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Canadian Network on Corporate Accountability
Réseau canadien sur la reddition de comptes des entreprises

BRIEFING NOTE

CANADA NEEDS TO BE OPEN FOR JUSTICE

Canada needs both: an extractive-sector Ombudsman and legislated access to Canadian courts

RECOMMENDATIONS

Those harmed by the activities of Canadian oil, gas and mining companies should have recourse to justice here in Canada. We need both:

1) **The creation of an extractive-sector Ombudsman in Canada**. This mechanism needs to have the power to receive complaints, undertake independent investigations to determine if a company has acted inappropriately and, if so, to make recommendations to the company and to the Canadian government in order to remedy the situation. The Ombudsman should make its findings public and should be able to recommend the suspension or cessation of political, financial and diplomatic support by the Government of Canada. Unlike the CSR Counsellor's Office, the Ombudsman needs to be mandated to perform these functions regardless of a company's willingness to participate.

2) **Legislated access to Canadian courts for people who have been seriously harmed by the international operations of Canadian companies**. There have been very few court cases in Canada concerning Canadian companies and overseas human rights abuse, despite a growing number of allegations. Canadian courts have been reluctant to hear cases brought forward by foreign plaintiffs, effectively denying them access to justice in Canada. Federal legislation should be adopted in Canada that allows non-Canadians who are affected by the overseas operations of extractive companies to bring civil lawsuits before Canadian courts. The statute should clarify that Canadian courts are an appropriate forum to hear claims against extractive companies that are registered in Canada.

THE PROBLEM — VULNERABLE PEOPLE HARMED BY CANADIAN EXTRACTIVE COMPANIES CANNOT ACCESS REMEDY

Individuals and communities who are harmed by multinational extractive companies often lack access to remedy. In those countries where multinational companies operate (host states), legal barriers, costs and corruption can hinder claimants' efforts to access remedy for human rights abuse and environmental damage. In many countries where multinationals are incorporated and/or controlled (home states), foreign citizens face difficulties initiating legal claims regarding overseas transgressions. Canada is no exception.

CNCA-RCRCE | 280 Albert Street # 100, Ottawa, ON K1P 5G8
613 731 6315 ext.25 | fax. 613 731 0233 | coordinator@cnca-rcrce.ca | www.cnca-rcrce.ca

Ideally, in countries with strong judicial systems, those who have suffered harm caused by transnational companies have at least two options to seek redress. They can take a company to court or seek remedy through a non-judicial grievance mechanism.

GLOBAL CALLS FOR CHANGE

Globally, there is widespread recognition regarding the **urgent need to improve access to remedy** for the victims of corporate abuse. The UN prioritized this area as one of the fundamental pillars of its 'Protect, Respect and Remedy' Framework concerning business and human rights. States are urged to address barriers that prevent legitimate cases from being brought before the courts. The **UN Guiding Principles on Business and Human Rights**, which were developed to implement the Framework, identify effective judicial and non-judicial grievance mechanisms as the centerpiece of an effective system for remedying human rights abuse.

PROBLEMS WITH EXISTING NON-JUDICIAL MECHANISMS IN CANADA

Canada's **National Contact Point for the OECD Guidelines (NCP)** is an interdepartmental committee chaired by the Department of Foreign Affairs, Trade and Development. The NCP is mandated to promote awareness of the OECD Guidelines and ensure they are implemented effectively. The Guidelines include **voluntary principles and standards** that are recommended in order to encourage more responsible corporate conduct. Unlike its counterparts in the UK and the Netherlands, **Canada's NCP does not undertake investigations and site visits** and only offers mediation between companies and complainants. It does not make public determinations about whether guidelines have been breached.

Canada's **Office of the Extractive-Sector Corporate Social Responsibility Counsellor does not provide a useful means to access justice for victims of overseas abuse**. A central flaw with the Office of the CSR Counsellor is that participation in the review process is **voluntary** – to date, in almost all cases brought to the CSR counsellor's office, the companies refused to participate or withdrew from the process. Were a complaint to proceed through the review process, the possibility of achieving effective remedy is remote. The CSR Counsellor is **not mandated to investigate complaints**, or determine whether companies have caused harm or breached the Government of Canada's guidelines for extractive companies. The Counsellor does not make binding recommendations. Nor is the office independent from the Government of Canada. The Counsellor reports directly to the Minister of Trade. The guidelines for extractive companies promoted by the CSR Counsellor's office are weak on indigenous rights, including the right to free, prior and informed consent. **Neither the CSR Counsellor nor the NCP can provide, or recommend that the Canadian government order, any form of sanction or remedy for harm that has been inflicted**.

CANADIAN COURTS ARE INACCESSIBLE

Canada is the home state to a large number of mining, oil and gas companies that operate in developing and emerging economies. However, **non-Canadians are effectively barred from accessing remedy in this country**. There have been very few court cases in Canada concerning Canadian companies and overseas human rights abuse, despite a growing number of allegations.

Generally, Canadian courts have declined to hear cases brought by foreign plaintiffs, arguing that other jurisdictions are more appropriate venues to adjudicate such claims (the legal principle of *forum non conveniens*). Plaintiffs also face significant financial and logistical hurdles when considering Canadian courts.

FOREIGN PLAINTIFFS TEST THE LEGAL WATERS

As the frequency and gravity of accusations concerning human rights abuse and Canadian companies continue to grow, foreign victims have begun to test the legal waters in Canada. However, **thus far, no non-national plaintiff has been successful in a claim against a Canadian company in a Canadian court**. The lack of success on this front underlines the need for legislative reform in Canada to eliminate existing barriers to justice.

To date, there have been six attempts to bring cases of corporate abuse relating to Canadian extractive operations overseas. In the one instance in which the lower court was prepared to accept jurisdiction, the decision was overturned on appeal. As a result, there is no Canadian precedent ruling that Canada is an appropriate venue to hear such claims.

In 1997, a group of indigenous Guyanese initiated a suit in the Superior Court of Quebec. The Guyanese citizens were the victims of an environmental disaster at the Omai gold mine. They sued for negligence in Quebec, where the mine's majority owner, Cambior, was incorporated. **The court dismissed the case, ruling that Guyana was the appropriate venue for the suit**, despite expert testimony regarding the inability of that country's judiciary to provide the victims with a fair trial, and ordered the plaintiffs to pay the company special costs. Subsequent suits brought in Guyana were also dismissed, leaving the victims without remedy. The Cambior decision cast a chill in Canada. Potential plaintiffs were discouraged by both the legal precedent and the adverse costs award.

Twelve years later, in 2009, a suit was launched in the province of Ontario by three Ecuadorians who were allegedly threatened and physically assaulted by security forces contracted by mining company Copper Mesa. The Ontario Superior Court did not consider the question of jurisdiction. Instead, it dismissed the plaintiffs' arguments that the defendants owed them a legal duty of care. **The court found that neither the TSX nor the corporate directors had sufficient connection to the plaintiffs to establish an enforceable legal obligation**. The decision was upheld on appeal.

In 2010, the Canadian Association against Impunity launched a class action lawsuit in Quebec against Anvil Mining for human rights abuses that occurred in the Democratic Republic of Congo. In October 2004, approximately 73 civilians were massacred by Congolese armed forces during an attack on the village of Kilwa. The army relied on logistical support supplied by the mining company including planes, vehicles, security personnel and food.[1] A military court in the Congo acquitted Anvil's former general manager, a Canadian, for aiding and abetting the army. The proceedings were highly irregular and widely criticized.[2] The Canadian lawsuit alleges that Anvil was complicit in the commission of serious human rights violations and argues

1 For more on this see: http://raid-uk.org/docs/Kilwa_Trial/MONUC_report_oct05_eng_translated_by_RAID.pdf.

2 Louise Arbour, when HR Commissioner, was one commentator who questioned the legitimacy of the proceedings. http://www.unhchr.ch/huricane/huricane.nsf/view01/9828B052BBC32B08C125730E004019C4?opendocument.

that the company should pay compensation for the harms that were sustained as a result. While the Quebec Superior Court determined that the case could proceed, the Quebec Court of Appeal overruled the lower court decision, finding that Quebec lacked jurisdiction. **On November 1, 2012, the plaintiffs' application for leave to appeal before the Supreme Court of Canada was dismissed**.

Three cases involving Guatemalan plaintiffs have been launched in Ontario Superior Court against mining company Hudbay Minerals Inc. They concern allegations that security guards employed by the company killed a local leader, seriously wounded another local resident and gang-raped eleven women. The Ontario Superior Court ruled for the plaintiffs on the issue of whether a corporation in Canada could be held responsible for the actions of its subsidiary overseas. The precedential ruling means that for the first time, plaintiffs in a case alleging harm caused by a Canadian extractive company overseas will have the chance to have their day in court. However, in this case, Hudbay Minerals Inc. withdrew its arguments that Ontario was an inappropriate forum in which to hear the claim. This means that while the case is not prevented from proceeding to trial on the issue of jurisdiction, it does not set a precedent on the issue of jurisdiction and future plaintiffs may face barriers to accessing our courts.

LINKS FOR ADDITIONAL INFORMATION

Pambazuka News: Bringing Canadian Mining Companies to Justice
www.pambazuka.org/en/category/features/74254

Anvil Mining: www.ccij.ca/programs/cases/index.php?WEBYEP_DI=14

Copper Mesa: www.ramirezversuscoppermesa.com

Hudbay Minerals: www.chocversushudbay.com

National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries (Advisory Group Report) (Ottawa: Foreign Affairs and International Trade Canada, 2007): www.miningwatch.ca/sites/www.miningwatch.ca/files/

Concerns with regard to the mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada (MiningWatch Canada, March 2011): www.miningwatch.ca/sites/miningwatch.ca/files/MiningWatch_Brief_on_CSR_Counsellor.pdf

FOR MORE INFORMATION about the Canadian Network on Corporate Accountability, or to join our email list, visit our website at **www.cnca-rcrce.ca**, or contact us at coordinator@cnca-rcrce.ca or 613.731.6315 ext. 25.

The CNCA brings together environmental and human rights NGOs, religious organizations, labour unions, and research and solidarity groups from across Canada who are advocating for federal legislation to establish mandatory corporate accountability standards for Canadian extractive companies operating abroad, especially in developing countries.