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Canadian Mining Operators Abroad – Corruption as a 'Real Risk' Factor in *Forum Non Conveniens* Applications

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Case Commented On: *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39 (CanLII)

In *Garcia v Tahoe Resources Inc*., 2017 BCCA 39 (CanLII) the Court of Appeal of British Columbia reversed an order which had granted Tahoe Resources Inc. (Tahoe) a stay of proceedings on grounds of *forum non conveniens*. The claim brought against Tahoe concerned the shooting of local protesters by security guards at Tahoe's Guatemalan mining operation. The Court of Appeal held that the possibility of corruption in the Guatemalan legal system raised a real risk that the claimants would not obtain a fair trial, and therefore concluded that British Columbia was the "more appropriate forum".

The decision raises a number of important issues, particularly for the Canadian energy and natural resources sector. The decision has the potential to undermine the attractiveness of Canadian jurisdictions as preferred venues for the registration of mining companies that engage in international activities. Tahoe's registered office is in Vancouver which gave rise to jurisdiction *simpliciter*. The decision is also noteworthy from a private international law perspective. Firstly, the effect of the judgment is that serious doubt has been cast over the reliability of the legal system of an entire country, thereby raising issues of comity upon which the functioning of private international law depends. Secondly, the case marks the acceptance of the English test of 'real risk' of judicial unfairness as a factor in Canadian *forum non conveniens* analysis. Lastly, the BCCA focused on the close alignment between international resources companies and their host state governments and considered that the context of extensive local opposition to a mining project was a factor that pointed to British Columbia as the more appropriate forum.

Background

The Canadian claim in *Tahoe* involves a civil claim for damages (including punitive damages) for battery and negligence arising from the fatal shooting of Mr. Garcia and injuries to six other members of the local community (referred to collectively as "Garcia") by a private security officer employed at a mine wholly owned by a Guatemalan subsidiary of Tahoe. Criminal proceedings had commenced against the security manager in Guatemala and, as permitted by the laws of Guatemala, a derivative civil claim was joined to that proceeding. But no charges had been brought against Tahoe or its Guatemalan subsidiary.

In the British Columbia Supreme Court proceedings, Tahoe was successful in its *forum non conveniens* application on the basis that Guatemala was the 'clearly more appropriate' forum (per *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 (CanLII)). The BCSC noted that all the facts (*i.e.*, that the claimants resided in Guatemala, the alleged injuries and losses occurred in

Guatemala, the evidence was in Guatemala and in Spanish, and Tahoe's subsidiary is a wholly-owned Guatemalan company) pointed towards Guatemala.

On appeal, the BCCA disagreed. Holding that British Columbia, not Guatemala, is a clearly more appropriate forum to dispose fairly and efficiently of the appellants' claim, it dismissed Tahoe's application, allowing the civil claim to proceed.

Extensive evidence had been adduced with respect to alleged judicial corruption, lack of independence of judges and the overall risk that Garcia would not receive a fair trial in Guatemala. Justice Garson of the BCCA undertook a detailed discussion of the shortcomings of the Guatemalan legal system, which included a consideration of new evidence. At the time the dispute was before the BCSC, the criminal proceedings were ongoing in Guatemala. This was considered by the BCSC as "a significant, if not pivotal, point" (at para 61) in the court's decision that the Guatemalan forum would effectively resolve the civil claim.

New evidence before the BCCA, however, indicated that the manager had absconded to Peru and there was uncertainty over his likely extradition to Guatemala. This change in circumstances, effectively, was held by Justice Garson to mean that the original "adequate extant proceeding" had fallen away, casting doubt over whether the criminal proceeding would move forward in a timely manner, if at all (at para 68). This was considered relevant new evidence by the BCCA in its conclusion that Guatemala was no longer the more appropriate forum to adjudicate the dispute (at paras 70-71).

Deficiencies in Guatemalan civil procedure also meant that Garcia would be unlikely to obtain a fair trial. According to the BCCA, the lower court had not given "adequate consideration to the difficulties that the appellants [would] face in bringing a stand-alone civil suit against Tahoe in Guatemala" (at para 79). This would require a complex and time-consuming process of discovery to obtain corporate documentation from Tahoe in British Columbia, including a petition of a Guatemalan judge. In light of the new evidence on the Guatemalan criminal proceedings, Justice Garson concluded that closer scrutiny should be given to the difficulties of pursuing a civil suit in Guatemala. The BCCA was mindful of placing too much emphasis on "procedural variances between Canada and other jurisdictions" (at para 80, per *Van Breda*), but the court was also acutely aware of the evidence regarding civil discovery in Guatemala. This would "point away" from finding that Guatemala was the more appropriate forum for pursuing a claim against a British Columbia corporate defendant (at para 80).

Furthermore, under Guatemalan law, Garcia had one year to commence a civil suit against Tahoe, and this period had long expired. The BCCA concluded that by bringing their claim in British Columbia, Garcia sought "legitimate juridical advantages" (at para 94) in avoiding this limitation period. Failure to sue Tahoe in Guatemala within the limitation period should not "militate against attaching any weight to this advantage factor" (at para 94). In the court's view, this was a serious issue which suggested that Garcia may not be able to pursue a civil claim against Tahoe in Guatemala at all.

Legal Test for Risk of Unfairness in the Foreign Judicial System

Before the BCCA, the case concerned whether the Guatemalan legal system was suitable to hear Garcia's claim, owing to allegations of corruption, intimidation and serious procedural deficiencies, which would limit the quest for legal redress. The case turned on whether the test for determining the risk of unfairness in a foreign legal system, as one of the factors for the

court's *forum non conveniens* analysis, should be "whether the foreign legal system is capable of providing justice" (as stated by the BCSC, at para 34) or whether "there is a real risk of an unfair process in the foreign court" (as stated by the BCCA, at para 115).

The "real risk" articulation has its origins in the English decision of *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*, [2012] 1 WLR 1804. Garcia's factum summarized this to mean that "the burden can be satisfied by showing that there is a real risk that justice will not be obtained…by reason of incompetence or lack of independence or corruption" (at para 115).

Application of the correct legal test is of course essential to any consideration of *forum non conveniens*. Justice Garson noted that there are significant differences between the English and Canadian approaches. English courts undertake a 'two-step' process, which first requires a defendant to establish that the proposed alternate forum is more appropriate. Second, once this burden is met, a stay will "ordinarily be granted" (at para 118) *unless* the plaintiff can also establish that there are other circumstances which would make the granting of a stay adverse to the interests of justice (per *Spiliada Maritime Corp. v Cansulex Ltd.*, [1987] AC 460). As the BCCA correctly noted, one such circumstance is the 'real risk' that a plaintiff will not obtain justice in the proposed alternate forum (per *AK Investments*). The English *forum non conveniens* process therefore undertakes any consideration of corruption or injustice in the proposed forum "at the secondary stage with a reverse onus on the plaintiff to show that granting a stay would be adverse to the interests of justice" (at para 118).

By contrast, the Canadian *forum non conveniens* analysis involves "a more unified approach" (at para 119). The BCCA referred to Justice Sopinka's analysis in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, where the Supreme Court of Canada examined the loss of 'juridical advantage' and held that it should be included in the other factors that are weighted to consider the appropriate forum (at para 119). As per *Amchem*, the consideration of a 'juridical advantage' is a function of a party's connection to the jurisdiction in question and, provided that there is a real and substantial connection with the forum, a party may avail of the advantages that that forum provides. As set out by Justice Garson in the BCCA, the Supreme Court of Canada in *Van Breda* affirmed the *Amchem forum non conveniens* analysis as "a weighing of all relevant concerns and factors" (at para 120). This manifests itself in a single-step analysis that places the overall burden on the defendant to establish that the proposed alternate forum is "in a better position to dispose fairly and efficiently of the litigation" (at para 120). According to the BCCA, Tahoe failed to establish that Guatemala would be the more suitable forum.

Drawing on the difference between the English and Canadian *forum non conveniens* approaches, Justice Garson noted that she would find it 'unhelpful' to frame the issue more narrowly as one of capability for assessing evidence of corruption and injustice. The BCCA noted that "it is more appropriate to frame the issue as whether the judge correctly defined a factor which she was required to consider in the overall *forum non conveniens* analysis" (at para 121). It was therefore not a question of the "capability" of the Guatemalan judicial system to provide justice, but one of considering the "likelihood" that the alternate forum would provide justice – in other words, "whether there was a real risk that justice would not be done" (at para 121).

According to the BCCA, the lower court had wrongly viewed the issue of alleged corruption and injustice as part of the secondary step in the analysis. This placed the burden on Garcia "to rebut [the lower court's] *prima facie* determination that Guatemala was the more appropriate forum"

(at para 123). The lower court also erred in making the inquiry about the 'capability' of the Guatemalan courts to provide justice (at para 123).

The Consideration of Evidence of Corruption and Injustice

As noted, the Canadian *forum non conveniens* analysis undertakes a search for an alternate forum that is "better equipped than Canada to dispose of the litigation fairly and efficiently" (at para 124). In light of this, Justice Garson held that it would be inadequate to ask whether the foreign jurisdiction is capable of providing justice, as this inquiry would offend basic principles of comity in private international law. On this basis, the 'real risk' standard as articulated in *AK Investment* was considered 'helpful' and was adopted by the BCCA. Where a plaintiff presents evidence of corruption or injustice in the defendant's proposed alternate forum, the 'real risk' test asks a court to determine whether the evidence suggests "a real risk that the alternative forum will not provide justice" (at para 124).

In her review of decisions of the English courts on the 'real risk' test, Justice Garson noted that the evidentiary standard to establish the test "is a high bar in England" (at para 125). This is directly related to the fact that the English *forum non conveniens* analysis, as discussed above, entails a two-step test and the court is asked, in the first part of the test, to make a finding that the alternate forum is "*prima facie* more appropriate for the dispute" (at para 125). By contrast, the unified Canadian approach does not require such a high evidentiary threshold to determine a risk of unfairness. A risk of unfairness is just one factor of many to be weighed. The weight attached to the evidence is dependent on its quality, with "detailed and cogent evidence of corruption" attracting significant evidentiary weight (at para 125).

Commentary

In *Tahoe*, the BCCA adopted the English test of 'real risk' of judicial unfairness as an important factor to consider in Canadian *forum non conveniens* analysis. In my view, this clarifies the Canadian private international law position. Given the significant emphasis by Canadian courts (*e.g.*, *Chevron Corporation v Yaiguaje*, 2015 SCC 42 (CanLII)) on the importance of comity, the 'real risk' approach is better suited to dealing with the issue of judicial corruption than an inquiry as to the capability of a foreign legal system.

However, the decision does raise some issues for the Canadian energy and natural resources sector. One concern is that the decision may undermine the attractiveness of Canada for the registration of mining companies that operate internationally. This is because jurisdiction to hear the case was established on grounds of jurisdiction *simpliciter* (arising from the corporate registration of Tahoe in Vancouver). If the decision is upheld, corporate companies may therefore reconsider their venues of registration and may potentially relocate out of Canada. Another is that the judgment has effectively cast doubt over the reliability of the legal system of an *entire* country, Guatemala, thereby undermining the principles of comity that are fundamental to the operation of private international law. This conclusion has the potential to be far-reaching. Does this now mean that whenever an application is brought in a Canadian court that involves a civil claim in Guatemala (with all jurisdictional requirements met), the Canadian court will never grant a *forum non conveniens* application? It is hard to predict this with any degree of certainty.

Lastly, some uncertainty is also raised by the BCCA's consideration of the "context" of local opposition to the mining project (which gave rise to the alleged shootings). As noted, this was a significant factor in the court's conclusion that British Columbia was the more appropriate

forum. Moreover, the court expressed concern that Garcia would encounter difficulties in obtaining a fair trial "against a powerful international company whose mining interests…align with the political interests of the Guatemalan state" (at para 130). This contextual approach strongly suggests that resources companies should be acutely aware that Canadian courts will likely look very closely at the company's interactions with host governments and local communities in deciding whether or not to decline jurisdiction on grounds of *forum non conveniens*.

This post may be cited as: Rudiger Tscherning "Canadian Mining Operators Abroad – Corruption as a 'Real Risk' Factor in *Forum Non Conveniens* Applications" (9 February, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/02/Blog_RT_Garcia_Tahoe.pdf