CITATION: Piedra v. Copper Mesa Mining Corporation, 2011 ONCA 191
DATE: 20110311
DOCKET: C52250 and C52251

# COURT OF APPEAL FOR ONTARIO

Rosenberg, Simmons and Cronk JJ.A.

BETWEEN

DOCKET: C52250

Marcia Luzmila Ramírez Piedra,
Jaime Polivio Pérez Lucero, and Israel Pérez Lucero

Plaintiffs (Appellants)

and

Copper Mesa Mining Corporation, William Stearns Vaughan,
John Gammon and TSX Inc., TSX Group Inc.

Defendants (Respondents)

AND BETWEEN

DOCKET: C52251

Marcia Luzmila Ramírez Piedra,
Jaime Polivio Pérez Lucero, and Israel Pérez Lucero

Plaintiffs (Appellants)

and

Copper Mesa Mining Corporation, William Stearns Vaughan,
John Gammon and TSX Inc., TSX Group Inc.

Defendants (Respondents)

Murray Klippenstein and W. Cory Wanless, for the appellants

Peter H. Griffin and Andrew Parley, for the respondents, the TSX defendants

John Keefe, Julie Rosenthal and Peter Kolla, for the respondents, the Copper Mesa defendants

Heard: November 25, 2010

On appeal from the orders of Justice C. Campbell of the Superior Court of Justice, dated May 7, 2010, with reasons reported at 2010 ONSC 2421.

**CRONK J.A.:**

## I. Introduction

[1] The appellants, Marcia Luzmilla Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero (the "plaintiffs"), are residents of Ecuador. Between 2007 and 2009, they commenced several negligence actions in Ontario again the respondents, TSX Inc. and TSX Group Inc. (the "TSX defendants"), and Copper Mesa Mining Corporation ("Copper Mesa"), Williams Stearns Vaughan ("Vaughan") and John Gammon ("Gammon") (the "Copper Mesa defendants"), claiming damages in the approximate amount of $1,591 million for various torts allegedly committed by or on behalf of Copper Mesa in connection with a mining project in a remote area of Ecuador.

[2] Copper Mesa (formerly known as Ascendant Copper Corporation) is a junior mining corporation incorporated under the laws of British Columbia. As pleaded by the plaintiffs, it carries on a mining exploration and development business through a series of

at least nine subsidiary corporations. One of its subsidiaries, a Barbadian corporation, in turn wholly owns the company that carries on mining operations in Ecuador.[1]

[3] Vaughan and Gammon became directors of Copper Mesa on June 2, 2006 and February 27, 2007, respectively. Both men reside in Toronto. I refer to Vaughan and Gammon as the "Directors" in these reasons.

[4] TSX Inc., a wholly owned subsidiary of TSX Group Inc., is a Canadian stock exchange recognized by the Ontario Securities Commission (the "OSC") under s. 21(2) of the *Securities Act*, R.S.O. 1990, c. S.5. TSX Inc. owns and operates the Toronto Stock Exchange (the "TSE").

[5] The TSX and Copper Mesa defendants moved to strike the plaintiffs' statements of claim under rule 21.01(1)(b) of the *Rules of Civil Procedure* on the ground that they disclosed no reasonable cause of action. By companion orders dated May 7, 2010, the motions judge struck the plaintiffs' pleadings, without leave to amend, and dismissed their related actions. He also awarded costs in favour of the TSX defendants ($12,500), and the Copper Mesa defendants ($15,000).

[6] The plaintiffs appeal both orders. Their appeals were heard together by this court.

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[1] In their pleadings, the plaintiffs direct their claims concerning the Copper Mesa defendants against the "Ascendant/Copper Mesa Group". In doing so, they draw little distinction between Copper Mesa and its various subsidiaries. However, only two subsidiary companies – Copper Mesa's Barbadian subsidiary and the Ecuadorian subsidiary of that company – are alleged to be connected with the mining project at issue. References in these reasons to "Copper Mesa" include these two subsidiaries, unless the context otherwise requires.

[7] The plaintiffs mount a three-part attack on the motions judge's decisions. They argue that he erred by holding that: (1) no duties of care were owed to the plaintiffs by the TSX and Copper Mesa defendants; (2) the requirements of foreseeability and proximity, necessary to anchor a recognition of the asserted duties of care, were not met; and (3) no policy considerations supported the imposition of the claimed duties of care.

[8] For the reasons that follow, I would dismiss the appeals. In my view, the motions judge correctly concluded that the plaintiffs' claims against the TSX and Copper Mesa defendants disclose no reasonable cause of action.

## II. Facts

### (1) The Plaintiffs' Allegations

[9] The plaintiffs oppose a proposed mining project in the Junín area of Ecuador, to be carried out by the Ecuadorian subsidiary of Copper Mesa's Barbadian subsidiary. According to the plaintiffs, Copper Mesa's initial mining exploration work in Ecuador was preparatory to the eventual construction of a large-scale open pit copper mine (the "Junín Project") on a site adjacent to several small villages where the plaintiffs live. The plaintiffs claim that the villages would be "severely impacted" by the mining operations associated with the Junín Project.

[10] In their negligence actions, the plaintiffs seek damages in excess of $1500 million (the TSX defendants) and $30 million (the Directors) for alleged human rights violations and abuses that the plaintiffs say were committed in connection with the Junín Project.

They also claim damages in excess of $60 million as against Copper Mesa, based on its alleged vicarious liability for the wrongful acts of the Directors.

[11] As described in their factum, the plaintiffs claim that between December 2005 and July 2007, the opponents of the Junín Project, including the plaintiffs, were subjected in Ecuador to a "campaign of intimidation, harassment, threats and violence", allegedly carried out by security forces controlled by, and other agents of, Copper Mesa in response to "widespread and sustained local opposition" to the Junín Project. They allege that as a result of their opposition to the Junín Project: (1) in December 2006, Marcia Luzmila Ramírez Piedra was physically assaulted, Israel Pérez Lucero was shot in the leg, and Jaime Polivio Pérez Lucero was threatened with death; and (2) in June and July 2007, Jaime Polivio Pérez Lucero was assaulted and again threatened with death.

[12] The plaintiffs' principal allegations in their various pleadings are virtually identical. As there is no dispute concerning the nature of these allegations, I will refer in these reasons, for convenience, to those claims set out in the plaintiffs' most recent Statement of Claim, dated March 3, 2009 (the "2009 Claim").

**(a) Claims against the TSX defendants**

[13] Copper Mesa's shares were listed for trading on the TSE effective November 21, 2005. The plaintiffs' claims against the TSX defendants arise out of this listing and Copper Mesa's ensuing access to equity financing, said to have been raised in large part on the TSE.

[14] In particular, the plaintiffs assert that the assaultive conduct and threats alleged could not have been committed without access by Copper Mesa to the substantial funds raised by it through a private placement and otherwise following the listing of its shares on the TSE. They claim that by listing Copper Mesa's shares on the TSE, the TSX defendants facilitated Copper Mesa's access to these funds and thereby "caused or materially contributed to the assaults that were committed and death threats that were issued against [the plaintiffs]" (para. 10, 2009 Claim).

[15] In this context, the plaintiffs plead that TSX Inc. is "under a legal duty not to list a corporation when there is a reasonably foreseeable and serious risk that funds raised on the [TSE] will be used in such a way as to harm individuals such as the Plaintiffs". In the alternative, they allege that TSX Inc. is "under a legal duty not to list a corporation on the [TSE] without instituting precautionary measures to prevent a serious risk that funds raised through the [TSE] will be used to harm individuals such as the Plaintiffs" (para. 74, 2009 Claim).

[16] As support for these alleged duties of care, the plaintiffs plead that prior to the listing of Copper Mesa's shares on the TSE, TSX Inc. "knew or ought to have known of the serious risk of harm to members of the Junín community" posed by the listing. They say that TSX Inc. knew or ought to have known, by various means, that:

> there was a serious risk that financing made available to [Copper Mesa] through listing on the [TSE] … would at least in part be used by [Copper Mesa] or its employees, agents or

> affiliates to perpetrate violence (including physical assaults and death threats)

(paras. 75-76, 2009 Claim).

[17] The plaintiffs' allege, in this regard, that TSX Inc. was informed on two separate occasions – once by the mayor of the affected local county in Ecuador and once by a Toronto lawyer – of mounting conflicts in Ecuador concerning the Junín Project, of the potential for violence and the loss of human lives arising from community confrontations regarding the Junín Project, and of "the serious risk of future violence" if the listing of Copper Mesa's shares on the TSE proceeded (paras. 34, 37 and 75, 2009 Claim).

[18] According to the plaintiffs, notwithstanding this knowledge, the TSX defendants breached their above-described duties to the plaintiffs:

> (1) by failing to take any steps "to attempt to reduce the risks created by providing access to capital to junior mining companies of the sort that have a record of perpetrating violence against local populations"; and
>
> (2) by "facilitat[ing] and mak[ing] possible" Copper Mesa's access "to over US $25 million in equity financing",

thereby causing or materially contributing to the harm suffered by the plaintiffs (paras. 77-81, 2009 Claim).

[19] Elsewhere in their pleadings, the plaintiffs claim that as a result of its TSE listing, Copper Mesa raised about US $26.7 million up to July 2007, over 85% of which was raised on the TSE (para. 41, 2009 Claim). These funds, the plaintiffs say, were used to finance Copper Mesa's wrongful acts in Ecuador, including the specific torts alleged.

**(b) Claims against the Copper Mesa defendants**

[20] The plaintiffs make no direct claim of negligence against Copper Mesa. Instead, they assert that Copper Mesa is vicariously liable for wrongs allegedly committed by the Directors during the course of their duties with Copper Mesa.

[21] The plaintiffs claim that the Directors are personally liable for some or all of the asserted torts since they each allegedly had a legal duty "to avoid acts or omissions that caused or materially contributed to" such torts against community opponents of the Junín Project (paras. 88, 105, 110 and 111, 2009 Claim).

[22] The plaintiffs go on to plead that the Directors had specific knowledge of the risk of harm and danger posed to the plaintiffs and other opponents of the Junín Project in Ecuador by the security forces and other representatives of Copper Mesa before the alleged torts occurred in December 2006 and June and July 2007.

[23] The plaintiffs claim that the Directors are fixed with this specific knowledge by virtue of: (1) a meeting in Toronto on April 27, 2007 between the Directors and a community member from the Junín area (the "April Meeting"); (2) their access to a prospectus dated October 14, 2005 filed by Copper Mesa in relation to its TSE listing application (the "Prospectus"); and (3) other publicly available information regarding instances of the use of violence and threats of violence by Canadian mining companies, including junior mining companies, against local opposition to mining through the use of security forces.

[24] The plaintiffs plead that at the April Meeting, the Directors:

> (1) were alerted to the "ongoing conflict" and "violent tactics" employed by Copper Mesa security forces against community opponents of the Junín Project and were shown photographs depicting Copper Mesa security forces pepper-spraying and drawing and shooting guns at community members;
>
> (2) were told of "the likelihood of future violence" against community opponents of the Junín Project as a result of Copper Mesa's actions and were asked "for their commitment that there would be no more violence committed by [Copper Mesa]"; and
>
> (3) promised "not to be part of 'illegal, immoral, unethical and unprincipled activities'" and promised "to ask for an explanation from [Copper Mesa] as to why the company was employing ex-members of the Ecuadorian military in Junín"

(paras. 55-58 and 112, 2009 Claim).

[25] The plaintiffs further plead that the Prospectus "outline[d] in detail the history of the conflict between [Copper Mesa] and the local community", took note of "the potential for future violence" and indicated, among other matters, that tensions concerning the Junín Project had risen and there had been "various allegations of human rights abuses and physical threats" committed by Copper Mesa and others against anti-mining groups and individuals (para. 36, 2009 Claim).

[26] The plaintiffs also claim that notwithstanding their alleged knowledge of the risk of harm and danger to community opponents of the Junín Project, the Directors breached their duties of care to the plaintiffs by:

> (1) [failing] to avoid acts or omissions that caused or materially contributed to the alleged assaults and threats against community opponents of the Junín Project;
>
> (2) [operating Copper Mesa] in a manner that created a high risk of violence against community opponents of the Junín Project;
>
> (3) [approving] corporate policies and practices intended to eliminate widespread opposition to the Junín Project, including policies and practices relating to [Copper Mesa's] security forces;
>
> (4) [approving] funding for security forces and other agents and affiliates of [Copper Mesa] who had in the past and were likely in the future to assault and threaten community opponents of the Junín Project;
>
> (5) [failing] to adequately supervise the executive of [Copper Mesa];
>
> (6) [failing] to institute proper corporate policies and practices so as to prevent threats and assaults from being committed by [Copper Mesa's] employees, security forces, agents or affiliates;
>
> (7) [failing] to join and ensure the implementation and fulfillment of the requirements of recognized corporate social responsibility governance frameworks aimed at the protection of human rights; and
>
> (8) [failing] to raise concerns about and investigate reported past incidents of violence committed by [Copper Mesa's] agents, employees or affiliates,

(paras. 93, 95, 113 and 118, 2009 Claim).

**(2) Motions Judge's Decisions**

[27] The motions judge correctly recognized that the governing test for the imposition of a duty of care, derived from *Anns v. Merton London Borough Council*, [1978] A.C.

728, was set out by the Supreme Court in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, refined in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and confirmed in *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (the "*Cooper-Anns* test").

[28] The motions judge referenced the decision of this court in *Williams v. Canada (A.G.)* (2009), 95 O.R. (3d) 401, leave to appeal refused, [2009] S.C.C.A. No. 298, in which Sharpe J.A. described the *Cooper-Anns* test in this fashion at paras. 13, 14 and 16-17:

> [13] Before applying the *Cooper-Anns* test in any given action, the court must first determine whether the duty of care asserted by the plaintiff has already been recognized by the law. *Cooper* holds that if the facts of the case bring it within a category that has already been recognized as giving rise to a duty of care, a duty of care is thereby established, and it is unnecessary to engage in the two step *Cooper-Anns* test: *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, at para. 15 ("*Desormeaux*"). If the proposed duty of care has not been recognized, then the *Cooper-Anns* test is used to determine whether the novel duty should be given legal recognition.
>
> [14] The *Cooper-Anns* test consists of two stages. The first stage, which determines whether the relationship between the parties justifies the imposition of a duty of care on the defendant, involves consideration of foreseeability, proximity and policy. For a duty of care to arise, more is required than foreseeability – the two parties must also be sufficiently proximate to one another: *Desormeaux* at para. 12. Proximity, explained the court in *Cooper* at para. 31, "is generally used in the authorities to characterize the type of relationship in which a duty of care may arise." Two parties are in proximity with one another if their relationship is sufficiently close and direct that it is fair to require the defendant to be mindful of the legitimate interests of the plaintiff: *Cooper* at paras. 32-34. The evaluation of whether a

> relationship is sufficiently proximate to ground a duty of care entails a consideration of the "expectations, representations, reliance, and the property or other interests involved. Essentially…factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care": *Cooper* at para. 34.
>
> …
>
> [16] At both stages, the *Cooper-Anns* test involves looking at policy reasons for refusing to impose a duty of care on the defendant. At the first stage, when determining whether to recognize a *prima facie* duty of care, the policy reasons must arise from the nature of the relationship between the parties, rather than any external concerns, which are not considered until the second stage of the test: *Cooper* at para. 30.
>
> [17] If the first stage of the *Cooper-Anns* test is met, the plaintiff has established a *prima facie* duty of care owed by the defendant and the analysis proceeds to the second stage. It is here that the court considers whether there are "residual policy considerations" that militate against recognizing a novel duty of care: *Cooper* at para. 30. These are policy considerations that "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper* at para. 37.

[29] The motions judge also referred to this court's earlier decision in *Morgis v. Thomson Kernaghan & Co.* (2003), 65 O.R. (3d) 321, leave to appeal refused, [2003] S.C.C.A. No. 400. He applied the principles enunciated in *Williams* and *Morgis* to the facts of this case, as pleaded.

[30] In respect of the TSX defendants, the motions judge concluded that neither the reasonable foreseeability nor the proximity requirements of the *Cooper-Anns* test were

met. Further, in his view, no policy considerations arose with respect to the TSX defendants and the plaintiffs that favoured the imposition of a duty of care. Consequently, as the *Cooper-Anns* test was not satisfied, the plaintiffs' claims against the TSX defendants disclosed no reasonable cause of action.

[31] The motions judge reached a similar conclusion regarding the plaintiffs' claims against the Directors. He held: "There is nothing in the allegations in the Statement of Claim that satisfies me that the conduct alleged is of the type of personal conduct by a director that could ground personal liability." He elaborated:

> For many of the same reasons as set out above in respect of the TSX Defendants, I do not find that the Plaintiffs have made out the necessary connection for foreseeability and duty in respect of two individuals who are non-management directors.

[32] Finally, given what he termed the "very limited involvement of two non-management directors of a company that does not do business in Ontario", the motions judge was not satisfied that any policy considerations argued in favour of extending personal liability to the Directors.

[33] In the result, the motions judge accepted that the plaintiffs' claims against the Directors failed to disclose a reasonable cause of action. Since the plaintiffs' claims against Copper Mesa were based solely on vicarious liability, it followed that those claims also failed to disclose a reasonable cause of action.

[34] Accordingly, the motions judge struck the plaintiffs' pleadings under rule 21.01(1)(b) and dismissed their associated actions. He also declined to grant the plaintiffs leave to amend their pleadings since, in his view, nothing would have been achieved by doing so.

## III. Issues

[35] There are two main issues on these appeals:

> (1) Did the motions judge err by striking the plaintiffs' claims against the TSX and Copper Mesa defendants on the ground that they disclosed no reasonable cause of action?
>
> (2) Did the motions judge err by declining to grant leave to the plaintiffs to further amend their pleadings?

## IV. Analysis

### (1) Rule 21.01(1)(b) Test

[36] The test for striking out a statement of claim at the pleadings stage under rule 21.01(1)(b) is well-established. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980, the Supreme Court described the test in these terms: "[A]ssuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action?" Further, as the Supreme Court also clarified in *Hunt*, at p. 980:

> Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. *Only if the action is certain to fail because it contains a radical defect ... should the*

> *relevant portions of a plaintiff's statement of claim be struck out [under a summary proceedings rule]*. [Emphasis added.]

See also *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para. 15; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455.

[37] The motions judge was alert to this stringent test and concluded that it was met in respect of the plaintiffs' claims against both the TSX and Copper Mesa defendants. For the reasons that follow, I agree. I turn first to the plaintiffs' claims against the TSX defendants.

**(2) Claims Against the TSX Defendants**

[38] The plaintiffs acknowledge that their case as pleaded against the TSX defendants does not come within nor is it analogous to a category of cases in which a duty of care similar to those asserted against the TSX defendants has already been recognized. Consequently, the evaluation of whether the TSX defendants owed duties of care as alleged fell to be determined under the *Cooper-Anns* test. The plaintiffs do not challenge the motions judge's appreciation of the requisite elements of the *Cooper-Anns* test. Rather, they attack his application of that test to the pleaded facts of this case.

[39] The plaintiffs argue that the motions judge erred in his analysis of their claims against the TSX defendants in three respects: (1) by holding that the TSX defendants could not reasonably foresee that an agent of Copper Mesa might assault or threaten the plaintiffs in Ecuador. This holding, the plaintiffs say, erroneously assumes that to fix the TSX defendants with the asserted duties of care, the plaintiffs' allegations, if proven, had

to establish that the TSX defendants could foresee a specific outcome or harm arising from a particular chain of events; (2) by holding that the plaintiffs' pleadings fail to disclose a relationship between the parties sufficient to satisfy the proximity requirement of the *Cooper-Anns* test; and (3) by failing to hold that significant policy considerations, including the need to protect fundamental human rights, support recognition of the posited duties of care.

**(a) Reasonable Foreseeability Requirement**

[40] The parties agree that the following passage from the motions judge's reasons contains his foreseeability findings concerning the TSX defendants:

> The TSX Defendants assert the Plaintiffs cannot demonstrate that they were so closely and directly affected by the pleaded acts of the TSX Defendants that they ought to reasonably have had them in mind as being so affected. In order to foresee this harm, the TSX Defendants would have had to foresee political and business events in Ecuador which allegedly led to unlawful conduct by agents of Copper Mesa. Such a chain of events was not foreseeable or reasonably foreseeable. The TSX Defendants could not be expected to reasonably foresee that some agent apparently hired by Copper Mesa in remote Ecuador might assault the Plaintiffs.

[41] The motions judge's quoted comments commence with the words, "The TSX Defendants assert…", thus suggesting that the comments that follow reflect a summary of the TSX defendants' arguments regarding foreseeability, rather than foreseeability findings by the motions judge. However, later in his reasons, the motions judge concluded in relation to the plaintiffs' claims against the Directors, "For many of the

same reasons as set out above in respect of the TSX Defendants, I do not find that the Plaintiffs have made out the necessary connection for foreseeability and duty in respect of [the Directors]." I am satisfied that when the motions judge's reasons are read as a whole, the above-quoted passage does set out his foreseeability conclusions with respect to the TSX defendants.

[42] Justice Abella, writing for the Supreme Court, explained the rationale for the reasonable foreseeability requirement in *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, at para. 25:

> The basic proposition underlying "reasonable foreseeability" is that everyone "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (*Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), *per* Lord Atkin, at p. 580). *The question is whether the person harmed was "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected"*. [Emphasis added.]

[43] In my view, the facts pleaded against the TSX defendants fall far short of establishing that the plaintiffs were "so closely and directly affected" by the impugned conduct of the TSX defendants that those defendants "ought reasonably to have [had the plaintiffs] in contemplation as being so affected" at the time of the listing of Copper Mesa's shares on the TSE. I say this for several reasons.

[44] First, none of the plaintiffs is an investor or shareholder in Copper Mesa. Nor does any of them otherwise participate in the Canadian capital markets – the business

with which the TSX defendants are concerned. Further, and importantly, none of the plaintiffs had any dealings of any kind at any time with the TSX defendants.

[45] Second, the act said by the plaintiffs to render the harms alleged reasonably foreseeable to the TSX defendants is the act of listing Copper Mesa's shares for trading on the TSE with the knowledge of a "serious risk" that funds thereafter raised by Copper Mesa as a result of the listing would be used to harm the plaintiffs or persons similarly situated. The plaintiffs rely principally on two letters to fix the TSX defendants with this alleged knowledge. Both letters were authored by strangers to this litigation.

[46] The first letter, dated March 8, 2005, was forwarded to the Finance and Audit Committee of the TSE by Anki Tituana Males, the mayor of one of the villages in Ecuador that the plaintiffs claim is at risk of adverse impacts from the Junín Project (the "Males letter"). The second letter, dated October 12, 2005, was forwarded by Paul Muldoon, a Toronto environmental law lawyer, to Cliff Rich, a banking executive in Vancouver, and copied to the Listed Issuer Services Director of the TSE, together with third parties not involved in this litigation (the "Muldoon letter"). The plaintiffs plead that these letters informed the TSX defendants of "past allegations of violence" committed by or on behalf of Copper Mesa and forewarned them of the "serious risk of future violence if the listing [of Copper Mesa's shares on the TSE] was allowed" (para. 75, 2009 Claim).

[47] In my view, the plaintiffs overstate the contents of these letters. Fairly read, neither letter warns of the risk alleged.

[48] The Males letter mentions opposition to Copper Mesa's mining activities, local confrontations that "could even lead to the loss of human lives", and local conflicts, divisions and confrontations allegedly caused by Copper Mesa's presence in the Junín area. The letter also concludes with a request that Copper Mesa "not be permitted to trade its stocks" on the TSE. The Muldoon letter requests that various matters be investigated as part of the due diligence inquiries associated with Copper Mesa's listing application. None of these matters concerns alleged incidents of violence or other deliberate wrongdoings by Copper Mesa or its agents in Ecuador.

[49] Simply put, nowhere in the Males or Muldoon letters is it stated or implied that the listing of Copper Mesa's shares on the TSE would lead to the use of funds raised as a result of the listing to finance the deliberate commission of wrongful acts, including human rights violations, in Ecuador. In particular, neither document connects the potential listing of Copper Mesa's shares on the TSE with the "serious risk of future violence" directed at opponents of the Junín Project, as alleged by the plaintiffs.

[50] Third, the plaintiffs are not assisted by their reliance on the Prospectus and other information in the public domain to bolster their claim that the TSX defendants had prior knowledge of a risk of "serious harm" to opponents of the Junín Project if Copper Mesa's TSE listing were to proceed.

[51] The TSX and Copper Mesa defendants objected to the use of the Prospectus in the proceedings before the motions judge. It is undisputed that, as noted by the motions

judge in his reasons, this objection was resolved by agreement of the parties that the motions judge could take notice that, "[T]he Prospectus contained a quantity of references to the fact of confrontation between various individuals and groups and security forces associated with [the Copper Mesa subsidiary]" at the site of the Junín Project.

[52] This is not sufficient to establish a link between the listing of Copper Mesa's shares on the TSE and the future financing of deliberate torts in the Junín area of Ecuador. In any event, the Prospectus and the other publicly available documents cited by the plaintiffs do not support the claim that the plaintiffs or persons similarly situated to them stood to be closely and directly affected by the TSE listing.

[53] Finally, the plaintiffs submit, in effect, that the motions judge also erred in his foreseeability analysis by imposing an inappropriately high bar for the plaintiffs to meet, namely, a requirement that the plaintiffs show that the TSX defendants could foresee a specific outcome and a particular chain of events.

[54] This mischaracterizes the motions judge's reasons. The motions judge expressly adverted to the nature of the foreseeability requirement as described in *Syl Apps* at para. 25, quoted earlier in these reasons: "The question is whether the person harmed was 'so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected'." His foreseeability findings, which follow in his

reasons immediately after his reference to *Syl Apps*, are directly responsive to this foreseeability standard.

[55] I do not rule out the possibility that, in a proper case, the risk of future tortious wrongdoings against third parties by a company whose shares are proposed to be listed on the TSE might be found to be reasonably foreseeable to entities like the TSX defendants where it is alleged, on the basis of sufficient material facts, that such entities received specific advance notice of the risk of specific harm attendant on a public securities offering. But that is not this case.

[56] In this case, the plaintiffs' pleadings do not contain the necessary factual underpinning for the claim that the TSX defendants ought reasonably to have had the plaintiffs or their interests in mind when deciding whether to list Copper Mesa's shares on the TSE. In my view, assuming that they are capable of proof, the facts pleaded against the TSX defendants do not demonstrate that the harms alleged were the reasonably foreseeable consequence of the TSX defendants' acts or omissions. I therefore agree with the motions judge that the requisite showing of reasonable foreseeability under the *Cooper-Anns* test is not established by the plaintiffs' pleadings.

**(b) Proximity Requirement**

[57] The plaintiffs' failure to meet the *Cooper-Anns* reasonable foreseeability requirement is sufficient to dispose of their appeal regarding the TSX defendants. However, even if I am wrong in concluding that this requirement is not satisfied on the

plaintiffs' pleadings, the plaintiffs' claims against the TSX defendants nevertheless fail on the proximity requirement of the *Cooper-Anns* test.

[58] There is no dispute that foreseeability alone is insufficient to establish the existence of a duty of care. Under the *Cooper-Anns* test, proximity is also required: *Syl Apps*, at para. 26. The determination of whether a relationship is sufficiently proximate to ground a duty of care requires consideration of several factors. *Cooper* holds at paras. 34-35 that, while proximity is not defined by any "single unifying characteristic", the relevant factors are those that allow the evaluation of "the closeness of the relationship between the plaintiff and the defendant and [the determination of] whether it is just and fair having regard to that relationship to impose a duty of care". See also *Williams*, at paras. 14 and 15.

[59] The motions judge held that "[T]here is no connection" between the plaintiffs and the TSX defendants and that, "There is no relationship, let alone one of sufficient proximity to impose an obligation on the TSX Defendants to be mindful of the Plaintiffs' interests when conducting their affairs." In my view, these proximity findings are unassailable.

[60] Recall that the plaintiffs are not participants in the Canadian capital markets, nor are they investors or shareholders in Copper Mesa. Recall also that they had no direct dealings with the TSX defendants of any kind.

[61] The plaintiffs' factum can be read as suggesting that the requisite proximity between the parties arises by virtue of the TSX defendants' regulatory function in relation to members of the TSE. However, during oral argument, I understood the plaintiffs to clarify that they did not rely on the TSX defendants' regulatory role to anchor the duties of care asserted against them. The plaintiffs' counsel therefore expressly disavowed the proposition that the TSX defendants have a duty to monitor the activities of all companies whose shares are listed on the TSE. Rather, he argued that the asserted duties of care arise in this case on the facts relating to the specific decision to list Copper Mesa's shares.

[62] I agree with the TSX defendants' submission that even on this recast – and significantly narrowed – argument, the plaintiffs' claims against the TSX defendants cannot mount the hurdle of the *Cooper-Anns* test.

[63] TSX Inc., which owns and operates the TSE, has been recognized by the OSC as a Canadian stock exchange under s. 21(2) of the *Securities Act*. OSC recognition of a person or company proposing to carry on business as a stock exchange in Ontario occurs under s. 21(2) only where the OSC is satisfied that to do so would be in the public interest. Once recognized by the OSC under s. 21(2), a stock exchange is required under s. 21(4) of the *Securities Act* to regulate the operations and standards of practice and business conduct of its members and their representatives. The formal OSC recognition order concerning the TSX defendants links the activities of the TSE to the statutory

securities scheme embodied in the *Securities Act*. Section 1.1 of the *Securities Act* stipulates that the purposes of the statute are "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets".

[64] Thus, under both the regulatory scheme of the *Securities Act* and the OSC recognition order, the TSX defendants' operation of the TSE and the TSE's functions are focused on the public interest relating to the capital markets in Ontario.

[65] The courts have held repeatedly that where statutory duties are imposed on a regulator to superintend the conduct of its members, those duties are owed to the public as a whole, rather than to individual members of the public. See *Cooper*, at paras. 44, 49-50; *Edwards*, at para. 14.

[66] In *Morgis*, this court considered whether a private law duty of care should be imposed on a voluntary regulator of securities dealers, the Investment Dealers Association of Canada (the "IDA"), at the instance of members of the investing public who complained of the regulator's alleged failure to properly carry out its supervisory, investigatory, and disciplinary functions regarding its dealer members. As with the TSX defendants under s. 21(2), the IDA had been recognized by the OSC as a non-statutory self-regulatory organization under s. 21.1(1) of the *Securities Act*.

[67] In my opinion, *Morgis* is fatal to the claim that the TSX defendants owed private law duties of care to the plaintiffs arising from the fact of, and the circumstances

surrounding, the listing of Copper Mesa's shares on the TSE. *Morgis* holds, at para. 30, that the IDA as recognized by the OSC was organized for purposes directed to the investing public as a whole, namely, the regulation of standards of practice and business conduct of its member firms and their representatives in order to promote the public interest and the protection of investors. In that context, the court declined to impose the asserted private law duty of care on the IDA, stating at para. 38:

> [T]he appellants' proximity argument rests on mere contact between the appellants, as complainants, and the IDA. If such contact with a regulator was itself sufficient to establish the close and direct relationship necessary to satisfy a *prima facie* duty of care, the regulator would owe a duty of care to all investors who lodge complaints, without regard to the merits of the complaints, any subsequent action taken by the regulator, or the nature of the interaction between the regulator and the complainants.

[68] During oral argument, the plaintiffs acknowledged that the principles enunciated in *Morgis* apply to the TSX defendants. This was a proper concession. However, the plaintiffs argued that since the TSX defendants also carry on a commercial enterprise (the operation of the TSE for profit), a relationship capable of supporting a duty of care exists between the TSX defendants and members of the public whenever a member of the public is likely to be harmed by the actions or omissions of the TSX defendants. I do not accept this argument.

[69] As in *Morgis*, the obligations of the TSX defendants in respect of the TSE, as set out under the *Securities Act* and the applicable OSC recognition order, are directed at the

public as a whole, not at individual members of the public. There was no regulatory or even contractual relationship between the plaintiffs and the TSX defendants. Moreover, unlike the facts in *Morgis*, there was no contact whatsoever, minimal or otherwise, between the plaintiffs and the TSX defendants that could be said to give rise to a "relationship" between them.

[70] I therefore agree with the motions judge that there was simply no relationship at all between the plaintiffs and the TSX defendants, let alone one which might be characterized as "proximate". Since there was no relationship between the parties, it cannot be said that policy considerations related to such a relationship militate in favour of the recognition of the asserted duties of care.

[71] Accordingly, as the plaintiffs' claims against the TSX defendants fail to meet the requirements of the first stage of the *Cooper-Anns* test, it follows that the motions judge was correct to rule that those claims disclose no reasonable cause of action.

**(3) Claims Against the Copper Mesa Defendants**

[72] The plaintiffs argue that the motions judge erred in striking their claims against the Directors: (1) by holding that the wrongful conduct alleged against the Directors is not "the type of personal conduct by a director that could ground personal liability"; and (2) by concluding that they had failed to make out "the necessary connection for foreseeability and duty" in respect of the Directors. I would not accede to these arguments.

[73] The circumstances in which directors and officers of a corporation may be held personally liable in negligence for the acts of the company they serve are limited. As Carthy J.A. of this court explained in *Adga Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101, at p. 112, leave to appeal refused, [1999] S.C.C.A. No. 124, citing *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (C.A.), at pp. 720-21, leave to appeal refused, [1996] S.C.C.A. No. 40:

> Absent allegations which fit within the categories described above [for instance, cases where the use of a corporate structure was a sham from the outset or cases involving findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers], *officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.* [Emphasis added.]

See also *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.), at p. 102.

[74] In this case, there is no suggestion that the Directors had any direct personal involvement in the complained of acts in Ecuador. Nor is there any allegation that they acted contrary to the best interests of Copper Mesa or outside the scope of their authority as directors. Instead, the plaintiffs claim that the Directors owed private law duties of care to them because the Directors allegedly knew of the climate of unrest and violence surrounding the Junín Project and of the nature of the violence said to have been perpetrated against community opponents of the Junín Project. The plaintiffs say that by

virtue of this knowledge, the Directors' acts in relation to Copper Mesa's activities in Ecuador, by commission or omission, were themselves tortious and separate from the identity and interests of Copper Mesa so as to trigger personal liability.

[75] Since the plaintiffs' claims against the Directors rest solely on the assertion that the Directors' acts were themselves tortious, the plaintiffs' pleadings against the Directors must withstand a high degree of scrutiny. See for example, *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.T.C. 203 (S.C.), at para. 10. This accords with the responsibility of the courts to be "scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort": *Adga*, at p. 114. As this court has indicated, were it otherwise, there is a risk that corporate officers and directors could be "driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation": *Adga*, at pp. 104-105.

[76] In my opinion, the application of these principles in this case compels the conclusion that it is plain and obvious that the plaintiffs' claims against the Directors disclose no reasonable cause of action.

[77] I begin with the plaintiffs' selection of defendants in relation to Copper Mesa's alleged torts. While the choice of party defendants is a matter for a plaintiff's election, the plaintiffs' choice in this case strongly underscores the weakness of any connection between the harms alleged and the Directors.

[78] The plaintiffs plead that the alleged assaults and threats were carried out by security forces employed by Copper Mesa or other unspecified "employees, agents or affiliates" of Copper Mesa. Yet the plaintiffs have not sued any of the actual perpetrators of the alleged torts, nor the operating company involved with the proposed mine in Ecuador or its Barbadian parent company. Further, only an indirect claim based on vicarious liability is advanced against Copper Mesa itself.

[79] Nor have the plaintiffs sued any other directors of Copper Mesa or any members of Copper Mesa's management or executive teams (*e.g.* its chief executive officer). Instead, the plaintiffs have sued only the two Directors, neither of whom had any management role with Copper Mesa or any of its subsidiaries, which may have cloaked them with responsibility for Copper Mesa's operational activities. Furthermore, neither of the Directors is said to have controlled Copper Mesa's board of directors or to have been an officer or director of Copper Mesa's Barbadian subsidiary or of the subsidiary of that company that is involved with the Junín Project.

[80] Second, the torts alleged comprise: (1) threats and assaults committed by Copper Mesa's security forces (or its "employees, agents or affiliates") on December 2, 2006; (2) threats made by Copper Mesa's "employees, agents or affiliates" on June 23, 2007; and (3) a physical assault committed on July 31, 2007 by a "mob" led by Copper Mesa's "employees, agents or affiliates". The plaintiffs have failed to plead any particulars regarding the identity of the alleged perpetrators of these wrongs or any material facts

supportive of an association between them and the Directors. None of the implicated "security forces" or the "employees, agents or affiliates" of Copper Mesa is alleged to have had any contact or communication of any kind with either of the Directors, at any time.

[81] More importantly, although there are several facets to the plaintiffs' claims against the Directors, the plaintiffs' pleadings contain virtually no particulars of any personal wrongdoing said to have been committed by the Directors. I would mention three particular pleadings deficiencies by way of illustration:

> (1) the plaintiffs allege that the Directors operated Copper Mesa "in a manner that created a high risk of violence" against the opponents of the Junín Project. No facts to support the claim that the Directors "operated" Copper Mesa are pleaded. Nor are any particulars of the manner in which the Defendants allegedly operated Copper Mesa pleaded;
>
> (2) the plaintiffs assert that the Directors approved "corporate policies and practices intended to eliminate widespread opposition" to the Junín Project. No particulars of the nature of these policies and practices, the manner of their implementation, or the way in which they contributed to the torts claimed are pleaded; and
>
> (3) the plaintiffs claim that the Directors failed "to adequately supervise the executive of [Copper Mesa]". No particulars of this alleged supervisory deficit or of any specific improper supervisory act by the Directors are pleaded.

[82] Tellingly, the plaintiffs also fail to allege that the torts at issue were carried out at the direction or on the instructions of, or with the approval or actual knowledge of the Directors. Aside from the alleged failure to join corporate social responsibility governance frameworks (a voluntary undertaking) and a general failure to investigate, the plaintiffs do not claim any connection between the harms alleged and the Directors' conduct.

[83] Instead, the plaintiffs plead merely that:

> [T]he [Directors'] continued failure to use their powers and influence as directors [to avoid their alleged wrongful acts] constitutes a tacit approval of past actions taken by [Copper Mesa's] employees, agents or affiliates in previous violent incidents. The [Directors'] approval through silence is tantamount to an authorization of future acts of violence

(paras. 97 and 114, 2009 Claim).

[84] Thus, the plaintiffs essentially contend that the Directors breached their asserted duties of care because they failed to use their positions as directors to avoid the harm alleged. In other words, the plaintiffs seek to hold the Directors personally liable for the torts alleged simply because they were directors of Copper Mesa.

[85] The plaintiffs have been unable to point to any authority for the proposition that personal liability attaches to an officer or director on this basis. This would be an unprecedented and, in my view, unworkable development in the law. A corporate director has no established duty in law to be mindful of the interests of strangers to the

corporation when discharging his or her duties as a director. The plaintiffs' pleadings fail to articulate a basis on which it could be concluded that the plaintiffs were so closely and directly affected by the Directors' acts that the Directors ought reasonably "to have [had] them in contemplation as being so affected" when carrying out their duties as directors: *Syl Apps*, at para. 25.

[86] The plaintiffs point to the April Meeting and to the contents of the Prospectus and other publicly available documents regarding the alleged activities of junior mining companies to support their claim that the Directors knew or should have known of the risk of the specific acts of wrongdoing alleged.

[87] There are several difficulties with this argument. First, on the facts pleaded by the plaintiffs, the Directors were informed at the April Meeting of alleged violent activities by "security forces" employed by Copper Mesa. The only alleged incidents that the plaintiffs claim involved Copper Mesa's security forces took place in December 2006. Thus, by the time of the 2007 April Meeting, these incidents had already occurred. No further incident involving the security forces is alleged.

[88] In addition, as pleaded by the plaintiffs, Copper Mesa's security forces were hired in 2005, before either of the Directors assumed office. Further, Gammon did not become a director of Copper Mesa until approximately three months after the alleged December 2006 torts. And in Vaughan's case, there is no allegation that he directed, encouraged or

authorized the use of violence by Copper Mesa's security forces, or indeed, that he even knew that they were armed.

[89] There is a similar lack of direct connection or involvement by the Directors with the June and July 2007 torts. As pleaded, these torts involved random acts of violence in confrontations with the community opponents of the Junín Project. There is no claim that either of the Directors directed, encouraged, or authorized these activities. Although the plaintiffs do plead that Vaughan "permit[ted] and condon[ed]" the December 2006 activities of Copper Mesa's security forces, this assertion is bald and conclusory. No facts are alleged to support this claim.

[90] Finally, as I have already mentioned, Copper Mesa's Prospectus contains general descriptions of community conflicts regarding the Junín Project. Although it was issued in 2005, before any of the torts alleged, neither of the Directors were then on Copper Mesa's board. Neither of the Directors had any involvement with the preparation or approval of the Prospectus or with the conditions of community unrest and tension described in it. In my view, neither the Prospectus nor the other publicly available mining company-related documents relied on by the plaintiffs establish the type of direct connection between the Directors and the plaintiffs, or between the Directors' acts and the torts alleged, sufficient to satisfy the foreseeability and proximity requirements of the *Cooper-Anns* test.

[91] Moreover, the cases relied on by the plaintiffs in this regard do not support a finding of personal liability against the Directors. In each of the authorities cited by the plaintiffs, the relevant corporate representative had direct knowledge of or immediate involvement in the wrongful acts alleged. Thus, no real issue regarding foreseeability or proximity arose in those cases. See *Nielsen Estate v. Epton* (2006), 392 A.R. 81 (A.B.Q.B.), aff'd (2006), 277 D.L.R. (4th) 267 (Alta C.A.); *Anger v. Berkshire Investment Group Inc.* (2001), 141 O.A.C. 301 (C.A.); *United Canada Malt Ltd. v. Outboard Marine Corp. of Canada* (2000), 48 O.R. (3d) 352 (S.C.); *Berger v. Willowdale A.M.C.* (1983), 41 O.R. (2d) 89 (C.A.), leave to appeal refused, [1983] S.C.C.A. No. 353. That is not this case. Here, foreseeability and proximity are squarely in issue.

[92] In the end, in my opinion, the plaintiffs seek to impose personal liability on the Directors without pleading the material facts necessary to anchor the imposition of private law duties of care or to establish the breach of those duties by the Directors. It follows that the motions judge did not err in striking the plaintiffs' claims against the Directors. Neither the foreseeability nor the proximity requirements of the *Cooper-Anns* test is satisfied with respect to these claims. It is therefore plain and obvious that the plaintiffs' claims against the Directors, as pleaded, do not disclose a reasonable cause of action.

**(4) Denial of Leave to Amend**

[93] The motions judge declined to grant leave to the plaintiffs to further amend their pleadings because, in his view, nothing would have been achieved by granting such relief. I see no basis on which to interfere with this discretionary ruling. Indeed, I agree with it.

[94] This court has held that leave to amend a statement of claim should be denied only in the clearest of cases: *Adelaide Capital Corp. v. Toronto Dominion Bank*, 2007 ONCA 456; *Taylor v. Tamboril Cigar Co.*, 2005 CarswellOnt 4775 (Ont. C.A.); *Heydary Hamilton Professional Corp. v. Hanuka*, 2010 ONCA 881. I am satisfied that this is one of those clear cases where leave to amend was properly denied.

[95] It appears that between November 2007 and the date of the motions to strike, the plaintiffs filed six separate pleadings against one or both groups of respondents. These pleadings contain comprehensive descriptions of the plaintiffs' allegations. Moreover, the plaintiffs have already availed themselves of several opportunities to amend their pleadings.

[96] Despite their length, the plaintiffs' pleadings contain radical defects, described above, that I regard as incapable of being cured by amendment. Although the plaintiffs now argue that further material facts could be pleaded to support their claims, the suggested additional facts would not affect the key question of whether duties of care of the type asserted should be recognized against the TSX and Copper Mesa defendants.

Thus, this is not a case where the addition of other facts as proposed by the plaintiffs would remedy the deficiencies in their pleadings.

[97] I note that the plaintiffs did not seek to adjourn the proceedings before the motions judge for the purpose of further amending their pleadings. Indeed, we were advised that no further pleadings amendment was proposed before the motions judge. Finally, no draft amended pleading was filed with the motions judge or provided to this court.

[98] In all these circumstances, I agree with the motions judge that no purpose would be served in granting leave to amend.

## V. Disposition

[99] The threats and assaults alleged by the plaintiffs are serious wrongs. Nothing in these reasons should be taken as undermining the plaintiffs' rights to seek appropriate redress for those wrongs, assuming that they are proven. But that redress must be sought against proper parties, based on properly pleaded and sustainable causes of action. The claims at issue in these proceedings do not fall in that category.

[100] For the reasons given, I would dismiss the appeals. The respondents are entitled to their costs of the appeals, if sought. I would fix those costs for the TSX defendants in the amount of $10,000 and in a like amount for the Copper Mesa defendants, both amounts inclusive of disbursements and applicable taxes.

RELEASED:

"MR"

"MAR 11 2011"

"E.A. Cronk J.A."

"I agree M. Rosenberg J.A."

"I agree Janet Simmons J.A."