FASKEN

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

333 Bay Street, Suite 2400
P.O. Box 20
Toronto, Ontario M5H 2T6
Canada

T +1 416 366 8381
+1 800 268 8424
F +1 416 364 7813

fasken.com

INTERNATIONAL ORGANIZATION OF EMPLOYERS:
CSR & HUMAN RIGHTS NEWSLETTER

The Canadian Experience: Lawsuits Involving Business Activities Abroad as of 2018

A number of recent cases are beginning to paint a picture of the current Canadian legal landscape regarding lawsuits involving the business activities of Canadian companies abroad. It is unclear whether the cases discussed below will represent a lasting point of departure, on the part of Canadian courts, in terms of the way in which they deal with allegations of human rights abuses arising out of the foreign business activities of a Canadian multinational corporation. This article provides an update on the status of Canadian court cases involving business activities abroad, as first discussed in the December 2015 CSR & Human Rights Newsletter.[1]

In the 2013 decision in *Choc v Hudbay Minerals Inc.*,[2] an Ontario court dismissed motions by Hudbay Minerals to dismiss the Guatemalan plaintiff's claims on the basis that no cause of action existed in Ontario. The plaintiffs claim, by way of a negligence action, that security forces working for Hudbay's Guatemalan subsidiaries committed a variety of human rights abuses (specifically, a shooting, a killing, and gang rapes in the vicinity of a mining project). The court's procedural decision was overwhelmingly considered by legal commentators to be a marked and significant shift in the approach taken by Canadian courts.

While concluding that the plaintiffs' claims that Hudbay was directly liable for its subsidiaries' security forces' conduct were "novel," the court ultimately concluded that it was not plain and obvious that the claims would fail. In reaching this conclusion, the court noted a variety of international legal and CSR standards including, the OECD G*uidelines for Multinational Enterprises*, the UN Protect, *Respect, and Remedy Framework*, and the UN *Guiding Principles on Business and Human Rights*, as well as public statements made by Hudbay affirming its compliance with such international standards.

Hudbay Minerals is continuing to progress through the court process in Ontario. In late 2017, a number of the plaintiffs participated in a discovery process in Toronto.

---

1 The December 2015 CSR & Human Rights Newsletter can be found at: http://www.ioe-emp.org/index.php?id=2947&utm_source=NL&utm_medium=email&utm_campaign=9.1ENG

2 2013 ONSC 1414.

In *Garcia v Tahoe Resources Inc.*[3], the British Columbia Supreme Court declined jurisdiction to hear the case of seven Guatemalan farmers who brought a claim of negligence and battery for injuries they allege to have suffered at the hands of security personnel hired by Tahoe Resources. The court held that Guatemala was the more appropriate forum based on a number of factors, including the fact that the events alleged, the evidence thereof, and the associated injuries and losses took place in Guatemala and, further, that Tahoe Resources did not carry on business in British Columbia (despite being incorporated in British Columbia).

The plaintiffs appealed the decision of the British Columbia Supreme Court. The original stay of the plaintiffs' action was reversed on appeal, with the Court of Appeal finding that the lower court judge erred in her discretionary application of the legal test for determining the risk of unfairness by a foreign judiciary.[4]

The Court of Appeal highlighted three factors weighing against a finding that Guatemala was a suitable jurisdiction for the hearing of the civil suit: (1) the difficulties that the plaintiffs would face due to limited discovery procedures in Guatemalan courts; (2) the fact that the one-year limitation period for bringing a civil suit in Guatemala had long expired and the lack of clarity on whether the plaintiffs would be permitted to bring their claim in Guatemala; and (3) the risk that the plaintiffs would not receive a fair trial of the issues in Guatemala against "a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state."

Tahoe Resources' subsequent application for leave to appeal was dismissed by the Supreme Court of Canada,[5] potentially affording significant precedential value to the decision of the British Columbia Court of Appeal.

In another decision from British Columbia, the Supreme Court of British Columbia released its decision in *Araya v Nevsun Resources*[6] in October 2016. The court dismissed Vancouver-based Nevsun Resources' application to strike the plaintiffs' claim for damages arising during the construction of Nevsun Resources' Eritrean-based mine.

The plaintiffs in *Nevsun Resources* are Eritrean nationals with refugee status. The plaintiffs' allege that they were conscripted into a government military program and forced to provide labour to companies engaged by Nevsun Resources and/or its Eritrean subsidiary. The plaintiffs' action is for damages under customary international law as incorporated into Canada for: the use of forced labour; torture; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. The plaintiffs also seek damages under British Columbia law for the torts of conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress.

The court found that Nevsun Resources failed to establish that comparative convenience and expense favoured Eritrea as the more appropriate forum and that there was sufficient evidence to conclude that a real risk existed that the plaintiffs would not be provided with justice in Eritrea. The court held

---

3 2015 BCSC 2045.

4 2017 BCCA 39.

5 2017 CarswellBC 1553.

6 2016 BCSC 1856.

that the plaintiffs' claims based on customary international law raise arguable, difficult and important points of law and should proceed to trial so that they can be considered in their proper legal context.

Nevsun Resources appealed the decision to the British Columbia Court of Appeal. The Court of Appeal dismissed Nevsun's appeal, holding that the lower court had not erred in dismissing the forum application due to a finding that there would be a real risk of corruption if the case were to be tried in the Eritrean legal system.[7]

The door is now open for the plaintiffs in both *Tahoe Resources* and *Nevsun Resources* to pursue their claims in British Columbia.

In April 2015, a CAD $2-billion class action against George Weston Ltd. and its subsidiaries (collectively, "Loblaws") was filed in Ontario by surviving garment factory workers, and the families of deceased workers of the 2013 Rana Plaza factory collapse in Bangladesh. The plaintiffs in *Das v George Weston Limited*[8] alleged that Loblaws knew of the "deplorable history of factory disasters in Bangladesh" and voluntarily undertook the responsibility of ensuring that the buildings in which its garments were manufactured were safe and structurally sound. The plaintiffs additionally alleged that Loblaws was careless and in breach of its own CSR standards and international standards when it failed to ensure that prior audits were sufficient to address the particular safety concerns that prevailed at the relevant time in Bangladesh.

On July 5, 2017, Justice Perell of the Ontario Superior Court refused to certify the class action lawsuit, stating that the plaintiffs failed to meet the requirements of a cause of action in negligence, in part due to the fact that the workers in the Plaza were not employees of Loblaws. Rather, the plaintiffs' employer was a sub-supplier to one of Loblaws' subsidiaries. As a result, the proximity factor required in a negligence action was not satisfied.

The decision in *George Weston Ltd.* has been appealed to the Ontario Court of Appeal. To date, a hearing of the matter has not been scheduled. Notably, the action is now statute-barred in Bangladesh.

While none of the above referenced claims have been decided on the merits as of yet, the claims will be closely monitored by the legal and business community in Canada and abroad. We will provide updates regarding relevant developments on this emerging issue as they occur.

February 22, 2018

Brian Burkett
Christopher Pigott
Gillian Round

---

7 2017 BCCA 401.

8 2017 ONSC 4129.