DEBUNKING THE MTHYS ON THE FEASIBILITY OF CSR REGULATORY REFORM IN CANADA

PREPARED FOR THE NATIONAL ROUNDTABLES ON CORPORATE SOCIAL RESPONSIBILITY AND THE EXTRACTIVE SECTOR IN DEVELOPMENT COUNTRIES

Introduction and Acknowledgements

This memorandum on jurisdictional issues in the regulation of Canadian extractive industry companies was commissioned by the Canadian Network on Corporate Accountability (CNCA). Its purpose is to support informed participation in the "2006 National Roundtables on Corporate Social Responsibility and the Extractive Sector in Developing Countries". The Roundtables will examine measures that could be taken to position Canadian extractive sector companies operating in developing countries to meet or exceed leading international CSR standards and best practices. We hope that civil society groups, as well as businesses and government, will find this paper useful in their discussions.

This paper addresses several key jurisdictional issues surrounding the regulation of Canadian extractive industries in their overseas activities. Broadly speaking, it focuses on two concerns: international legal issues relating to extraterritorial jurisdiction (i.e., laws that prescribe conduct outside of Canada); and, federalism issues (i.e. the division of powers between provincial and federal level of government).

This paper was prepared by Craig Forcese, Assistant Professor, Faculty of Law, University of Ottawa. The CNCA wishes to thank the Human Security Policy Division of Foreign Affairs and International Trade for providing the funding to make this document possible.

Ottawa, September 2006

Executive Summary

Introduction And Part I: Overview Of The SCFAIT Recommendations And The GOC's Response

The June 2005 House of Commons Standing Committee on Foreign Affairs and International Trade (SCFAIT) report includes recommendations that the Government of Canada (GOC) condition access to benefits on the overseas human rights and environmental performance of Canadian companies and that it establish clear legal standards to hold companies to account for infractions of human rights and environmental standards.

Possible responses to these recommendations, and the related issue of requiring companies to disclose more information on environmental and human rights performance, raise potential jurisdictional issues: the question of extraterritorial jurisdiction (i.e., laws that prescribe conduct outside of Canada); and, federalism issues (i.e., the division of powers between provincial and federal levels of government).

Part II: Jurisdictional Issues Associated With SCFAIT Recommendations and GOC Response

A. Extraterritorial Jurisdiction

The GOC's resistance to extraterritorial regulation is often predicated on political rather than strictly legal concerns; that is, the GOC has a policy of generally opposing extraterritorial regulation. However, public international law does permit extraterritorial regulation of companies incorporated or headquartered in Canada. It permits extraterritorial "prescription jurisdiction" – a state's legal competence to prescribe under its own laws conduct that takes place outside of its territory – in five circumstances. The two most important for this memorandum are: the universal and the nationality principles.

Pursuant to the "universal principle" of state jurisdiction, some international wrongs are so offensive that every state should be entitled to criminalize these acts, without regard to where and by whom they are committed. These include crimes against humanity, war crimes and genocide.

Under the "nationality" principle of jurisdiction, states may regulate the conduct of their own nationals overseas. In public international law, a "Canadian corporation" is, any company incorporated under federal or provincial law (or, alternatively, any company with a Canadian head office).

Despite clear public international legal authorization to do so, Canada has been quite conservative in extending its statute law beyond its border. Generally speaking, Canadian statutory law's reach is confined to the territorial extent of Canada. At the same

time, there are exceptions to the principle of territoriality. The several extraterritorial provisions in Canadian criminal law tend to implement Canada's international obligations under, for instance, international criminal law, torture and terrorism treaties. However, not every extraterritorial crime stems from an international treaty to which Canada is a party. When there is sufficient political appetite, Canada will legislate extraterritorially on the authority of the nationality principle, even on a unilateral (rather than treaty-motivated) basis.

Prescriptive jurisdiction is a concept applied typically to efforts by a state to criminalize conduct outside of its territory. While the matter is far from clear, international law may be even more permissive of civil jurisdiction (*i.e.*, the jurisdiction of courts to hear disputes concerning civil liability). Civil lawsuits predicated on one of the six principles of prescriptive jurisdiction would satisfy public international law requirements. Indeed, a cause of action not grounded in one of these sources of prescriptive jurisdiction might also be permissible.

Canadian common law doctrines in the area of civil obligations (such as tort) potentially have even more expansive extraterritorial reach than does typical Canada statute law. However, there are at least two requirements to be met for a Canadian court to have civil jurisdiction over a tort. Canadian courts will refuse to hear a case unless there is some real and substantial link between the wrong and Canada. This requirement may be satisfied if the defendant is located in Canada, and thus amenable to the jurisdiction of Canadian courts. If they are not, then courts may insist on some other link to Canada – such as evidence that some of the harm suffered took place in Canada.

Even if the real and substantial connection requirement is satisfied, Canadian courts may choose to dismiss the case on the basis of *forum non conveniens*; that is, it may conclude that while, strictly speaking, it has jurisdiction, a foreign court would be the more suitable place in which to hear the case.

The law that will be applied by a Canadian court that assumes jurisdiction in a tort action will be the substantive law of the place the tort took place. In rare cases, a court may instead use Canadian law where to apply the foreign law would work an injustice. The exact circumstances in which a court may do this are not well-defined.

B. Canadian Constitutional "Federalism" Issues

The "division of powers" – that is, the partitioning of legislative jurisdiction – between the federal and provincial governments is a matter governed by the *Constitution Act, 1867*. The 1867 Act includes a list of powers to be exercised by the provincial legislatures and a list of powers to be exercised at the federal level.

The courts have held that the federal government possesses a residual power to incorporate companies with more than provincial objects. This residual federal power includes much more than authority to incorporate, but also the power to safeguard the interests of shareholders. The Supreme Court has regularly validated provisions in

federal companies law that duplicate and overlap with provincial securities law, such as the regulation of insider trading. It has also repeatedly suggested, without deciding, that the federal Parliament has the power to enact a general securities regime.

Federal jurisdiction includes a power to allow recovery for damages or losses incurred by reason of prohibited conduct. Federal legislation often imposes civil liability on persons for the violation of the regulatory or criminal law scheme created by the statute. Federal civil liability that is rationally and functionally connected to the legitimate federal law is constitutionally permissible.

Federal jurisdiction includes the power to regulate the international actions of Canadian companies. The federal power of trade and commerce includes federal jurisdiction over international trade. Further, the federal level of government has assumed (and, indeed, virtually monopolized) functions in the area of international affairs. There is, therefore, no federalism impediment to regulation of overseas practices of Canadian companies. This is most acutely the case where that regulation takes the form of new criminal offences, a federal prerogative.

Part III: Application Of Jurisdictional Principles To Issues Raised By the SCFAIT Report And The GOC Response

A. There Is No Impediment On Human Rights And Environmental Conditions Being Applied To Canadian Extractive Industry Companies In Order to Receive Financial Or Other Benefits From the GOC Or Its Agencies

As a federalism issue, there is no impediment on the federal government conditioning access to the benefits it chooses to provide in the proper exercise of its spending, international trade or international affairs powers. Nor is there an issue of extraterritoriality. The public international law rules on extraterritorial prescriptive jurisdiction focus on state law-making. They limit, in other words, the legislative competence of states to pass laws enforceable outside of their territories. Extraterritorial regulation is not, therefore, the same thing as contractual conditions imposed as a pre-requisite to the receipt of some benefit.

In any event, human rights and environmental impact assessments undertaken before the commencement of an overseas project occurs prior in time to the extraterritorial behaviour. The foreign project is prospective, rather than actual. In these circumstances, it is nonsensical to call the human rights or environmental assessment "extraterritorial".

Even if contract conditionality was extraterritorial regulation (which it is not), this regulation would be permissible if directed at Canadian companies; that is, companies incorporated (or with a head office) in Canada. As noted above, the nationality principle of public international law permits this assertion of extraterritorial jurisdiction over a state's own nationals.

B. There Is No Impediment To The GOC Imposing Disclosure Obligations On Canadian Companies Operating Internationally

Disclosure by a company domiciled in Canada would be undertaken in Canada and is therefore not extraterritorial, even though it may include information on foreign operations. Mandating disclosure rules would also be a proper exercise of federal jurisdiction. Under Canada's constitutional federalism rules, the federal level is competent to regulate not only incorporation of companies with more than provincial objects, but also to introduce measures concerning the trading in the securities of these companies, and almost certainly a general securities law regime writ large. Therefore, Parliament may legislate a comprehensive disclosure regime for federally-incorporated companies or as part of a general securities law system.

C. The Enactment Of A Canadian International Crimes Compensation Act Would Be A Permissible And Desirable Means Of Holding Canadian Companies Accountable For Serious Violation Of International Law

An "International Crimes Compensation Act" (ICCA) would add credibility to a Canadian foreign policy that regularly invokes the centrality of human rights. Creating a "made in Canada" remedy would also limit the prospect of Canadian companies being sued in United States federal court under the expansive (and unpredictable) U.S. *Alien Tort Claims Act*, a burgeoning practice. A robust Canadian civil liability law will make it easier for Canadian companies to obtain dismissal of U.S. lawsuits on the basis that Canada is the more appropriate forum.

A Canadian ICCA should meet several objectives:

- First, it should minimize the substantial uncertainty that exists in Canadian law about the source of law applied to lawsuits involving international wrongs, without replacing this uncertainty with the ATCA's generic recourse to customary international law.

- Second, it should be confined to those international wrongs that truly do give rise to individual (rather than strictly state) culpability or responsibility.

- Third, in creating domestic civil liability for such an internationally criminal act, the ICCA should not make that liability dependent on an actual criminal prosecution and conviction.

- Fourth, the ICCA should be structured to restrict the ability of persons otherwise subject to it to avoid completely its requirements by organizational restructuring (*e.g.*, a Canadian corporation creating a foreign subsidiary).

The ICCA must also be drafted to lie within the federal Parliament's competence. Parliament has jurisdiction to create civil liability, so long as this civil liability is sufficiently integrated into a valid federal legislative scheme. The preferred course of

action is to graft onto the existing *Crimes Against Humanity and War Crimes Act* (CAHWCA) a civil liability provision modeled on that existing in the federal *Competition Act*. Put another way, the proposed ICCA would constitute amendments closely integrating a civil liability provision into an existing, valid federal criminal law. With these objectives in mind, an ICCA amending the CAHWCA is proposed.

D. Direct Regulation Of Canadian Companies In Order To Meet Certain Other Standards Would Be Desirable And Is Permissible

There will be circumstances where more direct regulation is necessary, especially in the environmental area. In states with poor environmental regulations, or who lack the capacity to enforce adequate regulations, extraterritorial regulation by Canada would be desirable. Certain deleterious practices – emissions of toxic substances, for example – may be universally harmful by reason of biology.

There will also be circumstances where a company's presence in a foreign jurisdiction is so undesirable that it should be compelled to withdraw. Yet, Canada's key sanctions law, the *Special Economic Measures Act*, has been interpreted very narrowly. The Act should be amended to permit sanctions compelling the withdrawal of Canadian investments where these are acerbating a conflict or contributing to serious human rights abuses.

Extraterritorial regulation of this sort would lie within Canada's jurisdictional competence under the "nationality principle" of public international law if directed at Canadian nationals, including companies incorporated (or with a head office) in Canada. To avoid systematic circumvention of this law by incorporation of subsidiaries under the law of another state, the regulations should include a supplemental requirement that Canadian parent companies compel adherence to the applicable standards by their subsidiaries.

Carefully crafted, regulations of this sort would plausibly lie within the federal Parliament's constitutional competence as a matter of international trade (or affairs) or, depending on how they are constructed, criminal law.

MEMORANDUM:
JURISDICTIONAL ISSUES IN REGULATION
OF CANADIAN EXTRACTIVE INDUSTRY COMPANIES

Craig Forcese
Assistant Professor
Faculty of Law, University of Ottawa

Table of Contents

The following memorandum addresses several key jurisdictional issues surrounding the regulation of Canadian extractive industry companies in their overseas activities. Broadly speaking, it focuses on two concerns: international legal issues relating to extraterritorial jurisdiction (*i.e.*, laws that prescribe conduct outside of Canada); and, federalism issues (*i.e.*, the division of powers between provincial and federal levels of government).

The memorandum is divided into three primary sections. Part I provides an overview of several material issues raised by the House of Commons Standing Committee on Foreign Affairs and International Trade in its June 2005 report on the mining sector and by the Government of Canada response. Part II provides a summary of relevant principles of law concerning extraterritoriality and federalism. Part III then addresses the application of these principles to three issues: government and market-based incentives for companies to comply with human rights and environmental standards; civil liability for international wrongs; and, direct regulation of overseas conduct.

Part I: Overview Of The SCFAIT Recommendations And The GOC's Response

A. Conditioning Receipt Of Financing, Support Or Other Benefits On Adherence To Human Rights And Environmental Standards

In 2005, the House of Commons Standing Committee on Foreign Affairs and International Trade (SCFAIT) issued a unanimous report on Canadian mining companies and their overseas human rights and environmental practices. In recommendation 2 of its June 2005 report on mining, human rights and the environment, SCFAIT called on the government to:

> *Put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards. Measures in this area must include making Canadian government support – such as export and project financing and services offered by Canadian missions abroad – conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanisms of human rights impact assessments.*[1]

[1] SCFAIT, *Fourteenth Report*, 38th Parl., 1st Sess. (June 22, 2005) available at http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=8979&Lang=1&SourceId=122762.

In its response, the Government of Canada (GOC) stated, in part:

> *The government agrees that more could be done to ensure that Canadian business has the necessary knowledge, support and incentives to achieve positive financial, social and environmental results in their operations abroad. However, given that the international community is still in the early stages of defining and measuring CSR, particularly with respect to human rights, further developments in this area are necessary before the government could consider committing to the full implementation of this recommendation.*[2]

In the past, the GOC and its agencies (such as Export Development Canada) have also raised the specter of "extraterritorial regulation" to limit calls for robust conditions on government benefits.

In its response, the GOC also underscored the important of private sector, market mechanisms in inducing appropriate company human rights and environmental behaviour:

> *investors, consumers and other stakeholders are beginning to recognize the financial risks and opportunities of environmental and social issues, and are paying close attention to how companies respond to these emerging challenges. This is generating an increased demand for transparency and disclosure of company information on their environmental and social performance. Such market-based demands reward corporate leadership, while encouraging business to meet market expectations. The Government of Canada has played a role in promoting transparency and disclosure by Canadian companies through such initiatives as the Online Sustainability Reporting Toolkit. The Government of Canada will continue to strengthen its approach to increasing corporate transparency and reporting on social and environmental performance through support for and participation in international reporting initiatives (e.g. the Global Reporting Initiative), monitoring the approaches adopted in other jurisdictions, as well as working with other stakeholders to identify opportunities for the Government of Canada to enhance its role in this area.*

---

[2] GOC, *Government Response To The Fourteenth Report Of The Standing Committee On Foreign Affairs And International Trade* (October 17, 2005), available at http://www.parl.gc.ca/infocomdoc/38/1/parlbus/commbus/house/faae/govresp/gr2030362/faae_rpt14_gvtrsp-e.htm#Recommend4.

To date, however, the GOC has not made disclosure of human rights and environmental performance obligatory for Canadian companies.

B. Establishing Clear Legal Norms To Ensure That Canadian Companies Are Held To Account When There Is Evidence Of Human Rights And Environmental Violations

In recommendation 4 of its report, SCFAIT called on the government to: "Establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies". In its response, the Government of Canada (GOC) observed that

> *[t]he primary responsibility for the promotion and protection of human rights and the environment rests with states. States implement their international obligations relating to human rights and the environment through a variety of measures, including through the adoption of domestic legislation. … Canadian law does not generally provide for extraterritorial application. Extending the application of Canadian legislation abroad could raise several problems, including conflict with the sovereignty of foreign states; conflicts where states have legislation that differs from that of Canada; and difficulties with Canadian officials taking enforcement action in foreign states. Canada has objected to the extraterritorial application of other states' laws and jurisdiction to Canadians and Canadian businesses where there is no sufficient nexus to those states or where the action undermines Canadian legislative authority or Canadian policy in the area.*

This view echoes that expressed by the GOC in its efforts to have dismissed the lawsuit brought against Talisman Energy for its actions in Sudan, brought in the United States under the *Alien Tort Claims Act* (ATCA). (The ATCA is discussed in detail below.) The GOC has objected, in particular, to the lawsuit as an impermissible application of extraterritorial jurisdiction:

> *Canada is opposed, in principle, to broad assertions of extraterritorial jurisdiction over Canadian individuals and entities arising out of activities that take place entirely outside of the state asserting jurisdiction. In international law, the limitations on the extent to which any single nation can extend its own jurisdiction are generally recognized as flowing from the sovereignty and equality of nations. Territoriality is universally recognized in international law as a primary ground for asserting jurisdiction.*

> *International law has developed a number of additional grounds for asserting jurisdiction that are based on the need for a "substantial and genuine" connection to the nation asserting jurisdiction. In the Talisman case, there is no connection with the US either through the plaintiffs or the defendants or the location where the alleged actions took place.*[3]

In practice, the GOC's resistance to extraterritorial regulation is often predicated on political rather than strictly legal concerns. The GOC has a policy of generally opposing extraterritorial regulation (in large measure because of the application of US extraterritorial measures in Canada). The GOC often invokes "international comity" to justify this view. "International comity" is not, however, a principle of law. Instead, it is a form of diplomatic courtesy;[4] in this case, a practice in which states accord deference to the superior (although not necessarily exclusive) jurisdiction of a fellow state.

Part II: Jurisdictional Issues Associated With SCFAIT Recommendations and GOC Response

A. Extraterritorial Jurisdiction

1. Public international law does permit extraterritorial regulation of companies incorporated or headquartered in Canada

In fact, public international law is quite permissive of extraterritorial "prescription jurisdiction"; that is, a state's legal competence to prescribe under its own laws conduct that takes place outside of its territory. There are a total of five justifications, giving rise to extraterritorial prescription jurisdiction. Most evidently, under the "territoriality principle", a state may assert jurisdiction over an act that is sufficiently connected to its territory. Pursuant to the "universal principle" of state jurisdiction, some international wrongs are so offensive that every state should be entitled to criminalize these acts, without regard to where and by whom they are committed. These include crimes against humanity, war crimes and genocide.[5] Under the "nationality" principle of jurisdiction, states may regulate the conduct of their own nationals overseas. Alternatively, they may apply the "passive personality" principle: pass laws applicable where the victim of the overseas act has a nation's nationality. Finally, they may follow the "protective

---

[3] Letter of the Canadian Embassy to the United States to the U.S. State Department, filed by the latter in U.S. District Court (January 14, 2005) (on file with author).

[4] Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2003) at 2 ("The rules of international law must be distinguished from what is called international comity … which are implemented solely through courtesy and not regarded as legally binding").

[5] While the question of universal jurisdiction for these wrongs is not without controversy, the GOC has taken the view that they are offences of universal jurisdiction by, for instance, criminalizing them in the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c.24, and providing for Canadian jurisdiction when an accused is simply present in Canada, and nothing more.

principle": regulate certain overseas conduct so fundamental to a state's interests that they attract such regulation.[6]

The nationality principle is the most material to the question of extraterritorial regulation of Canadian companies. International law establishes rules for ascertaining the nationality of corporations:

> *According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration.*[7]

A "Canadian corporation" is, therefore, any company incorporated under federal or provincial law (or, alternatively, any company with a Canadian head office). In the form of the nationality principle, public international law permits Canada to prescribe the overseas conduct of any such company.

Prescriptive jurisdiction is a concept applied typically to efforts by a state to criminalize conduct outside of its territory. While the matter is far from clear, international law may be even more permissive of civil jurisdiction (*i.e.*, the jurisdiction of courts to hear disputes concerning civil liability). As one leading authority in international law puts it, "…it is fair to say that the exercise of civil jurisdiction has been claimed by states upon far wider grounds than has been the case in criminal matters, and the resultant reaction by other states much more muted. … In view of, for example, the rarity of diplomatic protests and the relative absence of state discussions, some writers have concluded that customary international law does not prescribe any particular regulations as regards the restriction of courts' jurisdiction in civil matters".[8] Given this even greater latitude for civil causes of action, it follows that civil lawsuits predicated on one of the six principles of prescriptive jurisdiction would satisfy public international law requirements and, indeed, that a cause of action not grounded in one of these sources of prescriptive jurisdiction might also be permissible.

---

[6] For an overview of these and other principles of "prescriptive" state jurisdiction, see John Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 297 *et seq*.

[7] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Decision on Jurisdiction (September 27, 2001) at ¶ 107. *See* also Ian Brownlie, *Principles of Public International Law* (1990) at 422 ("the nationality must be derived either from the fact of incorporation …or from various links including the centre of administration (*siege social*) and the national basis of ownership and control").

[8] Shaw, *supra* note 4, at 578-9.

2. Canada does regulate extraterritorially in several instances, including where there is no international treaty expressly authorizing it to do so

Despite clear public international legal authorization to do so, Canada has been quite conservative in extending its statute law beyond its border. Generally speaking, Canadian statutory law's reach is confined to the territorial extent of Canada.[9] Thus, Canadian criminal offences are almost exclusively territorial in scope. As Cory J. noted in *R. v. Finta*, "[t]he jurisdiction of Canadian courts is, in part, limited by the principle of territoriality. That is, Canadian courts, as a rule, may only prosecute those crimes which have been committed within Canadian territory."[10] In fact, sub-section 6(2) of the *Criminal Code*[11] reads "[s]ubject to this Act or any other Act of Parliament, no person shall be convicted … of an offence committed outside Canada." In *Finta*, Cory J. observed that this section "reflects the principle of sovereign integrity, which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal, within its own territory."[12] At the same time, "there are exceptions to the principle of territoriality."[13]

For instance, express statutory exceptions to the territorial limit on Canada's criminal law are found in section 7 of the *Criminal Code*. Section 7's provisions enable Canadian courts to convict people, among other things, for overseas acts of terrorism or torture in a number of circumstances, including where the accused is Canadian, the victim is Canadian or where, simply, the accused in present in Canada after the commission of the offence. Likewise, the *Crimes Against Humanity and War Crimes Act* gives Canadian courts criminal jurisdiction in relation to war crimes, crimes against humanity and genocide, even those that take place overseas. These extraterritorial provisions tend to implement Canada's international obligations under, for instance, international criminal law, torture and terrorism treaties.

However, not every extraterritorial crime stems from an international treaty to which Canada is a party. For example, the *Criminal Code* makes it an offence to engage in certain sexual crimes against children outside of Canada "if the person who commits the act or omission is a Canadian citizen or a permanent resident".[14] At the time this provision was introduced, there was no international treaty requiring (or anticipating) this extraterritorial assertion of Canadian criminal law.[15] Instead, this offence was a clear

---

9 Indeed, there is a common law presumption against extraterritoriality. See Sullivan and Dreidger, Construction of Statutes, 4th edition at 592.

10 [1994] 1 S.C.R. 701 at 805-6.

11 R.S.C. 1985, C-46, as amended.

12 *Ibid*.

13 *Ibid*. One quasi-exception is an offence that takes place in part overseas, but is sufficiently connected to Canada to have a real and substantial connection there (*e.g.*, one of the elements of the offence takes place in Canada). See *R. v. Libman*, [1985] 2 S.C.R. 178.

14 *Criminal Code*, s-s. 7(4.1).

15 The bill amending the *Criminal Code* (Bill C-27) was introduced in 1996 and received royal assent in 1997. In 2002, the *Convention on the Rights of the Child* was supplemented with an *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*. Among other things, this treaty expressly permits extraterritorial jurisdiction over sex

manifestation of Canada's nationality jurisdiction (defined broadly to also include permanent residents). Put another way, when there is sufficient political appetite, Canada will legislate extraterritorially on the authority of the nationality principle, even on a unilateral (rather than treaty-motivated) basis.

3. Common Law Rules On Civil Liability Also Apply Extraterritorially

Canadian common law doctrines in the area of civil obligations (such as tort) potentially have even more expansive extraterritorial reach than does typical Canada statute law. However, there are at least two requirements to be met for a Canadian court to have civil jurisdiction over a tort. In the words of La Forest J., writing for a majority of the Supreme Court of Canada in *Tolofson v. Jensen*,

> *In Canada, a Court may exercise jurisdiction only if it has a "real and substantial connection" … with the subject of the litigation….This test has the effect of preventing a Court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of forum non-conveniens a Court may refuse to exercise jurisdiction where…there is a more convenient or appropriate forum elsewhere.*[16]

Put another way, a Canadian court will refuse to hear a case unless there is some real and substantial link between the wrong and Canada. This requirement may be satisfied if the defendant is located in Canada, and thus amenable to the jurisdiction of Canadian courts.[17] If they are not, then courts may insist on some other link to Canada – such as evidence that some of the harm suffered took place in Canada. Recently, the Ontario Court of Appeal suggested (but did not decide) in a case alleging overseas torture by Iran that it might be unfair to apply the real and substantial connection test where it

---

offences committed by a national overseas. Nevertheless, this international convention post-dates by five years the Canadian measure.

[16] [1994] 3 S.C.R. 1022 at 1049.

[17] In practice, the "real and substantial" link jurisprudence has developed to deal with circumstances in which a defendant is served *ex juris* – that is, the defendant is located outside of the jurisdiction in which the court sits. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1103-4, the Supreme Court of Canada seemed to regard circumstances in which the defendant was within the jurisdiction in which the court sat as different for the purposes of the real and substantial analysis. There, it indicated that no injustice would arise "in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement." This is the approach adopted by lower courts. See, *e.g.*, *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (On. C.A.) at para. 29 ("The real and substantial connection test applies where a court seeks to assume jurisdiction over defendants that have no presence in the jurisdiction. The real and substantial connection test serves to extend jurisdiction of the domestic courts over out-of-province defendants. It is not a pre-requisite for the assertion of jurisdiction over defendants, even out-of-province defendants, that they be present in the jurisdiction").

would mean the plaintiff was left with no where to sue (because, in that case, Iran had precluded that possibility).[18]

As *Tolofson* notes, even if the real and substantial connection requirement is satisfied, Canadian courts may choose to dismiss the case on the basis of *forum non conveniens*; that is, it may conclude that while, strictly speaking, it has jurisdiction, a foreign court would be the more suitable place in which to hear the case. In doing so, courts may point to a number of variables, including the fact that events constituting the wrong took place overseas, or that witnesses are located overseas, or that the language of most of the evidence is foreign.[19]

Tolofson also established that the law that will be applied by a Canadian court that assumes jurisdiction in a tort action will be the substantive law of the place the tort took place. In rare cases, a court may instead employ Canadian law where to apply the foreign law would work an injustice. The exact circumstances in which a court may do this are not well-defined, although one Ontario court has suggested that it might be unjust to apply laws "of a state run by a despot, but unacceptable in a democratic society".[20]

B. Canadian Constitutional "Federalism" Issues

The "division of powers" – that is, the partitioning of legislative jurisdiction – between the federal and provincial governments is a matter governed by the *Constitution Act, 1867*. The 1867 Act includes a list of powers to be exercised by the provincial legislatures and a list of powers to be exercised at the federal level. Discerning the precise meaning of the often antiquated language used in the 1867 Act has been a matter for litigation since Confederation. In essence, in considering the constitutionality of a given law, courts first characterize its "pith and substance"; that is, its dominant or most important characteristic.[21] If this dominant characteristic falls within the jurisdiction of the enacting legislature (whether provincial or federal), then there is no constitutional difficulty. If it does not, then the court will further inquire at to whether the provision is nevertheless valid because it is sufficiently integrated into a legitimate legislative scheme.[22]

---

[18] *Bouzari v. Iran* (2004), 71 O.R. (3d) 675 (On. C.A.) at paras. 36 *et seq*.

[19] See, *e.g.*, *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577(On C.A.) at para. 41 (listing the factors Canadian courts employ in the forum analysis as: the location of the majority of the parties; the location of key witnesses and evidence; contractual provisions that specify applicable law or accord jurisdiction; the avoidance of a multiplicity of proceedings; the applicable law and its weight in comparison to the factual questions to be decided; geographical factors suggesting the natural forum; whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court")

[20] *Davidson Tisdale Ltd. v. Pendrick* (1998), 116 O.A.C. 53 (Ont. Div. Ct.) at para. 26.

[21] See *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at para. 22.

[22] *Ibid* at para. 19.

For the purposes of this memorandum, the most important powers in the 1867 Act, and the level of government to which they are assigned are as follows:

Federal Powers (s. 91 of the 1867 Act)		Provincial Powers (s. 92 of the 1867 Act)	
	Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.	11.	The Incorporation of Companies with Provincial Objects.
2.	The Regulation of Trade and Commerce.	13.	Property and Civil Rights in the Province.
27.	The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.	16.	Generally all Matters of a merely local or private Nature in the Province.

1. The power to incorporate companies and to regulate corporate securities is shared between the federal and provincial levels

Sub-section 92(11) of the 1867 Act expressly permits the provinces to make laws governing "the incorporation of companies with provincial objects". However, the federal Parliament has also enacted a law – the *Canada Business Corporations Act*[23] – permitting the incorporation of companies under a federal process. This federal incorporation power arises necessarily from the constraint imposed by the 1867 Act on provincial incorporation – that it be restricted to companies with provincial objects. Very soon after Confederation, the courts held that the federal government possesses a residual power to incorporate companies with more than provincial objects.[24]

This residual federal power includes much more than authority to incorporate. In the Supreme Court of Canada's words:

> *The power of Parliament in relation to the incorporation of companies with other than provincial objects has not been narrowly defined. The authorities are clear that it goes well beyond mere incorporation. It extends to such matters as the maintenance of the company, the protection of creditors of the company and the safeguarding of the interests of the shareholders.*[25]

The Supreme Court has regularly validated provisions in federal companies laws that duplicate and overlap with provincial securities law, such as the regulation of insider

---

23 CBCA, R.S.C.1985, c. C-44

24 See *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 at 117, per Montague LJ ("it follows that the incorporation of companies for objects other than provincial falls within the general powers of the parliament of Canada"), cited with approval in *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161 at 175.

25 *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161 at 177.

trading.[26] It has also repeatedly suggested, without deciding, that the federal Parliament has the power to enact a general securities regime.[27] Under these circumstances, securities regulation has a strong "double aspect"; that is, is amenable to legitimate regulation by both the provincial and federal levels of government.

2. Federal jurisdiction includes the power to impose damages or losses incurred by reason of prohibited conduct

Federal legislation often imposes civil liability on persons for the violation of the regulatory or criminal law scheme created by the statute. While generally, civil liability is a matter reserved to the provinces by virtue of s-s. 92(13) of the 1867 Act, the Supreme Court has concluded that federal civil liability that is rationally and functionally connected to the legitimate federal law is constitutionally permissible.[28]

The leading case is *General Motors of Canada v. City National Leasing*.[29] At issue was the validity of a civil liability provision – s.31.1 – permitting recovery for damages and losses stemming from a violation of federal competition law. The Supreme Court concluded that the federal competition law was a legitimate exercise of federal power under s-s.91(2) of the 1867 Act, the federal trade and commerce power. Further, s.31.1 was sufficiently well integrated into this legitimate legislative scheme to be constitutional. In arriving at this holding, the Court noted:

> *As section 31.1 creates a civil right of action it is not difficult to conclude that the provision does, on its face, appear to encroach on provincial power to some extent. …This provincial power over civil rights is a significant power and one that is not lightly encroached upon. In assessing the seriousness of this encroachment, however, three facts must be taken into consideration. The first is that s. 31.1 is only a remedial provision; its purpose is to help enforce the substantive aspects of the Act, but it is not in itself a substantive part of the Act. By their nature, remedial provisions are typically less intrusive vis-à-vis*

---

[26] See discussion in *ibid*.

[27] See *ibid* at 173 ("I should not wish by anything said in this case to affect prejudicially the constitutional right of Parliament to enact a general scheme of securities legislation pursuant to its power to make laws in relation to interprovincial and export trade and commerce. This is of particular significance considering the interprovincial and indeed international character of the securities industry"); *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at para. 46 ("this Court has already upheld aspects of federal securities regulation, in another context, in *Multiple Access*, *supra* note 25, under the 'double aspect' theory. The Court's decision in the present appeal should not be taken in any way to question the holding of that case").

[28] See, *e.g.*, *ibid* at 182 (so holding with respect to the imposition of civil liability for insider traders under federal companies law); *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331 (permitting the federal Crown to sue a private party for the loss of services of a member of the military); *Jackson v. Jackson*, [1973] S.C.R. 205; *Zacks v. Zacks*, [1973] S.C.R. 891 (upholding the relief provisions of the *Divorce Act* in relation to alimony, maintenance or custody).

[29] [1989] 1 S.C.R. 641

> *provincial powers. The second important fact is the limited scope of the action. Section 31.1 does not create a general cause of action; its application is carefully limited by the provisions of the Act. The third relevant fact is that it is well-established that the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted.*[30]

The Supreme Court reaffirmed these views in 2005: "Not only has this Court sustained federally created civil causes of action in a number of cases, but the test developed by this Court ... makes clear that civil causes of action are *intra vires* [within the jurisdiction of] Parliament if sufficiently integrated into valid federal legislation."[31]

3. Federal jurisdiction includes the power to regulate the international actions of Canadian companies

It is axiomatic that the federal power of trade and commerce includes federal jurisdiction over international trade.[32] Further, while there is no express mention of a foreign affairs power in the 1867 Act, the federal level of government has assumed (and, indeed, virtually monopolized) functions in the area of international affairs. There is, therefore, no federalism impediment to regulation of overseas practices of Canadian companies. This is most acutely the case where that regulation takes the form of new criminal offences. Criminal law is a federal prerogative under s-s.91(27) of the 1867 Act. As noted in discussing extraterritoriality, Parliament has enacted several crimes with international reach, including crimes against humanity, war crimes and genocide.

Part III: Application Of Jurisdictional Principles To Issues Raised By the SCFAIT Report And The GOC Response

The sections that follow address the relevance of the general principles set out in Part II to several specific concerns connected to extractive industries and their overseas operations. These issues are: government and market-based incentives for companies to comply with human rights and environmental standards; civil liability for international wrongs; and, direct regulation of overseas conduct.

---

30 *Ibid* at 672-73.

31 *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65 at para. 27.

32 *Ibid* at para. 15 ("In *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, the Judicial Committee of the Privy Council distinguished two branches of federal power under s. 91(2): (1) the power over international and interprovincial trade and commerce, and (2) the power over general trade and commerce affecting Canada as a whole ('general trade and commerce')").

A. There Is No Impediment On Human Rights And Environmental Conditions Being Applied To Canadian Extractive Industry Companies In Order to Receive Financial Or Other Benefits From the GOC Or Its Agencies

As a federalism issue, there is no impediment on the federal government conditioning access to the benefits it chooses to provide in the proper exercise of its spending, international trade or international affairs powers.

1. Conditioning benefits on compliance with human rights and environmental rules is not extraterritorial regulation

Nor is there an issue of extraterritoriality. The public international law rules on extraterritorial prescriptive jurisdiction focus on state law-making. They limit, in other words, the legislative competence of states to pass laws enforceable outside of their territories. Extraterritorial regulation is not, therefore, the same thing as contractual conditions imposed as a pre-requisite to the receipt of some benefit. The Canadian government does not engage in extraterritorial regulation when it enters into a contract with a foreign supplier requiring, for instance, that the good purchased meet certain quality standards.

In exactly the same way, when the GOC and its agencies insist on adherence to certain standards by a Canadian company operating abroad as a contractual condition of receiving a good or service connected to that foreign operation, they act as a private contracting party in a private relationship with a firm. They do not act as a sovereign state exercising prescriptive jurisdiction within another nation's territory.

This remains true even if the effect of the contract condition is to influence how a Canadian company conducts its overseas operation. All contract conditions, by definition, are designed to affect behaviour of the contracting parties. If propensity to affect the overseas behaviour of an entity were the indicator of whether a measure was extraterritorial or not, much of what the Canadian government does would be extraterritorial (*e.g.*, taxation of worldwide income earned by Canadian individuals or companies obviously influences a taxpayer's overseas behaviour).

2. In any event, human rights and environmental impact assessments undertaken prior to the commencement of an overseas project occurs prior in time to the extraterritorial behaviour

Further, a Human Rights Impact Assessment (HRIA) or an Environmental Impact Assessment (EIA) required as a pre-condition on approval of a GOC funding, financing or other support precedes the actual overseas project. The foreign project is prospective, rather than actual. In these circumstances, it is nonsensical to call the HRIA or EIA "extraterritorial". Instead, performing these assessments has an overwhelmingly dominant Canadian territorial nexus: it is undertaken by a Canadian company in order to comply with requirements imposed by the government of Canada (within Canada and/or by Canadian officials) on the provision of Canadian benefits.

3. Even if conditioning benefits on compliance with human rights and environmental rules were extraterritorial regulation, it would be permissible under international law

Even if contract conditionality was extraterritorial regulation (which it is not), this regulation would be permissible if directed at Canadian companies; that is, companies incorporated (or with a head office) in Canada. As noted above, the nationality principle of public international law permits this assertion of extraterritorial jurisdiction over a state's own nationals. Likewise, the GOC would be free to impose a condition on a Canadian national that it ensure adherence to certain standards by its subsidiary. Since the Canadian national is the object of this regulation, it falls within the parameters of the nationality principle.

B. There Is No Impediment To The GOC Imposing Disclosure Obligations On Canadian Companies Operating Internationally

Contract conditionality may not, however, suffice to hold to account the many companies that do not receive (or who are not dependant on) GOC funding, financing or other support. The GOC urged in its response to the SCFAIT report that "the bulk of Canadian investment abroad takes place without the assistance of government services. Therefore, the impact of such measures would be limited." Accordingly, supplemental measures will always be required, including facilitating market pressures conducive to responsible company behaviour in the human rights and environmental area. As the GOC acknowledges in its response, key among the latter are disclosure rules.

Disclosure by a company domiciled in Canada would be undertaken in Canada and is therefore not extraterritorial, even though it may include information on foreign operations. Mandating disclosure rules would also be a proper exercise of federal jurisdiction. Under Canada's constitutional federalism rules, the federal level is competent to regulate not only incorporation of companies with more than provincial objects, but also to introduce measures concerning the trading in the securities of these companies, and almost certainly a general securities law regime writ large. It lies, therefore, well within Parliament's prerogatives to introduce a comprehensive disclosure regime for federally-incorporated companies or as part of a general securities law system.

In fact, the current *Canada Business Corporations Act* already requires substantial disclosure of company information. Thus, shareholders may examine the corporation's articles of incorporation, by-laws, unanimous shareholder agreements, notices regarding the appointment of directors and the registered office and a share register showing the owners of all the shares.[33] There is no jurisdictional bar on these requirements being enhanced to include emphatic information on a company's human rights and environmental performance.

---

[33] CBCA, ss.20-22.

C. The Enactment Of A Canadian International Crimes Compensation Act Would Be A Permissible And Desirable Means Of Holding Canadian Companies Accountable For Serious Violation Of International Law

1. An International Crimes Compensation Act would be consistent with Canada's international obligations, policies and interests

Market mechanisms in the form of shareholder scrutiny cannot cure or obviate every wrongdoing. If they did, there would be no need for civil liability in any area of the law involving companies. Deterring malfeasance by companies operating overseas therefore requires clearer rules than exist presently on civil liability in Canada for such infractions. This is most acutely the case where, as is often the case, the courts of the state in which the actual injury arose is either incapable of adjudicating such a claim (due, for instance, to under funding and capacity issues) or unwilling to do so (because of corruption and/or political influence). There is a need, in other words, for an "International Crimes Compensation Act" (ICCA), the precise parameters of which are described below.

Canadian action in this area would serve a number of other purposes as well. Not least, it would add credibility to a Canadian foreign policy that regularly invokes the centrality of human rights. Broader civil liability for serious human rights infractions mitigates the detrimental impact on Canadian foreign policy of Canadian corporate wrongdoing. The matter is moved from the political and foreign policy arena into a judicial, adjudicative one where concrete remedies are available.

Creating a "made in Canada" remedy would also limit the prospect of Canadian companies being sued in United States federal court under the expansive U.S. *Alien Tort Claims Act*, a burgeoning practice. The ATCA permits lawsuits in tort in U.S. federal court for the violation of established "customary" international law principles.[34] Customary international law is universally binding all states (excepting only those very few states that have been sufficiently persistent in rejecting the customary principle prior to its emergence as a binding norm). It is created by sufficiently general and universal state practice, undertaken by states with a sense of legal obligation (called *opinio juris*). Where these two ingredients – state practice and the *opinio juris* – become sufficiently widespread among the states of the world (an uncertain threshold in international law), the practice in question is said to become legally binding as customary international law.

As this formula suggests, the exact parameters and content of customary international law are vague, often contested and dynamic. The scope of the ATCA is, therefore, unclear (and unpredictable) in a number of areas, including the circumstances in which corporate complicity in serious human rights abuses is actionable.[35]

---

[34] 28 U.S.C.S. § 1350, as interpreted by *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (U.S.S.C. 2004)

[35] For a discussion of this issue, see Craig Forcese, "ATCA's Achilles Heel: Corporate complicity, international law & the *Alien Tort Claims Act*," (2001) 26 *Yale Journal of International Law* 487. Uncertainly as to the extension of customary international obligations in the areas of crimes against humanity and genocide to companies, while ultimately resolved in favour of liability, produced substantial

A robust Canadian civil liability law will make it easier for Canadian companies to obtain dismissal of U.S. lawsuits on the basis that Canada is the more appropriate forum. As discussed above, civil liability in Canada for a tort committed overseas exists in Canada at present, so long as a real and substantial connection exists to Canada and a court is persuaded that there is no more convenient forum. However, the law applied in such cases is the tort law of the foreign jurisdiction and, exceptionally (and in uncertain circumstances), standard Canadian tort law. This practice attracted negative commentary by the U.S. District Court for the Southern District of New York in the law suit brought under the U.S. *Alien Tort Claims Act* against Talisman Energy by Sudanese plaintiffs:

> *While Canadian courts may be fair and impartial, there are aspects of the substantive law which would be applied in Canadian courts which make Canada an inadequate alternative forum. A preliminary issue is the choice of law that would be applied. … [A]n Alberta court would, prima facie, apply the lex loci delicti, or the law of the place where the activity occurred. In this case, that would mean that the Alberta court would apply Sudanese, Shari'a law. However, as noted above, under Sudanese law, plaintiffs as non-Muslims would enjoy greatly reduced rights. Given this fact, it is difficult to see how a Canadian court applying Shari'a law would be a great improvement over a Sudanese court applying Shari'a law. …[T]he Canadian Supreme Court has held that domestic law could be applied instead of international law to avoid injustice, that court also held that it envisioned "few cases where this would be necessary." Tolofson v. Jensen, [1994] 3 S.C.R. 1022, at P 50. …*
>
> *Assuming, however, that a Canadian court (either Alberta or Ontario) would apply domestic [that is, Canadian] law, another problem remains. … These [Canadian] causes of action included a variety of common law claims (battery, false imprisonment, assault, intentional infliction of mental suffering, conspiracy, unlawful interference with economic interests, trespass to chattels, and negligence). …*
>
> *The concern is that the causes of action available do not reflect the gravity of the alleged offenses, and in particular, the universally-condemned nature of these acts. The offenses alleged in the Amended Complaint [in the Talisman lawsuit] are considered international crimes entailing individual responsibility and subject to universal*

---

activity and a lengthy interlocutory ruling in the Talisman case. See *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

> *jurisdiction precisely because they constitute a fundamental affront to the international order. Such crimes are more than the sum of their parts. Genocide may quantitatively be the same as a large number of murders, but it is qualitatively different, and this difference is recognized by the fact that the act enjoys special status under international law. … While plaintiffs may be able to obtain the same relief in Canadian courts that they seek in this jurisdiction, it is evident from the affidavits provided that Canadian courts will only be able to treat plaintiffs' allegations as violations of Canadian, rather than international law. Because this treatment fails to recognize the gravity of plaintiffs' allegations, the Court questions whether Canadian courts (in either Alberta or Ontario) would be adequate alternative fora.*[36]

2. An International Crimes Compensation Act would allow recovery in Canadian court for the most serious of international wrongs

A Canadian ICCA should meet several objectives.

- First, it should minimize the substantial uncertainty that exists in Canadian law about the source of law applied to lawsuits involving international wrongs, without replacing this uncertainty with the ATCA's generic recourse to customary international law.

- Second, it should be confined to those international wrongs that truly do give rise to individual (rather than strictly state) culpability or responsibility. For the most part, provisions of international law that give rise to individual responsibility are in the area of international criminal law. Privileging this body of international law avoids the problem of civil lawsuits brought for more banal wrongs that may adequately be dealt with by conventional tort law, under the regular rules described above. It also precludes a "floodgate" of litigation, since these dire international crimes will be comparatively rare.

- Third, in creating domestic civil liability for such an internationally criminal act, the ICCA should not make that liability dependent on an actual prosecution and conviction, since the standard of proof in a criminal proceeding is more demanding than civil proceedings and, in Canadian law, criminal proceedings for international crimes generally are only pursued with the express permission of the federal executive branch.

---

36 *Ibid* at 337.

- Fourth, the ICCA should be structured to restrict the ability of persons otherwise subject to it to avoid completely its requirements by organizational restructuring (*e.g.*, a Canadian corporation creating a foreign subsidiary).

3. A carefully drafted International Crimes Compensation Act lies with the federal Parliament's jurisdictional competence

The ICCA must also be drafted to lie within the federal Parliament's competence. Per the discussion above, Parliament has jurisdiction to create civil liability, so long as this civil liability is sufficiently integrated into a valid federal legislative scheme. It is possible that a special federal statute directed expressly at Canadian corporate activities overseas, and thus constitutional under the federal power over international trade, could contain civil liability provisions. A simpler course of action is to graft onto the existing *Crimes Against Humanity and War Crimes Act* (CAHWCA) a civil liability provision modeled on that existing in the federal *Competition Act*. (The latter is a provision that the Supreme Court held constitutional in *General Motors*, discussed above.) Put another way, the proposed ICCA would constitute amendments closely integrating a civil liability provision into an existing, valid federal criminal law.

With these objectives in mind, the amendments to the *Crimes Against Humanity and War Crimes Act* included in the ICCA might read:

Amendment	Rationale
9. (1) Subject to sub-section (2), any person who has suffered loss or damage as a result of conduct undertaken outside of Canada that, on a balance of probabilities, is that described in sections 6 or 7 [proscribing and defining war crimes, crimes against humanity and genocide] may, in any court of competent jurisdiction, sue for and recover a) an amount equal to the loss or damage proved to have been suffered by him or her and b) any additional amount that the court may allow in response to the particular gravity of the conduct from the person who engaged in the conduct. (2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under sections 6 or 7 is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that is described in sections 6 or 7 and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.	Subsections (2) and (3) are modeled on the civil liability provision found in s.36 of the federal *Competition Act*, although with some differences. First, sub-section (1) makes it clear that the conduct need only be proved on the civil standard of "balance of probabilities" rather than the criminal "beyond a reasonable doubt", to obviate any uncertainty on this point. Second, paragraph b) opens the door to punitive damages, a reasonable addition given the deterrence purpose of the amendment and the heinous nature of the international wrongs in question. Note that section 6 of the CAHWCA creates criminal liability for a person who "conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to" a war crime, crime against humanity or genocide. Conduct of this sort would, therefore, be captured by the new civil liability provision, ensuring that complicity by a company with the international crimes is actionable. Parent companies who conspire, direct or are accessories to such crimes with subsidiaries would also be exposed to liability.

(3) For greater certainty, the person who engaged in the conduct referred to in sub-section (1) may include an individual, body corporate, trust, partnership, fund, an unincorporated association or organization.	The GOC has expressed uncertainty as whether the crimes described in the CAHWCA, as presently described, can include corporations, since the latter are excluded from the jurisdiction of the International Criminal Court and the CAHWCA is intended to implement (at least in part) Canada's obligations under the instrument creating that body. The proposed sub-section (3) is designed to remove any uncertainty on this point. An equivalent amendment might usefully be made in relation to section 6, underscoring that in Canadian criminal law, corporations may be culpable of war crimes, crimes against humanity or genocide.
(4) Loss or damages may only be recovered under sub-section (1) if: (*a*) at the time the conduct is alleged to have been undertaken, (i) the person who engaged in the conduct was a Canadian national or was employed by Canada in a civilian or military capacity, (ii) the person who engaged in the conduct was a national of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state, (iii) the victim of the alleged offence was a Canadian national, or (iv) the victim of the alleged offence was a national of a state that was allied with Canada in an armed conflict; or (*b*) after the time the conduct is alleged to have been undertaken, the person who engaged in the conduct is present in Canada	This subsection replicates, in large measure, the jurisdictional provisions currently found in section 8 of the CAHWCA and applicable to sections 6 and 7. However, it replaces the reference to "citizen" (a term that is used to describe individuals) in section 8 with "national" (a term capable of including both individuals and companies) to clarify that the jurisdictional provision applies to companies as much as individuals. (A useful supplemental amendment would be to make the same changes to section 8, describing a Canadian court's criminal jurisdiction). For the reasons discussed in Part II above, it is not clear that international law requires that extraterritorial jurisdiction be as narrowly constrained for civil liability as it for criminal law. Nevertheless, by restricting civil liability per the language to the left, the ICCA amendments would preclude the new civil liability provisions being applied in cases where there is little or no connection to Canada. It is, therefore, broadly consistent with the standard "real and substantial" connection jurisprudence developed by the Supreme Court.

D. Direct Regulation Of Canadian Companies In Order To Meet Certain Other Standards Would Be Desirable And Is Permissible

The clear deficiency in an ICCA geared to crimes against humanity, war crimes and genocide is its limited reach: it would extend to only the most grievous of human rights abuses. As suggested, more banal injuries would be remedied, if at all, by Canada's conventional tort law (or that of the foreign state, applied in Canada), subject to the doctrines of real and substantial connection and *forum non conveniens*. There will be circumstances, however, where more direct regulation is desirable, especially in the

environmental area. In states with poor environmental regulations, or who lack the capacity to enforce adequate regulations, extraterritorial regulation by Canada would be desirable. Certain deleterious practices – emissions of toxic substances, for example – may be universally harmful by reason of biology.

There will also be circumstances where a company's presence in a foreign jurisdiction is so undesirable that it should be compelled to withdraw. Yet, Canada's key sanctions law, the *Special Economic Measures Act*,[37] has been interpreted by the GOC as applicable only where an international organization of which Canada is a member requests sanctions directed at the state in question, or, alternatively, where that nation is in the midst of an international conflict. The latter is a very narrow reading of the Act. It has the effect of precluding the application of the Act to civil conflict situations, even where a Canadian company may be contributing materially to the prolongation or gravity of that conflict. The Act should be amended to permit sanctions compelling the withdrawal of Canadian investments where these are acerbating a conflict or contributing to serious human rights abuses.[38]

Extraterritorial regulation of this sort would lie within Canada's jurisdictional competence under the "nationality principle" of public international law if directed at Canadian nationals, including companies incorporated (or with a head office) in Canada. To avoid systematic circumvention of this law by incorporation of subsidiaries under the law of another state, the regulations should include a supplemental requirement that Canadian parent companies compel adherence to the applicable standards by their subsidiaries. Here, the Canadian national would not be regulated for its actual performance on the ground, but for its failure of supervision.[39]

Carefully crafted, regulations of this sort would plausibly lie within the federal Parliament's constitutional competence as a matter of international trade (or affairs) or, depending on how they are constructed, criminal law.

---

[37] S.C. 1992, c.17.

[38] For discussion, see Craig Forcese, "'Militarized Commerce' in Sudan's Oilfields: Lessons for Canadian Foreign Policy," *Canadian Foreign Policy* (Spring 2001) at 37-56 or Craig Forcese, with members of the Canadian Lawyers Association for International Human Rights (CLAIHR), *Legislative Proposal: Ensuring that the Special Economic Measures Act is a tool that may be used in responding to Canadian corporate complicity with "grave breaches of human rights and human security"*, Unpublished memorandum prepared at the behest of the Sudan Inter-Agency Reference Group (200); *Backgrounder: Options available to the Government of Canada in responding to Canadian corporate complicity with human rights abuses*, Unpublished memorandum prepared at the behest of the Sudan Inter-Agency Reference Group (2000). The latter two documents are available on the CLAIHR website at http://www.claihr.org/.

[39] Notably, the latter is quite possibly undertaken by the parent on the territory of Canada and is not an extraterritorial function at all. For a careful discussion of direct extraterritorial regulation, see Sara Seck, *Exploding the Myths: Why Home States are Reluctant to Regulate* (October 2005), available at http://www.miningwatch.ca/updir/Keynote_SSeck.pdf.