

Spinning its Wheels: The Canadian Mining Industry's Human Rights Failures in Guatemala

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Abstract:

Although corporate social responsibility (CSR) is not a novel concept to the Canadian extractive sector, the mining industry has failed to uphold its commitments to international human rights laws abroad, particularly in Guatemala. As a result, stakeholders and institutional investors have lost trust in the Canadian mining sector. In order to reverse this trend, mining executives must undergo a fundamental shift in their approaches to CSR. This paper argues that Canadian mining companies must stop painting themselves out to be the drivers of positive social change in the international communities within which they operate and often hurt, and instead prioritize behavioural change across the industry in order to secure genuine trust and cooperation from those same communities.

Keywords:

Canadian mining abroad, human rights, Guatemala, corporate social responsibility, international law.

Appliquer notre droit à des situations à l'extérieur de notre territoire est contraire à nos conceptions; mais il y a des actes tellement répugnants qu'ils doivent nous forcer à revoir nos conceptions du droit. ¹

—*The Honourable former Justice Ian Binnie*

Introduction

In 2018, Canada had a total of 650 mining assets abroad valued at over \$174 billion,² thereby establishing its extractive industry as a rare sector of the Canadian economy that can be considered a global leader. *The Mining Association of Canada's* (MAC) website reads like a self-help book in which Canadian mining companies are the protagonists, guiding their readers through a corporate journey underpinned by absolute altruism and sustainable practices.³ However, even a surface-level look into reality reveals that, in fact, MAC members are some of the most deprived of the guidance they espouse – and investors have caught on. Condemned as a “necessary evil” by many, the Canadian extractive sector faces the challenge of overcoming poor public perception due to the inherently invasive nature of its activities abroad, both for the

¹ Yves Boisvert, “L'impunité de nos sociétés minières” (5 November 2012), online: *La Presse* < <https://www.lapresse.ca/debats/chroniques/yves-boisvert/201211/04/01-4590272-limpunite-de-nos-societes-minieres.php> >.

² Government of Canada, “Canadian Mining Assets (CMA) by Country and Region, 2017 and 2018”, (18 August 2020), online: *Natural Resources Canada* <<https://www.nrcan.gc.ca/science-data/science-research/earth-sciences/earth-sciences-resources/earth-sciences-federal-programs/canadian-mining-assets-cma-country-and-region-2017-and-2018/15406>>

³ Mining Association of Canada, *Towards Sustainable Mining* (2020), online: *The Mining Association of Canada* < <https://mining.ca/towards-sustainable-mining/> >.

environment and for the communities directly affected by it.⁴ As a result, investors are increasingly demanding that the industry establish genuinely effective methods to diminish the negative impacts of its activities, rather than continue to flourish economically at the expense of society while hiding behind a thinning veil of corporate social responsibility (CSR). Although undoubtedly motivated by moral objectives, this push for sustainability is not purely selfless. Mining companies that fail to achieve value beyond compliance at the intersection of economic performance and social progress face grave financial and reputational consequences,⁵ otherwise known as an investor's worst nightmare.

The failure of Canadian mining companies' attempts to uphold their commitments to CSR can be seen clearly in Canada's extractive relationship with Guatemala. Despite decades of ongoing violence and human rights abuse allegations on behalf of local communities, Canada's mining presence in the country is ever-present. Canadian mining companies operating in Guatemala are bound by Guatemalan law, not Canadian law. While there have been attempts to pass legislature that would legally bind Canadian corporations operating abroad to accepted principles of Canadian law, they have ultimately been futile. Recent progress has been made under our common law, however, much remains to be determined.

⁴ Shin Imai, Bernadette Maheandiran & Valerie Crystal, "Accountability Across Borders: Mining in Guatemala and the Canadian Justice System" (2012) Comparative Research in Law & Political Economy, online: Osgoode Digital Commons <<https://digitalcommons.osgoode.yorku.ca/clpe/28>> [Imai].

⁵ Leeora Black & Andrew Lane, "Trend 1: The social investor" (2020), online: *Deloitte* <<https://www2.deloitte.com/us/en/insights/industry/mining-and-metals/tracking-the-trends/2020/social-investors-in-mining.html>>; See also: Paula Laier, "Vale stock plunges after Brazil disaster; \$19 billion in market value lost" (28 January 2019), online: *Reuters* <https://www.reuters.com/article/us-vale-sa-disaster-stocks-idUSKCN1PM1JP> [Deloitte].

In undergoing the research process required for this paper, it unfortunately became evident there are countless avenues I could have pursued to illustrate the detrimental consequences of the Canadian mining industry's past and current practices on an international scale. However, against the backdrop of Canada's extractive projects in Guatemala, I will argue that there is a gap in the Canadian mining regulatory regime which fails to adequately address our nation's human rights abuses overseas – a flaw which may present dire consequences in the form of diminished investor interest if not supplanted by meaningful collaboration with local communities, bolstered by a legal regime that not only encourages compliance, but requires it. The future of the Canadian mining industry necessarily lies in the hands of socially conscious millennial investors, and without real change, (more) trouble lies ahead.

Canada-Guatemala Mining Relationship

Brief History

Following its entry into the capitalist world economy in 1523, Guatemala's indigenous communities have faced centuries of oppression and marginalization which has made them vulnerable to the self-serving activities of the mining industry, including those of Canadian companies.⁶ In the mid-20th century, Canada sought to expand the reach of its historically exploitative mining practices into Guatemala.⁷ The Canadian International Nickel Company (INCO) created a Guatemalan subsidiary following negotiations with the government of

⁶ Leah Shipton, "Canada's Mining Industry in Guatemala and the Right to Health of Indigenous Peoples" (2017) HHR at 1, online: *Health and Human Rights Journal* < <https://www.hhrjournal.org/2017/08/canadas-mining-industry-in-guatemala-and-the-right-to-health-of-indigenous-peoples/> > [Shipton].

⁷ *Ibid* at 2.

Guatemala with respect to the creation and control of the El Estor nickel mine. In order to fulfill the demands of INCO's contract, the Guatemalan military forcibly evicted its indigenous population from the region, killing between 3,000 to 6,000 individuals in the process.⁸ When INCO's operations were at its peak, company individuals and the Guatemalan military found themselves in the midst of numerous human rights violations that eventually led to the company's temporary suspension.⁹ In 1997, with the drafting assistance of INCO executives, Guatemala passed its Mining Law, which freed the way for mining companies to enter the country, and contained very few protections for its indigenous communities.¹⁰

Since then, Canada's mining presence in Guatemala has been fraught with violence and human rights abuses, but despite this, the Canadian mining industry continues to promote investment in Guatemala. Canadian companies account for 50-70% of mining assets in the country,¹¹ and despite Canada's staunch support of a number of international instruments aimed at protecting Indigenous rights, the Unit for the Protection of Human Rights Defenders in Guatemala has reported widespread aggressions against human rights defenders, a majority of which are Indigenous targets.¹²

⁸ *Ibid.*

⁹ Caren Weisbart, "Diplomacy at a Canadian Mine Site in Guatemala" (2018) 26 Crit Crim at 477, online: *Critical Criminology*, DOI: <10.1007/s10612-018-9422-y> [Weisbart].

¹⁰ Shipton, *supra* note 6 at 2.

¹¹ *Ibid.*

¹² Alleen Brown, "She defended her land against a mine in Guatemala, then she fled in fear for her life," (23 June 2019) *The Intercept*, online: <<https://theintercept.com/2019/06/23/guatemala-land-defender-san-rafael-mine/>> [Brown].

Today, A Case Study: Tahoe Resources Inc.

Before Tahoe Resources was acquired by Pan American Silver Corp. in a US\$1 billion transaction, the Canadian company was the owner and operator of the Escobal Mine in eastern Guatemala through its wholly owned subsidiaries.¹³ Escobal's operations have been suspended since 2017, as the Guatemalan government has been urged by the country's Constitutional Court to carry out a consultation with the local indigenous population, following a 2014 British Columbia lawsuit launched by Guatemalan community members against Tahoe Resources.

Tahoe's operations at Escobal began in September 2013, but violence and repression marked the development of the silver, gold, lead, and zinc mine since 2011. Rainfall in the mountains of San Rafael las Flores where Escobal is located feeds a number of water basins which fuel the production of sustenance for the Xinka Indigenous peoples living there.¹⁴ Tahoe denied the Xinkas' presence in the region,¹⁵ which only intensified their opposition to Escobal. In response, Tahoe hired international firms to secure its operations and lobbied the Guatemalan government to suppress the anti-mining sentiment.¹⁶ Trouble ensued. By 2012, local conflicts related to the Escobal mine intensified, as communities organized protests which in some cases escalated to vandalism, kidnappings, armed confrontations and murders. In April 2013, Tahoe's

¹³ Tahoe Resources is a spinoff company of Vancouver-based Goldcorp, whose Guatemalan Marlin mine has been the subject of numerous human rights abuses and international condemnation since its conception; Jackie McVicar, Ellen Moore & Jen Moore, "Lawsuit Against Tahoe Resources a Wake Up Call for Investors and Canadians" (18 June 2014), online: *Mining Watch Canada* <<https://miningwatch.ca/news/2014/6/18/lawsuit-against-tahoe-resources-wake-call-investors-and-canadians>>.

¹⁴ Brown, *supra* note 12.

¹⁵ Tahoe Resources, *Annual Information Form* (2012), online: <<https://www.sec.gov/Archives/edgar/data/1510400/000106299313001103/form40f.htm>>

¹⁶ Brown, *supra* note 12.

security guards, at the direction of security manager Alberto Rotondo, opened fire at a group of protesters gathered around Escobal's entrance.¹⁷ The conflict resulted in injuries for six mine opponents and the death of an officer. San Rafael was placed under a state of siege, thousands of military personnel were deployed to the region, and arrest warrants were issued for mine opponents being branded as organized crime leaders.¹⁸

*Garcia v Tahoe Resources Inc.*¹⁹

In 2014, seven Guatemalan individuals who were injured in the shooting of April 2013 launched a civil claim in the Supreme Court of British Columbia against Tahoe for its role in the violence. The plaintiffs brought the action in a B.C. court as they had "no faith in the Guatemalan legal system to hold the company accountable."²⁰ They alleged that the shooting was planned, ordered, and directed by Rotondo and that Tahoe "expressly or implicitly authorized the use of excessive force by Mr. Rotondo [...] or was negligent in failing to prevent the use of excessive force against the plaintiffs."²¹ Attempting to have the decision stayed, Tahoe argued on the basis of *forum non conveniens* that a Guatemalan court would be a more appropriate forum to hear the case.²² In November 2015, B.C. Supreme Court Justice Laura Gerow agreed with Tahoe and stayed the lawsuit, urging the plaintiffs to instead file in Guatemala. The Guatemalan plaintiffs, backed by Amnesty International Canada as an intervenor in the proceedings, appealed the

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Garcia v Tahoe Resources Inc.*, 2015 BCSC 20145 [*Garcia*].

²⁰ *Ibid* at para 4.

²¹ *Ibid* at para 7.

²² *Ibid* at para 3.

decision, and in what was hailed as a victory for human rights, the B.C. Court of Appeal overturned the lower court decision, thereby allowing the action against Tahoe to proceed in British Columbia based on the belief that there was little hope for a fair process in Guatemala.

The B.C. Court of Appeal found that Justice Gerow had erred in asking the question of whether Guatemalan courts were “capable” of providing justice²³, wherein the correct test is rather whether there is “a real risk of an unfair trial process in the foreign court”.²⁴ On the issue of the *forum non conveniens* analysis, the Court relied on *Van Breda*²⁵ to conclude that the burden of proof lay with Tahoe, as the party seeking the stay, and on *Black v Breeden*, where LeBel J. held that the analysis requires that one forum ultimately emerge as clearly more appropriate.²⁶ In this case, the Court held that the relevant factors pointed to a finding that Guatemala would not be the more appropriate forum for the appellants to proceed.²⁷ This was partly based on the Court’s belief that the lower court treated the events of the proceeding as a simple personal injury case, without placing enough emphasis on the social context and politicized nature of the events in question.

The significance of this decision is not to be overlooked. Cases such as this one have generally been prevented from proceeding due to the concept of the “corporate veil” which

²³ *Garcia v Tahoe Resources Inc*, 2017 BCCA 39 at para 114.

²⁴ *Ibid* at para 115.

²⁵ *Van Breda v Village Resorts Ltd*, 2012 SCC 17 at para 109.

²⁶ *Black v Breeden*, 2012 SCC 19 at para 37.

²⁷ The Court based this finding by concluding that: 1. Guatemalan courts have limited discovery procedures available to the plaintiffs; 2. It was unclear whether the plaintiffs would even be able to pursue their claims in Guatemala due to the expiry of the limitation period, and; 3. There was a risk that the plaintiffs would be barred from obtaining justice in Guatemala given the evidence of high corruption in the Guatemalan judiciary and the politicized nature of this case; *Garcia*, *supra* note 23 at paras 114-139.

limits the liability of a parent company for the actions of its subsidiaries abroad.²⁸ The plaintiffs in Tahoe attempted to circumvent the corporate veil issue by focusing on Tahoe's public statements with respect to CSR. Instead of persuading the Court to lift the corporate veil in order to hold Tahoe liable for the actions of its subsidiaries in Guatemala, the plaintiffs argued that Tahoe was directly liable on traditional tort grounds, pointing to public statements by Tahoe with regards to the adoption and maintenance of CSR standards as evidence that Tahoe retained absolute control over its subsidiaries' foreign operations.²⁹

According to the Canadian Centre for International Justice (which was part of the plaintiffs' legal team), the implications of *Garcia* were significant, as it represented "the first time that a Canadian appellate court permitted a lawsuit to advance against a Canadian company for alleged human rights violations committed abroad."³⁰

In February 2019, Tahoe was acquired by mining heavyweight Pan American Silver. In September of the same year, following a ruling by Guatemala's Constitutional Court, Tahoe's license to explore was suspended due to a lack of community consultations, in contravention of International Labour Organization Convention 169. Tahoe had invested more than \$500 million in the Escobal mine, and the company's shares plummeted dramatically. The Xinka Parliament released a statement in which they claimed that the Escobal project "represents a threat to the life of Xinka communities in the region" who in the nine years of resistance to the project were

²⁸ Ramsey Glass, Fred Pletcher & Rick Williams, "British Columbia Court of Appeal Rules on Corporate Veil Case: *Garcia v. Tahoe Resources INC*" (23 February 2017), online: *BLG* <<https://www.blg.com/en/insights/2017/02/british-columbia-court-of-appeal-rules-on-corporate-veil-case-garcia-v-tahoe-resources-inc>>.

²⁹ *Ibid*; see also, *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

³⁰ Erin Brandt, "Focus on Fairness: *Garcia v. Tahoe Resources*" (24 October 2018), online: *CanLII Connects* <<https://canliiconnects.org/en/commentaries/64104>>.

“victims of kidnapping, assassinations, criminalization, destruction of [their] ways of life, as well as the destruction of archaeological sites and sacred places.” The recommencement of activities “would mean deciding between the project and [their] survival.”³¹ Operations at Escobal continue to be suspended.

Pan American Silver settled the legal charges against Tahoe publicly. The terms of the settlement included acknowledgment of the wrongdoing, apologies to the victims, reiteration of the rights of the rights of the victims to protest against the mine in the future, and condemnation of the use of violence.³² In her review of the matter and potentially contrary to popular belief, Elizabeth Steyn argued that this should be seen as a win for the mining industry, as Pan American redressed its wrongs in a transparent way that could encourage support for the company, and the industry as a whole, in the future.

Canada’s Legislative History: Domestic Attempts to Hold Corporations Accountable for their Actions Abroad

Neoliberal development models such as those adopted by Canada are often associated with widespread human rights abuses and the tensions between neoliberal mining projects and local Indigenous populations are exacerbated in countries with long histories of violence and

³¹ Kirsten Francescone et al, “Indigenous people call on Pan American Silver to cease local interference out of respect for consultation process in Guatemala” (8 May 2019), online: <<https://tahoeontrial.files.wordpress.com/2019/07/press-release-pas-agm-8may19-english.pdf>>.

³² Elizabeth Steyn, “Slavery charges against Canadian mining company settled on the sly” (26 October 2020), online: *The Conversation* <<https://theconversation.com/slavery-charges-against-canadian-mining-company-settled-on-the-sly-148605>>.

corruption.³³ In the 1980s, at the height of neoliberalism, the Canadian government expanded the role of its Trade Commissioner Services, which ultimately paved the way for Stephen Harper's 2007 strategy of engagement in the Americas.³⁴ The strategy marked a shift in foreign policy with Latin America, and was followed by a significant increase in foreign direct investment in mining companies.³⁵

In 2009, Liberal Member of Parliament John McKay introduced Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*.³⁶ The stated purpose of the bill was to promote sound environmental practices and ensure the maintenance of international human rights standards with respect to the activities of Canada's extractive industry abroad. It would implement a mechanism through which complaints against the Canadian extractive industry could be made and would withhold public funding from those companies that failed to comply. The bill was strongly supported by several non-governmental organizations (NGO) such as Amnesty International, Mining Watch Canada, Ecojustice Canada, and World Vision, but critiqued heavily by industry executives on the basis that it would undermine Canada's global competitiveness in the mining industry.³⁷ In 2010, the

³³ Catherine Nolin & Jacqui Stephens, "We Have to Protect the Investors: 'Development' & Canadian Mining Companies in Guatemala" (2010) 5:3 JRCD at 37, 39, online: *Brandon U* <<https://journals.brandonu.ca/jrcd/article/view/279/71>> [Nolin].

³⁴ Weisbart, *supra* note 9 at 476.

³⁵ *Ibid.*

³⁶ Bill C-300, *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act*, 3rd Sess, 40th Parl, 2011 [Bill C-300].

³⁷ Imai, *supra* note 4.

proposed bill was rejected by Parliament.³⁸ The gap in legislation to hold Canadian corporations accountable for their actions overseas pervades at the expense of community suffering abroad.

Despite decades of violence and human rights abuses, the Canadian government under Justin Trudeau continues to uphold its commitment to prioritizing the activities of Canadian mining companies in Latin America.³⁹ In 2018, Trudeau's government announced the creation of a Canadian Ombudsperson for Responsible Enterprises (CORE), who "receives and reviews claims of alleged human rights abuses arising from the operations of Canadian companies abroad in the mining [sector]".⁴⁰ CORE, however, lacks the power to investigate abuses, and as such has come under much criticism. "An independent ombudsperson should operate at arms-length from government and have the power to order those under investigation to produce documents and testimony under oath. The position created [...] does neither," Development and Peace advocacy officer Elana Wright stated in a release.⁴¹ The CORE is the successor of Canada's Corporate Social Responsibility Counsellor, whose position proved to be fruitless as it was shown the office lacked the power to compel documents and testimony in an independent investigation.⁴² It should be evident to the Canadian government, therefore, that an office without the ability to initiate

³⁸ Bill C-300, *supra* note 36.

³⁹ Weisbart, *supra* note 9 at 476.

⁴⁰ Government of Canada, *Canadian Ombudsperson for Responsible Enterprise*, online: <https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng>.

⁴¹ Michael Swan, "Critics pan limited powers of Canada's new ombudsperson for corporate responsibility" (10 April 2019), online: *Grandin Media* <<https://grandinmedia.ca/critics-pan-limited-powers-canadas-new-ombudsperson-corporate-responsibility/>>.

⁴² Abeni Steegstra, "Will the Canadian Ombudsperson for Responsible Enterprise (CORE) have the powers to do her job?" (4 March 2020), online (blog): *International Justice and Human Rights Clinic at the Allard School of Law* <<https://blogs.ubc.ca/ijhr/2020/03/04/will-the-canadian-ombudsperson-for-responsible-enterprise-core-have-the-powers-to-do-her-job/>>.

meaningful investigations is ineffective.⁴³ This reality forces us to ask why the Canadian government continues to hide behind a shield of ineffective offices and baseless promises on the ground, while it publicly asserts its support for the fundamental rights of people abroad.

In an analysis aimed at determining the factors that lead to the establishment of a Social License to Operate (SLO)⁴⁴ in the mining industry, Jason Prno compared the operations of 4 mines around the world.⁴⁵ One of these was the Minto Mine in Canada's Yukon territory. His findings showed that an SLO is built first and foremost on relationships, whereby companies "need to be part of the fabric of the community and viewed as a trustworthy, respectful, community-minded entity where transparency, communication and making good on promises are essential".⁴⁶ Prno used the Minto Mine as a positive example of how leadership and commitment by mining executives leads to beneficial community consultation. Some individuals interviewed from the Minto mine spoke of the two groups – mining executives and local stakeholders – "meeting endlessly" and there hardly being a week that went by without correspondence.⁴⁷ Prno also noted that even at Minto, where local support was largely secured, tensions in the relationship emerged when local communities felt their sustainable development goals were not being

⁴³ Public records show that the CSR Counsellor received about a dozen requests for review in its operation from 2010 to 2018. Of these, only six were reviewed by the CSR Counsellor and none reached the formal mediation stage; *Ibid*.

⁴⁴ "There is general agreement in the literature that SLO broadly speaks to the nature of the relationship a company has with its stakeholders. Beyond that, however, definitions differ considerably in scope, ranging from narrow to broad SLO conceptions." Brueckner and Eabrasu argue that one of the main normative difficulties facing mining companies is the lack of a proper definition of a SLO. As such, the utility of a SLO is diminished.; Martin Brueckner and Marian Eabrasu, "Pinning down the social license to operate: The problem of normative complexity" (2018) 59 Resources Policy, DOI: < 10.1016/j.resourpol.2018.07.004>.

⁴⁵ Jason Prno, "An analysis of factors leading to the establishment of a social licence to operate in the mining industry" (2013) 38:4 Resources Policy, online: *Science Direct*, DOI: <10.1016/j.resourpol.2013.09.010> [Prno].

⁴⁶ *Ibid* at 585.

⁴⁷ *Ibid*.

sufficiently supported by the mine's activities.⁴⁸ This juxtaposition in the Canadian mining industry's actions at home and abroad is significant. When acting in Canada, where the legal regime arguably allows far more opportunity for local Indigenous communities to have their complaints heard in a court of law, Canadian companies exhibit much greater caution and respect in engaging with stakeholders. When operating in countries like Guatemala, against the backdrop of local poverty, despair and systemic corruption, where individuals unfortunately are not afforded the same rights that we as Canadians take for granted, the Canadian mining industry prioritizes wealth-generation, no matter the consequences. The Minto mine serves as a great example that industry executives know exactly what they *should* be doing, but they turn a blind eye when they are not legally required to act responsibly.

International Law & Canadian Initiatives

The United Nations (UN) and the international community at large have long acknowledged the need to address human rights abuses at the hands of the extractive sector. In the late 1990s, the mining industry faced increasing distrust from the public and plummeting commodity prices and was under the threat of losing its SLO. In response, a group of nine of the world's largest mining companies initiated the Global Mining Initiative (GMI), which sought internal reform and commenced an intensive study of the societal issues facing the sector.⁴⁹ The World Business Council for Sustainable Development commissioned the International Institute of Environment and Development to undertake a consultation process which became known as

⁴⁸ *Ibid* at 586.

⁴⁹ International Council on Mining & Metals, "Our History" online: ICMM < <https://www.icmm.com/en-gb/about-us/annual-reviews/our-history>>.

the Mining, Minerals and Sustainable Development (MMSD) initiative. The final report by the MMSD made recommendations to the industry aimed at aligning its actions with greater societal values. This eventually gave rise to the creation of the International Council on Mining & Metals (ICMM) in 2001 – with Canada as a member – which would use the findings of the MMSD initiative to develop 10 defining principles for guiding change in the industry.⁵⁰ MAC itself has published much guidance on encouraging its members to take action to support human rights and community development in host countries.⁵¹ MAC prides itself on the creation of *Towards Sustainable Mining* – the world’s “first externally-verified performance system for corporate responsibility and the only one implemented at the mine site,” participation in which is mandatory for all MAC members.⁵² It would be a difficult feat to attempt to list all the Canadian and international initiatives and reports that have been created with the goal of guiding the mining industry towards more sustainable practices, so I will stop there.

Canada is also signatory to a number of international instruments and agreements that seek to uphold community rights, such as the UN Declaration on Rights of Indigenous Peoples.⁵³ The International Labour Organization’s Indigenous and Tribal Peoples’ Convention (ILO 169) requires that Indigenous communities be consulted prior to the commencement of development activities on their territories. It proposes that governments must consult with and consider the

⁵⁰ *Ibid.*

⁵¹ Mining Association of Canada, *Community* (2020), online: *The Mining Association of Canada* <<https://mining.ca/our-focus/corporate-responsibility/community/>>.

⁵² Mining Association of Canada, *Corporate Responsibility* (2020), online: *The Mining Association of Canada* <<https://mining.ca/our-focus/corporate-responsibility/>>.

⁵³ *Declaration on the Rights of Indigenous Peoples*, United Nations, 2 October 2007, A/RES/61/295.

needs of communities affected by their activities, as well as promote the participation of these stakeholders in decision-making processes.⁵⁴ The Canadian government and its embassies purport to encourage all Canadian companies to comply with ILO 169. Interestingly enough, Canada has yet to ratify it. There is no mechanism in place to enforce compliance.⁵⁵ In the face of indisputable proliferation of human rights abuses for the profit of the extractive sector, the abundance of research, conventions, initiatives, reports, programs, commissions, and organizations aimed at sustainable and ethical practices simply serves as proof of its own redundancy.

Glimmer of Hope: *Nevsun Resources Ltd. v Araya*⁵⁶

Luckily, the Canadian courts seem to be picking up some of the slack on behalf of the government and the mining industry. In a 2020 landmark ruling, *Nevsun Resources Ltd v Araya*, a majority of the Supreme Court of Canada (SCC) recognized that a Canadian company can be held liable in a Canadian court for a breach of customary international law that occurred in another country. The defendant, Nevsun Resources Ltd. (Nevsun) brought a motion to the British Columbia Supreme Court to strike the claims of a group of Eritrean workers alleging violations of customary international law by way of conscription into Eritrea's mandatory national military service and compulsion to work on the construction of Nevsun's Bisha mine. The plaintiffs alleged they were subject to forced labour, slavery, cruel treatment, and crimes against humanity.⁵⁷

⁵⁴ *Indigenous and Tribal Peoples Convention*, 1989, ILO-169.

⁵⁵ Nolin, *supra* note 33 at 56.

⁵⁶ *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*].

⁵⁷ *Ibid* at para 4.

Nevsun argued the plaintiffs' claims should be shut down for two reasons. First, Nevsun suggested that BC courts were precluded from judging the legality of the actions of a foreign state under the "act of state" doctrine.⁵⁸ Second, certain novel tort claims regarding international human rights abuses had not been recognized in Canada and had no reasonable prospect of success.⁵⁹ Both the B.C. Supreme Court and B.C. Court of Appeal held that the plaintiffs could proceed with their lawsuit against Nevsun. Writing for the majority of the SCC, Justice Abella upheld these rulings.

The SCC based its ruling upon the application of the test of whether it was "plain and obvious" the plaintiffs' claims would fail. This is significant because on a motion to strike, the court must operate under the assumption that all the facts presented are true. As such, the ruling does not establish that the tort claims actually exist in Canada, or that the plaintiffs would succeed in proving their claims. These issues would have to be determined at the trial level. Unfortunately, the case was settled without going to trial. Even more unfortunately, the terms of the settlement were kept private. As such, many questions are left unanswered. It remains to be seen how Canadian courts will apply choice of law rules in international customary law claims.

Nonetheless, *Nevsun* represents an important milestone. It suggests a recognition by Canadian courts that there is a necessity for hearing transnational cases such as this. The decision may pave the way for Canadian mining companies to be held accountable for their actions abroad in a way that is consistent with Canadian laws.

⁵⁸ *Ibid* at para 5.

⁵⁹ *Ibid*.

Conclusion

The Canadian extractive sector has, on its face, embraced and promoted corporate social responsibility for years. At the risk of sounding overly cynical, I will assume this position is motivated by good intentions. However, despite their benevolence, Canadian mining companies have failed to uphold their commitments to international human rights laws abroad. This failure has resulted in a growing distrust of the industry by stakeholders and investors alike. In order to meet the increasingly burdensome demands of institutional investors, Canadian mining companies will be required to undergo a fundamental shift in their approaches to CSR. In a survey of 347 institutional investors, BNP Paribas Securities Services found that a growing number of investors are placing greater emphasis on the United Nation's Sustainable Development Goals (SDGs) when deciding where to place their funds.⁶⁰ Introduced in 2015, these SDGs are aimed at addressing global challenges such as poverty, inequality, peace and justice. Make no mistake, however, attracting investors in this way is not an easy fix. "This isn't just about compliance," stated Dr. Leeora Black, Global Mining & Metals Value Beyond Compliance Co-Leader of Deloitte Australia. "Many investors are making it clear that they will not advance funds unless companies can demonstrate a meaningful and measurable commitment to principles so much of society holds dear. This causes mining companies to consider not only threats to public trust, but also potential threats to investor trust."⁶¹

⁶⁰ Andrew Holt, "Asset managers align investments with UN Sustainable Development Goals" (23 April 2019), online: *IR Magazine* < <https://www.irmagazine.com/esg/asset-managers-align-investments-un-sustainable-development-goals>>.

⁶¹ Deloitte, *supra* note 5.

With public distrust in the entire industry so prominent, changing public perceptions on a large scale could take years. Creating self-serving associations and websites dedicated to promulgating notions of CSR will simply not be enough. Canadian mining companies will need to go beyond stating their values and principles and actually create real change in the communities they operate in. In doing so, they should refrain from making blanket statements about following “best practices” to ensure the reduction of poverty or the prevention of child labour worldwide. For an industry that is so obviously fraught with allegations of abuses worldwide, these statements illustrate nothing, except guilt. Rather than emphasize its commendable guiding principles on its website, MAC would be well-advised to instead reference the past and current abuses and violations of its members, and publicly commit to redressing these wrongs.

The current approach that Canadian mining companies take to improving their public record is flawed. It not only harms the communities that are affected by their activities, but also the companies themselves. In a critique of this social development-oriented approach, Bruce Harvey argues that mining companies should limit social development outreach and instead focus more on “in-reach” aimed at prioritizing activities that can result in behavioural change across the industry in order to secure trust and cooperation from local communities surrounding the mines.⁶² Harvey argues that there are laudable business-driven reasons why mining companies operating in less than ideal foreign contexts might want to contribute to development for the sake of their own operations and efficiency.⁶³ For example, by contributing to the

⁶² Bruce Harvey, “Social development will not deliver social licence to operate for the extractive sector” (2014) 1:1 *The Extractive Industries and Society* at 7, online: Science Direct <<https://doi.org/10.1016/j.exis.2013.11.001>> [Harvey].

⁶³ *Ibid.*

socioeconomic development of the communities they operate in, mining companies will create self-sustaining conditions that will lower its costs over time.⁶⁴ Without acknowledging these self-serving reasons, a cynical reader will be inclined to distrust the bold commitments to social development.

Harvey goes further to argue that extractive companies cannot get away from their unpopular image if associations like the ICMM continue to portray the extractive industry as first and foremost a development actor.⁶⁵ Rather than employ social science professionals and third party government and development actors to implement programs aimed at outreach, the fundamental thinking and behaviours of executives need to change. Social professionals are unable to create positive change when they are forced to deal with stubborn executives and ultimately become isolated departments of a company that do not engage with day-to-day business operations. In order to improve their SLOs, mining executives must abandon the belief that outreach programs are a sufficient substitute for the difficult work of engaging with local communities and truly listening to their concerns.⁶⁶ Programs necessarily involve delegating responsibility to other individuals and over time become disconnected from the main business activities of the operation.

Appropriate in-reach involves the interaction of people who live in the affected communities and mining executives and managers. Different contexts provide different challenges for operations, so solutions need to be well-tailored and pragmatic.⁶⁷ Often, in

⁶⁴ *Ibid* at 8.

⁶⁵ *Ibid* at 8.

⁶⁶ *Ibid* at 9.

⁶⁷ Prno, *supra* note 45 at 584.

maintaining control over the arena in which discussions occur, the power imbalance between Canadian mining companies and the local populations is exacerbated and leads to resentment and diminished desire for cooperation on behalf of Indigenous peoples.⁶⁸

In a study of the diplomatic relations between Tahoe executives and the Guatemalan government, Caren Weisbart uncovered troubling findings of “unofficial policy”.⁶⁹ Weisbart pointed to Tahoe’s regular contact with and access to the Canadian embassy in Guatemala through emails, meetings, lunches, and networking events held through the Canadian Chamber of Commerce in Guatemala to illustrate the existence of what she called a “state-corporate symbiosis”.⁷⁰ In an opinion piece for a Guatemalan national newspaper, *Prensa Libre*, the former Canadian ambassador to Guatemala, James Lambert, stated that Canada, as a major international mining actor, is also recognized as one of the most environmentally and socially responsible countries in the world.⁷¹ Another former Canadian ambassador to Guatemala, Kenneth Cook, was charged with slander in a Canadian court for making false claims that a doctor student used unoriginal footage for his documentary exposing human rights abuses at a Canadian mining project in Guatemala.⁷² It is exactly these kinds of misleading and calculating statements that fail to recognize the atrocities committed by the Canadian mining industry that reveal a clear disconnect between Canada’s commitment to security and justice in countries like Guatemala and their continued support of corrupt governments and practices. The UN-backed International

⁶⁸ Nolin, *supra* note 33 at 52.

⁶⁹ Weisbart, *supra* note 11 at 475.

⁷⁰ *Ibid.*

⁷¹ Nolin, *supra* note 33 at 49.

⁷² Weisbart, *supra* note 9 at 477.

Commission against Impunity in Guatemala (CICIG), which uncovered several webs of deep-seated corruption in the Guatemalan government and military was unilaterally terminated in 2019 by then Guatemalan president Jimmy Morales. The findings of the CICIG led to the arrest of former President and Vice president, Otto Perez Molina and Roxanna Baldetti, and the former Minister of the Interior, Mauricio Lopez Bonilla.⁷³ Both Perez and Bonilla were supportive of Tahoe's Escobal project, after being heavily lobbied by the Canadian embassy in Guatemala.

Much of the world looks to Canada to uphold the principles of democracy and equality, which it accomplishes in many ways. However, the failures of the Canadian mining industry must not be overlooked. It is time for Canadian mining industry executives to get to work and practice what they preach. To help regain investor trust, mining companies need to embrace their commitment to value beyond compliance.⁷⁴ This requires a change in employee attitudes and practices as well as a deeper understanding of what value means to the various stakeholders involved in operations. Only by delivering value to these stakeholders in the ways that they want the value delivered, will value in turn be received by shareholders.⁷⁵ When news cease to break with regards to human rights abuses perpetrated by Canadian actors abroad, maybe then investor interest will return to the industry. Silence might very well be the best indicator of progress.

⁷³ *Ibid* at 486.

⁷⁴ Deloitte, *supra* note 5.

⁷⁵ *Ibid*.

