A Policy Framework for the Regulation of Canadian Mining Companies Operating Internationally

MiningWatch Canada

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This is the final version of a paper that was circulated as background for the *Regulating Canadian Mining Companies Operating Overseas* conference held in Ottawa on October 20, 2005.

We are grateful to Jamison Young for his excellent work in researching and preparing this paper.

The final product is the responsibility of MiningWatch Canada.

Executive Summary

MiningWatch Canada and other Canadian non-government organisations (NGOs), and our partners overseas, are frustrated by our inability to hold Canadian mining companies to account for their actions outside of Canada. Voluntary measures have proven inadequate; the mining industry needs to be regulated and made accountable. We have documented case studies of the social, environmental, political and economic impacts associated with mining operations owned and managed by Canadian mining companies in the Philippines, Chile, Peru, and Ghana. We have also undertaken an analysis of regulations and legislation available or required to mitigate the negative impacts of mining.

In this paper, MiningWatch Canada has built on the research and analysis concerning regulation of companies operating internationally to present a policy framework for effecting legislative and regulatory change in Canada in order to control the impact of our mining industry abroad on human rights, environment and labour. This proposal offers regulatory mechanisms to facilitate implementation and enforcement of the proposed amendments regarding legislation, policy and infrastructure. This policy framework was presented for discussion at a roundtable with industry, government and civil society on October 20, 2005 in Ottawa.

The framework identifies three kinds of regulatory mechanisms and examines their respective components:

1. **Facilitative mechanisms**: Legislative measures that create an environment conducive to accountability by:
   A. *Developing a Canadian Corporate Code of Global Conduct (CCCGC):* The CCCGC will empower citizens and provide prescriptions and guidance to corporations. Facilitative mechanisms provide a foundation for accountability. There is a growing trend toward implementing extra-territorial legislation to allow governments to regulate corporations overseas. However, across different industries and different perspectives, there is imprecision and disagreement about standards and benchmarks. This leads to resistance from industry, which has a need for definite standards and a clear understanding of what constitutes a breach. The critical effort for NGOs may be directed at monitoring and sanctioning.
   B. *Establishing a Corporate Global Accountability Agency (CGA Agency) reporting to the Canadian government:* The CGA Agency would be established through a *Corporate Accountability Act.* This Agency would provide support and access to shared methodological resources as well as the capacity to develop and administer performance reporting, auditing and adjudication protocols. Depending on available resources, the creation of a specific CGA Agency has the potential to mobilize support.
   C. *Improving Corporate Disclosure and Accountability:* Making mandatory corporate disclosure and accountability operational would require:
      1. Amend the *Canadian Business Corporations Act* and provincial Acts of Incorporation to require full reporting on impacts on human rights, health, environment, and culture (in compliance with the CCCGC);
      2. Disclosure of social, human rights, environment impacts (and compliance with the CCCGC) in reporting to securities commissions (especially the Ontario Securities Commission as the one that oversees the Toronto Stock Exchange):
         a. Amend the *Ontario Securities Act,* and
         b. Change the rules of the *Ontario Securities Commission.*

3. Amend the *Canada Pension Plan Investment Board Act* to require inclusion of social, human rights, and environmental impacts of corporate behaviour as a part of the Board's fiduciary responsibility;
4. Full disclosure of Export Development Canada-funded projects.

D. *Implementing amendments in the provincial/territorial Corporations Acts:* Enable the empowerment of shareholders who are concerned about impacts of mining by:
1. Permitting shareholders to bring proposals related to the human rights, social and environmental impacts of companies;
2. Re-evaluating s.137(8) of the *Canadian Business Corporations Act* and provincial/territorial Acts to shift the onus to the corporate management of proving that a proposal does not 'relate in a significant way to the business or affairs of the company.'

E. *Amending federal legislation to provide whistle-blower protection for private sector employees:* Enact legislation targeted at protecting employees who disclose information about a criminal offence, illegal act or miscarriage of justice, environmental damage, or human health and safety risks that have occurred or will likely occur.

2. **Incentive mechanisms**: Provide support to Canadian corporations to improve their performance by:
A. Reforming taxation policy to withhold incentives from companies complicit in human rights and environmental abuses in line with the Canadian Lawyers Association for International Human Rights (CLAIHR);
B. Making government assistance conditional upon satisfactory results in a community/ environmental impacts assessment; in other words, make any form of incentive or government assistance conditional upon satisfactory compliance with the Canadian Code of Corporate Conduct, and – in its absence – on compliance with accepted standards for corporate behaviour;
C. Redefining the Environmental Effects section of the *Export Development Act* as Community Effects provisions, or institute a new section in the EDA for human, labour and Indigenous (or social) rights review. EDC has no comprehensive, enforceable directive to include determinants of human rights, labour, indigenous rights and environmental impact when considering projects. A separate regulation under the Canadian Environmental Assessment Act could be designed on the community impact assessment model to mandate an environmental review process. The NGO Working Group on EDC proposes that the assessment of projects proceed in four phases: a preparatory stage, impact assessment, project appraisal and review by the CGA Agency, and finally, project implementation.

3. **Coercive mechanisms**: Create legislation that authorizes government intervention in the activities of corporations and their directors or officers. Such sanctions include unilateral trade sanctions, criminal and civil liability. This would include:
A. *Trade Sanctions Law:* Remove the requirement for UN approval before the invoking of trade sanctions under the *Special Economic Measures Act* (SEMA). The existing interpretation of SEMA has effectively prevented its use to control Canadian companies' egregious actions abroad. It is necessary to challenge and either judicially re-interpret or amend this Act. The *Export and Import Permits Act* is a potential policy tool as well.
B. *Criminal liability:* Force senior officers of companies to be responsible for harm they cause, through extending the criminal negligence provisions of the Criminal Code to acts in foreign countries. Bill C-369 proposes the protection of employees of Canadian companies by placing a legal duty on senior officers to take reasonable steps to prevent bodily harm arising during the course of their responsibilities.
C. *Civil liability:* Enact legislation enabling foreign plaintiffs to sue Canadian defendants for damages in Canadian courts using tort law (civil suits). In torts, the burden of proof is on the balance of probabilities and remedies typically only compensate injured parties.

Introduction

Canada is the world's leading mineral exploration nation and the leading supplier of capital for the mining industry worldwide. In 2003, of the world's mining companies who reported significant exploration plans, 585 of the 917 companies (64%) were based in Canada, 41% of the world's larger companies (defined as having an annual exploration budget of at least $4.3 million in 2003) were based in Canada, and two-thirds of the smaller companies (with an exploration of at least $145,000 but less than $4.3 million) were based in Canada.

Almost two-thirds of the worldwide budgets of the larger Canadian-based companies were allocated for programs abroad in 2003. At the end of 2003, companies of all sizes listed on Canadian stock exchanges held interests in a portfolio of almost 2,800 mineral properties abroad. Of the $12.7 billion in equity financing that was raised for mineral exploration and development projects around the world in 2003, more than 45% was for companies listed on Canadian stock exchanges[1].

The expansion of Canadian mining overseas has been accompanied by some of the world's worst environmental disasters: Los Frailes in Spain, the Omai River in Guyana, the Marcopper spill in the Philippines, and the Porgera Mine in Papua New Guinea. All over the world, there are stories of the forced relocation of indigenous peoples (TVI in the Philippines, First Quantum in Zambia, Repadre in Ghana, Gabriel Resources in Romania, Barrick in Tanzania).

MiningWatch Canada, other Canadian NGOs and our partners overseas are frustrated by our inability to hold these Canadian-based and/or Canadian-registered mining companies to account for their actions outside of Canada.

We have documented case studies of the social, environmental, political and economic impacts associated with mining operations owned and managed by Canadian mining companies in the Philippines, Costa Rica, Chile, Peru and Ghana, as well as undertaken an analysis of regulations and legislation available or required to mitigate negative impacts of mining.

In *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy*[2] the authors talk about the "Governance Gap" whereby transnational corporations that operate outside of their home state jurisdiction are not accountable under international law or in most home state jurisdictions for complicity in human rights abuses. They also raise concerns about the adequacy and effectiveness of models of self-regulation developed by international organizations and companies

Deconstructing Engagement is one of numerous reports written in recent years on what is needed to regulate transnational corporations. These reports provide inventories and assessments of industry self-regulatory codes and principles; multilateral regulations; proposed national legislation; civil society-initiated codes and principles.

In this paper, MiningWatch Canada has built on the research and analysis concerning regulation of companies operating internationally, to present a policy framework for effecting legislative and regulatory change in Canada, in order to control the impact of our mining industry abroad on human rights, environment and labour.

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[1] Lemieux (2003)
[2] Gagnon *et al.* (2003)

The policy framework was presented for discussion to industry, government and civil society on October 20, 2005 at a roundtable in Ottawa.

We believe that the mining industry should be regulated for a number of critical reasons:

- There is a huge knowledge and power gap between mining companies and affected communities;
- Mining has significant and lasting environmental impacts;
- Mining companies can only mine where economical ore deposits are found ("forced locality"), however, some lucrative deposits are located in ecologically sensitive areas or in violent conflict zones where projects would require negotiating with local armed forces and unstable or repressive regimes.[3]

The paper divides proposed regulatory mechanisms into three kinds. [4]

- *Facilitative mechanisms* describe legislative measures, which create an environment conducive to accountability.
- *Incentive mechanisms* provide support (such as tax measures) to Canadian corporations to improve their performance.
- *Coercive mechanisms* describe legislation, which allows the government to assert its authority to halt or sanction the activity of corporations, their directors or officers.

Within these sections, we make the following recommendations for change.

Facilitative Mechanisms:

- Develop a precise, legislated Canadian Corporate Code of Global Conduct

- Establish a Corporate Global Accountability Agency reporting to the Canadian government

- Improve Corporate Disclosure and Accountability in a number of venues,
    - Amend the Canadian Business Corporations Act and provincial Acts of Incorporation to require full reporting on impacts on human rights, health, environment and culture (and compliance with the Canadian Code of Global Conduct)
    - Require disclosure of social, human rights, environment impacts (and compliance with the Canadian Code of Global Conduct) in reporting to the securities commissions (recommendations for the Ontario Securities Act and the Ontario Securities Commission),
    - Amend the Canada Pension Plan to have regard for social and environmental ethics as a part of fiduciary responsibility (and compliance with the Canadian Corporate Code of Global Conduct)
    - Require Full disclosure of EDC-funded projects

- Amend the provincial/territorial Corporations Acts to enable the empowerment of shareholders who are concerned about human rights, the environment and other impacts of mining

- Amend federal legislation to provide Whistle–blower Protection for private sector employees

Incentive Mechanisms

[3] Weissdbrodt (25 May 2000)
[4] Gagnon *et al*. (2003)

- Reform Taxation Policy to withhold incentives from companies complicit in human rights and environmental abuses

- Make Government Assistance conditional upon satisfactory results in a community/environmental impacts assessment

- Redefine the Environmental Effects section of the *Export Development Act* as Community Effects provisions, or institute a new section in the EDA for Human, Labour and Indigenous (or Social) Rights Review.

Coercive Mechanisms

- Remove the requirement for UN approval before the invoking of Trade Sanctions Law under the Special Economic Measures Act

- Force senior officers of companies to be responsible for harm they cause through extending the criminal negligence provisions of the Criminal Code to acts in foreign countries (support Bill C-369)

- Enact legislation enabling foreign plaintiffs to sue Canadian defendants for damages in Canadian courts

Facilitative Mechanisms

Develop a Canadian Corporate Code of Global Conduct

Proposal: Develop a national prescriptive tool, crystallized in legislation, to articulate, with legal precision, the standards expected of the Canadian mining industry in their international operations. Named the Canadian Corporate Code of Global Conduct *(CCCGC), the Code would be a part of a proposed* Corporate Global Accountability Act *(CGA Act).*

The Canadian statutory landscape lacks even the most fundamental accountability tools for corporations operating abroad. Facilitative mechanisms provide groundwork for accountability by empowering citizens, and providing prescriptions and guidance to corporations. Voluntary codes of conduct, multi-stakeholder processes and the norms of international agencies have proven ineffective in controlling damaging behaviour by Canadian corporations. Experience indicates that voluntary codes for corporate social responsibility are driven by the economic interests of corporations and that they will not be employed where there are competing economic interests.

Canadian legislatures have never articulated a legal definition of what standards are expected of corporations operating internationally. In 1997, the House of Commons Subcommittee on Sustainable Human Development called upon the government "to develop and publish a set of public policy guidelines for Canadian business practices," on specific international labour issues.[5]

Canada has made commitments under international law that it has not implemented.[6] Additionally, international law is not always an effective mechanism for resolving all issues. A wide range of human rights treaties are legally binding on states that ratify them, but only six human rights treaties in the

[5] Canada, Parliament, Sub-committee on Sustainable Human Development, (1997)

[6] *For a list of international covenants and conventions, not all signed on to by Canada, see Appendix I.*

United Nations system are upheld by monitoring bodies or "control committees."[7] Individuals may file complaints regarding human rights abuses in their countries to all but two of the committees, but these can only be filed once all remedies within their country have been exhausted.[8]. Further, treaties that have been ratified may still need to be enacted as legislation in Canada before they become effective. At the very least, Canada should ratify and operationalize our commitments under international law dealing with human, environmental, social, cultural and economic rights.[9]

While international law does not yet apply *directly* to corporations, there is an emerging duty rooted in evolving international customary law and in international expectations on corporations to conform to standards of international law.[10] Furthermore, a growing trend toward implementing extra-territorial legislation will allow governments to regulate the behaviour of their corporations overseas.[11] In Belgium, a proposed law would legally bind Belgian corporations to specific standards of sustainability and responsible behavior, set out in a corporate code of conduct, if they receive any form of financial support for their activities from the Belgian Export Credit Agency.[12]

Some existing voluntary codes and international norms provide a basis for a Code of Corporate Conduct for Canada. Many of these standards ensure greater universal applicability and acceptance than a simple extension of domestic laws.[13] Appendix I is a non-exhaustive list of agreements, conventions, treaties and codes whose substance should contribute to the CCCGC. We also propose that, in addition to the critical international human and humanitarian rights law standards contained in these international agreements[14] the International Cyanide Management Code for the Manufacture, the Transport and Use

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[7] *International Covenant on Civil and Political Rights, 1991; International Covenant on Economic, Social and Cultural Rights, 1948; International Convention on the Elimination of All Forms of Racial Discrimination, 1969; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Convention on the Elimination of All Forms of Discrimination Against Women, 2000; Convention on the Rights of the Child, 1989; listed in Rights and Democracy (2004: 2). Text and footnote from: Coumans, C. (2005) in Miranda, M. et al. (2005): Chapter 3, pp. 50-53.*

[8] *International Council on Human Rights (2002: 83-85). While the Committee on Economic, Social and Cultural Rights explicitly interprets the rights it oversees as applying to private companies, this committee does not receive complaints from individuals. Text and footnote from: Coumans, C. (2005) in Miranda, M. et al. (2005): Chapter 3, pp. 50-53.*

[9] Ward (2003) p. v.

[10] Coumans, C. (2005) in Miranda, M. et al. (2005): Chapter 3, pp. 50-53.

[11] Legislatures in the United States, United Kingdom, and Australia are considering draft legislation that would require accountability for some aspects of overseas corporate activity (Gagnon et al. 2003: 58-61). Text and footnote from: Coumans, C. (2005) in Miranda, M. et al. (2005): Chapter 3, p. 53.

[12] The Belgian bill obliges companies to meet standards set out in the following sources: (1) the OECD Guidelines for Multinational Enterprises; (2) the five ILO core labor standards (ILO 29 and 105 on forced labor; ILO 87 on Freedom of Association; ILO 98 on collective bargaining; ILO 100 and 111 elimination of discrimination in respect of employment, occupation and wage; and ILO 138 and 182 on the abolition of child labour), all of which have been ratified by the Belgian government; (3) the UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights; 4) the OECD Convention Against Bribery of Foreign Public Officials in International Business Transactions, which Belgium ratified in 1999; (5) the World Bank's environmental and social operational policies, included in its Pollution Prevention and Abatement Handbook. See Belgische Kamer van Volksvertegenwoordigers—Wetvoorstel. Doc 51 0648/001, Proposition de Loi, Chambre des représentants Belgique, January, 6, 2004. Available online at www.dekamer.be/FLWB/pdf/51/0648/51K0648001.pdf. Text and footnote from: Coumans, C. (2005) in Miranda, M. *et al.* (2005): Chapter 3, p. 53

[13] Ward (2003) (bv) at 15. The Human Rights framework is set forward as an objective and universal set of standards. There the challenges to merely extending domestic law are discussed.

[14] Miranda, M. *et al.* (2005). In Chapter 3 Coumans reviews a number of codes, conventions, and treaties that should form the basis for a Canadian Corporate Code of Conduct. www.frameworkforresponsiblemining.org

of Cyanide in the Production of Gold and the ILO Convention 176 on Mining be used as a foundation for the CCCGC.

Across the industries and across different perspectives there is imprecision and disagreement about standards and benchmarks. This leads to resistance from industry, which has a need for clarity of standards and clear understanding of what constitutes a breach. With standards clear for the "ready comparability of social responsibility across corporations,"[15] the critical effort of NGOs may be directed at monitoring and sanctioning.

Challenges and Opportunities
Comprehensive research and analysis of best practice international norms would result in high standards and precise definitions.[16] The CCCGC might even be attractive to larger corporations, often the subjects of social scrutiny, by providing a stable set of expectations and an 'even playing field.'[17] A code of corporate conduct would only raise compliance issues for smaller mining companies that are not able, or prepared, to mine responsibly. Industry will want to restrict its obligations under such a code. In the past, codes of conduct have not been universally applicable and companies have found many opportunities to lower expectations of their behaviour.[18] Likely, the biggest industry objection will be that compliance with CCCGC will conflict with compliance requirements of host state laws or financiers. This may be perceived by industry as another layer of unnecessary red tape.

Establish a Corporate Global Accountability Agency

Proposal: Create a federal body - the Corporate Global Accountability Agency (CGA Agency) *with responsibility for the realization of the Code – CCCGC.*

Any good set of rules needs a keeper. For example, the *Access to Information Act* (*AIA*) provides for a Commissioner to execute it.[19] The *Canadian Environmental Assessment Act* creates the Canadian Environmental Assessment Agency (CEAA) to implement its directives.[20]

The purposes proposed for the Corporate Global Accountability Agency have been borrowed from those set out for the Canadian Environmental Assessment Agency.[21]

- Administration of the *Corporate Global Accountability Act*.
- Ensuring community participation
- Promotion of compliance through training and guidance.
- Provision of administrative and advisory support for review mechanisms.
- Promotion of community assessment of compliance.
- Advancing the practice of the Canadian Corporate Code of Global Conduct by prescribing methodology for undertaking a community impact assessment (see sections below): stakeholder interviews; focus groups; case studies; quantitative and qualitative surveys.[22]

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[15] VanDuzer, (1997).
[16] International Council on Human Rights (2002) (bv) at 19.
[17] Hutchinson (2001) (cnpv) at 3-4 discusses the use of trade agreements in creating a level playing field.
[18] Justice (2003). 1 at 7.
[19] *Access to Information Act,* R.S.C. 1985, c. A-1, s.54.
[20] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s.61.
[21] Canadian Environmental Assessment Agency Website, (2005a)
[22] NGO Working Group (2004) at 23.

The Agency would provide prescriptive support and access to shared methodological resources and would develop and administer processes for performance reporting and auditing, as well as adjudication.

The proposed Agency would be established through a *Corporate Global Accountability Act.*

Which Ministry should house the Agency? Its concern with overseas commercial activities would appear to make it responsible to the Minister of International Trade or the Minister of Foreign Affairs. However, both Foreign Affairs and International Trade serve to promote Canadian trade and are not endowed with the appropriate regulatory mandate or capacity to enforce regulations with respect to corporate behaviour. Industry Canada's mandate includes ensuring "a more sustainable economic, environmental, and social future for Canadians,"[23] but its mandate is limited to domestic matters. Finally, it might become a function of the Commissioner of the Environment and Sustainable Development's office, or have a parallel office within the Auditor General's Office. However, these departments are only empowered to audit governmental activity, and are unlikely to serve the purposes of this proposal. The Agency could also report directly to the Privy Council Office.

Challenges and Opportunities
The creation of a specific agency involves an expansion of government and funding.

The CGA Agency would certainly be viewed as "red tape" by industry, and would probably face heavy lobbying to dilute its mandate.

On the other hand, depending on available resources the creation of a specific Agency for Corporate Accountability has the potential to mobilize public support.

Enhance Corporate Disclosure and Accountability

Proposal: Improve Corporate Disclosure and Accountability in a number of venues:

Proposal 1: Amend the *Canadian Business Corporations Act* and provincial Acts of Incorporation to require full reporting on impacts on human rights, health, environment and culture (and compliance with the Canadian Corporate Code of Global Conduct)

Proposal 2: Require disclosure of social, human rights, environment impacts (and compliance with the Canadian Corporate Code of Global Conduct) in reporting to the securities commissions (recommendations for the *Ontario Securities Act* and the Ontario Securities Commission)

Proposal 2a: Amend the Ontario Securities Act

Proposal 2b: Change the rules of the Ontario Securities Commission

Proposal 3: Amend the Canada Pension Plan to have regard for social, human rights, and environmental impacts of corporate behaviour as a part of their fiduciary responsibility

Proposal 4: Require Full Disclosure of Export Development Canada-funded projects

[23] Industry Canada website. (2005)

"Information is the democratic currency."[24] Disclosure mechanisms empower stakeholders, whether they are shareholders, consumers, suppliers, host governments or host communities.

Canadian securities laws and regulations require disclosure only where it can reasonably be expected to have a significant impact on the market price or value of securities.[25] The Canadian standard for disclosure is low compared to other countries. As an illustration, Canadian companies trading in US markets actually experienced a lessening of disclosure requirements when new rules brought them under Canadian standards.[26]

In a number of foreign jurisdictions, the past five years have seen a significant progress towards mandatory disclosure of social and environmental impacts. France passed legislation in 2001 updating its antiquated company law framework. The legislation requires companies listed on the 'premier marché' (high market capitalizations) stock exchange to disclose social and environmental issues in annual reports.[27] This early attempt at a stakeholder-centred and impact-based approach has been criticized for its ambiguity and lack of a formal auditing process.[28]

In 2002, the Johannesburg Securities Exchange (JSE) of South Africa became the first stock exchange in the world to require publicly listed companies to report to the standards set by the Global Reporting Initiative.[29] This requirement was not legislated but based on standards defined in the second *King Report on Corporate Governance for South Africa – 2002*. While the report requires all companies listed on the JSE to report at least annually on their sustainability performance, the certification of reports is not a legal responsibility.[30]

In March of 2005, the United Kingdom's *Operating and Financial Review (OFR)* came into force. This statutory instrument[31] applies to the directors of Great Britain Companies formed under *the Companies Act* (1985) who are 'quoted.'[32] It requires them to provide an analysis of business performance, company position and the main trends and factors underlying development, performance and position, which are likely to affect the company in the future. In fulfilling this requirement, directors may need to include information on, "environment, employee and social and community issues."[33] Directors must exercise judgment about what data and analysis to include and whether they have met the general requirements for inclusion outlined in paragraphs 1 and 2 of the OFR Schedule.[34]

In an international climate of change towards mandatory disclosure, Canada is clearly falling behind.

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[24] Forcese (1997)
[25] Weissdbrodt (2000) (de) at 68.
[26] Hutchinson (2001) (cnpv) at 14. The U.S. had threatened to end the agreement because it was unhappy with Canada's reporting requirements.
[27] Ward (2003) (licc) at 4. *Observatoire de la Certification et de la Communication Environmentale et Sociale (2002)*
[28] ARESE (2002)
[29] The Global Reporting Initiative is a multi-stakeholder process and independent institution that develops and disseminates Sustainability Reporting Guidelines. See Global Reporting Initiative Website, online: Global Reporting Initiative <www.globalreporting.org>.
[30] Baue (2003)
[31] *Companies Act* 1985 (U.K.), S.R. & O. 2005/1011, online: <http://www.opsi.gov.uk/stat.htm>
[32] United Kingdom Department of Trade and Industry (2005). This guiding publication provides and interpretation of the act and, here, what defines a 'quoted' company.
[33] United Kingdom Department of Trade and Industry (2005).
[34] *Companies Act* (1985)

There are several ways to operationalize mandatory disclosure for corporations, and to hold them accountable for their impacts.

Proposal 1: Amend the *Canadian Business Corporations Act* and provincial Acts of Incorporation to require full reporting on impacts on human rights, health, environment and culture (and compliance with the Canadian Corporate Code of Global Conduct)

Primarily, an amendment to the incorporating instruments of each province could provide for disclosure on social and environmental activities. It has been suggested that the *Canadian Business Corporations Act* (and its provincial equivalents) could be amended to force disclosure of operations, sources of materials and methods of production.[35] These amendments would apply to all businesses incorporated under the CBCA or under provincial/territorial laws. However current disclosure requirements are not onerous, even for financial disclosure.[36] For this reason, it may be unrealistic to expect legislators to impose significant environmental and social reporting requirements through this method.

Proposal 2: Require disclosure of social, human rights, environment impacts (and compliance with the Canadian Corporate Code of Global Conduct) in reporting to the securities commissions (recommendations for the *Ontario Securities Act* and the Ontario Securities Commission)

Another approach to mandating disclosure could be the regulation of trade in securities.

Transparency and access to information are central themes of the corporate social responsibility agenda.[37] Given that Canadian securities markets are a primary source of capital for mining companies operating internationally, this regulatory mechanism is important. Moreover, mandatory disclosure is particularly necessary in the mining industry because mining's forced locality increases the incidence of 'immoral' payments made to host governments in the way of royalties, tax and production sharing agreements.[38]

Meanwhile, Canadians are placing increased importance on environmental and social considerations when making investment decisions. As public opinion and shareholder surveys show, Canadians are increasingly practicing ethical investment. Canadian regulations for corporate disclosure must be adjusted to facilitate environment and social criteria in investment.[39]

To date, the provinces claim jurisdiction over the regulation of securities under their constitutional power over property and civil rights.[40] The rules governing securities trade are found in provincial securities acts, as are the rules of securities commissions empowered by such legislation.

This paper focuses on the *Ontario Securities Act* (OSA) and the Ontario Securities Commission (OSC), which governs all trade on the Toronto Stock Exchange. There are 12 other securities commissions or authorities in Canada, but since the Toronto Stock Exchange is the only market for public securities, the OSC has ultimate authority even if the company is registered in another province and that province's security commission is the primary reporting authority.

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[35] Hutchinson (2001) (cnpv) at 12.
[36] VanDuzer (1997) (lpc) at c. 4 (C)(2)(a).
[37] Ward (2003) (licc)
[38] Weissdbrodt (2000)
[39] Richardson (2004). Richardson generally discusses the role of social and environmental issues in the investment decisions of various demographic groups and provides support for the growth of ethically sensitive investment.
[40] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

Proposal 2a: *Amend the Ontario Securities Act*

The *OSA* requires, under Part XVIII (Continuous Disclosure), that all 'reporting issuers' report on "material changes in affairs, quarterly financial statements and annual comparative financial statements."[41] A disclosure requirement could be implemented through the addition of a provision in the act requiring social and environmental reporting analogous to the financial reporting requirements. The act would also require other minor amendments to facilitate publication and auditing of reports.

The regulation of securities is generally under provincial jurisdiction. However, in *Multiple Access v. McCutcheon*, the Supreme Court suggested that the federal government had a capacity to regulate because of the "international character of the securities industry."[42] Constitutional jurists have also observed that, "provincial commissions will tend to emphasize local policies and interests."[43] Securities may have to be regulated federally, making the national implementation of a regulatory mechanism much simpler.[44] New regulation requiring disclosure on social and environmental issues could be achieved in the federal legislature. This will not happen without extensive advocacy during continuing inter-governmental discussions.[45]

Proposal 2b: *Change the rules of the Ontario Securities Commission*

Section 143(7) of the *OSA* delegates authority to the Ontario Securities Commission (OSC) to make rules in respect to "prescribing requirements in respect to the disclosure … or varying the requirements of [the] Act in respect of [that] disclosure."[46] This provision provides another avenue for operationalizing disclosure.

In the wake of the Bre-X scandal, the Toronto Stock Exchange and the OSC created the Mining Standards Task Force to suggest proposals for increased investor protection. In response, the Canadian Securities Administrators, "a forum of the 13 securities regulators of Canada's provinces and territories" aimed at "coordinat[ing] and harmoniz[ing] regulation of the Canadian capital markets,"[47] drafted National Instrument 43-101 – *Standards for Disclosure for Mineral Projects*.[48] The instrument tightens disclosure rules to protect investors from the Bre-X-like frauds and was adopted by securities authorities across the country. A similar highly public affair involving issues of corporate environmental /social misbehaviour could result in a national movement towards social and environmental disclosure rules.

Challenges and Opportunities
Achieving mandated disclosure raises a number of challenges and opportunities:

- Typically, the government only becomes involved in the regulation of capital flows as a response to market failures, and attempts to control information symmetry, externalities and monopolistic practices.[49]
- The primary argument against disclosure mechanisms is that commercial information is sensitive and may affect competitive advantage. Some authors suggest a government mechanism (In this

[41] *Securities Act*, R.S.O. 1990 c.S.5.
[42] *Multiple Access Ltd. v. McCutcheon* [1982] 1 S.C.R. 161.
[43] Anisman and Hogg (1979). 135 at 142.
[44] Tse (1994)
[45] Discussions have been ongoing since the idea's inception in 1964. Resistance continues from the governments of Quebec, Alberta and British Columbia.
[46] *Securities Act*, R.S.O. 1990 at s.143.
[47] Canadian Securities Administrators Website, (2005)
[48] Canadian Securities Administrators (2001), 24 O.S.C.B. 303
[49] Richardson, (2004) at para 33.

proposal the CGA Agency would serve this purpose) where companies may challenge the duty to disclose.[50] An onus of proof on the corporation is advisable.

- The main objection to mandatory reporting tends to be cost. The anticipated cost of an Operating and Financial Review (OFR) under the UK instrument is £51,000. A provision in the UK scheme modifies the requirements for corporations qualifying as small and medium sized. The International Right to Know Campaign has suggested applying its rules to companies with at least $5,000,000 in annual income.[51]
- The efficacy of mandatory disclosure as a compliance mechanism has been questioned because of a lack of generally accepted domestic standards that set out appropriate principles, processes and benchmarks for social/environmental performance reporting and auditing. However, the institutionalization of standards and methodologies by the CGA Agency would mitigate this concern.
- Mandatory disclosure may be framed as a benefit to management. Mandatory disclosure allows self-determination about compliance with standards. Consulting with stakeholders throughout project development ensures that the potential impact is disclosed up front.[52]

Proposal 3: Amend the Canada Pension Plan to have regard for social, human rights, and environmental impacts of corporate behaviour as a part of its fiduciary responsibility.

There is an emerging body of legislation in foreign jurisdictions requiring pension fund managers to report on their social and environmental policies. Australia and the United Kingdom have legislation, which legally allows pension managers to have socially responsible investment policies in addition to being concerned with economic interests.[53] The UK initiative requires pension fund trustees to disclose how they take account of social, environmental and ethical factors in their investment decisions.[54] The Belgian and German governments have instituted similar regulations requiring pension funds to reveal whether they incorporate ethical, environmental and social performance of companies in their investment decision making practices.[55]

In Canada, pension funds are the second largest investment pool.[56] Of the close to $700 billion of fund assets in Canadian pension funds at the end of 2004[57] almost $100 billion are invested in the Canada Pension Plan.[58] Because of the significant value of investment in the Canada Pension Plan, an amendment to the plan's investment policies would have a huge impact.

Reports of investment in arms manufacture have spurred response from politicians. Member of Parliament Pat Martin publicly demanded that the CPP Investment Review Board be "prohibited from investing in companies and enterprises that manufacture and trade in military arms and weapons, have records of poor environmental and labour practices or whose conduct and practices are contrary to

[50] Hutchinson (2001) (cnpv) at 12.
[51] International Right to Know Coalition (2003). Financial limits could be set separately for exploration, small, mid-sized and large mining companies
[52] Hutchinson (2001) (cnpv) at 8.
[53] Gagnon *et al.* (2003) (de) at 67.
[54] Cragg *et al.* (2003) at 14.
[55] Cragg *et al.* (2003) at 12.
[56] Hutchinson (2001) (cnpv) at 15.
[57] Statistics Canada (2005)
[58] CPP Investment Board Website (2005a)

Canadian values."[59] This shows that political interest in this issue has been demonstrated in and out of the House of Commons.

The Canada Pension Plan's (CPP) assets are managed by the CPP Investment Board. The Board's investment decisions have supported reprehensible activity with the retirement dollars of Canadians, including the manufacture of weapons.[60] The *Canada Pension Plan Investment Board Act* dictates the policy to be employed by the investment board while managing excess contributions and the proceeds of maturing bonds.

The Act says:

5. The objects of the Board are
   (a) to assist the Canada Pension Plan in meeting its obligations to contributors and beneficiaries under the Canada Pension Plan;
   (b) to manage any amounts transferred to it under section 108.1 of the Canada Pension Plan, and its right, title or interest in any designated securities, in the best interests of the contributors and beneficiaries under that Act; and
   (c) to invest its assets with a view to achieving a maximum rate of return, without undue risk of loss, having regard to the factors that may affect the funding of the Canada Pension Plan and the ability of the Canada Pension Plan to meet its financial obligations on any given business day.[61]

In the Board's interpretation of these provisions, it says, "Our legislation specifically prohibits us from engaging in any investment activities other than maximizing investment returns without undue risk of loss."[62]

This strict interpretation of the Act makes it clear that it must be amended to read: "the board must include social and/or environmental criteria when managing assets transferred to it by the CPP."

Challenges and Opportunities
These provisions mandate the Investment Board to incorporate social and environmental criteria into its decisions. This may create political opposition, perhaps even from the general public.

Proposal 4: Require Full Disclosure of Export Development Canada-funded projects

Concerns about commercial confidentiality are the biggest bar to full disclosure at the EDC. Although the Auditor General in its report on environmental disclosure minimizes the proposed effect on competitiveness,[63] Treasury Board recommended that EDC be included under the *Access to Information Act (AIA)* only when mechanisms were developed to protect competitively secretive information.[64] Developing a mechanism to do so is overdue. Solutions have been incorporated in other OECD jurisdictions. The US export credit agency, the Ex-Im Bank, balances questions of confidentiality in favour of disclosure.[65] In Canada, the Sierra Legal Defence Fund proposes a legal obligation to disclose except where the project sponsor and EDC can prove that the information is commercially sensitive.

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[59] Martin (2004)
[60] Martin (2004)
[61] CPP Investment Board Website (CPPIB Act).
[62] CPP Investment Board Website, (2005b)
[63] Auditor General's Office (2004)
[64] Treasury Board of Canada, (2005).
[65] Howard and Christensen (2005)

The Treasury Board recommendations on the *AIA* were a response to the disclosure issues raised by the sponsorship scandal. In Belgium, legislative reform of its export credit agency, Ducroire, was incited by the institution's support of arms manufacturing in Tanzania and a controversial oil and gas pipeline in Peru.[66]

There has been an on-going battle for increased disclosure of project financing from Export Development Canada, which provides billions in guarantees, loans and political risk insurance to mining projects internationally. Recently the Environmental Review Directive (ERD) was criticized by the Auditor General for its ineffectiveness in disclosure and public consultation elements.[67] Furthermore, EDC's definition of 'project' has applied to only 1.2% of its business volume.

Compared to similar institutions of the US, UK and Australia, the World Bank and the Inter-American Development Bank, EDC has the poorest disclosure rules.[68] EDC itself describes the importance of disclosure: "disclosure of information on [EDC's] business practices is intended to enhance EDC's public accountability."[69] It strives, "for balance between public accountability and respect for customer confidentiality."[70]

However, current EDC disclosure policies are completely at the discretion of the project proponent.[71] Despite steps that have been taken by EDC in discretion, the Auditor General reported that EDC continues to be deficient in transparency, "the necessary counterbalance to an active discretionary policy."[72] In response to this report, EDC said they would be working on their environmental review and disclosure policies in "the months ahead."[73]

Some authors have suggested expanding the applicability of the *Access to Information Act* (*AIA*) to the corporate accounts of EDC. This amendment would provide statutory strength to any changes to the *EDA*.[74] In the most recent session of parliament, Member of Parliament, Pat Martin introduced Bill C-201, which amongst other things amended Schedule I of the *AIA* to include Export Development Canada.[75] This bill was not pursued.

Amend the Provincial Corporations Acts to Enable Shareholder Empowerment

Proposal: Amend the incorporating legislation of the provinces and territories to allow shareholders to bring proposals related to the human rights, social and environmental impacts of companies.

Proposal: Amend s.137 (8) of the *CBCA* and provincial/territorial acts to shift the onus to the corporate management of proving that a proposal does, "relate in a significant way to the business or affairs of the company"

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[66] Halifax Initiative (2005a)
[67] Auditor General's Office (2004)
[68] Hutchinson (2001) (cnpv) at 11.
[69] Howard & Christensen (2005) at 4.
[70] Howard & Christensen (2005) at 4.
[71]. Howard & Christensen (2005) at 4.
[72] Howard & Christensen (2005) at 4.
[73] Howard & Christensen (2005) at 4.
[74] NGO Working Group on the EDC (2004) at 86; also see Halifax Initiative Coalition (2005b)
[75] Bill C-201, *An Act to Amend the Access to Information Act and make Amendments to Other Acts,* 1st Sess., 38th Parl., 2004.

Provinces continue to have an exception enabling companies to decline shareholder proposals which are "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" [76] After vigorous advocacy from civil society early in this decade, the *Canadian Business Corporations Act (CBCA)* now disallows shareholder proposals only where, "it clearly appears that the proposal does not relate in a significant way to the business or affairs of the company."[77]

Provincial Acts should be amended to match the CBCA. Amendments could be a part of routine review of the Acts.

Under both the CBCA and the provincial Acts, if the corporate management continues to refuse to entertain a shareholder proposal, it is the shareholder who faces the burden of proving that their proposal does, "relate in a significant way to the business or affairs of the company." This is an expensive and time-consuming process. In the United States, the onus is on the corporation to prove to the Securities and Exchanges Commission why it is justified in refusing to entertain the proposal. Both the federal and provincial/territorial acts need to be amended to shift the burden of proof to the company.

Enact Whistle-blower Protection for Private Sector Employees

Proposal: Enact legislation in Canada aimed at protecting employees who disclose information about a criminal offence, illegal act or miscarriage of justice, environmental damage or human health and safety risk that has occurred or will likely occur.

Although there is now a form of protection for federal government employees, there are currently no laws in Canada to protect *private sector* employees who discover and disclose information of human rights violations in extraterritorial activities of Canadian Corporations. For example, in 2004, a report from the Government Accountability Project, pointed out that "none of the banks have reliably safe channels for whistleblowers to make a difference against corruption."[78] By comparison, the UK has local legislation aimed at protecting employees who disclose information about, amongst other things, a criminal offence, illegal act or miscarriage of justice, environmental damage or human health and safety risk has occurred or will likely occur.[79]

Incentive Mechanisms

The Canadian government uses incentive mechanisms to promote, financially support, or provide political risk insurance to Canadian corporations. Incentive mechanisms could also be used to encourage positive corporate behaviour. Two notable avenues are financial relief through taxation policy, and trade support/promotion.

[76] This is the traditional parlance used in Canadian incorporating instruments. It continues to be used in Alberta, Saskatchewan, Manitoba, Newfoundland, Yukon, Northwest Territories and Nunavut- Missing Quebec, PEI and Nova Scotia.
[77] The *CBCA* adopted these words from Ontario. British Columbia and New Brunswick are the same.
[78] Hawley (2005) at 61.
[79] *Public Interest Disclosure Act 1998* (U.K.), 1998, c. 23.

Taxation Policy

Proposal: Reform Taxation Policy to withhold incentives from companies complicit in human rights and environmental abuses inline with the Canadian Lawyers Association for International Human Rights (CLAIHR) recommendations

Canadian companies enjoy a number of tax incentives for their international operations that are not conditional on their human rights, environment or social impacts. CLAIHR recommends the following taxation policy:

> "Unilateral tax forgiveness for income tax paid to repressive regimes should be eliminated. At present there is no bar on companies obtaining a Canadian taxpayer funded-tax subsidy for operations that amount to complicity with human rights abuses. The Government should also bar business expense deductions in the calculation of corporate income taxes where those deductions are made for foreign projects raising serious human rights or human security issues. The power of disallowance should be introduced either as a separate amendment of the *Income Tax Act*."[80]

Make Government Assistance Conditional On Satisfactory Results in a Community/ Environmental Impact Assessment

Proposal: Make any form of incentive or government assistance conditional upon satisfactory compliance with the *Canadian Code of Corporate Conduct*, and – in its absence – on compliance with accepted standards for corporate behaviour.

The Government of Canada "helps large and small Canadian companies to expand and succeed internationally."[81] Assistance flows from various extensions of the government including Export Development Canada (EDC), the Minister of Finance, the Minister for International Trade, the Department of International Trade, the Department of Foreign Affairs, CIDA and CIDA INC, embassies, high commissions and consulates around the world. Assistance takes the form of problem-solving, counselling, information-sharing, advocacy when foreign practices and regulations constrain Canadian companies' activities, financial assistance for market entry or research (including missions and trade fairs, loans and insurance), political risk insurance, concessions financing, and participation in Team Canada trade missions.[82]

Export Development Canada

Proposal: Amend the *Export Development Act* to redefine the Environmental Effects section of the *Export Development Act* as Community Effects provisions, or institute an additional section for Human, Labour and Indigenous (or Social) Rights Review.

Export Development Canada's mandate is "provision of trade finance and risk management services to Canadian exporters and investors in up to 200 markets worldwide."[83] As an export credit agency and a crown corporation, EDC is an interesting case for analysis because it is proximate to the operations of

[80] Craig Forcese *et al.*, (2000)
[81] Canadian Department of International Trade Website, (2005)
[82] Forcese (1997) at 85.
[83] Export Development Canada Website, (2005)

projects in high risk environments[84] and at arms length from government, although its credit is backed by Canadian taxpayers.

Although EDC says it "conducts [its] business with honesty, integrity and fairness, and expect[s] the same from [its] customers,"[85] it has supported disastrous mining operations in PNG, Guyana, Kyrgyzstan, Chile, Indonesia, Peru and the Philippines.[86] It continues to support a number of mining projects around the world.[87]

EDC has no comprehensive, enforceable directive, which includes determinants of human rights, labour, indigenous rights and environmental impact when considering projects.

In July 2004, the NGO Working Group on EDC produced a discussion paper[88] that proposes a four phase human rights impact assessment. This model is fully developed and provides a template for a more generic assessment tool that we refer to as "*the community impact assessment model.*"

Seck has proposed mandating an environmental review process as a separate regulation under the *Canadian Environmental Assessment Act (CEA Act)*.[89] This could be achieved by amending the *CEA Act* to list Export Development Canada as a federal authority in the definitions (Section 2(1) of the *CEA Act*) or through a regulation by the cabinet prescribing EDC as a federal authority (Section 59(e) of the *CEA Act*). The approach was rejected in amendments to the CEA Act following a five-year review. A separate regulation under the CEAA could be designed on the community impact assessment model.

The Community Impact Assessment Model

Proposal: As a criteria for government support, borrow and expand the human rights impact assessment model developed by the EDC Working Group into a community impact assessment to determine compliance with the Code (the CCCGC). We propose that the community impact assessment be applied through the CGA Agency.

The EDC Working Group proposes that the assessment of projects proceed in four phases: a preparatory stage, impact assessment, project appraisal and review by the CGA Agency, and finally project implementation.

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[84] VanDuzer (1997) at 62.
[85] Export Development Canada, (2004) at 3.
[86] Kuyek (1999)
[87] According to Export Development Canada list of reportable transactions, the following are their identifiable mining investments since the end of 2003 (total 11)

04/03/05 Peru	Southern Peru Copper	$50-100 million	various CDN exporters
16/05/05 Peru	Mineria Almax SAC	less than $5 million	"
24/11/04 "	"	"	"
07/03/05 Peru	Co. Minera Doña Ines de Collahausi	25-50 million	various
09/12/04 Chile	Mineria Las Pelambres	50-100 million	various
26/10/04 Mexico	Mineria Mexico SA	50-100 million	various
15/07/04 Argentina	Minera Argentina Gold	50-100 million	Barrick
21/06/04 Chile	Corp. Nacionale de cobre	25-50 million	various
27/09/04 "	"	50-100 million	various
19/05/04 Zambia	FQM Zambia	5-15 million	Euclid-Hitachi; Volvo Motor
30/09/04 Philippines	Lepanto Consolidated Mining	less than 5 million	Mining Technolog iNT

[88] NGO Working Group on EDC (rrhr), generally.
[89] Seck (2001) (seac) at 5.

In the preparatory phase, a company would study whether the project may be feasibly implemented in compliance with the Code of Conduct (CCCGC). The project sponsor would be required to establish

- A feasibility study including a definition of stakeholders and a baseline survey of the social, economic, cultural, environmental and legal context;
- An assessment of the project's benefits, costs, effectiveness, alternatives considered, analysis of alternative selection, environmental effects, public opinions, and other factors.
- A means of avoiding or mitigating the negative effects of the project would be explored in a preliminary Comprehensive Options Assessment and proposal of alternatives.
- A grievance mechanism for future use to accommodate the interests of stakeholders who are dissatisfied with the outcome in a democratic forum.

This preparation would ensure that the project development phase results in a project that is both economically feasible and compliant with CCCGC.

During the second phase - project development - a community impact assessment would be conducted by the project sponsor, and submitted to CGA Agency. It would be based on Terms of Reference set by the CGA Agency. This submission would include:

- A review of the policies of financiers and co-financiers
- The regulations of the host country that affect the project.
- A description of the project and its geological, ecological, social and temporal context.
- Practical measures for maintaining participation and involvement of the host community, including a realistic budget for community participation leading to binding negotiated agreements
- The potential impact on the community in the context of the values prescribed in the CCCGC would be discussed.
- The potential negative impacts, salutary effects, and a protection plan would be outlined.
- The protection plan would include negotiated agreements between the sponsor and affected communities for compensation, guidelines for monitoring compliance of negotiated settlements, accident prevention and emergency response plan and guidelines for review.
- A budget and a description of the capacity to conduct these activities.

In phase three, EDC would integrate these submissions into its project review and appraisal process. Projects would be evaluated and categorized by EDC. The nature and level of support requested should not have a material impact on screening.[90] Factors determining categorization would include type, location, country, scale, and sensitivity. Categories would include projects that require extreme caution, good stewardship, no review, projects with financial intermediary provisions and no-go projects. Interested groups should be actively informed of the review of projects that require extreme caution.

The final agreement for the project would require financial and human resource capacity as well as implementation, monitoring and review goals and a decommissioning plan for the project. Approval terms and conditions would be made available to the public.

Additionally, ongoing monitoring in concert with local NGOs should be written into the agreement, as well as funds for capacity building of local civil society organizations if that is needed.

[90] Seck (2001), 1 at 17.

Coercive Mechanisms

Coercive mechanisms are those that involve an exercise of authority by the Government of Canada to sanction behaviour or halt the activity of Canadian Corporations abroad. Such sanctions include unilateral trade sanctions, criminal and civil liability.

Trade Sanctions Law

Proposal: Remove the requirement for UN approval before the invoking of the *Special Economic Measures Act* (*SEMA)*

Economic sanctions have been used to ban, "the sale and shipment of products to a country and on the purchase of its exports."[91] These unilateral economic sanctions have been criticized by some as blunt tools, which primarily impact poorer classes and ultimately only dent the repressive regime economically.

Canada's legislative landscape offers some mechanisms for indirectly controlling the activities of its corporations abroad. These include the Area Control List of the *Export and Import Permits Act*, the annulment of General Preferential Tariff status granted by the *Custom Tariffs Act*, the *United Nations Act*, and the *Special Economic Measures Act* (*SEMA*).

SEMA allows cabinet to quickly impose strong sanctions on trade and other connections to the country. However, its use has been stifled by disagreement about the meaning of a "grave breach of international peace and security [that] resulted or is likely to result in a serious international crisis,"[92] the trigger for unilateral use of the Act. The Department of Foreign Affairs has stated that the Act will not be invoked without a declaration from the UN Security Council under Article 39 of the UN Charter. This interpretation has prevented the Act's use in preventing Canadian corporate involvement with Burma's repressive government, and ultimately prevents the use of the Act for controlling Canadian companies egregious actions abroad. This is particularly frustrating since the apparent intention of legislators in enacting SEMA was to provide a means for Canada to impose sanctions without any action of the United Nations.[93] This will only be realized when the policy for unilateral sanctioning is challenged and either judicially re-interpreted or amended.

The *Export and Import Permits Act* has been similarly recognized as an instrument with potential. The Act, amongst other things creates an Area Control List, a list of countries that the Cabinet deems, "it necessary to control the export of any goods."[94] The Area Control List has been applauded for its flexibility and handling of Canadian business in countries governed by repressive regimes.[95] It has been criticized because it does not prevent Canadian activity but only trade in goods; business transactions are often diverted around the prohibitions in the Act. Currently, the only country listed on the Area Control List is 'Myanmar' i.e. Burma.[96]

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[91] Rossignol (1993)
[92] *Special Economic Measures Act* , R.S.C. 1992, c.17.
[93] *Senate Debates,* (11 May 1992) at 1461 (Hon. Royce Firth). *House of Commons Debates*, (20 February 1992) at 7403 (Hon. Barbara McDougall).
[94] *Export and Import Permits Act* R.S.C. 1985, E-19, s. 4.
[95] Hawley (2005)
[96] Department of Justice Canada Website, (2005)

Criminal Liability

Proposal: Extend the criminal negligence provisions of the Criminal Code to acts in foreign countries, in order to force senior officers of companies to be responsible for harm they cause. (Support Bill C-369)

Charges of criminal negligence and manslaughter were laid against Gerald Phillips, a former mine manager at the Westray mine in Nova Scotia, for his role in the 1992 disaster. By 1998, those charges were dropped, lacking evidence. There was public outrage and, almost twelve years after the Westray disaster, the federal parliament passed a law aimed at "expand[ing] the basis for corporate criminal liability beyond the existing common law" to include actions of "senior officers within the scope of corporate criminal liability.[97] However, since the Criminal Code only applies to acts or omissions committed on Canadian soil,[98] the new law that would only apply to activities in Canada (Exceptions are provided by Section 7 of the Criminal Code – see below).

But Phillips found himself in criminal trouble again; this time charged with attempted murder by the Honduran government. He had been employed as a construction manager for a gold mine operated by a Toronto-based company, Greenstone Resources Limited. An 18 year-old man, protesting the demolition of his town, was seriously injured as Phillips drove a bulldozer towards the town's water tower and a 200 year-old church. Whatever Gerald Phillips character, it remains that he was acting on behalf of his employers. Were the practices and policy of Curragh Resources Inc.[99] and Greenstone Resources Limited connected to criminal behaviour?

On April 22, 2005, Member of Parliament Ed Broadbent introduced a private members' Bill C-369[100] proposing to 'internationalize' the "Westray" Law. The saga of this proposed amendment provides a clear depiction of the challenges and opportunities in applying the criminal code internationally.

Mr. Broadbent's amendment deals with only one of the Westray rules: the duty of persons directing work. The purpose of the amendment in the political context is to "extend to foreign workers of Canadian companies the same health and safety protections that are guaranteed to Canadian workers."[101] The effect of the proposed law would be to protect employees of Canadian companies by placing a legal duty on senior officers to take reasonable steps to prevent bodily harm arising during the course of their responsibilities.

Section 6(2) of the Criminal Code prevents conviction of "an offence committed outside of Canada." Section 7 proceeds to provide circumstances where acts committed outside of Canada will be treated as though they were committed on Canadian soil. These exceptions have evolved to include extensions of jurisdiction into airspace, waters, in circumstances of terrorist activity and sexual crimes against children.

Bill C-369 adopts a simple modification of past exception provisions:

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[97] MacPherson (2004). The amendment also formalized the application of liability to non-corporate organizations.
[98] *Criminal Code* R.S.C. 1985, c. C-46, s.6(2).
[99] The Westray Mine was promoted by Curragh Resources Inc. Curragh, an Ontario Corporation created Westray Coal in 1987 to develop the mine.
[100] Bill C-369, *An Act to Amend the Criminal Code (legal duty outside Canada)* 1st Sess., 38th Parl., 2005.
[101] National Union of Public and General Employees (2005)

> "Notwithstanding anything in this Act or any other Act, every one who is under the legal duty in section 217.1 is deemed to be under that duty outside Canada, and every one who breaches that duty is deemed to have breached it within Canada."[102]

It is important to highlight two provisions in the Bill:

- "The legal duty in section 217.1" refers to the "duty of persons directing work" prescribed by Bill C-45, the Westray laws. This portion defines the offence or duty to be internationalized.

- Unlike any other 'internationalization' under section 7, this provision extends jurisdiction for a duty to prevent criminal negligence rather than extending the definition of offence.

a) Unprecedented Extension
While Section 7 has allowed prosecutions of certain offences committed abroad, it has not yet extended a duty to prevent criminal negligence beyond Canadian borders. This extension of a duty is novel, unprecedented and subject to a review by the courts.

b) The Sovereignty of States
Mr. Broadbent's bill only internationalizes a single duty with specific reason. The creation of an extraterritorial offence is a serious matter and is typically only done where there is a universal acceptance of moral culpability. The fundamental principle of International Law is the sovereignty of the state. When Canada presumes to exercise prescriptive jurisdiction over 'criminal' activity in another state, it threatens the sovereignty of that state. *R. vs. Finta* clarifies how Section 6(2) of the criminal code serves as a 'limitation on' rather than an 'element of' the offence. That is, a criminal act or omission is immoral regardless of where it takes place, but will only be illegal on Canadian soil. The section's existence shows respect for the legal fact that "the prosecution of a perpetrator of a criminal act is normally entrusted to the state in which the act was committed."[103]

Still, the existence of section 7, and of common law extensions of jurisdiction (such as in *R. v. Libman*[104]) indicate that the legislature and judiciary have been willing to prevent Canadians from preying on foreigners. Today, extensions of jurisdiction are only truly viable where they are imposed by legislatures, serious, and used sparingly. Political movements to internationalize criminal laws must be carefully weighed.

c) Joint Ventures
Finally, some "junior" Canadian partners in joint ventures may argue that in their non-controlling position that they did not, "undertake to supervise" work. In rebuttal, it has been suggested that the "related party" provisions of criminal law[105] will capture non-controlling partners where they aid, abet or have a common intention with the party who actually commits the offence. Presumably, liability can be established whether the Canadian crown is able to prosecute the controlling or "senior" party or not.

Civil Liability

Proposal: Enact legislation enabling foreign plaintiffs to sue Canadian defendants for damages in Canadian courts

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[102] Bill C-369, *An Act to Amend the Criminal Code (legal duty outside Canada)* 1st Sess., 38th Parl., 2005.
[103] *R. v. Finta* [1994] 1 S.C.R. 701 at 747.
[104] *R. v. Libman* [1985] 2 S.C.R. 178.
[105] Related party provisions of the criminal code make persons who aid or abet a criminal act or omission culpable as if they had committed the crime themselves.

Criminal law is not the only arena for pursuing international wrongs by Canadian companies. An often-considered mechanism is a cause of action in tort law (civil suits)

It is important to distinguish these two areas of law. The function of criminal law is to punish those who have committed offences under the Criminal Code in order to create retribution and/or deterrence. Conversely, tort law seeks to compensate parties injured as a result of another's conduct; whether it is criminal or not. Put simply, criminal law is between society and the accused, whereas tort law is a private process between an injured party and those who injured them.

There are countless differentiations between tort and criminal law that may influence which venue should be pursued. While criminal proceedings are entirely dependent on the Attorney General's decision to prosecute a case, a tort cause of action is the impetus of the injured party. The criminal law, with its punitive nature, can mete out serious consequences, but for this reason requires a significant burden of proof: beyond a reasonable doubt. In torts, the burden of proof is on the balance of probabilities and remedies typically only compensate injured parties.

The two streams of law do share a critical similarity. Like criminal law, tort law's application to complicit Canadian corporations is limited by jurisdictional issues. Resolving these issues will provide an avenue for holding Canadian corporations accountable.

Common Law Jurisdiction

The law of torts is founded in the thousand year-old, English, common law tradition, and. by default; decisions in tort law are made in accordance with preceding cases. Canadian precedents are unclear about the jurisdictional boundaries of Canadian courts considering tort claims.

A foreign injured party will encounter two significant jurisdictional hurdles when seeking damages from a Canadian Corporation in Canadian courts.[106]

1) The doctrine of *forum non-conveniens* allows a court to dismiss a case where the dispute more appropriately belongs in another legal forum. An analysis of appropriateness takes in a number of factors including: the place of residence of the parties and witnesses, the location of the evidence, the place where the fault occurred, the existence of court proceedings in another forum, the location of the property owned by the defendant, the law applicable to the case, the juridical advantage for the plaintiff in the chosen forum, and the interests of justice. The last factor has been suggested as an avenue for convincing a court that they are the most convenient forum for hearing a case.[107]

2) Once the court has agreed to try the case, it is faced with the question of what law it will use to try the case. The common law doctrine of *lex loci delicti* states that the law of the jurisdiction where the injury took place will be the law applied. Forcese says, "even where a Canadian court has jurisdiction over a transnational tort, it will tend to apply the law of the place where the harm stemming from the tort occurs. There are however, exceptions to the rule, including, possibly, where the [foreign law] is the product of a despotic regime unacceptable to a democratic society."[108]

[106] Seck (1999). 139.
[107] Forcese (1999)
[108] Forcese (1999)

Legislated Jurisdiction
The common law however, is trumped by legislation, when it is created by legislature acting within its constitutional competency. There is no legal bar to a legislature in Canada creating a law that establishes jurisdiction in Canadian Courts for foreigners injured by Canadian Corporations.

The *Alien Tort Claims Act* is the American version of this kind of law. It simply states that, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[109] Since 1980, this Act has been used close to 100 times and has been used to bring human rights cases to justice even where neither party has any connection to the United States.

Canadian legislatures could create a statute that provides their courts with international jurisdiction to hear cases concerning the activity of Canadian Corporations abroad.

Challenges and Opportunities
a) Federalism
Jurisdiction over civil rights and property and the administration of justice is given to the provinces in the Constitution Act, 1867.[110] Most indications suggest that such legislation would have to be enacted by every provincial parliament – an enormous task. Forcese has suggested that the international nature of such a law may be a basis for arguing that it is in the federal competency under international trade or peace, order and good government.[111]

b) The Sovereignty of States and International Prescriptions
The same limits that apply to criminal law described above, also apply to tort law.

The *Alien Tort Claims Act* is currently being used in American Courts against a Canadian Corporation, Talisman Energy Inc., for its alleged participation in a Sudanese genocide. In response, the Canadian Embassy in the United States issued a diplomatic letter to the U.S. Department of State condemning "the assumption of jurisdiction by US courts over Talisman, on the basis of the Alien Tort Claims Act," saying it raises, "serious foreign policy issues."[112] This intervention raises the question of whether, by "serious foreign policy issues," the Canadian government is suggesting that Canadian courts have jurisdiction over this issue.

Further, much of the litigation surrounding the *ATCA* focuses on whether or not the wrong has "been committed in violation of the law of nations or a treaty of the United States." A Canadian design ought to consider both subject matter jurisdiction (violation of the law of nations) and personal jurisdiction (nationality of the defendant vs. minimal contacts to the jurisdiction).

[109] *Alien Tort Claims Act*, 28 U.S.C. Sec. 1350
[110] Weissdbrodt (2000) at s. 92 (13).
[111] Forcese (1997)
[112] *Presbyterian Church of Sudan (Re)* [2005] O.J. No. 3212. Justice Pitt for the court cites a letter dated January 14, 2005 from Canadian Embassy in Washington the United States Department of State.

Appendix I: International Agreements, Codes, and Standards

International Agreements (Covenants/Conventions)

- *Corporate*: ILO Tripartite Declaration of Principles concerning Multi-National Enterprises and Social Policy.
- *Corporate*: OECD Guidelines for Multinational Enterprises
- *Corporate*: UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.
- *Basic Human Rights*: the Universal Declaration of Human Rights: Articles 3 and 5 and preamble; Convention on Civil and Political Rights, Convention on Economic, Social and Cultural Rights
- *Labour Rights*: the ILO Fundamental Declaration of Fundamental Principles and Rights at Work; ILO Tripartite Declaration: 33, 34, 37.
- *Environment*: Rio Declaration, Agenda 21, Conventions on Climate Change, Biodiversity and the Law of the Sea, Basel Convention on the Transportation of Hazardous Wastes, the Montreal Protocol, the Rotterdam Convention.
- *Indigenous Peoples*: ILO Convention 169 concerning Indigenous and Tribal Peoples; UN Draft declaration the rights of Indigenous Peoples (not in force)
- *Security Services*: UN code of Conduct for Law Enforcement Officials, UN Basic Principles on the Use of Force and Firearms by Law enforcement officials.
- *Business Practices*: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, UNCTAD Rules for the Control of Restrictive Business Practices.
- *Sovereignty and development strategies*: UN Charter of Economic Rights and Duties of States, Articles 1 & 2; ILO Tripartite Declaration of Principles concerning Enterprises and Social Policy 10, 19, 20; UN Convention on the Law of States.
- *Mining:* The ILO Convention 176 on Mining.
- *Trade*: NAFTA, FTAA, CAFTA, WTO and sub-agreements

Multi-stakeholder Processes

- Forest Stewardship Council
- Mining Certification Evaluation Project
- US/UK Voluntary Principles on Security and Human Rights
- Kimberley Process (conflict diamonds)
- Business Leaders Initiative on Human Rights
- Mining Certification Evaluation Project: Independent Certification of Environmental and Social Performance in the Mining Sector[113]
- Global Reporting Initiative

[113] WWF. (2001).

International Agencies

- World Bank Safeguard Policies: Environmental Assessment, Natural Habitats, Forests, Pest Management, Cultural Property, Involuntary Resettlement, Indigenous Peoples, Safety of Dams, Disputed Areas, International Waterways
- United Nations Global Compact

Voluntary Codes and Guides

- *Mining:* Mining Association of Canada: Toward Sustainable Mining Guiding Principles
- *Mining:* PDAC (Prospectors and Developers Association of Canada): E3: Environmental Excellence in Exploration
- *Corporate:* United Nations Global Compact
- *Social Responsibility:* ISO 26000 (International Standards Association)
- *Environment:* ISO 14000
- *Corporate:* Global Sullivan Principles
- *Corporate:* US Corporate Code of Ethics (2001)
- *Corporate:* Australia Corporate Code of Conduct (2002)
- *Mining:* International Cyanide Management Code for the Manufacture, Transport and Use of Cyanide In the Production of Gold.
- *Mining:* Mining Association of Canada: Guide to the Management of Tailings Facilities
- *Mining:* ICMM (International Council on Mining & Metals): Sustainable Development Framework
- *Mining:* Mining Association of Canada: Toward Sustainable Mining Guiding Principles
- *Project Finance:* Equator Principles
- *Corporate:* Coalition for Environmentally Responsible Economies: Ceres Principles
- *Corporate:* Extractive Industries Transparency Initiative (EITI)
- *Corporate:* World Business Council for Sustainable Development (WBCSD) and World Resources Institute (WRI): Greenhouse Gas Protocol
- *Corporate:* Social Accountability International's SA8000 ethical workplace system

Appendix II

The Community Impact Assessment Model	
Phase 1: **Preparatory**	▪ A feasibility study including a definition of stakeholders and a baseline survey of the social economic, cultural, environmental and legal context; ▪ An assessment of the project's benefits, costs, effectiveness, alternatives considered, analysis of alternative selection, environmental effects, public opinions, and other factors. ▪ A means of avoiding or mitigating the negative effects of the project would be explored in a preliminary Comprehensive Options Assessment and proposal of alternatives. ▪ A grievance mechanism for future use to accommodate the interests of stakeholders who are dissatisfied with the outcome in a democratic forum
Phase 2: **Project Development**	▪ A review of the policies of financiers and co-financiers ▪ The regulations of the host country that affect the project ▪ A description of the project and its geological, ecological, social and temporal context ▪ Practical measures for maintaining participation and involvement of the host community, including a realistic budget for community participation leading to binding negotiated agreements ▪ The potential impact on the community in the context of the values prescribed in the CCGC would be discussed ▪ The potential negative impacts, salutary effects, and a protection plan would be outlined ▪ The protection plan would include negotiated agreements between the sponsor and affected communities for compensation, guidelines for monitoring compliance of negotiated settlements, accident prevention and emergency response plan and guidelines for review ▪ A budget and a description of the capacity to conduct these activities
Phase 3: **Project Review and Appraisal**	▪ Evaluated and categorized by EDC ▪ Factors determining categorization would include type, location, country, scale, and sensitivity ▪ Categories would include projects that require extreme caution, good stewardship, no review, projects with financial intermediary provisions and no-go projects
Phase 4: **Project Implementation**	▪ The final agreement of the project requires financial and human resource capacity, as well as implementation, monitoring and review goals, and a decommissioning plan for the project. ▪ Ongoing monitoring, in concert with local NGOs should be written into the agreement, as well as funds for capacity building of local civil society organizations, if that is needed

Appendix III: The Policy Framework — Table Form Summary

Mechanisms	Proposals	Sub-Proposals	Challenges and Opportunities
Facilitative	Develop a precise, legislated Canadian Corporate Code of Global Conduct (CCCGC)		▪ A Code of Corporate Conduct would only raise compliance issues for smaller mining companies that are not able, or prepared, to mine responsibly ▪ This may be perceived by industry as another layer of unnecessary red tape
Facilitative	Establish a Corporate Global Accountability Agency reporting to the Canadian Government		▪ The creation of a specific agency involves an expansion of government and funding ▪ The CGA Agency would certainly be viewed as red tape by industry, and would probably face heavy lobbying to dilute its mandate ▪ Depending on available resources, the creation of a specific Agency for Corporate Accountability has the potential to mobilize public support
Facilitative	Improve corporate disclosure and accountability	Amend the Canadian Business Corporations Act and provincial Acts of Incorporation to require full reporting on impacts on human rights, health, environment and culture (and compliance with the CCCGC)	▪ It may be unrealistic to expect legislators to impose significant environmental and social reporting requirements through this method because current disclosure requirement are not onerous, even for financial disclosure
		Amend the CPP to have regard for social and environmental ethics as a part of fiduciary responsibility (and compliance with the CCCGC)	▪ These provisions mandate the Investment Board to incorporate social and environmental criteria into its decisions. This may create political opposition, perhaps even from the general public
		Require full disclosure of EDC-funded projects	▪ Expanding the *Access to Information Act* would create a space to increase transparency in the disclosure practices of the EDC

Mechanisms	Proposals	Sub-Proposals	Challenges and Opportunities
Facilitative	Improve corporate disclosure and accountability (continued)	Require disclosure of social, human rights, environment impacts (and compliance with the CCCGC) in reporting to the securities commissions (recommendations for amendments to the *Ontario Securities Act* and change the rules to the Ontario Securities Commission)	▪ Typically, the government only becomes involved in the regulation of capital flows as a response to market failures, and attempts to control information symmetry, externalities and monopolistic practices ▪ Commercial information is sensitive and may affect competitive advantage. Some authors suggest a government mechanism (the CGA Agency would serve this purpose) where companies may challenge the duty to disclose. An onus of proof on the corporation is advisable. ▪ The main objection to mandatory reporting tends to be cost. The anticipated cost of an OFR under the UK instrument is £51 000. A provision in the UK scheme modifies the requirements for corporations qualifying as small and medium sized. The International Right to Know Campaign has suggested applying its rules to companies with at least $5 000 000 in annual income ▪ Lack of generally accepted domestic standards that set out appropriate principles, processes and benchmarks for social/environmental performance reporting and auditing. However, the institutionalisation of standards and methodologies by the CGA Agency would mitigate this concern. ▪ Mandatory disclosure allows self-determination about compliance with standards and may be framed as a benefit to management. Consulting with stakeholders throughout project development ensures that the potential impact is disclosed up front.
Facilitative	Amend federal legislation to provide whistle-blower protection for private sector employees	Protect employees who disclose information about a criminal offence, illegal act or miscarriage of justice, environmental damage or human health and safety risk that has occurred or will likely occur	▪ Currently, there are no laws in Canada to protect *private sector* employees who discover and disclose information of human rights violations in extraterritorial activities of Canadian Corporations.

Mechanisms	Proposals	Sub-Proposals	Challenges and Opportunities
Incentive	Reform taxation policy to withhold incentives from companies complicit in human rights and environmental abuses in line with recommendations from Canadian Lawyers Association for International Human Rights (CLAIHR)		▪ CLAIHR recommends the following amendment: "Unilateral tax forgiveness for income tax paid to repressive regimes should be eliminated. At present there is no bar on companies obtaining a Canadian taxpayer funded-tax subsidy for operations that amount to complicity with human rights abuses. The Government should also bar business expense deductions in the calculation of corporate income taxes where those deductions are made for foreign projects raising serious human rights or human security issues. The power of disallowance should be introduced either as a separate amendment of the *Income Tax Act*…"
Incentive	Make any form of incentive or government assistance conditional upon satisfactory compliance with the *Canadian Code of Corporate Conduct*, and – in its absence – on compliance with accepted standards for corporate behaviour		▪ Assistance takes the form of problem-solving, counselling, information-sharing, advocacy when foreign practices and regulations constrain Canadian companies', financial assistance for market entry or research (including missions and trade fairs, loans and insurance), political risk insurance concessions financing and participation in Team Canada trade missions
Incentive	Amend the *Export Development Canada Act* to redefine the Environmental Effects section as Community Effects provisions, or institute an additional section for Human, Labour and Indigenous (and/or Social) Rights Review		▪ Four-phase human rights impact assessment was proposed and fully develops and provides a template for a more generic assessment tool that we refer to as "*the community impact assessment model"* (refer to next table for the breakdown of each phase) – this model determines compliance with the CCCGC and applied through the CGA Agency ▪ Another proposal includes mandating an environmental review process as a separate regulation under the *Canadian Environmental Assessment Act* (CEA Act)

Mechanisms	Proposals	Sub-Proposals	Challenges and Opportunities
Coercive	Remove the requirement for UN approval before invoking the *Special Economic Measures Act* (SEMA)	The apparent intention of SEMA was to provide a means for Canada to impose sanctions without any action of the UN, however the Department of Foreign Affairs has stated that the Act will not be invoked without a declaration from the UN Security Council under Article 39 of the UN Charter. Thus, the policy for unilateral sanctioning is challenged and needs to be either judicially re-interpreted or amended	
Coercive	Extend the criminal negligence provisions of the Criminal Code to acts in foreign countries in order to force senior officers of companies to be responsible for harm they cause (criminal liability).	Support Bill C-369	▪ Threatens the sovereignty of the state because Canada would be presuming to exercise prescriptive jurisdiction over 'criminal' activity in another state. ▪ The Sovereignty of States and International Prescriptions: The *Alien Tort Claims Act* is an American example of whether or not the wrong has 'been committed in violation of the law of nations or a treaty of the United States.' A Canadian design ought to consider both subject matter jurisdiction (violation of the law of nations) and personal jurisdiction (nationality of the defendant vs. minimal contacts to the jurisdiction)
Coercive	Enact legislation enabling foreign plaintiffs to sue Canadian defendants for damages in Canadian courts (civil liability or tort law).	Common law jurisdiction including a review of the doctrines of *forum non-conviens* and *lex loci delicti*. Further, reviewing Legislated jurisdiction, such as the *Alien Tort Claims Act* in the U.S.	▪ Federalism: Most indications suggest that jurisdiction over civil rights and property and the administration of justice would have to be enacted by every provincial parliament – an enormous task. It has been suggested that the international nature of such a law may be a basis for arguing that it in the federal competency under international trade or peace, order and good government

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