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ANTI-CORRUPTION, ANTI-MONEY LAUNDERING AND REGULATORY COMPLIANCE

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Tort Liability at Home for Alleged Wrongs Abroad: The Common Law Goes Extraterritorial?

Contemporary anti-corruption and bribery legislation is distinguished by its extraterritorial reach to conduct abroad – conduct which may indeed be lawful and/or expected as a condition of doing business where it occurs – as a basis for criminal liability at home both for individuals and other legal persons. Such statutes were, at inception, a marked departure from the principle of the sovereign equality of states, and previously sound business practices, that individuals and companies doing business abroad take and adhere to the law as they find it. Now, however, our anti-corruption regimes hold their individual and corporate entities to a common standard wherever they go.

In this phenomenon, Canadian legislation and courts may now be starting to lead by example. We are seeing the beginnings of similar developments in the realm of civil liability. Specifically, several recent decisions suggest a new type of extraterritorial tort liability for alleged violations of international human rights in foreign jurisdictions to which Canadian companies, particularly in extractive industries operating abroad, may be exposed. The fact that many of these companies are either based in or have asset-based connections to Canada also suggests that Canadian courts may become a centre for litigation of this kind.

Recent Examples of International Tort Litigation in Canadian Courts

Choc v. Hudbay Minerals Inc.[1] involves three lawsuits brought by members of the indigenous Mayan Q'eqchi' population in El Estor, Guatemala, for alleged abuses committed by security personnel at Hudbay's former mining project in Guatemala in 2007 and 2009, including a shooting, a killing and gang rapes. The plaintiffs have advanced claims against Hudbay, a Canadian mining company with headquarters in Toronto and incorporated under the *Canada Business Corporations Act*, for being directly liable for the actions of its former Guatemalan subsidiary (and in one of the three actions, for also being vicariously liable for the actions of the Guatemalan subsidiary). The plaintiffs argued that Hudbay was directly liable for failing to prevent harms committed by the security personnel of its Guatemalan subsidiary, and that a duty of care was owed by the parent company to the members of the local community. Amnesty International, acting as an intervener, made submissions regarding international law, standards and norms supporting the existence and scope of such a duty of care.

Madam Justice Brown of the Ontario Superior Court denied a preliminary motion to strike, allowing the claims to proceed to trial, and found that the plaintiffs had pled all material facts required to establish the constituent elements of their claim of direct negligence and a novel

[1] 2013 ONSC 1414 [*"Hudbay"*].

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duty of care owed by a parent company (which are reasonable foreseeability, proximity, and absence of policy reasons to offset or otherwise restrict that duty). *Hudbay* may prove to be a landmark case on the domestic enforcement of rights and norms originally derived from international law.

In June of this year, a Notice of Civil Claim was also filed in the Supreme Court of British Columbia against Tahoe Resources Inc., a Canadian mining company incorporated under the laws of British Columbia, by seven Guatemalan men for injuries they suffered when Tahoe security personnel at the Escobar Mine in Southeast Guatemala allegedly fired at them at close range.[2] The plaintiffs assert that Tahoe expressly or implicitly authorized the use of excessive force by its security personnel or was negligent in preventing or failing to prevent the security personnel from using excessive force. The plaintiffs claim that Tahoe owed a duty of care to the plaintiffs based on the fact that, among other things, it knew that the security personnel failed to adhere to internationally accepted standards on the use of private security personnel to which Tahoe had committed.

Tahoe has contested the jurisdiction of the British Columbia court over the defendant company[3], and how the British Columbia courts deal with the jurisdictional issue in this particular context may be an important precedent for future cases.

Another claim has also been very recently filed in the Vancouver Registry of the Supreme Court of British Columbia against Nevsun Resources Ltd. The claim alleges that the company was complicit in the use of forced labour – which the claim calls "a form of slavery" – at its copper mine in Eritrea, and gives rise to another potential precedent in this area of civil liability.[4]

Most of the other cases to date involving alleged violations of international norms or international human rights did not reach a trial on the merits and were dismissed by Canadian courts on jurisdictional grounds.[5] The decision in *Piedra v. Copper Mesa Mining Corporation*[6] went a little further and the Ontario courts had to consider, similarly to the *Hudbay* case, the existence of a novel duty of care. In *Piedra*, the plaintiffs alleged that Copper Mesa (vicariously), its two Ontario-resident directors and the Toronto Stock Exchange (TSX) were negligent in not preventing violence suffered by Ecuadorians opposed to the corporation's mining project. The Court of Appeal upheld the decision of the lower court judge that the plaintiffs' claims against the defendants disclosed no reasonable cause of action (i.e. there was no duty of care owed by each of the defendants to the plaintiffs).

The case law to date makes it clear that courts have not rejected these types of claims outright for want of subject matter jurisdiction. However, those decisions generally do not set out the genesis of international human rights-based tort litigation in Canada or the principles on which it is based. In addition, the claims advanced by the plaintiffs (as reflected in the court decisions) have not been uniformly framed with express reference to violations of international law or international human rights as being the foundation for the claims.[7] Thus, the questions that arise and that have not been answered fully yet pertain to how the rights and norms that derive from international law can be recognized and enforced by Canadian courts. Incorporation of international customary law into Canadian domestic law may provide a theoretical foundation for such recognition and enforcement.

International Norms in Canadian Law

In *R. v. Hape*,[8] the Supreme Court of Canada demonstrated that even though Canada lacks a statutory jurisdictional vehicle functionally equivalent to the ATS,[9] there is a legal basis for exposure of Canadian companies with operations abroad to legal actions in Canada for alleged violations of international law abroad. That case arose in the relatively unrelated context of alleged violations of the *Canadian Charter of Rights and Freedoms* with respect to a domestic criminal prosecution dependent on Canadian police investigations in a foreign jurisdiction. Nonetheless, it authoritatively resolved in the affirmative a long-held assumption that international customary law was automatically part of the law of Canada, absent clear statutory departures to the contrary.[10]

In Canada, treaties *per se* are not part of domestic law unless

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[2] Notice of Civil Claim in the Supreme Court of British Columbia Court File No. S-144726, dated June 18, 2014.

[3] Jurisdictional Response of the Defendant in the Supreme Court of British Columbia Court File No. S-144726, dated July 9, 2014; Notice of Application of the Defendant Tahoe Resources Inc. in the Supreme Court of British Columbia Court File No. S-144726, dated August 8, 2014.

[4] Jeff Gray, "Nevsun Resources faces lawsuit over 'forced labour' in Eritrea", *The Globe and Mail* (November 20, 2014).

[5] See *Recherches Internationales Québec v. Cambior Inc.*, [1998] Q.J. No. 2554 (Que Sup Ct); *Bil'In (Village Council) et al. v. GreenPark International Inc*, 2010 QCCA 1455, 322 D.L.R. (4th) 232, aff'g 2009 QCCS 4151, leave to appeal to SCC dismissed.; and *Canadian Association Against Impunity v. Anvil Mining Ltd.*, 2012 QCCA 117, rev'g 2011 QCCS 1966, leave to appeal to SCC dismissed.

[6] 2011 ONCA 191, aff'g 2010 ONSC 2421 ("*Piedra*").

[7] Often, and especially in decisions dealing with jurisdiction rather than the merits of the claims, the claims are analyzed from the private international law perspective.

[8] [2007] 2 SCR 292.

[9] Parliament has recently enacted a limited analogue to the ATS, the *Justice for Victims of Terrorism Act* (S.C. 2012, c. 1, s. 2; in force on assent March 13, 2012). Part I of a federal omnibus bill that also amended, *inter alia*, provisions of the *State Immunity Act* "to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters" (ibid., s. 3). This is, however, very focused legislation that does not cover the general field of international human rights-based tort liability we address here. Nor, in our view, is such legislation necessary to support such cases against private actors.

[10] For detailed commentary, see H.S. Fairley, "International Law Comes of Age: *Hape v. The Queen*" (2008) 87 Can. B. Rev. 229.

implemented by Parliament and/or provincial legislatures[11] but the same rules that are expressed in treaties can also be incorporated into the body of Canadian common law if the treaties stand as codifications of pre-existing international customary law.[12]

Canada's long-standing commitment to international human rights law is evidenced by its central role in the drafting of the *Universal Declaration of Human Rights* in 1947/1948 as well as its adoption of eight different core multilateral human rights treaties, all of which are now in force.[14] The breadth of Canada's international commitments in this regard provide a broad foundation for the importation of liability to Canadian private actors for human rights-based international torts.

In addition to customary international law evidenced by codification in treaties, certain fundamental principles of international law – known as "peremptory norms" or "*jus cogens* norms" – apply to all states without exception or permitted derogation.[15] As a category of customary international law, *jus cogens* norms require no formal implementation process in order for these rules to be incorporated into the body of Canadian common law. Examples of *jus cogens* norms include prohibition on the use of force; the law of genocide; the principle of racial non-discrimination; crimes against humanity; and the rules prohibiting trade in slaves or human trafficking. Serious allegations of human rights violations often invoke *jus cogens* norms.

What remains to be resolved on the facts of particular cases such as *Hudbay* and *Tahoe* is what legal effect customary international norms have once they are incorporated into domestic law. Are they automatically binding and capable of forming the basis, by themselves, for the decision of the court? Or do they give rise to, limit or extend enforceable rights at common law?[16] It appears that Ontario courts have taken the latter approach, using international law norms as a basis for the finding of a "novel" duty of care at common law. However, it remains to be seen whether, for example, international law can support the creation of new causes of action aimed specifically at civil liability for violations of international human rights, and what standard of liability will be applied for those claims. Eventually, the cases will tell us, not to mention the possibility of the Parliament and provincial legislatures weighing in with statutory prescriptions.

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[11] *A.G. Canada v. A.G. Ontario (Labour Conventions)*, [1937] A.C. 325 (P.C.)

[12] *Statute of International Court of Justice*, Art. 38; *North Sea Continental Shelf Cases*, [1969] ICJ Rep. 3, 32-41.

[13] G.A. res. 217A (III), U.N. Doc A/810.

[14] United Nations Convention Relating to the Status of Refugees 1951 ([1969] Can. T.S. no. 29); Convention Concerning Freedom of Association and Protection of the Right to Organize 1948 [1973] Can. T.S. no. 14); the International Covenant on Civil and Political Rights 1966 ([1976] Can. T.S. no. 47); the International Covenant on Economic, Social and Cultural Rights 1966 ([1976] Can. T.S. no. 46); International Convention on the Elimination of All Forms of Racial Discrimination 1966 ([1970] Can. T.S. no. 28); Convention on the Elimination of All Forms of Discrimination Against Women 1979 ([1982] Can. T.S. no. 31); Convention Against Torture 1984 ([1987] Can. T.S. no. 36); Convention on the Rights of the Child 1989 ([1992] Can. T.S. no. 3.) (for further details, see Gib van Ert, *Using International Law in Canadian Courts*, 2d ed. 2010 at pp. 323-325).

[15] See James Crawford and Ian Brownlie's *Principles of Public International Law*, 8th ed., 2012 at pp. 594-599 and *Vienna Convention on the Law of Treaties*, 115 UNTS 331; Can. T.S. No. 37, Art. 53.

[16] See *Hudbay, supra*. In *Piedra*, although the court did not find that there was a duty of care owed by the defendants, it broached the question by considering the Anns/Kamloops test, similarly to *Hudbay*.

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