




# The New Ombudsman: Canada's Evolving Approach to Oversight of its Overseas Miners



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# ▼ Overview

1. CSR Ombudsman: Risk and Challenge
2. CSR and the Canadian government: A look back
3. What is Ombudsman supposed to fix?
  - Key criticisms of CSR Counsellor
4. Challenges to Credibility of Ombudsman
  - Process and Integrity
5. Looking ahead - What to expect?

# ▼ CSR Ombudsman: Challenge & Opportunity

*Trust*

# ▼ CSR Ombudsman: Challenge & Opportunity

➤ **Trust** will depend on:

➤ **CREDIBILITY** of process

➤ Neutrality, supported by appropriate powers, duties, safeguards

➤ **INTEGRITY** of office

➤ Including reputation among stakeholders of individual ombudsman

➤ **EFFECTIVENESS** of Advisory Body

➤ Effective, broad participation; responsiveness



# **CSR, Mining and the Canadian Government**

## ***A Look Back***

# ▼ CSR, Mining and CND Government

## *A Look Back*

### **2005**: *Mining in Developing Countries and Corporate Social Responsibility [SCFAIT]*

- policy and law reform – international human rights and mining companies operating overseas

# ▼ CSR, Mining and CND Government

## *A Look Back*

**2006**: Government calls for series of national roundtables on CSR and the Canadian extractive sector in developing countries.

# ▼ CSR, Mining and CND Government

## *A Look Back*

**2007**: Roundtables Advisory Group publishes Recommendations

- Creation of an independent ombudsman and compliance review committee (Recommendation 2.4.2.1)



# ▼ CSR, Mining and CND Government

## *A Look Back*

**2009**: CSR Strategy Building the Canadian Advantage:  
*‘A Corporate Social Responsibility Strategy for the Canadian  
Extractive Sector Abroad’*

- Creation of the Office of the Extractive Sector CSR Counsellor
  - Consent-based, non-judicial grievance mechanism
  - Resolve international disputes between local communities and Canadian extractives companies.

# ▼ CSR, Mining and CND Government

## *A Look Back*

### 2009: Bill C-300

#### *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act*

- Department of Foreign Affairs and International Trade investigate claims of non-compliance
- Sanctions - Political and economic support contingent - IFC's social and environmental standards; *Voluntary Principles on Security and Human Rights*

# ▼ CSR, Mining and CND Government

## *A Look Back*

2014 - An “enhanced” CSR strategy for the Canadian mining sector

- Economic diplomacy (withdrawal of government of Canada services)
- Export Development Canada (EDC) take into account failures in financing decisions

# ▼ CSR, Mining and CND Government

## *A Look Back*

### 2018: Canadian Ombudsman

- A new Canadian Ombudsman for Responsible Enterprise (CORE)
- A multi-stakeholder advisory body to government (Advisory Body)

# ▼ CSR, Mining and CND Government

## *A Look Back*

### Other Developments:

- Other private member bills not passed (Bill C-492; Bill C-584)
- Litigation (*Choc v Hudbay Minerals Inc.*; *Araya v. Nevsun Resources Ltd.*)
- Greater willingness of Canada to assert extra-territorial jurisdiction (*CFPOA*- nationality principle)
- Other CSR-related legislation (*ESTMA*)
- UN Guiding Principles (2011)

# ▼ Key criticisms of CSR Counsellor's Office

- No independent investigatory powers (may engage in fact-finding)
- Consent-based (2014 enhanced strategy- company ineligible for trade advocacy support if refusal to participate)
- Cannot impose remedy or sanction/cannot make binding recommendations
- few cases; ineffective?

# ▼ Key changes with Ombudsman

- Independent investigatory powers (powers to compel document production; subpoena witnesses); collaborative/joint fact-finding
- Sufficient budget
- Transparency (regular reporting)
- Power to make recommendations (incl. compensation, withdrawal of political and economic support); oversee recommendations

# ▼ Key changes with Ombudsman

- Establishment of the Advisory Body
  - Advise the government on effective implementation of strategy; further development of law and policy
  - Help the government determine the ombudsperson's mandate and investigative procedures
  - Report to the Minister of International Trade
  - Meetings 4 + times/year





# CREDIBILITY OF PROCESS

## *Challenges*

# ▼ Challenges to Credibility of Process

## ➤ Nature of transnational claims:

*Complex relationships; complex claims*

- Ombudspersons are typically domestic managing domestic claims and issues
- relationships between domestic government body/institution/administration and an individual/member of the public/student

# ▼ Challenges to Credibility of Process

## ➤ Nature of transnational claims:

*Complex relationships; complex claims*

- Managing relationship between complainant(s) and businesses impacted by relationships with home and local governments, local communities
- Claims may go back generations involving harms committed by host states, local governments

# ▼ Challenges to Credibility of Process

- Effective fact-finding critical...but challenging
  - Any limitations negatively impact capacity to resolve issues fairly
    - Negative impact on trust; perception for neutrality and objectivity
    - Emphasis on collaborative fact-finding/joint fact finding
  - Coordination of production of evidence
    - Interaction with possible criminal, civil proceedings

# ▼ Challenges to Credibility of Process

- Challenge to create clarity and certainty re application of CSR norms
- Continuing uncertainty re scope and interpretation of CSR norms

# ▼ Challenges to Credibility of Process

- Balance between confidentiality and transparency
  - Transparency as enhancing trust but risk of early reputational harm
  - Risk-based due diligence
  - Protection of confidential information - use in future proceedings



# Challenges to Confidence

## *Integrity of Ombudsman*

# ▼ Challenges to Confidence in Integrity of Ombudsman

- (Early) failure to meet (high) expectations
  - Failures of process
  - Convincing parties of merits of resolution, collaborative fact-finding
  - Issues of Compensation
- Willingness/ability to engage, make appropriate changes
  - Role of Advisory Council



# ▼ Looking Ahead

## *What to expect*

- More complaints?
  - Nature of complaints
  - Indication of usefulness and role of ombudsman
  - Improvements through experience
- Initiation of fact-finding
- Fewer lawsuits?
- Increasing focus on human rights as the core focus of “responsible” business conduct

# ▼ Looking Ahead

## *What to expect*

### ➤ External

- active (and proactive) engagement
  - directly as member of Advisory Council
  - indirectly through members of Advisory Council

### ➤ Internal

- Review of internal company processes (accountability; operational level grievance mechanisms; stakeholder relationships)



# DISCUSSION

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