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By: Matt Eisenbrandt

After a six-year legal battle, a group of Guatemalan plaintiffs has achieved a landmark victory in the emerging field of transnational litigation for business-related abuses. It is the first time in Canadian courts that foreign citizens have reached a successful conclusion to a lawsuit against a Canadian mining company for human rights violations.

The milestone achievement brought justice for injuries the plaintiffs suffered in April 2013. That month, they and other residents of San Rafael Las Flores, Guatemala, gathered on a public road outside the gates of Tahoe Resources' Escobal Mine to protest the lack of community consultation on the silver mining project. The head of security for the mine, Alberto Rotondo, ordered security personnel to break up the demonstration by shooting at the crowd. Several protestors, including Adolfo Agustin Garcia, Wilmer Francisco Perez Martinez, and Misael Eberto Martinez Sasvin, were hit. Eighteen-year-old Luis Fernando Garcia Monroy was shot in the face and seriously hurt.

In 2014, the injured protestors brought a civil suit against Tahoe in British Columbia, where the company was incorporated. Their case was initially dismissed but reinstated on appeal in a precedent-setting decision, as described in more detail below. The appellate success cleared the path toward trial.

The plaintiffs' ultimate triumph, however, came not in the form of a court verdict but an apology by the company, believed to be the first ever issued in a transnational human rights case in Canada. Pan American Silver, a Vancouver-based company that acquired Tahoe in February 2019, issued a public statement acknowledging that "the shooting on April 27, 2013, infringed the human rights of the protestors." The company stated, "Pan American, on behalf of Tahoe, apologizes to the victims and to the community."

Because a public apology is so rare in this type of litigation, there is interest about the company's motivation to end the lawsuit in this way. Pan American has offered some public comments about its decision. President and CEO Michael Steinmann indicated that after acquiring Tahoe, the company "made it a priority" to "resolve the matter amicably rather than continue with the litigation." Pan American, he said, hoped that the resolution would be "a step towards repairing relationships with the broader communities in Guatemala."

This comes in the context of uncertainty surrounding the future of the Escobal Mine. A Guatemalan court suspended the mine's licence in 2017 because the Guatemalan government did not properly consult the indigenous Xinka population about the project. The court ordered the government to conduct those consultations before the license can be reinstated and the mine reopened. That process is ongoing in Guatemala, and the conclusion of the Canadian case will not impact the outcome.

Tahoe had been criticized for its relationship with local communities. In fact, the lawsuit alleged that the shooting was a premeditated attempt by Rotondo to eliminate local resistance to the mine. At the time, Escobal was Tahoe's lone asset and one that the company claimed could someday equal the

output of the world's largest silver mine. Despite opposition in several Guatemalan communities over concerns about possible environmental impacts and the lack of meaningful consultation with residents, Tahoe continued the development of the mine. In early April 2013, as a form of protest, residents of San Rafael Las Flores began stand-ins on a public road running past the mine. This was the protest that led to the shooting on April 27 of that year.

Three days after the incident, Rotondo was arrested at Guatemala City's airport while on his way to board a flight out of the country. He was criminally charged in Guatemala with obstruction of justice, causing serious and minor injuries, and mistreatment of a minor. (The plaintiffs in the Canadian case are also civil parties – "querellantes adhesivos" – in the Rotondo prosecution.) However, in 2015, Rotondo escaped from house arrest and managed to flee the country. The prosecution has been suspended while Guatemala seeks Rotondo's extradition from Peru, a process that has stretched on for years.

The lawsuit against Tahoe in British Columbia was the first in the province against a Canadian mining company concerning violence in another country. A second B.C. case, against Vancouver-based Nevsun Resources for forced labour, has been cleared to move to trial by the B.C. Court of Appeal. The Supreme Court of Canada is currently reviewing that ruling, with a judgment expected soon. In addition, three lawsuits against HudBay Minerals for human rights violations in Guatemala are moving toward trial in Toronto. In 2013, the judge in those cases refused to strike out the claims on the basis that it was possible the parent company could be held directly responsible for failing to prevent abuses by security personnel. This issue is at the heart of what these cases are seeking to achieve. Because Canadian parent companies are now potentially liable for incidents in their overseas operations, the mining industry is watching these cases closely.

In the Tahoe litigation, the Supreme Court of British Columbia initially stayed the case under the legal doctrine of *forum non conveniens*, finding that the matter should instead be heard in Guatemala. This was in line with previous lawsuits against Canadian mining companies that had been similarly dismissed in favour of foreign courts. In January 2017, however, the B.C. Court of Appeal overturned that decision and reinstated the case. The Court of Appeal ruled that several factors, including evidence of systemic corruption in the Guatemalan judiciary, pointed away from Guatemala as a preferable forum, thereby keeping the case in British Columbia. Examining whether there was "a real risk of an unfair process in the foreign court," the B.C. Court of Appeal concluded that there was "some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state." An important factor in the court's analysis was Alberto Rotondo's flight from Guatemala while under house arrest, leading to the suspension of legal proceedings in Guatemala. The B.C. Court of Appeal judgment represented the first time that a Canadian appellate court had permitted a lawsuit to advance against a Canadian company for alleged human rights violations abroad.

Importantly, the conclusion of the B.C. lawsuit does not impede the ability of the plaintiffs to continue exercising their legal rights of protest related to the Escobal mine. Indeed, the peaceful resistance, though impacted by a state of siege and prosecutions of protestors, remains active in Guatemala, particularly on the court-ordered consultation process.

In reaching the resolution of their suit, the plaintiffs were represented by Camp Fiorante Matthews Mogerman LLP, the Vancouver-based law firm for which I work. On a personal note, I have had the honour of being a member of the legal team for these courageous men since the beginning of their case. Through many trips to Guatemala, and their occasional visits to Vancouver, I have come to know them well, and I have the greatest respect for their tenacity, bravery, and solidarity with their community. They deserve praise for blazing a trail that can be followed by others seeking justice when abuses occur in the overseas operations of Canadian companies.

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About the author

Matt EisenbrandtMatt Eisenbrandt has nearly two decades of experience in the field of international justice, and he is one of Canada’s leading experts on universal jurisdiction prosecutions and corporate accountability for human rights violations. Matt is currently the Director of Transnational Investigations for Camp Fiorante Matthews Mogerman LLP, with a focus on the law firm’s cases in British Columbia against Canadian mining companies for alleged human rights abuses connected to their overseas operations. Matt was previously the Legal Director for the Canadian Centre for International Justice, where he spent nine years overseeing the organization’s casework on behalf of survivors seeking justice for torture, war crimes, and other atrocity crimes. He earlier served as the Legal Director for the Center for Justice & Accountability (CJA), a U.S.-based group that holds human rights abusers accountable through legal cases, particularly under the Alien Tort Statute. Among other cases, Matt was a member of the trial team in a lawsuit against a man from El Salvador for his role in the death-squad murder of beloved archbishop Oscar Romero. The case about Romero, who was canonized in the Vatican in 2018, is the subject of Matt’s award-winning book Assassination of a Saint. Matt has a J.D. from the University of Virginia School of Law and B.A. degrees in Latin American Studies and History from the University of Illinois at Urbana-Champaign.

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Image: Flickr, Protest of Tahoe Resources’ Escobar silver mine outside the Constitutional Court of Guatemala, May 2018, credit: Jackie McVickar, Attribution 2.0 Generic (CC BY 2.0).