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Not-so-innocent abroad

Like it or not, Canadian mining companies have a growing reputation in the developing world as bad actors who commit and condone environmental and human rights abuse. Would the appointment of an independent federal ombudsman help us clean up our act?

By Kerry Banks

March 2, 2017

It's no secret to anyone managing or sitting on the board of a Canadian mining company: in recent years, a startling litany of accusations of human rights abuses, including such serious crimes as murder, rape, slave labour and environmental destruction, have been leveled at Canadian miners operating in foreign countries.

Some of the highest-profile incidents have sparked precedent-setting court rulings permitting lawsuits to be brought against the companies in Canada even



though the events took place in Africa or Latin America. The latest of these was a January decision by the British Columbia Court of Appeal. It overturned a ruling by the B.C. Supreme Court and declared that seven Guatemalan miners who had filed a lawsuit against Tahoe Resources Inc. (TSX:THO) for injuries inflicted by security staff at a mine owned by a subsidiary of Tahoe, could pursue their case here.

While no charges have yet been proven in court, dozens of companies have been cited for incidents in the last 10 to 15 years, and the entire mining industry, along with Canada's federal regulatory oversight, has been strongly criticized. The latter includes calls by four United Nations bodies for the government to hold Canadian companies accountable for abuses overseas. And last fall, three Canadian advocacy groups as well as the federal New Democratic Party called on the Liberal government to appoint an independent ombudsman who could investigate human rights violations tied to Canada's extractive industries.

"The world is taking notice of Canadian companies for all the wrong reasons," says Shin Imai, a professor at York University's Osgoode Law School and author of a report on Canadian miners' abuses in Latin America, published last October by the Justice and Corporate Accountability Project. "I think they should welcome an ombudsman."

The ombudsman idea is not new. It originated in a national roundtable on the extractive sector in 2007, and was even part of the Liberals' 2015 election platform. But there is one difference today—the government is giving strong signals it intends to follow through. In December, MP John McKay, a long-time advocate for the ombudsman concept, told *The Hill Times* its creation was "a high priority item for the minister of international trade." He also said he expected a plan to be announced in March—though where that stands after the January cabinet shuffle (François-Philippe Champagne replaced Chrystia Freeland in international trade) is unclear.

This isn't to say there's no oversight mechanism already in place. In fact, there are two, linked under the government

Corporate Responsibility Strategy. Since 2000, following guidelines established by the Organisation for Economic Co-operation and Development, Canada has maintained a National Contact Point (NCP) responsible for ensuring that Canadian companies adhere to OECD guidelines for honourable business conduct. The second is a CSR counsellor's office, founded in 2009 by the Conservative government when it first created its Corporate Responsibility Strategy. Initially, the office was to act as an impartial adviser and facilitator in the mediation of disputes. That mandate was revised in 2014, putting greater emphasis on cooperation with the mining sector and other stakeholders in hopes of stemming potential conflicts before they escalate. Under the initiative, the government encouraged corporations to align with industry best practices and warned it was committed to cutting financial and diplomatic support for companies that failed to cooperate with either the CSR counsellor or the NCP process.

The problem? Critics say the current process is useless. To be effective, federal oversight must include the ability to "investigate complaints and propose consequences," says Jamie Kneen, communications and outreach coordinator for non-profit group MiningWatch Canada. "It must also be transparent and independent." The existing CSR strategy has none of that and results reflect it.

In 2013, frustrated Liberal MP McKay described the Harper government's CSR strategy as a "toothless, Potemkin of when the first counsellor resigned after failing to effectively mediate any of the six cases brought before her in four years at the post.

But recent reports like Imai's Justice and Corporate Accountability Project study cited above, as well as another published in November by MiningWatch Canada in tandem with two other advocacy groups, Above Ground and OE Watch, have tightened the pressure.

Imai's study, titled *The Canada Brand: Violence and Canadian Mining Companies in Latin America*, tracked 28

Canadian companies in 13 countries, from 2000 to 2015. According to the findings, 44 people have been killed near sites, 30 as a result of targeted killings, while more than 400 people have been injured, along with 700 arrests and detentions.

The second report, titled '*Canada is Back, ' But Still Far Behind*, examined five cases involving Canadian miners accused of human rights or environmental violations handled through the NCP system. It found that a lack of independence, delays, ineffective penalties and poor follow-up have resulted in a process that “has not ensured the provision of remedies or made any significant changes on the ground for affected communities.”

Not everyone is convinced an ombudsman is the best solution, however. The Mining Association of Canada, which represents 39 of the country's major industry players, opposes the concept. Pierre Gratton, association president and CEO, has stated that although the idea may be “laudable in theory,” its powers would be “impractical” and “unworkable.”

Imai questions this reaction. “When I started this research eight years ago, it was rare to see companies talking about social responsibility. Today I think that most companies view social responsibility as an important part of what they do, so I'm surprised that a sector of the mining industry hasn't come forward to say, ‘Let's deal with it.’”

On the other hand, Milos Barutciski, an attorney who specializes in international trade and investment law at Benne Jones LLP in Toronto, says it's hard to imagine how the type of ombudsman that advocacy groups are calling for could function. “What would the powers be? How would the office conduct investigations? Could they gather evidence overseas? You have to remember that the Canadian government has no jurisdiction in foreign countries. In a legal sense, I think it's very limited as to what can be done.”

That doesn't mean industry should ignore the conduct issue, however. The trend in Canadian courts to give standing to lawsuits filed against Canadian parent companies for actions of offshore subsidiaries that violate their domestic

standards is a serious concern. Barutciski calls the recent B.C. Court of Appeal's ruling against Tahoe Resources "significant." Ditto for earlier rulings by courts in B.C. and Ontario against Nevsun Resources Ltd. (TSX:NSU) and Hudbay Minerals Inc. (TSX:HBM), respectively. Not only does it mean a resource company's CSR commitments can contribute to liability when they are not properly implemented, says Barutciski, but they now also run the risk of incurring liability if they become complicit in abuses condoned or encouraged by host governments. "The cost of not doing due diligence is increasing. The stakes have suddenly gotten higher."



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