



# Critique of the Government of Canada’s 2014 “Enhanced Corporate Social Responsibility Strategy: To Strengthen Canada’s Extractive Sector Abroad”: Brief Prepared for Five Year Review

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## Summary

Canada’s 2014 “*Enhanced Corporate Social Responsibility Strategy: To Strengthen Canada’s Extractive Sector Abroad (CSR Strategy)*” does not ensure that the Government of Canada, through its departments, missions, and agencies upholds its obligation to protect human rights, nor does the CSR Strategy ensure that Canadian extractive companies operating overseas respect human rights.

Overall, it fails in the following related ways:

- **Lack of compliance mechanism.** The CSR Strategy sets out a number of *objectives* and *expectations*. Many of these objectives are not well-defined enough to be *measurable*. Further, the CSR Strategy does not request that achievement towards its objectives be measured or reported on by the Government of Canada’s own agencies (e.g. missions, Export Development Canada), and by Canadian extractive companies operating overseas,
- **Lack of transparency.** To the extent that the Government of Canada’s departments, missions, and agencies may seek to meet the objectives of the CSR Strategy, or state that they are doing so, there is a lack of transparency towards Canadian stakeholders and citizens regarding the degree of success or failure of these efforts.
- **Lack of accountability, sanction and remedy.** The CSR Strategy does not address lack of accountability in regard to the Government of Canada’s own departments, diplomatic missions and agencies when these fail to protect the human rights of persons who are, or may be, impacted by resource extraction by Canadian companies operating overseas. Further, the CSR Strategy does not ensure sanction for Canadian companies that do not respect human rights, nor remedy for those who have been harmed; sanction and remedy are central principles set out in Principle

25 of the [UN Guiding Principles for Business and Human Rights](#), which is one of the CSR Strategy's guidance documents.

## Recommendations

- 1) As an immediate first step, fulfill the Government of Canada's [commitment](#) of January 2018, to provide the Canadian Ombudsperson for Responsible Enterprise (CORE) with the power to compel documents and testimony so that it can effectively investigate human rights abuse allegations linked to Canadian extractive corporations operating overseas. As the Government is aware, these powers can be conferred under an Order in Council mandate under the *Inquiries Act*. Subsequently, the CORE should be made independent of government by constituting this office through legislation.
- 2) Enact comprehensive mandatory human rights due diligence legislation (mHHRD). Canada is already behind countries such as France, where mHRDD [legislation](#) was adopted in 2017,<sup>1</sup> and a growing number of [European countries](#) considering the adoption of such legislation. Mandatory human rights due diligence legislation requires companies to identify, prevent and mitigate human rights abuses and provides access to legal remedy in the company's home country through a cause of action when companies are alleged to have caused harm in their global operations, including through their subsidiaries and supply chains.
- 3) Introduce effective and transparent due diligence requirements for Canadian government departments, diplomatic missions, and agencies such as Export Development Canada to prevent these public agencies from supporting, financing and insuring business activity that is linked to human rights abuse.

## Some examples of failures of the 2014 CSR Strategy

### *Lack of compliance mechanism*

- **Alignment with CSR Strategy guidelines** - The 2014 CSR Strategy, in its first summary page, notes under the 5<sup>th</sup> bullet point that extractive companies are “expected to align with the CSR guidelines.”<sup>2</sup> But there is no clarity on *how* (by what ongoing effective and transparent mechanism or process) the Government of Canada will *measure* or determine whether or not a particular company, at a particular project abroad, is in fact aligning with the CSR Strategy guidelines. Details of what would constitute alignment, or lack thereof, are also missing. And yet, alignment with the CSR Strategy guidelines, is indicated as making a company “*eligible* for enhanced Government of Canada economic diplomacy” [emphasis added]. As well, *lack of alignment* with CSR Strategy guidelines is indicated in this same point as to be met, potentially, with “a penalty” defined as “Government of Canada support in foreign markets will be withdrawn.” Government of Canada support that may be withdrawn or withheld is further defined under the heading “Encouraging alignment...” as “withdrawal of TCS [Trade Commissioner Services] and other Government of Canada advocacy support abroad” such as “the issuance of letters of support, advocacy efforts in foreign markets and participation in Government of Canada trade missions” these activities are further described as “economic

<sup>1</sup> For brief summaries of key elements of the legislation see [here](#) and [here](#).

<sup>2</sup> These are defined as: the OECD Guidelines for Multinational Enterprises; the UN Guiding Principles on Business and Human Rights; the Voluntary Principles on Security and Human Rights; the International Finance Corporations' Performance Standards on Social and Environmental Sustainability; the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas; and the Global Reporting Initiative.

diplomacy.” As well, a “designation” of being not in alignment with the CSR Strategy guidelines would be taken into consideration by Export Development Canada “in its consideration of the availability of financing or other support.”

The *penalties* for lack of alignment with the CSR Strategy guidelines could be significant incentives for improved corporate behaviour, if they could be implemented. The lack of clear and transparent information on how the Government of Canada would determine lack of alignment with the CSR Strategy guidelines on an ongoing basis is a serious failure of the 2014 CSR Strategy. The roles of the now defunct CSR Counsellor and Canada’s National Contact Point (NCP) for the [OECD Guidelines](#) are described as “dispute resolution” devices. Non-participation in the efforts of these mechanisms is the only *clear* trigger for implementing the penalties mentioned above. However, the then-CSR Counsellor and current NCP do not have the mandates or powers necessary to make determinations of fact about whether or not a company is in alignment with the CSR Strategy guidelines. Both offices, respectively, were and are only mandated to encourage dialogue towards dispute resolution between companies and those allegedly harmed by their operations. They are not mandated to make determinations of fact about a company’s alignment with the CSR Strategy guidelines or respect for human rights.

The hiring of the Canadian Ombudsperson for Responsible Enterprise (CORE), in 2019, has not resolved the shortcomings of the NCP and former CSR Counsellor. The CORE is not mandated to determine on an ongoing basis that all overseas projects of Canadian extractive companies are aligned with the CSR Strategy and guidelines. Furthermore, if a complaint is brought to the CORE she cannot currently determine the facts of the issue. The (updated) [Order in Council mandate](#) of the CORE does not reflect commitments made by the Government of Canada in January 2018 that the CORE would have investigatory powers to compel documents and witnesses.<sup>3</sup> Without those powers the CORE will not be able to make definitive determinations of fact, which would allow for strong decisions by the Government of Canada to withhold economic diplomacy or financial support to a particular company. In fact, any attempt by the Government of Canada to withhold economic diplomacy, or, for example, future funding from EDC, would leave the government open to legal action without a strong defence based in evidence by companies allegedly disadvantaged.

### ***Lack of transparency***

- **Canadian Missions** – the 2014 CSR Strategy focusses on services Canadian missions provide Canadian extractive companies operating overseas, including “detect issues early on and contribute to their resolution.” But enhanced Trade Commissioner or Ambassador services to extractive companies, including those detailed in the CSR Strategy (such as “on-the-ground intelligence and practical advice on foreign markets”), should, according to the CSR Strategy, be restricted to companies that can demonstrate that they are aligned with the CSR Strategy guidelines. As detailed above, there is currently no ongoing mechanism or process by which mission staff can determine whether a company’s projects are aligned with the CSR Strategy guidelines. In fact, this alignment does not seem to have a high priority as the [web site](#) of Canada’s Trade Commissioner Service lists “eligibility criteria” for receiving services and none relate to any CSR guidelines or respect for human rights.

<sup>3</sup> See [MiningWatch Canada](#). 12 September 2019, Trudeau Government Drops Writ and Publishes Revised Ombudsperson Mandate, Again Fails to Provide Necessary Powers to Investigate Corporate Abuse of Human Rights

Furthermore, there is no transparency regarding whether companies that already benefit from enhanced consular services, or other forms of economic diplomacy, are in alignment with the 2014 CSR Strategy guidelines. There is even lack of transparency regarding whether these companies have signed on to an Integrity Agreement. Integrity Agreements do not cover all areas set out under the 2014 CSR Strategy guidelines and are *not transparent* as MiningWatch has been told that whether a company has signed such an agreement is confidential.<sup>4</sup>

Mission staff should be explicitly mandated to protect human rights. In cases in which human rights allegations are made against the operations of Canadian extractive companies operating overseas, missions should follow clearly defined and publicly available due diligence guidelines aimed at protecting human rights. Missions should be required to provide evidence of due diligence in their procedures in regard to dealing with human rights complaints brought against Canadian companies' overseas projects.

### ***Lack of accountability, sanction and remedy***

- **Access to remedy** – the 2014 CSR Strategy is focussed on dispute avoidance and resolution, and on hypothetical penalties for companies that do not align with CRS Strategy guidelines (concerns regarding this are discussed above). It has nothing to say about the right to access to remedy for those harmed by Canadian mining companies operating overseas. While the Ombudsperson's office *could* play a role in providing a non-judicial pathway to potential remedy the office is currently severely restricted in its ability to do so by the lack of strong investigatory powers and functional independence (see discussion above).

Mandatory human rights due diligence would increase corporate accountability and transparency by making companies responsible for reporting publicly on their own human rights due diligence, including in regard to their overseas operations, subsidiaries and supply chains. It would also create a cause of action for civil litigation in Canadian courts, ensuring a legal pathway to access to remedy.

<sup>4</sup> For further concerns see: Catherine Coumans, [\*Duty to Protect Human Rights: How Canada's Embassy Staff and Trade Commissioners Are Not Fulfilling Their Duty\*](#). Presented at the Canadian Network for Corporate Accountability Symposium, Ottawa, April 30, 2019.