry is considered to be one of the most significant in the world. As reported by the Due Process of Law Foundation ('DPLF') in 2014, as of 2012, 57 percent of the world's mining companies were listed on the Toronto Stock Exchange (TSX), and 70 percent of the shares issued by the mining sector worldwide were traded on the TSX<sup>3</sup>. DPLF's report also provides that "[o]f the 4,322 projects carried out by those companies outside Canada, 1,526 were in Latin America, 1,197"<sup>4</sup>.

For this reason, addressing human rights violations within the mining industry in the region requires addressing the social responsibility of Canada and other states in the region, as well as Canadian companies and their possible involvement in human rights abuses.

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<sup>1</sup> Soledad García Muñoz, "Annual Report of the Inter-American Commission on Human Rights 2017: Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (SRESCER): Working for the Effective Indivisibility and Interdependence of All Human Rights for All People in the Americas" (2017) General Secretary, Organization of American States (OAS).

<sup>2</sup> REDESCA, "ECONÓMICOS, SOCIALES, CULTURALES Y AMBIENTALES (REDESCA) DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (CIDH), 2018: Trabajando por la indivisibilidad e interdependencia efectivas de todos los derechos humanos para todas las personas en las Américas", Relatora Especial: Soledad García Muñoz (2018), online: <http://www.oas.org/es/cidh/docs/anual/2018/docs/IA2018REDESCA-es.pdf>, para 26.

<sup>3</sup> DPLF, "The impact of Canadian Mining in Latin America and Canada's Responsibility, Executive Summary of the Report submitted to the Inter-American Commission on Human Rights" (2014), online: [http://www.dplf.org/sites/default/files/report\\_canadian\\_mining\\_executive\\_summary.pdf](http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf), at 3; TMX. *Global Leaders in Mining. Sector Specs. Mining Companies Listed on Toronto Stock Exchange and TSX Venture Exchange*: [http://www.tmx.com/en/listings/sector\_profiles/mining.html]. Accessed on January 29, 2014.

<sup>4</sup> *Ibid*, DPLF, at 3.

In our submission, we provide examples of existing problems and challenges that we know of from our own experience. Furthermore, we provide information on 3 mechanisms for prevention and supervision of Canadian corporations abroad: Canadian government initiatives; civil law cases before Canadian courts; and legislation against corruption. These are not the only mechanisms available. For example, we have experimented with using shareholders' motions to bring issues of concern to annual general meetings of shareholders; and we have sent letters of complaint to securities commissions relating to misleading disclosure of information by companies. However, we do not discuss these more specialized business-oriented mechanisms in this submission. We will also provide an analysis of the three mechanisms described, and recommendations for improvement.

We have been involved in two other hearings before the Inter-American Commission on Human Rights, in 2014 and 2017, and the recommendations from those reports are attached as Appendix B and C.

## EXISTING OBSTACLES TO THE REALIZATION AND ENJOYMENT OF HUMAN RIGHTS

Below we give examples of the problems that we know of, from our own involvement in cases, or from our research. These problems will be described under three headings:

- Corporate accountability (accountability within Latin America)
- Business operations in complex ecosystems (Goldcorp in Guerrero, Mexico)
- Economic diplomacy (the role of Canadian embassies)

### 1. CORPORATE ACCOUNTABILITY

The presence of large extractive companies in Latin America has represented a serious challenge for human rights in the region. A proximity between mining and violence – often in Indigenous and/or campesino populations – is undeniable as issues and cases continue to arise both in national courts and at the Inter-American level. Unfortunately, many times cases of harassment, torture, assault, violation of the right to prior and informed consent, attacks against human rights defenders, and violation of environmental rights go by unpunished due to the state’s interest in the extraction of resources and the financial interests at play.<sup>5</sup>

For the most part, companies no longer argue that they can ignore international best practices and human rights. However, companies involved in this type of behavior are generally left untouched, justified in their actions as they act within the local legal boundaries, even where there may be inadequate state regulation. In today’s world, companies can also become

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<sup>5</sup> The Inter-American Commission on Human Rights has received five reports on the role of Canadian companies:

1. Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina, “El impacto de la minería canadiense en América Latina y la responsabilidad de Canadá” (2014) online:

<[http://www.dplf.org/sites/default/files/informe\\_canada\\_completo.pdf](http://www.dplf.org/sites/default/files/informe_canada_completo.pdf)>.

2. Justice and Corporate Accountability Project, “Human Rights, Indigenous Rights and Canada’s Extraterritorial Obligations,” (Thematic Hearing for 153rd Period of Sessions delivered at the Inter-American Commission on Human Rights, 28 October 2014), online: [http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada\\_mining\\_cidh\\_oct\\_28\\_2014\\_final.pdf](http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf)

3. “Posición de la Iglesia católica ante vulneración y abusos contra los derechos humanos de las poblaciones afectadas por las industrias extractivas en América Latina,” (Audiencia pública ante la Comisión Interamericana de Derechos Humanos 154th Sess, 19 March 19 2015), online:

<https://justiceprojectdotorg1.files.wordpress.com/2017/08/informe-final-celam-repam-2015.pdf>

4. Human Rights I of the Human Rights Research and Education Centre, “Extraterritoriality and Responsibility of Home States in the Protection of Human Rights for the Activities of Extractive Industries in Latin America”, (Thematic Hearing for Inter-American Commission on Human Rights delivered at 154 Period of Sessions on Corporations, Human Rights and Prior Consultation in the Americas, 17 March 2015) [unpublished].

5. Human Rights Research and Education Centre et al, “Measures to prevent human rights violations by Canadian extractive industries that operate in Latin America” (December 7, 2017), online: <https://justice-project.org/wp-content/uploads/2018/07/IACHR-Thematic-Proposal-Canada-and-Extractive-Industries-September-2017-rev.pdf>.

impossible to track down as they abandon their activities in the country at issue by dissolving or selling the subsidiary company that operates the mine. Companies also set up complex business structures in which one corporation's responsibility is fully detached from the other's, leaving these cases to fall under impunity.

*a. Using subsidiary corporations to avoid liability*

A common strategy for avoiding liability has been the creation of subsidiary corporations in Latin America to operate mines by Canadian mining companies. The parent company is kept safe and far from the in-land operations. It is headquartered abroad where it receives the profit from their projects in Latin America and publicizes these projects as their own in their websites. Between the Canadian company and the Latin American subsidiary, there may be a dizzying array of corporations as it can be seen in Appendix A which shows approximately 80 of Barrick Gold's most significant interlinked, but distinct, corporations. There other corporate structures which are not shown on the chart. The overriding purpose of this mechanism is avoiding tax and liability.<sup>6</sup> The subsidiary is merely the name behind a project but parent companies are the ultimate beneficiaries, both economically and publicly, until something goes wrong. As soon as a case is brought to the judiciary, the Canadian parent company claims that everything is the responsibility of the subsidiary and uses a "corporate veil" to shield the parent corporation and other members of the corporate group from legal liability and ultimate responsibility.<sup>7</sup> In some cases, the subsidiary company is even dissolved, sold or merges with another corporation in the country and the ties are broken, leaving communities in a legal vacuum, unable to continue judicial actions or receive remedies where those actions are successful.

A key example of this is the case of *Chevron Corp. v. Yaiguaje*,<sup>8</sup> which was before Canadian courts. Leave to appeal an Ontario Court of Appeal decision which rejected the claimant's arguments to pierce the corporate veil of Chevron, was refused in 2019 by the Supreme Court of Canada<sup>9</sup>. In this case, the oil-rich Lago Agrio region of Ecuador suffered extensive environmental pollution that has disrupted the lives and jeopardized the futures of its residents due to exploration and extraction activities. In 1993, when Chevron no longer had any assets left in Ecuador, Ecuadorian Indigenous people and those affected by the pollution tried to take the case to a court in New York in order to go after Chevron's assets in



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<sup>6</sup> Shin Imai, Leah Gardner & Sarah Weinberger, "The 'Canada Brand': Violence and Canadian Mining Companies in Latin America" (2017) 17: Osgoode Legal Studies Research Paper at 30.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Chevron Corp. v Yaiguaje*, 2015 SCC 42, 3 SCR 69 [Chevron v Yaiguaje].

<sup>9</sup> Nia Williams, « Canadian court dismisses Ecuador's \$9.5 billion claim against Chevron Canada" (4 April 2019), Reuters online: <https://ca.reuters.com/article/businessNews/idCAKCN1RG2GP-OCABS>.

the United States. The claim was rejected on the basis that it was better to have the trial in Ecuador than in the United States, so the case was brought in Ecuador.<sup>10</sup> After a long legal battle, in 2011, Ecuador's Court of Cassation upheld the judgement against Chevron amounting to a total amount of US\$9.51 billion owed as remedy. For over 20 years, the 47 affected people, who represent approximately 30,000 indigenous Ecuadorian villagers, have been seeking legal accountability and financial and environmental reparation for harms. Texaco, the initial oil corporation in Ecuador, was acquired by Chevron, a U.S. corporation<sup>11</sup> and Chevron removed all



Protests against Chevron

of its assets from Ecuador, refusing to honour the court decision. Chevron left affected populations in a legal vacuum without the ability to enforce judgements. The Ecuadorian claimants tried to have the judgment honoured in foreign jurisdictions where Chevron had assets. A US District Court blocked the enforcement of the judgment blaming fraud and racketeering<sup>12</sup> on the part of the lawyer for the Ecuadorians. In 2012, the Ecuadorians began a case in Canada against Chevron Canada, a subsidiary of the US corporation, in order to enforce the judgement. In 2015, the Supreme Court of Canada established that judgements against foreign corporations can be enforced against Canadian subsidiaries and allowed the case to go forward.<sup>13</sup> Unfortunately, an Ontario Court of Appeal decision then found that Chevron Canada was separate from Chevron USA, and therefore, the Ecuadorians could not make Chevron Canada pay for a judgement against Chevron USA.<sup>14</sup> The decision was appealed to the Supreme Court of Canada, which earlier this year refused leave to appeal<sup>15</sup>.

Both the Barrick Gold chart and the Chevron case are clear examples of how easy it has become for companies to avoid liability and responsibility, especially when on the other side are *campesinos* and indigenous communities who do not have comparable resources to those of the corporations to take on the legal fight. In the Chevron case, before the Ecuadorian judgement was released, a Chevron spokesperson insisted that the company would “fight this until hell freezes over. And then we’ll fight it out on the ice.”<sup>16</sup> This demonstrates the vulnerable and disadvantaged position at which local communities are when they are using the law to fight these corporate giants. There is an urgent need for greater access to justice for

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<sup>10</sup> Graham Henry, “Yaiguaje v Chevron Corp. Is Back in the Canadian Courts” *University of Toronto International Human Right Program*, Remark, 2018 ONCA 472.

<sup>11</sup> *Chevron v Yaiguaje*, *supra* note 8.

<sup>12</sup> Shin Imai, Leah Gardner & Sarah Weinberger, *supra* note 6.

<sup>13</sup> *Chevron v Yaiguaje*, *supra* note 8.

<sup>14</sup> *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 2018 CarswellOnt 7942 [Yaiguaje v Chevron 2018].

<sup>15</sup> Nia Williams, *supra* note 9.

<sup>16</sup> Daniel, Nicole. “Goliath Strikes Back: The *Yaiguaje v Chevron* Saga Continues”, *The Court* (24 October 2017), online: <<http://www.thecourt.ca/goliath-strikes-back-the-yaiguaje-v-chevron-saga-continues/>>.

affected communities; and a more rigorous transnational corporate accountability regime for mining companies.

*b. Impunity and lack of investigation*

There are numerous examples and cases in which community members who oppose mining or oil extraction have been targets of violence and harassment. While many times it is the state police enforcing harsh penalties over protesters and stifling free speech, we believe these situations should be regarded in the context in which they occur. As previously mentioned, the host state as well as the state where the company is based have a particularly high interest in the development of natural resources extraction along with mining corporations. When there are protests against these projects and such interests seem threatened, abuses begin to occur against environmental activists and human rights defenders. Opposition to mining in the region has been answered with arrests, harassment, espionage, assaults, and occasionally murder. These crimes oftentimes go unpunished with state officials failing to investigate and corruption becoming an issue as companies pressure or bribe state stakeholders.

An example of the pressure exercised by mining companies can be found in Guatemala, where Tahoe Resources commenced a secret lawsuit against the government, demanding greater protection for its mines.



Funeral procession for Exaltación Marcos Ucelo

Although the Constitutional Court dismissed the case, a month later the government began a series of arrests of known opponents of the mine.<sup>17</sup> Several protesters of the mine were victims of murder and violent assaults related to Tahoe’s Minera San Rafael in Guatemala. Exaltación Marcos Ucelo, a Xinka leader

was kidnapped on his way home from a plebiscite on mining in the town of Volcancito and was found dead the next day. Sixteen-year old Topacio Reynoso, a youth organizer against the mine, was assassinated and her father badly injured in an attack on their car in Mataquesuintla in April 2014. In April 2015, Telésforo Odilio Pivaral González, a member of the Committee in Defense of Life and Peace in San Rafael Las Flores, which opposes the mine, was assassinated at a bus stop near his home in Volcancito. Topacio Reynoso’s father, Edwin Alexander Reynoso Bran was shot again in October 2015 as he

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<sup>17</sup> Justice and Corporate Accountability Project, “Request to Investigate Tahoe Resources for Failure to Disclose Material Information” (2017) online: <[https://miningwatch.ca/sites/default/files/final\\_bcsc\\_disclosure\\_complaint\\_re\\_tahoe\\_-\\_may\\_15\\_2017.pdf](https://miningwatch.ca/sites/default/files/final_bcsc_disclosure_complaint_re_tahoe_-_may_15_2017.pdf)>.

and five companions were leaving the office of the mayor of Mataquescuintla<sup>18</sup>. These crimes remain in impunity as no suspects have been identified in any of these shootings and Tahoe denies any involvement.

Tahoe's mine was reviewed by one of its shareholders, the Norwegian Council on Ethics. The Council investigated a separate incident involving the shooting of seven unarmed campesino by Tahoe's private security forces. At the time of the incident, Tahoe claimed that the protest turned "hostile" and the "security force used tear gas and rubber bullets to repel the protestors at the mine gate." Unbeknownst to Tahoe, telephone conversations of their then head of security, Alberto Rotondo, had been wiretapped due to suspicions of his involvement in a prior incident of violence. The wiretap demonstrates that Rotondo ordered the shooting of the protesters and then conspired to cover up the evidence and fabricate a story about the attack. Rotondo was ultimately arrested in Guatemala in connection with the shooting. After being committed to trial in Guatemala he was placed under house arrest in December 18, 2014. In November 2015, he fled to Peru. He was captured in Peru in January 22, 2016, and five Guatemalan police officers have been arrested in connection with his escape.<sup>19</sup>

Tahoe told the Council on Ethics that it had conducted a "thorough internal investigation" of the shooting. However, Tahoe did not comply with the request from the Council on Ethics for information on the investigation or the company's rules of conduct. Amnesty International analyzed the situation and found that the actions of Tahoe's security personnel violated the Voluntary Principles on Security and Human Rights, which Tahoe says it follows<sup>20</sup>.

Another example of the aggressive methods used by mining companies takes us to Minera Yanacocha in Perú. In 2006, in the region of Cajamarca, Minera Yanacocha a subsidiary of the US company Newmont was



Marco Arana

involved in accusations of espionage and harassment against environmental and human rights defenders in the country, members of the environmental NGO, GRUFIDES and Marco Arana. The acts of persecution against members of GRUFIDES, included being followed

constantly, filmed, photographed and receiving phone calls with threats of grave and serious physical harm affecting their rights to freedom of expression and privacy. It was discovered eventually that there was a private investigative firm

<sup>18</sup> *Ibid.*

<sup>19</sup> Justice and Corporate Accountability Project, "Request," supra note 17.

<sup>20</sup> Amnesty International. "Mining in Guatemala: Rights at Risk" (2014) No 34/002/2014.

behind the acts, called C&G, with ties to FORZA, the mining company security contractor and involving former military from the Fujimori regime. A vast amount of evidence in this case indicated that FORZA may have been behind the illicit activities, by order of Minera Yanacocha. Activists and human rights defenders were followed, recorded, photographed, harassed and threatened. After the apprehension of one of the agents of the espionage company, the criminal prosecutor's office found all such records in seized computers and cameras. In spite of the outstanding evidence, no investigation took place and all the seized materials were returned to the perpetrators.<sup>21</sup> No agent of FORZA or the company have been duly investigated or tried by the state.<sup>22</sup> A petition was filed in 2009, by JCAP along with GRUFIDES lawyer, Mirtha Vásquez, against Peru before the Inter-American Commission on Human Rights ('IACHR'). The case is currently under joint evaluation of admissibility and merits before the Inter-American Commission on Human Rights.

## 2. BUSINESS OPERATIONS IN COMPLEX ECOSYSTEMS

Some mining projects are located in regions where there is a pre-existing level of organized crime. The international community has turned its attention to organized and transnational crime in the region but has put little effort into examining the relationship between the mining industry and cartel-related violence. Investigations in this course must be prioritized in order to protect human rights in complex and violent communities.

A case in the state of Guerrero, in Mexico, shows why this is an urgent matter. Guerrero



has been deeply impacted by police corruption and the presence of organized crime. Goldcorp's Los Filos mine is located between the towns of Mezcala and Carrizalillo, which have reportedly



Community members look over Los Filos mine

seen an increase in the presence of organized crime since the company began commercial production in 2008. Reports indicate that criminal groups have controlled and terrorized local communities, especially in the town of Carrizalillo. They have used fear to extort local mine workers and those receiving payments from the company for the use of their land. This state of affairs in two small communities has led to

at least 17 deaths, 3 disappearances, 8 injuries and hundreds of families being displaced.<sup>23</sup>

<sup>21</sup> "Crónica De Un Reglaje Al 'Diablo'." *LaRepublica.pe* (3 December 2006), online: <<https://larepublica.pe/archivo/265221-cronica-de-un-reglaje-al-diablo>>.

<sup>22</sup> Salvemos Cabana, Ernesto y Ricardo Cabellos Damian. "Operación Diablo" (January 10, 2010) online: YouTube <<https://www.youtube.com/watch?v=tWPE0I2KesE>>.

<sup>23</sup> Shin Imai, Leah Gardner & Sarah Weinberger, *supra* note 6.

Goldcorp publicly states that it is “working for mutual benefit in politically stable jurisdictions,” is committed to responsible mining and has recognized the violence and criminal activity surrounding its mining operations. However, according to a newspaper report, community members say that after a kidnapping of community members who work at the mine, Goldcorp disregarded the incident and a few days later the miners were found dead. Goldcorp’s defense has been that it can only provide security within the borders of the mine and cannot be held responsible for what happens outside.<sup>24</sup>

Mines operating in regions of organized crime likely require some direct or indirect understanding of the gangs in order to operate. For example, Rob McEwen, Canadian miner and founder and former chairman and chief executive officer of Goldcorp freely admitted on Canada’s Business Television Network that he had “good relations” with cartels in the region of his mine:

Generally we had a good relationship with them. If we want to go explore somewhere, you ask them, and they tell you no, but then they’ll say come back in a couple of weeks when we’ve finished with what we are doing...<sup>25</sup>

On April, 2015, McEwen issued an unusual statement backtracking on what he had said and stating that his answer was related to gaining access to properties for exploration.<sup>26</sup>

This situation brings forward a question as to whether companies and States in these complex ecosystems are doing enough to protect community members and hold those companies accountable, or whether the benefits of the mine are actually playing a more negative than positive role in the community. We recommend further investigation, including analysis on the collateral damage caused to the communities and mine employees when they are outside of the mine’s premises and an investigation to examine the possible existence and extent of relationships between organized crime and the mining industry in these areas. If the results of this research show it to be appropriate, principles and policies should be developed to establish the responsibilities and limits of mining companies in regard to the protection of employees and community members in complex ecosystems and whether the companies should begin operations in the first place.

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<sup>24</sup> Soledad García Muñoz, *supra* note 1 at 33-35.

<sup>25</sup> Dolia Estevez, “After Gold Heist, Canadian Mining CEO Says Company Had Good Relations with Mexican Cartels”, *Forbes* (13 April 2015), online: <<https://www.forbes.com/sites/doliaestevez/2015/04/13/after-gold-heist-canadian-mining-ceo-says-company-had-good-relations-with-mexican-cartels/#405922b12139>>.

<sup>26</sup> McEwen Mining, Press Release, “Statement by Rob McEwen- Cartel Confusion: Clarification of Statement” (13 April 2015), online: <<http://www.mcewenmining.com/investor-relations/press-releases/press-release-details/2015/Statement-by-Rob-McEwen--Cartel-Confusion-Clarification-of-Statement/default.aspx>>.

### 3. “ECONOMIC DIPLOMACY” & THE STATE’S OBLIGATION TO PROTECT HUMAN RIGHTS

The Working Group on Mining and Human Rights presented a report to the Inter-American Commission of Human Rights, dealing with several issues surrounding the practices of Canadian mining companies in Latin America. One of the highlighted problems was that Canadian embassies have several times acted as advisors to Canadian companies while disregarding or taking ineffective approaches to human rights considerations<sup>27</sup> or even their own adopted human rights policies as can be seen below.



Mayans sue HudBay in Canada

For example, in the cases of Hudbay Resources in Guatemala – which is now before Canadian courts for allegations of murder of indigenous leaders and sexual assault against indigenous women – and Excellon Resources in Mexico, the companies complained to the Canadian embassy, which intervened with local authorities on their behalf, resulting in the deployment of police or soldiers locally.<sup>28</sup>

Another example is the situation in Chiapas, Mexico at the Blackfire Exploration mine. Like many other mining companies, Blackfire faced opposition from the community close to the mining site. In 2009, the Director General of the mine managed by Blackfire in Chiapas revealed that the company was paying money directly into the bank account of the mayor of the town who promised to “keep the peace and prevent local members of the community from taking up arms against the mine.”<sup>29</sup> Local officials negotiated with the mining company regarding benefits and protections for impacted communities. Canadian civil society organizations pointed to a strong possibility of corruption of local officials linked to payment transfers from the company meant for the local community.<sup>30</sup>



Residents complained of environmental degradation and contamination, as well as cracks in houses they say were caused by the mine’s operations. After the company ignored community demands, local groups set up roadblocks and pickets. Community divisions over the project were present. It was reported that a leading activist, Mariano Abarca, who opposed the project

<sup>27</sup> Grupo de Trabajo, *supra* note 5.

<sup>28</sup> Shin Imai, Leah Gardner & Sarah Weinberger, *supra* note 6 at 32.

<sup>29</sup> Shin Imai, Public Release, “Submission to the Public Sector Integrity Commissioner in Relation to the Embassy of Canada in Mexico” *Justice and Corporate Accountability Project* (5 February 2018), online: <<https://justice-project.org/wp-content/uploads/2018/02/2.-PSIC-Public-final-rev1-.pdf>>.

<sup>30</sup> *Ibid.*

was beaten by Blackfire employees in 2008. In 2009, he was detained for eight days and he was assassinated three months later.

The Canadian Embassy in Mexico continued their support to Blackfire even after the murder and the bribery allegations, despite large community protests and the arrest of three men linked to Blackfire for the murder of Mr. Abarca. Throughout this period, the Canadian Embassy intervened often with state officials on behalf of Blackfire. Furthermore, the embassy not only continued to defend the company before Mexican state officials but also provided it with information on how to sue the state of Chiapas under the North American Free Trade Agreement for closing the mine, even though the mine was suspended due to environmental violations under Mexican law.<sup>31</sup> These circumstances raise serious questions about responsibility and make evident the problems with the lack of commitment to human rights obligations on the part of the Canadian government abroad.



**Bust of Mariano Abarca in his home town**

The Blackfire case is a clear example of how the role of the Canadian government in mining by Canadian companies in Latin America needs to be reformed in order to include adequate protection for human rights and fulfillment of the State's obligations. JCAP has filed a complaint before the Public-Sector Integrity Commissioner against

the embassy officers at the time, but unfortunately our complaint has been rejected on the basis that human rights protection policies for government officials abroad, which can be found in several statements and policy guidelines, are not "*official* Government of Canada policies." Along with the Abarca family, Mining Watch and civil society in Mexico took this case before the Federal Court of Canada with the hope that some concrete legal responsibilities be imposed to Canadian officials abroad when dealing with conflicts surrounding mining companies. On July 18, 2019, the Court dismissed the Appellants' application for judicial review on the basis that there was no wrongdoing on the part of Canadian Embassy personnel in Mexico that could trigger an investigation by the Commissioner.

We are currently appealing this decision before the Federal Court of Appeal. Even if such judicial process has a favourable result, we believe it is of utmost importance that the IACHR consider the creation of a framework to firstly, guide states in imposing human rights obligations for any foreign company engaging in the extraction of resources in the hemisphere

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<sup>31</sup> Julian Sher, "Canadian Mining Company Got Embassy Help amid Controversy in Mexico: Advocacy Group", *The Star* (5 May 2013), online: <[www.thestar.com/news/world/2013/05/05/canadian\\_mining\\_company\\_got\\_embassy\\_help\\_amid\\_controversy\\_in\\_mexico\\_advocacy\\_group.html](http://www.thestar.com/news/world/2013/05/05/canadian_mining_company_got_embassy_help_amid_controversy_in_mexico_advocacy_group.html)>.

and secondly, suggest limits on the interference of foreign states when human rights are at issue. Furthermore, Canada, in following its human rights obligations should clarify the status of such human rights policies and ensure that public officials carrying out functions abroad are complying with such obligations and policies, and that a means for accountability is available to civil society.

## INVESTIGATION, ACCOUNTABILITY AND REMEDIES

Canadian mining companies have a dominant presence in Latin America. Below, we briefly describe three of the main mechanisms for accountability related to this industry.

- The current Canadian Corporate Social Responsibility framework which includes the Corporate Social Responsibility Counsellor (now defunct), the National Contact Point under the Organization for Economic Co-operation and Development and the Canadian Ombudsperson for Responsible Enterprise (CORE), announced in January, 2018, but not yet functioning and which was recently amended to decrease its capacity
- The civil litigation regime for suing companies in Canada for wrongs committed overseas (the tort system)
- The system for addressing corruption abroad through the *Corruption of Foreign Public Officials Act*

The Justice and Corporate Accountability Project has experience in using the existing mechanisms in Canada and can attest that the mechanisms have generally failed to prove adequate for addressing human rights violations abroad. We have also explored other mechanisms of accountability such as shareholder activism and complaints to the Securities Commission, but we will not discuss them in this submission

### 1. THE CURRENT CANADIAN CORPORATE SOCIAL RESPONSIBILITY FRAMEWORK

Until 2018, the government of Canada relied exclusively on voluntary standards and mechanisms to promote and encourage corporate social responsibility.

The bulk of these policies is contained in Canada's enhanced Corporate Social Responsibility (CSR) Strategy entitled "Doing Business the Canadian Way: A Strategy to Advance Social Corporate Responsibility in Canada's Extractive Sector Abroad", announced in November of 2014.<sup>32</sup> There were two complaint mechanisms in place that may be used by those affected by the activities of extractive industries abroad: The Office of the Extractive Sector Corporate Social Responsibility Counsellor (CSR Counsellor) and the National Contact Point (NCP) for the Organization for Economic and Cooperative Development's (OECD) *Guidelines for Multinational*

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<sup>32</sup> Canada: Global Affairs Canada, "Doing Business the Canadian Way: A Strategy to Advance Social Corporate Responsibility in Canada's Extractive Sector Abroad" (2014).

*Enterprises*.<sup>33</sup> Both mechanisms provided mediation if both parties agree, but could not order the companies to do anything, nor do they provide for compensation for people whose human rights have been violated.

The CSR Counsellor had very limited powers and we were among a number of groups who criticized it for being ineffective: it could not investigate, could not require attendance at meetings, nor report finding. The National Contact Point for the OECD is also very limited in its powers. It only offers its offices for dialogue and, if both of the parties are not willing to participate in mediation, the NCP will close the case without further investigation.<sup>34</sup>

The shortcomings of the aforementioned avenues of redress for human rights violations related to business activities led to the announcement, in January 2018, of the intention to create the Canadian Ombudsperson for Responsible Enterprise (CORE). According to the original announcement, the CORE's mandate would be to investigate allegations of human rights abuses linked to Canadian corporate activity abroad.<sup>35</sup> According to the Government of Canada, the Ombudsperson will have a "wider mandate than existing mechanisms" and will have the ability to initiate independent fact-findings, even without the submission of a complaint. Moreover, the Ombudsperson will be able to make recommendation to the parties involved in the complaint as well as to the Canadian Government.<sup>36</sup> These recommendations will include sanctions as well as specific public recommendations.<sup>37</sup>

As of November 2019, the office had yet to be functioning and significant changes have been made to decrease its capacity of investigation. On April 2019, International Trade Minister Jim Carr announced that Sheri Meyerhoffer would be appointed as the first CORE<sup>38</sup>, a lawyer with ties to the energy industry who worked as a lobbyist for the Canadian Association of Petroleum

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<sup>33</sup> Shin Imai, Leah Gardner & Sarah Weinberger, *supra* note 3.

<sup>34</sup> Charis Kamphuis, "Advocating for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement" in Isabel Feichtner & Markus Krajewski, eds, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer, 2018) at 39, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3123209](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123209)>.

<sup>35</sup> Global Affairs Canada, News Release, "The Government of Canada brings leadership to responsible business conduct abroad" (17 January 2018), online: <[https://www.canada.ca/en/global-affairs/news/2018/01/the\\_government\\_ofcanadabringingleadershiptoresponsiblebusinesscond.html](https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringingleadershiptoresponsiblebusinesscond.html)>.

<sup>36</sup> Global Affairs Canada, "Responsible business conduct abroad - Questions and answers" accessed on 20 July 2018, online: <[http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&\\_ga=2.244535429.1291925542.1525646949-847369996.1525646949](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&_ga=2.244535429.1291925542.1525646949-847369996.1525646949)>.

<sup>37</sup> *Ibid.*

<sup>38</sup> Jennifer Wells, "Canada has a new watchdog for corporate ethics. But where are its teeth?" (9 April 2019) *The Star*, online: <<https://www.thestar.com/business/opinion/2019/04/09/canada-has-a-new-watchdog-for-corporate-ethics-but-where-are-its-teeth.html>>.

Producers<sup>39</sup>. However, the powers of the CORE to fulfill its mandate remain undefined as the government asks for external legal advice on which tools the Ombudsperson can have and whether these would be enough to engage in credible and effective investigations of alleged human rights abuses<sup>40</sup>. In its announcement of April of this year, Mr. Carr stated that legal advice was being sought to “consider the legislative and policy framework surrounding Canada’s approach to responsible business conduct abroad”, advice which will also define whether the CORE will have the power to compel documents and witnesses<sup>41</sup>, a key power to be able to conduct independent and thorough investigations. Meyerhoffer has said that she would ask the new Canadian cabinet minister responsible for overseeing her office for the authority to compel documents and testimony from companies and their executives<sup>42</sup>.

Catherine Coumans (Mining Watch Canada) has pointed out that when the CORE was originally announced she believed the new office would possess authority to compel testimony or subpoena documents and that this was supported by the CORE’s official website at one point<sup>43</sup>. When Global Affairs Canada posted a frequently asked questions section on its website it included in one of its answers, that the government had said it was committed to providing the office with such powers<sup>44</sup>. Coumans stated on April, that “[...] by Monday, that language had been removed” and that she believed “It’s pretty clear what happened if you look at the lobby registry”<sup>45</sup>. As reported by the Financial Post, online records, show that the Mining Association of Canada lobbied extensively on international trade issues<sup>46</sup>. A study by JCAP shows that the mining industry met with the federal government ... times between the first announcement of a strong ombudsperson in January 2018 and the announcement of an ombudsperson with no power in April 2019. About 100 of these meetings are labelled as “international” which suggests that the subject matter was the power of the Ombudsperson.<sup>47</sup>

In August 2019, there was a mass resignation from a government advisory board created to monitor allegations of unethical and illegal activities by Canadian corporations involved

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<sup>39</sup> Gabriel Friedman, “‘Lobbied to death’: Liberals face backlash over corporate responsibility ombudsman” (8 April 2019) *Financial Post*, online: < <https://business.financialpost.com/commodities/mining/lobbied-to-death-liberals-face-backlash-over-corporate-responsibility-ombudsman>>.

<sup>40</sup> Jennifer Wells, *supra* note 38.

<sup>41</sup> *Ibid.*

<sup>42</sup> Jeff Lewis, “Canada companies’ watchdog to press Trudeau for expanded powers” (21 November 2019), *Reuters*, online: < <https://ca.reuters.com/article/topNews/idCAKBN1XV2GS>>.

<sup>43</sup> Gabriel Friedman, *supra* note 39.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> JCAP, “Lobbying by Mining Industry”, July 24, 2019 online: <https://justice-project.org/wp-content/uploads/2019/07/2.-Report-on-Lobbying-by-Mining-Industry-july-24-fin.pdf>

overseas in mining, oil and gas and textiles<sup>48</sup>. The resignations came as a result of indications that the ombudsperson would lack the necessary authority to compel testimony and documents<sup>49</sup>.

It is not surprising that Canada has been criticized by several international bodies for its failure to hold Canadian mining companies accountable for their projects abroad.<sup>50</sup>

Most mining companies now adopt voluntary corporate social responsibility codes and publicize them on their websites. However, these voluntary codes are not enforceable and do not provide compensation to victims. A study of HudBay Minerals, formerly active in Guatemala, and now active in Peru, provides a good example of the problems with company codes.

At HudBay's Fenix Mine in Guatemala there had been years of protest following allegations of abuse, sexual abuse, and murder. We have mentioned above, two cases from the mine are currently before courts in Canada - *Choc v Hudbay Minerals Inc.*, and *Caal v Hudbay Minerals Inc.* HudBay quickly took the position that its personnel were not involved in the murder, and that the rapes did not happen.<sup>51</sup>

Despite the fact that HudBay heavily promotes its commitment to CSR and has adopted a number of internal as well as external policies on the matter<sup>52</sup>, these have been inadequate to address the issues raised by Guatemalans against the company. HudBay's 2012 Corporate Social Responsibility report listed four avenues available to complainants. The first two provided contact information to the Board or a Committee of the Board to register a concern.<sup>53</sup> In this case, seeing as the company had already taken a solid position regarding the allegations presented by the complainants, these avenues were unlikely to be useful to the plaintiffs. The third avenue directed complainants to the Canadian federal government's Corporate Social Responsibility Counsellor. However, the CSR Counsellor at the time did not have any significant

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<sup>48</sup> Gabriel Friedman, *supra* note 39..

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*; Ashley Boyes, "More accountability needed for mining industries", *Ottawa Citizen* (5 April 2017); Nicole Mordant, "Canada creates watchdog to oversee companies' conduct abroad", *Reuters* (17 January 2018).

<sup>51</sup> HudBay Minerals. n.d. "The Facts: Hudbay's Former Operations in Guatemala", online: <<http://www.hudbayminerals.com/English/Responsibility/The-Facts-CGN-and-Hudbay-in-Guatemala/>>.

<sup>52</sup> See HudBay's website for information on its corporate social responsibility initiatives. "Responsibility," *HudBay Minerals* (2017) online: <<http://www.hudbayminerals.com/English/Responsibility/default.aspx>>.

<sup>53</sup> Valerie Crystal, Shin Imai & Bernadette Maheandiran, "Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala" (2013) *Canadian Journal of Development Studies* No 286-303; Osgoode Legal Studies Research Paper No 43/2014, 286 – 303.

powers and could only act with the agreement of the corporation.<sup>54</sup> Even if HudBay agreed that the counsellor could get involved, the counsellor could not investigate the complaints or issue binding recommendations on the corporation.<sup>55</sup> The fourth mechanism suggested by HudBay was the National Contact Point of the Organization for Economic Development and Cooperation (OECD). The role of the National Contact Point (NCP) is to “facilitate inquiries and discussions between corporations and affected communities.”<sup>56</sup> Although the NCP is able to investigate complaints directly and attempt to mediate disputes, their resolutions are not binding on the corporation and are not enforceable by state governments.<sup>57</sup> Therefore, none of the mechanisms suggested by HudBay were able to provide an effective method for investigating the allegations raised by the Indigenous Guatemalans.

We recognize that CSR codes are necessary for companies to structure their own activities. However, the problem is that some companies have said that these voluntary CSR codes are all that is necessary. As we have shown above in the example of HudBay, the voluntary codes leave the communities without a remedy, leaving a legal vacuum.

In January 2018 the Canadian government announced it will address this legal vacuum by appointing the Canadian Ombudsperson for Responsible Enterprise (CORE). As mentioned above, the Ombudsperson was supposed to have important powers to investigate, including compelling people to testify and to order production of documents. Unfortunately, CORE has yet to be implemented and its powers seem to have been diminished or be extremely unclear for the moment. It is uncertain whether it will be successful in addressing human rights violations related to business activities. However, it is already clear that the effectiveness of the Ombudsperson will be limited by the fact that it will only be able to make non-binding recommendations to the parties involved as well as the Canadian Government. This limitation is therefore likely to present an obstacle for the comprehensive reparation and access to justice for the victims of human rights violations committed by Canadian extractive companies abroad. As we monitor the development of CORE in order to ascertain whether it will be useful to victims of human rights violations or whether it will be as ineffective as the aforementioned mechanisms<sup>58</sup>, we see very poor commitment from both the government and the industry sector and believe that so far, the signs seem to point to a rather weakened entity, rather than the originally innovative proposal. In addition to the problems surrounding the powers of the

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<sup>54</sup> *Ibid* at 301.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> “Globe Editorial: Ottawa needs to give new human-rights watchdog actual teeth,” *The Globe and Mail* (21 January 2018); Justice and Corporate Accountability Project, “Ombudsperson for Extractive Sector,” online: <<https://justice-project.org/ombudsperson-for-the-extractive-sector>>.

CORE to compel testimony and delivery of documents, for Latin America, there are three issues to monitor.<sup>59</sup>

First, will communities be provided with funds for representation by lawyers, for interpreters and for travel? The mining companies will have the benefit of all three, and it is critical that communities have funds that help address the power imbalance between the companies and the communities. This will be especially true if the Ombudsperson suggests mediation or negotiation, as communities could easily be overpowered.

Second, will there be investigations on the ground in the actual communities where conflicts occur? This type of investigation is crucial for finding out the truth. Merely receiving testimonies in Canada will favour the Canadian companies. The fact that the budget will allow for “complex collaborative and independent investigations” is a good sign that the CORE may be able to investigate at the sites of conflicts.

Third, how will communities inform the Ombudsperson that they have a problem? The CORE will have a website for receiving submissions as well as an option for submissions by mail. In order to increase accessibility, information should be available in Spanish and Portuguese given that Latin America is the largest destination for Canadian investment in resource extraction. It appears that the Ombudsperson will be able to initiate an investigation without waiting for a complaint, which will provide a beneficial option where community members do not make a complaint because they do not know about the existence of the CORE.

## 2. THE CIVIL CLAIMS REGIME

In Canada, if you are injured by another person you can sue the person in court, and if successful the court will order that you be compensated for your injuries. People who have been injured by the practices of Canadian mining companies abroad or relatives of those who have been killed have brought cases to a Canadian court in order to sue the mining company.

Torts are an important judicial mechanism to address human rights violations related to business activities. Currently, there are four cases against Canadian mining companies before

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<sup>59</sup> Shin Imai & Charis Kamphuis. “Canadian government promises stronger monitoring of Canadian companies operating abroad” *Justicia en las Americas* (30 January 2018) online: <<https://dplfblog.com/2018/01/30/canadian-government-promises-stronger-monitoring-of-canadian-companies-operating-abroad/>>; “El Gobierno de Canadá promete un seguimiento más riguroso de las empresas canadienses en el extranjero,” *Justicia en las Americas* (7 February 2018) online: <<https://dplfblog.com/2018/02/07/el-gobierno-de-canada-promete-un-seguimiento-mas-riguroso-de-las-empresas-canadienses-en-el-extranjero/>>.

Canadian courts: *Araya v Nevsun Resources Ltd.*<sup>60</sup>, *Garcia v Tahoe Resources Inc.*<sup>61</sup>, *Choc v Hudbay Minerals Inc.*<sup>62</sup>, and *Caal v Hudbay Minerals Inc.*<sup>63</sup>

*Araya v Nevsun Resources Ltd.* is a case brought by refugees from the State of Eritrea against Nevsun Resources Ltd., a British Columbia mining company. The plaintiffs allege that the mine in question was built “using forced labour, a force of slavery, obtained from the plaintiffs and others coercively under threat of torture by the Eritrean government and its contracting arms.”<sup>64</sup> Nevsun denies all of these claims. In 2017, the British Columbia Court of Appeal held that victims of human rights abuses committed by Canadian corporations abroad may be able to sue for a tort based on customary international law<sup>65</sup>.

*Garcia v Tahoe Resources Inc.* is a case between 7 Guatemalans and Tahoe Resources Inc. over alleged negligence and battery.<sup>66</sup> The plaintiffs were shot and injured by Tahoe’s private security personnel during a protest outside their Escobal mine in April of 2013. On appeal, the Court of Appeal for British Columbia justice dismissed Tahoe’s argument that Guatemala was a more appropriate forum for the case.<sup>67</sup> Tahoe’s mine was suspended by the Constitutional Court in Guatemala for failure to consult Indigenous people. Tahoe’s shares plummeted and was sold to another Canadian mining company, PanAmerican Silver. PanAmerican agreed to provide compensation to the victims.<sup>68</sup>

The last two cases against Hudbay Minerals Inc. are currently before the Ontario Superior Court of Justice after it was found that the company may have owed a duty of care to the Indigenous villagers affected by the actions of the security personnel of Hudbay’s subsidiary companies.<sup>69</sup> *Choc v Hudbay Minerals Inc.* is between Indigenous plaintiffs from Guatemala and Hudbay Minerals Inc., its subsidiaries HMI Nickel Inc. and Compañía Guatemalteca de Níquel (CGN). The plaintiffs allege that Angelica Choc’s husband, Adolfo Ich, was beaten and shot in the head by

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<sup>60</sup> *Araya v Nevsun Resources Ltd.*, 2017 BCCA 401, 4 BCLR (6th) 91 [Araya].

<sup>61</sup> *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39, 92 BCLR (5th) [Garcia].

<sup>62</sup> *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414, 116 O.R. (3d) 674 [Choc].

<sup>63</sup> *Ibid.*

<sup>64</sup> *Araya*, *supra* note 60 at para 4.

<sup>65</sup> Ting, Jacqueline. “Araya v Nevsun Resources Ltd: An Overview”, *Canadian Lawyers for International Human Rights* (6 April 2017), online: <<http://claihr.ca/2017/04/06/araya-v-nevsun-resources-ltd-an-overview/>>.

<sup>66</sup> *Garcia*, *supra* note 61 at para 49.

<sup>67</sup> *Ibid.*

<sup>68</sup> CFM Lawyers LLP, “Guatemalan protestors reach landmark conclusion to lawsuit against Canadian mining company” (30 July 2019), online: <<https://www.newswire.ca/news-releases/guatemalan-protestors-reach-landmark-conclusion-to-lawsuit-against-canadian-mining-company-855276548.html>>

<sup>69</sup> Amnesty International, “Angelica Choc v. Hudbay Minerals”, Case Comment on 2013 ONSC 1414, (2017) online: <<https://www.amnesty.ca/legal-brief/angelica-choc-v-hudbay-minerals>>.

CGN's security personnel in the context of a land dispute.<sup>70</sup> *Caal v Hudbay Minerals Inc.* is a case between 11 Indigenous women from Guatemala, Hudbay Minerals and HMI. The plaintiffs allege that they were each gang-raped by mining security personnel, police and the military when they were forcibly removed from their village. This removal was requested by the Canadian mining company Skye Resources, which was later acquired by HudBay.<sup>71</sup>

These cases established that bringing tort claims forward in a Canadian court can provide an avenue for corporate accountability and that this mechanism can be an effective way to shed light on the conduct of Canadian extractive companies abroad. However, tort cases are often lengthy and costly processes, requiring lawyers willing to work the claims *pro bono*. Moreover, there are a number of legal barriers to enforcing claims, such as the use of subsidiaries operating in the local jurisdiction, to protect the parent company from liability. The cases we describe above show that, while the subsidiary in Latin America may be nominally running a project, these projects are featured on the home pages of Canadian mining companies, often accompanied by statements about responsible mining or community development. However, when these companies are sued in Canada, the Canadian parent company claims that all actions are the responsibility of the subsidiary and uses the many layers of subsidiary corporations as a "corporate veil." This corporate veil allows the company to take advantage of the separate legal personality of subsidiary and parent to shield the parent corporation and other members of the corporate group from legal liability and ultimate responsibility.<sup>72</sup>

The same problem with subsidiaries occurs when the claimants choose to file their claim in their home jurisdiction. This was the case in *Yaiguaje v Chevron*,<sup>73</sup> where the claimants successfully sued Chevron in an Ecuadorian court. However, Chevron had pulled all of its assets out of Ecuador and so the Ecuadorians tried to go after Chevron's assets in the United States and in Canada. In the United States, the Court held that there was corruption in the Ecuadorian judgment, and so refused to make Chevron pay. In Canada, the Ontario Court of Appeal held in 2018 that Chevron's subsidiary in Canada, called Chevron Canada, was a separate body from Chevron USA, and therefore Chevron Canada was not responsible for the damages. Currently the case in Canada has been heard by the Supreme Court of Canada, the Ontario Court of Appeal, an Ecuadorian court, a New York Court<sup>74</sup>, and was eventually thrown out by the Ontario Court of Appeal because Chevron USA could hide behind Chevron Canada, even though Chevron Canada was a 100% subsidiary of Chevron USA. This makes clear the need to develop

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<sup>70</sup> *Choc*, *supra* note 62 at para 6.

<sup>71</sup> *Ibid* at para 7.

<sup>72</sup> Valerie Crystal, Shin Imai & Bernadette Maheandiran, *supra* note 53.

<sup>73</sup> *Yaiguaje*, *supra* note 8.

<sup>74</sup> Megan L Mah, "The continuing saga in *Yaiguaje v Chevron Corporation*: a lesson in security costs and the enforcement of foreign judgments", Weirfoulds LLP (2 October 2017).

a legal regime that would expressly allow review and if necessary, pierce the corporate veil where human rights violations have occurred.

This example shows that while the parent corporations benefit from the profits, they can avoid taking responsibility for the liabilities through the use of subsidiaries. Former Supreme Court of Canada Justice, Ian Binnie, is very critical of this practice:

The way in which those [subsidiaries] are now being used is to have profits taken from the bottom level corporations, sucked up to the top, then using the corporate veil to leave responsibility at the bottom, where there is no money left. It strikes me that, looking at the corporate structure as a whole, there is something wrong with that picture.<sup>75</sup>

In order to avoid this problem, there needs to be changes to the laws that allow courts to look at the corporate structure as a whole to assign liability.

### 3. THE SYSTEM FOR ADDRESSING CORRUPTION ABROAD

Canada's *Corruption of Foreign Public Officials Act* was passed in 1999 and it ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. A Canadian or Canadian company that is involved in corruption abroad can be charged with an offence and prosecuted in Canada. If found guilty they may have to pay a fine or go to jail. Canadian embassies are required to report cases of suspected corruption to the police in Canada.

An example of the limited scope of this statute is apparent in the Blackfire case in Chiapas, Mexico. The regular secret payments to the mayor of the local town in order to "keep the peace and prevent local members of the community from taking up arms against the mine,"<sup>76</sup> mentioned above came to light when Mr. Avila Cervera, the General Manager of Social Responsibility for Blackfire Mexico, filed a complaint with the Chiapas State Congress.<sup>77</sup> In doing so, he revealed that in addition to the payments into the personal bank account of the Mayor, Blackfire had also provided airline tickets to the mayor and his family. What sparked the public

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<sup>75</sup>"An Interview with the Honourable Justice Ian Binnie" (2013) 44 Ottawa Law Review 571 at 588, online: <<https://commonlaw.uottawa.ca/ottawa-law-review/interview-honourable-justice-ian-binnie>>.

<sup>76</sup> Shin Imai, "Submission to the Public Sector...", *supra* note 29.

<sup>77</sup> Chiapas Delegation Report - Blackfire Exploration Mexico, "To: President of the Honourable Congress of the State of Chiapas" (15 June 2009), Mining Watch Canada, online: <[https://miningwatch.ca/sites/default/files/Supporting\\_documents\\_for\\_investigation\\_into\\_Blackfire\\_B.pdf](https://miningwatch.ca/sites/default/files/Supporting_documents_for_investigation_into_Blackfire_B.pdf)>, The English translation of this document can be found archived online: <[https://miningwatch.ca/sites/default/files/Supporting\\_documents\\_for\\_investigation\\_into\\_Blackfire\\_A.pdf](https://miningwatch.ca/sites/default/files/Supporting_documents_for_investigation_into_Blackfire_A.pdf)>.

rift between the Mayor and Blackfire was when the Mayor requested money to invite a cabaret dancer named Niurka to perform at a local fair, and demanded that her contract include a “night of sex” with the Mayor. Blackfire claimed this was going too far and constituted extortion.<sup>78</sup>

The matter was investigated by Canada’s national police, but they decided that charges should not be laid under the *Corruption of Foreign Public Officials Act*. This was a very strange result, as payments made to “keep the peace” were clearly meant to stop opposition to the mine and airline tickets for personal travel highly resemble an act of bribery. One of the community members leading protests about the mine, Mariano Abarca, was beaten by Blackfire personnel, detained on a complaint by Blackfire, received death threats, and was eventually murdered.<sup>79</sup> It may be that the police did not pursue the charges against Blackfire because at that time, the *Act* required that the act of bribery occur in Canada.

The story of Blackfire’s payments to the Mayor seemed to prompt some reform after they were reported in Canadian newspapers in December, 2009. In March, 2010, the Canadian government issued new directives to its embassy personnel that they were to report suspicions of corruption to the Canadian national police. In June 2013, Canada amended the *Corruption of Foreign Public Officials Act* so that it could cover bribes paid by Canadian companies in countries outside of Canada.<sup>80</sup>

While these are positive changes, we do not know of a single instance when the Canadian embassy has reported suspected corruption, let alone any case where an investigation has been launched in Latin America.

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<sup>78</sup> *Ibid.*

<sup>79</sup> Shin Imai, “Submission to the Public Sector...,” *supra* note 29 at 4.

<sup>80</sup> Global Affairs Canada, “Canada’s Fight Against Bribery, Fourteenth Annual Report to Parliament” (August 2013) online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-14.aspx?lang=eng>>.

## CONCLUSIONS AND RECOMMENDATIONS

There is a clear problem with corporate accountability in the mining sector. Canadian companies are the largest investors in this sector in Latin America, so any improvements to the current situation must begin with Canada.

The larger context of the problems is set out in a number of reports that have already been presented to the Commission.

- 2013: Working Group on Mining and Human Rights in Latin America, *The impact of Canadian Mining in Latin America and Canada's Responsibility*.<sup>81</sup>
- 2014: Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project, *Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations*.<sup>82</sup>
- 2015: Human Rights Research and Education Centre, *Extraterritoriality and Responsibility of Home States in the Protection of Human Rights for the Activities of Extractive Industries in Latin America*<sup>83</sup>
- 2015: Iglesia Católica, *Posición de la Iglesia católica ante vulneración y abusos contra los derechos humanos de las poblaciones afectadas por las industrias extractivas en América Latina*<sup>84</sup>
- 2017: Human Rights Clinic - Human Rights Research and Education Centre, University of Ottawa, Justice and Corporate Accountability Project, Maritimes-Guatemala Breaking the Silence Network, Oxfam Canada, Due Process of Law Foundation, *Measures to prevent Human Rights violations by Canadian extractive industries that operate in Latin America*<sup>85</sup>

In this report, we have attempted to provide case studies in order to illustrate the factual basis for some of the current problems. In doing so, we have focused on three mechanisms for corporate accountability and made recommendations for each.

### (a) Government of Canada initiatives and the Canadian Ombudsperson for Responsible Enterprise

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<sup>81</sup> Working Group on Mining and Human Rights in Latin America, "The impact of Canadian Mining in Latin America and Canada's Responsibility Executive: Summary of the Report submitted to the Inter-American Commission on Human Rights" (2014), online:

<[http://www.dplf.org/sites/default/files/report\\_canadian\\_mining\\_executive\\_summary.pdf](http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf)>.

<sup>82</sup> Justice and Corporate Accountability Project (Shin Imai & Jen Moore) *supra* note 5 (no 2).

<sup>83</sup> Human Rights I of the Human Rights Research and Education Centre, *supra* note 5 (no 4).

<sup>84</sup> "Posición de la Iglesia," *supra* note 5 (no 3).

<sup>85</sup> Human Rights Research and Education Centre et al, "Measures to prevent human rights violations by Canadian extractive industries that operate in Latin America" (December 7, 2017), online: <https://justice-project.org/wp-content/uploads/2018/07/IACHR-Thematic-Proposal-Canada-and-Extractive-Industries-September-2017-rev.pdf>.

In our view this initiative is an important step forward, and provides for the first time, an opportunity for investigation of allegations of human rights abuses. In order to make the office effective, it should address three issues:

- (i) provide funds and resources to communities bringing complaints to address power imbalance issues
- (ii) ensure that the Ombudsperson have strong powers to investigate
- (iii) ensure access to Latin American complainants by making the site available in the languages of Latin America

At the same time, it should be recognized that the Ombudsperson can only make recommendations and that there still remains a gap in providing remedies to communities. The powers of the Ombudsperson should include the power to compel testimony and demand documents from corporate executives implicated in wrongdoing and the current process to define such powers should be public, transparent and accessible.

#### (b) Civil litigation (torts)

Theoretically, victims of violence can sue a Canadian company in Canada. However, there are serious challenges to this type of accountability. It will be necessary to remove legal barriers such as cost, legal representation and jurisdiction in order to facilitate access to Canadian courts for those who have been harmed by the international operations of Canadian companies. In addition, there needs to be a change in the law which allows corporations to manipulate subsidiaries to avoid liability and tax.

#### (c) Corruption Abroad

Canada has made some changes to the *Corruption of Foreign Public Officials Act*, including requiring embassy personnel to report allegations of corruption and extending the reach of the legislation to acts committed outside of Canada. On the other hand, these changes are only valuable if they are acted upon, and we have yet to see any investigations in Latin America.

The three recommendations made above arise from the cases that we have discussed in this report. They are not meant to replace recommendations from previous reports, which can be found in Appendix B and Appendix C.



## Appendix B

### Recommendations to the 166th Extraordinary Period of Sessions

December 7, 2017

Human Rights Clinic - Human Rights Research and Education Centre, University of Ottawa, Justice and Corporate Accountability Project, Maritimes-Guatemala Breaking the Silence Network, Oxfam Canada, Due Process of Law Foundation

- Ensure Canadian mining companies operating in Latin America do so in conformity with the international human rights standards established in treaties and the UN Guiding Principles on Business and Human Rights, which apply to both host countries and to Canada.
- In recognition of the increasing number of mining conflicts in Latin America and the Caribbean, it is vital that the Canadian government ensure Canadian mining companies respect the rights of Indigenous communities to self-determination and to free, prior, and informed consent before any mining activities are undertaken on their territories; and respect the decisions of numerous communities, Indigenous and non-Indigenous, who have said no to large-scale mining because of its severe damaging impacts on the environment and social wellbeing.
- End Canadian intervention and the provision of any kind of governmental support, be it through overseas development aid, trade, and investment agreements, public financing or technical assistance, or diplomacy that seeks to influence the adoption or modification of regulatory frameworks in recipient countries for extractive projects.
- Incorporate international human rights and transparency standards in the regulation of credit agencies and public and private investment that finance extractive activities and impose safeguards on companies that receive state subsidies.
- Guarantee effective access to Canadian courts so that victims of human right violations caused by Canadian businesses abroad can obtain justice, truth, and reparations.
- Create objective and impartial mechanisms to effectively monitor and investigate complaints of individual and collective human rights violations in connection with Canadian mining companies abroad. These mechanisms should be designed in conformity with the Paris Principles regarding the status and functions of national human rights institutions.

## Appendix C

### Recommendations to the Thematic Hearing for 153<sup>rd</sup> Period of Sessions October 28, 2014

Canadian Network on Corporate Accountability, represented by the Justice and Corporate Accountability Project and MiningWatch Canada

Preventing and addressing the serious harms that the Canadian mining industry is causing in Latin America and the Caribbean with political, economic and legal support from the Canadian government ultimately involves reforms in a number of areas. In order to prevent harms, it is vital that the Canadian government comply with its international obligations to promote universal respect for the Indigenous and human rights, and enhanced protections for the environment on which communities depend. Furthermore, as the 'Open for Justice' Campaign suggests, Canada will have to look at a combination of initiatives in order to establish an adequate legally binding framework for extraterritorial corporate and state accountability.

- Urge Canada to adopt corporate and state accountability standards that provide accessible processes, independent fact finding and remedies for harm.
- Urge Canada to comply with its international obligations to promote and respect Indigenous and human rights.
- Urge Canada to stop directing overseas development aid and diplomatic services toward the promotion of large-scale mineral extraction overseas.
- Urge Canada to enact legislation to ensure that Crown corporations, particularly those that finance and hold equity in companies, comply with its international human rights obligations
- Urge Canada to revise existing agreements and to stop promoting investor protection agreements that provide corporations with recourse to private international arbitration tribunals in order to sue governments when they or their courts make decisions intended to protect Indigenous and human rights.
- Make note of these concerns in the Commission's annual report.
- Prepare a regional thematic report on home state responsibility and the impact of the extractive industry on Indigenous and human rights.

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