CENTRE FOR INTERNATIONAL AND DEFENCE POLICY

BRIEFING NOTE FOR INFORMATION

SUBJECT: Judicial shift in Canada on corporate liability in foreign jurisdictions – *Garcia v Tahoe Resources*

A judgment handed down on January 26 by the British Columbia Court of Appeal (BCCA) could have serious practical ramifications on how mining and extraction companies provide and control on-site security in developing countries. On April 27th 2013, private security forces, which were hired by Tahoe Resources subsidiaries, allegedly opened fire on a crowd of protesters outside the Escobal mine in Guatemala. Adolfo Agustin Garcia began judicial proceedings against Tahoe, along with six other miners who had been harmed in the incident. The actions in battery and negligence were brought against Tahoe, a Canadian company, in both Canada and Guatemala.

The chambers judge before whom the initial pleadings were heard ordered a stay of proceedings, *forum non conveniens*, on grounds that Guatemala was "a more appropriate forum" for proceedings to continue. The chambers judge found that when deciding on a jurisdictional issue, the Court's focus should be on whether there is a possibility of justice being served in the original jurisdiction. The judge, on hearing evidence of the existence of a functioning judiciary system in Guatemala, portrayed the issue as one of form rather than substance and found that there was a real possibility of justice.

On appeal, this position was overturned. The BCCA found that while there was a functional judiciary system in Guatemala, the circumstances surrounding the case in Guatemala made the prospects of justice grim. The BCCA shifted the focus from one on form to one on substance. And while the Court was not convinced about the evidence they heard relating to corruption in the Guatemala judiciary, they were satisfied that in the present case, there was no possibility of justice. Tahoe has since applied for leave to the Supreme Court of Canada, with Can n[illegible] *Chevron Corp v Yaiguaje* (see [i]). This is a position that potentially loomed large in the Court's refusal to hear the appeal[ii].

This decision by the BCCA could be a seminal moment about the ways in which Canadian extraction companies establish their on-site security practices in foreign countries. Corporations or groups that practice a much more relaxed or "laissez-faire" attitude to security may change their approach considering this ruling. If Canadian courts take a much more inquisitive attitude to the judicial proceedings in other states, typically weaker states, this new found legal blind spot may send extraction corporations back to the drawing board. Proponents of the BCCA's decision say that this will further incentivize corporations to implement and uphold principles of corporate social responsibility. Others, however, have said that the *Tahoe* decision could potentially deter extraction corporations from registering in Canada.

While most extraction companies hire qualified security providers, vetting those providers more thoroughly may become common practice. Certain corporations have already incorporated those practices, vetting companies for no less than six months before even considering letting them handle a single extraction site. Despite an extensive vetting process, those same corporations have acknowledged that the directives implemented on-site may be a watered-down version of what was sent out at headquarters. With the broad scope of civil battery and negligence liability in Canada, domestic corporations may have a new-found incentive to turn to alternative conflict resolution altogether.

For more information, please contact;

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[i] *Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69
[ii] *Garcia v Tahoe*, 2017 BCCA 39, 407 D.L.R. (4th) 651