



## **FREQUENTLY ASKED QUESTIONS (FAQS): ACCESS TO JUSTICE**

*NOTE: All terms in [blue](#) are defined in the glossary at the end of the document.*

### **HOW ARE PEOPLE HARMED BY THE OVERSEAS OPERATIONS OF CANADIAN EXTRACTIVE COMPANIES?**

Individuals and communities can be adversely impacted by the overseas operations of Canadian mining, oil and gas companies in a variety of ways, several of which are identified here. Extractive projects may involve the forced relocation of local residents from their land. The evicted may suffer economic hardship, as well as the social and cultural impacts associated with community disruption or dissolution. The mismanagement of hazardous inputs or waste by-products can degrade land and water resources, with attendant impacts on health and livelihood. Moreover, opposition to extractive projects may be met with unwarranted violence resulting in death, injury and sexual assault.

### **WHY WOULD INDIVIDUALS WHO ARE HARMED BY THE OVERSEAS OPERATIONS OF A CANADIAN COMPANY SEEK LEGAL REMEDY IN CANADA AND NOT IN THE COUNTRY WHERE THE HARM OCCURRED?**

Many Canadian extractive companies operate in countries where the judiciary is unable or unwilling to provide the victims of corporate abuse with access to justice. Local courts may lack the resources needed to effectively adjudicate claims. The judiciary may also lack the independence required to provide a fair hearing. Potential plaintiffs who are affected by Canadian companies may have no viable alternative if their claims are not adjudicated in Canada. Furthermore, transnational litigation is one way of ensuring that Canadian corporations are held to Canadian legal standards.

### **HAVE LAWSUITS INVOLVING FOREIGN PLAINTIFFS AND CANADIAN EXTRACTIVE COMPANIES BEEN HEARD IN CANADA? WERE THEY SUCCESSFUL?**

Seven cases involving allegations of corporate abuse related to the overseas operations of Canadian extractive companies have been launched in Canadian courts. To date, no foreign plaintiff has been successful in a claim against a Canadian company in Canada. However, at the time of writing, four cases involving foreign plaintiffs remain before the courts. For more

information about these cases, please consult *Transnational Lawsuits in Canada against Extractive Companies, 1997-2015*.

## WHAT CHALLENGES DO FOREIGN VICTIMS FACE WHEN SEEKING LEGAL REMEDY IN CANADA?

Foreign victims of corporate abuse face a variety of legal and financial challenges. First, a foreign plaintiff must establish that a Canadian court has the jurisdiction to hear their case. Jurisdiction refers to a court's legal authority to adjudicate a matter. A plaintiff must establish that there is a substantial connection between the case and the province over which the court presides.

Although a court may have jurisdiction over a transnational matter, it may decline to exercise that jurisdiction. The legal principle of *forum non conveniens* allows a court to dismiss a claim if it determines that another court is better positioned to adjudicate the case. A corporate defendant that seeks the dismissal of a claim on this basis often argues that the *host state* is a more appropriate venue due to its proximity to the parties, witnesses and/or evidence.

A further challenge for foreign plaintiffs concerns the legal structure of multinational corporations. The '*corporate veil*' is a legal construct that treats a *parent company* and its subsidiaries as separate entities, shielding the former from *liability* associated with the latter. However, the separation is often fictitious, as parent companies are commonly involved in the management and operations of their subsidiaries. Plaintiffs may argue that the veil does not apply. Alternatively, they may recognize the veil but seek to 'lift' or 'pierce' it in the circumstances in order to hold a parent company responsible for the wrongdoing of its *subsidiary*. However, courts have often been reticent to remove the veil.

Another approach is to hold the parent company directly responsible for events overseas. Rather than argue that the parent company is responsible for the actions of its subsidiaries, this approach seeks to hold the parent responsible for its own acts and omissions regarding overseas operations. This basis of liability is currently being tested in the four transnational cases that are before Canadian courts.

*Transnational litigation* is expensive. Although a plaintiff's lawyers may work free of charge (*pro bono*) or on a contingency fee basis, cases routinely involve additional expenses related to travel and translation, the hiring of experts and the collection of evidence abroad.

Furthermore, it is typical for Canadian courts to order the losing party in *civil* litigation to pay at least a portion of the winning party's legal fees and expenses. The procedure for determining the value of a *costs award* varies from province to province. In some provinces, plaintiffs can apply for a no cost ruling, by which the court waives the plaintiffs' obligation to pay the other party's costs. In other provinces, however, plaintiffs may be ordered to post security prior to a court ruling in anticipation of a potential costs award.

In addition to legal and financial challenges, transnational litigation involves significant logistical burdens, such as long-distance communication and travel.

### **HOW CAN ACCESS TO CANADIAN COURTS BE IMPROVED FOR FOREIGN VICTIMS?**

A number of strategies can be pursued to improve access to Canadian courts by foreign victims. Efforts can be made to support potential plaintiffs and their lawyers to overcome the financial and logistical challenges associated with transnational litigation. Lawyers can bring forward compelling cases that set favourable legal precedents, making it easier for plaintiffs to obtain access to justice in Canada in the future. Finally, legislators can be encouraged to pass new [legislation](#) to address the legal challenges that impede access to the Canadian judicial system.

### **ALL OF THE CLAIMS THAT HAVE BEEN MADE BY FOREIGN PLAINTIFFS IN CANADA HAVE BEEN CIVIL LAWSUITS. WHY IS THAT? CAN CRIMINAL CHARGES BE BROUGHT IN CANADA AGAINST CANADIAN COMPANIES WITH REGARD TO THEIR OVERSEAS OPERATIONS?**

Civil litigation deals with disputes between private parties. The cases that have been brought before Canadian courts involve grievances between private citizens: the individuals and associations that file the suits, and the companies that are named as defendants. In contrast, [criminal law](#) is the purview of the state. With very limited exception, only the state can lay criminal charges.

Canadian legislation allows for the prosecution of certain crimes that are committed by Canadians or Canadian companies overseas. In other words, Canada applies some provisions of the *Criminal Code* extraterritorially. For example, amendments to Canadian criminal law in 2000 made it possible to prosecute those responsible for war crimes, crimes against humanity and genocide that take place overseas. Canadian legislation also includes provisions that permit the prosecution of Canadian citizens who bribe foreign public officials. There is a strong argument that these provisions could be applied to Canadian corporations as well as individuals. However, these provisions are very limited in scope and are enforced exclusively by the state.

### **WILL LITIGATION IN CANADA DRAW ATTENTION AND RESOURCES AWAY FROM IMPORTANT EFFORTS TO PURSUE LEGAL REMEDY IN HOST STATES? DO LAWSUITS IN CANADA UNDERMINE THE LOCAL RULE OF LAW?**

The filing of a legal claim in Canada does not preclude the use of local judicial mechanisms. For example, criminal proceedings are underway in Guatemala regarding the events that form the basis of several civil suits against Hudbay Minerals and Tahoe Resources that are currently before Canadian courts.

When foreign plaintiffs launch a lawsuit in Canada, their Canadian legal team often works in close collaboration with lawyers in the host state, and with local and international civil society organizations. This collaboration increases opportunities for sharing resources, experience and expertise that may, in turn, help to strengthen the local rule of law.

Furthermore, transnational lawsuits can serve to draw international attention to the challenges that plaintiffs face in their local struggle for justice.

### **DO TRANSNATIONAL LAWSUITS GENERATE NEGATIVE LOCAL IMPACTS?**

Transnational civil litigation seeks to compensate victims for any harm they have suffered and to deter corporate wrongdoing. These lawsuits can also empower victims by drawing national and international attention to their struggles and by generating important political and moral support.

Nonetheless, international litigation can create challenges for plaintiffs and their communities. Litigation can aggravate tensions between plaintiffs and company staff or third parties in the host state. Plaintiffs can face an increasingly hostile environment and incur additional risks to their personal safety. If their claims are unsuccessful, plaintiffs can also be burdened with the obligation of paying costs awards to corporate defendants.

While local and international civil society organizations, as well as plaintiffs' legal teams, can take steps to try and mitigate these impacts, prospective plaintiffs must decide whether the potential benefits of transnational litigation outweigh the prospective costs.

### **IF FOREIGN PLAINTIFFS HAVE GREATER ACCESS TO CANADIAN COURTS, WILL THESE FORA BE FLOODED WITH INTERNATIONAL SUITS?**

Despite the growing number of allegations against Canadian extractive companies, it is unlikely that improved access to Canadian courts will result in a flood of new cases. As discussed above, the financial cost of transnational litigation is very high. There are also significant logistical challenges. Furthermore, civil lawsuits often take a very long time to litigate – upwards of a decade in some cases – and therefore require a significant time commitment on the part of plaintiffs and their legal teams. Moreover, transnational civil litigation is likely to have a deterrent effect on corporate wrongdoing, which should result in a decline in complaints.

### **ARE THERE EFFORTS IN OTHER HOME STATES TO IMPROVE ACCESS TO COURTS FOR FOREIGN PLAINTIFFS?**

Efforts are underway in Australia, the United States, the United Kingdom, and several western European countries to facilitate transnational litigation. Many multinational companies are

incorporated or headquartered in these countries. In recent years, academics, legal experts and representatives of civil society organizations have worked to map the legal and practical challenges to judicial remedy in diverse [home states](#), and to develop policy and legislative recommendations. These actors identify the issue of access to justice for the victims of corporate abuse as a central concern.

## GLOSSARY

- Civil law**
- (1) A body of law that deals with disputes between private parties. Civil law includes such areas as tort, contracts, wills, trusts, property, family law and commercial law. The state plays no role in civil cases, unless it initiates a suit or is the party being sued.
  - (2) A legal system derived from ancient Roman law. In civil law jurisdictions, a civil code is the primary source of private law. A civil code is a comprehensive statute or collection of statutes.

In Canada, Quebec applies civil law in matters of private law, whereas all other provinces apply common law.

- Corporate veil** A metaphor that describes the legal separation of shareholders from the companies that they own. The veil represents the principle of corporate law known as separate legal personality. This principle prevents the assignation of legal responsibility to shareholders for the acts and omissions of their companies.

The corporate veil is applicable to parent companies that hold shares in their subsidiaries. The veil prevents parent companies from being held responsible for the acts and omissions of their subsidiaries. Often, this legal separation is not reflected in fact, as managerial oversight and resources flow through the corporate group unimpeded. To 'lift' or 'pierce' the veil is to treat the corporate group in law as it commonly exists in fact: as a single entity.

- Costs award** A court order requiring that the losing party in civil litigation pay all or a portion of the winning party's legal expenses.

- Criminal law** A body of law that prohibits conduct that constitutes a threat to the public at large or to accepted social values and that imposes punishment for unlawful behaviour.

In Canada, criminal law is set out in the *Criminal Code* and is applied uniformly across the country.

<b>Forum non conveniens</b>	A legal doctrine by which a court may decline to exercise its jurisdiction on a matter on the basis that another court is better suited to adjudicate the case.
<b>Home state</b>	The country where a parent company is incorporated, where it is headquartered and/or from which it exercises control over its operations.
<b>Host state</b>	A country, other than the home state, where a parent company operates, often through a subsidiary. A country that 'hosts' the parent company's investments.
<b>Legislation</b>	A law that has been enacted by a legislative body.
<b>Liability</b>	The legal obligation to answer for one's acts or omissions and to repair any loss or harm that may have been caused.
<b>Litigation</b>	Legal proceedings related to a civil lawsuit.
<b>Parent company</b>	A company that owns another company. The latter is often called a subsidiary.
<b>Subsidiary</b>	A company that is owned by another company. The latter is usually called the parent company.
<b>Transnational</b>	Transcending or operating across national borders.

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