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# IN-HOUSE COUNSEL

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# Corporate responsibility abroad

Will corporations accused of overseas **human rights violations** be taken to court in Canada?

# CSR ABROAD

## Hot debate surrounds a push to legislate human rights standards for Canadian companies operating abroad

By Cristin Schmitz

**JUSTICE** Ian Binnie set the cat among the pigeons last summer when he gave a warmly received speech to several dozen human rights and international law lawyers gathered at the Canadian Bar Association's annual conference in Quebec City.

It is rare for any judge, let alone the Supreme Court of Canada's most senior member after the chief justice, to call for the passage of a new law.

It is also uncommon for a judge to publicly wade into a debate as politically charged as allegations that some Canadian companies are abetting human rights abuses carried out by the foreign governments of countries where they do business.

Yet wearing his hat as a commissioner of the International Commission of Jurists (ICJ), Justice Binnie urged Canadian legislators to close the "governance gap" perceived by the Geneva-based NGO, which advocates for legal protections for human rights around the world.

The ex-Bay Street barrister suggested Canada should enact new legislation, possibly at the provincial level, that would make it easier for foreign



PHOTOGRAPH BY ADRIAN WYLD/CP PHOTO


**A protestor stands in front of a papier-mâché sun during a protest outside the Calgary offices of Talisman Energy Inc. in 2000. The protestors were demonstrating against the World Petroleum Congress and Talisman's alleged involvement in a genocide by the Sudanese government. Talisman has always strongly denied the allegations which were thrown out by a U.S. federal judge in 2006.**

plaintiffs to civilly sue corporations in domestic superior courts for alleged corporate complicity in human rights abuses committed abroad by foreign governments.

He argued this would give foreigners with bona fide claims of abuse access to a forum to legally determine and remedy their complaints, while also giving defendant companies who are falsely vilified the opportunity to effectively clear their names.

Binnie cited the example of Talisman Energy Inc., which was praised recently for its ethical business practices by anti-corruption watchdog Transparency International. Talisman used to be the poster child for Canadian corporate complicity before it divested its Sudanese oil investments in 2003. In 2006, a New York federal judge granted the Calgary-based petroleum company summary judgment and threw out for lack of admissible evidence a lawsuit brought by a church group under the U.S. *Alien Tort Statute* (ATS). The plaintiffs, who have appealed, accuse Talisman of collaborating in a genocide by the Sudanese government. Talisman has always strongly denied the allegations.

"Talisman Energy was criticized very widely in the press for activities in the Sudan," Justice Binnie noted. "So my point is not to suggest that these allegations against...[Canadian] companies are in fact well-founded, but only that it points to the need to have some forum in which this kind of complaint can be ventilated and resolved, and not [be] simply left as a dissatisfied local population squared off against a foreign company with no means of introducing a legal structure to look after the fallout."

So far there has been little domestic litigation, and no specific Canadian laws enacted, to civilly enforce respect for human rights norms abroad by Canadian companies with overseas operations.

But Ottawa lawyer Howard Mann, a sole practitioner, sees trouble ahead if the government fails to enforce Canada's international treaty and convention obligations to protect human and labour rights.

"It's entirely possible that Canada actually exposes itself to national legal liability for the conduct of some of the companies abroad if we don't find other ways to ensure that their conduct is held to a higher standard," he warns.

The international law expert was one of eight jurists on the ICJ's expert legal panel on corporate complicity in international crimes. The panel issued a three-volume report last fall detailing when companies risk liability under civil and criminal law for participating with states and other actors in gross human rights abuses.

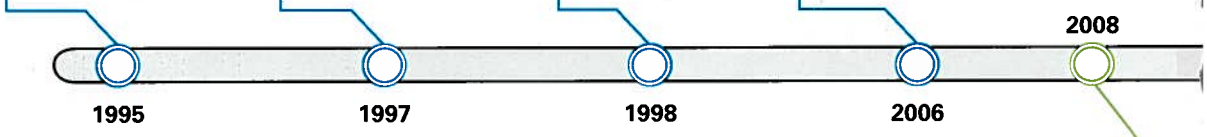
"The report's [aim] is to try essentially to put companies on notice that the world is changing, and that the doctrines and principles that shield companies from liability for participating in human rights-impacting activities, whether it [is] the denial of civil rights or torture or disappearances and so on... is no longer going to be accepted," Mann explains. "The legal tools for holding companies liable are expanding and growing rapidly [and] the historic shields, like forum non conveniens, are falling away."

Murray Klippenstein, of Klippensteins in Toronto, says the forum non conveniens rule remains a substantial hurdle for plaintiffs who wish to sue companies here for foreign human rights abuses. The common-law rule allows Canadian courts to decline

## Lawsuits in Canada for alleged human rights abuses abroad

There have been only a few lawsuits launched in Canadian courts alleging complicity by Canadian companies in human rights abuses in foreign countries, including:

- Cambior Inc.
- Green Park International Inc. and Green Mount International Inc.
- Copper Mesa Mining Corp. and the TSX




**The tailings** dam at the Omai Mine in Guyana failed in 1995, spilling mineral waste containing cyanide, heavy metals and other pollutants into a river.

**An advocacy** group filed a class action lawsuit against Cambior in 1997 seeking damages on behalf of about 23,000 people who lived near the river.

**In 1998,** the Quebec Superior Court ruled it had jurisdiction, but dismissed the case on the basis of forum non conveniens.

**In 2006,** a court in Guyana dismissed a subsequent action and ordered the plaintiffs to pay the defendants' legal costs.

**Two Quebec**-registered companies said to be involved in constructing and selling housing in the West Bank were sued for alleged war crimes in 2008 by the Village Council of the Palestinian town of Bil'in. The plaintiffs contend the defendants willfully or negligently participated in violating international humanitarian law, and domestic Canadian law, in respect of the expansion of Jewish settlements on Palestinian land. The plaintiffs want construction halted, as well as punitive damages. The companies have moved to strike the case on several grounds, including forum non conveniens.

to hear a case if there is a foreign forum that is better suited to deal with the litigation.

The Toronto litigator recently filed one of the few domestic civil actions ever against a Canadian company for complicity in alleged torts abroad: a multi-million-dollar damages suit in Ontario Superior Court against Vancouver-based Copper Mesa Mining Corp. and two of its directors in relation to alleged human rights violations in Ecuador. He also filed $1-billion-plus companion claims against the Toronto Stock Exchange for alleged negligence in listing Copper Mesa. The defendants vigorously deny all the allegations.

The Ecuadorian plaintiffs try to avoid forum non conveniens issues by alleging that the damages sustained in their homeland resulted from tortious decisions and actions taken in Ontario. "We hope to accomplish liability in this particular case on the part of the company and its directors, but at the same time the plaintiffs hope to have a small voice in contributing to legislative reform," Klippenstein says.

However, neither the federal nor provincial governments have thus far evinced any intention to heed various domestic and international pleas for the creation of a Canadian version of the ATS. That controversial U.S. law, first adopted in 1789, has led American courts to assume jurisdiction over dozens of lawsuits brought by foreign plaintiffs against corporate defendants, including Talisman, for alleged human rights violations outside the U.S. To date, most of the suits have been unsuccessful.

Calgary lawyer Jonathan Horlick, a sole practitioner who manages Talisman's defense of the Sudanese ATS claims, says Canada doesn't need an ATS. The

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**A statement** of claim was filed in Ontario Superior Court last March in connection with alleged violent attacks by the company's security forces on protesters against a proposed copper mine in northwestern Ecuador. The defendants vigorously deny all the allegations.

The suit contends that Copper Mesa is vicariously liable for alleged decisions made in Ontario by its board of directors, which resulted in the alleged assaults. The plaintiffs also claim the Toronto Stock Exchange negligently listed the company in 2005, despite knowing of a serious risk of violence to the plaintiffs from company activities that were financed by the public offering.

American statute gives the U.S. federal courts jurisdiction over certain serious torts committed against foreigners, but Canadian superior courts already have this jurisdiction, he explains.

"The superior court may, under its inherent powers, exercise subject-matter jurisdiction over the alleged human rights violation, whether it is pleaded as a common-law tort (e.g. assault, battery, intentional infliction of mental suffering, negligence, conspiracy) or a violation of customary international law (e.g. peremptory norms which constitute offences of universal concern such as genocide, torture, slavery, crimes against humanity, extra-judicial killing) in each case without regard to where the tort occurred," he says.

Yet some human rights experts complain that procedural hurdles still make it much too difficult to vindicate foreign plaintiffs' human rights in Canadian courts. Firms like Talisman have been pursued instead under the ATS, which permits the U.S. federal courts to adjudicate foreign plaintiffs' claims of violations of the law of nations, such as the prohibitions against genocide, torture or war crimes.

"The state of Canadian law with respect to corporate social responsibility, and extraterritorial corporate social responsibility in particular, is generally recognized to be insufficient," contends the Oxford Pro Bono Publico. The public law legal clinic run by Oxford University law professors and post-graduate law students studied in-depth the obstacles facing human rights plaintiffs in 13 countries.

"There is a dearth of specialized legislation that both adjudicates corporate human rights abuse abroad and provides victims specific causes of actions against transnational corporations for their violation of such rights," they write in their submission last November to John Ruggie, the UN Secretary General's Special Representative on Business and Human Rights.

This criticism echoes a 2005 complaint by the House of Commons Standing Committee on Foreign Affairs and International Trade that "Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards."

**Eric Miller, vice-president and general counsel of Nexen Inc., worries that legislating CSR rules could unduly burden companies like his which already fully respect human rights abroad.**

The Commons Committee recommended that the federal government "establish clear legal norms" to ensure that Canadian companies and residents "are held accountable" for environmental and/or human rights violations by Canadian mining companies. The Commons Committee focused on the Canadian extractive sector because junior mining companies have attracted most of the complaints of foreign human rights abuses.

Similarly in 2007, a series of federal government-organized roundtable discussions amongst mining industry and business associations, activists, aboriginals and academics culminated in formal recommendations. The roundtables urged Canada to create corporate social responsibility standards and reporting obligations for domestic companies, as well as an ombudsman's office to investigate complaints and evaluate compliance and a provision for withholding government services from companies in cases of serious non-compliance.

Last March, the Conservative government declined to implement those recommendations. Instead, the government announced it will create a new Office of the Extractive Sector Corporate Social Responsibility (CSR) "Counselor" whose role it will be to "advise" and "encourage" Canadian companies to implement human rights best practices and to submit an annual report to Parliament. The government also pledged to endorse and promote "widely-recognized" international CSR performance guidelines and to assist foreign countries where Canadian companies do business with "governance capacity-building initiatives."

At the same time the government urged legislators to vote against an "unnecessary" and "counterproductive" private member's bill that would punish companies who are not CSR-compliant abroad. Bill C-300 narrowly survived second reading debate last April, with the backing of MPs from the three opposition parties. But it faced an uncertain ride through the minority Parliament with business groups such as the Canadian Chamber of Commerce condemning it as ill-conceived and unduly onerous, particularly in the present poor economic climate.

Among other things, Bill C-300 would eliminate Export Development Corporation financing and loan guarantees for mining and oil and gas companies who fail to comply abroad with proposed "corporate accountability" guidelines that are consistent with international environmental best practices and Canada's commitments to international human rights standards.

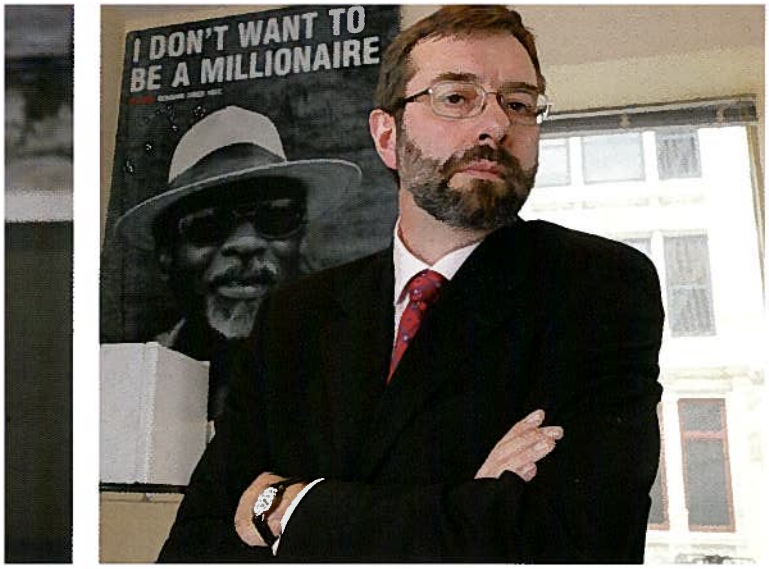
The bill's sponsor, Liberal MP John McKay, says the purely voluntary approach to CSR abroad has not worked.

"We talk a good game about corporate social responsibility," he observes. "And yet we have persistent reports, and a rather disturbing pattern, of some Canadian companies operating in a very un-Canadian fashion."

His bill would require the federal ministers of foreign affairs and International Trade to investigate non-frivolous human rights and environmental complaints made against mining and



PHOTOGRAPH BY PAUL LAWRENCE




**Toronto litigator Murray Klippenstein wants legal reforms to make it easier to sue Canadian companies here for alleged involvement in foreign human rights abuses.**

oil and gas companies and publicly report the results within eight months in the Canada Gazette. Like Justice Binnie, McKay believes responsible companies would benefit if CSR complaints were aired and determined in a credible forum. "To my mind, the corporations should be jumping all over this opportunity to effectively take themselves out of trial by media and enter into a process where there is a way better chance of them having their reputations kept intact," McKay argues.

University of Ottawa law professor Errol Mendes, who advises multinational companies on human rights, says Canadian CSR concerns in the globalized economy go beyond the extractive sector to industries such as international banking and pharmaceuticals.

A contributor to the ICJ's corporate complicity report, Mendes counsels companies to avoid engaging in conduct abroad that they know would get them into trouble if it occurred in Canada.

"The vast majority of Canadian companies want to know how to avoid the problems in this area," he emphasizes. "We need to bridge the gap between the activist NGOs who basically want blood, and the companies… who basically realize it's the right thing to do."

CSR abroad offers business "a competitive advantage," notes Eric Miller, vice-president and general counsel for Nexen Inc. Over the years, the Calgary oil sands giant has established a positive human rights track record in Yemen, Colombia and other arduous business environments.

"That means for us that communities welcome us when we show up because they know they are going to be treated with a very simple ethic which is 'treat others the way you want to be treated'," Miller explains.

Speaking personally, Miller worries that initiatives like Bill C-300 aim at regulating conduct engaged in by the relatively few, smaller companies who get into trouble abroad, yet they can wind up overburdening large firms, which already fully respect human rights. "The legislation is put in for one crowd, and it's actually used against another crowd because you are not going to get blood from a stone when the little guy has no capital resources," he observes. END

# Avoiding the zone of {LEGAL RISK}

When trying to identify company conduct that may trigger civil legal liability for complicity in human rights abuses abroad, in-house counsel should consider:

- Was harm inflicted to an interest of the victim that is protected by law?
- Did the company's conduct contribute to the infliction of harm?
- Did the company know, or would a prudent company in the same circumstances have known, that its conduct posed a risk of harm to the victim?
- Considering this risk, did the company take the precautionary measures a prudent company would have taken in order to prevent the risk from materializing?

SOURCE: *Corporate Complicity & Legal Liability: Civil Remedies*, Vol. 3, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Sept. 2008