Court File No. CV-10-8577-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

MARCIA LUZMILA RAMÍREZ PIEDRA,
JAIME POLIVIO PÉREZ LUCERO and
ISRAEL PÉREZ LUCERO

Plaintiffs

and

TSX INC., TSX GROUP INC.,
WILLIAM STEARNS VAUGHAN and
JOHN GAMMON

Defendants

Court File No. CV-10-8576-00CL

A N D B E T W E E N:

MARCIA LUZMILA RAMÍREZ PIEDRA,
JAIME POLIVIO PÉREZ LUCERO and
ISRAEL PÉREZ LUCERO

Plaintiffs

and

COPPER MESA MINING CORPORATION,
WILLIAM STEARNS VAUGHAN and
JOHN GAMMON

Defendants

PLAINTIFFS' RESPONDING FACTUM
(TSX Defendants' Motion to Strike Out Statement of Claim)

March 12, 2010

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PART I – OVERVIEW

1. Motions to strike out the Plaintiffs Statements of Claim are brought by TSX Inc. and TSX Group Inc. ("TSX Defendants") under rule 21.01(1)(b) of the *Rules of Civil Procedure*.

2. These Motions to Strike the Statements of Claim must fail:

   a. The test to strike out a claim as disclosing no cause of action is stringent. A claim will only be struck when it is plain, obvious and beyond doubt that it cannot succeed at trial.

   b. The Pleadings set out the negligence of the TSX in sufficient detail to give rise to a duty of care. The TSX's act of listing Copper Mesa was the necessary precondition that triggered and enabled the harms inflicted on the Plaintiffs. On the facts of the case, the relationship between the parties was proximate, and the harm was foreseeable.

   c. The policy reasons raised by the TSX defendants to negate a duty of care are speculative, and do not arise in this case. Rather, there are strong policy reasons to recognize a duty of care

   d. In any event, the court should not consider important and complex matters of policy on a motion to strike out the claim. That should only be done at trial, based on more complete evidence.

3. The stringent "plain, and obvious and beyond doubt" test is not met. There is a cause of action. The motions should be dismissed.

4. The 2009 Action is not an abuse of process.

PART II – SUMMARY OF FACTS

5. In 2004, Copper Mesa Mining Corporation ("Copper Mesa" formerly known as Ascendant Copper Corporation) was formed for the primary purpose of beginning

mineral exploration activities as a first step towards opening a large-scale open-pit copper mine in Junín, in the Republic of Ecuador (the "Junín Project"). In 2004, Copper Mesa Mining Corporation, through a subsidiary, gained ownership of the three concessions that make up the Junín Property.

Fresh as Amended Statement of Claim dated May 28, 2009 (07-CV-344095 PD1) now CV-10-8577-00CL ["Statement of Claim 2007"], paras. 17-20; TSX Defendants Motion Record ["TSX Defendants MR"], Tab 3, at p. 80

Copper Mesa's Dependence on the TSX

6. Copper Mesa is a small junior mining exploration corporation. Owing to the high financial risks associated with mineral exploration, Copper Mesa was dependent on gaining an eventual listing on the Toronto Stock Exchange in order to conduct operations at the Junín project. Without such a listing, any significant operation by Copper Mesa or its subsidiaries would have been impossible.

Statement of Claim 2007, paras. 33, 36; TSX Defendants MR, Tab 3 at pp. 84-85

7. As such, a listing on the Toronto Stock Exchange was one of Copper Mesa's primary corporate goals. Money raised prior to listing was characterized by the corporation as "seed financing", which was used in large part to fund the costs associated with seeking a listing on the Toronto Stock Exchange.

Statement of Claim 2007, paras. 17, 36; TSX Defendants MR, Tab 3 at pp. 80, 85

Community Opposition to Copper Mesa's Operations

8. Members of the communities located near the proposed Junín project were and are opposed to mining in their community. Their opposition stems from a desire to prevent environmental degradation, negative social impacts and loss of livelihood they fear will come with mining activities. This local opposition is widespread and sustained, and forced the first owners of the mining concessions to abandon the project in 1997.

Statement of Claim 2007, paras. 16, 24; TSX Defendants MR, Tab 3 at pp. 79, 81

9. The widespread and sustained local opposition to the Junín Project was a substantial and potentially crippling barrier to any exploration and mining activities in the region. In

particular, Copper Mesa was impeded from accessing the area around the Junín Project because community members blocked the primary access road to Junín.

Statement of Claim 2007, paras. 24, 45; TSX Defendants MR, Tab 3 at pp. 81, 87

Ascendant Copper Corporation, Prospectus: Initial Public Offering, dated October 14 2005, p. 10 ["Prospectus"]; Responding Motion Record of the Plaintiffs ["Plaintiffs RMR"], Tab 11

10. Prior to listing on the Toronto Stock Exchange, in an attempt to eliminate community opposition to the project, Copper Mesa, through its subsidiaries and agents, engaged in a campaign of intimidation, harassment, threats and violence. These efforts included creating a non-profit organization called "Corporation for the Development of Garcia Moreno ("CODEGAM") in order to delegitimize and suppress opposition to mining. Tactics employed by CODEGAM included physically assaulting individuals who attended anti-mining meetings, issuing death threats against the leaders of the community opposition to mining; bringing fraudulent criminal charges against prominent mining critics, and advocating for the expulsion of community leaders from the region. These tactics were also employed by other individuals under the control of Copper Mesa.

Statement of Claim 2007, paras. 24-26; TSX Defendants MR, Tab 3 at pp. 81-82

The Business of the Toronto Stock Exchange

11. Since demutualization in April 2002, the Defendant TSX Inc. ("TSX") has been a private, for-profit business corporation that is in the business of selling listing services to corporations. Corporations pay both initial listing fees and maintenance fees to the TSX in order to have access to the TSX's securities market and the benefits these markets provide. The profits generated by the TSX through its listing services are substantial.

Statement of Claim 2007, paras. 12, 121; TSX Defendants MR, Tab 3 at pp. 78, 112

12. The TSX competes with other international stock exchanges for the business of corporations which are seeking public listings. The TSX has carved out a niche as "the best access in the world" for capital for junior mining exploration companies. As a result, almost 60% of the world's mining companies are listed on either the Toronto

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1 This document is incorporated in the pleadings as it was specifically referred to and relied on in the Statements of Claim in all three Actions. See e.g. *Robinson v. Rochester et al.*, 2010 ONSC 463 (CanLII) at para. 19; PBA, Tab 20

Stock Exchange or the TSX Venture Exchange, both of which are owned by the Defendant TSX Inc.

Statement of Claim 2007, paras. 34, 119, 121; TSX Defendants MR, Tab 3 at pp. 85, 111-112

13. The TSX has protected and extended its business by advertising and promoting its services to mining companies that have projects in countries with weak government institutions, high vulnerability to conflict and violence, and where the risk of human rights abuse and other forms of harm is highest. For example, the TSX emphasizes its specialized ability to provide access to financing for projects located in the war-torn Democratic Republic of Congo.

Statement of Claim 2007, para. 34-35; TSX Defendants MR, Tab 3 at p. 85

Existence of a Serious Problem in the Canadian Mining Industry

14. The TSX was aware, or should have been aware, that there was a serious and growing human rights problem in the Canadian mining industry, and particularly the junior mining industry. In 2005, the Parliamentary Standing Committee on Foreign Affairs and International Trade raised concerns regarding the systemic involvement of Canadian mining companies in human rights violations in developing countries. Various media publications and NGOs have reported instances around the world of publically-listed Canadian mining companies, particularly junior mining companies, using violence and threats of violence against local opposition to mining through the use of security forces.

Statement of Claim 2007, paras. 59-68; TSX Defendants MR, Tab 3 at pp. 90-92

Copper Mesa Seeks a Listing on the Toronto Stock Exchange

15. In 2005, Copper Mesa approached the TSX to seek an initial listing on the Toronto Stock Exchange, through which Copper Mesa hoped it would gross $10 million.

Prospectus, p. 1-2; Plaintiffs RMR, Tab 1

16. Copper Mesa needed the capital provided through listing in order to continue operations. By September 2005, Copper Mesa had a working capital deficiency of almost half a million dollars.

Prospectus, p. 1-2; Plaintiffs RMR, Tab 1

17. In order to list on the Toronto Stock Exchange, corporations are required to submit a Prospectus to the TSX Listings Committee for consideration and approval prior to listing. The Prospectus discloses detailed information about the corporation and its operations.

Statement of Claim 2007, para. 30; TSX Defendants MR, Tab 3 at p. 83

18. On October 14, 2005, Copper Mesa submitted its final Prospectus for its Initial Public Offering to the TSX for consideration.

Statement of Claim 2007, para. 31; TSX Defendants MR, Tab 3 at p. 83

19. Members of the communities surrounding Junín were aware that a successful listing of Copper Mesa would have a substantial impact on their lives. In particular, they knew that a listing would result in a significant influx of capital to the corporation, some of which would be used in a continuing campaign to eliminate opposition to mining through the use of intimidation and violence.

Statement of Claim 2007, para. 29; TSX Defendants MR, Tab 3 at pp. 82-83

20. In order to protect his community, the local elected representative of the municipality in which the Junín Project is located, Mayor Auki Tituaña Males, wrote to the TSX and specifically asked it not to list Copper Mesa on the Toronto Stock Exchange. He warned that Copper Mesa had "adopted a divisive strategy provoking confrontations which could lead to the loss of human lives", and noted that a respected Ecuadorian human rights organization had documented and denounced human rights violations instigated by Copper Mesa in the Junín area.

Statement of Claim 2007, para. 29; TSX Defendants MR, Tab 3 at pp. 82-83

21. In the Prospectus submitted to the TSX for consideration and approval, Copper Mesa describes in detail the history of the conflict between Copper Mesa and the local community, and also takes note of the potential for future violence. In particular, the Prospectus notes that:

    a. "Tensions surrounding potential exploration and mining work on the Junin property have risen, creating the potential of further escalating violence unless steps are taken to diffuse the situation."

b. There have been various allegations that Copper Mesa has engaged in human rights abuses and made physical threats against anti-mining groups and individuals.

c. Copper Mesa believes that it has the right to use "armed forces and police presence" if it is obstructed from carrying out its operations.

d. Copper Mesa had hired a former army general as their first head of community relations.

Statement of Claim 2007, para. 31; TSX Defendants MR, Tab 3
Prospectus, p. 13; Plaintiffs RMR, Tab 1

22. Despite the warnings that listing Copper Mesa would create a serious risk of violence and conflict within the community, the TSX listed Ascendant Copper on the Toronto Stock Exchange on November 21, 2005. This initial listing raised just under $10 million, and represented all of Copper Mesa's operating capital.

Statement of Claim 2007, para. 32; TSX Defendants MR, Tab 3 at pp. 83-84

Threats and Violence Continue

23. Copper Mesa, now with significant operating capital, continued its campaign of violence and intimidation. One month after listing on the Toronto Stock Exchange, Copper Mesa or its subsidiaries contracted one or more private security forces using capital raised on the Toronto Stock Exchange. These security forces increasingly employed tactics of intimidation that included uttering threats of physical violence to community members opposed to the Junín Project. On November 1, 2006, armed members of the security forces used tear gas, guard dogs and machetes to disrupt an anti-mine protest and to disperse the crowd, which included children.

Statement of Claim 2007, paras. 38-41; TSX Defendants MR, Tab 3 at p. 86

TSX Continues to Provide Copper Mesa with Access to Capital

24. On November 15, 2006, Copper Mesa grossed over $4.5 million from a private placement, for which it required and obtained TSX approval.

Statement of Claim 2007, para. 42; TSX Defendants MR, Tab 3 at p. 86

Marcia Ramírez, Polivio Pérez and Israel Pérez are Assaulted and Threatened

25. On December 2, 2006, security forces, hired with money raised on the Toronto Stock Exchange and armed with restricted weapons including shotguns, handguns and pepper-spray, attacked a small group of unarmed men and women near Junín. In this attack, the security forces shot at Marcia Ramírez and pepper-sprayed her point-blank in the face and shot Israel Pérez in the leg.

Statement of Claim 2007, paras. 45, 46; TSX Defendants MR, Tab 3 at p. 87

26. On and around December 2, 2006 and June 23, 2007, individuals hired with money raised on the Toronto Stock Exchange issued death threats against Polivio Pérez, and on July 31, 2007, Polivio Pérez was assaulted by employees, agents or affiliates of Copper Mesa and/or its subsidiaries. As a result of these threats and assaults, Polivio Pérez was placed under police protection.

Statement of Claim 2007, paras. 54-57; TSX Defendants MR, Tab 3 at p. 89

PART III – ISSUES AND THE LAW

Test to Strike a Claim is Stringent

27. 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. 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) 74 D.L.R. (4th) 321 at paras. 36, 52 (S.C.C.); Plaintiffs' Book of Authorities ["PBA"], Tab 1**
***Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 at para. 8 (C.A.); PBA, Tab 2**

28. Contrary to the TSX Defendants' suggestion, the onus throughout this motion is on the Defendants to show that it is "plain and obvious, and beyond doubt" that the claims cannot succeed. The Defendants bear the burden throughout this motion, not the Plaintiffs.

TSX Defendants Factum, para. 28

It is Not "Plain and Obvious and Beyond Doubt" that the TSX Defendants Do Not Owe a Duty of Care to the Plaintiffs

29. On a rule 21 motion regarding a negligence claim, the court applies the two-stage *Cooper-Anns* analysis to the facts as pleaded in the Statement of Claim – not in order to determine whether a duty of care *will* be recognized – but rather to determine whether it is plain and obvious that *no* duty of care *can* be recognized. Unless the court unequivocally finds that the TSX Defendants could not possibly owe a duty of care to the Plaintiffs, the motion must be denied.

***Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 at para. 9 (C.A.); PBA, Tab 3**
***Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 at para. 24 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 208; PBA, Tab 4**

30. The Plaintiffs' assert that the TSX is under a legal duty to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others. Specifically, the Plaintiffs allege that the TSX was under a legal duty to take reasonable care that the provision of listing services to a company did not cause reasonably foreseeable and serious harm to the Plaintiffs.

Statement of Claim 2007, para. 74; TSX Defendants MR, Tab 3 at p. 95

31. Contrary to the statements of the Defendants, the Plaintiffs specifically do not allege that:

a. "the TSX Defendants had a duty to the Plaintiffs to intervene in the business of Copper Mesa and stop it from moving forward with its proposed project in Ecuador"; or

b. "by listing the shares of Copper Mesa without first instituting measures to restrict and control its proposed future mining projects, the TSX Defendants caused the threats and assaults allegedly perpetrated against the Plaintiffs"

TSX Defendants Factum, para. 14

The Proposed Duty of Care is Not Novel

32. The category of proximity asserted by the Plaintiffs (i.e. an overt act causing physical harm) has already been recognized by law. If foreseeability of harm is established, there is no need to engage in the *Cooper-Anns* Test.

> ***Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para. 36; PBA, Tab 5**

33. The Plaintiffs are not asserting a new duty of care. The law recognizes that a defendant is responsible for damage when their overt act directly and foreseeably causes physical harm to the plaintiff.

> What then are the categories in which proximity has been recogized? First, of course is the situation where the defendant's act foreseeably causes physical harm to the plaintiff.
>
> **Cooper v. Hobart, para. 36**

34. The TSX's act of listing Copper Mesa was the necessary precondition, strenuously pursued by Copper Mesa, that triggered and enabled the harms inflicted on the Plaintiffs. The TSX knew that Copper Mesa depended on financing provided through the TSX for continued operations, knew that serious allegations of violence, threats and human rights abuse had been made against Copper Mesa, and the TSX itself had been specifically warned of the serious risk of future violence if the TSX provided Copper Mesa with access to capital. But for the TSX's act of listing Copper Mesa, the Plaintiffs would not have been subjected to these threats and assaults.

35. The direct effect of the TSX's actions are evidenced by the following factors:

a. Copper Mesa's proposed operations at the time of the listing were clearly limited almost exclusively to the exploration and development of one property – the Junín property;

> **Prospectus, p. 1, 7; Plaintiffs RMR, Tab 1**

b. Copper Mesa faced widespread and sustained local community opposition that prevented operations on Copper Mesa's primary property at Junín;

> **Statement of Claim 2007, paras. 16, 24; TSX Defendants MR, Tab 3 at pp. 79, 81**
> **Prospectus, p. 10; Plaintiffs RMR, Tab 1**

c. Prior to the listing, Copper Mesa had attempted to deal with this opposition by engaging in a campaign of intimidation, harassment, threats and violence aimed at silencing the widespread and sustained local opposition.

Statement of Claim 2007, paras. 24-28, 38-41, 44-49, 54-57; TSX Defendants MR, Tab 3 at pp. 81-82, 86, 87-89

d. By September 2005, Copper Mesa had run out of operating capital. Copper Mesa sought a listing on the TSX specifically to give it the funds necessary to conduct operations.

Statement of Claim 2007, paras. 32, 33, 36; TSX Defendants MR, Tab 3 at pp. 84-85
Prospectus, p. 1; Plaintiffs RMR, Tab 1

e. Immediately after TSX listed Copper Mesa, Copper Mesa used the money it had acquired to hire security forces. These security forces engaged in violent attacks and threats, and on December 2, 2006, violently assaulted the Plaintiffs Marcia Ramírez and Israel Peréz.

Statement of Claim 2007, paras. 29, 38-41; TSX Defendants MR, Tab 3

The Cooper-Anns *Test*

36. In the alternative, if the claim does raise a novel duty that has not been recognized by the courts before, the Plaintiffs submit that the *Cooper-Anns* test is met, and in any case, and more importantly, it is not plain and obvious that no such duty of care could be recognized. Under the *Cooper-Anns* test, the correct approach is to ask: (1) whether the parties are in a relationship of sufficient proximity and foreseeability 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; PBA, Tab 6**

37. The Ontario Court of Appeal has held that both proximity factors and policy factors are often fact driven, and that it is usually not possible to determine these factors without the benefit of a factual record.

***Anger v. Berkshire Investment Group Inc.* at paras. 13, 15; PBA, Tab 3**

38. The pleadings in this case disclose that the harm was foreseeable and that the parties were sufficiently proximate. There are no negative policy implications sufficient to negate a duty of care. Indeed, there are overwhelming policy reasons to recognize such a duty.

This is not a case of regulatory negligence

39. The TSX Defendants have tried to pigeon-hole this lawsuit as a case of "regulatory negligence" by relying on other cases in which courts have held that where a regulator fails to prevent economic loss to individual investors, the regulator does not owe a duty of care to individual investors. This is not such a case.

TSX Defendants Factum, para. 37

40. Here, the Plaintiffs' claim is against a for-profit business for negligently providing a service to others that caused physical harm to the Plaintiffs. Such a case is fundamentally different from a claim against a regulator (statutory or otherwise) for negligent regulation that caused financial loss to voluntary participants in a financial market.

41. Further differences include:

a. The Plaintiffs in this case claim damages for physical harm rather than economic loss;

b. The alleged negligent acts in this case are acts of commission rather than omission;

c. The Plaintiffs in this case did not voluntarily enter a commercial relationship; and

d. The Plaintiffs were not in a position to protect themselves from the harm suffered.

42. In *Cooper v. Hobart*, and in *Morgis v. Thomson Kernaghan & Co.*, the defendants were both clearly regulators. They were created for the purpose of regulating and were acting as regulators when the alleged negligent omissions occurred. The duties of care alleged in those cases were fundamentally regulatory duties.

***Cooper v. Hobart* at paras. 1, 49; PBA, Tab 5**
***Morgis v. Thomson Kernaghan & Co.* (2003), 65 O.R. (3d) 321 at paras. 1, 11 (C.A); PBA Tab 7**

43. The relationship of concern in both *Cooper* and *Morgis* was between a regulator and investors who had invested money with a company that was overseen by that regulator. In these cases, the investor argued that the regulator had done a poor job overseeing the conduct of companies that fell under the regulator's mandate, and specifically had failed to take steps to protect the investor from sustaining economic loss.

> ***Cooper v. Hobart* at para. 20; PBA, Tab 5**
> ***Morgis v. Thomson Kernaghan & Co.* at paras. 13, 16; PBA, Tab 7**

44. If the Plaintiffs in this case were investors and were making a claim against the TSX for failure to prevent economic loss, this case would be analogous to *Cooper* and *Morgis*. They are not.

45. The TSX is not a statutory body. The TSX exists as a private, for-profit corporation whose core business includes selling listing services to corporations. Its business objective is to achieve profitable growth and to maximize shareholder returns. It does this in part by offering other corporations the service of listing and maintaining shares on the Toronto Stock Exchange in return for listing fees and maintenance fees. The TSX makes significant profits through the sale of its listing services.

> **Statement of Claim 2007, para. 121; TSX Defendants MR, Tab 3, p. 112**

46. As a private, for-profit business, the TSX competes with other stock exchanges, and seeks to maintain its competitive advantage as one of the most important sources of capital for junior mining companies.

> **Statement of Claim 2007, para. 119; TSX Defendants MR, Tab 3 at p. 111-112**

47. Like many regulated businesses, the TSX exists within a statutory context. For example, it can only "carry on business as a stock exchange" if it is "recognized" by the Ontario Securities Commission. Further, it must follow certain securities rules and must impose certain securities rules on the companies that list shares on the TSX.

> **Securities Act, R.S.O. 1990, c. S.5, s. 21(1)**
> ***Recognition Order re: TSX Group Inc. and TSX Inc.*, (2005) 28 OSCB 7034, as amended by order of the Ontario Securities Commission on December 16, 2005; August 10, 2006; May 30, 2008 ["TSX Recognition Order"]; PBA Tab 17**

48. The TSX involvement in actual regulation, however, is limited. The TSX has outsourced substantially all of its statutory market regulation services to the Investment Industry

Regulatory Organization of Canada ("IIROC"). These regulation services include administering, monitoring and enforcing market surveillance, and participant discipline.

Recognition Order re: Investment Industry Regulatory Organization of Canada (IIROC), Ontario Security Commission, June 1, 2008 ["IIROC Recognition Order"]; PBA Tab 18
TSX Recognition Order; PBA Tab 17

49. In this case the Plaintiffs have not alleged, as was the case in *Cooper* and *Morgis*, that the TSX owes any duties to the Plaintiffs in any regulatory capacity. The TSX Defendants accurately point out that Marcia Ramírez, Israel Pérez and Polivio Pérez are not investors and do not participate in Canadian capital markets.

TSX Defendants Factum, para. 44

50. The duty that is being asserted in the case at bar is fundamentally different than "Regulatory Negligence" cases. The Plaintiffs allege that the TSX owed a duty of care to the Plaintiffs in the TSX's role as a business that sells listing services to corporations where there was a serious risk that providing access to this service would cause physical harm to the Plaintiffs. In this case, the negligence alleged is not "failure to oversee" as it was in *Cooper* and *Morgis*, but rather the sale of listing services which caused physical harm.

Statement of Claim 2007, para. 69; TSX Defendants MR, Tab 3 at p. 93
***Cooper v. Hobart*; PBA, Tab 5**
***Morgis v. Thomson Kernaghan & Co.*; PBA, Tab 7**

51. The relationship that exists in this case is not defined or "governed" by statute. Instead, the proximate relationship between the TSX and the Plaintiffs is defined by other factors. These factors will be discussed below in a section entitled "proximity".

A Prima Facie *Duty of Care Exists*

52. The first stage of the *Cooper-Anns* test focuses on whether the pleadings disclose factors that show a proximate and foreseeable relationship between the plaintiff and the defendant such that a *prima facie* duty of care should be recognized. 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* at para. 20; PBA, Tab 5**

53. "Proximity" itself is nothing more than a label expressing the conclusion that, in a particular situation, it is just and fair to recognize that the Defendants have a legal obligation to be mindful of the Plaintiff's legitimate interests in conducting their affairs.

***Hercules Managements Ltd. v. Ernst & Young*, [1997] S.C.J. No 51 at paras. 23-24; PBA, Tab 8**

54. 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 v. Hamilton-Wentworth Regional Police Services Board* at para. 24; PBA, Tab 6**

55. The pleadings disclose several important factors which, taken together, strongly indicate that the harm was foreseeable and that the Defendants were in a legally proximate relationship with the Plaintiffs. It is certainly not "plain and obvious" that there is no proximate relationship. These factors include both factors indicating closeness between the TSX and the Plaintiffs, and factors providing reasons why it is just and fair to impose the costs of the harm on the TSX.

Proximity Factors Establishing Closeness on the Facts

The Defendants' act triggered and enabled the harm suffered by the Plaintiffs

56. 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 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 v. Hamilton-Wentworth Regional Police Services Board at para. 29; PBA, Tab 6

57. As described above, the TSX's act of listing Copper Mesa triggered and enabled the harm suffered by the Plaintiffs. Specifically, the TSX's act of listing Copper Mesa financed the security forces or other agents who physically assaulted Marcia Ramirez, Polivio Pérez and Israel Pérez, and who issued death threats against Polivio Pérez.

Statement of Claim 2007, para. 75; TSX Defendants MR, Tab 3 at p. 96

The TSX knew that listing Copper Mesa would create a high risk of harm to the Plaintiffs

58. The Supreme Court of Canada has held that the defendant's knowledge of the specific context is an important factor in deciding whether liability is appropriately imposed.

Jordan House Ltd. v. Menow, [1974] S.C.R. 239 page 250; PBA Tab 9

59. The TSX was aware that a narrow class of individuals were at risk – a class of individuals that included the Plaintiffs. Copper Mesa's key listing document, the Prospectus, repeatedly refers to an identifiable group of community members who are opposed to mining, and includes individuals particularly from within communities that would stand to be most directly impacted by the development of the Junín project.

Prospectus, pp. 1, 2, 9, 10, 12, 13, 20, 28, 58; Plaintiffs RMR, Tab 1

60. The TSX was also aware that various organizations, including a respected Ecuadorian human rights organization, had alleged that Copper Mesa had previously perpetrated violent assaults and issued death threats against this class of individuals.

Statement of Claim 2007, para. 29; TSX Defendants MR, Tab 3 at p. 82
Prospectus; Plaintiffs RMR, Tab 1

61. Further, the TSX knew or ought to have known that there was a serious risk that financing made available to Copper Mesa as a result of listing services provided by the TSX would be used to perpetrate violence against the Plaintiffs.

Statement of Claim 2007, paras. 29-32, 70-71; TSX Defendants MR, Tab 3 at pp. 82-84, 94-95
Prospectus, p. 1, 2, 10; Plaintiffs RMR, Tab 1

Elected community leader directly contacted the TSX Defendants

62. Mayor Auki Tituaña Males, the mayor of the municipal government of Cotacachi County in which the Junín property is located, sought to protect individuals in his community from harms that would result if Copper Mesa was listed on the Toronto Stock Exchange by writing directly to the TSX and explicitly asking that it not list Copper Mesa on the Toronto Stock Exchange. Mayor Tituaña's letter warned that Copper Mesa had caused serious internal conflicts and confrontations within Junín, and that Copper Mesa's divisive strategy provoked confrontations in the community which could lead to the loss

of human lives. He also noted that a respected Ecuadorian human rights organization had documented and denounced human rights violations committed by the company.

Statement of Claim 2007, para. 29; TSX Defendants MR, Tab 3 at pp. 82-83

Proximity Factors that Confirm it is Just and Fair to Recognize a Duty of Care

The importance of the interests at stake

63. The Supreme Court has found that when a relationship engages critical or important interests, such interests support the finding of a proximate relationship. In this case, the Plaintiffs' important human rights interests are at stake, including the right to security of the person, bodily integrity, and freedom from intimidation and threats to their lives.

***Hill v. Hamilton-Wentworth Regional Police Services Board* at para. 34; PBA, Tab 6**

The TSX has an economic incentive to provide listing services without considering potential harms created by providing listing services

64. The Supreme Court has also held that the existence of an economic incentive to engage in behaviour that is potentially harmful will support the imposition of a duty of care.

***Childs v. Desmoreaux*, [2006] 1 S.C.R. 643 at para. 22; PBA, Tab 10**

65. The TSX benefits financially from listing corporations on its stock exchange, and has an economic interest to both attract and list as many corporations as possible without regard for any potential negative consequences. As part of the process of competing with other stock exchanges for business, TSX specifically markets itself as a stock exchange for companies who operate in "high risk" states that are prone to conflict and violence, where the risk of human rights abuse is high, and where the ability of the state to either protect its citizens from harm or to provide remedies once harms occur is low.

Statement of Claim 2007, paras. 34-35, 119, 121, 122; TSX Defendants MR, Tab 3 at 85, 111-113

The Defendants' ability to control the risk and the Plaintiffs' inability to protect themselves

66. There is a severe power imbalance between the Defendants and the Plaintiffs. While the Defendants had the ability to control the risk of physical harm suffered by the Plaintiffs, the Plaintiffs were powerless to protect themselves from the same harms.

67. Taken together, all of these factors strongly suggest the existence of a *prima facie* duty of care on the facts of this case. Based on these factors, it is certainly not impossible that a *prima facie* duty could be found by a court at trial.

68. The proximity analysis in this case is highly fact specific and involves significant policy concerns, all of which would be most appropriately explored and resolved on the basis of a full evidentiary record. The limited Rule 21 context does not provide a sufficient basis for finally resolving these issues.

***Anger v. Berkshire Investment Group Inc.* at paras. 13, 15; PBA, Tab 3**

There Are No Policy Reasons to Negate a Prima Facie Duty of Care

69. The TSX Defendants have raised two speculative policy arguments in support of their proposition that a *prima facie* duty of care should be negated on policy grounds. They argue that recognition of a duty of care would result in conflicting duties for the TSX and in indeterminate liability.

TSX Factum, paras. 45-47, 52-55

70. These policy arguments fail for four reasons:

a. They are entirely speculative;
b. None of these policy concerns arise in this case as pleaded;
c. Even if they did arise, these concerns would not be sufficient to negate a *prima facie* duty of care;
d. Significant policy considerations, including the need to protect fundamental human rights, support recognizing a duty of care;
e. In any event, courts are very hesitant to rely on policy considerations to negate a duty of care without evidence to support those considerations.

The Defendants' policy arguments are speculative

71. The policy arguments are speculative and are stated as bald conclusions rather than arguments. No details are provided that explain why a duty to the Plaintiffs would necessarily and irreconcilably conflict with the duties the TSX may owe to investors, nor have the TSX Defendants explained why the duty, as proposed, would lead to indeterminate liability. The Supreme Court has held that a duty of care should not be denied on speculative grounds.

***Hill v. Hamilton-Wentworth Regional Police Services Board,* at paras. 43, 48; PBA, Tab 6**

There are no conflicting duties

72. The TSX Defendants argue that the duty of care asserted by the Plaintiffs (to take reasonable care that provision of listing services to a company does not cause foreseeable physical harm to the Plaintiffs) "cannot be reconciled with the TSX Defendant's general duty to investors as a group".

TSX Factum, para. 45

73. The proposed duty does not conflict with any duty allegedly owed to investors, and should not be used as a basis to deny the existence of a duty of care for four reasons.

74. First, what duties the TSX owes 'investors as a group' is not clear. As explained above, and in contrast to the cases of *Cooper* and *Morgis*, the TSX has delegated substantially all of its regulatory services to other independent organizations. This delegation of regulatory services has occurred on such a scale that it is unclear to what extent the TSX engages in any regulatory function whatsoever. The exact nature of the TSX's relationship to investors, including whether or not there is any real regulatory function, should be established at trial with the benefit of an evidentiary record.

IIROC Recognition Order; PBA Tab 18
TSX Recognition Order; PBA Tab 17

75. Second, the proposed duty to the Plaintiffs does not conflict with any duty potentially owed to investors. Rather, recognizing a duty of care to the Plaintiffs would likely support whatever duties the TSX owes to the investing public. For instance,

incorporating human rights considerations into listing decisions could reduce the instances of conflict between listed companies and local communities. This in turn, could reduce the risks to which investors are exposed. Recognizing new duties that are supportive of existing duties may have positive policy ramifications.

***Hill v. Hamilton-Wentworth Regional Police Services Board*, at paras. 43, 48; PBA, Tab 6**

76. Third, the Supreme Court has repeatedly held that even if a conflict or potential conflict exists, it will not necessarily negate a duty of care. A *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy considerations. In other words, it is not enough that there is a possible conflict, the conflict must be real and serious.

***Hill v. Hamilton-Wentworth Regional Police Services Board*, at paras. 40, 43; PBA, Tab 6**
***Fullowka v. Pinkerton's of Canada Ltd.*, [2010] S.C.J. No. 5, at para. 72; PBA, Tab 11**

77. Fourth, surely the law would not recognize and uphold a priority of the rights of investors over fundamental human rights of bodily integrity. To the extent that these duties may be found to conflict in some particular circumstance, a duty to investors would not be sufficient to absolve the Defendants of their fundamental duty not to be complicit in human rights violations.

There is no risk of indeterminate liability

78. There is no risk of indeterminate liability in this case.

79. The Plaintiffs submit that there is a principled basis in this case on which to draw the line between those to whom the duty is owed and those to whom it is not. Concerns of indeterminate liability do not arise because the scope of potential liability can adequately be circumscribed on the particular facts of the case.

***Fullowka v. Pinkerton's of Canada Ltd.*, at para. 70; PBA, Tab 11**
***Hercules Managements Ltd. v. Ernst & Young*, at para. 44; PBA, Tab 8**

80. As held by the Supreme Court, proximity will generally be the controlling concept which avoids the spectre of unlimited liability, especially in physical harm cases. The presence

of factors that indicate proximity in a given situation will mean that worries stemming from indeterminacy should not arise because the scope of potential liability is sufficiently delimited. These factors are described above in the section that describes the *prima facie* duty of care.

> ***Hercules Managements Ltd. v. Ernst & Young*, at para. 37; PBA, Tab 8**
> ***Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, at para. 62; PBA, Tab 13**

81. These proximity factors taken together create a particular class of individuals to whom a duty is owed.

82. Moreover, concerns regarding indeterminate liability are lessened by the fact that the TSX can readily control the liability to which it is exposed by exercising an appropriate standard of care. As the Statement of Claim points out, these reasonable steps may be as modest as "requiring those in industries associated with a high incidence of human rights abuse and other social harm to sign on to and participate in corporate social responsibility governance frameworks"

> **Statement of Claim 2007, para. 73; TSX Defendants MR, Tab 3 at p. 95**

83. Finally, and importantly, the concerns about indeterminate liability loom largest in negligence claims for pure economic loss where the potential economic losses flowing from a single act of negligence are indeterminate and potentially enormous. Such concerns do not arise in a case of physical harm such as this.

> ***Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, at para. 62; PBA, Tab 13**

84. In any event, if the TSX Defendants are concerned about liability that cannot be limited in the ways described above, that will be for the TSX to establish at trial. Without some demonstrated evidentiary foundation, the TSX Defendants' concern remains speculative.

> ***Sauer v. Canada (Attorney General)*, [2007] O.J. No. 2443(CA), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 454 at para. 45-47; PBA, Tab 14**

Policy Considerations Regarding the Protection of Human Rights Support Recognizing a Duty of Care

85. There are significant policy reasons that suggest that a duty of care should be recognized in the present circumstances. The details of these policy reasons, as with all policy arguments, depend upon a full factual record. Much of the following is an example of the kind of policy arguments that will be put forward, with evidence, at trial.

86. Canada, through the Canadian *Charter of Rights and Freedoms*, and through the adoption of international human rights instruments such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, has indicated strong state support for the promotion and protection of human rights.

87. In 2005 the Parliamentary Standing Committee on Foreign Affairs and International Trade presented a report to the Government of Canada in which it outlined concerns regarding the systemic involvement of Canadian mining companies in human rights violations in developing countries.

Statement of Claim 2007, para. 60; TSX Defendants MR, Tab 3 at p. 90

88. Supreme Court of Canada Justice Ian Binnie has raised concerns that globalization has created "governance gaps" which make it difficult for societies to redress human rights abuses committed by or on behalf of private enterprise.

> The root cause of the business and human rights predicament lies in the **governance gaps created by globalization**—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. **These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.** [emphasis added]
>
> **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 p. 45; PBA, Tab 15.**

89. Part of this governance problem is created by the ease with which corporations can raise large amounts of capital on the Toronto Stock Exchange for use in countries where the risk of corporate involvement in human rights abuse is high. According to Justice Binnie, the governance problem is the result of the combined effect of several factors including the "ever-expanding reach of global trade, concomitant global interdependency, the

increasing economic influence of transnational companies, and the increasing political influence of such companies in war-torn and economically depressed countries in which the latent risk of human rights abuse is highest."

Justice Ian Binnie, "Legal Redress" at p. 45; PBA, Tab 15

90. The Plaintiffs have pleaded that the Toronto Stock Exchange specifically markets and promotes itself to companies who are operating, or are contemplating operating, in countries with weak governmental institutions, and where there is a high risk of conflict and violence, and where the latent risk of human rights abuse is highest, and further that it does so without considering the impact of providing financing to corporations operating in such environments.

Statement of Claim 2007, para. 35, 121; TSX Defendants MR, Tab 3 at pp. 85, 112
Justice Ian Binnie, "Legal Redress" at p. 45; PBA, Tab 15

91. This problem can and should be addressed, at least in part, using existing domestic law tort principles. As Justice Binnie has noted "there is no need for novel solutions. The legal basis of the duty to respect human rights ought to be related to well-established corporate concepts and legal principles."

Justice Ian Binnie, "Legal Redress" at p. 47; PBA, Tab 15

92. A policy argument can and will be made at trial that recognizing the duty of a stock market to take into account the human rights consequences of listing a company on its exchange when considering a listing application is an effective and efficient way of responding to the "governance gaps" highlighted by Justice Binnie. The recognition of such a duty is consistent with and furthers Canada's commitment to the promotion and protection of human rights. Further, such recognition could in fact be in the long term interests of Canada's mining industry operating abroad by establishing Canada's mining industry as a desirable partner in other countries, rather than being tainted by the association of human rights abuse.

Policy Considerations Should Not Be Used to Strike Out a Statement of Claim

93. In any event, the above policy argument, as with all policy arguments, should be examined on the basis of a proper evidentiary record. Only then can all of the policy

arguments, both for and against the recognition of a duty, be properly considered and weighed.

94. Courts are reluctant to dismiss a claim on policy grounds and without considering evidence on which the court can analyze the strengths and weaknesses of the policy arguments.

> The court "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."
>
> ***Sauer v. Canada (Attorney General)*, [2007] O.J. No. 2443(CA), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 454 at para. 45**

If the Claim is Struck, Leave to Amend Should Be Granted

95. Even if it is held (contrary to the Plaintiffs submissions) that the pleadings in their current form do not disclose a valid cause of action against the TSX the correct order is to strike the offending paragraphs with leave to amend. Leave to amend will only be refused in the clearest of cases. Even in cases where the court is of the view that it is very unlikely that a proper pleading can be fashioned, courts have shown great reluctance to strike out a cause of action without leave to amend.

> **Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd., [2001] O.J. No. 1068 at para. 30 (Sup. Ct.); PBA, Tab 19**

2009 Action Is Not an Abuse of Process and Should Be Consolidated with the 2008 Action and the 2007 Action

96. As the TSX Defendants observe, the Plaintiffs have brought what are now two identical actions against the TSX Defendants.

a. Action No. CV.10-8577-00CL, ("the 2007 Action")

b. Action No. CV-10-8576-00CL ("the 2009 Action")

97. The Plaintiffs are seeking to have the above Actions consolidated. The Plaintiffs' Consolidation Motion is being heard at the same time as the TSX Defendants' Motion to Strike.

Plaintiffs' Notice of Motion to Consolidate Three Related Actions.

98. As was made clear in the Statement of Claim in the 2009 Action, this Action was brought as a proposed consolidation of claims previously brought the 2007 Action. The Statement of Claim in the 2009 Action was issued for the sake of convenience in order to give all parties and the courts a unified document to which the parties and the court could refer, and in order to remedy concerns related to the service of the Copper Mesa Defendant John Gammon.

Statement of Claim dated March 3, 2009 (CV- 09-373561) now CV-10-8576-00CL ["Statement of Claim 2009"], at para. 154; TSX Defendants MR, Tab 2 at p. 58

99. At all times, the Defendants have been informed of the Plaintiffs intention to seek consolidation.

Statement of Claim 2009, at para. 154; TSX Defendants MR, Tab 2 at p. 58
Statement of Claim 2007, at para. 143; TSX Defendants MR, Tab 3 at p. 117

100. The practical usefulness of the unified Statement of Claim in the 2009 Action has already been demonstrated. In their motion to strike (heard at the same time as the present one), the Copper Mesa Defendants refer to only the pleadings in the 2009 Action in light of the proposed consolidation.

Factum of the Defendants Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon (Defendant's Rule 21 Motion, returnable March 25, 2010). at para. 5.

101. Not all of the claims made against the TSX Defendants in the 2009 Action are statute barred. In order to calculate a limitations period, "the clock starts running" when the Plaintiff has a cause of action. The Plaintiff Polivio Pérez suffered threats and an assault in June and July 2007 as a result of the Defendants' earlier actions. The 2009 Action was commenced on March 3, 2009, well within the two year limitation period.

***Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B, ss. 4 & 5.**

102. In cases where plaintiffs have brought sequential and very similar claims, courts have held that the appropriate remedy to the situation is to consolidate the claims, not to strike the later as an abuse of process. For example, in *I.C. Farms Ltd. v. Hironaka*, a plaintiff brought one action in Calgary and another in Edmonton that added parties to the original claim but was otherwise almost identical. The defendants in *I.C. Farms* raised

limitations issues and argued that the later claim should be struck as an abuse of process. In that case, the court ordered that the claims be consolidated and held:

> I am satisfied, however, this is not an abuse of process situation. The second action was clearly – the way it is designed – to overtake the first action and in fact to expand both parties and damage claims in this instance. That, in and of itself, is not an abuse of process. That in fact seems to me to be one of sort of the ordinary incidents of litigation.
>
> ***I.C. Farms Ltd. v. Hironaka*, 2005 ABQB 71 (CanLII), at para. 43; PBA, Tab 16**

103. As will be argued in the Plaintiffs' Motion to Consolidate, heard at the same time as the TSX Defendants' Motion to Strike, the appropriate remedy is consolidation.

PART IV – ORDER REQUESTED

104. The Plaintiffs seek:

a. An order that the TSX Defendants' motion to strike be denied; and

b. Costs of the motion

All of which is respectfully submitted this 12th day of March, 2010

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