Parent Company Liability for Foreign Subsidiary’s Actions – Alarming New Trend?

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A recent lawsuit in British Columbia is the latest example of an emerging trend in which plaintiffs are seeking to hold parent companies liable in negligence in relation to the actions of their foreign subsidiaries. Residents of Guatemala are suing Tahoe Resources Inc., a Canadian mining company incorporated in British Columbia, in connection with an alleged shooting by security personnel at the Escobal mine. The mine is not owned by Tahoe, but by its Guatemalan subsidiary.

Instead of asking the B.C. court to “lift the corporate veil” to hold Tahoe liable for its subsidiary’s actions – which Canadian courts have been very reluctant to do – the plaintiffs are alleging that Tahoe is directly liable in negligence and battery. Should the matter proceed to trial, the plaintiffs will argue that the Canadian parent company owed a duty of care directly to the Guatemalan residents, in view of the extensive control that the parent company exercises over the operating subsidiary (including with respect to mine security). The plaintiffs will also argue that the Canadian parent company breached its duty by negligently hiring, training and/or supervising the security personnel.

The question remains open whether a parent company can owe a duty of care to members of the local community in which a subsidiary’s operations are located. In Choc v Hudbay Minerals Inc, the Ontario Superior Court of Justice refused to strike out a similar negligence claim made against Canadian mining company Hudbay Minerals (also in relation to an incident involving security personnel at a mine located in Guatemala). Although the Hudbay decision is not a final disposition of the case on its merits, that decision provides an indication of the factors that may be relevant in determining whether a Canadian parent company owes a duty of care to local residents. In particular, the following factors may be relevant:

- effective control of the subsidiary (for example, whether the subsidiary is wholly owned or not);
- the degree of control exercised by the parent company over the situation giving rise to potential liability;
- public representations by the parent company regarding its relationship with its subsidiary;
- assumptions of responsibility by the parent company regarding the situation giving rise to potential liability;
- employment by the parent company, rather than the subsidiary, of the individuals responsible for the subsidiary’s activities; and
- adoption of policies by the parent company that apply to its subsidiary.

The claim against Tahoe, like the Hudbay decision, should serve as a warning to all those who believe that a parent corporation is immune from liability by reason of its separate legal personality. The application of this new theory of parent liability is not limited to issues of employee conduct; it could open Canadian companies up to a wide universe of claims regarding the conduct of their subsidiaries, including environmental claims. Depending on the circumstances, the actions and omissions of foreign subsidiaries could have serious financial and reputational consequences for Canadian companies.

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