Rights Action
info@rightsaction.org
January 6, 2014

Update: **Hudbay Minerals versus Mayan Q'eqchi Plaintiffs Of Guatemala**

2014 is a very good year to keep on supporting the Q'eqchi people of Guatemala, as they seek justice in Canadian courts against Hudbay Minerals, for a killing, shooting and gang-rapes they suffered in Guatemala.

Below: In a series of memos, major Canadian law firms warn their corporate clients to pay close attention to the "Hudbay Minerals Lawsuits". While there is repetition in these law firm memos, we reproduce a few of them and provide links to others.

Being some of the major Canadian corporate law firms that represent mining companies, and other corporations working globally in other industries – many of which have caused directly or indirectly, and profited from environmental and health harms, and human rights violations at their operations around the world -, major law firms are now warning their clients about the new "risks" (of legal liability) represented by the "Hudbay Minerals lawsuits" and the July 23, 2013 ruling of the Ontario Superior Court.

It is important to note, as set out in some of the memos, that the Hudbay Mineral lawsuits have legal liability implications for Canadian corporations working globally in other industries, including: sweatshop maquiladoras; tourism; hydro-electric dams; oil and gas; etc.

WHAT TO DO in 2014 – See Below:

- Organize a screening of award-winning documentary film "Defensora"
- Invite Rights Action to give presentations in your community
- Donate funds to the Mayan Qeqchi people fighting for truth and justice
- Come on educational, fact-finding trips to Guatemala to learn first-hand about these issues

****

Norton Rose Fulbright
http://www.nortonrosefulbright.com/

Corporate Social Responsibility: A New Era Of Transnational Corporate Liability For Human Rights Violations

http://www.nortonrosefulbright.com/knowledge/publications/104195/corporate-social-responsibility-a-new-era-of-transnational-corporate-liability-for-human-rights-violations

Can a Canadian parent company with a subsidiary operating in a foreign jurisdiction be liable for human rights violations in the foreign jurisdiction that occur at the level of the subsidiary?

In a recent decision, an Ontario court has allowed this issue to proceed to trial in three related actions, rejecting arguments by the defendants [Hudbay Minerals] that the claims brought by the plaintiffs, all of whom are residents of the foreign jurisdiction, disclose no reasonable cause of action.

While the recent Ontario court decision involved a Canadian mining company, the outcome has implications for other industries.

Whatever the outcome at trial where issues of liability will ultimately be determined, one thing is clear: international public expectations are changing, and directors and officers of Canadian companies need to be aware of the potential risk of claims by foreign plaintiffs seeking redress for alleged harm committed beyond Canada's borders.

This bulletin provides an update of the key issues that arise from the Ontario court decision, and highlights key takeaways for Canadian parent companies with foreign subsidiaries.

Key issues arising from current proceedings

Lifting the corporate veil – liability under agency principles
It is a long-standing principle of Canadian corporate law that companies are distinct legal entities and parent companies are not liable for the acts or omissions of their subsidiaries. There are certain limited exceptions to this rule, including instances where a subsidiary is acting as an "authorized agent" of its parent. In such instances, a court may "lift the corporate veil" and hold the parent liable for the acts or omissions of the subsidiary.

In the recent Ontario decision, the court found that, in one of the actions, the plaintiffs had sufficiently pleaded that an agency relationship existed between the parent and its foreign subsidiary at the material times. As a result, the court concluded that the question of whether an agency relationship existed between the parent and its subsidiary is not "patently ridiculous or incapable of proof," and allowed this issue to proceed to trial.

Direct liability in negligence – a novel duty of care
There is currently no established duty of care owed by a parent company to ensure that the operations of its foreign subsidiaries are conducted so as to protect the residents of the communities with whom the subsidiary interacts. The plaintiffs argued that, under long-standing principles of tort law, if a duty of care can be established, a parent and its subsidiary can be found jointly and severally liable for negligence if the direct actions of each result in damage.

The Ontario court found that the plaintiffs had pleaded all the material elements required to support the establishment of a novel duty of care. Accordingly, the court allowed the issue of whether a novel duty of care should be recognized in the circumstances of the actions to proceed to trial.

It is important to note that the foreign plaintiffs in the three actions do not claim that the parent company is indirectly responsible for the conduct of the security personnel that is alleged to have caused the harm, rather that the parent company is directly responsible for having failed to prevent the harm.

It is also important to note that once a duty of care is established for a category of cases, it becomes an established duty of care for future cases. This raises the importance of the three actions that have been allowed to proceed to trial.

Under Canadian tort law, there is a three-fold test for establishing a novel duty of care:
Foreseeability of Harm. First, the harm complained of must be a reasonably foreseeable consequence of the alleged breach. The relevant question is whether the defendant knew or ought to have known about the potential for "general harm" (not "its manner of incidence").

In one of the three actions, the facts alleged by the foreign plaintiffs against the two Canadian defendants included allegations that they knew or ought to have known that violence is frequently used by security personnel to force evictions of local communities in the foreign jurisdiction, and knew about past violence by security personnel to force evictions of local communities in the foreign jurisdiction, the heightened risk that more extreme forms of violence would be used during the eviction in remote communities, the deficiencies of the local justice system, and the high incidence of violent crime in the foreign jurisdiction.

In the other two actions, the foreign plaintiffs alleged that the Canadian defendants had authorized the use of force in response to peaceful opposition and controlled and directed security personnel, and that the harms were a reasonably foreseeable consequence because the Canadian defendants' managers and executives were advised of rising tensions, knew that violence had been used at previous forced evictions, knew that the chief of security had been credibly accused of serious and criminal acts (including issuing death threats), knew that security personnel were inadequately trained and in possession of illegal firearms, and knew of deficiencies of the local justice system.

The Ontario court found that if these and other alleged facts were proven at trial, they could establish that the harm complained of was a reasonably foreseeable consequence of the conduct of the Canadian defendants.

Proximity. Secondly, there must be sufficient proximity between the foreign plaintiffs and the defendant such that, in conducting its affairs, the defendant had an obligation to be mindful of the plaintiffs' interests.

The factors that could satisfy the test for proximity include (a) a close causal connection, (b) the parties' expectations, and (c) any assumed or imposed obligations. Alleged facts in support of a proximate relationship put forward by the foreign plaintiffs included statements by the parent's senior management concerning discussions with local residents to seek solutions and develop trusting relationships, various promises made by the parent to respect human rights "in the best possible manner," and public statements by the company that it had adopted certain internationally recognized standards (of which more later).

The Ontario court found that the pleadings disclosed "a sufficient basis to suggest that a relationship of proximity between the plaintiffs and defendants exists, such that it would not be unjust or unfair to impose a duty of care on the [parent company]." It is important to note, however, that the court did not find that a duty of care has been found to exist, and simply concluded that, "It is not plain and obvious that no duty of care can be recognized. A prima facie duty of care may be found to exist ... [at trial]." [emphasis added]

Policy Considerations. Once the first two parts of the test are satisfied, a novel duty of care is established on a prima facie basis. As part of its analysis, the court must then determine whether there are any policy reasons that negate or otherwise restrict the recognition of a prima facie duty of care.

In the current proceedings, both the plaintiffs and the defendants put forward policy reasons to support their position as to whether the court should recognize a new duty of care in the circumstances.

The defendants argued, among other things, that a private member's bill introduced to require Canadian extractive companies to meet environmental and human rights standards was defeated (Bill C-300). The defendants also argued that "recognizing a duty would pre-empt the efforts of the federal government over the past seven years to work with Canada's mining sector to implement corporate social responsibility principles" and that "recognizing a duty risks exposing any Canadian company with a foreign subsidiary to a myriad of claims, many of which will likely be meritless."

In response, the foreign plaintiffs took the position that policy considerations favour the finding of a duty of care for a number of reasons, including the fact that the Government of Canada has endorsed international standards of conduct in relation to human rights for Canadian businesses operating abroad, and that establishing a duty of care in this area would support initiatives by the Government of Canada.

The Ontario court found that there were clearly competing policy considerations in recognizing a duty of care in the circumstances, that it is not plain and obvious that a prima facie duty of care would be negated for policy reasons.

Having concluded that the pleadings could satisfy the test for reasonable foreseeability and proximity, and that it was not plain and obvious that policy considerations would negate the finding of a duty of care in the circumstances, the court rejected the argument that the claim should be struck out as disclosing no reasonable cause of action for a novel claim of negligence against the defendants.

Questions and key takeaways
Canadian parent companies with foreign subsidiaries face some difficult policy issues that arise from the recent Ontario court decision, and others that could arise if the foreign plaintiffs are ultimately successful at trial. For example:

Agency relationship. If the Canadian parent company is ultimately found to be indirectly liable for the actions of its subsidiary under the theory that the subsidiary was acting as the "authorized agent" of the parent, it will be important to consider the basis for the finding of "agency." In particular, it will be necessary to consider whether the basis for the finding of "agency" is an erosion of the long-standing, foundational principle of corporate separateness, or whether the factual findings in respect of the actions of the parent and subsidiary fit easily into the traditional grounds for a finding of agency.

The result could have implications for what parent companies should do to mitigate liability through their corporate governance structures. For example, a distinction must be made between, on the one hand, actions that demonstrate a principal-agent relationship between a parent company and its subsidiary, as compared to, on the other hand, activities in relation to subsidiaries that are part of an appropriate governance structure and may be necessary for the

parent to comply with securities and other legislation, such as the preparation of consolidated financial statements or the setting of general company policy.

In considering this potential novel duty of care, the courts will ultimately have to take into account not only questions of good human rights practices, but also the obligations that parent companies have under certain extra-territorial statutes such as anti-bribery and corruption laws.

Whatever the result, companies will have to consider issues of reputational risk and enterprise value risk that all too frequently attend a company faced with allegations of human rights violations.

Novel duty of care and the role of international law

Significantly, the Ontario court granted intervener status to Amnesty International, permitting it to give evidence on international law and international norms in the area of human rights.

Voluntary codes of conduct cited as evidence that a novel duty of care may exist in circumstances where a parent company's subsidiary is alleged to have been involved in human rights abuses included the Voluntary Principles on Security and Human Rights, the OECD Guidelines for Multinational Enterprises, the UN's Protect, Respect and Remedy Framework for Business and Human Rights and the International Standards Organization's involvement in corporate social responsibility (for example, ISO 26000).

Amnesty International submitted that, "The existence of these international norms and standards of conduct demonstrate the recognition by companies in the extractive industries of the risks of security forces, both public and private, violating human rights and otherwise causing injury to members of local communities in high risk areas."

It is also noteworthy that the Ontario court cited the parent company's alleged public statements to the effect that it had implemented the internationally recognized Voluntary Principles on Security and Human Rights as a factor to be taken into account in determining the proximity part of the test for establishing a novel duty of care.

If this factor continues to be applied, the adoption of international codes of conduct and best practices in managing human rights could impact the legal risks facing a Canadian parent company in its foreign operations. Such a result could undermine the overarching goals of these currently voluntary standards for promoting human rights best practices globally. Further, it begs the question whether any duty of care emerging from international standards could be construed as a duty applying to an industry as a whole, making it irrelevant whether the individual company has voluntarily adopted the standard.

In the meantime, Canadian companies need to exercise caution when implementing written policies and making public statements concerning their corporate social responsibility practices, including in the area of human rights.

Common law versus statutory liability

The Government of Canada has made a clear choice not to implement a prescriptive approach to enforcing international human rights standards (at least as yet). This might be compared to the path chosen by the Government of Canada to legislate against the bribery of foreign public officials under the Corruption of Foreign Public Officials Act (Canada), which concerns a different area of corporate social responsibility and which was originally implemented to ratify the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

From a policy perspective, establishing a novel duty of care at common law premised upon, among other things, a myriad of best practices articulated by international and transnational organizations, could create a level of uncertainty for Canadian parent companies without clear guidelines as to whether, for example, the company has an absolute obligation to prevent harm, or whether taking adequate steps proportionate to the risk to prevent harm mitigates against such liability.

Due diligence

It is noteworthy that certain of the conduct alleged by the foreign plaintiffs occurred before the Canadian parent company acquired the foreign subsidiary. This highlights the importance for Canadian companies to be mindful of

the need for due diligence on human rights issues when acquiring companies, and the need to deal with the risk of litigation through appropriate contractual provisions.

Footnotes
Angelica Choc; German Chub Choc; Caal et al. v. Hudbay Minerals Inc. et al., 2013 ONSC 998 http://canlii.ca/en/on/onsc/doc/2013/2013onsc998/2013onsc998.pdf; Choc v. Hudbay Minerals Inc., 2013 ONSC 1414 (July 22, 2013) (Ontario Superior Court of Justice) http://www.chocversushudbay.com/wp-content/uploads/2010/10/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf.

[…]

****

Baker & McKenzie
http://www.bakermckenzie.com/

Ontario Judgment Opens Door to Increased Risk for Canadian Mining Companies Working Abroad

http://bakerxchange.com/rv/ff0011695314994b28f73b95644194f793dd20ab

For what may be the first time in Canada, the Ontario Superior Court has allowed civil lawsuits against a Canadian mining company to proceed to trial in Ontario, where the claims are based largely upon wrongs allegedly carried out at a foreign operation.

In Choc v. Hudbay Minerals Inc., the mining company and its subsidiaries sought to have the lawsuits, which involve allegations of human rights violations at a Guatemalan mining project, dismissed before trial. In its procedural decision, the Court considered established tests regarding "piercing the corporate veil" and the "duty of care" in relation to new facts, resulting in a potentially noteworthy decision.

Although the Court allowed the claims to proceed, they did not make any decisions regarding the merits of the case. The allegations have not been proven and the defendants have made clear their intention to strenuously defend themselves against the lawsuits.

However, the fact that the claims will proceed to trial is noteworthy, as it signals to Canadian companies that they may now face an increased risk of litigation in Canada for conduct abroad. When the case is heard on its merits, the Court is expected to be asked to consider, among other issues, the extent to which Canadian companies are responsible for the conduct of their subsidiaries and agents working in foreign operations.

Background
The mining company, Hudbay Minerals Inc. ("Hudbay"), acquired Skye Resources Inc. ("Skye") in 2008. Through a Guatemalan subsidiary (CGN), Skye owned and operated the Fenix mining project in El Estor, Guatemala. Following the acquisition, the Fenix project continued to be operated by CGN. The Fenix project was sold in 2011, but the alleged conduct that led to the current lawsuits was alleged to have taken place between 2007 and 2009.

The plaintiffs, who are members of the indigenous Mayan Q'eqchi' community in El Estor, filed three related civil lawsuits in Ontario against Hudbay/Skye and two subsidiaries, HMI Nickel Inc. ("HMI") and CGN (collectively, the "defendants"). The plaintiffs alleged that the defendants were responsible for human rights violations related to the Fenix project. Although the claims were filed in Canada, the plaintiffs alleged that they suffered harm in Guatemala.

"Piercing the Corporate Veil"
In one of the three cases, the plaintiffs argued that the Court should "pierce the corporate veil," and find Hudbay responsible for the alleged actions of CGN in Guatemala. Hudbay asserted that the Court should not overlook the fact that it is a separate legal entity from its subsidiaries. The Court did not make a final decision on this issue, but noted that Hudbay could be held liable in Canada if it was proven at trial that CGN or HMI acted as Hudbay's agent in carrying out the alleged wrongs. Because it was possible that the plaintiffs would be able to prove that the subsidiaries had acted as Hudbay's agents, the Court allowed the claim to proceed to trial in Ontario.

Generally, a parent company will be treated as a separate entity from its subsidiaries and related companies, with respect to legal liabilities. However, this Superior Court decision serves as a reminder that, in special cases, Canadian courts may look past the fact that companies are separate entities and hold related companies responsible for one another's actions. Where a subsidiary acts as an agent of the parent company by carrying out the parent's instructions, the fact that the companies are separate entities may not be determinative to a court.

A Corporate "Duty of Care"?
In the remaining two claims, the plaintiffs alleged that that Hudbay was involved in overseeing and authorizing the use of CGN's security personnel at the mine site. The plaintiffs claimed that Hudbay had a "duty of care" to protect individuals affected by the Fenix project, and alleged that Hudbay had acted negligently in failing to prevent the alleged human rights violations. If proven at trial, this type of duty of care may lead to increased scrutiny of mining companies' actions or omissions abroad.

Without making a decision on the merits of the plaintiffs' allegations, the Court determined that it was not impossible for the plaintiffs to prove that a duty of care existed and that Hudbay was liable, if it could be proven that Hudbay was aware of the risk of harm and was in a position to prevent it. Because it is not impossible that the claims might succeed, the Court refused to dismiss the lawsuits before trial. As a result, Canadian parent companies operating abroad may now face an increased risk of civil litigation at home.

Conclusion
The plaintiffs' allegations have not been proven and the issue of liability will not be decided until trial. Notwithstanding that the Court's decision was procedural, the fact that it allowed the claims to proceed to trial In Ontario may have an impact on Canadian mining companies that take an active role in overseeing foreign operations. If the plaintiffs are ultimately successful on the merits of their claims, this case may lead to increased exposure and liabilities for Canadian companies working abroad.

****

Bennett Jones

A Warning for Canadian Corporations with Foreign Subsidiaries

http://www.bennettjones.com/Publications/Updates/A_Warning_for_Canadian_Corporations_with_Foreign_Subsidiaries/
July 30, 2013

On July 22, 2013, the Ontario Superior Court of Justice handed down its highly anticipated decision in Choc v Hudbay Minerals Inc., 2013 ONSC 1414. Hudbay serves as a significant warning for Canadian corporations operating in foreign countries that they could potentially face civil liability in Canada for wrongs committed in foreign countries.

Background
In Hudbay, a group of indigenous peoples from Guatemala sued Hudbay Minerals Inc., a Canadian corporation, and its Guatemalan subsidiary, Compañia Guatemalteca De Niquel (CGN), for alleged human rights abuses at a Guatemalan mining project owned through CGN. The Plaintiffs brought their claims in Ontario, not Guatemala.

Hudbay applied to strike the claims on the basis that the claims improperly relied on "piercing the corporate veil" or ignoring the separate corporate personalities of Hudbay, a Canadian corporation, and CGN, its Guatemalan subsidiary. Hudbay further argued that the Plaintiffs were seeking to impose a supervisory liability on parent corporations over their foreign subsidiaries.

Hudbay's applications were dismissed, and the action is allowed to proceed against it and its Guatemalan subsidiary in an Ontario Court. In particular, the Judge appears to have accepted that the Canadian parent could be directly responsible for the wrongs allegedly committed in Guatemala by CGN, based on the following:

Hudbay was alleged to be directly responsible and in control of key aspects of on-the-ground operations at the mining project, including responsibility over security policy and personnel and corporate response to ongoing land conflicts with the local indigenous population;
Hudbay was alleged to have publicly stated a commitment to implementing standards of conduct applicable to security personnel at the mine;
Hudbay executives were alleged to be familiar with previous forced evictions, to have known of the risks of extreme forms of violence in evicting remote communities, and to have known that its security personnel were a high risk;
Hudbay's managers and executives were alleged to have been advised of rising tensions regarding land conflict between the company and the indigenous population;
Hudbay was alleged to have known of previous violence;
Hudbay was alleged to have known of previous accusations of threatening acts carried out by its Chief of Security;Hudbay was alleged to have made representations, including by its CEO, that Hudbay was working with local representatives and stakeholders;
Hudbay was alleged to have made representations that the evictions of the indigenous population had been carried out properly;
Hudbay was alleged to have made public statements recognizing its relationship with the indigenous population; and
Perhaps most importantly, Hudbay was alleged to have its own executives and employees directly in charge of on-the-ground operations, controlling community relations with farming villages on contested lands, and assuming direct responsibility and control over security at the site.

Even without these allegations of direct wrongdoing by Hudbay, the Judge was also prepared to find that the Plaintiffs may ultimately be able to tag Hudbay with liability for its Guatemalan subsidiary's acts, because the subsidiary had acted as an agent of the Canadian parent.

In the result, the motion brought by Hudbay and its subsidiary to dismiss the Action was unsuccessful. The Action will now continue to proceed in Canadian courts, against the Canadian parent, for wrongs allegedly committed at the mine site in Guatemala.

An Important Reminder for Canadian Companies with Foreign Subsidiaries
This decision serves as an important reminder for Canadian corporations with foreign subsidiaries. The advantages made available by incorporating foreign subsidiaries can be undermined if employees of the Canadian parent are directly involved in operating the foreign subsidiary, including developing its policies, speaking on its behalf, or directly engaging in on-the-ground activities. The advantages of separate corporate personality are only enjoyed where separate corporate personality is respected in theory and practice.

Companies must ensure that their carefully structured foreign operations are carried out in reality in such a way that the benefits of the foreign subsidiary structure are not completely undone. The result in Hudbay may have been quite different had all individuals involved demonstrably been employees of the Guatemalan subsidiary, rather than the Canadian parent, and had the Guatemalan subsidiary been given more autonomy over its day-to-day operations.

****

Osler, Hoskin, & Harcourt
http://www.osler.com/

Ontario Court Gives Green Light to International Human Rights Tort Claims in Choc v. Hudbay Minerals Inc.

http://www.osler.com/newsresources/Ontario-Court-Gives-Green-Light-to-International-Human-Rights-Tort-Claims-in-Choc-v-Hudbay/
July 26, 2013

In a precedent-setting decision that could have important implications for Canadian companies with foreign operations, the Ontario Superior Court of Justice has allowed a lawsuit against Hudbay Minerals Inc. to proceed to trial in Ontario. The lawsuit involves allegations of human rights violations at Hudbay’s Guatemalan mining project.

On July 22, 2013, Justice Brown of the Ontario Superior Court released her decision in Choc v. Hudbay Minerals Inc., 2013 ONSC 1414 (Choc v. Hudbay), dismissing three motions brought by Hudbay and two of its subsidiaries that sought to have the case dismissed on the basis that no cause of action existed in Ontario, that one claim was brought outside the limitation period and that Ontario courts had no jurisdiction over the claim against Hudbay's Guatemalan subsidiary.

Although liability, including compensation, will ultimately be determined at trial, the successful outcome of these motions is nevertheless significant. At trial, the Court will have an opportunity to consider the issue of Canadian corporations' responsibility for the conduct of their foreign agents and subsidiaries.

Background

Until August 2011, Hudbay, a Canadian mining company headquartered in Toronto, owned the Fenix mining project in eastern Guatemala through Compañía Guatemalteca de Níquel (CGN), its wholly controlled Guatemalan subsidiary. The Fenix project was a proposed open-pit nickel mining operation, which Hudbay acquired through its acquisition of Skye Resources Inc., later renamed HMI Nickel Inc.

The plaintiffs in Choc v. Hudbay are indigenous Mayan Q'eqchi' from El Estor, Guatemala. They brought three related actions against Hudbay, CGN and HMI (the Claims), alleging that Fenix mining project security personnel working for HMI and CGN, who were under the control and supervision of Hudbay, committed human rights abuses, including murder and gang rape.

The Motions

The defendants brought three preliminary motions regarding the Claims:
a motion to strike all the Claims on the ground that it was plain and obvious that they disclosed no reasonable cause of action, according to Rule 21.01(1)(b) of the Ontario Rules of Civil Procedure (the Rule 21 Motion);
a motion to strike one of the Claims as statute-barred by the Limitations Act (the Limitation Period Motion); and
if the Rule 21 Motion was unsuccessful, a motion by CGN to have the Claims against it stayed or dismissed on the ground that the Court had no jurisdiction simpliciter in relation to CGN, a Guatemalan corporation (the Jurisdiction Motion).

All three motions failed for the reasons discussed below.

The Rule 21 Motion

The test for striking pleadings under Rule 21 is whether, assuming the facts set forth in the statement of claim can be proven, it is nevertheless plain and obvious that no reasonable cause of action is disclosed.

Justice Brown proceeded to assess two possible causes of action raised by the plaintiffs: (1) whether the Court should pierce the corporate veil and find Hudbay liable for the actions of its subsidiary, CGN; and
(2) whether Hudbay was directly liable for the conduct of its agents abroad.

Piercing the Corporate Veil

In most circumstances, a parent corporation is seen as a legal entity distinct from a wholly owned subsidiary. Ontario courts, however, have recognized three circumstances in which a separate legal personality can be disregarded and the corporate veil pierced:

where the subsidiary is completely dominated and controlled and being used as a shield for fraudulent or improper conduct,
where the subsidiary is seen to be an agent, and
where a statute or contract requires it.

Justice Brown considered only the first two grounds. She held that the fact that Hudbay allegedly engaged in wrongdoing through its subsidiary is not enough to pierce the corporate veil. Rather, the basis for the claim had to be grounded in facts that alleged that Hudbay had used CGN for the very purpose of avoiding liability for wrongful conduct. This basis for piercing the corporate veil failed because the plaintiffs had failed to plead the required facts.

Nevertheless, Justice Brown was satisfied that the plaintiffs had alleged that CGN was Hudbay's agent at the relevant time, which if ultimately provable at trial would justify the piercing of Hudbay's corporate veil. Justice Brown noted that "whether or not this agency relationship is ultimately found to have existed at the relevant time, the allegation is not patently ridiculous or incapable of proof, and therefore must be taken to be true for the purposes of this motion."

Direct Negligence

The plaintiffs also alleged that Hudbay owed a duty of care to the plaintiffs and should be held liable in negligence for its own actions and omissions in Guatemala. In particular, they claimed that Hudbay was, itself, negligent in failing to prevent the harm committed by the Fenix mining project's security personnel against the plaintiffs.

The plaintiffs did not argue that there was an established duty of care that applied to their situation. For this reason, Justice Brown applied the test for establishing a novel duty of care, as originally set out by the House of Lords in Anns v. Merton London Borough Council (the Anns Test).1 According to this test, the following must be proven:

The harm complained of was a reasonably foreseeable consequence of the alleged breach;
There is sufficient proximity between the parties and it would not be unjust or unfair to impose a duty of care on the defendants; and
There exist no policy reasons to negate or otherwise restrict the duty.

Taking the plaintiffs' pleadings as proven for the purposes of the motion, Justice Brown found that the plaintiffs had pleaded that Hudbay/Skye knew various facts that made it reasonably foreseeable that Hudbay's authorization of the use of the security personnel in forced evictions or in response to peaceful opposition from the local community could lead to acts of violence and the harm allegedly suffered by the plaintiffs.

Regarding the issue of proximity, Justice Brown held that, on the basis of the facts alleged in the plaintiffs' pleadings, it would not be unjust or unfair to impose a duty of care on the defendants. In particular, it was claimed that Hudbay/Skye had made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations by the plaintiffs. Moreover, the plaintiffs' interests were clearly engaged when the defendants initiated a mining project near the plaintiffs' community and allegedly requested that they be forcibly evicted.

Finally, on the policy issues militating against this novel duty of care, both the plaintiffs and the defendants advanced several competing arguments. The defendants argued, among other things, that this new duty of care would risk exposing any Canadian company with a foreign subsidiary to a myriad of meritless claims and would likely impinge upon the fundamental principle of separate corporate personality entrenched in the common law and in corporate statutes.

The plaintiffs made a number of counter-arguments, including that local communities should not have to suffer without redress when adversely affected by the business activity of a Canadian corporation operating in their country. Justice Brown concluded that the presence of clearly competing policy considerations in recognizing the proposed duty of care would indicate that it was not plain and obvious that the plaintiffs' claims should fail on the last part of the Anns Test.

The Limitation Period Motion

The defendants claimed that one of the Claims was statute-barred by the Limitations Act, because it was brought outside the two-year limitation period under the Act. However, Justice Brown dismissed this motion on the basis that the claim at issue was exempted from the two-year requirement due to an exception in the Act for claims based on sexual assault.

The Jurisdiction Motion

CGN conceded that, if the Rule 21 Motion was unsuccessful, the company would be a necessary and proper party to the Claim. Therefore, Justice Brown dismissed the Jurisdiction Motion without further analysis.

The Role of International Law

International law and international frameworks on business and human rights played a secondary, but relevant, part in the decision and may become a significant element during the trial of the Claims.

Amnesty International Canada (Amnesty) was an intervener in Choc v. Hudbay and provided submissions on the Voluntary Principles on Security and Human Rights, which were established in 2000 and set out norms for corporate conduct in the extractive industry when corporations engage public and private security forces to protect business interests in conflict- or violence-prone areas. Amnesty also referred to the following international instruments:

OECD Guidelines for Multinational Enterprises;
The United Nations' Protect, Respect and Remedy: Framework for Business and Human Rights; and
United Nations Guiding Principles on Business and Human Rights

These international guidelines and principles are increasingly being relied on by multinational corporations operating abroad. Effective implementation of these guidelines may prevent human rights violations from occurring and can mitigate corporations' exposure to legal liability.
It is also relevant to note that these international norms on business and human rights may become important elements in informing the content of legal standards. For instance, in Choc v. Hudbay, Justice Brown referenced Hudbay's public statements regarding its compliance with international human rights standards, including the Voluntary Principles, as one of the factors establishing the proximity between Hudbay and the plaintiffs as part of the Anns Test.

Conclusion
The plaintiffs in Choc v. Hudbay were successful in challenging the defendants' motions, opening the way to a trial on the merits of the actions. In addition to complex evidentiary issues, the trial will involve hard questions of legal policy and law in establishing a novel duty of care. If successful, however, Choc v. Hudbay may usher in potential expanded exposure to risks and liabilities for Canadian corporations doing business abroad, not only in the natural resources sector but also in various other sectors, including banking, manufacturing, retailing and telecommunications.

****
McCarthy Tetrault
Canadian Companies: Why is the Ontario Superior Court decision in Choc v. HudBay Minerals important for your foreign operations?
http://www.miningprospectslawblog.com/2013/09/17/canadian-companies-why-is-this-osc-decision-in-the-hudbay-case-important-for-your-foreign-operations-2/

****
McMillan
Canadian Mining Companies: Is There Liability In Canadian Courts For Activity In Foreign Countries?
http://www.mcmillan.ca/Canadian-mining-companies-is-there-liability-in-Canadian-courts-for-activity-in-foreign-countries

****
Foley Hoag
ATS of the North? Canadian Court Allows Suit to Continue for Human Rights Abuses Committed Abroad
http://www.csrandthelaw.com/2013/08/ats-of-the-north-canadian-court-allows-suit-to-continue-for-human-rights-abuses-committed-abroad/

****
Lancaster House
Canadian mining company can be sued in Canada for violence in foreign countries, judge rules

http://lancasterhouse.com/headlines/article/id/14588/tkn/92xc48jz

****

Heenan Blaikie

Commentary: Guatemalans' lawsuit against Hudbay in Canada

http://www.heenanblaikie.com/en/News_Media_Centre/News/2013/Christina-Hall-and-Kevin-D-MacNeill-Discuss-Hudbay-Minerals-Inc-Lawsuits-in-The-Northern-Miner.html

****

More Information

Defensora, a film by Rachel Schmidt that documents the lives and vision of the Mayan Qeqchi people, and their efforts to seek justice in Canadian courts against Hudbay Minerals. View trailer / organize a screening / more information: www.defensorathefilm.com

Join an Educational Delegation to Guatemala, May 31-June 8, 2014

Mining Injustice ~versus~ Community well-being and the Environment, in the context of on-going struggles for truth, memory and justice for the genocides and repression of the past. Hosted by Rights Action and SMAK (Sustainable Mining Alliance of the Kootenays). Contact: info@rightsaction.org

Tax-Deductible Donations (Canada & U.S.)

To support community-based pro-democracy, environmental, development and human rights work in Honduras and Guatemala, make check payable to "Rights Action" and mail to:
United States: Box 50887, Washington DC, 20091-0887
Canada: (Box 552) 351 Queen St. E, Toronto ON, M5A-1T8

Credit-Card Donations Can Be Made (Canada & U.S.): http://www.rightsaction.org/tax-deductible-donations
be a monthly credit card donor (Canada & U.S.)
to donate stock, contact: info@rightsaction.org

Regular Updates by Listserv and Facebook

To receive regular articles, reports and editorials about the work and struggles we fund and support:
get on Rights Action's listserv: www.rightsaction.org
follow Rights Action on facebook: www.facebook.com/RightsAction.org