

September 24, 2019

ARTICLE

## Pan American Silver Resolves Human Rights Claim Against Tahoe

On July 30, Pan American Silver announced the resolution of *Gracia v. Tahoe Resources Inc.* This marks the conclusion of the first of three claims against Canadian mining companies by foreign plaintiffs relating to allegations of human rights abuses abroad.

The *Garcia* case concerned the 2013 shooting of protestors by security forces at the Escobal mine in Guatemala, owned and operated by Minera San Rafael, a subsidiary of BC's Tahoe Resources. Individuals injured in the shooting brought their claim against Tahoe in British Columbia, seeking to pierce the corporate veil. Tahoe initially succeeded at dismissing the claim, but the BC Court of Appeal overruled the trial court decision. The Supreme Court of Canada denied leave to appeal in 2017 and the case was proceeding to trial on the merits.

Pan American Silver then acquired Tahoe on February 22, 2019 and began efforts to resolve the claim.

In announcing the resolution, "Pan American, on behalf of Tahoe, acknowledge[d] that the shooting on April 27, 2013, infringed the human rights of the protestors." The company, on behalf of Tahoe, also apologized "to the victims and to the community." (The BC *Apology Act* clarifies that issuing an apology does not constitute an admission of fault or liability, or acknowledgement of liability, and is not admissible in court as evidence of fault or liability.)

This statement is the first time a Canadian mining company publicly acknowledged human rights abuses committed in its operations abroad.

### Addressing human rights is a competitive advantage

Resolving the claim represents a deliberate strategy and roadmap for improved global operations for extractive companies. Pan American's community engagement and efforts to assist the Guatemalan government to conduct indigenous consultations concerning the Escobal mine demonstrate the competitive advantages available to companies that engage proactively on human rights.

Tahoe's investment in Guatemala faced a serious challenge. Guatemala's Supreme Court suspended the mine's licence in September 2018 for failure to properly consult with Indigenous peoples. In addition, local communities blockaded the road to the mine, which is still ongoing.

Acknowledging the human rights violations and issuing an apology is a step forward towards peacefully resolving outstanding issues. The trust and goodwill it builds with local communities creates an opportunity that did not otherwise exist, and improves the prospects for resuming operations.

Canadian companies with global operations should strongly consider following this lead and engage early and proactively on human rights issues.

### Changing government expectations

Engaging with and demonstrating a commitment to respecting human rights abroad also aligns with the Government of Canada's expectations for Canadian businesses.

Government-led consultation on business and human rights legislation begun in spring 2019 indicates the government is considering mandating Canadian companies to respect human rights within their global operations and supply chains.

The new Canadian Ombudsperson for Responsible Enterprise (CORE) is another attempt to ensure Canadian companies respect human rights abroad. In addition to resolving disputes between local communities and companies, the CORE is tasked with advising companies on responsible business conduct and promoting implementation of the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Human rights can also affect a company's access to trade finance. In May 2019, Export Development Canada released its human rights policy which integrates human rights due diligence based on the UN Guiding Principles into its assessment process.

## Moving forward on human rights

Companies looking to avoid events like those that occurred at the Escobal mine and to mitigate consequential financial and reputational risk can do so by adhering to the UN Guiding Principles and OECD Guidelines. A key step in the process is to perform human rights due diligence as required by these instruments. A company's commitment to human rights should also inform proactive relations with local stakeholders to identify and resolve issues before they materialize.

Human rights due diligence permits companies to identify adverse impacts before they happen. Companies can then take steps, together with other stakeholders, to prevent and mitigate those adverse impacts. Taking these steps at the outset and monitoring human rights over the course of a project prevents issues from escalating. This lessens the chance of negative consequences from ensuing, like the suspension of a mining licence, protests by disaffected communities, and lawsuits or complaints to the CORE.

Canadian companies with operations abroad should not wait for the resolution of the two other legal claims against mining companies to examine the human rights impacts of their own operations. Those claims may provide guidance on the extent to which companies may be legally liable for acts that occur abroad in specific situations. The claims, however, will not change the fact that companies with strong commitments to respecting human rights will be more successful in their operations than those that do not.

*BLG advised Pan American on its acquisition of Tahoe.*

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