

Brief Remarks on Intersocietal Responsibility and Canada's Honour

in the Case of *Angelica Choc v. Hudbay Minerals Inc.*[°]

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December 1, 2010

In my view, this case should be situated in a wider context. It is not only what we call a 'private law' case – which is one party suing another party for civil damages – but it is also a case that Canadians should understand as very public in a number of senses.

In the first sense, what is at stake (as has been at stake in several other efforts to seek justice against Canadian corporations through Canadian courts or through private-member legislative initiatives in Parliament) is Canadian society's responsibility to other societies. The right of foreign citizens to access our courts to hold our corporations to account needs to be embedded within a broader ethical framework of intersocietal responsibility.

A second sense in which this case goes well beyond private parties is that both our honour and reputation in the world is at stake. To date, the activities of some Canadian or Canadian-connected mining companies around the world have generated real repercussions for how we are being viewed abroad. This includes Central America, from El Salvador to Honduras to Guatemala, where the Canadian flag on one's backpack or one's luggage tag increasingly feels like a badge of shame. Not only is mining industry conduct a cause of this increasingly jaundiced and disillusioned view about Canada amongst a significant segment of the more aware citizens in these other countries, but it has so far been taken as a given by many abroad that Canadian courts have so far not welcomed cases seeking to hold accountable Canadian companies (whether mining companies or companies from other fields) for harms abroad that have

[°] For information on the progress of this lawsuit, visit <http://www.chocversushudbay.com>.

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significant human rights or environmental dimensions. To date, at least three major transnational corporate accountability cases of this sort have run aground on legal doctrines – or, rather, run aground on specific judges’ interpretations of legal doctrines – with respect to jurisdiction (notably the doctrine of *forum non conveniens* with its analysis of whether a court should, exceptionally, stay proceedings because it views another court system to be clearly more appropriate for trying the case) and around the threshold application of rules of liability (notably, via a doctrine that allows proceedings to be ended for lack of a reasonable cause of action). Other legal doctrines are waiting in the wings or have already played either an interstitial or a shadow role in these three unsuccessful cases.

Meanwhile, some litigants have deliberately avoided bringing suit in Canada and have turned to US courts as their first recourse even though the alleged harm did not occur in the United States and even though the impleaded corporation is Canadian. In one of these cases, the government of the Province of Marinduque in the Philippines took the position in its argument before a US court that, when the court was determining whether the US was the appropriate forum in which to sue a Canadian mining company for alleged harm in the Philippines, the US court should compare the US court’s jurisdiction with the jurisdiction of Filipino courts because the Province of Marinduque did not consider Canadian courts a realistic option for their lawsuit. It seems clear that such desire to avoid Canadian courts is connected to perceived barriers for Canadian judges reading Canadian law receptively, so as to facilitate versus frustrate transnational corporate accountability.

The third sense in which this case is public follows from the first and second senses. Recall the first sense related to Canadian society’s ethical responsibility to other societies and the second related to valuing our honour and reputation. While I do not have time in these brief remarks to go into detail, the third point is that Canadian hypocrisy is in play when our courts consider legal responsibility for Canadians’ conduct elsewhere in the world. Go ahead and do elsewhere what you cannot do in Canada. In this respect, the transnational corporate accountability context should be understood in light of other areas of law. How quickly we have forgotten that, in the constitutional case brought by Amnesty International and the BC Civil Liberties Association seeking to stop Canada from transferring Afghan detainees to the custody of Afghan government

agencies known to torture, our Federal Court of Appeal ruled – in a poorly reasoned judgment upholding a somewhat better reasoned first level ruling – that the Canadian Charter of Rights and Freedoms is not available to Afghans harmed by or as a consequence of Canadian government conduct in Afghanistan. The Supreme Court of Canada – acting through three judges – denied leave to appeal in the case, thus leaving the Federal Court of Appeal judgment standing as the current law. Meanwhile, the same Supreme Court bent over backwards to find a way for Charter rights to be applicable in the case of Omar Khadr's situation in Guantánamo, using reasoning that seems inconsistent with the Federal Court of Appeal reasoning in the Afghan-detainee-transfer case. Could it be that a key difference will turn out to be that Mr. Khadr is a Canadian citizen and that the transferred Afghan prisoners are not? And over a decade ago, the family of Canadian Shidane Arone tried to sue the government of Canada for the torture-death of Arone by Canadian troops in Somalia. A trial judge here in Ontario used several procedural grounds to dismiss the case, most of which were inadequately reasoned. Featuring in the reasoning was an assumption by the judge that there was insufficient proximity to generate a duty of care flowing from the government of Canada to a teenager detained by Canadian soldiers in Somalia. The fact an international border lay between Ottawa and Shidane Arone's brutal death somehow loomed large in the judge's understanding of the legal universe. To add insult to injury, not a single report service – whether Ontario Reports or the Dominion Law Reports or the online report services of the day – felt this case was important enough to publish.

To finish up, as noted in Murray Klippenstein's remarks before me, Canadian law as it stands is already adequate for transnational corporate liability to be adjudicated in our courts, including in this case being bravely brought by Angelica Choc. But, the real question is whether our courts are up to the task. And, as Graham Russell noted in his remarks, this should be a very easy case from the point of view of humanistically-interpreted legal doctrine, assuming the facts as alleged can be proven. But, everyone expects this case will face many hurdles as the company's well-resourced legal team plays every card our system allows. Despite these expected challenges, the final question I would ask the Canadian legal system and the Canadian legal profession is this: if a plaintiff cannot find justice in Canadian courts on these facts, then what hope is there – not only for future plaintiffs but for us as a society that likes to tell itself that Canada is amongst the better angels in this world? If not now, when?