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Risks of international tort litigation at home

Many Canadian companies with global operations are unacquainted with the risks of domestic tort litigation as a result of their business activities in foreign countries. While there has been increased awareness of the importance of compliance planning with regard to some international sources of risk such as foreign environmental assessments, bribery and corruption prosecutions, and securities class actions, there has been comparatively less cognizance of the risks of international tort litigation — particularly the risks stemming from alleged violations of international human rights norms admitted into Canadian law. The July 22, 2013 decision in *Choc v. Hudbay Minerals Inc.* has recently brought this topic to the forefront for the Canadian legal audience. In that decision, the Ontario Superior Court of Justice ruled that negligence claims brought by 13 Guatemalans, for alleged human rights violations that took place in Guatemala, could proceed against a Canadian mining company in Canadian courts. While a determination on the merits is still pending, *Hudbay* has precipitated a discussion within the Canadian legal community about how to lower the risks of international tort litigation. To that end, this quiz will discuss some of the situations Canadian companies operating abroad may have to navigate to manage this potential source of liability.

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1 You are legal counsel to a Canadian company with global operations called Worldly Canadian Business Corp. An American member of the company's management team tells you that since Canada does not have a statutory jurisdictional vehicle functionally equivalent to the Alien Tort Statute (which has historically permitted victims of international torts to bring their claims on American soil) your company is not exposed to tort actions in Canada for foreign human rights violations. Is her interpretation of the law correct?

(A) Yes

(B) No

(C) Maybe, it depends

2 After you carefully outline the finer legal nuances surrounding the domestic enforceability of customary international law, another member of your company's management team remarks, "Well, even if our American friend isn't quite right, since threshold cases advancing claims of civil liability for alleged human rights violations by Canadian companies operating abroad have had virtually no success in Canada, there is really nothing to worry about." Is his analysis correct?

(A) Yes

(B) No

3 Your company is now considering acquiring exploration rights for an oil and gas property in Foreignlandia. The company's CFO is cautioning only due diligence that is considered "absolutely necessary" can be undertaken in order to keep the total acquisition costs down. Does this mean your company should skip a human rights risk assessment exercise?

(A) Yes

(B) No

(C) Maybe, it depends

4 Your company has decided to purchase the property in Foreignlandia and, after exploration activities have been conducted, a decision has been made to move into full-scale production. Should you reassess the human rights policy the company put in place when it was in the exploration stage?

(A) Yes

(B) No

(C) Maybe, it depends

5 Some local citizens of Foreignlandia are unhappy that your company's property has moved into production. They stage a series of protests to voice their discontent. You are informed by the manager of the property in Foreignlandia that the company's security personnel have been accused of malevolent conduct by local citizens. Should company resources be allocated to manage the local issues?

(A) Yes

(B) No

(C) Maybe, it depends

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QUIZ ANSWERS

1 (B) No. In *Hape v. The Queen*, the Supreme Court of Canada authoritatively resolved a long-held assumption that international customary law was automatically part of the law of Canada, absent statutory departures to the contrary. So, even though Canada lacks a statute similar to the American Alien Tort Statute, Canadian companies operating abroad may still face litigation in Canada for alleged violations of international law. In practice, this means that violations of certain customary international laws (including international human rights norms admitted into Canadian law) can create liability for private actors (both individuals and corporations) in Canadian courts.

2 (B) No. It is not the case that Canadian courts have rejected these types of claims outright because of a lack of subject matter jurisdiction. Instead, the cases brought prior to Hudbay failed for reasons unique to each case and not because this type of claim is inherently untenable. And, as the July 22, 2013 Hudbay decision makes clear, there is now jurisprudence to support the proposition that these types of claims may indeed proceed to a determination on the merits.

3 (C) Maybe, it depends. Careful Canadian companies operating abroad should consider engaging in a so-called "human rights due diligence" exercise which is proportionate to the risk of infringements posed by the operations of the target. The risks from international tort litigation are heightened for Canadian companies operating abroad in the extractive sector because many companies operate in high-risk jurisdictions such as developing nations with a history of inter-state and/or intra-state violence. For example, to protect their foreign assets in high-risk jurisdictions, companies frequently retain local security providers for foreign project sites. These organizations and individual employees must be carefully supervised by the target to ensure that their behaviour is respectful of human rights, otherwise they can create a potential source of liability for a prospective purchaser. At the same time, any human rights due diligence exercise must be commensurate with the risk of infringements posed by the size and nature of the company's operations. The right policies for an oil and gas property in the United States will likely be very different from the right policies for an oil and gas property in the Democratic Republic of Congo.

4 (A) Yes. A periodic reassessment of the appropriateness of the company's human rights policy is a wise strategy. This is a particularly useful exercise when there is a significant change in the company's activities and/or its operations environment. Typically, exploration-stage companies need a much less robust human rights program than production-stage companies because of the relative intensity of their operations on the ground. In undertaking any reassessment, company leadership should engage with relevant stakeholders as well as company personnel to ensure important developments are appropriately covered by the human rights policy.

5 (A) Yes. In order to ensure that a human rights policy will achieve the best results, it is often useful to track potential human rights issues and incidents, report this performance, and undertake appropriate remediation. Tracking can be achieved by monitoring qualitative and quantitative metrics. This data can then be reported to internal company decision-makers to keep them apprised of developments. External reporting can also sometimes be appropriate but should be undertaken only after consideration of the impact of disclosure on those involved in the matters reported. In certain circumstances, it may be appropriate to discuss remediation options in order to mitigate adverse impacts and reduce the risk of future incidents. Access to appropriate remedies can be an effective tool to rebuild relations between the company and the community because it demonstrates accountability for actions and a desire to improve future outcomes.

YOUR RANKING?

- **One or Two correct:** *might be time to brush up*
- **Three correct:** *not bad, but some further work needed*
- **Four correct:** *very well done, but not perfect*
- **Five correct:** *excellent*