TRANSNATIONAL LAWSUITS IN CANADA AGAINST EXTRACTIVE COMPANIES

DEVELOPMENTS IN CIVIL LITIGATION

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*NOTE: All terms in **blue** are defined in the glossary at the end of the document.*

INTRODUCTION

Eight claims containing allegations of environmental or human rights abuse related to the overseas operations of Canadian extractive companies have been filed in Canadian courts. To date, no foreign plaintiff has been successful in a claim against a Canadian company in Canada. However, five cases involving foreign plaintiffs are before the courts. Two of these, *Garcia v. Tahoe Resources* and *Araya v. Nevsun Resources Ltd.*, were filed in 2014. Three others, which were filed in 2010/11, involve the defendant Hudbay Minerals.

In addition to the claims described above, Ecuadorian plaintiffs filed an action in Canada in 2012 that seeks to enforce an Ecuadorian judgment against a US extractive company. Both the US company and its Canadian subsidiary were named as defendants in the Canadian suit.

Transnational suits face a number of legal challenges. First, foreign plaintiffs 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 or territory over which the court presides.[1] The same is true for cases brought before the federal court.

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 may argue that the **host state** is a more appropriate venue due to its proximity to the parties, witnesses and/or evidence. The burden is on the plaintiffs to prove, on the contrary, that a foreign court is unable to provide them with a fair trial.

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

[1] In Canadian common law jurisdictions (all but Quebec), the fact that a defendant company is registered or operates an establishment in the jurisdiction is sufficient to establish a substantial connection.

subsidiaries as separate entities, shielding the former from **liability** associated with the latter. The separation is often fictitious, as parent companies are commonly involved in the management and operations of their subsidiaries. In order to hold a parent company responsible for the wrongdoing of its subsidiary, 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. However, courts have often been reticent to remove the veil. Another approach is to seek 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 five transnational cases that are before Canadian courts.

CASES

RECHERCHES INTERNATIONALES QUÉBEC v. CAMBIOR INC.

In 1997, a group of indigenous Guyanese initiated a **class action** lawsuit in the Quebec Superior Court. The Guyanese citizens were the victims of an environmental disaster that took place two years earlier when the tailings dam at the Omai gold mine ruptured, spilling billions of litres of contaminated mine waste into the nearby Omai and Essequibo rivers. The plaintiffs argued that the resulting pollution impacted their right to health, food, water, livelihood, and a clean environment.

The plaintiffs sued Cambior Inc., the mine's majority owner, for **negligence** in Quebec, the province where the company was incorporated. The Quebec court determined that both Quebec and Guyana had jurisdiction to try the case, but that Guyanese courts were a more appropriate forum for the lawsuit, despite expert testimony regarding the improbability that that country's judiciary would provide the victims with a fair trial. The court dismissed the claim and ordered the plaintiffs to pay Cambior a **costs award**. Subsequent suits brought in Guyana by the plaintiffs were also dismissed, leaving the victims without remedy.

The Cambior decision cast a chill on transnational **litigation** in Canada. Potential plaintiffs were discouraged by both the legal precedent and the adverse costs award.

For more information:
http://www.amnesty.ca/news/open-letters/open-letter-launch-of-injustice-incorporated

RAMÍREZ v. COPPER MESA MINING CORPORATION

In 2009, three Ecuadorians initiated a lawsuit in the Ontario Superior Court. The plaintiffs alleged that they were threatened and physically assaulted between 2005 and 2007 by security personnel contracted by Copper Mesa Mining Corporation. During one attack in December 2006, dozens of security personnel advanced on a small group of local residents. Unprovoked, the security guards fired weapons and pepper spray. The plaintiffs claimed that this attack was part of a wider intimidation campaign aimed at silencing sustained community opposition to the company's Junín project.

The plaintiffs sued the Toronto Stock Exchange (TSX), which listed the company's shares, in negligence. They also sued two of the company's Ontario-based directors. The lawsuit alleged that money raised by the company on the TSX was used to finance Copper Mesa's security personnel, many of whom were off-duty or former members of the Ecuadorian military. The plaintiffs further argued that both the TSX and the corporate directors were warned of the likelihood of violence in the areas under exploration by the company, and that they had a responsibility to avoid conduct that might harm individuals and communities located in those areas. The plaintiffs also sued Copper Mesa, claiming that the company was **vicariously liable** for the actions of its directors.

The Ontario Superior Court dismissed the plaintiffs' claim that the defendants owed them a legal **duty of care**. The court found that neither the TSX nor the company's directors had sufficient connection to the plaintiffs to establish an enforceable legal obligation. The decision was upheld on appeal.

For more information:
http://www.ramirezversuscoppermesa.com

ASSOCIATION CANADIENNE CONTRE L'IMPUNITÉ (ACCI) v. ANVIL MINING LTD

In 2010, the Canadian Association against Impunity, a registered Canadian non-profit corporation, launched a class action lawsuit in the Quebec Superior Court against Anvil Mining Ltd. The lawsuit concerned human rights abuse that occurred in the Democratic Republic of the Congo in 2004, when approximately 73 civilians were massacred by Congolese armed forces during an attack on the village of Kilwa. The army relied on logistical support supplied by the mining company, including planes, vehicles, security personnel and food.

A military court in the Congo acquitted Anvil's former general manager, a Canadian, for aiding and abetting the army. The proceedings were widely criticized for their procedural irregularities. The subsequent Canadian lawsuit alleged that Anvil, a company incorporated in Quebec, whose head office was located in Australia, was complicit in the commission of serious

human rights violations. The plaintiffs sought compensation for the harms that were sustained as a result.

While the Quebec Superior Court determined that the case could proceed in Quebec, the Court of Appeal ruled that the Quebec court lacked jurisdiction. On appeal, the court found that Anvil's Montreal office was not involved in the decisions that led to its alleged role in the massacre and that legal options were available to the victims in Australia and the Congo. The plaintiffs' application for leave to appeal before the Supreme Court of Canada was dismissed in 2012.

For more information:
http://www.ccij.ca/cases/anvil-mining/

CHOC v. HUDBAY, CHUB v. HUDBAY AND CAAL v. HUDBAY

In 2010 and 2011, three cases involving Guatemalan plaintiffs were launched in the Ontario Superior Court against Canadian mining company Hudbay Minerals Inc. One of the cases also names Hudbay's Guatemalan subsidiary as a defendant. The lawsuits allege that between 2007 and 2009, security personnel employed by Hudbay at its Fenix nickel mine killed a local community leader, seriously wounded another local resident, and gang-raped eleven women.

Hudbay initially sought to have the cases dismissed in Ontario on the grounds that it was an inappropriate forum. The company later withdrew this argument, a decision that allowed the cases to proceed but that prevented the development of a legal precedent in Ontario on the application of the *forum non conveniens* doctrine in this particular case.

Hudbay also brought a preliminary motion to strike the cases on the grounds that they disclosed no **cause of action**. Hudbay argued that the plaintiffs were attempting to assign it responsibility for the acts and omissions of its Guatemalan subsidiary, a legal argument that fails to respect the principle of separate legal personality (i.e. an attempt to lift the corporate veil). In 2013, the Ontario Superior Court ruled in favour of the plaintiffs and denied the company's motion to strike. The judge determined that the plaintiffs' claims are based on the direct negligence of the parent company. The plaintiffs do not seek to assign liability to Hudbay for the acts and omissions of its subsidiaries but rather, for the company's own acts and omissions. For this reason, the claims are consistent with the doctrine of separate legal personality and may proceed. The plaintiffs must now prove that Hudbay owed them a duty of care and that it failed to discharge that duty.

The court's ruling sets a precedent with respect to parent company liability. For the first time in Canada, cases involving foreign plaintiffs who allege to have suffered harm caused by a Canadian company's overseas operations will proceed to trial.

In addition to the **civil** case in Canada, **criminal** proceedings were launched in Guatemala against Hudbay's former head of mine security. In 2017, he was acquitted of all charges in a trial that was criticized for procedural irregularities, including the presiding judge's request that criminal charges be brought against the victims, certain witnesses and the prosecutor.

For more information:
http://www.chocversushudbay.com/

GARCÍA v. TAHOE RESOURCES INC.

In June 2014, seven Guatemalans launched a lawsuit in the British Columbia Supreme Court against Canadian mining company Tahoe Resources Inc. The plaintiffs claim that they suffered serious injuries when Tahoe's security personnel shot at them during a peaceful demonstration against the company's Escobal silver mine in April 2013. They also claim that the shooting was a premeditated attempt by Tahoe's security personnel to silence sustained community opposition to the mine.

The plaintiffs sued Tahoe, a company incorporated in BC, for **battery** and negligence. The lawsuit claims that Tahoe's manager of security ordered the shooting. It further alleges that Tahoe expressly or implicitly authorized the manager's conduct or was negligent in its management of security personnel. The plaintiffs argue that Tahoe was aware of widespread community opposition to the mine and the manager's conflictive relationship with the community.

While Tahoe recognized that the BC court has jurisdiction to try the case, it sought to have the claim dismissed on *forum non conveniens* grounds. In 2015, a BC Supreme Court judge sided with the company, finding that Guatemala was a more appropriate forum to adjudicate the plaintiffs' claim. Expert testimony provided in court highlighted the serious, systemic barriers to justice that prevail in Guatemala. Despite this, the BC court determined that the Guatemalan judiciary is capable of providing a fair and impartial trial. The judge emphasized that because all relevant evidence and witnesses are located outside BC, a trial in that province would be both inconvenient and expensive.

The plaintiffs appealed the decision and in 2017 the BC Court of Appeal granted their appeal, allowing the plaintiffs' case to proceed to trial. The Court of Appeal found that evidence of endemic corruption in Guatemala meant that the plaintiffs faced a real risk of injustice if they brought their civil suit in Guatemalan courts. This decision sets important precedence for cases where corporate defendants seek to move proceedings to corrupt foreign legal systems.

In 2017 the Supreme Court of Canada denied Tahoe's application for leave to appeal. The case will proceed to trial.

In addition to the civil case in Canada, criminal charges were filed in Guatemala against Tahoe's former security manager. However, he subsequently fled to Peru and it is uncertain whether he will be extradited to Guatemala.

For more information:
www.ccij.ca/cases/tahoe

ARAYA v. NEVSUN RESOURCES LTD.

In 2014, three Eritreans launched an action in the British Columbia Supreme Court against Canadian mining company Nevsun Resources Limited. The plaintiffs claim that Nevsun expressly or implicitly approved the widespread use of forced labour by its local contractor, Segen Construction Company, at the Bisha mine in Eritrea. Eritrea is a single-party state with a notoriously repressive government. The Bisha mine is a joint venture between the government and Nevsun's Eritrean subsidiary, Bisha Mining S.C. The company is the majority owner. Segen is wholly owned by the Eritrean government.

The plaintiffs allege that they endured appalling working and living conditions, and were subjected to severe punishment for perceived disobedience. They are suing Nevsun, a company incorporated in BC, for **conversion**, battery, unlawful confinement, negligence, conspiracy and the negligent infliction of mental distress.

The lawsuit also asserts claims based on international law, relying on provisions against forced labour, torture, slavery, cruel, inhuman or degrading treatment and crimes against humanity.

Nevsun seeks to have the case dismissed on several grounds including ***forum non conveniens***. The company also relies on the 'act of state' doctrine, which prohibits Canadian courts from ruling on the acts of foreign states. The plaintiffs claim that they were conscripted by the Eritrean government and forced to work at the Bisha mine. Nevsun argues that in order to make a determination about its behaviour, a Canadian court must first rule on the legality of the Eritrean government's conduct, which the act of state doctrine prohibits. Nevsun further argues that the plaintiffs' claims in international law must also fail as those provisions govern states, not companies.

In October 2016, Nevsun's motion to dismiss the case was denied on all grounds by the Supreme Court of British Columbia. This lower court decision was upheld on appeal in November 2017, marking the first time a Canadian appeal court has recognized that a corporation can be sued for alleged violations of international human rights law.

In January 2018, Nevsun applied for leave to appeal before the Supreme Court of Canada.

Over 50 additional plaintiffs have joined the lawsuit since it was filed in 2014.

For more information:
http://www.ccij.ca/cases/nevsun/
http://www.siskinds.com/nevsun-resources/

YAIGUAJE v. CHEVRON CORPORATION

In addition to the cases brought by foreign plaintiffs against Canadian companies in Canadian courts, there is an additional case outstanding that involves a foreign multinational company's overseas activities.

In 1993, a class action lawsuit was filed in a federal court in New York on behalf of 30,000 indigenous and settler residents of the Amazon region of Ecuador known as the Oriente. The lawsuit was filed against Texaco, a US oil company whose head office was located in New York. The plaintiffs alleged that they suffered harm, including property damage and adverse health and environmental impacts, as a result of Texaco's intentional and reckless mismanagement of crude oil and toxic waste in the Oriente. In 2002, the US court dismissed the case, *Aguinda v. Texaco Inc.,* on the grounds that Ecuador was a more appropriate forum.

In 2003, the *Aguinda* plaintiffs filed a lawsuit in Ecuador against Chevron Corporation. Chevron, a US oil company whose head office is in California, acquired Texaco in 2001. In 2011, the Ecuadorian court found Chevron liable for over US$19 billion in **damages**. Two years later, the Ecuadorian National Court of Justice upheld the decision, reducing the award to US$9.51 billion.

At the time of judgment, Chevron held no assets in Ecuador, making it impossible for the plaintiffs to recoup the damages award they had been granted in that country. Consequently, the plaintiffs filed suit to enforce the Ecuadorian judgment in a number of jurisdictions where the company and/or its subsidiaries did hold assets. In 2017, enforcement actions were dismissed in Argentina and Brazil for lack of jurisdiction. In 2014 a U.S. lower court ruled that the Ecuadorian judgment was obtained through fraud and could not be enforced in that jurisdiction. The court determined that the plaintiffs relied on fabricated evidence in the Ecuadorian proceedings. A U.S. appeals court upheld the decision in 2016 and the following year the U.S. Supreme Court declined to consider the matter.

In 2012, the plaintiffs brought suit in Ontario against Chevron Corporation and its Canadian subsidiary, Chevron Canada. Chevron and Chevron Canada sought to have the Ontario claim dismissed, arguing that the court lacked jurisdiction to hear the case. In 2013, an Ontario Superior Court judge determined that the court had jurisdiction, but chose to suspend the action. The judge found that the plaintiffs had no prospect of recovering assets in the province. He emphasized that Chevron Corporation lacked assets in Ontario. Moreover, the judge found that the plaintiffs would be unsuccessful in their attempt to pierce the corporate veil in order to obtain Chevron Canada's assets. In other words, the plaintiffs would be barred from enforcing a

damages award that was made against a parent company (Chevron Corporation) by claiming the assets of its subsidiary (Chevron Canada).

Both parties appealed the decision. The Ontario Court of Appeal upheld the lower court judgment regarding jurisdiction but reversed the court's decision to suspend the action. Chevron and Chevron Canada were granted leave to appeal the decision before the Supreme Court of Canada. The Supreme Court dismissed the appeal in a unanimous decision issued in September 2015, sending the case back to the Ontario Superior Court.

In January 2017, the Ontario Superior Court dismissed the case against Chevron Canada. The judge held that there was no applicable law that would allow the plaintiffs to pierce the corporate veil in order to use Chevron Canada's assets to pay the debts of its parent company, Chevron Corporation. The judge also ruled that certain legal defences could no longer be used by Chevron Corporation, against whom enforcement proceedings could proceed to trial.

The plaintiffs appealed the decision regarding Chevron Canada to the Ontario Court of Appeal. Chevron Corporation obtained a court order requiring that the plaintiffs provide a $943,000 deposit to cover the company's legal costs should the plaintiffs lose the appeal. In October 2017 that order was set aside by the Ontario Court of Appeal, which found that it ran counter to the interests of justice.

In May 2018, the Ontario Court of Appeal found in favour of Chevron Canada. The court upheld the legal principle of corporate separateness, confirming that a corporation's assets cannot be accessed to pay the debts of its corporate affiliates.

For more information:
http://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=35682
http://www.chevrontoxico.com
https://www.earthrights.org/publication/amicus-briefs-chevron-ecuador-litigation
http://www.ccij.ca/cases/chevron-2/

GLOSSARY

Battery — A criminal offence and a tort. The act of intentionally and voluntarily bringing about unwanted harmful or offensive physical contact with a person or an object in use by that person.

Cause of action — (1) The legal basis for a suit (e.g. negligence, battery, false imprisonment, etc.).

(2) The set of facts that entitles a party to seek judicial relief.

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.

Class action — A legal action involving a group of people who have a similar interest regarding an alleged wrong. Through a class action, multiple claims are resolved in a single court proceeding.

Common law — A legal system that is derived from medieval English courts. In common law systems, precedence is the primary source of private law. Precedence is the body of prior decisions made by judges on cases with the same or similar subject matter.

Conversion — A kind of tort. An act through which a party is deprived of his or her personal property in the absence of consent.

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.

Damages

Compensation for injury. In civil litigation, a person who suffers a tortious injury is entitled to receive damages from the party that is responsible.

Duty of care

An element of the tort of negligence. A legal obligation to avoid causing unreasonable loss or injury to another party or their property.

Forum non conveniens

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.

Host state

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.

Jurisdiction	In the context of the judiciary, the legal authority of a court to adjudicate a matter.
Liability	The legal obligation to answer for one's acts or omissions and to repair any loss or harm that may have been caused.
Litigation	Legal proceedings related to a civil lawsuit.
Negligence	A kind of tort. A breach of one's obligation to avoid acts or omissions that cause unreasonable loss or injury to another party or their property. Negligence requires that a duty of care be owed by one party to another, that the applicable standard of care be breached, that the party towards whom the duty is owed suffer loss or harm, and that the negligent act or omission cause the loss or harm.
Parent company	A company that owns another company. The latter is often called a subsidiary.
Subsidiary	A company that is owned by another company. The latter is usually called the parent company.
Tort	A body of private law that governs when a party will be held responsible for causing harm to another party. Examples of torts include negligence, assault, and false imprisonment.
Transnational	Transcending or operating across national borders.
Vicarious liability	A legal doctrine that imposes liability on a party for the negligent acts or omissions of another party. Vicarious liability requires that the parties be linked through a particular legal relationship, such as that between a parent and child or an employer and employee.