

**SUBMISSIONS  
FROM KENT ELSON TO THE DEPARTMENT OF FOREIGN AFFAIRS AND  
INTERNATIONAL TRADE**

**RE: NATIONAL ROUNDTABLES ON CORPORATE SOCIAL  
RESPONSIBILITY AND THE CANADIAN EXTRACTIVE  
SECTOR IN DEVELOPING COUNTRIES**

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I am a student of law at Osgoode Hall Law School, located in Toronto. Although my submissions are based on my legal studies, they are also informed by my background in economics, political science, and international development studies. I make this submission as one of the growing number of Canadian citizens who are shocked by the actions of Canadian companies operating abroad. My aim is to encourage the Canadian government to take a leading role in the regulation of multinational corporations.

### **Background**

I would like to suggest a regulatory tool that to my knowledge has not been raised during the roundtable discussions – Pollutant Release and Transfer Registers (PRTR).

Pollutant Release and Transfer Registers require individual facilities (such as a chemical plant, mining site, or smelter) to report their annual *releases* of specified chemicals to air, water and land and *transfers* for recycling, treatment or disposal.<sup>1</sup> This data is compiled into a database (the *register*) that is available to the public on the internet. The special characteristics of PRTR statistics – pollution, medium, and facility specific – and their ease of access make them particularly useful to Government regulators, environmental organisations, investors, workers and consumers.

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<sup>1</sup> Commission for Environmental Cooperation, “Taking Stock: 2003 North American Pollutant Releases and Transfers” (Released July 2007, accessed August 2007) online: CEC  
<[http://www.cec.org/files/PDF/POLLUTANTS/TS03\\_en.pdf](http://www.cec.org/files/PDF/POLLUTANTS/TS03_en.pdf)> at section 1.1.1.,

Canada's PRTR, created by the *Canadian Environmental Protection Act, 1999*, is called the National Pollutant Release Inventory (NPRI).<sup>2</sup> Facilities meeting the thresholds are required to report releases and transfers of over 300 substances. The reporting thresholds are based mainly on the number of employees (usually 10 full-time employees) and the amount of the substance that the facility manufactures, processes or otherwise uses. Green house gasses are reported under a separate system, but they too are published on the internet by Environment Canada.<sup>3</sup> Unfortunately, the NPRI only requires reporting from facilities on Canadian soil so it cannot track releases when a company outsources pollution intensive activities to an overseas partner or subsidiary. Outsourcing looks like pollution reduction to the NPRI even if emissions have increased through the relocation to a less regulated market.<sup>4</sup> The lack of international coverage is a significant flaw in the NPRI.

PRTRs could be a powerful tool to encourage and eventually require higher standards of environmentally responsible practices for Canadian operations in lesser developed countries (LDC). PRTR reporting requirements, through the NPRI or otherwise, should apply to Canadian facilities in LDCs in the extractive and other sectors. These registers are an important part of a regulatory framework, but they do not address problems such as human rights abuses or substandard construction of tailings ponds. They aim primarily to reduce emissions of toxic chemicals to the natural environment.

## **Request**

I respectfully request that the Government of Canada:

1. Institute *mandatory* reporting to a Pollutant Release and Transfer Register for Canadian companies operating in developing countries as soon as possible.
2. Concurrently work with other governments to coordinate international efforts to require pollutant release and transfer reporting for all multinational corporations with facilities in developing countries.

## **Grounds**

1. Only mandatory measures produce significant improvements in environmental performance
2. A mandatory PRTR would improve performance either alone or as part of a greater regulatory framework
3. Voluntary codes have not and will not generate sufficient or unbiased information disclosure
4. Canada has a duty to act and an opportunity to show global leadership

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<sup>2</sup> See Environment Canada, "National Pollutant Release Inventory" (accessed Nov 2006)  
<http://www.ec.gc.ca/pdb/npri/>

<sup>3</sup> See Environment Canada, "Green House Gas Sources and Sinks" (Accessed Oct 2006)  
[http://www.ec.gc.ca/pdb/ghg/ghg\\_home\\_e.cfm](http://www.ec.gc.ca/pdb/ghg/ghg_home_e.cfm).

<sup>4</sup> One study of the US semiconductor industry found that the American PRTR "fails to account for the effects of globalization and economic restructuring" see Mazurek, Jan "How Fabulous Fablessness? Environmental Challenges of Economic Restructuring in the Semiconductor Industry" GMI 21 (Winter 2000).

## **1. Only mandatory measures produce significant improvements in environmental performance**

The extent of environmental degradation occurring in LDCs is evidence that markets cannot be relied on to protect the environment or human health. In part, this is because even the most responsible firms are constrained by profit competition. Although it sometimes pays to be environmentally responsible, this is often not the case in countries where pollution goes unpunished due to a lack of laws or due process. It pays for companies in developed countries to be environmentally responsible in part because they can avoid regulatory sanctions and civil liability. Without this threat, as in many LDCs, environmental responsibility represents a cost without corresponding benefits.

The need for mandatory measures is more than merely theoretical – it is backed up by statistics and a growing consensus in the environmental NGO community. For example, one peer reviewed study examined National Pollutant Release Inventory data from 1993 to 1999 to determine the cause of decreases in the release of toxic substances.<sup>5</sup> The researchers found that voluntary reductions motivated by honour and shame were “overwhelmed by old-fashioned threats and punishment.”<sup>6</sup> As another example, the results gained through the American voluntary toxics reduction program, Responsible Care, have been “ambiguous.”<sup>7</sup> Environmental NGOs have long known that such voluntary measures are inadequate.<sup>8</sup>

In the worst situations voluntary codes can act as a smoke screen, deflecting pressure from NGOs and regulators. In one case study of a US-company operating in Ecuador the author notes that voluntary standards:

offer government officials and other stakeholders a sense of security that standards are being implemented and practices are improving. Yet the evidence shows that this security is spurious, for it is based on enigmatic standards that lie beyond the reach and responsibility of national authorities, with regard to both standard setting and oversight mechanisms.<sup>9</sup>

To be sure, there are some success stories of industry leaders implementing voluntary measures. However, these stories belie the aggregate evidence: that voluntary measures fail to produce significant results.

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<sup>5</sup> Harrison, Kathryn and Werner Antweiler “Incentives for Pollution Abatement: Regulation, Regulatory Threats, and Non-Governmental Pressures” *Journal of Policy Analysis and Management*, Vol. 22, No. 3, 361–382 (2003); Note: The authors accounted for the variable toxicity levels of the NPRI substances in their analysis.

<sup>6</sup> *Ibid.* at pg. 378.

<sup>7</sup> Karkkainen, Bradley C., “Information as Environmental Regulation: TRI and Performance Benchmarking. Precursor to a New Paradigm?” 89 *Geo .L.J.* 257 (2000-2001) at pg. 307

<sup>8</sup> See MiningWatch Canada, “A Policy Framework for the Regulation of Canadian Mining Companies Operating Internationally” (Nov. 2005, accessed Oct 2006) Online: Mining Watch Canada <[www.miningwatch.ca](http://www.miningwatch.ca)> at 2; and Hutchinson, Moira “Canadian Ngo Policy Views On Corporate Responsibility And Corporate Accountability: An Overview Paper Prepared For An Ngo-Government Meeting, May 2001” (accessed Oct 2006) Online: Canadian Council for International Co-operation <[www.web.net/ccic-ccci](http://www.web.net/ccic-ccci)> at pg. 28.

<sup>9</sup> Kimerling, Judith, “Corporate Ethics in the Era of Globalization: The Promise and Peril of International Environmental Standards” *Journal of Agricultural and Environmental Ethics* 14: 425–455, 2001 at pg. 445.

Mandatory environmental regulation can take many more or less intrusive forms. At one end of the spectrum are *substantive* requirements that place restrictions on pollution discharges or specify allowable production methods and technologies. Contrasted to that, *procedural* requirements merely require that environmental impacts are actually considered and monitored. Unlike most procedural requirements, PRTRs are hard to evade and manipulate because they focus on hard data. Substantive requirements are politically unpopular because of sovereignty and cost issues. Until that lack of political will is overcome, PRTRs represent a halfway house between unpopular substantive requirements and ineffective voluntary measures.

## **2. A mandatory PRTR would improve performance either alone or as part of a greater regulatory framework**

Some evidence suggests that pollutant registers may be able to improve environmental performance without further regulatory action. In the very least, PRTRs can help companies make objective, quantifiable and standardized performance indicators.<sup>10</sup> But more importantly, the publication of this information generates pressure for companies to reduce their emissions. This pressure can come from the goods market through green consumers,<sup>11</sup> the capital market through green and self-interested investors,<sup>12</sup> and from environmental NGOs through shaming and lawsuits. However, the significance of those mechanisms remains unclear, and some evidence indicates only minor environmental improvements.<sup>13</sup> Furthermore, this pressure would be even weaker in developing countries. For example, investors react negatively to poor environmental performance reported to PRTRs in part because this suggests the likelihood of future civil or regulatory liabilities. In LDCs without adequate laws or due process, the threat of liability and corresponding investor pressure is much weaker.

The most powerful aspect of PRTRs is that they reinforce traditional regulation and enforcement. Environmental law is unique in the vast amounts of information required to create new rules. The amount of chemical, geographical, physical, and cost factors that need to be considered are staggering. Before PRTRs, information gathering occurred on an ad hoc basis, creating many data sets that could not be compared, reconciled, or analysed together. One of the greatest benefits of PRTRs is that information is continually gathered in a method that allows for ease of analysis and a variety of uses.<sup>14</sup> In the United States, PRTR data was used to create the 1990 Clean Air Act Amendments, the Resource Recovery and Conservation act, the Comprehensive Environmental Response, Compensation, and Liability Act and the “33/50” program as well as a

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<sup>10</sup> Karkkainen *supra*. note 7 at pg. 295.

<sup>11</sup> For evidence of albeit low levels of effects of green consumers see: Antweiler, Werner and Kathryn Harrison, “Toxic Release Inventories and Green Consumerism: Empirical Evidence from Canada” *Canadian Journal of Economics*, Vol. 36, No. 2, Pg. 495 (May 2003).

<sup>12</sup> See Hamilton, James T “Pollution as News: Media and Stock Market Reactions to the Toxics Release Inventory Data” *J. of Environmental Economics and Management* 28, 98-113 (1995); Khanna, Madhu and Wilma Rose H. Quimio, and Dora Bojilova, “Toxics Release Information: A Policy Tool for Environmental Protection” *Journal of Environmental Economics And Management* 36, 243-266 1998. Article No. EE981048

<sup>13</sup> See Harrison *supra*. note 5.

<sup>14</sup> Esty, Daniel C., “Environmental Protection in the Information Age” 79 *N.Y.U. L. Rev.* 115 2004 at 171.

targeting tool for enforcement actions.<sup>15</sup> For the more developed LDCs PRTR data could aid in the creation of domestic legislation. In other cases, PRTR data could be used as a basis for further home state regulation of Canadian overseas facilities.

### **3. Voluntary codes have not and will not generate sufficient or unbiased information disclosure**

Most legal and economics scholars agree that companies do not have the incentives required to voluntarily disclose all material environmental information. This leads to a commonly cited market failure – information asymmetry.<sup>16</sup> A firm that causes environmental harm has strong incentives to remain ignorant of these harms or at least to keep this information secret.<sup>17</sup> In reality, firms only have the incentive to disclose *favourable* information.<sup>18</sup> Essentially, generating and disseminating complete information has many costs but few benefits for companies.

This theory is supported by the fact that voluntary codes fail to induce environmental disclosure. For example, ISO 14001 standards merely require that the organisation disclose their “environmental policy.”<sup>19</sup> The guidelines specifically permit an organisation to “*decide* whether to communicate externally about its significant environmental aspects.”<sup>20</sup> Unlike the ISO guidelines, the Global Reporting Initiative (GRI) has substantial requirements that include reporting on specific performance indicators such as discharges of some hazardous substances.<sup>21</sup> Unlike PRTRs, these indicators are not compiled in a large database, need not be facility specific, and carry no sanctions if inaccurately reported. Therefore this information is mostly useless for the purpose of regulatory action. Additionally, a 2005 study of 340 Canadian companies found only 3% “in accordance” with GRI guidelines.<sup>22</sup>

Industry proposals for voluntary disclosure must be met with extreme scepticism. Promises of voluntary disclosure look insincere when industrial groups, including representatives from the

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<sup>15</sup> Ashe, Andrew D., “New Regulations Under The Tri: The Need For A Tiered Approach” 1 *Envtl. Law.* 859 1994-1995 at pg. 862.

<sup>16</sup> See Case, David “Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective” 76 *U. Colo. L. Rev.* 379 2005 at 414; Echeverria, John D and Julie B. Kaplan, “Poisonous Procedural “Reform”: In Defense of Environmental Right-to-Know” 12 *Kan. J.L. & Pub. Pol’y* 579 2002-2003 at 587; Franco, Nicholas (US EPA), “Corporate Environmental Disclosure: Opportunities to Harness Market Forces to Improve Corporate Environmental Performance” ABA Conference on Environmental Law, Keystone, Colorado March 8-11, 2001 at pg. 4.

<sup>17</sup> Wagner, Wendy E. “Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment” 53 *Duke L.J.* 1619 2003-2004.

<sup>18</sup> Coglianese, Cary, “Seeking Truth and Power: Informational Strategy and Regulatory Policymaking” 89 *Minn. L. Rev.* 277 2004-2005 at pg. 277.

<sup>19</sup> National Standard of Canada CAN/CSA-ISO 14001:04, “Environmental Management Systems – Requirements with Guidance for Use”, Canadian Standards Association (2004) s. 4.2(g)

<sup>20</sup> *Ibid.* s. 4.4.3. (emphasis added).

<sup>21</sup> Global Reporting Initiative, “Sustainability Reporting Guidelines” (accessed Oct 2006) online: GRI <[http://www.globalreporting.org/NR/rdonlyres/A1FB5501-B0DE-4B69-A900-27DD8A4C2839/0/G3\\_GuidelinesENG.pdf](http://www.globalreporting.org/NR/rdonlyres/A1FB5501-B0DE-4B69-A900-27DD8A4C2839/0/G3_GuidelinesENG.pdf)> at pg. 29.

<sup>22</sup> Stratos, “Gaining Momentum: Corporate Sustainability Reporting in Canada” (December 2005, Accessed Oct 2006) online: Stratos < [http://www.stratos-sts.com/sts\\_files/Gaining%20Momentum%202005.pdf](http://www.stratos-sts.com/sts_files/Gaining%20Momentum%202005.pdf)>

extractive sector, often lobby the Government to limit the NPRI reporting requirements.<sup>23</sup> We know that voluntary disclosure is inadequate because of the failure of voluntary codes and because full disclosure is not in companies' self-interest.

#### **4. Canada has a duty to act and an opportunity to show global leadership**

Operations in LDCs benefit Canadian shareholders, manufacturers and consumers. This alone creates a duty to *make sure* such operations follow environmental and human rights codes. Even ignoring the benefits accrued to Canadians, we have a duty to act because we have the ability to do so. So far the Government has only provided excuses:

The primary responsibility for monitoring company compliance with local laws rests with host governments themselves.

The primary responsibility for the promotion and protection of human rights and the environment rests with states.<sup>24</sup>

How can the primary responsibility for protecting human lives rest with weak, often corrupt governments that *do not have the capacity* to protect human rights or the environment? We *benefit* from such operations, we have the *ability* to regulate such operations, and therefore we have the *duty* to ensure that they operate responsibly.

Canada has an opportunity to show global leadership in tackling this problem. A decisive move on our part would spur other developed countries to adopt similar legislation and would encourage international solutions. In fact, PRTRs are most effective when data between many countries can be analysed and compared. Both OECD and UNECE countries have made commitments regarding the establishment and harmonization of PRTRs.<sup>25</sup> Concurrent with efforts to expand the National Pollutant Release Inventory to cover the foreign facilities of Canadian companies, Canada could lead the way in international talks aimed at global PRTR standards. This is a great chance for Canada to do something that we could all feel proud about.

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<sup>23</sup> For example, see Environment Canada, "Report Of The National Pollutant Release Inventory Multi-Stakeholder Work Group On Substances" (November 24, 2005, accessed Nov 2006) online: Environment Canada <[http://199.212.18.76/pdb/npri/documents/WG2005/WG\\_substances2/NPRI\\_WG\\_Substances\\_e.pdf](http://199.212.18.76/pdb/npri/documents/WG2005/WG_substances2/NPRI_WG_Substances_e.pdf)> at pg 21.

<sup>24</sup> Government of Canada, "Government Response To The Fourteenth Report Of The Standing Committee On Foreign Affairs And International Trade" (accessed Oct 2006) Online: <[cmte.parl.gc.ca/Content/HOC/committee/381/faae/govresponse/rp2030362/faae\\_rpt14\\_gvtrsp-e.htm](http://cmte.parl.gc.ca/Content/HOC/committee/381/faae/govresponse/rp2030362/faae_rpt14_gvtrsp-e.htm)>

<sup>25</sup> OECD Recommendation, 20 February 1996 - C(96)41/Final amended on 28 May 2003 - C(2003)87 (accessed Nov 2006) online: OECD <[http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(96\)41](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(96)41)>; UNECE, "Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998" (accessed Nov 2006) online: UNECE <<http://www.unece.org/env/pp/documents/cep43e.pdf>>; UNECE, "Protocol On Pollutant Release And Transfer Registers" (accessed Nov 2006) online: UNECE <<http://www.unece.org/env/pp/prtr/docs/PRTR%20Protocol%20English.pdf>>

## Request

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Submitted by:



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