Case Comment: Transnational Law and Canadian Courts – The Issue of Forum non Conveniens

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By: James Hendry

Canadian extractive corporations do business around the world. Sometimes protest and conflict surround their activities or labour might be procured in less than humane ways and locals become victims. Can relief be sought where the parent corporation resides in Canada for what might amount to breaches of human rights norms?

A story from Guatemala wanting to be heard in British Columbia

In *Garcia et al. v. Tahoe Resources Inc.*[1], the Court of Appeal for British Columbia held that seven Guatemalan protesters could sue Tahoe in the British Columbia Supreme Court for injuries allegedly resulting from being shot by private security officers at a mine owned by Tahoe through its wholly-owned subsidiaries in Guatemala during a protest.

The story related by the Court of Appeal

The Guatemalan claimants alleged that Tahoe's security manager, Rotondo, had been concerned that escalating local protests against the mine would interfere with its operation and directed security

officers to fire on the protesters and to cover up what happened. The claimants also alleged that Tahoe authorized the action or was negligent in failing to prevent it.

Guatemala started criminal proceedings only against Rotondo for aggravated assault and obstruction of justice. The claimants were named as civil complainants in the criminal proceedings enabling them to seek compensation.

Corporate structure

The Court of Appeal indicated that three of Tahoe's directors live and work in the US and five in Canada. It has an office in British Columbia sufficient to meet the reporting requirements of a BC corporation. It holds annual general meetings in Vancouver, where the directors also meet once or twice a year. Tahoe manages and controls the mine's operations through its wholly-owned subsidiary Minera San Rafael S.A. (MSR). The mine's then-manager, a Vice President of Operations of Tahoe, lived in Guatemala. He was in charge of daily operations of the mine and reported to the US-based COO of Tahoe on security matters. Rotondo reported to him. Tahoe had Corporate Social Responsibility initiatives in place, with a Committee established by its Directors to oversee health, safety, environmental and other community matters who hired consultants to help it comply with business and human rights conventions.

The action in British Columbia

The claimants started an action in the Supreme Court against Tahoe alleging both direct and vicarious liability for battery, as well as negligence. They alleged that Tahoe controlled MSR, the mine, and either authorized the actions of Rotondo and his security officers, or was vicariously liable as parent corporation. They also alleged that Tahoe owed them a duty of care based, among other things, on its control of the operations of the mine and MSR, its knowledge of the political context and because its Corporate Social Responsibility policies bound it to supervise security operations in accordance with the human rights of protesters.

Tahoe conceded that the British Columbia courts had jurisdiction over the claim because Tahoe was a British Columbia corporation.[2] But it sought a stay alleging *forum non conveniens*.

The stay was granted

The Applications judge applied s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*:[3]

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the

proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

Tahoe had the onus of proving the alternate forum was "clearly more appropriate".[4]Garson J. also noted that the s. 11(2) list of factors was not exhaustive.[5]

Garson J. writing for the unanimous Court of Appeal summarized the reasons of the Applications judge. The Applications judge held that the ordinary factors in s. 11(2) favoured Guatemalan courts.[6] She rejected the relevance of evidence of corruption and lack of independence in the Guatemalan legal system because she characterized the matter as only a "personal injury case".[7] She identified the *forum non conveniens* issue as "whether the foreign legal system is capable of providing justice".[8] She thought that Tahoe could be added to the criminal proceedings or could be sued civilly in Guatemala. The factors of choice of law (Guatemala), avoidance of multiple proceedings, potential for conflicting decisions and ability to enforce a judgment favoured Guatemalan jurisdiction. She noted that a negligence claim against a parent company for actions of its subsidiary might not be successful in Canada. She rejected the argument that the problems with documentary discovery process in a Guatemala proceeding would be an impediment. She did not consider that the expiration of the one-year limitation in Guatemala for suing civilly would impede the claimants if Tahoe got the stay. She granted the stay after holding Guatemala was clearly the more appropriate forum.

The Court of Appeal of British Columbia

Garson J. held that the standard of review of the Applications judge's discretionary decision was deferential, but required correctness on a point of law.[9]

Appropriateness of the criminal proceedings

Garson J. held that the claimants' derivative claim in the Guatemalan criminal proceedings was not a more appropriate forum for their dispute.

The claimants sought to introduce new evidence relevant to the criminal proceedings occurring after the stay was issued. Rotondo had escaped to Peru, had been cited for contempt by a Guatemalan

court leading to his arrest in Peru. Guatemala had commenced extradition proceedings, but there was no evidence about whether it would occur. Garson J. held that this evidence met the stringent requirements for the admission of new evidence on appeal because of its relevance to the premise of the stay which was that there were criminal proceedings in Guatemala in which the claimants could make their claim for compensation.[10] This led her to the "inescapable" conclusion that the criminal proceedings with the derivative civil claim did not provide a more appropriate forum.[11]

A stand alone civil claim in Guatemala?

Garson J. then reversed the finding of the Applications judge that the availability of a stand-alone civil suit made Guatemala the more appropriate forum.[12]

First, she held the Applications judge erred in conflating access to the prosecutor's documents in the criminal proceedings with a right to civil discovery of Tahoe's documents in a civil suit. The Applications judge did not sufficiently consider the difficulties and delay that the claimants would experience in a Guatemalan civil proceeding: the claimants would have to obtain letters rogatory in Guatemala to request a BC court to order production of Tahoe's BC documents. Further, the fate of the criminal proceedings was now in doubt. Garson J. noted the Supreme Court of Canada's warning about placing too much emphasis on the differences in procedure between jurisdictions when weighing the juridical advantage factor in the *forum non conveniens* calculation. However, she held the differences in civil discovery of Tahoe's Canadian documents weighed against Guatemala as the most appropriate forum for a tort claim, particularly because of the evidence that the criminal proceedings might be stalled.[13]

Second, the one year limitation for a tort claim against Tahoe in Guatemala had expired. The Applications judge had found that the expiry would not bar the claimants from a civil suit in Guatemala against Tahoe. Garson J. wrote that she did not understand whether the Applications judge had understood the evidence to mean that the Guatemalan courts were bound to hear a civil suit if there was a *forum non conveniens* decision in BC or whether she had found that the claimants could file a civil suit without further considering the effect of the limitation period expiry.[14] Garson J. held that the Applications judge was wrong in finding that Tahoe had proved the expiry would have no effect on a Guatemalan civil suit.[15]

Garson J. then considered what effect the limitation issue had in the *forum non conveniens* analysis. The courts in Canada were split on this question, so she concluded that it was a fact-specific inquiry.[16] The facts in this case showed that the claimants had pursued their claim diligently. Their claim in Guatemala was part of the criminal proceedings and they had brought this claim in BC. They had not been forum shopping. The juridical advantage in BC was legitimate. The Application judge's apparent misunderstanding of the effect of the limitation issue in Guatemala led to her failure to account for a juridical advantage in BC that should benefit the claimants. This factor should count against finding Guatemala a more appropriate forum because of the doubt about whether the claimants could now pursue a civil claim in Guatemala at all.[17]

Third, though Garson J. refused to allow new evidence about judicial corruption in Guatemala because it was similar to evidence already before the court and so failed to meet the test for inclusion on appeal because it would not affect the outcome of the decision, she held that the Applications judge had not given the existing evidence enough weight because she had thought it would have little effect on a “personal injury” case.[18] However, Garson J. thought the existing evidence highlighted the political context of the case that favoured the large power imbalance between the parties that would reduce the likelihood of getting a fair and impartial trial.[19] The evidence also showed that Guatemalan judges do not have tenure which made them vulnerable to political pressure.[20] There was evidence that there were almost no cases of individuals who had sued foreign corporations in tort in Guatemala.[21] Garson J. thought the Applications judge had missed the importance of the government support of a large foreign mining company and the protest against it in the context of a judicial proceeding against the mine when she characterized the matter as “a personal injury claim”.[22] While remaining sensitive to the lack of detail of the corruption evidence in cases involving foreign corporations provided by the claimants, when detailed evidence was usually required in a *forum non conveniens* case, the evidence did show that corruption was widespread and judges lacked judicial independence.[23]

Test for unfairness in foreign courts

Garson J. then turned to the legal test for assessing the appropriateness of the foreign court. She repeated that the Applications judge had asked whether the foreign court “was capable of providing justice”.[24] However, the parties agreed that the proper test was established by English cases that asked “whether there is a real risk of an unfair process in the foreign court”.[25] Garson J. thought that she had to resolve the difference between the English and Canadian approaches to *forum non conveniens* to determine whether the Applications judge had applied the right test. English cases require the defendant to prove the alternate forum is more appropriate, and if successful, the onus reverses to the plaintiff to show that a stay is contrary to the interests of justice, such as a risk of injustice.[26] The Canadian approach to *forum non conveniens*is a single stage approach which considers all factors, with the burden on the defendant to show that the alternate forum “is in a better position to dispose fairly and efficiently of the litigation”.[27] This led Garson J. to the conclusion that the Applications judge had wrongly applied the English test by requiring the claimants rebut her conclusion that Guatemala was the more appropriate forum, by showing that they could not get justice in Guatemala based on their evidence of corruption and injustice.[28]

Further, the Applications judge had incorrectly defined the factor relevant to the issue of corruption and injustice in the single stage Canadian test. She had asked whether Guatemalan courts were capable of providing justice. The proper factor was whether there was a real risk of not obtaining justice in the alternate forum.[29] This respected the principle of judicial comity and was the way to properly consider evidence of corruption and injustice. Garson J. thought that it was not necessary for this kind of evidence to meet the high bar required in English law because this was only one factor among many and could be weighed with the others.[30] The general evidence provided by the

claimants would have less weight than detailed and cogent evidence of the same conditions.[31] Garson J. held that the errors made by the Applications judge resulted in giving the evidence of judicial weakness and lack of independence insufficient weight. This would allow the Court of Appeal to reverse her decision.

In conclusion, Garson J. held that the three factors she discussed: limited discovery, uncertainty of the effect of the limitation period on the claim, and "some measurable"[32] risk of injustice, weighed against finding that the Guatemalan courts were clearly more appropriate. She allowed the appeal of the stay for the Court of Appeal.

Conclusion

The Court of Appeal of British Columbia allowed a tort claim to proceed against a Canadian mining corporation where the actions occurred at the site of its mine owned through its subsidiary in another country. Garson J. of the Court of Appeal had to resolve a number of issues. On the effect of the expiration of a limitation period in the other jurisdiction, she resolved the issue, which had divided Canadian courts, as one of diligence. She applied a Canadian approach to assessing the combined weight of all of the factors in determining the appropriateness of the forum. She thought that evidence of potential injustice in the foreign court involved asking whether there was a real risk of unfairness in the foreign court, rejecting the Applications judge's test that asked whether the foreign court was capable of providing justice. This meant that issues about a foreign judiciary did not have to meet a high level of proof in the assessment, but could be weighed with other factors according to its cogency.

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James Hendry **About the Author**

James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.

References

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6. *Ibid*., para. 34.
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27. *Ibid*., para. 120, citing *Van Breda*, note 4, para. 109.
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