An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries (Bill C-300) was not doomed to failure, but by galvanizing corporate resistance its adoption became a David vs. Goliath affair, and the result was not biblical. The purpose of this Note is to recount the failure of this legislative initiative, which had a modest but significant objective. Bill C-300 aimed to render Canadian extractive sector corporations operating in developing countries and benefiting from the financial support of the Canadian federal government, subject to withdrawal of funding if their environmental and human rights performance abroad violated international standards. The proposed legislation was a Private Member’s bill put forward by Liberal MP John McKay. It was defeated by 140 to 134 because although it had the support in principle of three parties with a majority of votes—the Liberals, NDP and Bloc Québécois—twenty-five members of those parties, including Liberal leader Michael Ignatieff, chose not to attend the vote after a monumental business lobbying effort.¹

The Note is divided into three parts. The first part gives some background to Bill C-300. The second part discusses the arguments that were successful in defeating the legislation. The

¹ The breakdown of the vote was as follows: Liberal Party: 62 Yeas, 14 Absent; New Democratic Party: 32 Yeas, 4 Absent; Bloc Québécois: 40 Yeas, 7 Absent; Conservative Party: 139 Nays, 3 Absent; Independents: 1 Nay, 1 Absent. See How’d They Vote?: A Resource for Political Accountability, “Bill: C-300, Concurrence Motion (Report Stage)” (27 October 2010), online: How’d They Vote <http://how-dtheyvote.ca/vote.php?id=940>.
third part reflects on why it is so difficult to put accountability mechanisms into place for international corporate activity.

1. BACKGROUND

Bill C-300 was introduced following a period in which the Canadian extractive sector came under considerable scrutiny with regard to how it had been addressing the environmental and social impacts of its activities in developing countries. In June 2005 the Standing Committee on Foreign Affairs and International Trade (SCFAIT) issued a report entitled Mining in Developing Countries and Corporate Social Responsibility, calling on the federal government to institute measures to ensure that Canadian mining companies conduct their operations abroad in a socially and environmentally responsible manner. The Government of Canada responded the following year by organizing a series of “National Roundtables on Corporate Social Responsibility and the Canadian Extractive Sector in Developing Countries” (the “National Roundtables”) in order to examine measures that could be taken to position Canadian extractive sector companies operating in developing countries to meet or exceed leading international corporate social responsibility (CSR) standards and best practices.

Roundtables were held in Vancouver, Toronto, Calgary, and Montreal in the summer and fall of 2006. An Advisory Group, consisting of representatives from the extractive industry, civil society, academics, and labour groups, was established to report on the Roundtables and draft recommendations for adoption by the Government of Canada. The Advisory Group submitted its final report to the Canadian Government in March 2007. The central recommendation in the Advisory Group’s report concerned the development of a “Canadian CSR Framework” consisting of six major components:

- Canadian CSR Standards, for initial application, based on existing international standards that are supported by ongoing multi-stakeholder and multilateral dialogue.
- CSR reporting obligations based on the Global Reporting Initiative, or its equivalent during an initial phase-in period, at a level that reflects the size of the operation. The Global Reporting Initiative relies on an international multi-stakeholder process for its development and continued improvement and applies universally-

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2 This part of the Note draws upon Richard Janda, “Bill C-300: Sound and Measured Reinforcement for CSR” (September 2009), report prepared for the Canadian Network on Corporate Accountability, available online: Amnesty International <http://www.amnesty.ca/files/Janda%20report.pdf>.


5 Advisory Group of the National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Sector in Developing Countries, “National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Sector in Developing Countries: Advisory Group Report” (March 2007), online: Mining Association of Canada <http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf>. 
applicable reporting principles, guidance and indicators for organizations of all sizes and sectors.

- An independent ombudsman office to provide advisory services, fact finding and reporting regarding complaints with respect to the operations of Canadian extractive companies in developing countries.

- A tripartite Compliance Review Committee to determine the nature and degree of company non-compliance with the Canadian CSR Standards, based upon findings of the ombudsman with respect to complaints, and to make recommendations regarding appropriate responses in such cases.

- The development of policies and guidelines for measuring serious failure by a company to meet the Canadian CSR Standards, including findings by the Compliance Review Committee. In the event of a serious failure and when steps to bring the company into compliance have also failed, government support for the company should be withdrawn.

- A multi-stakeholder Canadian Extractive Sector Advisory Group to advise government on the implementation and further development of the Canadian CSR Framework.

It is worth recalling that the Mining Association of Canada publicly voiced its support for the CSR Framework recommended by the National Roundtables Advisory Group. In a joint press release, dated 29 March 2007, the Mining Association asserted:

> Canada could become a world leader on Corporate Social Responsibility (CSR) if the federal government and other stakeholders accept and act on the recommendations…

In the same press release the Executive Director of the Prospectors and Developers Association of Canada was equally supportive:

> Canadian mining companies listed on Canadian stock exchanges are the largest outward investors, with interests in more than 8,000 properties in over 100 countries around the world,” adds Tony Andrews, Executive Director of the Prospectors and Developers Association of Canada. “Their activities can help to create new economic opportunities in the developing world. However, it is equally important that they continually improve their performance in line with corporate social responsibility expectations. The Advisory Group’s report will contribute to the development of necessary guidance and tools.

However, by 2008 the Conservative government was backing away from the Advisory Group Report—a product of a body set up by their Liberal predecessors. In particular, it became clear that the government would not establish the Ombudsman office called for in the Report, and the industry associations began to distance themselves from the Report’s most ambitious recommendations. As a result, a number of the civil society groups that had been involved in

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negotiating the Advisory Group consensus sought a response from the opposition parties. Bill C-300 was born.

As a Private Member’s bill, C-300 could not seek to implement entirely the Advisory Group’s recommended Ombudsman office. To understand why, one must distinguish between legislation that would appropriate public funds—which Bill C-300 did not purport to do—and legislation that places conditions upon the use of public funds that have otherwise been appropriated, which Bill C-300 would have done. In brief, ss. 53-57 of the Constitution Act, 1867 provide a specific constitutional foundation and process for public appropriations and taxes. Such legislation must be initiated in the House of Commons (not the Senate) and according to s. 54 must first be “recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.” This gives rise to the restrictions in parliamentary practice upon the scope of a Private Member’s bill, well summarized as follows:

There is a constitutional requirement that bills proposing the expenditure of public funds must be accompanied by a royal recommendation, which can be obtained only by the government and introduced by a Minister. Since a Minister cannot propose items of Private Members’ Business, a private Members’ bill should therefore not contain provisions for the spending of funds. However, since 1994, a private Member may introduce a public bill containing provisions requiring the expenditure of public funds provided that a royal recommendation is obtained by a Minister before the bill is read a third time and passed. Before 1994, the royal recommendation had to accompany the bill at the time of its introduction. The Speaker is responsible for determining whether any bill requires a royal recommendations and the Speaker is empowered to decline to put the necessary questions on bills which require, but have not received, a royal recommendation.

Thus, had Bill C-300 proposed the creation of an Ombudsman office, it would have entailed the expenditure of fresh public funds and thus required a royal recommendation. In contrast, Bill C-300 sought to set conditions upon the existing appropriation of funds and thus gave rise to no new expenditures or taxes.

The basic mechanism of Bill C-300 was as follows: it charged the Ministers of Foreign Affairs and International Trade to receive complaints regarding Canadian extractive sector companies from Canadians or from residents or citizens of a developing country in which a company had activities. The Ministers were to investigate whether the activities in question violated guidelines on human rights and environmental practices.

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substantially similar to those used by the International Finance Corporation. The results of the investigations were to be published in the Canada Gazette. If a Minister determined that the guidelines had been violated, the President of Export Development Canada (EDC) and the Chairperson of the Canada Pension Plan Investment Board (CPPIB) were to be informed. Given the guidelines applicable by those agencies, the determination by the Minister was meant to initiate the withdrawal of funds.\(^\text{11}\)

In March 2009, as a counterpoint to Bill C-300, the federal government released its own CSR strategy for the international extractive sector titled “Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for Canadian International Extractive Sector” (“the GOC CSR Strategy”).\(^\text{12}\) In particular, an Order-in-Council established the Extractive Sector Corporate Social responsibility Counsellor with the mandate to:

- review the corporate social responsibility practices of Canadian extractive sector companies operating outside Canada; and
- advise stakeholders on the implementation of the performance guidelines.\(^\text{13}\)

However, the Order-in-Council specified that the “Counsellor shall not

- make binding recommendations;
- make policy or legislative recommendations;
- create new performance standards; or
- apply standards other than the performance guidelines.”

Furthermore, the “Counsellor shall only undertake a review with the express written consent of the parties involved.” In contrast to Bill C-300, therefore, and indeed in contrast to the Advisory Group’s recommendation for an Ombudsman, the Counsellor was given a modest mandate. Parties subject to complaint could simply choose not to cooperate and there were no formal consequences to violations of guidelines—only advice to stakeholders. Withdrawal of government financing was not part of the equation.

2. ARGUMENTS AGAINST C-300

Inevitably, the creation of the Counsellor’s office was used as a Trojan horse against Bill C-300. The government argued that it was premature and redundant to proceed with C-300 until the Counsellor’s office had been given an opportunity to prove itself. Furthermore, a barrage of testimony was unleashed in the House of Commons in an effort to demonstrate that Bill C-

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\(^{11}\) The amended version of the bill dropped the provision that would have amended the Canada Pension Plan Investment Board Act, SC 1997, c 40, since any amendments to that legislation require provincial support (except Quebec). The bill also envisaged the withdrawal of consular services promoting or supporting the impugned activities.


\(^{13}\) The Order-in-Council is available on the CSR Counsellor’s website, online: FAIT <http://www.international.gc.ca/csr_counsellor-conseiller-rse/mandate-mandat.aspx?menu_id=57&menu=L>. 

300 would produce a flight of capital from Canada, would place Canadian companies under a severe competitive disadvantage, would represent an illegitimate extra-territorial application of Canadian law, would tarnish the reputation of good Canadian corporate citizens, and would create dramatic administrative overreach. A broad range of civil society groups rallied behind the bill in response to this line of criticism, arguing that Canada’s international standing was at stake if it was unprepared to link government funding to good corporate performance abroad.

The line of argument behind the contrarian position reached its dramatic crescendo in the last few weeks before the October 27, 2010 vote when the Canadian Chamber of Commerce circulated a memo to Members of Parliament entitled “Summary of Frank Iacobucci Memorandum Respecting Bill C-300”, carrying the weight of opinion of a former judge of the Supreme Court of Canada. Shortly thereafter, a document that had been prepared for Prospectors and Developers Association (PDAC) in response to Bill C-300 but containing a number of findings adverse to PDAC was leaked and dramatized by civil society groups. By way of stylized summary of a long and complex debate, these two documents will be discussed in greater detail.

2.1 The Canadian Chamber of Commerce Memorandum

It is worth reproducing the Canadian Chamber of Commerce memorandum in its entirety:

- Mr. Iacobucci has reviewed Bill C-300 and concluded that there are “serious issues” as to whether Bill C-300 is constitutional, administratively fair and extraterritorially applicable. The concerns he highlights are summarized below.

**Federalism Issues**

- Bill C-300 gives the Ministers broad powers to issue guidelines respecting Canadian mining, oil or gas corporations operating abroad, receive complaints and undertake examinations respecting alleged violations of these guidelines, and publish the results of such examinations. Findings of inconsistency are likely to lead to significant reputational and financial consequences for the company(s) involved.

- Given the broad scope of this proposed regulatory scheme, it is likely to be regarded as business regulation that falls within the provinces’ broad authority over property and civil rights, rather than under federal authority.

- There does not appear to be any federal head of power (such as federal powers over federal incorporation, criminal law or trade and commerce) that clearly authorizes Parliament to establish the regulatory scheme proposed by Bill C-300.

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14 On file with the author. The original memorandum prepared by former Supreme Court Justice Frank Iacobucci was prepared for Barrick Gold Corporation, Goldcorp Inc. and IAMGOLD on 1 September 2010 [Iacobucci Memorandum Summary].


Fairness Issues

- The examination procedure set out in the regulatory scheme has serious shortcomings, particularly in light of the significant consequences that may flow from a finding of inconsistency. The shortcomings include: the vagueness of the standards to be incorporated into the guidelines; the lack of guidance as to how the Ministers are to conduct examinations; and the absence of any safeguards to ensure a fair hearing.

- These due process problems raise serious issues as to whether the regulatory regime is consistent with section 11(d) of the Charter, which requires a fair and public hearing before a decision-maker imposes penal consequences, or with the requirements of administrative procedural fairness, which require decision-makers to act in a procedurally fair manner.

Extraterritoriality

- Under Bill C-300’s regulatory regime, it appears that the only necessary link between an examination of non-compliance and Canada is that the affected company has received specified forms of support from the Government of Canada.

- There is a serious question as to whether this is sufficient to establish a “real and substantial link” between Canada and the activities being examined, which is required in order for a Canadian court or tribunal to exercise jurisdiction over activities in a foreign jurisdiction. In addition, such investigations would inevitably raise serious concerns as a matter of international law and comity.

The description of Bill C-300 as creating “broad powers to issue guidelines” is perplexing. Given that the bill did not set out powers to regulate the conduct taking place abroad, for example by granting licenses or establishing administrative monetary penalties, its “breadth” was inherently limited. The guidelines were to determine parameters for federal investment of federal government monies. It is difficult to know what it means to say that the bill gave rise to “broad powers” to set such guidelines for federal spending.

As for any reputational effects and potential financial consequences for firms, it must be emphasized that they would have flowed from guidelines based on international standards that extractive sector companies themselves are publicly committed to observing. These guidelines would also have been worked out with extractive companies and patterned after guidelines used by the International Finance Corporation of the World Bank. Parallel standards are now being applied by the Overseas Private Investment Corporation (OPIC) of the United States. The specific guidelines would have been promulgated only after a process of consultation open to all stakeholders. It should also be underscored that the reputational and financial consequences of having Canadian firms violate international standards abroad are in fact absorbed by Canada as a whole and the reputational benefit of having Canada stand behind international standards would be a gain to Canadian firms.

The counterpoints to the Canadian Chamber of Commerce memorandum are drawn from a responding memorandum circulated by John McKay’s office on October 25, 2010, and which the author of this Note participated in drafting and signed along with law professors Audrey Macklin, Penelope Simons, François Tanguay-Renaud, Evan Fox-Decent, Shin Imai, Craig Scott, Aaron Dhir and Gus Van Harten.

Bill C-300 was not a “broad regulatory regime” governing business in general and falling within provincial jurisdiction. Whereas the provinces could readily set up parallel guidelines for investments of their own funds (e.g. the Caisse de dépôt et placement du Québec), the provinces obviously could not set guidelines to be used by the EDC or consular services.

The nub of Bill C-300 was to create a methodology to assess whether Canadian extractive sector companies are engaged in activities abroad that should be funded by the federal government. The spending power and federal authority over international trade were ample constitutional grounding for this.

If anything, Bill C-300 strengthened procedural safeguards around EDC funding. If the federal government were to decide tomorrow to cut off all future EDC funding to the extractive sector, there would be no issue of procedural fairness or Charter violation. There is no right to EDC funding. Instead, Bill C-300 provided a set of procedural safeguards not only for the extractive sector but also for affected stakeholders to ensure that no decision to withdraw funding would be taken without a complaint procedure, inquiry, as well as opportunity for response and corrective measures by the company complained against.

The Supreme Court of Canada has emphasized that s. 11 of the Charter only applies to criminal law proceedings and nothing contemplated by Bill C-300 came close to an application of criminal law. The legislation had no penal consequences.

Government funding for foreign operations by extractive sector companies was a real and substantial link to justify examining whether those companies were in compliance with conditions of their financing. Even if one were to accept the dubious notion that government support of foreign activity does not justify enforcement measurers abroad, the Supreme Court has made clear that Parliament can by statute establish a “real and substantial link” between Canada and the activities in issue where enforcement measures are carried out within the territory of Canada—as was the case with Bill C-300.

No Canadian court or tribunal was being seized of jurisdiction to arrive at determinations concerning whether international guidelines have been violated. There was no civil or other remedy being created before the courts. Thus, there was no effort to create extra-territorial jurisdiction for a Canadian court. Nor was there any issue of comity since Canada would have been seeking to protect its own reputation abroad given the activities of its companies were supported by federal agencies.

3.2 The Canadian Centre for the Study of Resource Conflict (CCSRC) Report for PDAC

The CCSRC Report was based on a compilation of publically available English-language incident reports and complaints involving mining and exploration companies operating in the developing world and interviews with organizations and two Canadian researchers involved in relevant CSR initiatives (e.g. the Extractive Industry Transparency Initiative – EITI).

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21 Iacobucci Memorandum Summary, supra note 13 at 4-5. On the Extractive Industry Transparency Initiative (EITI), see generally online: EITI <http://eiti.org/>.
the public position taken by industry representatives was that Bill C-300 was based on the false assumption that Canadian companies had a problematic environmental and social record abroad, the CCSRC Report was far from sanguine, noting “Canadian companies have been the most significant group involved in unfortunate incidents in the developing world.”\textsuperscript{22} The report found that the record of Canadian companies as a whole is worse than its peer group from Australia, the United Kingdom or the United States. According to the Report, the largest group of “unfortunate incidents” related to community conflict, notably “significant negative cultural and economic disruption to a host community, as well as significant protests and physical violence.”\textsuperscript{23} Indeed, this is a rather tame way of putting what Mining Watch, Amnesty International and Human Rights Watch have documented: violence by security forces used by Canadian companies.\textsuperscript{24}

Since the CCRSC Report was prepared for PDAC in response to Bill C-300, it generated considerable publicity in the press and undercut the argument that Canadian companies were unfairly singled out by the proposed legislation.\textsuperscript{25} Of course, Barrick Gold’s Porgera mine in Papua New Guinea, the subject of an Amnesty International report, had provided a significant backdrop to Bill C-300 because of scrutiny coming from Norway in 2008, and its putatively “extra-territorial” application of its jurisdiction. An independent review conducted by the Council on Ethics for the Norwegian Pension Fund found that the mine had given rise to significant environmental hazards for the local population, notably because of arsenic-laden tailings disposed directly in the adjacent river—a prohibited practice in Canada.\textsuperscript{26} The Council Report concluded that Barrick’s “assertions that its operations do not cause long-term and irreversible environmental damage carry little credibility. This is reinforced by the lack of openness and transparency in the company’s environmental reporting.”\textsuperscript{27} Thus Norway withdrew its $229 million investment from Barrick.

While Norway has a formal mechanism to keep its investments ethically accountable to the people of Norway, Canada does not. In 2009, EDC supported $18.2 billion in business

\textsuperscript{22} Ibid at 11. Although the CCSRC Report, supra note 14, contextualized this finding by emphasizing that Canadian companies account for 74% of global activity, nevertheless it also noted (at 10) that Canadian companies did not have "close 'competitors' or peers" as regards rates of incidents and were involved disproportionately in incidents characterized as "conflict with local communities."

\textsuperscript{23} Ibid at 5. The CCSRC Report underscored (at p. 11) that gold ventures are “the most major [sic] source of problematic incidents.”


\textsuperscript{27} Ibid at 25.
volume for companies in the extractive sector. While EDC has corporate social responsibility guidelines and a Compliance Officer, there is no formally binding mechanism to investigate human rights and environmental complaints against Canadian mining companies operating abroad and to withdraw funding if a company does not comply with guidelines. Bill C-300 sought to fill that gap.

3. THE LIMITS TO CORPORATE SOCIAL RESPONSIBILITY

The vehemence of the resistance to change is as significant as the arguments used to back that resistance, particularly if the arguments have but a modest capacity to survive scrutiny. Why did Bill C-300 produce such vehement resistance even and especially among groups that had not long before backed the Advisory Group Report on which it was based? Why did they show such strong buyer’s remorse?

Bill C-300 was situated at a critical threshold in the elaboration of corporate fiduciary responsibilities. That threshold involves connecting voluntary business initiatives that respond to market imperatives with government participation in markets shaped in part by general justice considerations. Whereas corporations are quite comfortable now putting in place complex and sometimes expensive CSR “products” that can be used to manage risk and reduce long-term costs, they are less comfortable being held financially accountable for their justice footprint since they do not view themselves as purveyors of justice or injustice. Bill C-300 told them that financing was conditional on justice—or at least on the avoidance of injustice.

The failure of Bill C-300 is an occasion, therefore, to reflect on the vehemence with which corporations resist seeing themselves as connected to the production of injustices. That this resistance should also arise around the presence of the extractive sector in developing countries is telling. The basic proposition behind the activities in question, of course, is that it can be just to extract resources from poor countries for profit in rich ones and that continued and enhanced extraction is a pathway to development. Environmental and social impacts are not peripheral to these activities—they are inherent to them. Furthermore, as demand for resources grows and their sources become more difficult to exploit because the most accessible and immediate ones have already been exhausted, environmental and social impacts are likely to gain in significance. The countries targeted for resource extraction will increasingly include less stable regimes and their resource deposits will be harder and more risky to extract.

The growth, visibility and pervasiveness of environmental and social impacts in the extractive sector could give rise to corporate strategies of diffusion, control and avoidance: diffuse public concern, control information and avoid responsibility. But such strategies, attractive as they must be within the corporation, remain temporary and crisis-prone. Corporations could choose instead strategies of engagement, transparency, and acknowledgement: engage with public concern, shed light on practices, and acknowledge ongoing responsibility. In particular, this would mean acknowledging that with extraction comes a justice burden that must be faced and will not always be fully borne. This latter strategy was traced out by Bill C-300. Buyer’s remorse at purchasing a stake in ongoing and future injustice is understandable but weak-

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spirited. There will come a time when Bill C-300 will seem to have been a mild measure in comparison with the growing justice burden corporations are coming to bear.