Court File No. C52251

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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)

APPELLANTS' FACTUM
(Appeal of Order Striking Out Claims Against Copper Mesa Defendants)

July 13, 2010

KLIPPENSTEINS
Barristers and Solicitors
160 John Street, Suite 300
Toronto, Ontario M5V 2E5

Murray Klippenstein, LSUC No. 26950G
W. Cory Wanless, LSUC No. 57288M
Tel.: (416) 598-0288
Fax: (416) 598-9520

Solicitors for the Plaintiffs, Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero

TO: **GOODMANS LLP**
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

John A. Keefe, LSUC No. 16002T
Peter Kolla, LSUC No. 54608K
Tel: (416) 979-2211
Fax: (416) 979-1234

Solicitors for the Defendants
Copper Mesa Mining Corporation,
Williams Stearns Vaughan and John Gammon

AND TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
Barristers
130 Adelaide Street West, Suite 2600
Toronto, Ontario M5H 3P5

Peter H. Griffin, LSUC No. 19527Q
Andrew Parley, LSUC No. 55635P
Tel: (416) 865-9500
Fax: (416) 865-9010

Solicitors for the Defendants TSX Inc. and TSX Group Inc.

TABLE OF CONTENTS

PART I: THE APPELLANTS, THE COURT APPEALED FROM, AND THE RESULT IN THAT COURT

1. The Appellants, Marcia Luzmila Ramírez Piedra ("Marcia Ramírez"), Jaime Polivio Pérez Lucero ("Polivio Pérez"), and Israel Pérez Lucero ("Israel Pérez"), appeal the decision of the Honourable Mr. Justice Colin Campbell of the Superior Court of Justice (Commercial List) released May 7, 2010.

2. In that decision, the Court granted the motions of the defendants William Stearns Vaughan, John Gammon and Copper Mesa Mining Corporation (together the "Copper Mesa Defendants") to strike three related statements of claim as disclosing no reasonable cause of action under rule 21.01(1)(b) of the *Rules of Civil Procedure*. The Court further granted the motions without giving leave to amend the statements of claim. The Appellants respectfully submit that the court erred in granting this motion and by refusing leave to amend the claim.

3. The Appellants have a right of appeal to this Honourable Court from these motions as the Order striking the claim, denying leave to amend and dismissing the actions is a final order of a judge of the Superior Court of Justice and no appeal lies to the Divisional Court from this Order.

PART II: OVERVIEW DESCRIBING NATURE OF CASE AND ISSUES

4. In December 2006, and as a result of their opposition to a proposed Canadian mining project near their homes in a remote area of Ecuador, Marcia Ramírez was physically assaulted, Israel Pérez was shot in the leg, and Polivio Pérez was threatened with death. In June and July 2007, Polivio Pérez was assaulted and threatened with death.

5. The statement of claim alleges that actions and omissions of John Gammon and William Stearns Vaughan, two directors of Copper Mesa Mining Corporation caused or materially contributed to these assaults and threats. Vaughan and Gammon are sued personally.

6. Copper Mesa Mining Corporation is sued vicariously for the torts committed by John Gammon and William Stearns Vaughan during the course of their duties as directors and agents of Copper Mesa Mining Corporation. No claim is made directly against Copper Mesa Mining Corporation, aside from vicarious liability.

7. The Honourable Justice Campbell struck the statements of claim without leave to amend, finding that the conduct alleged is not of the type of personal conduct by a director that could ground personal liability, and further that the Plaintiffs have not "made out the necessary connection for foreseeability and duty" in respect of Vaughan and Gammon.

> **Reasons for Decision of the Honourable Mr. Justice Colin Campbell dated May 7, 2010 at paras. 48-49 [Reasons]; Appeal Book and Compendium, Tab 5 at 30.**

8. With respect these constitute errors in law.

9. The appeal should be granted on the following grounds:

   (a) Numerous courts have held that directors of corporations are liable for their tortious conduct even when acting in the course of their duties as directors. This principle extends to both negligent acts and negligent omissions.

   (b) Vaughan and Gammon committed various intentional acts and omissions as directors of Copper Mesa that resulted in the Plaintiffs being assaulted and threatened.

(c) The Pleadings establish that Vaughan and Gammon owe a personal duty of care to the Plaintiffs.

(d) In any event, the test to strike out a claim at the pleadings stage is stringent. A claim will only be struck when it is plain, obvious and beyond doubt that the claim cannot succeed at trial.

PART III: SUMMARY OF FACTS RELEVANT TO ISSUES ON APPEAL

10. The material facts, as set out in the statement of claim,[1] are as follows.

11. At all relevant times, William Stearns Vaughan and John Gammon were directors of a corporation that is now named Copper Mesa Mining Corporation ("Copper Mesa").[2] Vaughan became a director of Copper Mesa on June 6, 2006 while Gammon joined the board of directors on February 27, 2007.

Statement of Claim dated March 3, 2009 (CV-09-373561) at paras. 19-20 [Statement of Claim 2009]; Appeal Book and Compendium, Tab 7 at 43.

Copper Mesa's business

12. Copper Mesa was a small corporation that had only four direct employees.

Statement of Claim 2009 at para. 112(e); Appeal Book and Compendium, Tab 7 at 71-72.

[1] For reasons related to the addition of parties, there are three closely related statements of claim in three related actions. The 2009 Statement of Claim was brought for the sake of convenience as a proposed consolidation of claims previously brought in the other two actions. The 2009 Statement of Claim includes all claims made in the 2007 and 2008 Actions and was intended to be used by all parties and the courts as a unified and consolidated document. Justice Campbell recognized the prudence of such an approach, and made reference only to the 2009 Statement of Claim in his judgment of first instance. For the purposes of this factum, reference will only be made to the 2009 Statement of Claim.

[2] Copper Mesa was previously known as Ascendant Copper Corporation.

13. During Vaughan and Gammon's tenure as directors, Copper Mesa's business was almost exclusively limited to and focused on the exploration of one mining property known as the "Junín Property" or the "Junín Project". Exploration was the first step towards the eventual construction of a large-scale open-pit copper mine. The Junín Project is located in a defined geographical region of the Republic of Ecuador, and includes or is immediately adjacent to several small villages that would be impacted by mining operations. Marcia Ramírez, Polivio Pérez and Israel Pérez reside in two of these affected villages.

Statement of Claim 2009 at paras. 13-15, 25; Appeal Book and Compendium, Tab 7 at 41-42, 44.
Ascendant Copper Corporation, Prospectus: Initial Public Offering, dated October 14, 2005, at 7, 60 [Prospectus]; Appeal Book and Compendium, Tab 10 at 200, 253.[3]

14. Because only an Ecuadorian-based foreign entity can be in possession of Ecuadorian mining concessions, Copper Mesa conducts its business through Ecuadorian subsidiaries. These Ecuadorian subsidiaries, however, are intimately connected to their parent corporation. During Vaughan and Gammon's tenure, Copper Mesa's board of directors maintained *de facto* control over the technical, operational, managerial and financial activities of all relevant subsidiaries at all times. Gerald Davis, who was appointed as the Chief Executive Officer of Copper Mesa by the board of directors and was also named as the CEO of all relevant subsidiaries.

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[3] The overwhelming preponderance of Ontario authorities hold that documents referred to and relied on in a Statement of Claim are, in effect, incorporated into the pleadings and are not evidence that would be precluded by Rule 21.01(1)(b). Copper Mesa's prospectus is specifically referred to and relied upon by the Plaintiffs in paragraphs 35, 36, 95, 112 of the Statement of Claim 2009, and its contents may therefore be considered by this court.

Web Offset Publications Ltd. v. Vickery **(1999), 43 O.R. (3d) 802 at para. 3 (C.A)**; **Appellants' Book of Authorities at Tab 21.**
Wakeford v. Canada (Attorney General) **(2001), 81 C.R.R. (2d) 342 at para. 7 (Ont. S.C.J); Appellants' Book of Authorities at Tab 20**

Statement of Claim 2009 at para. 26; Appeal Book and Compendium, Tab 7 at 44.
Prospectus at 6; Appeal Book and Compendium, Tab 10 at 199.

Violence committed by Copper Mesa's agents

15. Both prior to and after Vaughan and Gammon's tenure as directors, widespread and sustained local opposition to the Junín mining project was the major barrier to Copper Mesa's primary business objectives. Vaughan and Gammon participated in discussions at board meetings regarding how to deal with this opposition.

Statement of Claim 2009 at paras. 29, 112(c); Appeal Book and Compendium, Tab 7 at 45, 71.

16. In order to silence and suppress this widespread and sustained opposition, Copper Mesa, through its agents, engaged in a campaign of intimidation, harassment, threats and violence. Copper Mesa's agents physically assaulted individuals who attended public anti-mining meetings, issued death threats against leaders of the community opposition to the Junín project and brought fraudulent criminal charges against prominent mining critics.

Statement of Claim 2009 at paras. 29-31; Appeal Book and Compendium, Tab 7 at 45-46.

17. In 2006, security forces under Copper Mesa's control increased their presence and activity in Junín, and increasingly employed tactics of intimidation that included uttering threats of physical violence. On November 1, 2006, armed members of Copper Mesa's security forces used tear gas, guard dogs and machetes to attack a peaceful anti-mine protest.

Statement of Claim 2009 at paras. 44-45; Appeal Book and Compendium, Tab 7 at 50.

Vaughan and Gammon's knowledge of violence committed by Copper Mesa's agents

18. In their role as directors, Vaughan and Gammon knew of the past and ongoing violent confrontations that were perpetrated by individuals under the control of Copper Mesa. Further, they had this knowledge prior to the assaults and threats at issue.

> **Statement of Claim 2009 at para. 112 (b); Appeal Book and Compendium, Tab 7 at 71.**

19. Particulars of Vaughan and Gammon's knowledge are specifically pleaded.

20. The pleadings state that prior to the assault of Polivio Pérez, Vaughan and Gammon met with Carlos Zorrilla, a community representative from the Junín area, who specifically informed them of the violent tactics employed by Copper Mesa security forces and showed them photographs of these security forces attacking community members with pepper-spray and guns. Zorrilla also specifically warned them about the high risk of future threats and physical assaults being committed by individuals under Copper Mesa's control. Examples of the photographs showed to Vaughan and Gammon by Zorrilla are attached to the statement of claim at schedule A.

> **Statement of Claim 2009 at paras. 55-57, 112 (a); Appeal Book and Compendium, Tab 7 at 52, 71.**

21. At these meetings, Vaughan and Gammon promised they would investigate the violence, and that they would not be a part of such violence in the future.

> **Statement of Claim 2009 at paras. 58, 111; Appeal Book and Compendium, Tab 7 at 52, 70.**

22. Vaughan and Gammon discussed and considered the ongoing conflict in Junín and the allegations of human rights abuse at board meetings.

> **Statement of Claim 2009 at para. 112 (c); Appeal Book and Compendium, Tab 7 at 71.**

23. Vaughan and Gammon had actual knowledge of corporate policy and practice regarding security forces and local community relations.

Statement of Claim 2009 at para. 112 (d); Appeal Book and Compendium, Tab 7 at 71.

Vaughan and Gammon's tortious conduct

24. Despite Vaughan and Gammon's knowledge of the specific danger posed by Copper Mesa to members of the Junín community and their power, authority and influence to take steps to reduce that danger, Vaughan and Gammon continued to operate the company, as part of the Board, in a manner that created a high risk of violence against community members.

Statement of Claim 2009 at para. 113; Appeal Book and Compendium, Tab 7 at 72-73.

25. The pleadings allege that Vaughan and Gammon approved corporate policies and practices intended to eliminate widespread opposition to the proposed Junín Project, including policies and practices relating to Copper Mesa's security forces, and approved funding for security forces and others under the control of Copper Mesa who had in the past and were likely in the future to assault and threaten members of the community.

Statement of Claim 2009 at para. 113 (b)-(c); Appeal Book and Compendium, Tab 7 at 72.

26. The pleadings further allege that Vaughan and Gammon failed to adequately supervise the executive of Copper Mesa, failed to institute proper corporate policies and practices so as to prevent threats and assaults from being committed by individuals under Copper Mesa's control, and failed to raise concerns about and investigate reported past incidents of violence.

Statement of Claim 2009 at para. 113 (d)-(e), (g); Appeal Book and Compendium, Tab 7 at 72-73.

27. Further, Vaughan and Gammon knew about the violence caused by their corporation, and had the power and influence to stop it, and yet intentionally failed to do so. In the circumstances, this tacit approval of past violence is tantamount to an authorization of future acts of violence.

Statement of Claim 2009 at paras. 114, 136, 144; Appeal Book and Compendium, Tab 7 at 73, 80, 82.

Harm suffered by the Plaintiffs

28. On December 2, 2006, as a result of Vaughan's approval of funding for security forces, approval of corporate practices and policies related to security, and failure to investigate past incidents of violence, security forces under the control of Copper Mesa who were armed with restricted weapons including shotguns, handguns and pepper-spray, attacked and shot at a small group of unarmed men and women near Junín who were protesting against Copper Mesa's mining plans. In this attack, the security forces shot Israel Perez in the leg, and pepper-sprayed Marcia Ramírez point-blank in the face. Around this date, and also as a result of Vaughan's actions and omissions, Polivio Peréz received various death threats issued by individuals under the control of Copper Mesa.

Statement of Claim 2009 at paras. 49-51, 54; Appeal Book and Compendium at 51-52.

29. The threats and violence continued despite the fact that Vaughan and Gammon were shown photographs of the above attack. As a result of Vaughan and Gammon's continuing approval of corporate practices and policies, and specifically their failure to investigate the December 2, 2006 attack, Polivio Peréz was threatened with death in June

2007, and subsequently assaulted by a group of individuals under the control of Copper Mesa in July 2007. As a result of these threats and assaults, Polivio Pérez was placed under police protection.

Statement of Claim 2009 at paras. 59-61; Appeal Book and Compendium, Tab 7 at 53.

PART IV: ISSUES AND THE LAW

30. The major issue raised by this appeal is whether the motions judge erred in finding that it was plain and obvious that the pleadings do not disclose a reasonable cause of action against Vaughan and Gammon.

31. This is a question of law; the appropriate standard of review is correctness.

32. In reaching his conclusion, the motions judge made two salient findings.

33. First, the motions judge found that "[t]here is nothing in the allegations in the Statement of Claim that satisfies me that the alleged conduct is of the type of personal conduct that could ground personal liability."

Reasons at para. 48; Appeal Book and Compendium, Tab 5 at 30.

34. Second, the motions judge also found that the Plaintiffs had not "made out the necessary connection for foreseeability and duty" in respect of Vaughan and Gammon. In other words, he held that Vaughan and Gammon do not owe the Plaintiffs a duty of care.

Reasons at para. 49; Appeal Book and Compendium, Tab 5 at 30.

35. With respect, both findings constitute errors in law.

It is not plain and obvious that the claims should be struck

36. The test for striking out a Statement of Claim is a "stringent one with a difficult burden for the defendants to meet". Pursuant to rule 21.01(1)(b), a court should only strike a pleading if it is "plain and obvious, and beyond doubt" that the facts, taken as proved, do not disclose a reasonable cause of action. "If there is a *chance* that the plaintiff *might* succeed", the plaintiff's claim should not be struck out (emphasis added). Neither the novelty of the cause of action nor the potential for the defendant to mount a strong defence should prevent the claim from proceeding. "Only if the action is certain to fail because it contains a radical defect" should the claim be struck out.

> ***Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at paras. 32-33 (cited to QL); Appellants' Book of Authorities at Tab 11 [Appellants' BOA].**
> ***Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* 82 O.R. (3d) 321 at para. 8 (C.A.); Appellants' BOA at Tab 7.**

37. The claims against Vaughan and Gammon sound in the tort of negligence. The elements of the tort of negligence, and in particular the factors giving rise to a potential duty of care, are properly pleaded in this case.

Directors are liable in law for their own negligent acts and omissions

38. The Ontario Court of Appeal has considered the question of the personal liability of directors of corporations and has repeatedly confirmed that directors are responsible for their tortious conduct, even when they are acting in the course of their duties and even when their conduct is directed in a *bona fide* manner to the best interests of the corporation.

> ***ADGA Systems International v. Valcom* (1999), 43 O.R. (3d) 101, [1999] O.J. No. 27 at paras. 18, 39 (C.A.) (cited to QL); Appellants' BOA at Tab 1.**

***Anger v. Berkshire Investment Group Inc.* (2001), 141 O.A.C. 301, [2001] O.J. No. 379 at para. 11 (C.A.) (cited to QL) [*Anger*]; Appellants' BOA at Tab 2.**
***Unisys Canada Inc. v. York Three Associates Inc.* (2001), 150 O.A.C. 49 at para. 11; Appellants' BOA at Tab 18.**

39. Both the Ontario Court of Appeal and other Canadian courts of appeal have confirmed that the "tortious conduct" for which directors can be held personally liable includes negligence, and specifically includes both negligent acts and negligent omissions.

40. In the case of *Anger v. Berkshire*, the Court of Appeal allowed a claim against directors for "negligent supervision" to proceed to trial. The allegations were that the directors had been negligent in their supervision of their sales force, such that the sales force breached securities law and caused harm to third party customers.

***Anger, supra* at para. 9; Appellants' BOA at Tab 2.**

41. In *Berger v. Willowdale*, Cory J. (as he was then) found the director of a company personally liable for his "negligent omission to rectify a dangerous situation", specifically by failing to direct his staff to clear a snow-covered sidewalk. In so finding, Justice Cory noted that "[i]t is apparent that for more than 125 years, acts of omission have fallen within the definition of 'negligence' as readily as acts of commission", and further that "[a]cts of omission can be every bit as dangerous as acts of commission."

***Berger v. Willowdale A.M.C.*, (1983) 41 O.R. (2d) 89, [1983] O.J. No. 2959 at paras. 24, 27, 34, 37 (C.A), leave to appeal to S.C.C. refused, [1983] S.C.C.A. No. 353 (cited to QL) [*Berger*]; Appellants' BOA at Tab 4.**

42. Similarly, a recent judgment by the Alberta Court of Queens Bench, affirmed by the Alberta Court of Appeal, relied heavily on Ontario cases to hold a director personally liable for "creat[ing] and maintain[ing] corporate policy which predictably sustained a seriously dangerous working environment". The court further held:

> Serious dangers were reasonably foreseeable, were reducible and avoidable by Epton taking reasonable steps within his capacity and authority as director. It lay easily within his power to reduce or avoid those dangers. Epton's approach addressed virtually none of such dangers but allowed them to continue and even grow.

Nielsen Estate v. Epton (2006), 13 B.L.R. (4th) 209, [2006] A.J. No. 10 (A.B.Q.B) at para. 611 (cited to QL); aff'd 277 D.L.R. (4th) 267 (C.A.) [_Nielsen_]; Appellants' BOA at Tab 15.

43. The negligent conduct of directors described in the above cases, which included including negligent supervision, failure to rectify a known dangerous situation and creating and maintaining corporate policy which predictably allowed a dangerous situation, is very similar to the allegations made against the directors in the present case. For example, Vaughan and Gammon are alleged to have operated their company in a manner that created a high risk of violence, to have approved corporate policies and practices intended to eliminate opposition to mining, to have failed to adequately supervise the executive, to have failed to institute proper policies and practices to prevent violence and to have failed to raise concerns about and investigate past incidents of violence that were known to them.

Statement of Claim 2009 at paras. 95, 113; Appeal Book and Compendium, Tab 7 at 65, 72-73.

Vaughan and Gammon owe the Plaintiffs a prima facie duty of care

44. This Court has confirmed that in order to determine whether a director owes a personal duty of care to another individual, as in this case, the court must apply the regular two part *Cooper/Anns* Test that is used to determine whether any one person owes a legal duty of care to anyone else.

***Anger, supra* at para. 12; Appellants' BOA at Tab 2.**

45. Under the *Cooper/Anns* test, the court asks: (1) whether Vaughan and Gammon are in a relationship of sufficient proximity and foreseeability with the plaintiffs such that a *prima facie* duty of care is owed; (2) if so whether there are any policy considerations that should negate or limit the duty of care.

> ***Hill v. Hamilton-Wentworth Regional Police Services Board,*** **[2007] 3 S.C.R. 129 at para. 20 [*Hill*]; Appellants' BOA at Tab 10.**

46. On a rule 21 motion, the question is whether it is "plain, obvious, and beyond doubt" that a legally proximate and foreseeable relationship could *not* be found.

> ***Cooper v. Hobart,*** **[2001] 3 S.C.R. 537 at para. 30 [*Cooper*]; Appellants' BOA at Tab 6.**

Foreseeability is sufficiently pleaded

47. The harm suffered by the Plaintiffs was foreseeable on the facts as pleaded.

48. In his judgment, the motions judge appears to hold that it is plain and obvious that the "chain of events" which included "political and business events in Ecuador which allegedly led to unlawful conduct by agents of Copper Mesa" was not foreseeable or reasonably foreseeable. This finding is an error in law because it applies the wrong test.

> **Reasons at paras. 35, 49; Appeal Book and Compendium, Tab 5 at 28, 30.**

49. Reasonable foreseeability does not require the defendant to be able to foresee a particular chain of events. This Court has held that one need not envisage the precise concatenation of circumstances which led to the harm, provided that the general harm is reasonably foreseeable.

> ***Bingley v. Morrison Fuels*** **(2009), 95 O.R. (3d) 191 at paras. 20-22 (C.A.); Appellants' BOA at Tab 3.**

50. Vaughan and Gammon were intimately aware of the risk facing individuals in the Junín area who opposed the actions of their company. The pleadings allege that Vaughan and Gammon met with a community representative who showed them actual photographs of past incidents of being perpetrated by security forces under the control of their company, and warned them about the high risk that similar future violence would be committed by their company. Vaughan and Gammon had access to and should have read corporate documents that warned of "the potential for further escalating violence" and that noted that various respected sources had accused the company of engaging in "threats and abuses of individuals in the community". Further, at board meetings, Vaughan and Gammon discussed human rights abuse allegedly committed by Copper Mesa's agents. Not only was the risk reasonably foreseeable, it was actually foreseen.

Statement of Claim 2009 at paras. 36, 112; Appeal Book and Compendium, Tab 7 at 47-48, 70-72.
Prospectus at 9-13; Appeal Book and Compendium, Tab 10 at 202-206.

Proximity is sufficiently pleaded

51. The factors which satisfy the requirement of proximity are diverse and depend on the circumstances of the case. There is no single rule or factor or definitive list that can be applied in every case.

***Hill, supra* at para. 24; Appellants' BOA at Tab 10.**

52. The proximity analysis is not concerned with how intimate the plaintiff and defendant were, or their physical proximity, but rather is concerned with whether the actions and omissions of the alleged wrongdoer have an effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.

***Hill, supra* at para. 29; Appellants' BOA at Tab 10.**

53. The pleadings disclose several important factors that indicate proximity. These factors include the power and control Vaughan and Gammon exercised over a small corporation; their knowledge of the specific danger caused by their corporation; direct contact between Vaughan and Gammon and a community representative; and the specific acts and omissions that were committed by Vaughan and Gammon. Taken together, these factors strongly indicate that Vaughan and Gammon are in a legally proximate relationship with the Plaintiffs.

Power and control of the directors over a small corporation

54. In director liability cases, factors of power and control are often important considerations in determining whether there is sufficient proximity. As was the case in both *Berger* and *Nielsen*, Vaughan and Gammon had the power, authority and influence to take steps to prevent the risks to the Plaintiffs from materializing and to remedy the dangerous situation once the risk was apparent.

***Berger, supra* at para. 27; Appellants' BOA at Tab 4.**
***Nielson, supra* at para. 611; Appellants' BOA at Tab 15.**

55. Vaughan and Gammon were the directors of a very small corporation that had only four employees and operations that were limited to one exploration mining project in one specific geographic area, that would impact identifiable communities and villages.

Statement of Claim 2009 at para. 112(e); Appeal Book and Compendium, Tab 7 at 71-72.
Prospectus at 7, 15, 60; Appeal Book and Compendium, Tab 10 at 200, 208, 253.

56. As the directors of a small corporation, Vaughan and Gammon had considerable influence over Copper Mesa and those under Copper Mesa's control. They had wide

powers, authority and responsibility as members of the board of directors to establish and enforce corporate policies, appoint and supervise executive officers, and investigate acts committed by individuals under the control of the board of directors.

> **Statement of Claim 2009 at para. 107; Appeal Book and Compendium, Tab 7 at 69.**

57. Vaughan and Gammon and other members of the board maintained *de facto* control over the technical, operational, managerial and financial activities of all relevant corporate actors at all relevant times.

> **Statement of Claim 2009 at para. 106; Appeal Book and Compendium, Tab 7 at 69.**

Vaughan and Gammon's knowledge of a specific danger caused by their corporation

58. Knowledge of the specific risk or dangerous situation is an important factor in establishing whether a director will owe a personal duty of care.

> ***Berger, supra*. at para. 39; Appellants' BOA at Tab 4.**
> ***Nielson, supra.* at para. 573; Appellants' BOA at Tab 15.**
> ***United Canada Malt Ltd. v. Outboard Marine Corp. of Canada* (2000), 48 O.R. (3d) 352, [2000] O.J. No. 1554 at paras. 12, 14 (Sup. Ct.) (cited to QL) [*United Canada Malt*]; Appellants' BOA at Tab 19.**

59. For example, in *United Canada Malt Ltd.*, the court held:

> [T]he allegation that individual directors knew of the existence of an environmental problem such as it is alleged to have existed here and did nothing to alert the plaintiff of the risk posed to the plaintiff's operation, such that the plaintiff was subsequently harmed, is sufficient on the surface to found a reasonable cause of action against those individual directors.
>
> ***United Canada Malt, ibid*. at para. 14; Appellants' BOA at Tab 19.**

60. As explained above, Vaughan and Gammon were intimately aware of the risk facing individuals in the Junín area who opposed the actions of their company. Vaughan and Gammon knew that local opposition to mining from the villages near the proposed

mining area was the largest barrier facing Copper Mesa, that in the past, Copper Mesa been accused of assaulting and threatening community groups and individuals from those particular villages in an attempt to eliminate such opposition, and further, that future attacks against a defined class of community leaders were likely.

Statement of Claim 2009 at para. 112; Appeal Book and Compendium, Tab 7 at 70-72.

61. Vaughan and Gammon knew that members of the local Junín community were vulnerable to violence instigated by individuals under Copper Mesa's control, and despite this knowledge, they continued to make decisions that led to the violent assaults and death threats suffered by the Plaintiffs. In other words, they were aware of an ongoing danger caused by their corporation to specific individuals, and yet acted in a way that both continued and extended this risk.

Statement of Claim 2009 at paras. 137 (c), 145 (c); **Appeal Book and Compendium, Tab 7 at 81, 83.**

Direct contact and representations made by Vaughan and Gammon

62. Vaughan and Gammon met with Zorrilla, a community representative, on April 27, 2007. After being told of the violent tactics employed by individuals under the control of Copper Mesa against community members, and after being shown photographs of a physical attack on villages, including two of the Plaintiffs, Vaughan and Gammon promised to investigate past incidents of violence and not to be a part of unethical or illegal activities. These representations demonstrated that Vaughan and Gammon recognized and acknowledged their legal duty to be mindful of the legitimate interest of the community members in Junín.

Statement of Claim 2009 at paras. 55-58, 111; Appeal Book and Compendium, Tab 7 at 52, 70.

Specific Acts and Omissions committed by Vaughan and Gammon

63. Despite Vaughan and Gammon's knowledge of the specific danger posed by Copper Mesa to members of the Junín village and the powers, authority and influence they had to remedy this danger, Vaughan and Gammon acted in a manner that allowed the high risk of violence to continue and grow.

Statement of Claim 2009 at para. 113; Appeal Book and Compendium, Tab 7 at 72-73.

64. In particular, the pleadings allege that Vaughan and Gammon committed the following acts, among others:

(a) approved corporate policies and practices intended to eliminate widespread opposition to the proposed Junín Project in the villages surrounding the proposed mine site, including policies and practices relating to Copper Mesa's security forces; and

(b) approved funding for security forces and others under the control of Copper Mesa who had in the past and were likely in the future to assault and threaten members of the villages who opposed the Junín Project.

Statement of Claim 2009 at para. 113 (b)-(c); Appeal Book and Compendium, Tab 7 at 72.

65. The pleadings allege that Vaughan and Gammon committed the following acts of omission, among others:

(a) failed to adequately supervise the executive of Copper Mesa;

(b) failed to institute corporate policies and practices so as to prevent threats and assaults from being committed by individuals under Copper Mesa's control;

(c) demonstrated their implicit approval of the ongoing acts of violence committed by those under the control of Copper Mesa by failing to raise concerns about and to investigate reported past incidents of violence.

Statement of Claim 2009 at paras. 113 (d)-(e), (g), 114; Appeal Book and Compendium, Tab 7 at 72-73.

66. As was the case in *Nielsen*, the pleadings allege that Vaughan and Gammon created and maintained corporate policy and practices that sustained a serious risk of physical harm to the Plaintiffs. These serious dangers to particular groups of persons in specific villages were reasonably foreseeable, and were reducible and avoidable by Vaughan and Gammon taking reasonable steps within their capacity and authority as directors. It lay easily within their power to reduce or avoid those dangers. Vaughan and Gammon's approach addressed virtually none of such dangers but allowed them to continue and even grow.

***Nielsen, supra* at para. 611; Appellants' BOA at Tab 15.**

No policy reasons exist to negate a prima facie duty of care

67. Stage two of the *Cooper/Anns* test arises once a *prima facie* duty of care is found. At this stage, the court considers whether there are "residual policy considerations" that militate *against* recognizing a duty of care.

***Hill, supra* at para. 20; Appellants' BOA at Tab 10.**

68. The motions judge stated that he was "not satisfied there are any policy considerations that would at this stage argue in favor of extending liability." The motions judge does

not appear to deal with any policy considerations that could negate a *prima facie* duty of care, and did not appear to rely upon policy considerations when dismissing the claim. In any event, policy considerations form an important part of the *Cooper/Anns* Test and as such, will be dealt with here.

Reasons at para. 52; Appeal Book and Compendium, Tab 5 at 30-31.

69. In the case at bar, there are no policy considerations that negate the *prima facie* duty of care owed by Vaughan and Gammon. Policy concerns related to unlimited liability in the context of individual directors, for example, have been canvassed and rejected by this Court.

> It was said that to reach this conclusion would "open the floodgates of litigation". This *in terrorem* argument is without foundation. The liability of an executive officer of a corporation will, of course, be dependant upon the facts of the individual case.
>
> ***Berger, supra* at para. 45; Appellants' BOA at Tab 4.**

70. In any event, this Court has cautioned that courts should be circumspect in determining so early in an action that residual policy considerations make it plain and obvious that there is no duty of care. It is to be remembered that the Defendants bear the evidentiary burden of showing countervailing policy considerations sufficient to negate the *prima facie* duty of care.

> ***Sauer v. Canada (Attorney General)* (2007), 225 O.A.C. 143, [2007] O.J. No. 2443 at para. 45; Appellants' BOA at Tab 16.**

<u>Policy reasons to recognize a directors' duty of care</u>

71. In the motion below, questions were raised regarding why the Plaintiffs have not sued Copper Mesa or any of Copper Mesa's subsidiaries directly.

72. The Plaintiffs have not sued the corporation directly because of the practical and legal difficulties of attempting to make Canadian corporations accountable for harms that are felt overseas. This particular problem has recently been described by the Honourable Mr. Justice Ian Binnie of the Supreme Court of Canada.

73. Justice Binnie, quoting United Nations Special Representative on Business and Human Rights Professor John Ruggie, has noted that globalization, and in particular, the "ever-expanding reach of global trade, concomitant, global economic interdependency, the increasing economic influence of transnational companies, and the increasing political influence of such companies in war-torn and economically depressed in which the latent risk of human rights is highest" has created "governance gaps that provide the permissive environment for wrongful acts of all kinds without adequate sanctioning or reparation."

> **Justice Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: a Progress Report" (2009) 38:4 *The Brief* 44 [Legal Redress] at 45; Appellants' BOA at Tab 24.**

74. Further, developing nations that host transnational corporations, "often have little incentive to regulate" and even when they do, "the political influence of transnational companies, particularly in conflict-ridden and economically underdeveloped countries, may be such that a state has little real power to impose its will".

> **Justice Ian Binnie, Legal Redress at 45; Appellants' BOA at Tab 24.**

75. Part of this "governance problem" relates to laws that currently exist in Canada that may make appropriate legal accountability difficult to achieve:

> [A]t a very practical level, domestic law reform is needed if domestic courts are to play a useful role in remedying international human rights abuse. For example. . . **statutory and common-law obstacles to veil-piercing exist and these may inappropriately shield parent companies from liability in respect of subsidiaries**; and there can be **inordinate difficulty in establishing jurisdiction (especially where**

> **liberal use is made of the doctrine of *forum non conveniens*)**. In some cases, there will be good reason to limit or deny the possibility of civil recovery. However, **as a general matter the state duty to protect [human rights] means that a concerted effort be made to eliminate barriers to recovery that are unnecessary or arbitrary in their operation.** [Emphasis added]
>
> **Justice Ian Binnie, Legal Redress at 50; Appellants' BOA at Tab 24.**

76. This "concerted effort" has not yet happened, and the "unnecessary or arbitrary" barriers for foreign plaintiffs attempting to seek remedies for harms done to them by companies controlled and financed in Canada, but with operations elsewhere, remain formidable. For these reasons, no attempt was made to directly sue either Copper Mesa or its subsidiaries directly in Canada or anywhere else, not because they did not commit wrongful acts for which they should be held legally accountable, but because potential formal legal hurdles made this an ineffective avenue for redress.

77. These larger issues described by Justice Binnie, however, do not, in the Plaintiffs' submissions, detract from the claims validly made in this case against the directors. What is before the court in this case is the well-established principle that directors owe personal duties of care when acting in their capacity as directors. Application of this well-established principle in this case will encourage Canadian corporate actors who conduct business in the developing world to act responsibly and in accordance with international human rights norms – human rights norms that are accepted in Canada as well.

In the alternative, leave to amend should be granted

78. The motions judge further erred by refusing the Plaintiffs leave to amend their statement of claim. He did not provide reasons for this refusal.

79. It is very rare that a case will be decided at the pleadings stage without allowing the plaintiff either the opportunity to correct its statement of claim or to establish the claim at trial. Because the consequences of denying leave to amend is to deprive the plaintiff altogether of their right to litigate the particular issues, the Court of Appeal has held that leave to amend should only be refused when a pleading contains a radical defect incapable of being cured by amendment.

> ***Taylor v. Tamboril Cigar Company*, 2005 CanLII 35678 at para. 4 (O.C.A); Appellants' BOA at Tab 17.**
> ***Indal Metals v. Jordan Construction Management Inc.* (1994), 29 C.P.C (3d) 361, [1994] O.J. No. 1616 at para. 13 (O.C.J.) (cite to QL) Appellants' BOA at Tab 13.**

80. The Motions Judge based his findings in part on the basis that the Plaintiffs had not pleaded sufficient connections between the Plaintiffs and the Defendants to ground personal liability. This issue is essentially a question of the sufficiency of material facts pleaded. If the Plaintiffs have not pleaded sufficient material facts, the Plaintiffs should have the opportunity to address this deficiency.

> **Reasons at para. 49; Appeal Book and Compendium, Tab 5 at 30.**

PART V: ORDER SOUGHT

81. The Appellants seek that the Order striking out the claims in and dismissing Action Nos. CV-10-8577-00CL, CV-10-8576-00CL, CV-10-8575-00CL, be set aside and that an Order be granted dismissing the motions to strike brought by the Copper Mesa Defendants.

82. The Appellants seek their costs for:

(a) this appeal on a substantial indemnity basis; and

(b) the Motion to Strike below on a substantial indemnity basis;

together with post-judgment interest thereon pursuant to s. 129 of the *Courts of Justice Act*.

83. The Appellants also seek such further and other relief as counsel may request and that seems just to this Honourable Court.

All of which is respectfully submitted this 13th day of July, 2009.

_____
Murray Klippenstein

_____
W. Cory Wanless

KLIPPENSTEINS
Barristers and Solicitors
160 John Street, Suite 300
Toronto, Ontario M5V 2E5

Murray Klippenstein, LSUC No. 26950G
W. Cory Wanless, LSUC No. 57288M
Tel.: (416) 598-0288
Fax: (416) 598-9520

Solicitors for the Appellants, Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero

CERTIFICATE RE: ORIGINAL RECORD AND TIME ESTIMATE

I, **MURRAY KLIPPENSTEIN**, lawyer for the Appellants, certify that:

1. An Order under subrule 61.09(2) (original records and exhibits) is not required; and

2. the Appellants estimate that 1.5 hours will be required for the Appellants' oral argument, not including reply.

July 13, 2010

_____
Murray Klippenstein

KLIPPENSTEINS
Barristers and Solicitors
160 John Street, Suite 300
Toronto, Ontario M5V 2E5

Murray Klippenstein, LSUC No. 26950G
W. Cory Wanless, LSUC No. 57288M
Tel.: (416) 598-0288
Fax: (416) 598-9520

Solicitors for the Appellants, Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero

SCHEDULE "A" – LIST OF AUTHORITIES

ADGA Systems International v. Valcom (1999), 43 O.R. (3d) 101, [1999] O.J. No. 27 (C.A.) (QL).

Anger v. Berkshire Investment Group Inc. (2001), O.A.C. 301, [2001] O.J. No. 379 (C.A.) (QL).

Berger v. Willowdale A.M.C., (1983) 41 O.R. (2d) 89, [1983] O.J. No. 2959 (C.A), leave to appeal to S.C.C. refused, [1983] S.C.C.A. No. 353.

Bingley v. Morrison Fuels (2009), 95 O.R. (3d) 191 (C.A.).

Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76 (QL).

Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care) 2006, 82 O.R. (3d) 321 (C.A.).

Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, [2007] S.C.J. No. 41 (QL).

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (QL).

Indal Metals v. Jordan Construction Management Inc. (1994), 29 C.P.C (3d) 361, [1994] O.J. No. 1616 (O.C.J.) (QL).

Nielsen Estate v. Epton (2006), 13 B.L.R. (4^{th}) 209, [2006] A.J. No. 10 (A.B.Q.B) (QL); aff'd 277 D.L.R. (4^{th}) 267 (C.A.).

Sauer v. Canada (Attorney General) (2007), 225 O.A.C. 143, [2007] O.J. No. 2443 (QL).

Taylor v. Tamboril Cigar Company, 2005 CanLII 35678 (O.C.A) (CanLii).

Unisys Canada Inc. v. York Three Associates Inc. (2001), 150 O.A.C. 49 (C.A.).

United Canada Malt Ltd. v. Outboard Marine Corp. of Canada (2000), 48 O.R. (3d) 352, [2000] O.J. No. 1554 (Sup. Ct.) (QL).

Web Offset Publications Ltd. v. Vickery (1999), 43 O.R. (3d) 802 (S.C.).

Wakeford v. Canada (Attorney General) (2001), 81 C.R.R. (2d) 342 (Sup. Ct.), appeal dismissed (2001), 156 O.A.C. 385 (C.A.).

Justice Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: a Progress Report" (2009) 38:4 *The Brief* 44.

SCHEDULE "B" – TEXT OF STATUTES AND REGULATIONS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (Courts of Justice Act)

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

…

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

…

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

MARCIA LUZMILA RAMÍREZ PIEDRA et al.
Plaintiffs (Appellants)

v.

COPPER MESA MINING CORPORATION et al.
Defendants (Respondents)

Court File Nos. C52251

COURT OF APPEAL
FOR ONTARIO

Proceeding commenced at Toronto

APPELLANTS' FACTUM (COPPER MESA APPEAL)

KLIPPENSTEINS
Barristers and Solicitors
160 John Street, Suite 300
Toronto, Ontario M5V 2E5

Murray Klippenstein, LSUC No. 26950G
W. Cory Wanless, LSUC No. 57288M
Tel: (416) 598-0288
Fax: (416) 598-9520

Solicitors for the Plaintiffs (Appellants)