Corporate Parent Liability: Litigation Risks for Resource Companies

Mining Bulletin

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Traditionally, parent companies have been considered legally distinct entities and thus immune from the actions of their subsidiaries, a concept described as the “corporate veil”. Courts have been reluctant to allow claimants to pierce the corporate veil unless a company is incorporated for an illegal, fraudulent or improper purpose, or when the parent uses it for improper activity. In such rare instances, a court may disregard a company’s distinct legal personality and hold the parent liable for the acts or omissions of its affiliates.

This position is now being challenged in lawsuits which assert as-yet-unproven claims of environmental and human rights violations against parent companies for actions of their foreign subsidiaries and subsidiaries’ contractors within the resource sector.

Global developments

Courts in Europe and North America are being asked to make judgments regarding the activities of parent companies’ related entities abroad. For example, Nigerian plaintiffs sought relief in the Netherlands from both Shell Petroleum Development Company of Nigeria Ltd. (“Shell Nigeria”), and its Dutch parent company Royal Dutch Shell plc, for two oil spills which occurred as a result of sabotage to Shell Nigeria’s underground pipelines in Nigeria. In 2013, the Dutch court held Shell Nigeria liable for failing to take sufficient steps to prevent the sabotage but did not hold Royal Dutch Shell plc liable under Nigerian law.

In 2013, the United States Supreme Court narrowed the scope in which it will accept jurisdiction for foreign tort claims violating international norms under the Alien Tort Statute (“ATS”). In *Kiobel v. Royal Dutch Petroleum Co.*[1], the US Supreme Court held that the presumption against extraterritoriality applies to all cases filed pursuant to the ATS to sue a corporation in the United States for wrongs allegedly committed abroad. Plaintiffs can rebut the presumption when “claims touch and concern the territory of the United States” with “sufficient force.” Importantly, however, the Supreme Court held that a plaintiff must prove that a defendant has more than a “mere corporate presence” in the United States. Despite this narrowing, plaintiffs attempting to rebut the presumption against extraterritoriality continue to bring claims under the ATS. Since *Kiobel*, lower courts have rejected cases where the connection to the US was limited to the existence of US subsidiaries, office locations, or bank accounts situated in the US[2].

Canadian developments

More recently, foreign plaintiffs have turned to Canadian courts to seek relief from Canadian companies for the actions of their related foreign affiliates outside Canada.

In three cases filed against parent Canadian mining companies since 2013 foreign plaintiffs are attempting to impose liability directly on a parent corporation for alleged actions of their subsidiaries and subsidiaries' contractors abroad[3]. The allegations in these cases include claims of battery, torture, forced labour, and negligence. Seeking to pierce the corporate veil, the plaintiffs claim that the subsidiaries acted as agents of and are fully controlled by the parent company defendants or that the parent company is vicariously liable for the acts allegedly committed abroad.

The plaintiffs in these cases are also attempting to establish direct liability in negligence against the parent companies, arguing that the parent companies owed a separate duty of care to the plaintiffs. The plaintiffs allege that the parent companies knew of and turned their minds to the legal risks of working in the foreign jurisdictions and that they either failed to establish or adhere to corporate social responsibility (CSR) standards that they purported to adopt or publicly endorsed. An intervenor in one of the cases, Amnesty International, further argues that the content of the duty of care owed by the parent company is set by international CSR standards that have been endorsed by the Canadian government, whether or not the parent company has adopted those standards.

On November 9, 2015, the BC Supreme Court declined jurisdiction in the first of these cases, *Garcia v Tahoe Resources Inc.*[4], on the grounds that the case is more appropriately tried in Guatemala, where the alleged battery and negligence took place. The decision did not address whether parent company liability would be accepted by Canadian courts. For more information on the *Tahoe* decision, see our bulletin on the decision here. No decisions on the merits have yet been made in the two remaining cases. It therefore remains to be seen whether Canadian courts will be prepared to overturn the established principles, and if so, on what basis.

In a fourth case, Canadian courts are being asked to enforce foreign awards against extractive companies and their Canadian affiliates, regardless of whether the Canadian affiliate was a party to the original action or found liable. Ecuadorian nationals have asked an Ontario court to enforce a US $9.51 billion damages award against Chevron Corporation and Chevron Canada, despite Chevron Canada not being a party to the original claim and Chevron not having any Canadian assets. An Ecuadorian court granted the award amid widespread allegations of judicial bribery and fraud. Courts in the United States have refused to enforce on the grounds that the Ecuadorian judgment was fraudulently obtained.

In *Chevron Corp. v. Yaiguaje*[5], the Supreme Court of Canada held that Canadian courts have jurisdiction over both Chevron Corporation and Chevron Canada but emphasized that its finding of jurisdiction does not mean the plaintiffs will be successful in enforcing the Ecuadorian award.

Conclusion

The implications of these developments are clear: foreign plaintiffs are seeking many routes to impose liability on corporations for the actions of their subsidiaries and contractors abroad for alleged environmental and human rights violations. Until these claims are resolved, and the law on these issues becomes more settled, uncertainty will remain as to what extent mining companies will be able to rely on the corporate veil to protect parent companies from the acts of their foreign subsidiaries with respect to

environmental and human rights claims.

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[1] 133 S. Ct. 1659 (2013).

[2] See *Tymoshenko v. Firtash*, 2013 WL 4564646 (SDNY Aug. 28, 2013); and *Balintulo v. Daimler AG*, 727 F 3d 174, 182 (2d Cir 2013).

[3] See *Choc v. Hudbay Minerals, Inc.,* Order 2013 ONSC 1414, cv-10-1411159 (Superior Court of Justice – Ontario, July 22, 2013); *Garcia v. Tahoe Resources, Inc.,* Notice of Claim S 144746 (Supreme Court of British Columbia, June 18, 2014); *Arraya v. Nevsun Resources, Ltd.,* Notice of Claim S 148932 (Supreme Court of British Columbia, Nov. 20, 2014).

[4] 2015 BCSC 2045.

[5] 2015 SCC 42.