

Canadian Mining: Still Unaccountable



The Marlin mine in Guatemala, in the westernmost department of San Marcos, where the Canadian Goldcorp company has been extracting gold since 2004.

By Karyn Keenan

ON NOVEMBER 27, 2009, MARIANO ABARCA Roblero was shot dead outside his home in Chiapas, Mexico. Abarca was a well-known community activist who led local opposition to a mining operation near his home. The aptly named Payback mine is owned by a Canadian company, Blackfire Exploration. Mexican police have arrested three men in connection with Abarca's death, one of whom is currently employed by the company. The other suspects are former Blackfire em-

ployees, and allegations have surfaced that the company repeatedly bribed local authorities to quell local dissent. The Mexican government temporarily halted Blackfire's operations after Abarca's killing, citing environmental violations at the mine site. According to media reports, the company has threatened to sue the Mexican government under the North American Free Trade Agreement (NAFTA) for damages incurred as a result of the mine closure. In Canada, civil society organizations

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have requested a government investigation of Blackfire under legislation that bars Canadian citizens from bribing foreign public officials.

Unfortunately, as remarkable as these events may sound, they are not as uncommon as one might expect. Not only do Canadian mining operations in Latin America cause significant environmental damage, but they are also associated with social disruption and human rights violations, and generate conflict with and among local communities.¹ Those who oppose mining operations are often harassed and intimidated.² In recent months, several critics of Canadian mining companies have been murdered in El Salvador, Guatemala, and Mexico.³ Moreover, according to a former cabinet minister from Argentina who recently testified before Canadian Parliament, Canadian mining companies unduly influence the legislative process in her country.⁴ (Canadian mining company Barrick Gold refutes her testimony on its website.)

Local communities have responded to the arrival of Canadian mining companies with a variety of strategies aimed at protecting their land and resources. Some of these efforts have yielded positive results. For example, an overwhelming majority of local residents in Tambogrande, Peru, opposed the extraction of a gold deposit located underneath their town, as proposed by Manhattan Minerals, a junior Canadian mining company. The municipal government convened a referendum on the project so that local perspectives would be considered in decision-making concerning the project. Ninety-eight percent of registered voters rejected the project, which was eventually turned down by the Peruvian government.

Unfortunately, Tambogrande is an anomaly. In most cases, communities are marginalized from the decision-making over mining projects in their areas. Moreover, host governments are often unwilling or unable to effectively regulate the operations of transnational companies in their territories. Communities are commonly denied access to meaningful mechanisms of legal redress in their countries regarding the damages they suffer as a consequence of poorly regulated mining operations. Several mining-affected populations have turned to international mechanisms to voice their grievances. For example, indigenous communities affected by the Marlin mine in Guatemala brought complaints before the World Bank's Compliance Advisor Ombudsman and the Canadian National Contact Point. However, the non-binding recommendations that are produced by these offices are of limited impact.

Other populations affected by Canadian mining

operations have sought redress through the Canadian judicial system. Representatives of indigenous communities in Guyana filed a suit in a Canadian court after a tailings dam failure caused massive environmental contamination at a Canadian mine in their country. The Canadian court refused to hear the case, arguing that Guyana was the appropriate legal forum. The Guyanese judicial system proved equally ineffectual. Now Ecuadoran plaintiffs are testing the Canadian legal system once again, suing the Canadian mining company Copper Mesa, its directors, and the Toronto Stock Exchange in association with death threats and assaults committed against community members who opposed the development of a copper mine.

Several Latin American governments have taken steps to better regulate the mining industry. But these efforts are often stymied. For example, the Argentine Congress unanimously passed legislation to protect that country's glaciers from mining activities. Large tracts of the Andean cordillera on the country's Chilean border have been included in mining concessions granted to Canadian companies. President Cristina Fernández de Kirchner vetoed the legislation, according to some sources, in response to pressure from Canadian mining interests.⁵ In other cases, governments are penalized when they strengthen environmental and health protections in relation to mining operations. For example, Canadian mining company Pacific Rim responded to the Salvadoran government's decision not to issue permits for the company's El Dorado project by suing it for damages under the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA).

NOWHERE IS THE CANADIAN MINING SECTOR'S PRESENCE felt overseas more acutely than in Latin America. The region is the single most important destination for Canadian mining capital, surpassing by a wide margin Africa, the industry's second choice. In 2008, more than half of Canadian mining companies' global assets were located in Latin America, at a value close to \$57 billion (all values throughout this article are in Canadian dollars).⁶ The Canadian government is an important partner with this flagship industry, actively supporting mining companies' overseas operations through the provision of both financial and political backing.

This state support takes various forms. Extractive companies (mining, oil, gas) are the single greatest recipient of backing from Export Development Canada (EDC), a state-owned "Crown corporation" that provides financing and insurance to facilitate Canadian

exports and overseas investments. In 2008, EDC facilitated Canadian business in the Latin American extractive sector worth more than \$4 billion and is poised to expand its support for the Canadian mining industry in the region.⁷ With new offices in Santiago and Lima, EDC now has a permanent presence in Brazil, Chile, Mexico, and Peru, countries that, together with Argentina, were the top five destinations for Canadian mining capital in Latin America from 2002 to 2008.⁸ Meanwhile, the Canada Pension Plan, a publicly administered fund to which most working Canadians are legally required to contribute, holds equity worth about \$2.5 billion in publicly traded Canadian mining companies that operate in developing countries.⁹ And the Canadian Trade Commissioner facilitates access to foreign markets for Canadian mining companies. For example, Manhattan Minerals obtained its interest in the Tambogrande mine concession shortly after participating in a Team Canada trade mission to Peru.

Canadian embassies also provide valuable political backing. The Canadian ambassador to Guatemala published an opinion piece in a local paper, praising the Canadian mining industry, when indigenous communities expressed opposition to the Canadian-owned Marlin mine. In Peru, communities frustrated with operations at the Antamina mine blocked an access road to the mine site.¹⁰ Days later, an article appeared on the front page of the Canadian Embassy website showcasing Antamina and praising its achievements as a socially responsible company. According to a representative of Canadian company Corriente Resources, whose operations in Ecuador have been associated with violent conflict and allegations of human rights abuse, “the Canadian Embassy in Ecuador has worked tirelessly to affect [sic] change in the mining policy—including facilitating high-level meetings between Canadian mining companies and President Rafael Correa.”¹¹ Corriente Resources participated in one such meeting, during which the Canadian ambassador expressed the government of Canada’s concerns regarding changes to Ecuador’s regulatory framework.

THE CHALLENGES CREATED BY CANADIAN MINING COMPANIES’ international operations are not unique. A vibrant international debate is under way

concerning the responsibility of home countries for the overseas activities of their transnational companies. Home countries are those jurisdictions in which transnational companies incorporate, raise capital, and receive public backing. In Canada, this debate has focused on the federal government’s responsibility regarding the international operations of the Canadian extractive sector. Canada currently falls short in two respects. First, it lacks an effective legal or policy framework to regulate the overseas operations of Canadian extractive companies. Applicable legislative provisions are extremely limited in scope. And the Canadian government’s policy of corporate social responsibility

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for the extractive sector, described below, is unlikely to have a positive impact. Second, non-nationals who are adversely affected by the overseas operations of Canadian extractive companies face daunting barriers in accessing the Canadian legal system.

However, in recent years the serious and increasingly widespread problems associated with the global operations of the Canadian mining sector have provided the impetus to address corporate impunity through policy and legal reform in Canada. Unprecedented efforts to this end have focused on both corporate and government accountability, and have involved the leadership of parliamentarians, industry representatives, and civil society.

In 2005, members of the Parliamentary Standing Committee on Foreign Affairs and International Trade held hearings on Canadian mining operations in developing countries. The committee heard testimony and received submissions from representatives of communities affected by Canadian mining operations. At the conclusion, the committee released a groundbreaking, all-party report expressing its concern that “Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples.”¹² The committee called for significant policy and law reform in Canada to address this gap, including the adoption of legal norms “to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies.”

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Demonstrators in Santiago, Chile, protest the Pascua-Lama mine project headed by Canadian mining company Barrick Gold.

The committee report also called for the adoption of accountability mechanisms to ensure that companies that receive government support, such as export and project finance, and services offered by Canadian missions abroad, comply with clearly defined standards, including human rights norms. However, the Liberal government under Paul Martin chose to adopt only one of the committee's recommendations: It convened a multi-stakeholder process to address government policy and programming in this area. The subsequent national roundtable process, which was unique in the Canadian experience, achieved unprecedented outcomes.

The 2006 roundtables were hosted by the Department of Foreign Affairs and International Trade (DFAIT). The process was led by an advisory group

in which the author of this article participated. This group featured representatives of industry associations, including the CEOs of both the Mining Association of Canada and the Prospectors and Developers Association of Canada; individual mining, oil, and gas companies; civil society groups; academics; and an ethical investment organization. Government and advisory group members participated in public consultations and closed-door expert sessions across the country. Following these discussions, members of the advisory group worked for several months to develop policy recommendations for the government of Canada. The group sought consensus, convinced that the presentation of divergent viewpoints would justify government inaction. Remarkably, concessions were made on all

sides, and in March 2007, the advisory group released a consensus report identifying a proposal for policy reform that would enhance the accountability of Canadian extractive companies that operate in developing countries.¹³

The report's centerpiece is the Canadian Corporate Social Responsibility (CSR) framework, which includes standards and public reporting requirements for extractive companies. It also features a unique complaint mechanism for the extractive industries, in which an ombudsman will operate at arm's length from the government and will undertake independent investigations regarding the overseas operations of Canadian extractive companies. The office will accept complaints from both Canadians and non-Canadians, and will publicly release its findings. While not grounded in binding legislation, the framework is intended to promote more responsible corporate behavior by disseminating credible, independent information about corporate operations and by linking the provision of government support to corporate compliance with performance standards.

Unfortunately, the Canadian CSR framework does not include legally binding regulations for Canadian companies or mechanisms for legal redress in Canada for non-nationals who are affected by Canadian companies.

Despite these shortcomings, the advisory group report is supported by most Canadian civil society organizations that work to promote corporate accountability in the extractive sector.¹⁴ These groups view the CSR framework as a sound starting point for more comprehensive reform, which they believe will be facilitated by several mechanisms proposed by the advisory group, particularly the office of the ombudsman.

In March 2009, two years after the release of the advisory group's singular report, the Conservative government issued its long-awaited response. Stockwell Day, then minister of international trade, presented the government's CSR policy, "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector." The woefully inadequate policy was hardly worth the lengthy wait. It disregards virtually all of the advisory group recommendations, shifting the focus of accountability from Canada to the countries where Canadian companies invest. Mechanisms that were designed by the advisory group to encourage corporate compliance

with performance standards are absent from the government strategy. Eligibility for government support is no longer linked to these standards. The office of the ombudsman has been stripped of its independence and power. The position is now government-appointed and can only undertake investigations with the explicit sanction of industry.

Canadian mining companies' overseas operations are largely unregulated, and non-nationals face daunting barriers in accessing the country's legal system.

MINISTER DAY WAS VICE CHAIR OF THE Standing Committee on Foreign Affairs and International Development (SCFAIT) in 2005 when the committee issued its hard-hitting report on the Canadian mining industry. Yet, four years later, Day rejected a set of policy measures that are modest compared to the legally binding regulations he endorsed as a member of the opposition—policy measures that enjoy widespread support. The Mining Association of Canada has consistently endorsed the advisory group recommendations, the opposition parties agree, and the government has been flooded with supportive letters from civil society organizations and members of the public.¹⁵ So what happened?

Not everyone in industry was happy with the advisory group report. After Tony Andrews, executive director of the Prospectors and Developers Association of Canada (PDAC) and member of the advisory group, endorsed the group's recommendations in his "personal capacity," PDAC distanced itself from the report. In a submission to the ministers of Foreign Affairs and International Trade, PDAC argued that the report "reflects an underlying bias against the Canadian mining industry" and cautions that "the development of a CSR Framework specifically targeted at Canadian mining companies, could disturb the 'level playing field' and place them at a competitive disadvantage."¹⁶

The Canadian Chamber of Commerce publicly slammed Prime Minister Stephen Harper in July 2007 when he spoke favorably about the advisory group report in a press release at the conclusion of the G8 Summit in Germany: "Canada has recently completed a nation-wide consultation process involving stakeholders with the Canadian extractive sector (mining, oil and gas) in developing countries. Implementation of the recommendations from this process will place Canada among the most active G8 countries in advancing

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international guidelines and principles on corporate social responsibility (CSR) in this sector.”¹⁷ Members of the G8, Canada included, committed themselves to promote and strengthen corporate social responsibility during the summit.¹⁸

The Chamber of Commerce emphatically rejected the adoption of any accountability measure for industry in a letter to the government regarding the advisory group report. “The voluntary nature of social responsibility *must* be maintained,” the chamber declared. “Attaching explicit sanctions to what is determined to represent non-compliance with the Canadian CSR Framework makes the framework mandatory for all intents and purposes. This must be avoided.”¹⁹ Several extractive companies, including Kinross, Barrick, and Nexen, also expressed concern regarding the establishment of an independent ombudsman empowered to scrutinize their operations.²⁰

OPPPOSITION PARTIES BECAME FRUSTRATED WITH THE lengthy delay in the release of a government response to the advisory group report. Members of Parliament filed motions in the House of Commons, calling for a government response. The New Democratic Party (NDP), Canada’s social-democratic political party, drafted legislation to regulate the overseas operations of Canadian mining companies and challenged the government to adopt the provisions.

Then, in February 2009, a month before the government released its CSR policy, Liberal Party MP John McKay tabled a private member’s bill, Bill C-300, in the House of Commons. Private members’ bills may be introduced by any parliamentarian who is not a member of the cabinet, according to a lottery system. Bill C-300, titled An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, is a government-accountability bill that codifies a number of the advisory group’s recommendations. The legislation regulates several government agencies that support extractive companies, including Export Development Canada, the Canadian Pension Plan, Canadian embassies, and trade commissioner staff. Bill C-300 establishes a set of binding standards that must be met by companies that seek support from these government entities. The legislation also creates a complaints mechanism that investigates corporate compliance with the standards. These investigations occur as a matter of course; there is no requirement that the company in question grant its consent.

Bill C-300 passed an initial vote in the House of

Commons and was under review in committee when Parliament was dissolved in December. Both the government and industry oppose the bill. However, the legislation has received the support of current and former government officials in countries where the Canadian mining industry has a significant presence. It also has the backing of a broad constituency of civil society organizations in Canada. Moreover, since its

The Canadian government’s oversight policy, among other things, shifts the focus of accountability from Canada to the countries where Canadian companies operate.

introduction, analogous statutory provisions have been adopted in the United States regarding its export credit agency, the Overseas Private Investment Corporation.²¹ The promulgation of this law in the United States weakens government and industry arguments that C-300 will put Canadian investors at a competitive disadvantage.

The bill must pass a final vote in the House of Commons. It then moves to the Senate, where the governing Conservative Party enjoys a majority. While adoption of the legislation would be a positive step toward putting the government’s house in order, it is not enough. Bill C-300 will not prevent the abuse associated with

Canadian extractive companies that don’t seek government services. Nor does the legislation address the lack of legal redress for those who are wronged by Canadian companies. These issues must also be resolved if the cycle of impunity is to be broken.

The 2005 Parliamentary hearings and the subsequent roundtable process raised the corporate accountability debate in Canada to a new level. These forums provided credible, public platforms to highlight the problems associated with Canadian extractive investment abroad and the associated regulatory vacuum in Canada. However, the power of such processes to elicit change is severely constrained. Governments are not bound by their recommendations. The legislative process, particularly in the current minority government context, offers better opportunities. As does the judicial process: Copper Mesa, the mining company sued in Canada by Ecuadoran nationals, was de-listed by the Toronto Stock Exchange in January. Both the legislative and judicial routes will be arduous, but represent the only viable option to avoid the abuse suffered by Mariano Abarca and others across Latin America. **□**

NOTES

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No Smoking Gun—Yet

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