MEMORANDUM:

RESPONSE TO PDAC OPINION ON EXTRATERRITORIAL REGULATION
PREPARED BY APPLETON & ASSOCIATES

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The following memorandum responds to assertions made in the memorandum by Appleton & Associates dated November 9, 2006 and prepared for the Prospectors and Developers Association of Canada ("PDAC Memo"). It focuses on areas where the PDAC Memo makes categorical assertions concerning law and extraterritoriality. In several instances, the document overreaches, justifying political objections to a given course of action by invoking an exaggerated or non-existent legal impediment. What follows below responds to these legalized claims. The following discussion does not address the actual policy issues raised in the PDAC Memo, on the assumption that it is exactly these policy issues that the Roundtable process is designed to debate and decide.

This document should be read in association with Craig Forcese, *Jurisdictional Issues in the Regulation of Canadian Extractive Industry Companies* (Memorandum prepared for the Canadian Network on Corporate Accountability in the National Roundtables on Corporate Social Responsibility, 2006) ("CNCA Memo 1").

A. Extraterritorial Regulation Does Not Violate International Law If Conducted In A Manner Consistent With One Of Five Justifications

It is indisputable that states may regulate persons and activities on their territories (subject to various immunities recognized in international law). International law recognizes, however, that the international system is not simply a patchwork quilt of hermetically-sealed states. States have a *bona fide* and legitimate interest in regulating some activities that occur outside of their national boundaries.

For exactly this reason, 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. As noted in CNCA Memo 1, there are a total of five justifications that may be employed to establish prescriptive jurisdiction in a manner compliant with public international law.

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 torture, crimes against humanity, war crimes and genocide.[1]

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 state's nationality.

Finally, they may follow the "protective principle": regulate certain overseas conduct so fundamental to a state's interests that they attract such regulation.[2]

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[1] 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. (Torture is criminalized in the *Criminal Code* s.2691.1 but is subject to an extraterritoriality provisions, s.7(3.7), creating universal jurisdiction).

[2] 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*.

These bases for extraterritorial jurisdiction are described in a recent paper on extraterritoriality commissioned by the Law Commission of Canada and prepared by professors and international legal scholars at Dalhousie Law School.[3] With the arguable exception of the passive personality (and perhaps protective principle), they are readily recognized in state practice and in international legal scholarship. For this reason, extraterritorial regulation that complies with one of at least the territoriality, nationality or universal principles is compliant with public international law.

A state that chooses *not* to employ one or other of these justifications for extraterritorial regulation does so for political and not legal reasons.

B. Extraterritorial Criminal Law Is Commonplace In Other Countries

For political reasons, Canada has chosen not to regulate extraterritorially as thoroughly as international law allows it to.[4] Other states, however, have acted in a manner entirely compliant with international law in exercising more substantial extraterritorial jurisdiction. Many civil law states, for example, extend their *entire* criminal codes beyond their borders to apply to the conduct of their nationals *everywhere*, often with the additional requirement that the criminal conduct in question also be a crime in the state in which it occurs ("dual criminality" requirement). The applicable provisions in the laws of several states are summarized below.[5]

State	Provision
Austria	"Section 65(1)(1) PC establishes Austrian jurisdiction to prosecute its nationals for offences committed abroad. The only additional requirement for nationality jurisdiction is double criminality."[6]
Belgium	"Belgian criminal law applies… to crimes and offences committed outside the Kingdom by Belgian nationals and any person having his principal place of residence in Belgium ("active personal jurisdiction" under Article 7 of the Criminal Procedure Code)…"[7]
Denmark	"Pursuant to Section 7(1) of the Danish Criminal Code, acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state are subject to Danish criminal jurisdiction where the act was

[3] Steve Coughlan, Robert J. Currie, Hugh M. Kindred, Teresa Scassa (all of Dalhousie Law School), *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction In The Age Of Globalization* (Paper prepared for the Law Commission of Canada, June 2006) at 7 *et seq.*

[4] As the PDAC Memo correctly notes, the Government of Canada (GOC)'s resistance is driven by Canada's historical preoccupation with American assertions of extraterritorial jurisdiction. Indeed, several US (and now European) statutes and court rulings in the competition and sanctions law area adopt an expansive view of extraterritorial jurisdiction that is, arguably, not compliant with any of the five grounds for asserting extraterritorial prescriptive jurisdiction.

[5] The material in this table is drawn from reports prepared by the OECD in relation to criminalization of overseas bribery of public officials. Those reports also, however, include general observations on extraterritorial criminal jurisdiction in several states. The latter information is portrayed in the table.

[6] OECD, *Austria: Phase 2* (2006) at para. 121, available at http://www.oecd.org/dataoecd/16/22/36180957.pdf.

[7] OECD, *Belgium: Phase 2* (2005) at para. 108, available at http://www.oecd.org/dataoecd/59/8/35461651.pdf.

	committed (i) outside territory recognised by international law as belonging to a state, provided that acts of the kind concerned are punishable by a sentence exceeding imprisonment for four months; or (ii) within the territory of a foreign state, provided that it is also punishable under the law in force in that territory (dual criminality requirement)."[8]
Finland	"Pursuant to Chapter 1, subsection 11(1) of the Penal Code, in order to establish nationality jurisdiction (i.e. jurisdiction over an offence committed abroad by a Finnish national) an offence must be punishable under the law of the place of commission and a sentence could have been passed for it also by a court in that state (dual criminality)." [9]
France	"French criminal law is applicable to offences committed by French nationals outside of French territory if the offences in question are punishable under the legislation of the country where they are committed … Article 1837 of the Civil Code provides that "companies whose head office is located on French territory are subject to French law". For its part, the Cour de Cassation has ruled, in a tax case, that 'for a company, nationality is determined, in theory, by the location of its real head office, defined as the seat of effective management and presumed to be its statutory head office' (Cass., Ass. plénière, 21 December 1990)."[10]
Italy	Articles 7 and 9 of the Criminal Code includes nationality-based jurisdiction so long as assorted dual criminality requirements are met.[11]
Japan	Article 3 of the Penal Code includes nationality-based jurisdiction and does not require dual criminality".[12]
Netherlands	"As provided under article 5.1 of the Penal Code, the Netherlands has jurisdiction over criminal offences committed outside the Netherlands by 'Dutch citizens'", generally with a dual criminality requirement.[13]
Spain	"The LOPJ [*Ley Orgánica del Poder Judicial*] provides for nationality jurisdiction in article 23.2. Nationality jurisdiction requires dual criminality, but it is broadly defined to require only that 'the act is punishable in the place where it was carried out'."[14]

The survey of comparative criminal demonstrates clearly that other states have not made the same political decisions as Canada. Canada, like other common law countries, is more conservative than international law necessitates in its application of extraterritorial law. This failure of political will has elicited negative international

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[8] OECD, *Denmark: Phase 2* (2006), at para. 189, available at http://www.oecd.org/dataoecd/14/21/36994434.pdf.

[9] OECD, *Finland: Phase 2* (2002), at 25, available at http://www.oecd.org/dataoecd/52/0/2088239.pdf.

[10] OECD, *France: Phase 2* (2004) at para. 120, available at http://www.oecd.org/dataoecd/36/36/26242055.pdf.

[11] OECD, *Italy: Phase 2* (2004) at paras. 153-154, available at http://www.oecd.org/dataoecd/0/50/33995536.pdf.

[12] OECD, *Japan: Phase 2bis* (2006) at para. 48, available at http://www.oecd.org/dataoecd/54/23/37018673.pdf.

[13] OECD, *Netherlands: Phase 2* (2006) at para. 179, available at http://www.oecd.org/dataoecd/14/49/36993012.pdf.

[14] OECD, *Spain: Phase 2* (2006) at para. 97, available at http://www.oecd.org/dataoecd/28/35/36392481.pdf.

commentary. For example, the OECD has criticized Canada for its failure to establish clear nationality jurisdiction over its nationals engaged in bribery of foreign public officials.[15]

C. The Nationality Principle May Be Used To Regulate The Extraterritorial Activities Of Canadian Companies

As noted in CNCA Memo 1, 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.[16]

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. This is exactly the conclusion of Law Commission of Canada June 2006 paper on extraterritoriality authored by professors and international law scholars from Dalhousie Law School: "Individuals may not be the only target of extraterritorial action. The federal government may legislate with respect to the activities of Canadian corporations operating outside Canada's borders."[17]

D. The Nationality Principle Is Not Offended By Regulating The Relationship Between A Canadian Company And Its Foreign Subsidiaries

The PDAC Memo asserts that

> Proposals that seek to create legal obligations on Canadian companies for actions of their subsidiaries in developing countries have no connection with events that occur within Canadian territory. They are based solely on the nationality

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[15] OECD, *Canada: Phase 2* (2004) at 33, available at http://www.oecd.org/dataoecd/20/50/31643002.pdf.

[16] *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").

[17] Coughlan, Currie, Kindred, Scassa, *supra* note 3, at 11, citing *B.C. Electric Railway Co. v. The King* [1946] A.C. 527, at paras 8-10 (.

> of the shareholders (and, in some cases, management) of corporations operating in developing countries. As a result, they violate the sovereign rights of developing countries to determine the legal standards applicable to mining projects in their territories.[18]

The PDAC Memo also claims that international law does not allow the "indirect" regulation of foreign subsidiaries through the imposition of obligations on Canadian parent companies.

In making these assertions, the PDAC Memo overstates the extent to which regulation of Canadian extractive companies in a manner that indirectly affects foreign subsidiaries would transgress international law. As support for its position, the PDAC Memo invokes the Canadian experience with U.S. Cuban sanctions law. However, the U.S. law that precipitated the Canadian response under the *Foreign Extraterritorial Measures Act* in 1992 (discussed in the PDAC Memo) attempts to ***directly*** regulate foreign-incorporated subsidiaries of U.S. companies.[19] Put simply, it requires direct compliance with U.S. law by these foreign subsidiaries.

It is misleading to portray Canadian regulation of parent companies (***without*** imposition of direct obligations on foreign subsidiaries) as analogous to the U.S. extraterritorial measures to which Canada has objected. Put simply, nothing stops Canada from requiring that Canadian parent companies compel adherence to applicable standards by the subsidiaries they control or that companies be penalized for directives causing harm overseas. Here, the Canadian national would not be regulated for its actual performance on the ground, but instead for its failure to properly supervise subsidiaries it controls. Under these circumstances, public international law is not offended for at least two reasons.

First, where a subsidiary responds to directives issued by a Canadian domiciled parent (or individual executive, director or employee), a clear territorial link may exist between Canada, the directive and the ultimate carrying out of that directive overseas. Here, there is no issue of extraterritorial regulation whatsoever. Indeed, existing doctrines of Canadian criminal law anticipate that the entire web activity – from directive to wrongful overseas action – could be penalized on the basis of a "real and substantial link" between Canada and an element of the offence (*i.e.*, the issuance of a directive setting off a chain of illegal activity).[20] The fact that the wrongful overseas act was actually carried out by a foreign-incorporated subsidiary is utterly irrelevant.[21]

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[18] PDAC Memo at 6.

[19] 31 C.F.R. § 515.329 (defining person "subject to the jurisdiction of the United States" as including "Any corporation, partnership, association, or other organization, *wherever organized or doing business, that is owned or controlled* by persons" located, incorporated in, or with the citizenship of, the United States); 31 CFR 515.559 (purporting to extend to "U.S.-owned or controlled firms in third countries").

[20] *R v. Libman*, [1985] 2 S.C.R. 178 at 212-213 ("…all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada" and that "it is sufficient that there be a 'real and substantial link' between an offence and this country"). The Government of Canada makes a similar point in its response to the SCFAIT report that generated these Roundtables. See Department of Foreign Affairs and International Trade, "Government

Second, where the Canadian regulation prescribes the conduct of the Canadian parent company – requiring that it to exercise sufficient oversight of the foreign subsidiaries it controls, for example – the subject of the Canadian law is a Canadian company (or executive, director or employee). Canada is regulating the actions of its own nationals. Canada may legitimately exercise this sort of regulatory control over the Canadian person, either because that person acts on Canadian territory or pursuant to the nationality principle of extraterritorial jurisdiction.

The PDAC Memo also claims that disclosure rules that reach as far as foreign-incorporated subsidiaries would violate public international law, at least when they oblige disclosure of information not material to Canadian shareholders.[22] By attaching this materiality caveat, the PDAC Memo presumably recognizes Canadian securities law reaches as far as foreign subsidiaries even now. It is inconceivable, for example, that a mining company traded on a Canadian exchange could refuse to disclose the foreign expropriation of its only property, even one technically owned by a foreign-incorporated subsidiary. The loss of this property, even if held by a subsidiary, is material to the financial stability of the company. The concept of "material fact" and "material change" in Canadian securities law does not hinge on a formal, fixed definition tied to how a company structures its affairs between parent and subsidiary.[23]

This approach is best characterized as a reasonable assertion of Canadian territorial jurisdiction: Canada is compelling persons subject to its territorial jurisdiction – companies traded on its exchanges – to supply certain information on their operations, wherever they occur and regardless of the manner in which the company has structured itself.

Broadening the definition of materiality to include specific corporate social responsibility performance disclosure does not suddenly convert a commonplace, territorially-based regulatory practice into one that violates public international law rules on extraterritoriality.

E. The Universal Principle Provides A Viable Alternative Basis For Extraterritorial Jurisdiction, Including In Terms of Civil Jurisdiction

1. Public international law does not preclude universal civil jurisdiction

The PDAC Memo asserts that the "assertion of universal civil jurisdiction is generally acknowledged to be a violation of international law rules against

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Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade – Mining in Developing Countries – Corporate Social Responsibility", under recommendation 4.

[21] Indeed, it should be noted that as a *de facto* matter, parent companies do have liability exposure in civil actions for negligent oversight of their overseas subsidiaries. This line of cases has been richly developed in the United Kingdom. See *Connelly v. RTZ Corporation*, [1997] UKHL 30; *Lubbe and 4 Others v. Cape PLC*, [2000] 4 All ER 268 (HL).

[22] PDAC Memo, at 8.

[23] Under National Instrument 51-102, "material change" means, *inter alia*, "a change in the business, operations or capital of the reporting issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer…".

extraterritoriality."[24] The PDAC Memo's perfunctory dismissal of universal civil jurisdiction is excessively categorical. In fact, there is substantial support for universal civil jurisdiction tied to the limited range of serious infringements of international law. This is exactly the position taken by the European Union in relation to the U.S. *Alien Tort Claims Act* (ATCA) in *Sosa v. Alvarez-Machain*. In that case, the *amicus* brief filed by the European Commission did not query the legitimacy of the ATCA so long as that law's scope was defined in keeping with international law, including the universal principle.[25]

The public position taken by the European Commission belies the statement in PDAC Memo that "this [Alien Tort Claims] statute is generally regarded as a violation of customary international law rules against extraterritoriality." Nor can support for the PDAC Memo's position be found in decisions of the International Court of Justice. The PDAC Memo states that "the International Court of Justice has observed that the United States' unilateral exercise through the ATCA of the function of guardian of international values 'has not attracted the approbation of States generally'." In fact, this (rather equivocal) passage stems, not from a decision of the International Court of Justice, but rather from the separate (and dissenting in part) opinion of Judges Higgins, Kooijmans and Buergenthal in a case that did not actually involve – or ultimately pronounce on – the merits of universal civil jurisdiction.[26]

The fact is that, while the matter is not fully resolved, international law may be even more permissive of civil jurisdiction (*i.e.*, the jurisdiction of courts to hear disputes concerning civil liability) than it is of criminal jurisdiction. 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

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[24] PDAC Memo, at 10.

[25] Brief of *Amicus Curiae* by the European Commission in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), at 14, 26-27, available at http://www.sdshh.com/Alvarez/ECBriefforSosavAlvarez_Machain_v1_%5B1%5D.pdf ("Universal jurisdiction permits States to exercise jurisdiction over matters of universal concern even when the State exercising jurisdiction has no connection with the case. In the absence of a traditional basis for prescriptive jurisdiction, the Alien Tort Statute should not be read to reach claims based on all violations of the law of nations, but only such conduct as the United States would have authority to regulate under principles of universal jurisdiction. …The existence and scope of universal civil jurisdiction are not well established. To the extent recognized, it should apply only to a narrow category of conduct and should be exercised only when the claimant would otherwise be subject to a denial of justice").

[26] Separate opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000* [2002] I.C.J. Rep. 77, available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_higgins-kooijmans-buergenthal.PDF at para. 48. This case actually involved *criminal* not civil universal jurisdiction. In the end, the decision of the full court turned on questions of state immunity. The issue of universal jurisdiction – civil or otherwise – was never addressed by the full court.

> that customary international law does not prescribe any particular regulations as regards the restriction of courts' jurisdiction in civil matters.[27]

Given this even greater latitude for civil (as opposed to criminal) causes of action, it follows that civil lawsuits predicated on one of the six principles of prescriptive jurisdiction would satisfy public international law requirements. Indeed, given ambiguity on the question, a cause of action *not* grounded in one of these sources of prescriptive jurisdiction might also be permissible. For these reasons, the position taken in CNCA Memo 1 concerning civil jurisdiction over international crimes governed by the universal principle (torture, crimes against humanity, genocide, and war crimes) is a very modest one.

For all these reasons, there is no basis to conclude that Canada would act contrary to public international law in enacting a universal civil jurisdiction law tied to acts of torture, crimes against humanity, war crimes and genocide.

2. Canadian law does not preclude universal civil jurisdiction

The PDAC Memo asserts that "Canadian courts have categorically rejected the expansion of universal jurisdiction to civil actions, even in cases involving torture."[28] It then cites *Bouzari* v. *Islamic Republic of Iran*.[29] However, the PDAC Memo misconstrues the holding in that case. The passage block-quoted at page 10 of the PDAC Memo *does not* constitute authority from the Ontario courts that universal civil jurisdiction is impermissible.

In *Bouzari*, plaintiffs were suing Iran. One issue in the case was whether an Ontario Court could have jurisdiction over a foreign government. Generally, in Canadian law, a court must have jurisdiction *simplicter*. This in turn requires a real and substantial connection between Canada and the litigation. [30] 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.[31] If they are not, then courts may

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27 Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2003) at 578-9.

28 PDAC Memo, at 10.

29 [2004] 243 19 D.L.R. (4th) 406 at para. 28 (Ont. C.A.).

30 *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049.

31 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

insist on some other link to Canada – such as evidence that some of the harm suffered took place in Canada.

In *Bouzari*, the torture took place overseas and, critically, Iran was clearly not an entity domiciled in Ontario. The plaintiff, moreover, had no tie to Canada at the time the torture was committed. There were real questions, therefore, as to whether a "real and substantial link" existed. Accordingly, plaintiff and *amici* asked for this real and substantial link test to be relaxed because the harm in question – torture – is a significant violation of international law. In essence, they urged that universal jurisdiction should be permitted even in relation to a defendant without many (or any) real connections to the forum jurisdiction (Ontario).

In statements that are *obiter dicta* (*i.e.*, the case was not decided on this point, and thus provides no binding precedent), the Court of Appeal declined to do so permit. In the course of arriving at this conclusion, it asserted that there is no *obligation* on Canada in international law to relax the real and substantial link test and allow a more permissive universal jurisdiction (in this case, in relation to the foreign actions of a foreign state, a defendant not truly present in Ontario). This is the context for statement cited by the PDAC Memo.

The Court *did not* suggest, however, that universal jurisdiction would be *impermissible* in other circumstances. Indeed, even on the facts in *Bouzari*, it equivocated and suggested there might be good reason for Canadian courts to allow cases for foreign torture against torturers domiciled outside of Canada:

> First, the action is based on torture by a foreign state, which is a violation of both international human rights and peremptory norms of public international law. As the perpetrator, Iran has eliminated itself as a possible forum, although it otherwise would be the most logical jurisdiction. This would seem to diminish significantly the importance of any unfairness to the defendant due to its lack of connection to Ontario. …
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> Second, if Ontario does not take jurisdiction, the appellant will be left without a place to sue. Given that the appellant is now connected to Ontario by his citizenship, the requirement of fairness that underpins the real and substantial connection test would seem to be of elevated importance if the alternative is that the appellant cannot bring this action anywhere.[32]

Bouzari was ultimately decided on grounds unrelated to universal civil jurisdiction. Because of this, the Court expressly indicated that "it is unnecessary to finally determine how the real and substantial connection test would apply here. That is

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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").

[32] *Bouzari*, *supra* note 29 at para. 36-37.

best left for a case in which the issue must be resolved."[33] The matter remains undecided, in other words, even on the extraordinary facts in *Bouzari*: that is a foreign torturer, located outside Canada being sued for an act of overseas torture committed against a plaintiff who, at the time, had no ties whatsoever to Canada.

It is important to underscore the *Bouzari* case is very different from the situation that would exist if a lawsuit brought against a defendant actually domiciled in Canada. As indicated above, where the defendant is based in the Canadian jurisdiction, the real and substantial link requirement is satisfied. Certainly, foreign plaintiffs suing a Canadian-domiciled company for injuries occurring abroad might confront arguments that the foreign jurisdiction is the more convenient forum.[34] This is, however, a very different analysis from whether a Canadian court would have jurisdiction *simplicter* in the first place.[35]

In sum, it is simply inaccurate to claim that "Canadian courts have categorically rejected the expansion of universal jurisdiction to civil actions, even in cases involving torture."[36] There is no domestic legal bar to universal civil jurisdiction.

Further, universal civil jurisdiction is a reasonable policy for Canada to adopt, a point made cogently in the 2006 Dalhousie Law School paper prepared for the Law Commission of Canada:

> To the extent that gross violations of human rights are proscribed as genocide, torture, crimes against humanity and war crimes and their perpetrators are subject to the universal jurisdiction of states, so their victims ought to be able to access a remedy against their violators universally. Since Canada has accepted and implemented its international obligations to prosecute the perpetrators of international crimes simply on the basis of custodial jurisdiction (detention), it arguably has every reason to afford similar access to Canadian courts for the victims of extraterritorial abuse in pursuit of the remedies and recompense legally due to them.
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> Secondly, as part of Canadian concern for an orderly international society, asserted above, Canada undoubtedly has an interest in upholding human rights worldwide. In

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33 *Ibid* at para. 38.

34 For a discussion of *forum non conveniens*, see CNCA Memo 1.

35 See, *e.g. Plant Technology International, Inc. v. Peter Kiewet Son Co.* (2002), 15 C.P.C. (6th) 84 at para. 57 (Ont SCJ). ("The distinction between the real and substantial connection/jurisdiction simpliciter test, and the forum non conveniens test, is that if the court lacks jurisdiction simpliciter, it can not take jurisdiction. Under the forum non conveniens test, the court decides whether it should refuse to take jurisdiction. In other words, at the jurisdiction simpliciter stage, the question is whether the court "can" take jurisdiction. At the forum non conveniens stage, the question is whether the court "should" take or refuse jurisdiction.")

36 PDAC Memo, at 10.

particular, there is a real and substantial involvement of Canada in cases of abuse of human rights abroad which concern victims of Canadian origin and refugees or stateless persons who come to Canada. Moreover, Canada's promotion internationally of the principle of responsibility to protect populations at risk from genocide, war crimes, ethnic cleansing, and crimes against humanity is grounds to argue that Canada has a real and substantial involvement in all violations of human rights everywhere. Hence, on this approach also, it could be argued that Canada might provide access to its courts for victims to pursue justice and enforceable remedies for extraterritorial violations of their human rights.[37]

[37] Coughlan, Currie, Kindred, Scassa, *supra* note 3, at 55-56.