CITATION: Piedra v. Copper Mesa Mining Corporation, 2010 ONSC 2421
Court File Nos.: CV-10-8575-00CL, CV-10-8576-00CL, CV-10-8577-00CL
DATE: 20100507

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	Court File No. CV-10-8575-00CL
MARCIA LUZMILA RAMÍREZ PIEDRA, JAIME POLIVIO PéREZ LUCERO and ISRAEL PéREZ LUCERO Plaintiffs	*Murray Klippenstein, Basil Alexander* for the Plaintiffs Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero
- and -	
COPPER MESA MINING CORPORATION, WILLIAM STEARNS VAUGHAN and JOHN GAMMON Defendants	*John A. Keefe, Peter Kolla* for the Defendants Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon
AND B E T W E E N:	Court File No. CV-10-8576-00CL
MARCIA LUZMILA RAMÍREZ PIEDRA, JAIME POLIVIO PéREZ LUCERO and ISRAEL PéREZ LUCERO Plaintiffs	*Murray Klippenstein, Basil Alexander* for the Plaintiffs Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero
- and -	
COPPER MESA MINING CORPORATION, WILLIAM STEARNS VAUGHAN and JOHN GAMMON Defendants	*John A. Keefe, Peter Kolla* for the Defendants Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon
AND B E T W E E N:	Court File No. CV-10-8577-00CL
JAIME POLIVIO PéREZ LUCERO and ISRAEL PéREZ LUCERO Plaintiffs	*Murray Klippenstein, Basil Alexander* for the Plaintiffs Jaime Polivio Pérez Lucero and Israel Pérez Lucero
- and -	
TSX INC., TSX GROUP INC., WILLIAM	*Peter H. Griffin, Andrew Parley,* for the

STEARNS VAUGHAN and JOHN GAMMON

Defendants

) Defendants TSX Inc. and TSX Group Inc.
) *John A. Keefe, Peter Kolla* for the
) Defendants William Stearns Vaughan and
) John Gammon
)
) **HEARD: March 25, 2010**

REASONS FOR DECISION

[1] Motions were heard in related actions to strike out the claims of the Plaintiffs under Rule 21.01 [b.] of the *Rules of Civil Procedure* on the basis that the Statements of Claim do not disclose a reasonable cause of action against the respective Defendants.

[2] Several separate actions have been commenced against each set of Defendants. For the purposes of dealing with these motions I will consider only the latest Statements of Claim.

[3] Each of the Claims is lengthy and complex, being over 50 pages in length and containing 150 individual paragraphs. For the purposes of these motions, however, the salient facts can be specifically stated.

[4] The Plaintiffs are natives of Ecuador who have opposed the mining, exploration and development proposed by a company in Ecuador that is a subsidiary of a Bahamian subsidiary of the Defendant Copper Mesa Mining Corporation ("Copper Mesa.")

[5] Copper Mesa is a British Columbia incorporated corporation that does business through various subsidiaries, including one in the Bahamas, which in turn owns the Ecuadorian subsidiary responsible for exploration and development in that country.

[6] Other than having its shares registered on the Toronto Stock Exchange ("TSX"), Copper Mesa does not appear to have any connection with Ontario. The Defendants Vaughan and Gammon are residents of Ontario who in 2006 and 2007 respectively became non-management directors of Copper Mesa.

[7] None of the remaining board of directors or the officers of Copper Mesa or any of its subsidiaries is named as defendants in either action. The only claim made against Copper Mesa in these actions is in respect of vicarious liability for the alleged failures of Messrs. Vaughan and Gammon.

[8] The TSX operates a stock exchange in Toronto and is incorporated by virtue of the *Toronto Stock Exchange Act*, R.S.O. 1990 ch. T-15 and related statutes. The claim in the action against TSX is that it owed duties to the Plaintiffs in connection with the actions of the Copper Mesa subsidiary in Ecuador as a result of Copper Mesa raising funds through a public offering.

[9] An issue arose at the commencement of the hearing on these motions with respect to what use, if any, could be made by any party to a Prospectus of Copper Mesa dated October 14, 2005, which was filed by Copper Mesa with the TSX.

[10] Counsel for the Plaintiffs referred in oral submissions to various selected passages to establish particulars of the knowledge on the part of the Defendants in both actions in respect of opposition in Ecuador to the mining development proposed by Copper Mesa.

[11] In resolving the objection by counsel for Copper Mesa and the Defendant directors to the Prospectus constituting "evidence" on these motions, it was agreed that the Court could take notice that the Prospectus contained a quantity of references to the fact of confrontation between various individuals and groups and security forces associated with the Copper Mesa subsidiary at the proposed site of exploration and development in Ecuador.

[12] The Plaintiffs state that it is at the heart of their claims that Copper Mesa and individual company directors and the TSX were aware of opposition and confrontation and failed to take any steps to avoid violence between those who were associated or contracted by Copper Mesa and various individual Ecuadorians, including the Plaintiffs and their supporters.

[13] The Plaintiffs assert in considerable detail allegations that the Defendants in these actions knew or ought to have known that violence would ensue once Copper Mesa was listed and financed through the TSX unless Copper Mesa took steps to ensure that its agents, employees and contractors were authorized to prevent violence.

Rule 21

[14] Counsel for both the Plaintiffs and the Defendants agree that the Rule 21 test is whether it is "plain and obvious" that the impugned actions should not proceed to trial on the basis that they disclose "no reasonable cause of action." (See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.)

Claim against TSX Defendants

[15] As against the TSX Defendants the action is pleaded in negligence. The duty of the TSX Defendants is pleaded as a duty to the Plaintiffs (a) "not to list a corporation when there is a reasonably foreseeable and serious risk that funds raised on the Exchange will be used in such a way as to harm individuals such as the Plaintiffs;" or in the alternative, (b) "not to list a corporation on the Exchange without instituting precautionary measures to prevent a serious risk that funds raised through the Exchange will be used to harm individuals such as the plaintiffs."

Claim against Copper Mesa Defendants

[16] The Plaintiffs claim that they were assaulted or threatened in Ecuador by the Security Forces or agents, employees or affiliates of the Company or its subsidiaries. However, the

Claims do not allege that the Directors authorized or directed the Security Forces, agents, employees or affiliates to commit the assaults or threats, nor that they supervised them.[1]

[17] Instead, the factual allegations against the Directors are that they:

(a) operated the company in a manner that created a high risk of violence against community members opposed to the proposed Junín project;
(b) approved corporate policies and practices intended to eliminate opposition to the Junín project, including policies and practices relating to the Security Forces;
(c) approved funding for Security Forces, agents and affiliates of the Company or its subsidiaries who were likely to commit assaults and threats in the future;
(d) failed to adequately supervise the Company's management;
(e) failed to implement corporate policies and practices to prevent threats and assaults by the Security Forces, agents or affiliates;
(f) failed to join corporate social responsibility governance frameworks; and
(g) failed to raise concerns and investigate past incidences of violence.[2]

[18] It is again to be noted that the liability of Copper Mesa is founded on the failure of the two named non-management directors to cause the companies to take the steps referred to.

Analysis and Law

[19] 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.

[20] It is urged by the Plaintiffs that the TSX's act of listing Copper Mesa was the necessary precondition strenuously pursued by Copper Mesa, which triggered and enabled the harms inflicted on the Plaintiffs. The TSX is said to have known 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, it is said, the Plaintiffs would not have been subjected to these threats and assaults.

[21] As against the Copper Mesa Defendants, Vaughan and Gammon, the Plaintiffs allege that these Defendants had knowledge of the risk of harm to the Plaintiffs prior to the assaults and threats that are at issue in the lawsuit. The pleadings state Vaughan knew or should have known of past violent confrontations that occurred prior to his directorship that were perpetrated by individuals under Copper Mesa's control; Vaughan is said to have had access to, and would have reviewed, corporate documents that discuss allegations of violence committed on behalf of Copper Mesa, including Copper Mesa's Prospectus; the Board on which Vaughan sat is said to

[1] 09-Claim, paras. 49-54, 59-60; Directors Motion Record, Tab 4
[2] 09-Claim, paras. 95, 1[illegible]3; Directors Motion Record, Tab 4

have extensively discussed and considered the on-going conflict in Junín, the major barriers facing Copper Mesa's operation, and allegations of violence and threats of violence made against the corporation; Vaughan was or should have been aware of the numerous and widely published reports on various junior mining companies that have committed violence against local opposition to mining in developing countries through the use of private security forces.

[22] The pleadings further state that prior to the assaults of December 2, 2006 and despite his "knowledge of the specific danger posed by Copper Mesa", Vaughan, among other acts, approved corporate practices intended to eliminate widespread opposition to the proposed Junín Project, including practices relating to security forces; approved funding to security forces and other individuals under Copper Mesa's control who had in the past and were likely in the future to assault and threaten members of the community opposed to the Junín Project; 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 committed by individuals under Copper Mesa's control.

[23] As against Mr. Gammon it is alleged John Gammon joined Copper Mesa's Board of Directors on February 27, 2007. As explained above regarding Vaughan's knowledge, Gammon had knowledge of the risk of harm to the Plaintiffs prior to the assaults and threats that occurred in June and July of 2007.

[24] It is further alleged that on April 27, 2007, Carlos Zorrilla, a community member from the Junín area, met with Vaughan and with Gammon in Toronto, Ontario to ensure that they were aware of the violence, death threats and physical assaults committed by individuals under the control of Copper Mesa. Zorrilla showed Vaughan and Gammon photographs that depicted Copper Mesa security forces pepper-spraying an unarmed group of women and children, and drawing and shooting their guns. He further told them of the likelihood of future violence, and asked for their commitment that the violence would stop.

[25] It is further alleged that prior to threats and assaults that occurred in June and July 2007, and despite their knowledge of the specific danger posed by Copper Mesa, Vaughan and Gammon, among other things approved corporate practices intended to eliminate widespread opposition to the proposed Junín Project; approved funding to individuals under Copper Mesa's control who had in the past and were likely in the future to assault and threaten members of the community opposed to the Junín Project; 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 committed by individuals under Copper Mesa's control.

Legal Analysis

[26] Counsel are agreed that the test for determining whether or not any of the Defendants owe a duty of care to the Plaintiffs starts with the test as set out in the 1977 decision of the House of Lords in *Anns v London Borough of Merton*, [1998] A.C. 728.

[27] That test has been refined in decisions of the Supreme Court of Canada and of the Court of Appeal for Ontario in recent years. The decision of the Ontario Court of Appeal in *Williams v Canada (Attorney General)*[3] contains a succinct summary of the application of the test.

[28] Mr. Justice Sharpe speaking for the Court commencing at paragraph 12 said the following:

> 2. The *Cooper-Anns* Test and the Duty of Care
>
> [12] It is common ground that the test for determining whether a duty of care exists in a given situation is that enunciated by the Supreme Court of Canada in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, and *Cooper v. Hobart*, [2001] 3 S.C.R. 537 ("*Cooper*"). This test has its origin in the House of Lords decision in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492, and I will refer to it as the *Cooper-Anns* test.
>
> [13] Before applying the *Cooper-Anns* test in any given action, the court must first determine whether the duty of care asserted by the plaintiff has already been recognized by the law. *Cooper* holds that if the facts of the case bring it within a category that has already been recognized as giving rise to a duty of care, a duty of care is thereby established, and it is unnecessary to engage in the two step *Cooper-Anns* test: *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, at para. 15 ("*Desormeaux*"). If the proposed duty of care has not been recognized, then the *Cooper-Anns* test is used to determine whether the novel duty should be given legal recognition.
>
> [14] The *Cooper-Anns* test consists of two stages. The first stage, which determines whether the relationship between the parties justifies the imposition of a duty of care on the defendant, involves consideration of foreseeability, proximity and policy. For a duty of care to arise, more is required than foreseeability - the two parties must also be sufficiently proximate to one another: *Desormeaux* at para. 12. Proximity, explained the court in *Cooper* at para. 31, "is generally used in the authorities to characterize the type of relationship in which a duty of care may arise." Two parties are in proximity with one another if their relationship is sufficiently close and direct that it is fair to require the defendant to be mindful of the legitimate interests of the plaintiff: *Cooper* at paras. 32-34. The evaluation of whether a relationship is sufficiently proximate to ground a duty of care entails a consideration of the "expectations, representations, reliance, and the property or other interests involved. Essentially…factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care": *Cooper* at para. 34.
>
> [15] While a number of different factors may be helpful in determining whether proximity exists between two parties, the Supreme Court has stated that proximity is not defined by any "single unifying characteristic", nor is there a clear test to be applied to determine whether proximity exists in a given case: *Cooper* at para. 35. In *Cooper*, the court held that the statutory duty imposed on the Registrar of Mortgage Brokers to oversee the conduct of mortgage brokers was owed to the public as a whole, rather than to individual mortgage investors. While losses to investors were reasonably foreseeable from carelessness in carrying out the Registrar's duties, there was nothing in the statute or in the relationship between individual investors and the regulator to create the required element of proximity. In a companion case, *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 ("*Edwards*"), the court rejected on similar grounds the proposition that the body given power to regulate the legal profession in Ontario owed a duty of care to individuals who had entrusted funds to an errant solicitor.

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[3] *Williams v. Canada (A.G.)* (2009), 95 O.R. (3d) 401 (C.A.), *Williams v. Ontario*, 2009 ONCA 378, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 298

Claim against TSX

[29] The position of the Plaintiffs is that in applying the two-stage *Cooper-Anns* test, 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.[4]

[30] 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.

[31] The Plaintiffs' position is summarized in paragraph 19 of the Plaintiffs' counsel's factum in response to the TSX motion:

> 19. Members of the communities surrounding Junin 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.

[32] Counsel for the TSX submits that the duties alleged by the Plaintiffs are not duties recognized by law. It is submitted that they do not fit into any of the categories of previously recognized claims nor are they analogous to any of those categories.

[33] In *Cooper v Hobart*,[5], the Supreme Court of Canada noted at paragraph 35:

> ...the factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic"

and at paragraph 36

> What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendants act foreseeably causes physical harm to the plaintiff or the plaintiff's property.

[34] The position of the TSX is that the Plaintiffs have not met the requirement of foreseeability (namely, that the alleged harm must have been reasonably foreseeable) or that of proximity (that there must be a relationship of sufficient proximity between the plaintiffs and the defendants.) In this context reliance is placed on the decision of the Supreme Court of Canada in *Syl Apps Secure Treatment Center v. B. D.*[6] in the following passage:

> 24. To determine whether there is a *prima facie* duty of care, we examine the factors of reasonable foreseeability and proximity. If this examination leads to the *prima facie* conclusion that there should be a duty of care imposed on this particular relationship, it remains to determine whether there are nonetheless additional policy reasons for not imposing the duty.
> 25. The basic proposition underlying "reasonable foreseeability" is that everyone "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (*Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), *per* Lord Atkin, at p. 580). The question is whether the person harmed was "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected" (*ibid.*).
> 26. There must also be a relationship of sufficient proximity between the plaintiff and defendant. The purpose of this aspect of the analysis was explained by Allen Linden and Bruce Feldthusen in *Canadian Tort Law* (8th

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[4] See *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para. 34 and *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 at para 25.
[5] *Cooper v Hobart*, [2001] S.C.J. No. 76
[6] *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83

> ed. 2006) as being to decide "whether, despite the reasonable foresight of harm, it is unjust or unfair to hold the defendant subject to a duty because of the absence of any relationship of proximity between the plaintiff and the defendant" (p. 304).

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

[36] In addition to foreseeability, there must be proximity. A duty of care should not be imposed unless there is a relationship of sufficient proximity between the defendant and the plaintiff. Mere foreseeability is insufficient to found a *prima facie* duty of care. See *Morgis v. Thomson Kernaghan & Co.* [7]

[37] Counsel for the Plaintiffs sought to counter any suggestion that the TSX was a statutory body and therefore subject to greater immunity from claim by noting the private for-profit nature of its business. The *Toronto Stock Exchange Act* does provide some help in defining the nature of its business in listing companies to enable the public to trade shares in those companies on the Exchange.

[38] I accept the submission on behalf of the TSX Defendants that there is no connection between the Plaintiffs and the TSX Defendants. The Plaintiffs did not participate in the Canadian capital markets and are not investors or shareholders in Copper Mesa. There is no relationship, let alone one of sufficient proximity, to impose an obligation on the TSX Defendants to be mindful of the Plaintiffs' interests when conducting their affairs. The TSX is itself governed by a statutory regime of securities regulation rooted in s. 21(2) of the *Securities Act,* which empowers the Ontario Securities Commission to recognize a stock exchange in Ontario.

[39] A similar conclusion was reached by the Court of Appeal for Ontario in respect of a claim against the Investment Dealers Association of Canada in holding,

> tort liability may not be imposed on a voluntary regulator of securities dealers at the instance of members of the investing public who complain of the regulator doors alleged failure to ensure their competence and good character of a dealer's representatives and to adequately supervise, monitor, investigate and discipline the dealer.[8]

[40] Given the conclusion that I have reached, it is not necessary to consider the second branch of the *Anns* test that relates to policy considerations underlying the relationship. I will, however, deal with this argument after consideration of the position of the individual Defendants and the corporate Defendant Copper Mesa.

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[7] *Morgis v. Thomson Kernaghan & Co.* (2003), 65 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 400.

[8] [See *Morgis v Thomson Kernaghan & Co.*, [2003] O.J. No. 2504.]

Claim against Messrs. Vaughan, Gammon and Copper Mesa

[41] It would appear from the pleading that the sole contact on which the Plaintiffs seek to found liability against the individual Defendants is a meeting on April 27, 2007 where it is alleged a community member from the area of exploration in Ecuador sought to advise them of confrontation and risk of violence.

[42] I note again that the two individual Defendants had recently become directors and were not involved at the time a prospectus was filed with the TSX and were not part of the management of any of the Copper Mesa entities.

[43] The acts complained of against the individual Defendants are summarized in paragraph 34 of the Plaintiffs' factum in response to Copper Mesa's motion:

> 34. The Plaintiffs have specifically pleaded that Vaughan and Gammon intentionally and consciously engaged in tortious actions and omissions which caused harm to the Plaintiffs, and further that Vaughan and Gammon permitted and condoned the threats of violence and acts of violence that are at the heart of these actions.

[44] Counsel for the Plaintiffs acknowledges that the only involvement of Copper Mesa in this action relates to vicarious liability for the alleged tortious acts of the individual directors.

[45] The position of the individual Defendants is that none of these alleged acts or omissions creates a personal nexus between the Directors and harm to the Plaintiffs that is sufficient to support personal liability. A director is only liable in tort for his or her personal tortious acts or omissions. None of these alleged acts or omissions is itself tortious because any link between these acts and omissions by the Directors and the events in Ecuador is far too tenuous and would effectively negate the basic principle that directors are only personally liable for personal torts.

[46] The individual Defendants go on to assert that the Claims admit this tenuous connection as they state that the Directors' omissions listed above constitute "tacit approval" of past violent actions in Ecuador and approval through silence was "tantamount to an authorization of future acts of violence." The Plaintiffs' allegation is that the Security Forces, agents, affiliates or employees in Ecuador received only "silence" from the Directors. But the Claims do not allege that the Security Forces, agents, affiliates or employees ever followed corporate policies or practices or took any instructions regarding the threats and assaults from anyone associated with the Company, particularly these non-management Directors. As such, "silence" from the Directors cannot establish the requisite personal nexus between the acts and omissions of the Directors and what allegedly occurred in Ecuador to the Plaintiffs. Reliance is placed on the decision of Nordheimer J. in *Abdi*[9].

[47] In that case, the pleadings against the officers on a Rule 21.01 (1)(b) were struck with the following finding:

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[9] *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.T.C. 203 (Ont. S.C.J.)

> I also have difficulty with the nature of the allegations made here being characterized as personal torts of the officers. It is hard to see how the failure to implement policies and procedures could be otherwise than a failing of the corporations, albeit a failing caused by the corporations' human agencies.[10]

[48] There is nothing in the allegations in the Statement of Claim that satisfies me that the conduct alleged is of the type of personal conduct by a director that could ground personal liability. I agree with the submission of Mr. Keefe on behalf of the individual Defendants that if directors of companies could be found to be personally liable for this type of activity, it would negate the concept, as enunciated in numerous cases, that directors of limited companies are protected from personal liability unless their actions are themselves tortious. (See *Williams v. Canada (A.G.), supra* and *Childs v. Desormeaux, supra*.

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

Policy Considerations

[50] While not necessary to do so based on the findings above, I do conclude that the policy considerations that are part of the *Cooper-Anns* are not met in this case. In *Williams, supra,* Sharpe J.A. at paragraphs 16 and 17 sets out the analysis:

> [16.] At both stages, the *Cooper-Anns* test involves looking at policy reasons for refusing to impose a duty of care on the defendant. At the first stage, when determining whether to recognize a prima facie duty of care, the policy reasons must arise from the nature of the relationship between the parties, rather than any external concerns, which are not considered until the second stage of the test: *Cooper* at para. 30.
>
> [17] If the first stage of the *Cooper-Anns test* is met, the plaintiff has established a *prima facie* duty of care owed by the defendant and the analysis proceeds to the second stage. It is here that the court considers whether there are "residual policy considerations" that militate against recognizing a novel duty of care: *Cooper* at para. 30. These are policy considerations that "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper* at para. 37. One such residual policy concern is the need to immunize the policy decisions of the government from tort liability: *Cooper* at para. 38. Policy decisions, as contrasted with operational decisions, are based on social, political or economic factors: *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, at p. 455 ("*Swinamer*"). Determining whether a governmental decision is a policy decision requires evaluating the nature of the decision itself, rather than the identity of the actors: *Swinamer* at p. 457.

[51] I can well understand the concern on the part of citizens of countries in which Canadian companies do business to ensure that the actions of those companies are carried out with the same kind of care and attention as if they were conducted in Canada.

[52] In the materials submitted on behalf of the Plaintiffs, reference was made to a number of statements of human rights principles, including remarks of an eminent Canadian jurist. Such personal comments are not sufficient to found a policy duty, particularly when one considers the limited statutory-based mandate of the TSX and the very limited involvement of two non-

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[10] *Abdi, supra* at paragraph 13

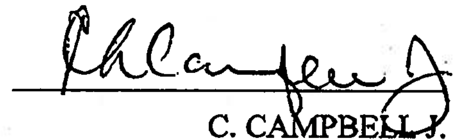
management directors of a company that does not do business in Ontario. I am not satisfied there are any policy considerations that would at this stage argue in favor of extending liability.

[53] If there were to be policy considerations that would favor extending liability as sought by the Plaintiffs, such policy would appropriately be a matter for legislatures and not the courts, at least on these facts.

Conclusion

[54] For the above reasons the motions to strike on behalf of both the TSX Defendants and Copper-Mesa and the individual Defendants will be granted. In the circumstances I do not think that anything would be achieved by granting leave to amend the Statement of Claim and accordingly the motion is granted without leave to amend.

[55] If it is necessary to deal with the issue of costs, counsel may make written submissions within the next two weeks.



C. CAMPBELL J.

Released: May 7, 2010

TOTAL P.013

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ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Court File No. CV-10-8575-00CL

BETWEEN:

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)

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

BETWEEN:

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)

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

BETWEEN:

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)

REASONS FOR DECISION

C. CAMPBELL J.

Released: May 7, 2010