Insight

IN-DEPTH DISCUSSION

SEPTEMBER 16, 2015

In Canada, Foreign Workers Seek to Use International Norms as the Standard of Care in Negligence Claims Against Multinationals Operating Overseas

BY JOHN KLOOSTERMAN, TRENT SUTTON, SARI SPRINGER AND LAVANGA WIJEKOON

Non-Canadian workers are increasingly suing their employers in Canadian courts for human rights violations allegedly committed outside Canada by the companies themselves or by other entities in their supply chains. This development seems to be spurred by recent U.S. cases limiting the rights of workers and their representatives from bringing these claims in the United States.

These claims rest on a theory that international norms such as the UN Guiding Principles on Business and Human Rights form a standard of care that, when violated, constitutes actionable negligence. These "norms" were previously regarded as nonbinding "soft law," but the Canadian developments could transform them into binding "hard law" enforceable through awards of civil damages. The practical effects of this trend include a growing effort to use Canada as a forum for redressing alleged human rights violations committed overseas, and an emphatic need for employers to consider developing and implementing effective codes of conduct for their supply chains.

2014 and 2013: Groundbreaking Decisions

Recent cases illustrate the trend. In 2013, members of an indigenous Mayan community in Guatemala brought three suits in Toronto against Canadian company Hudbay Minerals for alleged abuses committed by security personnel at a nickel mining project.[1] The plaintiffs argued that the company violated its duty of care by failing to prevent these harms.

The alleged duty of care arose from, *inter alia,* international norms, including the International Finance Corporation Performance Standards and the Voluntary Principles on Security and Human Rights, which the company had publicly committed to follow. Amnesty International, as an intervenor, filed a submission arguing that these international norms, as well as the UN Guiding Principles on Business and Human Rights (the "UN Guiding Principles") and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, formed the applicable duty of care.

1 *See Choc v. Hudbay Minerals, Inc.*, Order 2013 ONSC 1414, cv-10-1411159 (Superior Court of Justice – Ontario, July 22, 2013).

The court, having applied a multi-factor test, recognized that the negligence claim was "novel" and denied a preliminary motion to strike the allegations, finding, among other things, that plaintiffs had properly pled the duty of care. It noted that the company had made public statements that it had adopted certain "international norms," and, therefore, there was a "proximate" relationship between the plaintiffs and the company. As the court stated, "these public statements alleged to have been made by the parent company are one factor to be considered…[that] are indicative of a relationship of proximity," which creates the company's obligation "to be mindful of the plaintiffs' legitimate interests."

More recently, in June 2014, seven Guatemalan workers filed suit in the Supreme Court of British Columbia against Canadian company Tahoe Resources Inc., claiming that the company was negligent in preventing or failing to prevent security personnel at one of the company's Guatemalan mines from using excessive force against them in violation of international norms that the company had expressly adopted.[2] These foreign workers argued that the company owed a duty of care based on the fact that it knew that its subsidiary's security personnel failed to adhere to internationally accepted standards on the use of security personnel, including those standards in the UN Guiding Principles and the Voluntary Principles on Security and Human Rights, to which the company had publicly committed. The company's challenge to the jurisdiction of the Canadian court remains under review.

Recent, More Aggressive Claims

In other cases, foreign workers have taken an even more aggressive stance by arguing that international norms apply to companies that have not expressly adopted them.

In April 2015, survivors and family members of workers who died in a factory collapse in Bangladesh filed suit in Toronto against the Canadian retail company Loblaws, seeking nearly $2 billion in damages.[3] The plaintiffs claimed that the company was negligent because it knew of a "significant and specific risk" to workers making garments in the factory for the company's clothing line, but failed to conduct inspections and audits in accordance with its own standards and also international standards set forth in the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises and the ISO 26000 Guidance on Social Responsibility. Thus, these plaintiffs are also arguing that a defendant company's duty of care may be founded upon international norms beyond those to which the company had publicly committed.

In November 2014, three Eritrean refugees filed suit in the Supreme Court of British Columbia alleging that Canadian company Nevsun Resources "aided, abetted, contributed to and became an accomplice to the use of forced labor, crimes against humanity and other human rights abuses" at an Eritrean mine.[4] The plaintiffs alleged that the company was negligent because it violated the International Finance Corporation Performance Standards, which the company had publicly represented it would follow. These foreign workers also appeared to claim that the company owed them a separate duty of care based upon customary international law prohibiting forced labor. In other words, these plaintiffs claimed that a duty of care arose from not only publicly stated commitments by the company to certain international norms, but also from international law in general.

Could Canada Become the Next Preferred Forum for Testing International Negligence Liabilities?

To date, only the *Hudbay* court has squarely acknowledged that a duty of care may exist based upon international norms that the company publicly committed to, and the court did so only in the context of a preliminary motion to strike. Nonetheless, there appears to be an emerging trend in which plaintiffs view Canadian courts as potentially more hospitable to such negligence claims than are courts in the United States.

This view is consistent with recent U.S. developments. Since the 1980s, foreign plaintiffs had sought redress in U.S. courts under the Alien Tort Claims Act (ACTA) against multinational corporations accused of engaging in or condoning human rights atrocities in foreign jurisdictions. In 2013, however, the U.S. Supreme Court limited the jurisdictional scope of ATCA in *Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659 (2013). In *Kiobel*, the Court held that ATCA may not be used to bring claims in U.S. courts against multinational companies for employment practices in foreign jurisdictions since ATCA is a strictly jurisdictional statute that does not provide a private right of action. Given the decision in *Kiobel*, plaintiffs with extra-territorial claims against multinational companies may be inclined to focus their efforts in Canadian courts as opposed to

2 *See Garcia v. Tahoe Resources, Inc.*, Notice of Claim S 144746 (Supreme Court of British Columbia, June 18, 2014).

3 *See Das v. Loblaws, Inc.*, Notice of Claim cv-15-526628 (Superior Court of Justice – Ontario, Apr. 22, 2015).

4 *See Arraya v. Nevsun Resources, Ltd.*, Notice of Claim S 148932 (Supreme Court of British Columbia, Nov. 20, 2014).

U.S. courts. Indeed, the plaintiffs suing Tahoe Resources, Inc. could have arguably brought suit in Nevada since the company is headquartered there, but they chose to bring suit in British Columbia instead based on the company's registration there.[5]

Global Developments Indicate a Move to Make International Norms Binding Law

These developments in Canada take on added importance as the global community focuses attention on the accountability of multinationals for their supply chains, and adopts as binding law some of the international norms the plaintiffs in the above cases relied upon. For example, the UN Human Rights Council's Open-Ended Intergovernmental Working Group (OEIWG) has been negotiating a multi-lateral treaty that makes the UN Guiding Principles binding law.[6] An ever-increasing number of countries have been adopting "national action plans" to implement the UN Guiding Principles, which include introducing and adopting legislation that binds those countries' companies to certain of those UN Guiding Principles. Most recently, in August 2015, Sweden published its national action plan to implement these principles, which inter alia, explores how the Swedish state should carry out its "obligation to provide effective remedies when a company has committed human rights abuses."[7] Plaintiffs will likely point to these global developments to transform "soft law" into "hard law" in support of their efforts to impose international norms such as the UN Guiding Principles as a standard of care for multinationals operating overseas.

Practical Considerations

These Canadian cases indicate that multinational employers should anticipate the possibility of lawsuits in Canada not only for standards they expressly adopt but also for international norms, such as the UN Guiding Principles. At the same time, these developments emphasize the importance of proper supply chain management. While there are no easy answers or one-size-fits-all models, the following suggestions for developing and implementing supplier codes of conduct may help employers avoid such claims and act as good corporate citizens.

First, when developing a code of conduct, begin with identifying the company's values and goals as a corporate citizen. Although these issues are necessarily specific to the company's identity and culture, companies can and should inform their plans by researching the various objectives, codes and initiatives in their industry, among their competitors and, of course, with any upstream customers or business partners to ensure compliance with applicable requirements.

Second, undertake efforts to understand and identify the supply chain. Doing so is critical to assessing risks and opportunities, as different countries and suppliers present different risks and challenges. This exercise is no easy task, and companies should understand that their supply chain may change and that they may need to utilize outside resources to assist.

Third, once some risks and challenges are identified, determine the scope of the company's efforts and identify internal and external resources that are necessary and appropriate to address them. It is fundamental that appropriate stakeholders within the organization are committed to the project and that stakeholders from different regions of the world, and serving different functions—including compliance, legal, communications and operations personnel—be involved. No company can address every human rights issue or every supplier that arguably falls within its supply chain. A supply chain management strategy should be manageable and capable of execution. One that focuses on certain company and industry risks, or a certain cause that resonates with the company's culture, is generally advisable.

Fourth, develop or refine tools to implement the strategy. For example, once a supplier code of conduct is put in place, supplier contracts may be developed (or amended, as needed) to require that the suppliers adhere to the standards articulated in the code of conduct, agree to audits and inspections, and face contract termination should the suppliers violate those standards.

---

5 Nonetheless, in April 2015, one day after the suit against Loblaws was filed, certain Rana Plaza plaintiffs also sued additional retailers in the District of Columbia for negligence claims similar to those leveled against Loblaws. These plaintiffs also argued that the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises, and the ISO 26000 Guidance on Social Responsibility set the standard for the duty of care owed to the plaintiffs. However, this case was short-lived because, in July 2015, plaintiffs voluntarily dismissed this action. The circumstances that led to this dismissal are currently unclear.

6 United Nations General Assembly, Human Rights Council, Thirty-second session, *Report of the Open-ended inter-governmental working group on transnational corporations and other business enterprises with respect to human rights* (July 10, 2015).

7 7 Government Offices of Sweden, *Action Plan for Business and Human Rights* (Aug. 2015).

Conclusion

Striking the appropriate balance between appropriate due diligence and potentially exposing the employer to liability such as those facing companies in the Canadian courts described above is a complex, culture-specific and risk-specific exercise. These issues can only be handled effectively if the company dedicates itself to building or refining its own human rights infrastructure to identify and address these issues.