

BILL C - 300 ACCOUNTABILITY OR STIGMATIZATION?

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OBVIOUSLY, AS REGARDS THE MINING INDUSTRY, QUÉBEC WILL NOT BE THE ONLY JURISDICTION IN WHICH ACTION IS EXPECTED AFTER THE SUMMER BREAK. WHILE THE PARLIAMENTARY COMMISSION CONTINUES REVIEWING BILL 79 AMENDING THE MINING ACT (QUÉBEC)¹, OTTAWA IS NOT OUTDONE AS THE HOUSE OF COMMONS MUST PROCEED WITH THE THIRD READING OF BILL C-300 (THE "BILL") ENTITLED: *CORPORATE ACCOUNTABILITY OF MINING, OIL AND GAS CORPORATIONS IN DEVELOPING COUNTRIES ACT*.

Submitted for first reading on February 9, 2009, the Bill was reviewed by the Standing Committee on Foreign Affairs and International Development (the "Committee") beginning in June 2009 and has been supported by several non-governmental organizations ("NGOs") including *Canada Mining Watch*². However, it raises quite serious concerns in the extractive industry. Case in point, the *Prospectors & Developers Association of Canada* ("PDAC") is leading a mobilization campaign against the Bill and a section of its Internet site features several relevant links.³

Given the importance of the Canadian extractive industry from a global perspective, it is appropriate to sum up the issues. While the supporters of the Bill invoke greater social accountability of the extractive industry, the latter, well aware of its image problem with certain segments of the population, feels that the Bill will rather entail further stigmatization.

CONTEXT

What is commonly referred to as *corporate social responsibility* ("CSR") is the Bill's backdrop and its purpose is "to ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with international environmental best practices and with Canada's commitments to international human rights standards" (section 3).

This noble aim seems to rally the extractive industry. However, an equally strong industry consensus is emanating to the effect that not only is the Bill, as drafted, useless to achieve that aim but, in addition, legislating proves to be the wrong approach since several CSR standards and principles already exist, are being gradually implemented by the industry and, it should be noted, continue to evolve.

¹ This Bill was the subject of a newsletter in June 2010 (<http://lavery.ca/publications/our-publications/in-fact-and-in-law/bill-79-amending-mining-act-stimulating-industry-another-cause-concern/>).

² See: <http://www.miningwatch.ca/en/urgent-action-support-legislation-hold-canadian-mining-companies-account-abuses-overseas>.

³ See: <http://www.pdac.ca/c300/>.

In this respect, a large consultative group made up of stakeholders in the extractive industry as well as representatives of NGOs, aboriginal communities and civil society, looked into the state of affairs pertaining to CSR. This group reported to the government in March 2007. The government's response took the form of statement of strategy (the "**Strategy**") published on March 26, 2009⁴.

While acknowledging that the Canadian extractive sector is recognized at home and abroad for its " leadership " in CSR matters, this Strategy exhorts the industry to do more. In concrete terms, the Strategy supports the establishment of a CSR Centre of Excellence through a recognized institution, the *CIM*⁵, and has set up an Office of the Extractive Sector CSR Counsellor⁶ for the extractive industry with a mandate to:

- ▶ review the CSR practices of Canadian extraction companies in foreign countries;
- ▶ advise interested parties on recognized best practices; and
- ▶ report annually to the minister of International Trade.

Several extractive industry stakeholders have welcomed the multilateral and collaborative approach that led to the Strategy as well as the incentives described therein. In the same breath, they lament the fact that the Bill, submitted by a member of the opposition (a private member's bill⁷), Liberal John McKay, has not been the subject of prior consultations with interested parties and seems to go against the above-mentioned collaborative approach.

It is interesting to note that Mr. McKay declared, at a luncheon organized by PDAC on last April 15, that the Bill was the "brainchild of NGOs" and that he had no problem being labelled a "captive" of such NGOs because they were widely respected groups⁸.

PRINCIPAL ELEMENTS OF THE BILL

CORPORATIONS COVERED

Although the definition of corporation⁹ only covers those incorporated in Canada, it seems obvious that the Project covers the CSR practices or activities of any foreign subsidiary since Canadian extraction companies typically carry on their activities in developing countries through local entities.

However, this lack of precision could prove to be problematic in the case of a complaint against a Canadian corporation pertaining to CSR practices or activities of (i) a joint venture where such corporation merely holds a minority interest and/or is not the operator; or (ii) a recently-acquired subsidiary whose CSR practices do not yet comply with the Bill's guidelines, or whose operational history includes events that may give rise to a complaint under the Bill.

Moreover, while the group of targeted corporations seems limited to those "receiving support from the Government of Canada" (section 3 of the Bill), the Bill casts the net wide as Export and Development Canada ("**EDC**"), a federal government institution, is often involved in the financing of extraction projects in developing countries, particularly by means of political risk insurance.

GUIDELINES

The Bill provides that within twelve months from its coming into force as a law, the Ministers of Foreign Affairs and International Trade (the "**Ministers**") must establish guidelines with respect to CSR practices that the targeted companies must comply with. For the time being, the Bill merely states that such guidelines must include certain standards and principles put forward by international conventions and a corporation affiliated with the World Bank Group.¹⁰

⁴ See: " Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" (<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx>).

⁵ *Canadian Institute of Mining & Metallurgy*. See: www.cim.org/csr/.

⁶ See: http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx.

⁷ See: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4>.

⁸ As reported in the April 26-May 2, 2010 edition of *The Northern Miner* (Vol. 96, No. 10) by Anthony Vaccaro.

⁹ Subsection 2(1) *in fine* of the Bill: "company or legal person incorporated by or under an Act of Parliament or of any province".

¹⁰ These standards and principles are set out in subsection 5(2) of the Bill as follows: a) the IFC's (World Bank) Policy on Social & Environmental Sustainability, Performance Standards on Social & Environmental Sustainability, Guidance Notes to those standards, and Environmental, Health and Safety General Guidelines; b) the Voluntary Principles on Security and Human Rights; c) human rights provisions that ensure corporations operate in a manner that is consistent with international human rights standards; and d) any other standard consistent with international human rights standards.

COMPLAINTS MECHANISM

The Bill confers upon the Ministers the authority to receive and examine any complaint concerning any alleged contravention by an extraction corporation of the said guidelines (to be established), to publish the results of their examination and, in the event of such a contravention, to impose sanctions on the said corporation by withdrawing government financial and political support.

The Ministers may decline to examine a complaint if they determine that it is "frivolous or vexatious or is made in bad faith" (subsection 4(3) of the Bill) and, if applicable, must publish the reasons therefor. A complaint may be submitted by "any Canadian citizen or permanent resident or any resident or citizen of a developing country in which [extraction activities] have occurred or are occurring" (subsection 4(1) of the Bill). The Ministers may also examine, on their own initiative, any possible contravention of a guideline by an extraction corporation.

SANCTIONS

The withdrawal of government support entails the non-availability or withdrawal of any support program developed by the Ministers, but more concretely consists of directing EDC to refrain from participating in the financing of, or, as the case may be, to withdraw from an extractive project, and also directing the Canada Pension Plan Investment Board to refrain from investing in the securities of an extraction corporation thus sanctioned or, as the case may be, to dispose of the securities thereof already held by it.

EDC's unavailability of financing or withdrawal from a project, is not insignificant because that institution is involved in numerous financings of extraction projects led by Canadian corporations in developing countries. The extractive industry, moreover, is the largest recipient of support from that institution. A possible EDC unavailability or withdrawal from any extraction project may be a material risk for the financial institutions involved in project financing.

In addition, once a contravention of the guidelines is established by the Ministers, the sanctions provided for in the Bill seem to follow automatically, without any possibility for the sanctioned corporation to refute the Ministers' conclusions or to remedy the situation so as to avoid, or at least suspend, the application of a sanction.

REACTIONS

Not surprisingly, the Committee hearings provided an excellent overview of the industry/NGOs antagonism when, without bothering much with nuances, some NGOs specifically denounced certain mining projects by name as having caused negative environmental and social impacts, which sparked heated protest from one of the targeted operators who, moreover, has dedicated a whole section of its Internet site to refuting each allegation.¹¹

Part of the political class does not wish to be outdone in criticizing the extractive industry; thus, a member of the Opposition emphasized in the House the "very numerous cases of abuse by Canadian corporations" and the "disastrous consequences on the populations"¹². Because this type of statement may cause it significant harm, the extractive industry fears that the Bill will entail the creation of a forum facilitating accusations against corporations without offering them effective means of response.

UNCERTAINTIES AND CONCERNS

A review of the Bill enables one to see that such fear is not unfounded. The Bill is silent in terms of procedure and process surrounding the examination of complaints, the formulation of conclusions by the Ministers and, as the case may be, the determination of any sanctions.

While the Ministers may refuse to examine any complaint considered "frivolous or vexatious or is made in bad faith" (subsection 4(3) of the Bill), if such complaint does not come within this narrow category, they are required to examine same. Therefore, the Ministers must examine the issue raised by the complaint and publish the reasons supporting their refusal, hence the certainty that the issue will be made public in any event, with possible adverse consequences for the targeted corporation.

The Bill does not provide for any consequence for an author of a complaint that would be set aside as being "frivolous or vexatious or is made in bad faith". A corporation victim of such complaint is at a disadvantage relative to any complainant as subsequent steps to set the record straight and obtain hypothetical compensation will prove to be arduous as compared with how easily any complainant may launch the examination process under Bill's section 4.

¹¹ See on this subject: <http://www.barrick.com/CorporateResponsibility/KeyTopics/Bill-C-300-Submission-to-the-Standing-Committee/default.aspx>.

¹² See on this subject: <http://www.richardnadeau.org/rnadeau.asp?no=14605>.

Also, despite the indication that CSR standards and principles developed by international organizations will be incorporated in the Bill, the guidelines will not yet be fixed at the time of the Bill's enactment, if applicable. This situation will entail a period of uncertainty for the industry that may continue for 12 months, during which, for example, the EDC may be tempted to decline any participation in the financing of any extraction project.

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE MINING LAW GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

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CONCLUSIONS

Numerous industry voices underline the contradiction between the collaborative (government – industry – other interested parties) approach fostered by the Strategy and the Bill's underlying inquisitorial mode. While the Strategy acknowledges the industry's "leadership" in CSR, the Project's premise seems to be ensuing from a vote of non-confidence of the Legislator in the industry's capacity to assume its CSR responsibilities.

In the event the Bill is enacted as a law, it will be interesting to observe how the government will proceed to get the industry's full adherence to the Strategy on the one hand, while keeping a watch on the same industry on the other hand. For the time being, it is hard to see how the Project can be harmonized with the Strategy.

If the Bill is finally enacted as presently drafted, subsection 5(3) provides that the Ministers "shall offer to consult with government departments or agencies, representatives of the mining, oil and gas industries, non-governmental organizations, and other interested persons in or outside Canada as they may see fit" when establishing the guidelines. That will be another opportunity for the industry to make its views known in the hope that the Legislator will then listen carefully to its legitimate concerns.

It is desirable that, in parallel with the adoption of clear and precise guidelines, the Ministers also establish equally clear and precise rules and procedures in order to control the complaint, examination, publication and sanction process. It remains especially important to avoid that this new law merely becomes a means of facilitating a barrage of wide-ranging denunciations and accusations.

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