Environmental Managers Asssociation Legal Update: Recent Case Law

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Outline

- **Contaminated Site Cases**
- **Prosecutions**
- **Environmental Assessment Cases**
- **Jurisdictional Issues**

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Domovitch v. Willows, 2016 BCSC 1068

- Cost-recovery action for historical contamination resulting from an underground oil storage tank.

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Domovitch v. Willows, 2016 BCSC 1068

- Willows sold land containing a UST to Hult in 1991
- Hult decommissioned the tank and then sold the land to Domovitch in 2004
- Domovitch later discovered (and paid to remediate) contamination caused by a leak in the UST, when selling the property in 2015
- Remediation costs $38,845
- Domovitch sues Willows, but not Hult
- Willows seeks an indemnity from Hult

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Domovitch v. Willows, 2016 BCSC 1068

Persons not responsible for remediation

46 (1) The following persons are not responsible for remediation of a contaminated site:

[…]

(d) an owner or operator who establishes that

(i) at the time the person became an owner or operator of the site,

(A) the site was a contaminated site,

(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and

(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

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Domovitch v. Willows, 2016 BCSC 1068

- Domovitch deemed to be an “innocent purchaser.”
- Did not have reason to suspect that the property was contaminated
- Insisted on receiving proof from Hult that the tank had been decommissioned
- Made it a term of the contract
- Reasons focus on Domovitch’s subjective assurance rather than what a reasonable person would believe.

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Domovitch v. Willows, 2016 BCSC 1068

- Both Willows and Hult were held to be responsible persons since contamination occurred while they owned the property.
- Willows used a heating oil tank during her period of ownership – 40% liable
- Hult also “probably” used the heating oil tank during period of ownership prior to decommissioning – 60% liable

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Tri-City Contracting Ltd. v. Leko Precast Ltd., 2016 BCSC 623

- Application to have site remediation recovery action struck for want of prosecution
- Plaintiff was contractor on Coquihalla Highway project in 2005
- Defendant built restroom sewage system for toll booths.
- Contamination was discovered shortly thereafter after when the booths were dismantled.
- Writ was filed in 2007. Statement of Claim filed in 2010
- File was advanced sparingly between 2010 and 2016.
- Defendant engineer swore he now had little memory of the project.

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Tri-City Contracting Ltd. v. Leko Precast Ltd., 2016 BCSC 623

- Delay between 2007 and 2011 was justified because plaintiff was waiting for damages to stabilize and waiting to settle claim by Ministry (2010).
- Was delay inordinate and inexcusable?
- Delay between 2011 and 2016 was inordinate.
- However, the delay was excusable because the plaintiff was unaware that delay could result in claim being strike, plaintiff was not seeking to get an advantage, and there was no “serious” prejudice to the defendants.

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Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., 2016 BCSC 489

- Defendants were permitted to import contaminated soil in permanently encapsulated cells to backfill their quarry as part of site reclamation requirements.
- Operation including both a landfill facility and a soil treatment facility.
- Municipality claimed activity violated local land-use bylaws. Defendants claimed they were exempt from bylaws because reclamation is a mining activity.

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Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., 2016 BCSC 489

- Supreme Court: reclamation is not an integral, core mining activity because reclamation is not a necessary aspect of the extraction process.
- Backfilling is properly characterized as a landfill, which can be validly restricted by local bylaws.
- Injunction granted against operating the landfill facility and the soil treatment facility.

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Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., 2016 BCCA 432

- Court of Appeal: backfilling a quarry is not a landfill *per se* because it is not a dump for municipal waste.
- Site reclamation is an integral part of mining regulatory regime: “excavation of a quarry and its site reclamation are simply two sides of the same coin.”

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Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., 2016 BCCA 432

- However, Court of Appeal held soil treatment facility was not integral to reclamation process. Soil could be treated anywhere and it was not necessary that soil be treated on site.
- Injunction against operating the landfill facility was lifted but the court upheld the injunction against operating the soil treatment facility.

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Revolution Infrastructure Inc. v. Lytton First Nation, 2016 BCSC 1562

- Interlocutory injunction application to stop Lytton First Nation from enforcing its bylaw preventing Revolution Infrastructure Inc. from using a road passing through Lytton First Nation's reserve.

- Plaintiff operates an organic composting facility on the McKay Ranch.

- LFN claims nuisance noise, "unbearable" odour, whiteflies, increase in rat population

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Revolution Infrastructure Inc. v. Lytton First Nation, 2016 BCSC 1562

- Revolution Infrastructure Inc. argued the road is a public road and Lytton First Nation has no authority to pass enforce the by-law
- Court agreed with Revolution Infrastructure Inc.
  - Lytton First Nation had allowed the road to be used by others for many years
  - Revolution Infrastructure would suffer irreparable harm to its business operations if the injunction was permitted.
  - Status quo should be preserved during ongoing facilitation process

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British Columbia v. Canada Forest Products Ltd., 2016 BCSC 1261

- B.C. claimed $5.5. million in damages for negligence and breach of contract for causing a 6,100 hectare wildfire near Vanderhoof, B.C.
- B.C. claimed the defendant's feller buncher started the fire and that the fire would have been contained sooner if the defendant had the required number of fire watchers on site.
- The defendants counterclaimed for inadequately responding to the fire.

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British Columbia v. Canada Forest Products Ltd., 2016 BCSC 1261

- The court held that B.C. failed to prove the defendant started the fire.
- There was no direct evidence that the feller buncher started the fire.
- On the other hand, weather reports stated and witnesses reported that there was lighting in the area, which was therefore the more likely cause.

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British Columbia v. Canada Forest Products Ltd., 2016 BCSC 1261

- The court found that the defendant had less fire watchers than required by the *Wildfire Regulation*.
- However, B.C. failed to prove that more fire watchers would have limited the damage.
- It was speculative where and when the fire started and, as a result, unclear whether the fire would have been suppressed had additional fire watchers been on site.

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British Columbia v. Canada Forest Products Ltd., 2016 BCSC 1261

- The court dismissed the plaintiff's claim.
- The court also dismissed the defendant's counterclaim.
- Although the Crown owed the defendants a duty of care and its response could have been better, it was not a substantial departure from firefighting standards.

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R. v. Teck Metals Ltd. (unreported)

- Teck Metals operates the world's largest lead-zinc smelter.
- 125 million litres of effluent consisting of heavy metals was released into Columbia River
- Release occurred through 13 separate incidents over 15 month period.

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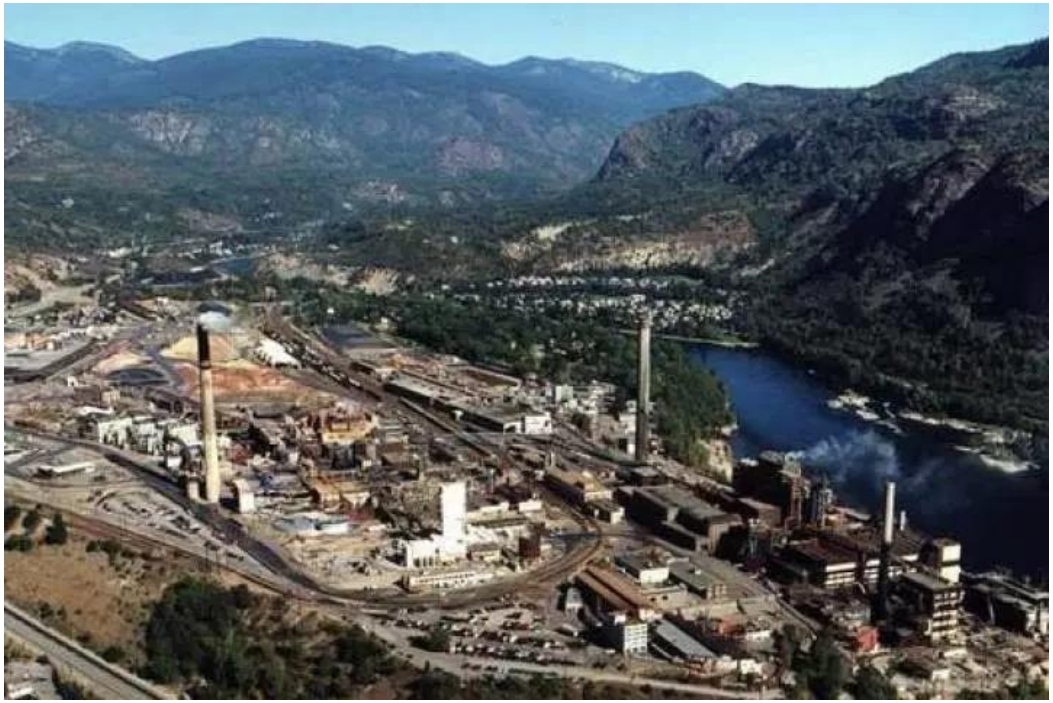
R. v. Teck Metals Ltd. (unreported)



- Teck Metals Ltd. fined $3.4 million for offences under federal and provincial environmental legislation.
- Largest environmental offence penalty in B.C. history.
- Also ordered to conduct on-site improvement projects that will costs $50 million.

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R. v. Northern Pulp Nova Scotia Corp., 2016 NSPC 29

- Defendant charged under the *Fisheries Act* for releasing 47 million litres of effluent into the East River/Pictou Harbour
- The effluent escaped from a pipeline that ran between the defendant's mill and treatment plant.

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R. v. Northern Pulp Nova Scotia Corp., 2016 NSPC 29

- Mitigating factors: the defendant had no prior record, accepted responsibility, conducted proper remediation, and the release is unlikely to cause long-term damage to the environment.
- Aggravating factors: that the release "was an accident that waiting to happen." The defendant failed to conduct inspections even though the pipeline had a history of leaks.
- Its conduct was on the midway scale of culpability.
- Court accepted joint recommendation of $225,000 fine.

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R. v. Morshedian, 2016 BCPC 80

- Sentencing of West Vancouver couple who undertook significant landscaping work without permits or sediment control plans.
- Convicted of 8 of 10 counts brought by City
- Deposited over 100 truck loads of soil during rainy period. A Landslide resulted in the deposit of soil into local creeks and neighbouring sites.

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R. v. Morshedian, 2016 BCPC 80

- Mitigating factors: the accused did not have a record, they had incurred significant remediation costs, and there was little risk of re-offending.
- Aggravating factors: the defendants ignored a work stop order, misled local officials, and the work was done for the purely selfish reason of wanting to increase property value.
- Because conduct was on high end of culpability scale and general deterrence was a significant consideration, the couple was fined $100,000.

Coastal First Nations v. British Columbia (Environment), 2016 BCSC 34

- Judicial review of Northern Gateway project
- Case is significant to all interjurisdictional projects requiring an environmental assessment
- Successful challenge of an “Equivalency Agreement” entered into between the Province’s Environmental Assessment Office and the National Energy Board

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Coastal First Nations v. British Columbia (Environment), 2016 BCSC 34

- Agreement had deemed National Energy Board's environmental assessment as equivalent to, and thus satisfied, the Province's environmental assessment requirement

- Court held that the use of Equivalency Agreements is limited to the fact-finding, not decision-making, aspect of another jurisdiction's environmental assessment

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Coastal First Nations v. British Columbia (Environment), 2016 BCSC 34

- There is a duty to consult and accommodate whenever Aboriginal groups express concern over an Equivalency Agreement, which cannot be delegated
- Court ordered the Province to consult with concerned First Nations groups before deciding whether to grant an environmental assessment certificate for the project
- The Province did not appeal the decision

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Coastal First Nations v. British Columbia (Environment), 2016 BCSC 804

- Petitioners sought special costs on the basis that their involvement in the proceedings was in the public interest
- Court applied the three-part test in *Carter:*
  - *Does case involve public interest of significant social impact?*
  - *Does case only involve personal interests of litigants?*
  - *Would litigants have been able to litigate issue with private funding?*

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Coastal First Nations v. British Columbia (Environment), 2016 BCSC 804

1. Resolution of the constitutional and jurisdictional issues would have far-reaching effects.
2. Issues affect all Aboriginal and non-Aboriginal people throughout Canada.
3. Litigation only was possible with sizable donations and discounts provided by counsel
4. Court awarded special public interest costs ($230,000)

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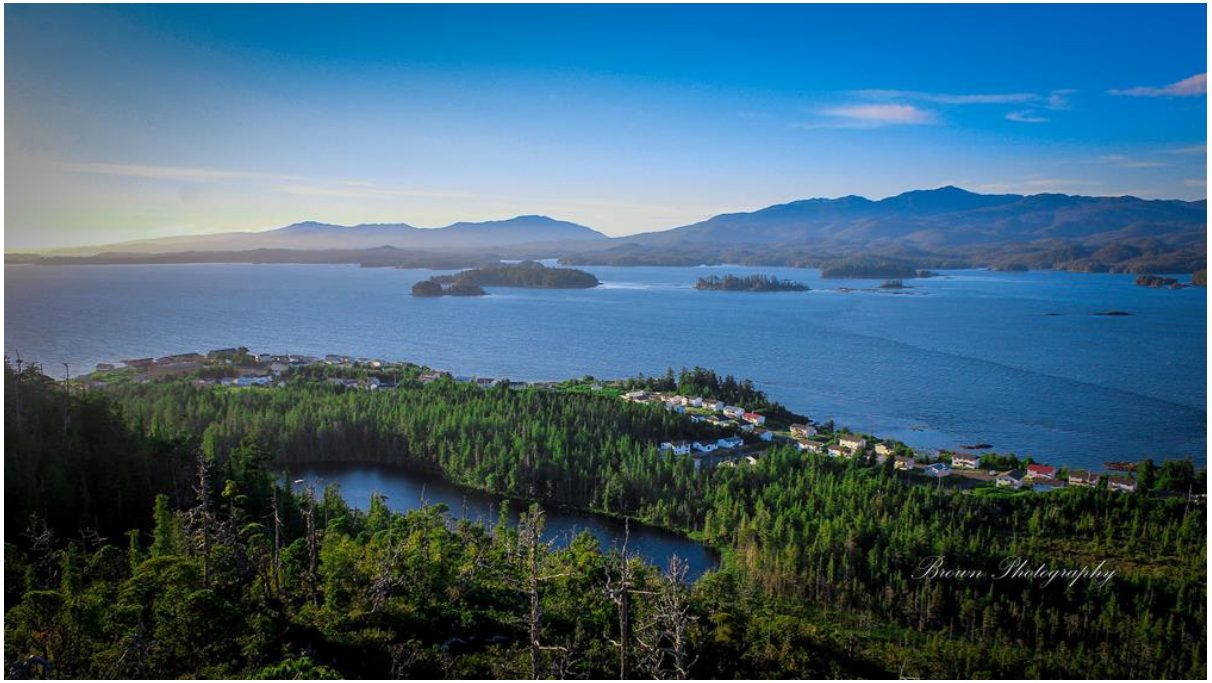
Gitxaala Nation v. Canada, 2016 FCA 187

- Government failed to give meaningful consultation and accommodation to Gitxaala Nation with respect to the Northern Gateway Pipeline environmental assessment process.



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Gitxaala Nation v. Canada, 2016 FCA 187

- The overall framework for consultation was reasonable:
  - No prejudgment by the government
  - Consultation process was not imposed on First Nations but was reasonable
  - First Nations had adequate funding to participate
  - No improper delegation
  - Government did not have to share results of their legal assessment of the First Nations' rights or title claims

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Gitxaala Nation v. Canada, 2016 FCA 187

- The execution (at the post-report stage) of the consultation framework was unreasonable:
  - Only had 45 days to advise government of concerns
  - Concerns had to be in relation to three questions posed by the government
  - Concerns could not be more than 2-3 pages in length
  - The Report contained inaccuracies, and the government incorrectly believed it nonetheless had to accept it
  - Government response letters to concerns raised by the Gitxaala Nation were sent 1 week before the final decision was made
- As a result, entire subjects of central concern to the affected First Nations were entirely ignored.

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Fort Nelson First Nation v. British Columbia (Environmental Assessment Office), 2016 BCCA 500

- Appeal of Supreme Court decision that found the Environment Assessment Office's interpretation of *Reviewable Project Regulation* was unreasonable and that they failed to consult with First Nation when interpreting the regulation.
- Case concerned the Komie North Mine in Fort Nelson First Nation territory. The EAO had originally interpreted the regulations such that the silica mine was not subject to an environmental assessment.

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Fort Nelson First Nation v. British Columbia (Environmental Assessment Office), 2016 BCCA 500

- The EAO sent letters advising the parties of its interpretation of the regulations.
- The Court of Appeal held that the EAO interpretation was not a "decision" subject to judicial review (which the lower court did not consider) because the EAO "decision" was merely non-determinative guidance on the meaning of the regulations
- Although not subject to judicial review, court still considered merits of the case

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Fort Nelson First Nation v. British Columbia (Environmental Assessment Office), 2016 BCCA 500

- EAO's interpretation was reasonable—it was consistent with the plain meaning of the word, consistent with how the term is used throughout the act, and did not undermine the statutory objectives and scheme.

- Interpretation does not attract a duty to consult—interpreting legislation is aimed at providing an uniform interpretation of general application; consultation aims to provided unique outcomes for each First Nation.

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Ernst v. Alberta Energy Regulator, 2017 SCC 1

- Jessica Ernst brought an action against the Alberta Energy Regulator for breaching her right to freedom of expression.
- The board refused to accept her ongoing complaints and returned her letters unopened
- Lower court struck her claim because of an immunity clause in the governing legislation which bars actions against the board for any conduct it does pursuant to its enabling legislation

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Ernst v. Alberta Energy Regulator, 2017 SCC 1

- The SCC upheld the lower courts' denial of her claim.
- The board was acting within its discretionary authority in declining to engage a vexatious litigant.
- The immunity clause on its face prevents Charter damages, and Ernst failed to demonstrate that the legislation was unconstitutional.

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Ernst v. Alberta Energy Regulator, 2017 SCC 1

- The appropriate avenue for Ernst would have been to seek judicial review, which cannot be barred by the immunity clause.

- "Issues about the legality, reasonableness, or fairness of this discretionary decision are issues for judicial review."

- 5-4 decision: dissent would have had the lower courts consider the *Charter* issue as it was not obvious that Charter damages are inappropriate in this case.

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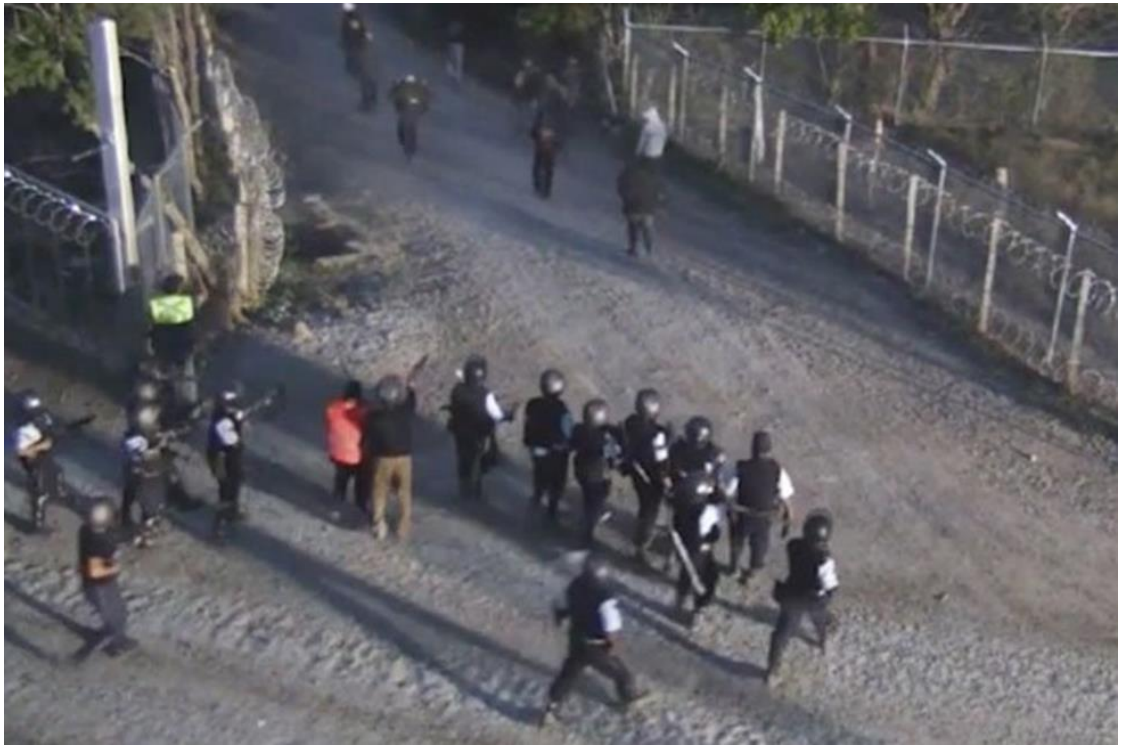
Garcia v. Tahoe, 2016 BCCA 320

- Guatemalan citizens alleged battery and negligence against Canadian-owned Guatemala mine.
- Citizens allege they were shot at and injured by security personal when protesting the mine.
- In a prior order, which is currently under appeal, the court held that Guatemala is the proper forum for the case
- Amnesty International sought leave to intervene in that appeal



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Garcia v. Tahoe, 2016 BCCA 320

- The Court granted Amnesty International intervenor status as a matter of public interest because it has an unique understanding of relevant international human rights law
- Conditions: Amnesty International may not duplicate appellants' submissions or introduce new issues.

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Araya v. Nevsun Resources Ltd., 2016 BCSC 1856

- Group of Eritrean men allege the defendant engaged Eritrean state-run contractors and its military to build a mine through forced labour, and in deplorable conditions
- The claim is based on international law prohibitions on forced labour, slavery, torture and crimes against humanity.
- Nevsun sought to have Eritrea ordered the appropriate forum for the case.

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Araya v. Nevsun Resources Ltd., 2016 BCSC 1856

- Court rejected Nevsun'a attempt to dismiss the action on the basis that it should be heard in Eritrea.
- There was a real risk that plaintiffs would be unable to obtain justice in Eritrea, as Nevsun is a primary economy generator in Eritrea.
- It was unlikely the judiciary would risk its personal safety or career in ruling in plaintiff's favour.

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