



**Canadian Lawyers Abroad – Avocats
canadiens à l'étranger**

2013-2014 Student Chapter Theme Document

**Corporate Social Responsibility and the
Extractive Industry**

Student Chapter Theme Guide 2013 – 2014

Every year, Canadian Lawyers Abroad (CLA) chooses an annual theme for the Student Chapter Program, in an area relating to law and development. Student Chapters LEARN about the theme; THINK about steps Canada can take to address the issue; and ENGAGE in activities that raise awareness. In past years, topics have ranged from Children's Rights to Indigenous Rights and from Access to Justice to Transitional Justice. This year we have chosen to focus on Corporate Social Responsibility, specifically within the extractive industry.

Canada is a global leader in the extractive industry, with over 75 percent of the world's mining companies incorporated in Canada.¹ As the industry continues to grow, the Government of Canada has increasingly promoted Canadian extractive projects, through direct foreign investment² and through direct and indirect grants provided through the Canadian International Development Agency's development projects.³ With an increased focus on the extractive industry, CLA believes that it is extremely important that all law students, as the future of the legal profession, learn about the emerging field of corporate social responsibility and the impact that Canada and Canadian companies operating in the sector have on different aspects of corporate social responsibility and development.

How to use the theme guide

The purpose of this theme guide is to provide Student Chapters with a concise and organized document of key background information on Corporate Social Responsibility (CSR). Student Executives are encouraged to browse through the theme guide early in the year to plan ahead for events.

Given the breadth of what CSR entails, the theme guide focuses on three areas: the environment, Indigenous peoples, and human rights. This is by no means an exhaustive list or examination of these areas, but rather is intended to offer a starting point for further research.

For each area the main legislation, regulations, and standards endorsed by the Canadian government are provided. Case studies of conflicts that have arisen under each area, raising questions of CSR and providing the various perspectives of invested parties, are also available as annexes to the guide.

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¹ Foreign Affairs, Trade and Development Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, (Ottawa: FATDC 2009) [*Building the Canadian Advantage*]. Kristen Shane, "Canada Urged to Ensure that Miners Publish What They Pay", *Embassy Magazine* (17 May 2013).

² Export Development Canada, *Corporate Social Responsibility*, online: Export Development Canada <<http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/default.aspx>>.

³ Foreign Affairs, Trade and Development Canada, News Release, "Minister Oda announces initiatives to increase the benefits of natural resource management for people in Africa and South America" (29 September 2011) online: FATDC <<http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/CAR-929105317-KGD>>.

Table of Contents	page
How to Use the Guide	1
Corporate Social Responsibility	2
CSR and Canadian Extractive Companies Operating in Canada	3
CSR and Canadian Extractive Companies Operating Abroad	3
Voluntary Frameworks Supported by Companies	5
Corporate Accountability	6
Part I: CSR and the Environment	8
Part II: CSR and Human Rights	11
Part III: CSR and Indigenous Peoples	16
Part IV: Activities for Student Chapters	19
Part V: Annexes	21

Corporate Social Responsibility

While there is no universally accepted definition of Corporate Social Responsibility (CSR), also referred to as “*corporate responsibility, corporate sustainability* or the “*triple bottom line*”,⁴ it is understood to be a broad concept that encompasses the environmental, social and economic impacts of a company on such affected parties as customers, employees, communities, government, civil society, investors and suppliers, the environment and future generations. Industry Canada has defined CSR as “the way in which firms integrate social, environmental and economic concerns into their values, culture, decision making, strategy and operations in a transparent and accountable manner and thereby establish better practices within the firm, create wealth and improve society.”⁵

Internationally, CSR standards have developed through international organizations, such as the Organisation for Economic Co-operation and Development (OECD), the United Nations Global Compact, International Organization of Standardization (ISO), and the International Finance Corporation, as well as through industry-specific bodies, such as The Voluntary Principles on Security and Human Rights, the Equator Principles, Extractive Industries Transparency Initiative, Principles for Responsible Investment, and Global Reporting Initiative (GRI). While these and other industry- or issue-specific standards and principles cover all aspects of business operations, they remain voluntary. Some organizations, such as the OECD Guidelines,

⁴ “Triple bottom line”, *The Economist* (17 November 2009), online *The Economist* <<http://www.economist.com/node/14301663>>.

⁵ Industry Canada, *Corporate Social Responsibility: An Implementation Guide for Canadian Business* (Ottawa: Industry Canada, 2006), online: Industry Canada <<http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/rs00126.html>> [*Implementation Guide*].

do establish mechanisms for implementation and oversight, such as the National Contact Points; however, company compliance is not mandatory.

Corporate Social Responsibility and Canadian Extractive Companies Operating in Canada

In Canada there is no specific legislation governing corporate social responsibility. Aspects of CSR principles are, however, covered indirectly by regulations and legislative schemes. These include such items as provincial and territorial mining acts, provincial environmental impact assessments, regulations for waste management, such as mine effluent and air emissions, and federal environmental legislation, such as the *Canadian Environmental Protection Act* and the *Fisheries Act*. Other applicable instruments include land claim agreements and section 35 of the *Constitution Act, 1982*, labour legislation, corporate legislation such as the *Competition Act*, human rights legislation in the *Canadian Charter of Rights and Freedoms*, and provincial human rights codes. Summaries of some key legislation are provided in an annex to this guide.

Despite the lack of explicit CSR legislation, the Government of Canada has established the *Corporate Social Responsibility Implementation Guide for Canadian Business* (hereafter the "Implementation Guide").⁶ The Implementation Guide sets out voluntary guidelines for companies and notes that although CSR requires adherence to the law, elements of CSR typically include "beyond law" activities as well. Areas covered in the guide include:

- Corporate governance and ethics
- Health and safety
- Environmental stewardship
- Human rights, including core labour rights
- Human resource management
- Community involvement, development, investment
- Involvement and respect for Aboriginal peoples
- Corporate philanthropy and employee volunteering
- Customer satisfaction and adherence to principles of fair competition
- Anti-bribery and corruption measures
- Accountability, transparency, performance reporting
- Supplier relations for both domestic and international supply chains

The Implementation Guide does not set out specific guidelines on how to incorporate these activities into company policies, but rather encourages companies to create their own strategy based on company priorities and activities.⁷

Corporate Social Responsibility and Canadian Extractive Companies Operating Abroad

In Canada, there is no legislation directly governing CSR activities of Canadian companies operating overseas. Several Bills have been tabled in the House of Commons, but none have passed legislative review.⁸

⁶ *Ibid.*

⁷ *Implementation Guide, supra* note 5 at 5.

⁸ See Bill C-300 *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess, 40th Parl, 2009 ; Bill C-492 *An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights)*, 2nd Sess, 38th Parl, 2007.

Alternatively, for Canadian extractive companies operating abroad the Government of Canada has created the *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, first released in 2009.⁹ The policy is composed of 4 pillars:

Pillar 1: *Support for host country capacity-building initiatives related to resource governance and for host countries to benefit from these resources to reduce poverty (via CIDA, sometimes in collaboration with Natural Resource Canada (NRCAN)).*¹⁰

As part of this pillar, Canada is a supporting country of the Extractive Industries Transparency Initiative (EITI), which requires the implementation of increased transparency requirements of extractive companies. However, Canada has not adopted the EITI as a standard to be implemented within Canada.¹¹

Pillar 2: *Promote widely recognized voluntary international CSR performance guidelines.* The endorsed guidelines include:

- International Finance Corporation Performance Standards on Social and Environmental Sustainability
 - Covers the assessment and management of environmental and social risks and impacts; labour and working conditions; resource efficiency and pollution prevention; community health, safety, and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable management of living natural resources; Indigenous peoples; and cultural heritage.
- Voluntary Principles on Security and Human Rights
 - Focuses on the specific interaction of security and human rights
 - Principles fall into 3 categories: risk assessment, relations with public security, and relations with private security.
- Global Reporting Initiative for CSR Reporting by the Extractive Sector
 - Aims at increasing transparency in the extractive industry, these reports look at management/performance indicators covering economic, environmental, and social issues.
- OECD Guidelines for Multinational Enterprises
 - Covers areas such as: respecting human rights; encouraging local capacity building; avoiding causing/contributing to adverse impacts; stakeholder engagement; and good governance practices. The Guidelines also provide specific guidelines on disclosure, human rights, employment and industrial relations, the environment, combating bribery/corruption, consumer interests, science and technology, competition, and taxation.

There are no legal or economic ramifications for those who fail to comply with any of the above named standards.

Pillar 3: *Creation of the Office of the Extractive Sector CSR Counsellor (CSRC).*¹²

⁹ *Building the Canadian Advantage*, *supra* note 1.

¹⁰ *Ibid.*

¹¹ Foreign Affairs, Trade and Development Canada, *Corporate Social Responsibility*, online: FATDC <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>> [FATDC, CSR].

¹² *Ibid.*

The Office of the CSRC has two main roles - advisory and dispute resolution. In its advisory role the CSRC advises stakeholders on implementation of the performance standards endorsed by the Canadian government (named above).¹³ The Office of the CSRC also neutrally reviews disputes linked to the first three of the standards named that have been brought by a company based or registered in Canada or by a project-affected individual, group, or community located outside of Canada. The CSRC does not deal with violations of laws in host countries or of international law. The review process is entirely voluntary and the parties may withdraw at any time.

At the time of publication, all reviews initiated have been ended by the company's withdrawal from the process.¹⁴

Pillar 4: Development of a Centre for Excellence in CSR.¹⁵

The Centre was created within the pre-existing Canadian Institute of Mining, Metallurgy and Petroleum, and provides CSR tools and information to those in industry and abroad, and serves as a source of technical advice.

Further to this voluntary CSR policy, Prime Minister Stephen Harper announced on 12 June 2013, that Canada will be establishing new mandatory reporting standards for Canadian extractive companies operating in mining, gas, and oil. The new reporting regime is anticipated to focus on enhancing "transparency and accountability around material payments by extractive companies to all levels of government domestically and internationally, including taxes, license fees and other receipts."¹⁶ However, details on the new requirements have not yet been released.

Voluntary Frameworks Supported by Companies

Due to the growing attention given to CSR, many companies are choosing to adopt their own CSR policies and frameworks. In doing so, they will often indicate their support for and conformity to various voluntary frameworks, as guidelines. For example, Canadian companies often adhere to the frameworks and guidelines endorsed by the Canadian government in its CSR Strategy (named above). In addition to government-endorsed frameworks, several Canadian industry-based organizations have developed their own set of guidelines that they encourage or require their members to adhere to. For example, the Mining Association of Canada (MAC) has created the Towards Sustainable Mining Initiative (TSM), participation is required for MAC membership.¹⁷ The Prospectors and Developers Association of Canada has

¹³ Foreign Affairs, Trade and Development Canada, *Office of the CSR Counsellor, Our Advisory Role*, online: FATDC <http://www.international.gc.ca/csr_counsellor-conseiller_rse/advisory-role-role-consultatif.aspx?lang=eng>.

¹⁴ Foreign Affairs, Trade and Development Canada, *Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor: Review Process*, online: FATDC <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/review_process-processus_examen-eng.pdf>; See also op-ed by CSRC about reason for companies to engage in CSR: Marketa Evans, "Are Canadian miners "good players" in CSR?", Editorial, *Canadian Mining Journal* (1 February 2013) online: Canadian Mining Journal <<http://www.canadianminingjournal.com/news/are-canadian-miners-good-players-in-csr/1002175225/>>.

¹⁵ Centre for Excellence in CSR, *Corporate Social Responsibility*, online: Canadian Institute of Mining, Metallurgy and Petroleum <<http://web.cim.org/csr>>.

¹⁶ Prime Minister of Canada Stephen Harper, News Releases, "Canada commits to enhancing transparency in the extractive sector" (12 June 2013) online: Prime Minister of Canada <<http://pm.gc.ca/eng/media.asp?category=1&featureId=6&pageId=26&id=5525>>.

¹⁷ The Mining Association of Canada, *Towards Sustainable Mining*, online: MAC <<http://www.mining.ca/site/index.php/en/towards-sustainable-mining.html>>.

also created the e3 Plus guidelines which they encourage members to follow.¹⁸ Each association issues yearly reports on these frameworks and highlights those companies who they feel have done well under the standards created.

Further to this, many companies issue annual or biannual CSR reports as part of their CSR policy, in adherence to the requirements of many of the CSR guidelines and principles they have internally adopted. Some frameworks, such as the TSM and the EITI, require the verification of company claims by external sources, but most company CSR reports are not subject to external verification.

Corporate Accountability

For the activities of Canadian companies operating overseas, the *Corruption of Foreign Public Officials Act* recognizes the bribing of foreign public officials in the course of business as a criminal offence, and under the *Crimes Against Humanity and War Crimes Act* corporations can be held criminally liable where a senior officer is party to, aids, or abets an offence under the *Act*. However, holding Canadian companies accountable for alleged abuses abroad and bringing cases to the Canadian courts has generally proven difficult.

Canadian courts have consistently refused to hear claims, arguing a lack of jurisdiction under the principle of *forum non conveniens*, recognizing host-country courts as a more appropriate forum. Examples of such cases are: *Recherches Internationales Québec c Cambior Inc* (1998) (discussed below **under CSR and the Environment**) and *Anvil Mining Ltd v Association Canadienne Contre l'Impunité*, 2012 QCCA 117, 2011 QCCS 1966 (discussed below **under CSR and Human Rights**). In other cases, Canadian courts have found an insufficient link between the company officials accused and the harms suffered for the case to proceed (See *Piedra v Copper Mesa Mining Corporation*, 2010 ONSC 2421, 2010 ONSC 3253, 2011 ONCA 191; *Ramirez Piedra v TSX Inc*, 2009 (ONSC)) (discussed below **under CSR and Human Rights**).

In June 2013, the Ontario Superior Court ruled that the case against HudBay Minerals could proceed.¹⁹ This ruling has the potential to set a new precedent, making it possible for Canadian companies to be held accountable in Canada for their actions overseas. See annex of this Guide for case details.

Further Resources

- 1) TED Talk series: The end of oil? It's the question of our generation: Can we find a sustainable alternative to oil? Scientists, inventors and activists present stern warnings and visionary solutions for the energy of tomorrow.
http://www.ted.com/playlists/58/the_end_of_oil.html
- 2) Canadian Business for Social Responsibility has a helpful resource providing overviews of the various CSR Frameworks available to the Extractive Industry, including some discussions of strengths and weaknesses of each one. It can be found here:
<http://www.cbsr.ca/sites/default/files/file/CSR%20Frameworks%20Review%20April%202013.pdf>

¹⁸ Prospectors and Developers Association of Canada, *e3 Plus*, online: PDAC <<http://www.pdac.ca/programs/e3-plus>>.

¹⁹ For more information on the status of the case see <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/HudBayMineralslawsuitsreGuatemala>

- 3) Op-ed by the Canadian CSR Counsellor from February 2013 in the Canadian Mining Journal, titled “Are Canadian miners “good players” in CSR?”
<http://www.canadianminingjournal.com/news/are-canadian-miners-good-players-in-csr/1002175225/>
- 4) The Canadian Network on Corporate Accountability provides some information and critiques of the Canadian CSR Strategy for extractive industries: <http://cnca-rcrce.ca/>. They also have some very helpful fact sheets summarizing the legal framework and existing jurisprudence for Canadian extractive companies operating overseas: <http://cnca-rcrce.ca/category/issues/legal-cases/>
- 5) Mining Watch Canada has a useful resource (though some legislation has since been changed) on the legal framework for mining in Canada, which can be found here:
<http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Introduction%20to%20the%20Legal%20Framework%20for%20Mining%20in%20Canada.pdf>

PART I: CSR and the Environment

Due to the interdependence between humans and their surrounding environment, and to the potential for extractive industry activities to cause deep, lasting impacts on the integrity of the natural environment, CSR and what it demands of companies, in terms of environmental impact prevention and mitigation, are gaining increased attention.

In Canada, the potential impacts of extractives on the environment are covered by a patchwork of legally binding legislation and regulations and voluntary standards, as well as a patchwork of jurisdictions, between the Federal and Provincial governments, and Aboriginal communities. Federal legal requirements are encompassed in four main pieces of legislation and their subsidiary regulations: *Canadian Environmental Protection Act*, *Canadian Environmental Assessment Act* (CEAA, 2012), *National Energy Board Act*, *Fisheries Act*, and the *Navigable Waters Protection Act* (soon to be changed to the *Navigation Protection Act*). They include regulation of what levels of toxic substances can be released and where; cross-border air and water pollution; waste disposal; and reporting requirements on toxics in waste rock, air emissions, tailings, and effluents via the National Pollutants Release Inventory.

The CEAA, 2012 governs environmental assessments where there are potential impacts on areas of Federal jurisdiction, such as Aboriginal peoples and their lands, fish and fish habitat, aquatic species, migratory birds, and inter-provincial impacts. Assessments are required for projects listed in regulatory schedules under the CEAA, 2012 that are either regulated by a particular responsible authority or designated by ministerial order.

In a 2010 decision, the Supreme Court concluded that the CEAA “must be applied” in a manner that “fully respects” Constitutional obligations toward Indigenous peoples “in accordance with the principles” established by the courts.²⁰ The extractive industry’s environmental responsibilities are also governed by provincial and territorial mining and oil and gas acts, provincial and territorial environmental assessment processes, provincial waste regulations and the provisions of modern land claims agreements.

Beyond legislation or regulations, the Canadian government has endorsed a number of international standards and created the *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*²¹ policy, which calls on companies to assess, manage, monitor, and mitigate environmental impacts throughout the life of a project, and encourages companies to engage with local communities about environmental concerns. While the potential for extractive activities to have a profound impact on the environment is recognized, the policy is voluntary and lacks any enforcement mechanism.

Framework

Legislation and Regulation

- *Canadian Environmental Protection Act, 1999 (CEPA)*
- *Canadian Environmental Assessment Act, 2012 (CEAA, 2012)*
- *Fisheries Act, 1985 (FA)*
- *Metal Mining Effluent Regulations*
- *Navigable Waters Protection Act (NWPA)* (Amendments not yet in force changing it to the *Navigation Protection Act, NAP*)

²⁰ *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 45.

²¹ *Building the Canadian Advantage*, *supra* note 1: For an online version of the complete policy see

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx>

- *Constitution Act, 1982 – s 35*

Key Cases

- *West Moberly First Nations v British Columbia: (Chief Inspector of Mines)*, 2011 BCCA 247.
This case dealt with the issue of when consultation with Aboriginal groups is required in Canada. The decision by the British Columbia Court of Appeal (leave to appeal to the Supreme Court denied) held that the province had failed to fulfill its constitutional obligation to consult before approving the collection of samples, which was done with the aim of opening up coal mining in the area. The court held that a specific statutory decision is not required in order to trigger the duty to consult. (For commentary on the case, visit: <http://www.oktlaw.com/blog/west-moberly-supreme-court-of-canada-denied-leave-to-appeal/>)
- *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.
This case affirmed the approach established in the *Haida Nation* case that stated that the duty to consult arises when “the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that may adversely affect it.” The Supreme Court noted that the duty to consult extends beyond government decisions with an immediate impact on Aboriginal lands and resources to “strategic, higher level decisions” as well.
- *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484. In this case, the Federal Court held that the Crown’s duty to consult and accommodate on various pipeline projects was met through the National Energy Board review process. The Court found that the regulatory process that existed could and did meet this duty and that nothing further was required of the Crown in terms of consultation or accommodation. (For a discussion of some of the implications of the case, visit: <http://www.thecourt.ca/2009/10/21/low-threshold-for-crowns-duty-to-consult-and-accommodate-aboriginal-rights-in-brokenhead-ojibway-first-nation-v-canada/>)
- *Recherches Internationales Québec c Cambior Inc* (1998)
In 1995, the Omai gold mine in Guyana suffered the failure of a tailings dam which released more than three billion liters of toxic waste into the Essequibo River. The spill contaminated the water supply of thousands of Indigenous people who launched a class action law suit against Cambior, who were majority shareholders in the project. However, the Quebec Superior Court refused to hear their negligence claim, applying the common law doctrine of *forum non conveniens* (where courts may refuse jurisdiction if there is a more appropriate forum available) and saying Guyana was the appropriate place to hear the case.

Voluntary Instruments

- *The Extractive Industries Transparency Initiative (EITI)*
- *The International Finance Corporation Performance Standards on Social and Environmental Sustainability*
- *OECD Guidelines for Multinational Enterprises*
- *Voluntary Principles on Security and Human Rights*
- *The Global Reporting Initiative (GRI)*
- *The Corporate Social Responsibility Implementation Guide for Canadian Business*

Further Resources

- 1) TED Talk: Edward Burtynsky - My wish: Manufactured landscapes and green education
http://www.ted.com/talks/edward_burtynsky_on_manufactured_landscapes.html
- 2) The Centre for Excellence in CSR provides a list of laws and regulations by province based around various themes, including the environment:
<http://web.cim.org/csr/MenuPage.cfm?sections=44&menu=65>
- 3) Ecojustice.ca provides a great deal of commentary and resources on environmental laws and regulations in Canada, including backgrounders on proposed and incoming changes to the legal framework. (www.ecojustice.ca)
 - a. EG: Legal backgrounder: Bill C-45 and the Navigable Waters Protection Act (RSC 1985, C N-22), (Ottawa: Ecojustice, 2012) online: Ecojustice <http://www.ecojustice.ca/files/nwpa_legal_backgrounder_october-2012>.
- 4) ECOLEX provides an abstract of the *Cambior* case:
<http://www.ecolex.org/ecolex/ledge/view/RecordDetails;DIDPFDSI?id=COU-143670&index=courtdecisions>
- 5) Mining Watch Canada released a report in 2012 titled “Troubled Waters” which explores some of the dangers of mine waste and current disposal practices:
<http://www.miningwatch.ca/news/troubled-waters-how-mine-waste-dumping-poisoning-our-oceans-rivers-and-lakes>
- 6) Canadian Environmental Impact Assessment Agency, *Voisey's Bay Mine and Mill Environmental Assessment Panel Report*. <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=0A571A1A-1&xml=0A571A1A-84CD-496B-969E-7CF9CBEA16AE>
- 7) Arlene Kwasniak, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward.” (2009) 20 *Journal of Environmental Law & Practice* 1.
- 8) Mark Haddock, *Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine* (British Columbia: Northwest Institute, 2011) online: Northwest Institute <http://northwestinstitute.ca/images/uploads/NWI_EAreport_July2011.pdf>.
- 9) Documentary on the proposed Enbridge Northern Gateway Pipeline, SPOIL, by EP Films provides a look at some of the potentially affected areas of the proposed pipeline and the potential impacts: <http://vimeo.com/19582018>
- 10) Documentaries on environmental impacts of mining in Honduras:
 - a. Steven Schnoor, shared by Rights Action: 10 minute documentary about the alleged health and environmental harms caused by Goldcorp in the Siria Valley <<http://www.rightsaction.org/content/all-glitters-isnt-gold-story-exploitation-and-resistance>>
 - b. Los Despojados has also released a short independent documentary, “Minefield: Gold Mining and the Transformation of the Honduran Countryside” on the Clavo Rico open-pit gold mine in Honduras: <http://losdespojadosfilms.tumblr.com/>

Part II: CSR and Human Rights

The increasing awareness and publicity of human rights abuses allegedly linked to Canadian mining companies, compounded with potentially weak human rights protection mechanisms in place where companies are operating, has raised the profile of human rights issues in the extractive industry and for CSR.

Canada has a long history of ratifying most major international human rights conventions, such as the International Labour Organization conventions, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on the Elimination of Racial Discrimination (CERD). Further to this Canada has also been a supporter of other human rights instruments and mechanisms, including the Universal Declaration on Human Rights (UDHR), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the United Nations Special Representative on Human Rights and Transnational Corporations and other Business Entities (SRSG). Each of these international instruments recognizes a state party's obligation to respect, protect and fulfill the human rights of individuals, including the duty to protect against human rights abuses by third parties.²²

While Canada has not directly incorporated international human rights treaties into domestic legislation, many of the human rights obligations set out in these instruments are affirmed in the Canadian Constitution and the *Charter of Rights and Freedoms*. Further to this, Canadian courts have recognized international human rights standards as relevant and persuasive sources of interpretation. The Supreme Court has stated that, courts should avoid conflict with international obligations unless there is a clear legislative intent to do so.²³

In Canada, human rights of Canadian citizens are enshrined in the *Constitution Act, 1982*, under the *Canadian Charter of Rights and Freedoms*. The *Charter* does not apply to interactions between private citizens but rather to government actions or omissions, and legislation and regulations that infringe upon the rights and freedoms of Canadian citizens. Provincial human rights codes and tribunals deal with allegations of human rights violations between private parties. Federal and provincial labour legislation also govern the human rights obligations of companies operating in Canada.

International human rights treaties and agreements between states do not create international legal obligations on companies, though states are obligated to protect the rights of their citizens from third parties²⁴, and to encourage corporations headquartered within their borders to adhere to the laws of other states while operating abroad. As noted above, there are many voluntary mechanisms, such as the Compliance Advisor Ombudsman for the World Bank Group's International Finance Corporation and Multilateral Investment Guarantee Agency which will advise companies and communities when disputes arise. These mechanisms are voluntary and their rulings are non-binding.

²² *International Covenant on Civil and Political Rights*, "General Comment No 3 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant", CCPR/C/21/Rev 1/Add 13 (26 May 2004) articles 2, 3 at para 2; *International Covenant on Economic, Social, and Cultural Rights*, Article 2(1); *International Covenant on the Elimination of Racial Discrimination*, "Concluding Observation to Canada's Periodic Report 2007", para 17; John Ruggie, *Summary of five multi-stakeholder consultations*, A/HRC/8/5/Add 1,(2008), p 6-7.

²³ *Baker v Canada*, [1999] 2 SCR 817; *R v Hape*, 2007 SCC 26; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994).

²⁴ Canadian Network for Corporate Accountability, "Human Rights" *Canadian Network for Corporate Accountability* (15 May 2012), online: CNCA <<http://cnca-rcrce.ca/human-rights/>>.

In relation to the impact of Canadian extractive companies operations on the human rights of individuals and communities overseas, the Canadian government has taken the position that its international human rights treaty obligations do not impose direct obligations on companies. Rather such instruments serve “to guide the development of corporate social responsibility standards” for government.²⁵

There are a number of voluntary standards (discussed above) endorsed by the Canadian government, such as the Office of the Extractive Sector CSR Counsellor. The standards endorsed call for companies to assess, avoid, mitigate, and remediate where necessary negative human rights impacts from their activities overseas, as well as engage with affected communities about their human rights concerns and provide grievance mechanisms for responding to complaints. Additionally, they call for respect for various international conventions throughout company operations, as well as the recent United Nations Guiding Principles on Business and Human Rights. The main limitation of these standards, and of the Counsellor, has been the lack of or limited enforcement mechanisms.

While not legally binding on states or companies, the United Nations Special Representative of the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises (UNSRSG)²⁶, has established a policy framework comprising of three core principles: 1) the State duty to protect against human rights abuses by third parties, including business; 2) the corporate responsibility to respect human rights; and 3) the need for greater access by victims to effective remedies.²⁷

On 16 June 2011, the UN Human Rights Council endorsed the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” proposed by UNSRSG, John Ruggie. The “Ruggie Framework”, as it has come to be known, focuses on three core principles: the state duty to protect against human rights abuses by third parties; the corporate responsibility to respect human rights; and the need for more effective access to remedies.²⁸ The Ruggie Framework has raised debate and dialogue on the obligations and the interplay between home state (where a company is incorporated) and host state (the state in which a company operates but is not legally incorporated) and corporations, on the issues of corporate related human rights abuses.²⁹

Framework

- Canada’s obligations under International Human Rights Law
 - Universal Declaration of Human Rights
 - United Nations Declaration on the Rights of Indigenous Peoples
 - International Labour Organization conventions

²⁵ *Building the Canadian Advantage*, *supra* note 1.

²⁶ The UN Commission on Human Rights adopted a resolution on 20 April 2005 (by a vote of 49 to 3 with 1 abstention) requesting “the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises” (UNSRG). John Ruggie was appointed in 2005 and in June 2008 the policy framework for business and human rights was proposed by the UNSRSG and welcomed by the UN Human Rights Council. The Council extended the UNSRSG’s mandate for another three years, asking him to “operationalize” the framework in order to provide concrete guidance to States and businesses.

²⁷ The main report is UN document A/HRC/8/5; a companion report, A/HRC/8/16, clarifies the concept of “corporate complicity” in human rights abuses, and finds that “corporate sphere of influence” is too ambiguous to serve as a viable basis for determining the scope of the corporate responsibility to respect human rights. The Council’s resolution welcoming the framework and extending the mandate is in A/HRC/RES/8/7.

²⁸ John Ruggie, *Summary of five multi-stakeholder consultations*, A/HRC/8/5/Add.1, (2008).

²⁹ John Ruggie, “*Protect, Respect and Remedy*” Framework, A/HRC/17/31 (21 March 2011).

- Convention (no 87) concerning Freedom of Association and Protection of the Right to Organize
- Convention (no 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value
- Convention (no 105) concerning the Abolition of Forced Labour
- Convention (no 111) concerning Discrimination in respect of Employment and Occupation
- Convention (no 122) concerning Employment Policy
- Convention (no 182) concerning Worst Forms of Child Labour
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on the Elimination of All Forms of Racial Discrimination
- Covenant on the Elimination of All Forms Discrimination Against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Covenant on the Rights of the Child
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- Convention on the Rights of Persons With Disabilities
- International Convention for the Protection of All Persons from Enforced Disappearance
- United Nations Special Representative on Human Rights and Transnational Corporations and other Business Enterprises
- *Canadian Charter of Rights and Freedoms*
- Provincial Human Rights Codes

Key Cases

Choc v HudBay; Caal v HudBay; Chub v HudBay

In 2007, Mayan Q'eqchi' farmers were evicted from land claimed by Skye Resources for their Fenix nickel project, during which 11 women were gang raped by mine security forces. In 2008, Skye Resources was subsumed into HudBay Minerals Inc and in 2009 community leader Adolfo Ich Chaman was shot and killed. German Chub Choc was shot and paralyzed on the same day. Adolfo's widow, German Chub, and the 11 women have brought lawsuits against HudBay Minerals for the human rights violations they claim were carried out in HudBay's name by security forces. HudBay has since sold its shares in the project. However, the lawsuit against them is ongoing. If the plaintiffs are successful, a landmark precedent would be set for the potential for Canadian companies to be held accountable for actions at operations overseas. In July 2013, the Ontario Superior Court ruled that it is possible for HudBay to be held liable for the alleged violence in Canada.³⁰

For further information, see the annex to this Guide, where this case is covered as a case study, as well as:

- <http://www.chocversushudbay.com/>
- <http://www.defensorathefilm.com/>
- <http://www.hudbayminerals.com/English/Media-Centre/Media-Statements/EI-Estor-Guatemala/default.aspx>

³⁰ <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/guatemalan-mine-claims-against-hudbay-can-be-tried-in-canada-judge-says/article13360800/#dashboard/follows/>; <http://rightsaction.org/action-content/media-reports-precedent-setting-ruling-canada-against-hudbay-minerals-indigenous>

- http://www.hudbayminerals.com/files/doc_downloads/Statement_on_letterhead_3.pdf
- Testimony of one of the victims:
https://www.youtube.com/watch?feature=player_embedded&v=dSGuDk4cnz4#at=33

Anvil Mining Ltd v Association Canadienne Contre l'Impunité, 2012 QCCA 117, 2011 QCCS

This class action lawsuit was brought in 2010 by the Canadian Association Against Impunity on behalf of Congolese victims of massacres in the Democratic Republic of Congo (DRC) in 2004 committed by Congolese armed forces. The claim was based on the argument that the army relied on logistical support provided by Anvil Mining (a Canadian company), such as planes, vehicles, security personnel, and food. Anvil's general manager was acquitted by a military court in the DRC, but the hearing was widely criticized. The plaintiffs were asking for compensation for harms that resulted from Anvil's complicity in the human rights violations committed. The Quebec Superior Court ruled the case could go forward, but the Quebec Court of Appeal overturned this decision, saying Quebec was not the appropriate jurisdiction for the case. The Supreme Court of Canada refused leave to appeal in November 2012.

For further information on the case and arguments:

- <http://www.mondaq.com/canada/x/175388/Class+Actions/Anvil+Mining+Ltd+v+Association+Canadienne+Contre+l'Impunit>
- http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39764
- <http://www.miningwatch.ca/article/statement-regarding-quebec-court-appeal-decision-canadian-association-against-impunity-v>

Piedra v Copper Mesa Mining Corporation, 2010 ONSC 2421, 2010 ONSC 3253, 2011 ONCA 191; *Ramirez Piedra v TSX Inc*, 2009 (ONSC)

In a court case started in 2009, three Ecuadorians sued Canadian mining company Copper Mesa and two of its directors in response to alleged threats and assaults by company security forces. They argued the company directors were negligent in their management of the security forces they employed by failing to take active steps to reduce the risk of violence despite having seen photographs showing company security attacking villagers. They also brought a claim against the Toronto Stock Exchange for listing the company after being warned that money generated would lead to violence. The initial claim was dismissed and the Ontario Court of Appeal upheld the decision, saying there was no reasonable cause of action. The court held that the TSX had no duty towards the plaintiffs and that the connection between the actions of Copper Mesa and the alleged wrongs was insufficiently strong. Costs were awarded to Copper Mesa and the TSX, to be paid by the Ecuadorian plaintiffs. Copper Mesa eventually ran out of money and was de-listed from the TSX and the project that was the original source of conflict was not carried out.

Read the ONCA decision: <http://canlii.ca/en/on/onca/doc/2011/2011onca191/2011onca191.pdf>

See the website by the plaintiffs for further information and resources on the allegations:
<http://www.ramirezversuscoppermesa.com/>

Further Resources

- 1) Universal Periodic Review – Canada – United Nations, Office of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/CASession4.aspx>

- 2) Human Rights Watch provides a number of resources and in-depth information on human rights and extractive industries: <http://www.hrw.org/topic/business/extractive-industries>
 - a. A Heavy Price: Lead Poisoning and Gold Mining in Nigeria's Zamfara State (<http://www.hrw.org/features/a-heavy-price>) provides photos, videos and other resources on the impacts both on the environment and human rights of gold mining in Nigeria.
 - b. Gold's Costly Dividend: The Porgera Joint Venture (<http://www.hrw.org/features/png-golds-costly-dividend>) provides videos , photos, and further information on the Porgera mining project in Papua New Guinea and the human rights impacts on surrounding communities.
- 3) The University of Ottawa had a workshop in 2009 on human rights and the Canadian mining sector, the summary of which provides a variety of perspectives on the obligations and legal recourses available domestically and internationally for those claiming violations of human rights: <http://www.commonlaw.uottawa.ca/en/news/audio/-video/human-rights-in-the-canadian-mining-sector.html>
- 4) Further short documentaries on mining and human rights in Guatemala:
 - a. Otra Vez La Mina shows an attempt by mining company trucks accompanied by National Police to circumvent peaceful protesters, who say they were never consulted about the project: <http://www.rightsaction.org/content/otra-vez-la-mina-once-again-mining>
 - b. Los Despojados will be releasing in 2013 a new short film on the interaction of extractive activities and human rights in Guatemala, focusing on the case of the Polochic Valley, which includes discussion of the HudBay case: <http://losdespojadosfilms.tumblr.com/post/52513882345>

Part III: CSR and Indigenous Peoples

Indigenous peoples have been disproportionately impacted by extractive industry activities in Canada and abroad. This is often a result of the location of communities and their traditional lands, whether formally recognized and demarcated by the state or not, and the impact of such activities on their rights as Indigenous peoples.

The rights of Indigenous peoples have been recognized³¹ by international human rights bodies³¹ as well as regional human rights mechanisms³², and have been internationally reaffirmed through the United Nations General Assembly adoption of Declaration of the Rights of Indigenous Peoples (UNDRIP).

While the UNDRIP is not a binding legal document, it does reflect binding international human rights standards and principles. The UNDRIP sets out internationally recognized collective rights of Indigenous peoples, such as the right to self-determination and the right to control land, as well as individual rights. The UNDRIP states that Indigenous peoples have the right “to the recognition, observance and enforcement of treaties” concluded with States or their successors. It also prohibits discrimination against Indigenous peoples and promotes their full and effective participation in all matters that concern them, guided by the principle of Free, Prior and Informed Consent (FPIC).³³ According to the UNDRIP, the principle of FPIC is a precondition for state approval on any project affecting Indigenous peoples’ lands, territories and resources (Article 32(2)).

As stated previously, the United Nations Guiding Principles for Business and Human Rights calls for corporations to exercise due diligence to ensure their actions do not lead – whether directly or indirectly – to a deterioration in the enjoyment of human rights.³⁴ The principle of FPIC is increasingly recognized as a means by which their obligation of due diligence can be met. This has been further encouraged by international associations, such as the International Council on Mines and Metals, IPIECA – the Global Oil and Gas Industry Association, and the International Finance Corporation (IFC).³⁵

Canada has endorsed the UNDRIP, however only as an aspirational document.³⁶ A central concern has been the potential for free, prior and informed consent to be a “veto” granted to Indigenous peoples.³⁷

³¹ S James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Human Rights Council, 11 August 2008, UN Doc. A/HRC/9/9; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C 12/1/Add 31, (10 December 1998).

³² See the Inter-American Commission on Human Rights, Report No 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002; and Intern-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs*. Judgment of August 31, 2001; Report No 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002; Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII concerning Indigenous Peoples*, CERD/C/51/Misc 13/Rev 4, (adopted by the Committee on August 18, 1997).

³³ For more information about the UNDRIP see CLA’s Theme Guide 2011-2012 <http://www.cla-ace.ca/documents/ThemeGuide2011-12.pdf>

³⁴ *Guiding Principles for Business and Human Rights*, endorsed by the UN Human Rights Council, June 2011.

³⁵ International Finance Corporation, “Performance Standards on Environmental and Social Sustainability” (1 January 2012), online: <http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf>.

³⁶ Aboriginal Affairs and Northern Development Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples”, online: AANDC <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>; Government of Canada, “Speech from the Throne” (3 March 2010) online: GC <<http://www.speech.gc.ca/eng/media.asp?id=1388>>.

Aboriginal and treaty rights are constitutionally protected in Canada, under the *Canadian Constitution Act, 1982*, section 35, which recognizes and affirms existing Aboriginal and treaty rights of Aboriginal peoples in Canada.³⁸ Given the fiduciary duty towards Aboriginal people, the Government of Canada has an obligation to ensure the rights of Aboriginal peoples are protected during negotiations or consultations with extractive companies.

The *Duty to Consult and Accommodate* as recognized by the Supreme Court of Canada, requires the Crown to engage in adequate consultation, in good faith, with Aboriginal peoples, whenever their Aboriginal and/or treaty rights are potential affected by any policy, legislation or decision.³⁹ In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, the Supreme Court recognized that the duty to consult varies with circumstances, and that the duty to consult is proportional to the potential effects and in some cases, may require the full consent of affected Aboriginal communities.

In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 the Supreme Court said that the duty to consult “arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.” The Court went on to say that “Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 25 of the Constitution Act, 1982, demands.” In *Haida*, the Court found that the duty of consultation and accommodation by the government can arise even if Aboriginal right or title is not yet proven.

Further, in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, the Supreme Court said that the duty to consult does not require an immediate impact on lands and resources but “extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.”⁴⁰ Although the duty to consult applies only to the Canadian Government and Crown Corporations, aspects of consultation may be delegated to project proponents, such as the environmental impact assessment agency. As well, private companies will often adhere to the principle of consultation to foster positive relationships in the communities in which they operate.

In 2012 the Government of Canada tabled the *Economic Action Plan 2012: Jobs, Growth and Long-term Prosperity*, which included Bill C-38 and Bill C-45. These bills contain numerous amendments which affect Aboriginal rights in relation to land and resource developments. For example, Bill C-38 replaces previous environmental assessment procedures with the *Canadian Environmental Assessment Act, 2012* (CEAA). Environmental Impact Assessments for projects with the potential to affect Aboriginal rights have been recognized by the Supreme Court of Canada as a means by which the federal government can ensure its duty to consult is fulfilled.⁴¹

³⁷ Permanent Mission of Canada to the United Nations, *Statement by the Observer Delegation of Canada delivered by Jean-François Tremblay, Senior Assistant Deputy Minister, Indian and Northern Affairs Canada, at the tenth session of the United Nations Permanent Forum on Indigenous Issues: Follow-Up to the Recommendations of the Permanent Forum on Free, Prior and Informed Consent* (17 May 2011), online: GC <http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/ecosoc/2011may17mai_jean_francois_tremblay.aspx>.

³⁸ Article 35 (2) sets out “Aboriginal peoples” as including First Nations, Inuit and Métis peoples of Canada.

³⁹ *R v Sparrow*, [1990] 1 SCR 1075.

⁴⁰ Penelop Simons & Lynda Collins, “Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective” (2010) 6 McGill JSDLP 177.

⁴¹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at 537; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at 554-555.

Framework

- United Nations Declaration on the Rights of Indigenous Peoples
- *Canadian Constitution, 1982*, s 35
- *Canadian Charter of Rights and Freedoms*

Further Resources

- 1) For a comprehensive overview of the implication of the *Economic Action Plan 2012*, see the Assembly of First Nations Technical Bulletin at <http://www.afn.ca/index.php/en/news-media/latest-news/Technical-Bulletin-Update-on-Bill-C-38-Jobs-Growth-and-Long-term-Prosp>
- 2) Grand Council of the Crees (Eeyou Istchee) *et al.*, 'Joint Submission to the United Nations Human Rights Council in Regards to the Universal Periodic Review Concerning Canada (Second Cycle)' (October 2012):
http://www.ubcic.bc.ca/files/PDF/UPR_Canada_JointSubmission.pdf
- 3) Amnesty International:
 - a. A short film on the British Columbia First Nation of Nak'azdii and their struggles with the construction of a gold and copper mine on land where they hunt, fish, trap, and gather berries and medicines. The community had no say in the decision to open the mine. (<http://www.amnesty.ca/blog/one-year-one-world-the-farewell-ceremony>)
 - b. A submission by AI that provides some insight into FPIC and the international human rights of Indigenous Peoples and arguments on how they should be considered in Canada (<http://www.ceaa-acee.gc.ca/050/documents/p63928/91085E.pdf>)
- 4) KAIROS Canada has some resources available on Indigenous peoples in Alberta and how they have been impacted by the Tar Sands:
<http://www.kairoscanada.org/sustainability/tar-sands/>
- 5) Mining Watch Canada has published an overview of the conflict between the Ontario First Nation Kitchenuhmaykoosib Inninuwug (KI), the Ontario government, and a mining company, which highlights many of the concerns of Aboriginal communities, as well as the extreme complexity such issues involve in Canada (<http://www.miningwatch.ca/publications/no-means-no-kitchenuhmaykoosib-inninuwug-and-fight-resource-sovereignty>). They also share a thesis study done on KI by James Wilkes titled "Decolonizing Environmental Management" (<http://www.miningwatch.ca/decolonizing-environmental-management>).
- 6) Foley Hoag, "Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges" (<http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy>)
- 7) Former United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: <http://unsr.jamesanaya.org/list/special-reports>

PART IV: Activities for Student Chapters

In October, Presidents of the CLA-ACE Student Chapters will attend a leadership and training workshop in Ottawa on CSR and the extractive industry. This workshop will be focussed on building their knowledge about the theme and will provide them with concrete ideas as to how to raise awareness about relevant issues at their schools.

Between November and March, Student Chapters should focus on and engage in raising awareness about the theme for this year. As part of their activities, all Student Chapters are required to:

- i) Host at least one event about corporate social responsibility and the extractive industry (see ideas below) that will be publicized at the school and open to all students; and
- ii) Write one article about the theme for publication in their law school or university newspaper or website.

Suggested Activities

- 1) Organize a Professor or Expert Debate on corporate social responsibility and how legal and policy developments are impacting communities near your university. What is the importance of corporate social responsibility for law firms and the legal profession?

Useful links as a launching point:

- <http://www.cbc.ca/thenational/thenewconquistadors/index.html>
- http://www.deloitte.com/view/en_CA/ca/pressroom/ca-pressreleases-en/ffe20f020a74b310VqnVCM2000003356f70aRCRD.htm
- <http://a4id.org/business-human-rights>
- <http://a4id.org/resource/talk/impact-investing-lawyers-pt-1>

- 2) Pick a theme relevant to CSR and host a film festival. Consider any of the resources listed in this document.
- 3) Invite a panel of local practitioners who work in industry, civil society, local firm and/or government to speak at your university. Have them discuss what they think could be done to strengthen CSR in Canada and abroad, or to share best practices of what Canadian companies have implemented. Then write an article about it for your university newspaper.
- 4) Find out if there are any issues that have arisen locally over CSR and the extractive industry. Create a panel of representatives of various perspectives (local communities, industry, civil society, government) and host a discussion on the subject. Invite members of the local community to spread awareness of the conversation.
- 5) Invite a past CLA intern to speak to your Chapter about their experiences, particularly about the practical impediments to the success of ensuring consultation and participation in resource management and development.
- 6) Ask the professors who teach relevant courses at your university to discuss CSR issues in their classes (perhaps they would be open to letting you arrange a guest speaker, or leading a discussion on the subject).
- 7) Host a “lunch and learn” or informal pub or coffee shop night debate to discuss CSR issues - suggestions for discussion topics include: Legal obligations versus voluntary standards?; or the ongoing HudBay case and other jurisprudence on the legal responsibility of Canadian

companies for their actions abroad – arguments for and against the existing judicial positions. Provide basic information on the topic beforehand to those who are interested so they can inform themselves a bit before the discussion.

- 8) Spread the word: Partner with other law or undergrad clubs or other faculties to implement campaigns, promote events and help fundraise for your Student Chapter, and increasing the reach of CLA-ACE initiatives.
- 9) Concert Fundraiser: Hold a concert at a local venue with bands looking to promote themselves. Charge cover at the door and ask the bartender to make a specialty drink for the night from which CLA can collect the proceeds.
- 10) Silent Auction: Include a silent auction at any event. Ask local businesses to donate items and gift certificates for students to bid on. Also ask upper year students to donate a few hours of tutoring time for first years to bid on.

PART V: Annexes

Annex I – The Extractive Industry in Canada Fact Sheet

Annex II – Canadian CSR Related Legislation and Regulations Fact Sheet

Annex III – Case Studies – CSR and the Environment

Annex IV – Case Studies – CSR and Human Rights

Annex V – Case Studies – CSR and Indigenous Peoples

The Canadian Extractive Industry

Extractive Activities in Canada

The extractive industry has become an increasingly prominent player in the Canadian economy in recent years. Indeed, Prime Minister Stephen Harper's described Canada as an "emerging energy superpower" to the G8 in 2006.

- Seventy five percent (75%) of the world's mining companies are registered in Canada.⁴²
- The GDP for mining, quarrying, and oil and gas extraction was \$57.4 billion in 2011.⁴³
- As of December 2011, there were over 18,000 mining, quarry, and oil and gas extraction establishments in Canada, over 60% of which were located in Alberta.⁴⁴
- Foreign direct investment in the Canadian metallic minerals/metals products sector was \$60.9 billion in 2011.⁴⁵
- The mining industry (not including oil and gas) paid more than \$9 billion in taxes and royalties to Canadian governments in 2011⁴⁶ (encompassing corporate income tax, personal income taxes paid by employees, royalties and mining taxes).
- Capital expenditure on Canadian mineral resource development totalled nearly \$15 billion in 2011.⁴⁷
- 320,000 Canadians were employed by the mining industry in 2011, which is one in every 54 Canadian jobs.⁴⁸
- Mining is proportionally the biggest Canadian private sector employer of Aboriginals.⁴⁹
- Approximately 1200 Aboriginal communities are located within 200 kilometres of about 180 producing mines and more than 2500 active exploration properties.⁵⁰

Extractive Activities by Canadians Abroad

Given the size of the extractive industry in Canada, the Canadian government has promoted Canadian extractive projects overseas both by elected officials and through embassies and ambassadors⁵¹ and linked Canada's development efforts to the extractive sector.⁵²

⁴² North-South Institute, republishing of Embassy Magazine article by Kristen Shane, "Canada Urged to Ensure that Miners Publish What They Pay" (17 May 2013)

⁴³ Industry Canada, "Gross domestic product (GDP): Mining, Quarrying, and Oil and Gas Extraction (NAICS 21)", online <https://www.ic.gc.ca/app/scr/sbms/sbb/cis/gdp.html?code=21>

⁴⁴ Industry Canada, "Establishments: Mining, Quarrying, and Oil and Gas Extraction (NAICS 21)", online <http://www.ic.gc.ca/cis-sic/cis-sic.nsf/IDE/cis-sic21etbe.html>

⁴⁵ Facts & Figures of the Canadian Mining Industry 2012, The Mining Association of Canada at 97 http://www.mining.ca/www/media_lib/MAC_Documents/Publications/2013/Facts%20and%20Figures/FactsandFigures2012Eng.pdf

⁴⁶ Facts & Figures of the Canadian Mining Industry 2012, The Mining Association of Canada at 22

⁴⁷ Facts & Figures of the Canadian Mining Industry 2012, The Mining Association of Canada at 22

⁴⁸ Facts & Figures of the Canadian Mining Industry 2012, The Mining Association of Canada at 59

⁴⁹ Facts & Figures of the Canadian Mining Industry 2012, The Mining Association of Canada at 6

⁵⁰ Facts & Figures of the Canadian Mining Industry 2012, The Mining Association of Canada at 8

⁵¹ (<http://www.theglobeandmail.com/news/politics/huge-opportunities-for-canadian-mining-industry-to-work-in-developing-countries/article12670581/>); <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>; Mining Watch Canada, "Canadian Ambassadors, or Ambassadors for Canadian Mining Companies?" (4 June 2013)

- Half of the mining that occurs around the world is done by Canadian companies and 70% of the world's free enterprise oil is located in Canada.⁵³
- Canadian investment overseas in the mining sector reached \$130 billion in 2010, up from \$30 billion in 2002⁵⁴ and accounts for about 10% of Canada's foreign investment.⁵⁵
- In 2007, Canadian mining companies had \$60 billion invested in developing countries - \$41 billion in Latin America and nearly \$15 billion in Africa⁵⁶; Africa receives about 20% of Canadian overseas mining capital.⁵⁷
- More than 1000 Canadian exploration companies operate in over 100 countries.⁵⁸
- Canada's direct investment abroad totalled \$684 billion in 2011, of that the metallic minerals and metal products sector accounted for \$58.6 billion.⁵⁹
- In 2011, Export Development Canada gave over \$17 billion sector in finance and insurance to the extractive sector.⁶⁰
- In 2011, the Canadian International Development Agency (CIDA) committed \$26.7 million to financing three NGOs to provide aid projects in conjunction with Canadian mining companies in Burkina Faso, Peru, Colombia, Bolivia, and Ghana.⁶¹
- In 2013, Julian Fantino, Minister of International Cooperation co-hosted a conference on the extractive industry in development titled "Maximizing the Value of Extractives for development"⁶² and spoke to the Mining Association of Canada in order to highlight the need for partnership between CIDA and the extractive industry.⁶³

<http://www.miningwatch.ca/article/canadian-ambassadors-or-ambassadors-canadian-mining-companies>; Shin Imai, Ladan Merhanvar & Jennifer Sander, "Breaching Indigenous Law: Canadian Mining in Guatemala", (2007) 6 Indigenous LJ 101.

⁵²Publish What You Pay: <http://www.publishwhatyoupay.org/resources/canada-under-pressure-g8-mining-transparency>

⁵³ (<http://www.ctvnews.ca/canada/canada-s-extractive-industries-to-face-tougher-rules-around-payment-disclosure-1.1322035>)

⁵⁴ Report of the second annual meeting of the Advisory Panel of the Office of the Extractive Sector Corporate Social Responsibility Counsellor, 25 & 26 January 2012, Toronto, Ontario http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/2012-01_ap_report-rapport_gc-eng.pdf

⁵⁵ Publish What You Pay: <http://www.publishwhatyoupay.org/resources/canadas-mining-industry-steps-towards-publishing-what-it-pays>

⁵⁶ DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

⁵⁷<http://www.pambazuka.org/en/category/features/74254>

⁵⁸ Revenue Watch Institute, 6 September 2012: <http://www.revenuewatch.org/news/background-qa-canadian-extractive-resource-revenue-transparency-working-group>

⁵⁹ Facts & Figures of the Canadian Mining Industry 2012, The Mining Association of Canada at 97

⁶⁰ CNCA, "Briefing Note: Government Support to Extractive Companies – The Role of Export Development Canada", (14 February 2013) <http://cnca-rcrc.ca/wp-content/uploads/cnca-government-support-to-extractives-cos-EDC1.pdf>

⁶¹<http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/CAR-929105317-KGD>

⁶²<http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/NAT-22884011-J2N>

⁶³<http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/ANN-618151732-OMH>;
<http://www.theglobeandmail.com/news/politics/fantino-talks-foreign-aid-with-mining-industry/article9242181/>

Canadian CSR – Key Legislation and Regulations

The following selection of legislation and regulations is not an exhaustive list. Selections were chosen for their relation to the Theme Guide sub-themes of environment, human rights and Indigenous peoples.

Canadian Environmental Protection Act, 1999 (CEPA)

(Environment Canada, Minister of the Environment, Minister of Health)

The CEPA is an Act respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development has as its primary purpose “to contribute to sustainable development through pollution prevention.” Its regulations cover such areas as toxic substances, cross-border air and water pollution, and waste disposal. It affects the extractive industry in a few ways, such as:

- Laying out processes to assess risks from commercial substances to human health/environment
- Giving timeframes/tools to manage fuel/toxic substances (safe transport, storage, disposal)
- Specifying mine requirements, such as reporting requirements on toxics in waste rock, air emissions, tailings, effluents (publicly available via the National Pollutants Release Inventory)

Canadian Environmental Assessment Act, 2012 (CEAA, 2012)

(Environment Canada, Minister of the Environment)

The CEAA, 2012, or An Act respecting the environmental assessment of certain activities and the prevention of significant adverse environmental effects requires the person, body, federal authority or government proposing a project to provide an assessment of the potential environmental effects on areas of federal jurisdiction, such as Aboriginal peoples, fish and their habitat, aquatic species, migratory birds, and inter-provincial impacts.

Updates: The *CEAA, 2012* replaced the *CEAA, 1995*. It dictates that an assessment is required for projects included in the list of “designated projects,” which are created through the *Regulations Designating Physical Activities* (RDPA). *CEAA, 2012* stipulates that assessment is only required for projects on the list that are either (a) regulated by a particular responsible authority; or (b) designated by ministerial order.

Fisheries Act, 1985 (FA)

(Department of Fisheries and Oceans, Minister of Fisheries and Oceans)

The Fisheries Act is meant to protect not just fish, but also their habitat. It makes it an offence to “carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction of fish habitat.” The FA prohibits the disposal of “prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on” or in “any type in water frequented by fish.”

Update: Recent amendments allow the government to pass regulations, narrowing or suspending its application, or narrowing the scope of the *Fisheries Act*, though none have been passed as of February 2013.

Metal Mining Effluent Regulations

(Department of the Environment, Minister of the Environment)

This set of regulations, created alongside the *Fisheries Act*, governs the disposal of mine effluents into surface water and tailings impoundments. They provide rules around testing and

studies that must be done before disposal begins; regular testing of effluent and biological effects once it has started; reporting of results; and where effluent can be disposed of, among other things.

Navigable Waters Protection Act (NWPAA) (Amendments not yet in force changing it to the *Navigation Protection Act, NAP*)

(Minister of Transport)

The *NWPAA* requires approval for any works that may affect navigation on navigable waters in Canada (which has had the “floating canoe” standard since 1906).⁶⁴ It affects the extractive industry in that it governs dumping and disposal as well as structures and excavation that may interfere with navigation (ss 2 (a) and (b)).

Updates: Amendments to the *NWPAA* passed in 2013 (not yet in force) include a reduced list of bodies of water falling under its protection – the previous standard of the “floating canoe” has been replaced by a list which includes 3 oceans, 97 lakes, and 62 rivers. However, the *Navigation Protection Act (NPA)* increases the number/types of punishable offences under the Act, explicitly recognizes the liability of directors of corporations and impose positive duty on them to take all reasonable care to ensure corporation complied with NPA.

Constitution Act, 1982 – s 35

Section 35 of the *Constitution Act, 1982* contains a few general legal requirements for the federal government in its dealing with Aboriginal people. As the federal government is held to have a fiduciary duty towards Aboriginal people, it generally is required to represent them in negotiations or consultations with extractive companies. This encompasses two main concepts – honour of the Crown and duty to consult. The Crown has a duty to consult whenever the interests of Aboriginal peoples are going to be adversely affected, where Aboriginal title to land or resources remain unresolved or where there are implications for treaty rights. Some argue that mining operations are sufficient to trigger the duty to consult, implying a duty on the federal government to consult with potentially affected Aboriginal communities. The duty to consult can also trigger the duty to accommodate. However, with few exceptions, there is no statutory duty to consult at the staking stage of mining activities when the land is claimed by a company.

Potential Developments:

Increased Liability for Offshore Drilling

On 18 June 2013 the Minister of Natural Resources, Joe Oliver, released a statement that a bill has been drafted in coordination with the governments of Nova Scotia and Newfoundland and Labrador that would increase the absolute liability costs for offshore drilling from \$30 million on the Atlantic and \$40 million in the Arctic to \$1 billion nationwide.

Suggested absences:

No legislation in Canada deals with orphaned or abandoned mines (mines with no one who claims ownership or responsibility for them), which are not well documented in terms

⁶⁴ In 1906 the Supreme Court of Canada adopted the “floating canoe” threshold. To determine what constitutes “navigable water”, and as such within the scope of the *NWPAA*, a craft, whether a steam ship or canoe, must be able to pass over the body of water. See *Quebec (Attorney General) v. Fraser*, 37 S.C.R. 577, affirmed by the Judicial Committee of the Privy Council in *Martha Suzanna Wyatt and others v The Attorney General of the Province of Quebec* [1911] UKPC 39, [1911] A.C. 489 (13 June 1911), Canada.

of their numbers or their associated physical, health, or environmental impacts and liabilities. The National Orphaned/Abandoned Mines Initiative (NOAMI) has documented some statutory requirements in place in terms of closure plans, but says there is little focus on how to maintain sites with ongoing water treatment and contamination concerns upon company departure.

Case Studies – CSR and the Environment

Case Study # 1 – The Alberta Oil Sands and Suncor and Syncrude

Often a contentious topic, the Alberta oil sands have been the target of environmental criticism for decades, but the provincial and federal governments say they are properly regulating the situation and companies maintain that their activities are being carried out in a sustainable way. Suncor and Syncrude are two of the longest-standing participants in oil sand development. Concerns have been raised about the health effects of pollution from oil sands facilities, toxins released into the environment, impacts on water systems and local wildlife both in close proximity to the facilities and further downstream, and a host of other issues. Confirming the environmental concerns, in March 2013, a leak in a Suncor pipeline led to the release of 350,000 litres of wastewater containing toxic chemicals into the Athabasca River.⁶⁵

Government perspective:

The federal government-created CSR Implementation Guide notes that Suncor has gone “to considerable lengths to put effective sustainability practices in place and to work with local communities” and as a result they are “reaping rewards in the form of increased community acceptance of its plans for expansion.”

The Provincial Energy Strategy for Alberta has responsible stewardship of natural resources and the environment, as one of its guiding principles. Additionally, Alberta has a number of environmental laws and regulations in place that would impact extractive sector CSR activities, such as the *Climate Change and Emissions Management Act*, the *Environmental Protection and Enhancement Act*, the *Mines and Minerals Act*, the *Oil Sands Conservation Act*, and the *Water Act*.

Company perspective:

As soon as the March 2013 leak was discovered, Suncor began work to halt the flow and test the water before and after it entered the river. They claim that the water quality tests showed that the water released into the river was within regulatory approval limits and that samples taken 15 km downstream show no detrimental impact to aquatic life.⁶⁶

As part of their Towards Sustainable Mining Initiative, which involves external verification, the Mining Association of Canada (MAC) gave Suncor an “A” for their environmental footprint for their tailings management⁶⁷ and another “A” for energy efficiency for their energy use and

⁶⁵ “Environmental groups request federal action over Suncor spill”, *ecojustice* (25 April 2013) online: Ecojustice <<http://www.ecojustice.ca/media-centre/press-releases/environmental-groups-request-federal-action-over-suncor-spill/?searchterm=tar%20sands>>.

⁶⁶ http://sustainability.suncor.com/2013/pdf/se_ros13_prod_proof_E_WEB.pdf at 11

⁶⁷

http://www.mining.ca/www/media_lib/TSM_Documents/protocols_2012/TSM%20TAILINGS%20PROTOCOL%20December%202011.pdf

Greenhouse Gases (GHG) emissions management⁶⁸ in 2011. An “A” signifies that comprehensive systems and processes are developed and implemented that conform to Towards Sustainable Mining (TSM)⁶⁹ guidelines in that area. The MAC also stated that Syncrude had a commitment to superior environmental performance, which had been strengthened by TSM participation, under which their performance had been consistently strong.⁷⁰

Civil Society Perspectives:

Ecojustice has released a report stating that pollutants given off by oil sands facilities in Alberta are contaminating the Athabasca River and its tributaries, which are fish-bearing waterways, and the impact on the Athabasca and surrounding environment is likely significant.⁷¹ The report points to Suncor Energy Oil Sands and Syncrude as the top emitters of the particulate matter that it found is affecting the Athabasca River. Ecojustice has also publicly called for prosecution of Suncor under the *Fisheries Act* under which it is illegal to deposit deleterious substances into waters frequented by fish. They also say that Alberta Environment and Sustainable Resource Development has found that toxicity exceeded approved levels as a result of the March 2013 spill.⁷²

Keepers of the Athabasca, is a grassroots organization of Aboriginal peoples, environmental groups, concerned citizens and communities. They point to a number of statements by various groups across Alberta and Canada calling for a moratorium on new oil sands projects in Alberta until a better assessment of the impacts can be done and until Aboriginal groups can approve development plans.⁷³

Additionally, Global Forest Watch released a report⁷⁴ in July 2013 documenting that between 1996 and 2012 there have been a minimum of 4063 alleged contraventions of environmental regulations out of a minimum of 9262 environmental incidents. Of these 4063 alleged regulation violations, about 47% have been attributed to Syncrude and 39.5% to Suncor. The report goes on to say that of those incidents, the Alberta Environment and Sustainable Resource Development Ministry took only 37 actions to enforce regulations, representing 0.9% of

⁶⁸

http://www.mining.ca/www/media_lib/TSM_Documents/2013_protocols/TSM_Energy_Use_and_GHG_emissions_Management_EN_Web.pdf

⁶⁹ Towards Sustainable Mining, is an initiative of the Mining Association of Canada. For more information see http://www.hudbayminerals.com/files/doc_downloads/TSM%20TAILINGS%20PROTOCOL%20December%202011.pdf

⁷⁰ <http://mining.ca/tsm/assets/tsm-2012-english.pdf>

⁷¹ Elaine MacDonald, *Oilsands pollution and the Athabasca River: Modelling particulate matter deposition near Alberta's largest free-flowing river*, Ecojustice (March 2013), online: [ecojustice.<http://www.ecojustice.ca/publications/oilsands-pollution-and-the-athabasca-river/attachment>](http://www.ecojustice.ca/publications/oilsands-pollution-and-the-athabasca-river/attachment).

⁷² Ecojustice, Letter to MPS, “Re: Request for investigation and prosecution pursuant to the *Fisheries Act*” (25 April 2013) online: ecojustice <http://www.ecojustice.ca/files/letter-to-federal-government-re-suncor-spill/at_download/file>.

⁷³ *Supporters of a Moratorium/Pause on New Oil Sands Projects in Alberta*, Keepers of the Athabasca (March 2013) online: <<http://www.keepersofthewater.ca/oilsandsopposition.pdf>>.

⁷⁴ http://globalforestwatch.ca/pubs/2013Releases/03PollutionIncidents/Envir_Incidents_July-22-2013.pdf

violations. Even when enforced the median financial penalty is \$4500 meaning “industry may have little incentive to undertake improvements that might result in increased costs.”

For Further Information:

Centre for Excellence in CSR

(<http://web.cim.org/csr/MenuPage.cfm?sections=44,65&menu=108>) – provides links to Alberta environmental legislation and regulation.

Case Study # 2 – Eldorado Gold in Greece

Basic Overview:

Eldorado Gold, based out of Vancouver, has 95% ownership of Hellas Gold SA, which has large mining and exploration concessions in Northern Greece. Environmental concerns have been raised as a result of the physical changes required by the proposed open pit gold and silver mining projects and the impact of usage by the mining projects on the local aquifer, as well as the cyanidation process required by the gold mine. The projects have divided local communities and have led to violent clashes between police and protesters. Some believe the projects will bring benefits, such as jobs and investment, while others fear the impact on other industries and ways of life such as agriculture and tourism, as well as the aforementioned environmental concerns. The projects are anticipated to involve the movement of 9.5 million tons of earth a year.

Government Perspective:

The Canadian Ambassador to Greece has made statements indicating Canada’s support for the project. Additionally, the Canadian and Quebec pension plans have millions invested in Eldorado’s mining activities, and Export Development Canada, a Crown corporation, was recently named as a major lender to Eldorado.⁷⁵

Company Perspective:

In response to environmental concerns, Eldorado Gold has stated⁷⁶ that:

- Only a tiny percentage (0.09%) of the total Halkidiki forest will be affected.
- They will commit to restore and rehabilitate the land upon completion of the project
- They have excellent water management systems designed to be closed loop and the be efficient through the use of recycling, re-circulating water, and collecting rain water runoff, including continuous monitoring and management of use and quality (Whitepaper at 2)
- Operations in Turkey have not led to negative impacts on agriculture and beekeeping but have rather improved the situation of those industries

⁷⁵ <http://www.miningwatch.ca/article/background-eldorado-gold-s-proposed-mines-northern-greece>

⁷⁶ <http://www.eldoradogold.com/i/pdf/Greece-Facts-Fallacies.pdf>; <http://www.eldoradogold.com/i/pdf/Greece-Whitepaper.pdf>

- They have already provided the Greek government with a €50 million letter of guarantee to insure the environmental rehabilitation of their projects
- “Through implementing responsible mining practices, Eldorado’s Greek operations will create shared value – for communities and the government – while maintaining environmental integrity.” (Whitepaper at 1)
- “Wherever Eldorado operates, it follows industry best practices, strictly adheres to all safety and environmental regulations, promotes a culture of safety and maintains systems to identify, manage, audit and remedy potential impacts of its projects from inception through to closure.” (Whitepaper at 1)
- Eldorado spent more than five years on some of the EIAs conducted in Greece and also conducted public consultations with municipalities and communities
- Eldorado is a signatory of the International Cyanide Management Code as of 2012 which involves having an independent third party determine the status of Code implementation⁷⁷

Civil Society Perspective:

The mayors of 22 towns have come out in opposition to the projects, though various council members and the Greek government favour the project. The Mayor of Alexandroupolis has stated that he felt pressured by the Canadian Ambassador and feels that concerns about the use of cyanide have not been adequately responded to. Further, he feels that if the mining is going to involve cyanide in any capacity it should not proceed as their ecosystem and environment are too delicate and their water and health are too precious to risk.⁷⁸

Among other things, Hellenic Mining Watch points to the fact that the use of cyanide is to be ended by 2018 following a European Union directive and argue that no new mines should be opened that would use a cyanidation method.⁷⁹

SOS Halkidiki⁸⁰ is an organization opposed to the Halkidiki mine project and points to the importance of agriculture, livestock, fishery, beekeeping, forestry, and tourism to the area and claim that all that would be at risk if the project were to proceed. They say that activities have already been carried out that were not covered in the Environmental Impact Assessment (EIA) conducted, such as illegal stream covering and logging. They also cite scientists saying that there are methodological and interpretation issues with the EIA.

⁷⁷ http://www.eldoradogold.com/s/Sustainability_Report.asp?ReportID=584074;
<http://www.cyanidecode.org/about-cyanide-code>

⁷⁸ <http://www.miningwatch.ca/article/canadian-ambassadors-or-ambassadors-canadian-mining-companies>

⁷⁹ <http://antigoldgr.wordpress.com/2013/07/14/gold-mining-projects-a-danger-to-human-rights-the-rule-of-law-and-ecological-integrity/#more-723>

⁸⁰ http://antigoldgr.files.wordpress.com/2013/05/soshalkidiki_01_en.pdf

Case Studies – CSR and Human Rights

Case Study # 1 – HudBay Minerals in Guatemala

In 2007, Mayan Q'eqchi' farmers were evicted from land claimed by Skye Resources for their Fenix nickel project, during which 11 women were gang raped by mine security forces. In 2008, Skye Resources was subsumed into HudBay Minerals Inc and in 2009 community leader Adolfo Ich Chaman was shot and killed and German Chub Choc was shot and paralyzed on the same day. Adolfo's widow, German Chub, and the 11 women have brought lawsuits against HudBay Minerals for the human rights violations they claim were carried out in HudBay's name by security forces. HudBay has since sold its shares in the project. However, the lawsuit against them is ongoing. If the plaintiffs are successful, a landmark precedent would be set with the potential for Canadian companies to be held accountable for actions at operations overseas. In July 2013, the Ontario Superior Court ruled that it is possible for HudBay to be held liable for the alleged violence.⁸¹

Government Involvement:

The Canadian Embassy has referred to the Mayan Q'eqchi' famers as squatters without acknowledging the forcible evictions that occurred during the civil war.⁸² Additionally, the former Canadian Ambassador to Guatemala, Kenneth Cook, disparaged a documentary on the 2007 evictions as false and featuring a paid actress. The ambassador was found guilty of slander and the filmmaker was awarded \$5000 from Cook and \$2000 from the federal attorney general for not responding properly to his complaints⁸³

Company Perspective:

In their 2012 CSR report⁸⁴, HudBay stated that they had tried to resolve the issues of illegal land occupation through dialogue. They state that they have investigated the claims of wrongdoing against security personnel and believe that the allegations are untrue. They note that they have adopted the Voluntary Principles on Security and Human Rights and that they train all security personnel on the Voluntary Principles and also relevant UN principles and codes of conduct. Hudbay also says that they have the support of the majority of residents in the area and had actually negotiated an agreement with the squatters to move off the land which included commitments to implement improvements for the neighbouring community.⁸⁵ Hudbay says that company personnel were attacked by protesters as they left an unsuccessful round of

⁸¹ <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/guatemalan-mine-claims-against-hudbay-can-be-tried-in-canada-judge-says/article13360800/#dashboard/follows/>;
<http://rightsaction.org/action-content/media-reports-precedent-setting-ruling-canada-against-hudbay-minerals-indigenous>

⁸² <http://www.schnoorversuscanada.ca/timeline.html>, citing <http://www.schnoorversuscanada.ca/docs/embassy-meeting-re-skye.pdf> documents released under ATI

⁸³ http://www.thestar.com/news/gta/2010/06/17/former_canadian_ambassador_guilty_of_slander.html; more about the case here: <http://www.schnoorversuscanada.ca/>

⁸⁴ 2012 CSR Report http://www.hudbayminerals.com/files/doc_downloads/csr/5961_Hudbay_CSR_2012_ENG.pdf at 12

⁸⁵ <http://www.hudbayminerals.com/English/Media-Centre/Media-Statements/El-Estora-Guatemala/default.aspx>

negotiations with squatters who refused to acknowledge the original agreement. They say that during this attack five of its personnel were injured and in the process Adolfo Ich Chaman died of wounds sustained during the struggle. HudBay argued at the Superior Court of Ontario that going ahead with the trial would violate the corporate law principle that parent companies are not liable for the actions of subsidiaries.

The Mining Association of Canada has commended HudBay for committing to apply the TSM to their overseas operations (TSM Report 2012 at 14).

Civil Society Perspective:

The 13 plaintiffs in this case argue that “many of the decisions regarding the operations of the Fenix Project that set the stage for Adolfo’s death were made by HudBay Minerals in Canada. Similarly, the decisions that set the stage for the rapes at Lote Ocho were made by Skye Resources in Canada.”⁸⁶ Community members argue that rather than illegal squatters, they are the traditional owners of the land from which they were forcibly evicted in the 1970s during the brutal Guatemalan civil war by the Guatemalan government, security forces, and Skye’s predecessor Inco so that mining could proceed.⁸⁷

For Further Information:

<http://www.chocversushudbay.com/>

<http://www.defensorathefilm.com/>

<http://www.hudbayminerals.com/English/Media-Centre/Media-Statements/EI-Estor-Guatemala/default.aspx>

http://www.hudbayminerals.com/files/doc_downloads/Statement_on_letterhead_3.pdf

Case Study # 2 – Nevsun Resources and Forced Labour in Eritrea

Eritrea has been described as an isolated and repressive country, with a poor human rights record. The Eritrean government and Nevsun Resources formed a joint venture in 2011 that has already begun operations in the form of the Bisha mine that actually began in 2008. However, concerns have been raised about the partnership with the Eritrean government due to their use of a national service program, which some consider to be indefinite forced labour. Nevsun points to various efforts to discern whether forced labour is being used by government contractors but says such efforts have been blocked by those companies that are part of the national service program. Human Rights Watch has argued that Nevsun is failing to meet the basic levels of CSR.

Government Perspective:

The Canadian government has made no specific reference to the Bisha project but Prime Minister Harper made statements in 2013⁸⁸ that the development of extractive industries will be

⁸⁶ <http://www.chocversushudbay.com/why-sue-in-canada>

⁸⁷ <http://www.chocversushudbay.com/history-of-the-mine>

⁸⁸ <http://www.cbc.ca/news/politics/story/2013/01/15/pol-canadian-mine-project-eritrea-forced-labour.html>

an important factor in the future prosperity of Africa. He also announced support for the African Mineral Development Centre, which is meant to help countries better manage their extractive industry transparently.

Company Perspective:

Nevsun's 2012 CSR report⁸⁹ states that there is no forced labour at the Bisha Mine and that all hiring conforms to their policies, which require that those hired demonstrate that they have been released from the national service program and that contractors and sub-contractors also must agree to abide by. They state that they investigated previous allegations of forced labour and concluded it is not occurring. They also say that the allegations of forced labour against the contractor mentioned in the Human Rights Watch report (discussed below) were historical and that they have since done random interviews of employees and have found they are all there by choice and that the facilities and conditions for the workers are acceptable. However, Nevsun has acknowledged that its policies were possibly not sufficiently developed when operations began.⁹⁰ They also have pointed out that they have contributed more than \$400 million in remittances to the Eritrean government, as well as contributions to the economy through indirect means like salaries, medical services and local supply-chain purchases.⁹¹

Civil Society Perspective:

The news source, Mining.com has pointed out that the Bisha Mine project has provided badly needed economic benefit to Eritrea, noting that in its first year of operation (2011) it produced approximately \$614 million worth of ore.⁹²

Human Rights Watch (HRW) published a report on the Bisha mine project in 2013 stating that Nevsun failed to conduct human rights due diligence since the inception of the project. The report cited interviews with former employees of the project who said they had been conscripted into forced labour and described terrible working conditions including potential capture and imprisonment if leaving without permission. They acknowledged the steps taken by Nevsun, which seem to indicate concern about possible human rights violations, but say they are insufficient. The report states that "Nevsun cannot simply pass on the responsibility for human rights problems at its mine site to the contractor it is paying to work there. Any human rights abuses [by the contractor] would implicate Nevsun, and Nevsun has a responsibility to investigate them and ensure that they stop."⁹³ Ultimately, HRW says that Nevsun risks being complicit in forced labour if it does not do more to ensure that operations do not involve the use of forced labour. HRW also opines that governments need to develop mechanisms to monitor the human rights records of their companies as they operate abroad.

⁸⁹ http://www.nevsun.com/pdf/Nevsun-2012_CSR-Report.pdf

⁹⁰ <http://business.financialpost.com/2013/01/11/nevsun-resources-rejects-claims-it-used-forced-labour-at-eritrea-mine/>

⁹¹ <http://www.guardian.co.uk/global-development/2013/jan/15/eritrea-mining-human-rights-laws;>
<http://www.nevsun.com/responsibility/human-rights/>

⁹² <http://www.mining.com/international-watchdog-exposes-use-of-forced-labour-in-canadian-eritrea-gold-project-83939/>

⁹³ <http://www.hrw.org/reports/2013/01/15/hear-no-evil> at 2-3



For Further Information:

<http://www.nevsun.com/responsibility/human-rights/>

http://www.nevsun.com/pdf/Nevsun-2012_CSR-Report.pdf

<http://www.hrw.org/reports/2013/01/15/hear-no-evil>

<http://www.guardian.co.uk/global-development/2013/jan/15/eritrea-mining-human-rights-laws>

Case Studies – CSR and Indigenous Peoples

Case Study # 1 – Algonquins of Barriere Lake

The Rivière Doré project is located in Quebec in an area under a co-management agreement (the Trilateral Agreement) between the Algonquins of Barriere Lake and the governments of Quebec and Canada. It was originally held by Cartier Resources, who, the Algonquins say, set up camp without notifying the community or obtaining consent. The project was later sold to Copper One and the claim is currently suspended. Additional companies with claims in the Trilateral Agreement area include Cenit, Mundiregina, Forest Gate Energy, Mines Virginia and SOQUEM, a Quebec government-owned corporation. There have been ongoing disputes with the federal government since the signing of the Trilateral Agreement in 1991, which was meant to ensure sustainable development but did not discuss mining. The Rivière Doré project was suspended by the Quebec government in 2011 when it was still held by Cartier Resources, a suspension that lasted until July 2013.⁹⁴

Government Perspective:

To date, neither the Quebec government nor the Federal government have made statements regarding the Rivière Doré project.

Company Perspective:

Copper Ones states on its website⁹⁵ that they are “actively engaging with local First Nations communities and an exploration program will move forward once discussions have been positively concluded with these communities. They say they are committed to carrying out respectful dialogue and engagement and sharing information about proposed activities and operations with Aboriginal communities. They go on to say that they are committed to listening to community concerns about social, economic, environmental, cultural and traditional issues.

The previous owner, Cartier Resources, is a subscriber to the Prospector and Developers Association of Canada e3 Plus CSR framework and has been recognized by PDAC for their high level of environmental social responsibility.⁹⁶

Civil Society Perspective:

In March 2013, the Algonquins of Barriere Lake affirmed their opposition to proposed exploration activities. The Rivière Doré project is an area under a co-management agreement between Barriere Lake, Quebec, and Canada and which the Algonquins of Barriere Lake describe as unceded traditional territory.⁹⁷ They say that mining was not a consideration in the co-management agreement and no process has been developed through which prospecting, exploration, and mining activities can be considered by their communities. They say the Quebec

⁹⁴ <http://www.ressourcescartier.com/en/Communique.aspx?Resourceld=606527df-2180-495e-a23f-f8f5f9e32f65>

⁹⁵ http://www.ccab.com/progressive_aboriginal_relations_par

⁹⁶ <http://www.ressourcescartier.com/en/sites/RessourcesCartier2/Reports.aspx>

⁹⁷ <http://www.miningwatch.ca/news/algonquins-barriere-lake-affirm-opposition-copper-one-s-rivi-re-dor-project-and-all-claim>

government owes them the duty to consult and must obtain their consent before any mineral exploration. Consequently, they have taken the position that they have no reason to negotiate with Copper One, who they say has established an interest in their territory without consent. They call for their traditional territory to be withdrawn from staking by the Quebec government. Communities also note they stand to make none of the profit and point to concerns about impact on traditional practices such as hunting, fishing and trapping, as well as the already low sturgeon population.⁹⁸

Additionally, they say that Cartier Resources said they had no knowledge that there was a First Nation community nearby that might be impacted by their activities. They were issued permits by Quebec and started exploration without consultation or community knowledge.⁹⁹

For Further Information:

<http://www.barrierelakesolidarity.org>

<http://www.miningwatch.ca>

<http://www.copperone.com>

http://www.defendersoftheland.org/barriere_lake

<http://www.aadnc-aandc.gc.ca/eng/1100100016352/1100100016353>

Case Study # 2 – Panama, the Ngäbe Bugle, and the Cobre Panama

The Cobre Panama project is an open pit copper and gold development project, described as one of the largest undeveloped copper deposits in the world, as well as being one of the largest development projects in Panama's history. The project would require the displacement and resettlement of about 500 people in 6 areas, 2 of which represent Ngäbe Bugle territory. The project was initially proposed and moved forward by Inmet Mining Inc, but has since been taken over by First Quantum Resources in 2013 who now have an 80% share in the project through their hostile takeover of Inmet.

Government Perspective:

The Canadian government has made no official statement on the Cobre Panama project but testimony from both company and local representatives was given to the Standing Committee created in the lead up to the Canada-Panama free trade agreement that entered into force in April 2013.¹⁰⁰ In a press release, issued at the time, the Department of Foreign Affairs and International Trade highlighted the benefits of partnership with Canada as including Canadian mining expertise.¹⁰¹

Company Perspective:

The Mining Association of Canada pointed to Inmet as an industry leader for committing to apply their Towards Sustainable Mining (TSM) initiative to their overseas operations. In their

⁹⁸ <http://desmog.ca/2013/03/14/algonquins-of-barriere-lake-fight-copper-mine>

⁹⁹ <http://desmog.ca/2013/03/14/algonquins-of-barriere-lake-fight-copper-mine>

¹⁰⁰ http://www.international.gc.ca/media_commerce/comm/news-communiqués/2013/04/01a.aspx?lang=eng

¹⁰¹ http://www.international.gc.ca/media_commerce/comm/news-communiqués/2013/04/01a.aspx?lang=eng

2012 TSM Report, the MAC highlighted Inmet's engagement with Indigenous peoples as exemplary through the conclusion of resettlement agreements, after extensive consultation and negotiations with affected communities. The MAC awarded Inmet an AAA for their community of interest (COI) identification, an AA for effective COI engagement and dialogue and an AAA for their COI response mechanism.

Inmet described the Ngäbe Bugle as having recently immigrated to the region and say that their representatives agreed to the resettlement agreement. As part of that agreement, Inmet agreed to certain community development projects involving construction, education, health programs and land ownership. Their Environmental Impact Assessment has also been approved by Minera Panama and a Biodiversity Action Plan has been completed. They also say that through extensive consultation they secured the free, prior and informed consent of the affected communities and created a resettlement process that adhered to "the highest international standards of fairness and transparency."¹⁰²

First Quantum has not yet made any mention of interactions with Indigenous groups on the Cobre Panama project or their CSR strategy in relation to the project.¹⁰³

Civil Society Perspective:

The Ngäbe Bugle say that Panama's government imposed its own electoral system in 2010 contrary to Panama law, as well as prior governance agreements. They say that this interference was motivated by a desire to facilitate access to natural resources and that their right to free, prior and informed consent over proposed development projects has not been respected. These claims have been supported by McGill professor Daviken Studkiki-Gizbert.

Traditional leadership within the Ngäbe Bugle say that the agreements reached between development companies and community representatives are not legitimate as they do not conform to Ngäbe Bugle law or customs. Further, the Ngäbe Bugle are concerned about the effects of the Cobre Panama project, including: deforestation, air pollution, noise levels, reduction in soil and water quality, negative impacts on plant and animal life, waste management, loss or disturbance of archaeological sites, increased in-migration, the associated rise in social problems, and the displacement of Indigenous populations and farmers.

They also say that testimony to the Canadian Standing Committee on International Trade about the then-proposed Panama-Canada free trade agreement by a Canadian mining company representative misrepresented community support for the project, the legal requirements for consultation and consent by the Ngäbe Bugle people. It was not addressed that the representative had intervened financially in 2010 elections in their territory, or that he paid to

¹⁰² http://www.inmetmining.com/files/2011report/docs/csr_full.pdf

¹⁰³ <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/first-quantum-starts-cost-cutting-at-cobre-panama-mine-suspends-snc-lavalin-contract/article10706824/>

intimidate and disrespect residents opposed to mining, obliging them to accept it in their territory.¹⁰⁴

For Further Information:

<http://www.unsr.jamesanaya.org/notes/panama-special-rapporteur-to-study-situation-of-indigenous-peoples-in-the-country>

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/supporting_communication_1_self-governance_dsg_english_.pdf

¹⁰⁴ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/supporting_communication_1_self-governance_dsg_english_.pdf - "Supporting Communication to the Special Rapporteur on the rights of indigenous peoples" by McGill prof;
http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_from_regional_ngabe_bugle_to_ciit_english_and_spanish_25jan11.pdf