



Submission to the United Nations Working Group on Business and Human Rights

February 19, 2018

Above Ground is a charitable initiative that promotes respect for human rights. We encourage the Canadian government to fulfill its legal duty to protect against human rights abuse by the private sector and to provide access to justice for those who are harmed by Canadian companies overseas. Through research, analysis, collaboration and outreach, Above Ground sheds light on the links between transnational business and human rights abuse, and advances solutions for corporate accountability in Canada.

Above Ground and other members of the Canadian Network on Corporate Accountability (CNCA) provided the UN working group on business and human rights with input during its 2017 country visit to Canada. Among other issues, civil society organizations raised the lack of policy or legal mechanisms in Canada to ensure that Canadian corporations respect human rights, both domestically and abroad. Civil society also raised concerns about barriers that impede access to remedy in Canada by foreigners who suffer harm associated with the operations of Canadian companies.

This submission provides the working group with complementary and updated information in anticipation of the release of its Canada visit report. The submission focuses on the Canadian government's newly announced human rights ombudsperson and on the state-business nexus.

1. Canadian Ombudsperson for Responsible Enterprise

In January 2018, the Canadian government announced the creation of a human rights ombudsperson. The new office will be mandated to investigate allegations of human rights abuse connected to the overseas operations of Canadian companies, make public findings regarding harm, and issue recommendations regarding remedy, eligibility for government services, and policy and law reform.

Together with colleagues from the CNCA, Above Ground has long called for the creation of an effective non-judicial grievance mechanism to investigate allegations of harm involving Canadian companies overseas. The CNCA developed model legislation to provide guidance on the creation of such an office and continues to engage with the Canadian government on the

establishment and operation of the office, including with respect to several elements that have not yet been finalized.

The integrity and credibility of the ombudsperson office rest on its independence; the office must be designed to operate at arm's length from government, free from political interference. To undertake meaningful investigations, the ombudsperson will require the power to obtain all relevant information. In cases involving corporations that refuse to fully co-operate with the ombudsperson's investigations, the office will require the power to summon witnesses and compel the production of documents. Finally, the office must be afforded the resources necessary to provide an effective and timely response to the complaints it receives.

2. The state-business nexus

The Canadian government offers a range of services to facilitate the overseas and domestic operations of transnational corporations. Canada's export credit agency is one of the largest in the world; it provided companies with over CDN\$112 billion in financing and insurance in 2016.¹ The Canada Pension Plan (CPP), a public fund, holds assets valued at over CDN\$337 billion.² The Trade Commissioner Service (TCS), run by Global Affairs Canada, provides companies with market intelligence, contacts and other services to facilitate business overseas. It supports tens of thousands of transactions annually.³ The Canadian diplomatic corps supports and promotes the private sector, and Canada's new development finance institution will soon provide corporations with an additional source of public financing.

Despite this extensive offering of public services, Canada lacks the policy and legal instruments necessary to ensure that its private sector clients respect human rights. As a consequence, the recipients of these services include companies implicated in credible and/or proven allegations of human rights abuse.⁴ Some of these corporations are repeat clients.

The Morro do Ouro mine in Brazil provides a powerful case in point. Since the working group's visit to Canada, Above Ground and Justiça Global published *Swept Aside: An Investigation into Human Rights Abuse at Kinross Gold's Morro do Ouro Mine*. The report, which is the product of a multi-year investigation, documents a series of human rights violations associated with the

¹ <https://www.edc.ca/EN/About-Us/Corporate-Reports/Documents/annual-report-e-2016.pdf>

² www.cppib.com

³ Personal communication with Alain Gendron, Global Affairs Canada, May 13, 2016.

⁴ See materials on the Above Ground website including <http://aboveground.ngo/export-development-canadas-new-dfi>

largest gold mine in Brazil, owned by Canadian company Kinross Gold.⁵ For several years during and after a major expansion at the mine, Brazilian authorities raised serious concerns about the project's impact on local communities. Despite an extensive public record about the mine's impacts and a series of lawsuits by public prosecutors seeking to halt the project, Kinross received multiple loans totalling as much as CDN\$850 million from Canada's export credit agency, Export Development Canada (EDC).

Those most directly harmed by Kinross's expansion project were the quilombola, people of African descent living in three nearby communities. Quilombola communities' territorial and cultural rights are protected under the Brazilian Constitution. According to Brazilian public prosecutors, the company employed intimidation tactics to pressure quilombola residents to abandon their land. The expansion project, which included the construction of a massive waste containment facility, rendered large areas of quilombola land unsuitable for occupation or use. The territories of two of the three quilombola communities impacted by the mine are no longer inhabited by community members.

Federal prosecutors in Brazil started raising concerns about the impact of the mine on quilombola rights as early as 2003. Prior to EDC's first loan for the project in 2006, prosecutors documented serious environmental damage to quilombola territory caused by the mine. In 2007, prosecutors raised concerns with Brazilian government authorities that their failure to recognize and protect the rights of local quilombola communities could invalidate the licence for the mine expansion. That same year, EDC granted Kinross a second multi-million-dollar loan for its operations in Brazil.

By the time EDC provided Kinross with a general corporate loan in 2012, public attention had been repeatedly called to the serious human rights problems associated with the company's operations at Morro do Ouro. In a 2009 report,⁶ the federal agency responsible for quilombola land titling concluded that the company's actions in Machadinho, in whose territory the company built its new tailings facility, resulted in the elimination of an ethnic community.

Moreover, prior to 2012, federal and state public ministries initiated multiple lawsuits to protect the land rights of the quilombola communities from the company's activities. Quilombola community members had spoken publicly about the enormous pressure they felt to abandon their territories. They complained about environmental contamination and the

⁵ For more details, including the company's perspective, see the [full report](#).

⁶ INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de Machadinho, Relatório Antropológico.

destruction of natural resources. Some expressed fear for their personal security. Residents in the city of Paracatu had openly complained of health impacts, property damage and environmental contamination.

None of these serious grievances had been addressed when EDC provided Kinross with four additional loans between 2014 and 2017.

The Canadian government also supports Kinross financially through the Canada Pension Plan, which holds an equity interest in the company worth CDN\$42 million,⁷ and politically through its embassy in Brazil.⁸ Following publication of *Swept Aside*, the Canadian ambassador and consul general to Brazil traveled to the Morro do Ouro mine and circulated messages praising Kinross's "responsible business programs" on social media.⁹ The diplomats visited and promoted the company's community projects, including in São Domingos.

São Domingos is the only quilombola community near the mine that retained a portion of its territory following the project expansion. The office of the federal prosecutor has documented a legacy of grievances regarding the impacts of the mine on the community. The former president of the Quilombola Association of São Domingos, Evane Lopes, reports having received anonymous death threats and other forms of harassment, which she believes are linked to her criticism of Kinross. Lopes felt compelled to enter a government protection program and ultimately left Paracatu.

The Canadian diplomats' commentary on social media during their visit to the mine was silent on these issues.

In 2016, the Canadian government announced guidelines¹⁰ "to support officials of Global Affairs Canada at Canada's missions and at Headquarters" for the advancement and protection of human rights defenders. The guidelines are clear and unequivocal:

⁷ http://www.cppib.com/documents/1604/cdn_publicequityholdings_Mar2017_en.htm

⁸ In 2008, as a government agency (INCRA) was preparing documentation for the collective land titling process in the community of Machadinho, it received a request for a meeting with the president of Kinross and a representative of the Canadian embassy in Brazil. At the meeting, the company reportedly expressed impatience with the speed of the titling process and emphasized that a lack of clarity regarding land ownership placed its investment at risk. The company pushed INCRA for a rapid resolution to the question.

⁹ Twitter posts, February 1, 2018: <https://twitter.com/EvyCoul/status/959048249142403075>;
<https://twitter.com/savoner/status/959047075764822017>;
<https://twitter.com/EvyCoul/status/959122766703349760>.

¹⁰ http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng

...The ultimate goal is to ensure that Canada continues to provide effective support to people around the world who are working for human rights - from helping human rights defenders be more effective advocates to helping protect them from harm...

...Canada's approach to supporting human rights defenders is based on these key values:

- Do no harm - the safety and privacy of the human rights defenders are paramount;
- Human rights are universal and inalienable; indivisible; interdependent and interrelated.

... Human rights defenders - including those advocating for rights related to land and the environment - often focus on the activities of multinational corporations, subsidiary companies and contracted organizations in supply chains. Support for these human rights defenders should be provided as outlined in these guidelines, regardless of the nationality of the company in question...

The Canadian diplomats' social media messages about Kinross's mine in Paracatu neither acknowledge nor express support for the human rights defenders who've spoken out about the company. There is a clear lack of policy coherence between the government's guidelines on human rights defenders and the practice of publicly praising Canadian companies whose operations are associated with human rights abuse.

As part of its legal duty to protect against human rights violations, Canada is required to ensure that its representatives and agencies neither contribute to nor ignore human rights abuse by the corporations they support. The UN Guiding Principles on Business and Human Rights confirm that "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."

To uphold these legal obligations, Canada must adopt regulatory measures that prohibit its representatives and agencies from supporting or promoting companies that fail to respect

human rights. Legal measures must require that government actors apply effective and transparent due diligence processes to identify, prevent and mitigate human rights abuse. To fulfill its obligations regarding access to remedy for the victims of human rights abuse, the Canadian state should also adopt legal mechanisms that establish an explicit duty of care on the part of government agencies such as Export Development Canada towards the people and communities affected by their clients' operations.

This year the Canadian government will undertake a formal review of the *Export Development Act*, legislation that governs the operations of Export Development Canada. The review provides a welcome opportunity to evaluate the need for legislative reform regarding the issues described above.