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British Columbia Lawsuit by Guatemalan Plaintiffs Against Tahoe Resources Inc. Stayed on *Forum Non Conveniens* Grounds

In a decision with important implications for Canadian companies with foreign operations, the Supreme Court of British Columbia declined jurisdiction to hear a claim brought against Tahoe Resources Inc. (Tahoe) in British Columbia.

On June 18, 2014, seven Guatemalan residents brought a claim against Tahoe in the Supreme Court of British Columbia seeking damages, including punitive damages, for negligence and battery based on various grounds, including alleged human rights violations(the Claim). The Claim relates to an incident that occurred on April 27, 2013 outside of the Escobal Mine in San Rafael Las Flores, Guatemala, which is operated by Tahoe's wholly-owned subsidiary, Minera San Rafael S.A. (MSR). On that date, a group of individuals, including the plaintiffs, assembled in front of the gates of the Escobal Mine. The plaintiffs allege that they suffered multiple bodily injuries as a result of actions taken by mine security personnel.

On November 9, 2015, the Supreme Court of British Columbia issued its ruling on the jurisdictional application brought by Tahoe, in which Madam Justice Gerow granted Tahoe's jurisdictional application, declining to hear the action as Guatemala is clearly the more appropriate forum for adjudicating the claim (*Garcia v. Tahoe Resources Inc., 2015 BCSC 2045*).

Tahoe's legal team was led by McMillan LLP who worked in collaboration with Tahoe's counsel based in Reno, Nevada and counsel based in Guatemala. The McMillan team was led by Karen Carteri and also consisted of Amandeep Sandhu and Robert Wisner.

Novel Tort Claims in Canada

The Tahoe case is one of three cases that have recently been launched in Canada against parent companies with subsidiaries operating in foreign countries. In the Tahoe case, the plaintiffs claimed that Tahoe expressly or implicitly authorized battery by security personnel. Alternatively, the plaintiffs claimed that Tahoe owed them a duty of care arising in part out of its corporate social responsibility policies, and that it breached that duty in part as a result of Tahoe's alleged failure to establish procedures for security personnel to comply with international guidelines pertaining to the use of force.

A proposed class action has also been brought by three Eritreans against Nevsun Resources in British Columbia alleging among other things that forced labour was used at the Bisha Mine in Eritrea in violation of international law, and by Guatemalan plaintiffs against Hudbay Minerals in Ontario alleging among other things that human rights abuses, such as sexual assault, were perpetrated by the companies' security personnel. While each case has very different facts and while each case includes other causes of action, they each contain a common theme of alleging violation of international human rights principles or guidelines as a basis in tort to make a Canadian company responsible for the acts of its foreign subsidiaries or agents.

Hudbay sought to have the action against it struck on the basis that there was no legal basis for the claim. The Ontario court dismissed that application, leaving the matter of whether such a claim can be successfully made in Canada to be determined at trial. Tahoe applied to have the action against it stayed based on the jurisdictional principle of *forum non conveniens*, saying that Guatemala was clearly the more appropriate forum for determination of the plaintiffs' claims

in that case. Nevsun Resources has brought a *forum non conveniens* motion and a motion to strike, which motions are scheduled to be heard in early 2016.

The Decision to Decline Jurisdiction

Forum non conveniens is a legal doctrine by which courts may refuse to exercise jurisdiction over matters where there is a more appropriate forum available to the parties. A defendant must meet a high threshold to succeed on a *forum non conveniens* application, as it must establish that a foreign jurisdiction is clearly the more appropriate forum for determination of the matters in dispute.

The factors that a court in British Columbia uses to determine whether or not it is an appropriate forum is found in section 11 of the *Court Jurisdiction and Proceedings Transfer Act* (the CJPTA). This non-exhaustive list of factors include:

1. the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
2. the law to be applied to issues in the proceeding,
3. the desirability of avoiding multiplicity of legal proceedings,
4. the desirability of avoiding conflicting decisions in different courts,
5. the enforcement of an eventual judgment, and
6. the fair and efficient working of the Canadian legal system as a whole.

As per the Supreme Court of Canada's decision in *Club Resorts Ltd. v. Van Breda*, the objective of the court in deciding a *forum non conveniens* application is to ensure fairness to the parties and an efficient resolution of their dispute.

In the Tahoe case, the central feature of the plaintiffs' submissions on the *forum non conveniens* motion was that the Guatemalan legal system is corrupt and that they would be unable to receive a fair trial

in Guatemala. The plaintiffs also asserted that the Claim was centered in Canada because the central issue is whether a Canadian company has responsibility under Canadian law for security personnel hired to protect its main asset.

Madam Justice Gerow made the following findings as they relate to each of the factors outlined in section 11(2) of the CJPTA:

comparative convenience of the parties and witnesses

- trying the action in British Columbia would result in considerably greater inconvenience and expenses for the parties and witnesses;
- the alleged battery occurred in Guatemala, none of the plaintiffs speak English, and all medical, financial and related records are located in Guatemala and most, if not all, are in Spanish;
- the majority of Tahoe's management and staff, who might be called as witnesses, live and work in Reno, Nevada, and the majority of Tahoe's documents are in Nevada;
- most, if not all, of the witnesses will have to travel to Vancouver from Guatemala and Reno, and many will only speak Spanish;
- where the ordinary factors set out in the CJPTA and case law point to Guatemala as the more appropriate forum, the question is not whether Canada's legal system is fairer and more efficient. It is whether the foreign legal system is capable of providing justice, and the plaintiff must take the forum as he finds it, even if it is less advantageous in certain respects, unless he can establish that substantial justice cannot be done in the appropriate forum;
- while Guatemala's legal system may be imperfect, it functions in a meaningful way, and parties can pursue rights and remedies such as the ones raised by the plaintiffs in their claim;
- Guatemalans who have lesser means to pursue claims are supported by organizations like El Centro de Accion Legal-Ambiental y Social de Guatemala (CALAS), which provides free

legal assistance. The plaintiffs are using the benefit of such representation;

- the evidence is that both the alleged battery and the alleged breaches of duty on the part of Tahoe occurred in Guatemala and perhaps Nevada, and as such the plaintiffs' assertion that the case is centered in Canada is not supported by their pleadings;
- this is not a case where the plaintiffs will not have a trial or hearing in the other jurisdiction. The plaintiffs are advancing a compensation claim through existing criminal proceedings in Guatemala, and they could also commence a civil action in Guatemala;

choice of law

- the law applicable to tort claims is the law of the place where the activity occurred and in this case that was in Guatemala;
- further, as the breaches of the duty alleged in the notice of civil claim occurred in Guatemala, it is likely that Guatemalan law should be applied to the plaintiffs' claim;

avoiding multiplicity of legal proceedings

- following the incident, the Guatemalan public prosecution authority, known as the *Ministerio Publico*, laid criminal charges against Alberto Rotondo, MSR's contracted security manager. Since the plaintiffs are seeking compensatory damages against Rotondo through the ongoing criminal proceedings in Guatemala, and since they are seeking damages in British Columbia against Tahoe for the same injuries arising out of the same incident, there is a possibility of reaching conflicting decisions and a multiplicity of legal proceedings arising out of the same cause of action;

enforcing foreign judgments

- there is no evidence to suggest that a Guatemalan judgment could not be enforced by the plaintiffs in British Columbia;

fair and efficient working of the Canadian legal system

- in terms of the direct liability the plaintiffs allege against Tahoe, while it is argued by the plaintiffs, it is far from clear in the *Choc* decision that such a duty will be established, as the claim is noted in *Choc* as being a novel one;
- plaintiffs have been able to obtain documents and evidence in Guatemala, and expert evidence has outlined the procedures for obtaining and submitting evidence in civil procedures in Guatemala;
- if the claim were to proceed in British Columbia, non-party witnesses would have to be compelled from Guatemala or other jurisdictions, which would present significant challenges; and
- public interest requires that Canadian courts proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens, and the principle of comity must not be ignored.

Having considered the above factors, the case law, evidence and submissions, Madam Justice Gerow concluded that Guatemala is clearly the more appropriate forum for adjudicating the plaintiffs' claims for damages relating to their injuries, and she exercised her discretion to decline jurisdiction in this case. Among other things, this case demonstrates that generalized arguments and evidence about corruption in foreign courts and the existence of a potentially novel domestic claim do not prevent a case from being stayed within the broad range of well established *forum non conveniens* factors and principles.

by Karen Carteri, Amandeep Sandhu and Robert Wisner

For more information on this topic, please contact:

Vancouver	Karen Carteri	604.691.7431	karen.carteri@mcmillan.ca
Vancouver	Amandeep Sandhu	604.691.7448	amandeep.sandhu@mcmillan.ca
Toronto	Robert Wisner	416.865.7127	robert.wisner@mcmillan.ca

a cautionary note

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