British Columbia Court of Appeal Rules on Corporate Veil Case: Garcia V. Tahoe Resources INC.

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Overview

The latest court decision in a line of cases attempting to hold Canadian mining companies liable for the actions of their foreign subsidiaries was released at the end of January. The case concerns a claim for damages brought by Guatemalan plaintiffs against a Canadian parent company, Tahoe Resources Inc. ("Tahoe"), over the actions of mine security personnel at the Escobal mine in Guatemala. The mine is owned by two subsidiaries of Tahoe. The case has been tied up in jurisdictional arguments since it was commenced.

In this recent decision (*Garcia v Tahoe Resources Inc.*, 2017 BCCA 39), the British Columbia Court of Appeal overturned a stay imposed by a lower court in 2015. The Chambers judge had previously held that Guatemala was the more appropriate jurisdiction to hear the plaintiffs' application as there was evidence of a criminal proceeding and also a potential civil suit in Guatemala regarding the same event. However, the Court of Appeal disagreed and overturned the decision, allowing the action to proceed against Tahoe in British Columbia, on finding that there was a serious risk of unfair process in Guatemala.

Traditionally, cases like this one have been prevented by the "corporate veil" that insulates a parent company from liability for the actions of its subsidiaries. What makes the plaintiffs' claims in *Tahoe* interesting from a legal perspective is that they, like a number of other recent cases (*e.g.*, *Araya v. Nevsun Resources Ltd.* and *Choc v. Hudbay Minerals Inc. et al.*), are attempting to get around the corporate veil issue by focusing on the Canadian companies' public statements regarding their commitment to corporate social responsibility ("CSR"). Rather than seeking to have courts "lift the corporate veil" to hold the parent companies liable for their subsidiaries actions, the plaintiffs instead allege that the parent companies are directly liable on traditional tort grounds, such as negligence, battery, and conversion. In order to make a direct link to the Canadian companies, the plaintiffs point to public statements by the parent companies committing to the adoption and maintenance of certain CSR standards, such as the 2006 IFC standards on social and environmental performance and the Voluntary

Principles on Security and Human Rights. The plaintiffs allege that these commitments represent acknowledgement by the Canadian companies that they retained ultimate control over and had responsibility for their subsidiaries' foreign operations, particularly security practices.

British Columbia Supreme Court

In 2013, private security personnel allegedly opened fire at seven individuals who were protesting outside of the Escobal Mine, using shotguns, pepper spray, buckshot and rubber bullets, injuring Adolfo Garcia and six others. The seven Guatemalan plaintiffs brought an action for damages against Tahoe in the Supreme Court of British Columbia as "they had no faith in the Guatemalan legal system to hold the company accountable."

Tahoe conceded that the British Columbia Supreme Court had jurisdiction over the claim, but applied for the court to exercise its discretion to decline jurisdiction on the grounds that Guatemala was the more appropriate forum. Tahoe's application, technically referred to as a ***forum non conveniens*** application, was granted. The judgment turned on whether the plaintiffs could obtain a fair trial in Guatemala, which the Chambers judge found that it could – either through a civil suit or a criminal proceeding.

British Columbia Court of Appeal

On appeal, the court found that the Chambers judge had erred in framing the question as whether Guatemalan courts were "capable" of providing justice. The proper test is whether the evidence discloses ***a real risk of an unfair trial process in the foreign court***. To determine that, the Court of Appeal considered the limitation period and discovery procedures for civil suits in Guatemala and the risk of unfairness in the Guatemalan justice system and found that they all weighed against Guatemala being the more appropriate forum for the action.

In particular, procedural hurdles in the discovery process in the Guatemalan civil system (specifically, the "complex and time consuming process" – in the words of the Court of Appeal – of petitioning a Guatemalan court to issue letters rogatory requesting that a British Columbia court, in turn, require Tahoe to produce documents) made a civil suit in Guatemala against a Canadian company significantly challenging. This finding was further compounded by the fact that the Guatemalan plaintiffs had failed to file a civil suit in Guatemala prior to the limitation period ending. Tahoe argued that this was a failure on the part of the plaintiffs, but the Court of Appeal treated it as another reason as to why Guatemala was not the appropriate forum.

In addition, the Court of Appeal took into account the issuance of a stay in the Guatemalan criminal proceeding, due to the accused security personnel fleeing the country. This new evidence was admitted on appeal, as the court found it to be pivotal.

There was also general evidence that the risk of injustice in Guatemala was high. Evidence on corruption within the Guatemalan justice system was raised on the application, particularly with regard to criminal proceedings against "illegal security forces and clandestine security structures." The Court of Appeal put more emphasis on the politicized events of the shooting and the social conflict involving mining activity in

Guatemala than the Chambers judge, who had treated the events as a personal injury case without social context.

With all factors weighing in favour of British Columbia being the most appropriate forum, the court allowed the appeal and dismissed Tahoe's application for a stay.

Conclusion

This latest decision focused solely on the appropriate judicial forum and did not consider the merits of the case. As a result, the question of whether CSR disclosure and commitments are enough to ground liability for Canadian mining companies remains unanswered.

Canadian mining companies with operations abroad will want to continue to monitor this case and other lawsuits where damages for human rights abuses have been sought before Canadian courts against Canadian mining companies for the operations of their foreign subsidiaries. From a practical perspective, these decisions highlight the importance of mitigating tensions between local communities and foreign mining operations, lest they result in costly and time-consuming human rights litigation here in Canada.

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