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Against Settlement in Transnational Business and Human Rights Litigation

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Introduction

Settlement is inextricable from the contemporary civil litigation process. In Canada and elsewhere, the vast majority of civil claims settle.[1] Provincial civil procedure rules encourage early settlement and, correlatively, punish parties who refuse to settle.[2] A settlement saves courts time and tax payers money, provides a measure of redress to plaintiffs, and allows defendants to move on without accepting fault. In short, settlement is here to stay. It has far too many benefits to be expunged, even partially, from the civil justice system.[3]

Acknowledging this, there are drawbacks to settling civil disputes. In his seminal 1984 article *Against Settlement*, Owen Fiss attuned us to some of these drawbacks.[4] In response to Derek Bok and other proponents of alternative dispute resolution (ADR) at the time, Fiss argued that settlement may not always be the optimal result of civil suits, particularly those that involve novel or ambiguous areas of law or ostensible power imbalances.[5] He heralded against an unscrupulous acceptance of ADR and conciliatory mechanisms that take as their lodestar a more efficient, cost-effective and, overall, a more accessible civil dispute resolution process.[6]

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[1] See e.g. Erik S Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36:1 Queens LJ 113 at 115.
[2] See *Rules of Civil Procedure*, RRO 1990, Reg 194, r 49.
[3] See e.g. Derek C Bok, "A Flawed System of Law Practice and Training" (1983) 33:4 J Leg Educ 570; Paul Fenn & Neil Rickman, "Delay and Settlement in Litigation" (1999) 109:457 Econ J 476.
[4] See Owen M Fiss, "Against Settlement" (1984) 93 Yale Law J 20. Also see Owen M Fiss, "Justice Chicago Style" (1987) U Chi Legal F 1; Symposium, "Against Settlement: Twenty-Five Years Later" (2009) 78 Fordham L Rev.
[5] Other works to which Fiss was responding include: Warren E Burger, "Isn't There a Better Way?" (1982) 68 ABA J 274; Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981); Richard A Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2 J Leg Stud 399.
[6] For a similar sentiment, see Trevor C.W. Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) at 233 ("without adequate public scrutiny, primarily through open court processes and the

Although Fiss's article and the scholarship it spurred are now almost four decades old, their currency persists in common law systems in which courts are, at times, called upon to expand or even re-envision existing doctrines and procedural rules. This article revisits that decades-long debate with respect to one burgeoning area of civil litigation. It applies *Against Settlement* to transnational business and human rights (TBHR) litigation that has, over the past few decades, resulted in a number of high-profile civil claims across the common law world.[7] In doing so, it pushes back against Leora Bilsky's contention that settlement ought to be viewed as "an important legal milestone [on] … how best to hold giant corporations accountable for human rights violations."[8]

For those who may be new to TBHR litigation, it typically involves a multinational corporation (MNC) headquartered in a western "home state" with one or more subsidiary or affiliate corporations operating in "host states" in developing parts of Asia, Africa, and Latin America. This arrangement predominantly occurs in extractive and manufacturing industries that rely on low-cost labour or, otherwise, the cooperation of Indigenous or rural communities that live adjacent to commercial projects.

Judicial systems in developing host states where human rights violations (encompassing personal and environmental harm) have been committed by individuals with ties to western-headquartered MNCs remain incapable of adjudicating complex transnational mass tort or class action cases. Often, these cases concern novel interpretations of common law or statutory torts or, otherwise,

publication of precedents, there is a real danger that parties, particularly including those with power, will use the private system to circumvent public policies, accountability, and basic notions of procedural fairness.").

[7] See *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*]; *Vedanta Resources PLC & Ors v Lungowe*, [2019] UKSC 20 (UK) [*Vedanta*]; *Okpabi v Royal Dutch Shell PLC* [2021] UKSC 3 (UK) [*Okpabi*]; *Yaiguaje v Chevron Corp*, 2017 ONSC 135 [*Yaiguaje*]; *Kiobel v Royal Dutch Petrol Co*, 569 U.S. 108 (2013); *Nestlé USA v Doe I*, 141 S Ct 1931 (2021) (US).

[8] Leora Bilsky, *The Holocaust, Corporations, and the Law: Unfinished Business* (Ann Arbor: University of Michigan Press, 2017) at 2.

civil procedures yet to be adopted or utilized within a host state system. Given those realities, host state victims routinely decide to commence their claims in MNC home state courts.[9]

Here, I focus on three TBHR case studies, all of which affirm one or more aspects of Fiss's argument that the notion of settlement as a systemic solution to civil dispute resolution ought to be challenged. As noted in the opening paragraph, there are positive aspects to parties settling a case before it drags on for months or years in order to reach a judge's docket for an arms-length 'win or lose' decision. However, there are benefits to adjudicating a civil claim 'on its merits', meaning to the point of a judicial determination on liability and/or remedies. As fleshed out later in the context of TBHR litigation, adjudication to the merits of a claim has benefits beyond the specific litigants involved. For one, it may assist putative litigants rely on precedential doctrines and principles in future cases where they would not exist otherwise.

Part I of this article reviews salient literature that takes sides on the settlement versus litigation debate. It also presents literature that sees merit in both views or that takes a completely divergent tack from the litigation-settlement dichotomy that Fiss and others propagated. Part II situates TBHR litigation as an area that legal philosophers (Ronald Dworkin in particular) have characterized as "hard cases."[10] Within the scope of TBHR litigation, these types of cases warrant a consideration that settlement may not always be an optimal or even a worthwhile solution for litigants, lawyers, and other interested parties who want to move the needle forward on corporate accountability for human rights abuses in the developing world.

[9] See Hassan M Ahmad, "The Missing Forum for Corporate Human Rights Violations in Africa" in Damilola S Olawuyi & Oyeniyi O Abe, eds, *Business and Human Rights Law and Policy in Africa,* (Cheltenham, UK: Edward Elgar Publishing Ltd, 2022).
[10] Ronald Dworkin, *Law's Empire*, reprinted (Cambridge, Mass.: Belknap Press, 1988) at 129.

Parts III to V proceed through three TBHR case studies, each of which highlight one or more aspects of Fiss's argument against a systemic reliance on settlement. In Part III, I address how the October 2020 settlement in *Araya v. Nevsun Resources Ltd.* further obscures what continues to be a murky intersection of customary international law and Canadian common law. Part IV looks at U.K. litigation around Barrick Gold's labour practices in East Africa. In that instance, settlement has been ineffectual to stop the mining giant from continuing to engage in harmful practices that contribute to personal and environmental harm. Part V discusses how the settlement in *Garcia v. Tahoe Resources Inc.*, a case commenced in the British Columbia (B.C.) courts, is an example of transnational corporate defendants side-stepping accountability when they settle out of court, even if they publicly acknowledge wrongdoing.

The lessons gleaned from each case study can, at times, be applied to one or more of the other case studies discussed in this article. The point is not that one case study tells us something that is absent in the other case studies. On the contrary, this article examines the three case studies to suggest that Fiss's argument is still relevant. And to the extent his argument can be operationalized in the future by legislatures, judges, or litigants who are involved with deciding when and how to settle contentious civil disputes, it ought to be taken seriously, despite the fact that ADR mechanisms—settlement included—have become a panacea on how to fix problems associated with state-based judicial dispute resolution processes.

I. For and Against Settlement (and somewhere in between)

As alluded to above, I do not neglect the utility of settlement, but adopt Fiss's posture that settlement has drawbacks in circumstances that are present in TBHR litigation. In this part, I detail what Fiss and his contemporaries had to say about the negative and positive consequences of

settling civil disputes. I also briefly review more recent literature that has weighed in on the topic. In all, there is a range of perspectives, largely falling within the spectrum of being partial to either settlement or litigation, or, otherwise, seeing merit in both. With that said, a few authors have challenged the settlement versus litigation dichotomy altogether.

Fiss's immediate impetus for writing *Against Settlement* was as a response to Harvard Law School professor Derek Bok's 1983 article, *A Flawed System of Law Practice and Training*.[11] In that work, Bok's immediate concern was how law students at his time were trained to prepare for 'legal combat.' He remarked scathingly, "[l]ook at a typical catalogue. The bias is evident in the required first-year course in civil procedure, which is typically devoted entirely to the rules of federal courts with no suggestion of other methods for resolving disputes."[12] Bok urged that rather than law schools emphasizing to their students the nuances of trial practice, appellate advocacy, and litigation strategy, they should concentrate on methods of mediation and negotiation as cost effective and efficient ways to resolve disputes.

Bok's intention was undoubtedly laudable, even inspiring. He wrote passionately that "society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry."[13] Undoubtedly, then as now, a more conciliatory ADR-focused approach to civil litigation is merited at times. Bok described the American legal system of his time as increasingly complex and expensive, overly-regulated and specialized, and inaccessible to the poor and middle-class. He lamented what had become of an incessantly adversarial legal culture that spawned tens of thousands of new law school graduates annually, educated in a method of civil dispute resolution that alienated them from the masses of

[11] Bok, *supra* note 4.
[12] *Ibid* at 582.
[13] *Ibid* at 583.

the population that could not afford protracted disputes destined to be resolved in the courts.[14] This sentiment prevails across the common law world, including in Canada where, for instance, Jerry McHale recently wrote that "[civil justice] [r]eform has focused too much on the machinery and operations of the justice system and not enough on the internal culture and mindset of the people who operate it."[15]

As Fiss viewed the matter, his disagreement with Bok about the centrality of settlement in civil dispute resolution could be reduced to a view of adjudication as a process that was meant to determine the lot of private parties versus a view of adjudication as a public good that reflected societal values.[16] In this regard, Fiss wrote:

> Someone like Bok sees adjudication in essentially private terms: The purpose of lawsuits and the civil courts is to resolve disputes, and the amount of litigation we encounter is evidence of the needlessly combative and quarrelsome character of Americans. I, on the other hand, see adjudication in more public terms: Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.[17]

At the outset, it should be stated that Fiss appeared to be against settlement *only* when it was presented as a general and systemic practice that, at all material times, was considered to be a worthwhile option. According to him, settlement remains a viable option—and even a preferable one—in ordinary cases, being those with regularly-pleaded fact patterns in well-established areas of law.[18] It is important to mention this because some of Fiss's detractors have misapprehended

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[14] The concerns that Bok and others expressed have since been heeded by law schools across the common law world. Upper-year curricula in, for instance, Canada and the United States put a far greater emphasis now on experiential education couched in clinical programs. See Sari Graben, "Law and Technology in Legal Education: A Systemic Approach at Ryerson" (2021) 58 Osgoode Hall LJ 139.

[15] M. Jerry McHale, QC, "Legal Culture as the Key to Affordable Access" in Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver; Toronto: UBC Press, 2020) at 249.

[16] But, Fiss and Bok may have been talking past each other. Bok indeed acknowledges that there is a difference between a view of litigation as a private matter and it having a wider public purpose. See Bok, *supra* note 4 at 576 ("By concentrating so heavily on the immediate parties in dispute, judges are also more likely to reach results that affect other people in unexpected and undesirable ways.").

[17] Fiss, "Against Settlement", *supra* note 4 at 1089.

[18] *Ibid*.

his critique of settlement as being categorical.[19] In the circumstances where it is sub-optimal, Fiss views settlement as a "capitulation to the conditions of mass society" that "should be neither encouraged nor praised."[20]

Fiss's argument is four-fold. First, the terms of settlement are a function of an inescapable power imbalance that results in distinctions between poorer plaintiffs and richer institutional defendants around the ability to: i) analyze information necessary to predict the prospective outcome of a dispute, if it were not settled; ii) wait for the prospect of a substantial monetary sum pursuant to a judgment (being a sum that is likely far greater than any settlement amount); iii) finance protracted litigation. Fiss acknowledges that litigation is not bereft of power imbalances but "aspires to autonomy from distributional inequalities."[21]

Second, settlement is accompanied by an absence of authoritative consent. Fiss writes that, "[i]n many situations, individuals are ensnared in contractual relationships that impair their autonomy,"[22] citing lawyers and insurance companies as actors that "agree to settlements that are in their interests but are not in the best interests of their clients."[23] Fiss points to Rule 23(a) of the U.S. Federal Rules of Civil Procedure as an example of mandatory representation in which the individual choices of group members go unheeded.[24] Canadian jurisdictions have a similar mandatory requirement. For instance, under section 5(1)(e) of Ontario *Class Proceedings Act*, a court can only certify a proposed class action when "there is a representative plaintiff or defendant

[19] See e.g. Michael Moffitt, "Three Things To Be Against ('Settlement' Not Included)" (2009) 78:3 Fordham L Rev 1203 at 1206 (suggesting that Against Settlement can be read to suggest that "litigation is *always* more worthy of praise than settlement.") [emphasis added].
[20] Fiss, "Against Settlement", *supra* note 4 at 1075.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] See *Federal Rules of Civil Procedure*, 37 CFR § 2.116 (2021), r 23(a).

who would fairly and adequately represent the interests of the class."[25] In practice though, as Fiss's argument suggests, it is nearly impossible for a representative to embody the interests of all other class members.

Third, for Fiss, settlement removes judicial involvement. It trivializes the remedial element of litigation, shifting dispute resolution to a purely private matter in which the parties to a civil dispute determine how best to resolve it. This aspect of Fiss's argument was challenged by his contemporaries and also later authors. For instance, Carrie Menkel Meadow challenges Fiss's characterization of a strict dichotomy between judicial involvement in litigation and judicial exclusion in settlement. She sees a spectrum in which judges are, at times, involved and even integral to settlement discussions.[26] Moreover, particularly in class proceedings in the common law world, there is often a requirement for courts to approve settlement agreements. Within that framework, court retain the option of voiding the agreement if it is found to be concluded through unfair and prejudicial processes or has led to an unjust result.[27]

Fourth, Fiss asserts that settlement is peace-centric, not justice-centric. Because litigation elicits the use of public resources and officials, it implicitly involves and is thus able to bind the public rather than concern a select group of private parties. Judges make decisions in the public good, not to "maximize the ends of private parties, nor simply secure the peace."[28] For Fiss, litigation "give[s] force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[29] In this way, concerns about

[25] *Class Proceedings Act*, 1992, SO 1992, c 6, s 5(1)(e).
[26] Carrie Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 UCLA L Rev 485 at 497: "One study of the role of courts found that 75% of federal judges and 56% of state judges initiate settlement discussions in jury trials." Also see Judith Resnik, "Managerial Judges" (1982) 96:2 Harv Law Rev 374.
[27] See *Class Proceedings Act, supra* note 25, s 27.1.
[28] Fiss, "Against Settlement", *supra* note 4 at 1085.
[29] *Ibid*.

efficiency—moving another case along as expeditiously as possible—is at odds with the "agony of judgment."[30] He views courts as having duties to resolve disputes and/or to clarify the law. These duties are not discharged when parties settle.[31] Again, it should be remembered that Fiss was not advocating for protracted litigation in all circumstances, but rather only complex and even novel disputes that affect a swath of people and would serve a public benefit when a judicial decision is rendered.

Menkel-Meadow took an intermediary stance in the litigation-settlement divide. She was critical of Fiss's support of litigation over settlement, even if his support was not categorical. She viewed each side of the debate as making "unspecified assumptions about the empirical reality of both the formal adjudicatory system and the alternative dispute resolution mechanisms."[32] She disapproved that Fiss, without explanation, collapsed a variety of settlement processes into one. According to her, Fiss did not appreciate the nuances of, for instance, bilateral negotiation, mediation, arbitration, court-sponsored settlement, and even a process known as "rent-a-judge" that could elicit ad hoc judicial support to come upon a resolution. She agreed that some disputes infuse a stark power imbalance into the settlement process, but that Fiss overlooked the judicial capacity to mitigate that imbalance *in settlement* just as much as in the course of litigation.[33]

She also critiqued the supposed public/private divide that Fiss saw between himself and settlement advocates like Bok.[34] She questioned how we can determine at the outset of the civil dispute resolution process which cases have sufficiently public elements such that they necessitate litigation by state-sanctioned judges. I partially respond to this criticism in the next part by laying

[30] *Ibid*.
[31] Fiss, "Against Settlement", *supra* note 4. But see Resnik, *supra* note 266.
[32] Menkel-Meadow, *supra* note 26.
[33] See also Resnik, *supra* note 26.
[34] But see Bok, *supra* note 3 at 572 (seeing his position as advancing the public interest through efficiency measures).

out some characteristics of TBHR litigation that brings it within the fold of "hard cases" that ought to be adjudicated on their merits rather than systemically settled. With that said, Menkel-Meadow, like Bok, asserts that prioritizing settlement advances a public purpose by putting less strain on the judicial system as well as providing an expedient option for litigants to resolve disputes without the need to involve the courts.[35]

Beyond the scope of this article, she asks an important question: who ought to decide whether a civil dispute should proceed via public adjudication versus private settlement processes?[36] Lawyers in Fiss and Menkel-Meadow's time, just as now, are bound by their clients' instructions. This arrangement is problematized to an extent in class proceedings in which plaintiff-side lawyers represent, by and large, an absentee group of claimants. Even in those cases, lawyers and the plaintiff class often opt for significant payouts over spending years of time and expenses in a dispute that a judge may ultimately decide against them. Rational plaintiff-side lawyers will likely be unconvinced to litigate a claim to its merits for the prospect of a judicial decision that will markedly advance the common law in a way that will support future claims. I unpack some aspects of this lawyer-client relationship in this article's conclusion but steer clear of Menkel-Meadow's larger point around the normative distribution of decision-making power concerning settlement.

Menkel-Meadow ends up taking an intermediary stance in the litigation-settlement divide. In her view, settlement's legitimacy stems from the fact that it elicits consent from all litigants and, at times, even from the judiciary. It particularizes a resolution based on litigants' interests and avoids win/lose binary results that inherently accompany litigation. With that said, she simultaneously agrees with Fiss's assertion that settlement can be subject to implicit coercion by a wealthier and

[35] Menkel-Meadow, *supra* note 266.
[36] *Ibid* at 501.

more powerful party or even by judges mandated to facilitate settlement. And like Fiss, she sees settlement as a way to circumvent a clear and authoritative ruling.[37] At a systemic level, settlements may tend to create a distinct subset of disputants who "are allocated routinely or by paid choice to one form of dispute resolution [i.e. settlement]."[38]

Similar to Menkel-Meadow's critique that the litigation-settlement debate hardly relies on empirical evidence to back up each side's assertions, Paul Fenn and Neil Rickman note a lack of data to assess the impacts of delay in litigation.[39] To remedy this gap, they employ Spier's bargaining model. That model concludes that settlements are likely to be reached either early in the litigation process or shortly before trial in light of impending deadlines.[40] The authors test Spier's hypothesis by analyzing British medical negligence cases.[41] They reveal that delays in settlement occur when litigants face low bargaining costs (i.e. in legal aid cases), when estimated damages are high, and when a defendant denies liability.[42]

In a 1987 piece, Jethro Lieberman and James Henry reflected on the ADR movement and sought to defend it in light of Fiss's critique.[43] They offered four rebukes of Fiss's argument. First, they rejected his characterization that settlement or other forms of ADR elicit opposition or aversion to litigation. They agreed with Fiss that cases such as *Brown v. Board of Education* should receive authoritative judicial decisions.[44] However, they acknowledged that not all cases are consequential in this way. Second, contrary to Fiss's view, they viewed ADR as often being agnostic to power

[37] Menkel-Meadow, *supra* note 26.
[38] *Ibid*.
[39] See Paul Fenn & Neil Rickman, "Delay and Settlement in Litigation" (1999) 109:457 Econ J 476 at 476.
[40] See Kathryn E Spier, "The Dynamics of Pretrial Negotiation" (1992) 59:1 Rev Econ Stud 93; Fenn & Rickman, *supra* note 3 at 489.
[41] *Ibid.*
[42] *Ibid* at 490.
[43] See Jethro K Lieberman & James F Henry, "Lessons from the Alternative Dispute Resolution Movement" (1986) 53:2 Univ Chic Law Rev 424.
[44] *Ibid* at 433.

dynamics among the litigants. Rather, parties choose alternatives to litigation in order to avoid "the injustice resulting from delay and the prohibitive costs of pursuing a case through the courts."[45] Third, they did not view settlement as foreclosing answers to important doctrinal questions that would be accompanied by broader societal implications. Rather, such questions could simply be answered at a later time. They stated that "[w]e should be equally concerned to prevent courts from rendering judgment when settlement is more appropriate."[46] Finally, they rejected Fiss' claim that courts, as opposed to the many forms of ADR, are more likely to achieve just results.[47]

Another of Fiss's contemporaries, Jack Weinstein categorized the settlement-litigation debate into four categories.[48] The first category ("when settlement is not desirable") requires showdown litigation because it is practically the only way for society to change in a positive way. Like Fiss as well as Liberman and Henry, Weinstein gives the example of racial segregation in the U.S. and the need to litigate cases such as *Brown* or 'One-Person One-Vote' to merits determinations rather than settling at an earlier stage of the dispute resolution process.[49] Weinstein's second category ("when settlement is essential") recognizes instances when there may be weaknesses or outright flaws in a plaintiff's case such that it may be preferable to settle a case early.[50]

Weinstein's third category ("when settlement is desirable following some individual adjudication") sets out instances when the facts, law, psychological dynamics, and the "diversity of political, economic, and other pressures and considerations" require some trials and summary judgment motions in order to establish a rationale framework for global settlement.[51] And the

[45] *Ibid* at 434.
[46] *Ibid* at 434.
[47] See *ibid*.
[48] See Jack B Weinstein, "Comments on Owen M. Fiss, against Settlement (1984) Symposium - Against Settlement: Twenty-Five Years Later" *supra* note 4.
[49] *Ibid* at 1267.
[50] Weinstein, *supra* note 48 at 1268.
[51] *Ibid* at 1270.

fourth category ("cases outside the tripartite structure") comprises unique instances in which there are significant political barriers, such as powerful industry and interest groups. Weinstein cites cigarette-related and gun violence cases in the U.S. as indicative of this category.[52]

More recent work has continued in the vein of attempting to import a level of nuance into an otherwise largely categorical approach taken by Fiss and Bok, among others. For example, Michael Moffitt argues that litigation and settlement do not merely coexist—and are certainly not dichotomous.[53] Rather, each depends on the other to fulfill their respective dispute resolution functions. For Moffitt, the process and result of litigation provide "law articulation." This means that courts clarify otherwise ambiguous legal rules in a given case *and* for similarly-situated future disputants. Despite its increasing support for ADR mechanisms over the past several decades, the Supreme Court of Canada has affirmed Moffitt's point, emphasizing that "[w]ithout public adjudication of civil cases, the development of the common law is stunted."[54] This idea of "law articulation" will come to light in Part III of this article in the example around the *Nevsun* litigation. With a merits decision, future disputants are furnished with valuable information that will help them determine whether or not to settle.

On the other hand, according to Moffitt, settlement offers litigation at least three things. First, it creates value for both parties by either making them better off or, at least, no worse off than before the settlement. This is obvious for plaintiffs who are compensated for their harm. For a defendant, the confidential nature of settlement allows it to conclude contentious litigation without having to admit fault. Also, settlement terms are not disclosed to the public in a way that can result in

[52] *Ibid*.
[53] Moffitt, *supra* note 19.
[54] *Hryniak v Mauldin*, 2014 SCC 7 at para 2.

reputational risks.[55] This 'value creation' role is what allows institutional defendants to continue operating relatively unscathed after a dispute has concluded—a reality that will be illustrated in the example around Barrick Gold's operations in East Africa, discussed in Part IV.

Second, settlement addresses the non-financial and non-legal aspects of adjudication, particularly the emotional toll that adjudication brings to litigants. It offers finality to such stress. Conversely, litigation's adversarial structure, as Moffitt asserts, "is not well suited for relationship building."[56] Although Moffitt's point about the stresses of litigation is, by and large, indisputable, there is arguably a balance to be struck between that emotional toll and the consequential benefits of litigating contentious disputes that involve novel areas of law that concern systemic harms. This is the crux of the argument in subsequent parts of this article. Finally, Moffitt's third point about what settlement offers litigation is that it is not encumbered by procedural rules around, for instance, joinder and standing that can have the result of excluding some victims from the prospect of redress.[57]

Theresa Sing, a final author salient to the litigation-settlement debate, argues, like Moffitt, that litigation and settlement are interdependent phenomena.[58] Sing focuses on *how* settlement and litigation are engaged as constituent parts of one legal system rather than one being dominant over the other. She proposes a shift towards "a both-and approach."[59]

Addressing Fiss, Sing writes:

> The main shortcomings of the legal tradition are the ineffectiveness in detecting and addressing underlying forms of cultural and structural violence, the neglect of deeper reconciliation and broader basic human needs, and the lack of independence from the

[55] Moffitt, *supra* note 19.
[56] *Ibid* at 1214.
[57] See *ibid* at 1215.
[58] See Theresa Sing, "Alternative Dispute Resolution or Legalism? Beyond The Schism!" (2017) Galtung-Institut Working Papers at 8; see also Moffit, *supra* note 199.
[59] *Ibid* at 5.

> economic sector. Mediation and conflict transformation … may offer a more adequate response to address the challenges Fiss' [*sic*] was justifiably concerned about.[60]

With some past and more recent literature that has focused on the litigation-settlement debate laid out in this part, I shift in Part II to understanding how this debate is applicable to contemporary TBHR litigation that has and will continue to take place in common law home state courts into the future. I first present some characteristics of this area of litigation that makes it ripe for adjudication as opposed to settling before a merits decision and then detail the three case studies outlined in the introduction.

II. Transnational Business and Human Rights Litigation as 'Hard Cases'

Every case is different. A court file number atop a piece of paper may indicate the workings of a basic procedural framework, but, as legal philosophers have long recognized, there are 'easy cases' and 'hard cases.' Dworkin characterizes hard cases as ones in which "no settled rule dictates a decision."[61] In other words, in such cases lawyers and judges cannot simply apply the plain language wording of a statutory provision or transfer a common law rule devised in one case to another case in order to dispose of a matter. In hard cases, there are ambiguities around whether and how to apply a set of doctrines to a particular fact pattern. Alongside those ambiguities, there are often entrenched disagreements among judges and academics about whether one or more doctrines can even be applied.

In two of Dworkin's seminal works, *Taking Rights Seriously* and *Law's Empire*, he fleshes out the distinction between arguments of policy and arguments of principle, both of which apply to hard

[60] *Ibid* at 8.
[61] Ronald Dworkin, *Taking Rights Seriously: With a New Appendix, a Response to Critics* (Cambridge, Mass: Harvard University Press, 1978) at 83.

cases that, as will be explained shortly, encompass TBHR litigation. Arguments of policy concern systemic legal issues that merit legislation, evincing a new set of rights that can subsequently be recognized and interpreted by a court. Dworkin and even his positivist counterparts do not take issue with arguments of policy falling primarily within the sphere of legislatures. A policy argument warrants a decision that "advances or protects some collective goal of the community as a whole."[62] That notion aligns with the positivist 'argument from democracy' that views legislatures as the only legitimate promulgators of legal rules because they represent the populous and are, as such, in the best position to enact laws that serve that populous.[63]

Where Dworkin departs from the positivists is in his conception of an argument of principle, which he characterizes as an argument that "respects or secures some individual or group right."[64] Principled arguments are made by courts, not legislatures. Importantly though, courts cannot invent new rights, like policy arguments put forth by legislatures. As Dworkin appreciates, a court that invents new rights would be contravening a basic principle of justice as it would be applying a legal standard to an event or incident that did not exist at the time the event or incident took place. This *ex-post* method of adjudication would be illegitimate because it would mandate a standard of conduct of which the defendant was not even aware it was required to uphold. Therefore, according to Dworkin, principled arguments as they apply in hard cases intertwine an acceptable interpretation of an existing right with a community's prevailing morality.

The point of that brief excursion into Dworkin's distinction between arguments of policy and principle is that there is a basis—in a liberal rights-based conception of the rule of law to which

[62] *Ibid* at 82.
[63] Ronald Dworkin, *A Matter of Principle*, reprint edition ed (Cambridge, Mass: Harvard University Press, 1986) at 270–71.
[64] Dworkin, *supra* note 61 at 82.

Dworkin adheres—for judges to expand their interpretive scope to devise what were previously absent legal principles. These principles could then apply in future cases with similar fact patterns. In that way, Dworkin's approach harkens back to Blackstone's oft-quoted statement that "judges are depositories of the law" with whom rests the ultimate determination of what falls within and, otherwise, outside of the law's purview.[65] Of course, these hermeneutics are missing in cases that settle. In those instances, judges are not afforded an opportunity to undertake arguments of principle like Dworkin envisions.

As Fiss writes, "[t]he settlement movement must introduce a qualitative perspective; it must speak to these more 'significant' cases, and demonstrate the propriety of settling them."[66] Even though Fiss argued for a distinct approach to these significant or hard cases, neither he nor his contemporaries suggested ways for the settlement or ADR movement to speak to hard cases in order to appreciate the propriety of settling them. That inquiry is likewise outside the scope of this article. With that said, one potential method may be a system of 'partial settlements.' Under that scheme, plaintiffs or a plaintiff class would accept a nominal settlement amount accompanied by an agreement between the parties that—even though the defendant not be required to provide further compensation—the dispute would be heard by a court to determine liability and, correlatively, so litigants can engage both the discovery process and legal principles that may be nascent in a given area of law. Admittedly, the barrier to that framework would be convincing plaintiff lawyers to continue litigating the dispute after a settlement as there would be no ostensible financial reason for them to do so.

[65] See 1 WILLIAM BLACKSTONE, COMMENTARIES *69.
[66] Fiss, "Against Settlement", *supra* note 4.

Fiss's "qualitative perspective" such that hard cases do not tread down the same path as easy ones is admittedly a nebulous concept. With that said, there continue to be some areas of law in which cases are litigated more frequently to the point of a merits decision.[67] In those areas, legal principles tend to be better defined.[68] TBHR is a burgeoning area of litigation that falls within the scope of 'hard cases' as authors have understood that term. Despite there being consistent contours that define this area of litigation, outlined in this article's introduction, it involves both jurisdictional principles and substantive law issues in tort law, international law, and corporate law that require greater clarity on the part of domestic courts. Otherwise, MNCs that operate in developing host states will continue to do so in doctrinally ambiguous spaces that effectively bolster the ability for personal and environmental abuses to take place.

In TBHR litigation, multiple sovereign states and consequently multiple legal systems are implicated in the proceedings. That reality yields jurisdictional tensions. Ambiguities and disagreements arise, for instance, in *forum non conveniens* (FNC) motions that are decided on discretionary bases from incomplete factual records and novel doctrinal arguments. This is illustrated below in the transnational dispute between Guatemalan plaintiffs and Canadian mining company Tahoe Resources Inc., recently litigated in the B.C. courts. TBHR litigation also raises concerns over the justiciability of private law disputes in a domestic court. TBHR litigation often involves a close relationship between an MNC and a host state government in the course of foreign

[67] For example, the US Civil Justice Survey of State Courts, 2005 found that 61% of civil cases concluded by trial were tort claims, while 33% were contract cases. Motor vehicle accidents (35%), seller plaintiff (11%), buyer plaintiff (10%) and medical malpractice (9%) were most frequently disposed of by trial. See Lynn Langton & Thomas H Cohen, *Civil Bench and Jury Trials in State Courts, 2005* (October 2008) at 2, online (pdf): *Bureau of Justice Statistics* <https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf>.

[68] See e.g. Nora Freeman Engstrom, "When Cars Crash: The Automobile Law Legacy" (2018) 52 Wake Forest L Rev 293 at 302-303. Motor vehicle claims proceed to trial at "unusual rates" and are characterized by a higher rate of success and shorter trials, due in part to legal principles more accessible to jurors.

investment. Corporate defendants have raised prudential doctrines such as political question and act of state that elicit foreign relations concerns.[69]

To some extent, the above-noted issues have been resolved by appellate courts in common law home states. For example, in *Nevsun* the Supreme Court of Canada decided that the act of state doctrine has not developed and is, as such, inapplicable in Canadian jurisprudence. The Court in *Nevsun* opted for principles that have developed over time under the banners of private international law and judicial restraint.[70] Otherwise, pursuant to the *Brussels I Convention*, British courts have determined that FNC is not a basis to defer jurisdiction to a court outside of the European Union.[71] Despite these recent doctrinal advancements, the TBHR case studies in subsequent parts of this article outline just a few of the ongoing doctrinal complexities that persist and arguably require judicial consideration.

Moreover, in TBHR litigation like other contentious areas of law, facts patterns are highly idiosyncratic—at times with no discernible precedent. To return to FNC motions that have the aim of dismissing claims in a home state court, each case will differ slightly on where seminal management decisions were made or where witnesses and important documents are located. Furthermore, each case will come with a distinct consideration of an adequate alternative forum based on the host state's judicial system and political context. Reflections around the adequacy of the legal system in India may be different from those around, for instance, Guatemala, Nigeria, Columbia, or Indonesia—all of which have been host states where MNCs have been alleged to have been involved in human rights violations. As detailed below, one consequence of settlement

[69] See e.g. *Mujica v Occidental Petroleum Corp*, 381 F Supp 2d 1164 (CD Cal 2005); *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (2007*); Samantar v. Yousuf*, 560 U.S. 305, 322 (2010).
[70] See *Nevsun, supra* note 7 at para 44.
[71] See *Owusu v Jackson & Ors* [2002] EWCA Civ 877 (Eng) at para 51.

in TBHR litigation is that it perpetuates a vacuum of precedent. Court are left to compare doctrinal and factual apples with oranges because there is no other available option.

In short, there has been insufficient judicial analysis given the factual and doctrinal nuances that are routinely present in TBHR litigation. As a result of that lacuna, litigants and their counsel are currently left with two arguably sub-optimal prospects. They can either opt to settle given the uncertainty around how a court will decide their case; or, they can role the dice and hope that a court will make doctrinal strides in an under-considered area of law. With the latter option at least, the difficulties experienced by the first few (or few dozen) cases will illuminate the path for subsequent cases in the decades that follow. As authors canvassed in the previous part have noted, that approach has been a strategic hallmark in other areas of public interest litigation from the American civil rights movement to more recent pharmaceutical and tobacco cases.[72] Fiss's argument with respect to private law's capacity to elicit public outcomes ought then to be heeded in the TBHR context that has not resulted in enough judicial analysis to date. In the next three parts, I present distinct consequences that result from settling TBHR cases commenced in common law home state courts.

III. Obscuring the Law (Nevsun Resources Ltd.)

The first TBHR case study that elicits Fiss's concerns with settlement is the almost decade-long litigation between B.C.-based Nevsun Resources Ltd. and Eritrean refugees who worked in the MNC's Bisha Mine that houses gold, copper, and zinc reserves. The Eritrean plaintiffs sought tort remedies alleging that they had been conscripted into their country's National Service Program (NSP), forced to work in inhumane conditions, and even subjected to torture.[73] The peculiar

[72] See e.g. Weinstein, *supra* note 488 at 1268.
[73] For background facts, see *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 at paras 14-70 [*Araya*].

doctrinal aspect of the case concerned the argument that Nevsun Resources' actions against the plaintiffs violated customary international law (CIL), which should then serve as a basis for a novel common law tort.[74]

In *Nevsun Resources Ltd. v. Araya*,[75] the defendant MNC challenged the assertion that the CIL-based tort constituted a viable cause of action. The issue proceeded to the Supreme Court of Canada where the plaintiffs were required to establish that claim had a reasonable prospect of success. In a 2020 decision, the Court denied the MNC's attempt to strike the CIL tort claim, holding that, in theory, there can be one or more new common law causes of action in tort that are grounded in CIL norms.[76] The Court also held that despite CIL norms historically being restricted to state actors, a tort action couched in CIL principles could apply to private actors, including MNCs.[77] The Court's majority concluded that CIL norms are "of a more public nature",[78] more heinous,[79] and symbolically different[80] than 'garden variety' negligent or intentional torts. Those distinctions attract discrete causes of action that can be applied to Canadian MNCs that commit human rights violations in host states.[81]

I have argued elsewhere that to respect CIL's distinctive nature, subsequent Canadian courts ought to restrict CIL-related torts to instances in which a corporate defendant has behaved abroad like a public actor.[82] To relate *Nevsun* back to this article, an ensuing ambiguity has arisen around CIL

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[74] For discussion on the distinction between domestic torts and a potential CIL tort, see *Nevsun*, *supra* note 7 at para 124 (CIL norms "are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these norms shocks the conscience of humanity.") [internal citation omitted].
[75] *Ibid* at paras 5, 63.
[76] *Ibid* at para 127.
[77] *Ibid* at Part II for the majority's reasons for applying CIL to private corporations.
[78] *Ibid* at para 124.
[79] *Ibid* at para 125.
[80] *Ibid.*
[81] For the use of 'garden variety' torts as a term to describe generally-used domestic law torts, see Francois Larocque, "The Tort of Torture (Le Délit De Torture) (2009) 17 Tort L Rev 158.
[82] **Omitted for peer review purposes.**

tort claims under Canadian common law and their application to private actors because the parties to the litigation entered into a confidential settlement soon after the Supreme Court's 2020 decision.[83] As a result, the nascent principles the Court's majority opinion set out were never litigated before a judge of first-instance in order to clarify the existence and application of CIL torts under Canadian common law. With *Nevsun* settling, the state of Canadian law with respect to TBHR litigation that could warrant CIL-based tort claims has been restricted to a decision on a pleadings motion that went only as far as to say that such claims are theoretically plausible.

Recall Fiss's assertion that, distinct from a categorical application, settlement ought to be avoided in disputes that concern complex or novel areas of law in order for courts to serve, in Moffitt's words, a 'law articulation' role. As causes of action, there is almost no understanding around CIL-related torts. In what instances would such torts apply? What actions on the part of a defendant elicit these torts? What are their elements and defences? Does intentionality matter? All of these questions and others require a subsequent dispute to work its way through the courts for there to be some doctrinal clarity. One or more merits-based decisions in the lower courts after the Supreme Court's ruling in *Nevsun* may not have addressed all of the unanswered questions. But, since the Supreme Court was not given the opportunity to weigh in on the merits of the case, the majority's opinion essentially remains a thought experiment. In a subsequent case, a lower court may decide to ignore the Supreme Court's analysis around CIL-related torts or, otherwise, distinguish the facts of that case in order to render those nascent causes of action inapplicable.

As I mention in this article's conclusion, there is yet no real avenue to address problems that arise when TBHR or other areas of litigation with contentious and novel doctrinal elements settle,

[83] See Yvette Brend, "Landmark settlement is a message to Canadian companies extracting resources overseas: Amnesty International" *CBC News* (23 October 2020), online: <https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910>.

leaving ambiguity in the state of the law. The decision to settle remains with the litigants, even if a dispute has implications beyond one particular case. Litigants—particularly refugees, like in *Nevsun*, who have been mistreated in their country of origin—may be in a compromised position in which they would prefer to settle to obtain some level of compensation, despite the fact that settlement would obviate the prospect of a merits-based decision that could clarify complex areas of law for future disputants. Fiss warned of the scenario that played out in *Nevsun*. Economic disparities between large institutional defendants and individual plaintiffs tend to result in settlements that may effectively minimize (or remove) the potentially public consequences of private law litigation.[84] For movement lawyers, litigation may not be an isolated method by which to pursue some social change, but is a necessary part of a puzzle that involves non-adversarial techniques, such as awareness campaigns, protests, boycotts, scholarship, and the like.[85]

To substantiate the concerns with settlement that have left CIL-related torts in a murky status post-*Nevsun*, consider the Ontario Superior Court of Justice's 2022 decision in *Toussaint v. Canada (Attorney General*), which attempted to build on what can be characterized, at most, as a half-baked set of principles from *Nevsun*.[86] In *Toussaint*, the plaintiff alleged that her exclusion from health care on the basis that she did not possess permanent residency or citizenship status violated the *Charter of Rights and Freedoms*. Although there are multiple aspects to the case, for our purposes the Superior Court was asked to grapple with Canada's obligation to provide health care

[84] Fiss, "Against Settlement", *supra* note 4 at 1076.
[85] See Christopher Ewell, Oona A Hathaway & Ellen Nohle, "Has the Alien Tort Statute Made a Difference?" (2022) 107 Cornell L Rev 114 at 1275.
[86] See *Toussaint v. Canada* (AG) 2022 ONSC 4747 [*Toussaint*].

to *everyone* (irrespective of citizenship status) under CIL as well as from its decision to sign on to the *International Covenant on Civil and Political Rights* (ICCPR) and its *Optional Protocol*.[87]

In his decision, Justice Paul Perell invoked *Nevsun* for the principle that the ICCPR's provisions—mainly the right to a remedy—constitute CIL norms and are automatically integrated within Canadian common law.[88] There are a number of questionable assertions in Perell's opinion, not least of which being the conversion of a treaty obligation into a CIL norm. The distinction between those two categories of international law are salient because Canada's treaty obligations are not automatically integrated into domestic law without ratifying legislation. Conversely, as the Supreme Court has now affirmed in a handful of decisions, CIL norms are part of Canada's common law without the need for independent legislative or judicial action.[89] In short, the settlement in *Nevsun* that left the Supreme Court's decision on a procedural motion as the only authority on the issue of CIL-related torts has resulted in a doctrinal mess. Arguably, the settlement has set CIL-related torts on a path far afield from historical understandings of international law and how it interacts with domestic legal systems. As detailed in the subsequent paragraphs, *Toussaint* proves that point.

For one, the majority decision in *Nevsun*—followed in *Toussaint*—at no point established the right to a remedy as a CIL norm that would then be automatically integrated into Canadian common law. Rather, the international law authority that the Court in *Nevsun* and subsequently Justice Perell in *Toussaint* rely upon to argue that the right to a remedy guarantees a private cause of action for international human rights violations, in fact, does not establish that a right to a remedy is

[87] *Ibid* at para 193; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*Optional Protocol*].
[88] *Toussaint*, *supra* note 866 at para 177.
[89] See *R v Hape*, 2007 SCC 26 at para 39; *R v Kazemi*, 2014 SCC 62.

custom. Rather, the U.N. Human Rights Committee report to which both Canadian decisions turn stated:

> [t]he enjoyment of the rights recognized under the … [ICCPR] can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application or national law.[90]

In other words, as unsatisfactory as it may be, the right to a remedy is a treaty right, not custom. As such, without legislative action, the right to a remedy under the ICCPR does not fall with the ambit of Canadian law. The Court's majority reasons in *Nevsun* jumped over distinctions between CIL and treaty law when it came time to applying those distinctions to the facts at hand. It took for granted the requirement to provide a domestic law remedy—even for human rights violations that easily fall within existing understandings of CIL.

A decision in *Nevsun* on the merits (had one been rendered) may have elaborated on the plaintiffs' right to a remedy for a defendant's violation of established CIL norms that concern international human rights. Alternatively, a subsequent court may have taken that right for granted. The point is that the Superior Court in *Toussaint* was left with, at best, a nascent theoretical framework that provided minimal guidance on the right to a remedy for breaching CIL norms. Justice Perell concluded in *Toussaint* that "the *Nevsun Resources decision* is a complete answer and a reason to dismiss Canada's Rule 21 motion."[91]

For the reasons outlined above, *Nevsun* is anything but a complete answer. In fact, it arguably imports a greater degree of ambiguity around the interaction of international law and Canadian common law. Therefore, unless an appeal court in *Toussaint* clarifies the Superior Court's decision

[90] Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, adopted 29 March 2004, UN doc CCPR/C/21/Rev.1/Add. 13; *Toussaint, supra* note 866 at para 187.
[91] *Toussaint*, *supra* note 866 at 189.

or *Toussaint* proceeds to a decision on the merits of the claim, subsequent Canadian courts may mistakenly take for granted that any time a defendant allegedly commits harms—even if that harm and a subsequent right to a remedy is not recognized under Canadian law—the plaintiff has a valid cause of action because a treaty right exists. Relying on the cursory reasons in *Nevsun* and the decision in *Toussaint*, courts in subsequent cases may simply assume that a right to a remedy pursuant to the ICCPR translates into custom and consequently a cause of action under the common law of torts. As stated above, the problem with that analysis is that a right to a remedy is not CIL. *Toussaint* misapprehends Canada's doctrine of adoption (how international law integrates into domestic legal systems), which differs between CIL and treaties.

Fiss pointed out that courts are reactive institutions. He wrote, "[t]hey do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts."[92] Even though courts assert adjudicative authority and are responsible for 'law articulation', they are simultaneously passive actors in a system largely driven by entrepreneurial plaintiff lawyers who, for a slew of reasons, use their discretion to decide when to push forth TBHR and other public interest cases that involve novel fact patterns and doctrinal interpretations. Courts must be summoned to clarify or advance the law in areas of penumbra and cannot do so on their own accord.[93] This scenario erects a framework in which ambiguous doctrinal principles (or even faulty ones) are, at times, the only reliable source to which litigants, lawyers, and lower courts can turn until subsequent decisions are rendered, preferably on the merits of a claim and by an appeal or apex court.

[92] Fiss, "Against Settlement", *supra* note 4 at 1085.
[93] See e.g. Amanda C Cohen, "Ripeness Revisited: The Implications of Ohio Forestry Association, Inc v Sierra Club for Environmental Litigation" (1999) 23 Harvard Environmental L Rev 547.

To put it differently, whether it be TBHR litigation or an analogous area of law that likewise falls within the scope of hard cases, presented above, settlement spoils what is a rare opportunity for courts to divine—potentially multiple times—on novel jurisdictional, liability, and/or remedial matters. Settlement in one case leaves a vacuum around a legal issue that takes a considerable amount of human and financial resources to bring back before the courts in a subsequent case. Even from a cost-benefit perspective, there ought to be some consideration around how to avoid the need for the extensive resources and efforts that are required to litigate cases that have to operate in areas of ambiguity, especially when that ambiguity need not be inevitable.

The lasting effect of settling complex cases, including TBHR litigation, is that, as Fiss remarked, justice is not done.[94] That recognition does not mean that plaintiffs do not get their day in court or are unable to secure successful judicial decisions. In fact, in *Toussaint* the ambiguity in the law actually worked in favour of the plaintiff. By justice not being done, Fiss meant—and I agree—that the law meanders without systemically developing based on existing frameworks and understandings.[95] What remains as the current scenario for TBHR litigation in Canada, settlement risks the possibility that future litigants will be left only with decisions on low-level threshold motions that do not explicitly accept or reject a doctrinal trajectory or a foundational principle that can be elicited in future decisions.

Irrespective of one's views on settlement, the state of the law around CIL-related torts in Canada rests on procedural motions. Given the egregious nature of the allegations that tend to accompany those types of claims, the law remains disproportionately frail and vulnerable to being developed in fragmented or perennially partial ways. If that scenario persists, it not only provides uncertainty

[94] Fiss, "Against Settlement", *supra* note 4 at 1085.
[95] *Ibid*.

for potential litigants and their lawyers, it casts Canada's civil justice system as a risky or unreliable venue for transnational or human rights-related litigation. Unfortunately, in TBHR litigation that scenario may augment the barriers that foreign plaintiffs face in pursuing compensation when MNCs subject them to human rights and environmental harms.

IV. Permitting Bad Practices (Barrick Gold)

From a law and economics perspective, settlement is viewed as the cost to defendants to internalize negative externalities.[96] However, unlike a potentially debilitating compensatory award ordered by a judiciary that, in some instances, has signaled a mitigation or even the end of previous bad practices on the part of corporate actors,[97] in the TBHR context internalizing costs through a settlement has little bearing on how a corporate actor will behave after confidentially paying off foreign plaintiffs. This may be because settlements are implicitly coerced agreements in which plaintiffs opt for *some* guaranteed sum of money, rather than the uncertainty of succeeding at a trial or a summary judgment motion that may result in a much larger compensatory sum.

As Fiss noted, settlement can result from vast economic disparities between wealthy institutional actors and plaintiffs of modest means who are willing to accept a relatively paltry sum that nonetheless improves their economic fortune. This scenario manifested itself in, for example, the Bhopal gas plant disaster litigation against Union Carbide in which Indian plaintiffs accepted a settlement amount far below anything that would cause a dent in the defendant's bottom line. That

[96] See e.g. Alexander Stremitzer, "Exploiting Plaintiffs through Settlement: Divide and Conquer: Comment" (2008) 164 J of Institutional & Theoretical Economics 27 at 27.
[97] See e.g. *JTI-MacDonald Corp,* Re, 2019 ONSC 1625 in which tobacco company JTI-MacDonald sought creditor protection as a result of a class action against it in which plaintiffs were awarded $13.5 billion in damages.

litigation was punted from the U.S. judicial system to the Indian courts and was hampered by incessant delays and allegations of corruption.[98]

In the Bhopal litigation, the claims were never adjudicated on the merits. Two years after the U.S. dismissal and five years after the explosion, Union Carbide's parent company settled with the plaintiffs for a mere $470 million USD in return for a full waiver of all legal claims. One comparative study found that had Bhopal victims been compensated according to the same principles as those in asbestos cases against U.S. corporations litigated in U.S. courts, the settlement amount would be in excess of $10 billion USD.[99]

Without substantial compensation awards (inclusive of debilitating punitive damages awards in, for instance, pharmaceutical and tobacco cases), confidential settlements are, at most, a brief hiccup for, among others, extractive industry MNCs that operate in under-regulated territories in parts of the Global South. In the absence of a confidential settlement having a significant effect on these MNCs' bottom line or their reputation, MNCs are able to operate abroad just as they did prior to settling. As a second TBHR case study that illustrates the argument Fiss made almost three decades ago, consider an ongoing dispute that involves the Canadian-British MNC Barrick Gold and its mining operations in parts of East Africa.

In 2013, Tanzanian villagers who lived in proximity to the North Mara Gold Mine (the "Mine") initiated legal proceedings against African Barrick Gold Plc (ABG) and its subsidiary North Mara Gold Mine Ltd. (NMGM) in the High Court of England and Wales.[100] ABG changed its name to Acacia Mining in 2014 and changed it again in 2020 to Barrick Tz Ltd. Barrick Gold Corporation

[98] See *In re Union Carbide Corp Gas Plant Disaster*, 809 F.2d 195 [*Bhopal*].
[99] See Edward Broughton, "The Bhopal Disaster and Its Aftermath: A Review," Environmental Health: A Global Access Science Source, <www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/>, cited in Maya Steinitz, *The Case for an International Court of Civil Justice* (Cambridge, Cambridge University Press, 2018) at 49.
[100] See *Kesabo v. African Barrick Gold*, [2013] EWHC 3198 (QB).

(BGC), ABG's Canadian-based parent company, acquired the Mine in 2006, but was not itself named a defendant in the British suit. In their claim, the Tanzanian plaintiffs (miners and their family members) alleged "injuries or deaths that occurred in or around the North Mara gold mine in Tanzania since 2010 as a result of the use of unlawful and/or excessive force by private security agents and/or police at the mine."[101] According to a Memorandum of Understanding between NMGM and the Tanzanian police services, the police were paid by AGB to serve as private security personnel in order to protect the Mine.[102]

In 2015, the parties entered into a settlement agreement. Although the full details of the settlement are confidential, what is known is that none of the Canadian, British, or African corporations implicated in the violence against the plaintiffs and their family members admitted to any wrongdoing.[103] It is also not known precisely how many plaintiffs were included in the out-of-court agreement.[104] Prior to the settlement, Eliakim Maswi, Permanent Secretary of Tanzania's Ministry of Energy and Minerals, had sent a letter to BGC acknowledging that "[f]or a long time, NMGM has been using the Police Force to control security of the mine in the outer perimeter of the mine site through a MoU signed by the two parties. However, despite having large number of police at the mine (about 160) the intrusions [into the Mine] have been escalating."[105] That letter

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[101] *Ibid* at para 1.

[102] See *Memorandum of Understanding* (July 2010), online <https://www.raid-uk.org/sites/default/files/MoU%20re%20North%20Mara%20policing%202010.pdf>.

[103] See John Vidal "British gold mining firm agrees settlement over deaths of Tanzanian villagers" *The Guardian* (10 February 2015), online: <https://www.theguardian.com/environment/2015/feb/10/british-gold-mining-settlement-deaths-tanzanian-villagers>.

[104] See RAID, *Human Rights Violations Under Private Control: Acacia Mining's Grievance Mechanism and the Denial of Rights* (12 June 2019) at 16, online (pdf): *RAID,* <https://www.raid-uk.org/sites/default/files/raid_report_on_private_grievance_mechanisms_final_12_june_2019.pdf>.

[105] See MiningWatch Canada & RAID, *Background Brief: Adding Insult to Injury at the North Mara Gold Mine, Tanzania* (September 2016) at 2, online (pdf): *MiningWatch* <https://miningwatch.ca/sites/default/files/adding_insult_to_injury_north_mara_0.pdf>.

called for the company to ensure "zero intrusions and zero fatalities," referring to the "high number of deaths and serious injuries of prospectors and people living in the vicinity of the mine."[106]

After the settlement, the Tanzanian government launched an official inquiry into abuses at the Mine that resulted in the lawsuit in the British courts.[107] In part, the inquiry recommended a specialized complaint mechanism to be implemented by BGC and its Tanzanian subsidiaries that would be available to miners in case of future wrongdoing by any of the corporate actors involved. In 2019, BGC acquired NMGM from Acacia Mining's minority shareholders and privatized it. Currently, it operates the Mine through a new company, Twiga Minerals, in which the Tanzanian government has 16% ownership.[108] As such, the Tanzanian government has become a partner in the Mine's operations and ensuing profits.

Unfortunately, after the 2015 settlement, not only have abuses continued against Tanzanian workers and community members[109]—many of whom live on minimal wages and are relatively uneducated—but BGC's internal complaint mechanism that came out of the settlement has been employed as a means for the company to systemically avoid the prospect of legal proceedings. Published in late 2017, the company's procedural manual for its site-level complaint mechanism alleged to fairly compensate Mine victims and adhere to the United Nations Guiding Principles on Business and Human Rights.[110] However, in a 2019 report by Rights and Accountability in

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[106] *Ibid* at 1.
[107] *Ibid* at 2.
[108] See Barrick "Twiga a Triumph of Partnership" (23 October 2020), online: *Barrick* <https://www.barrick.com/English/news/news-details/2020/twiga-a-triumph-of-partnership/default.aspx>.
[109] RAID reported that from 2014-2016, Acacia Mining (as it was called then) itself acknowledged 32 'trespasser-related' deaths at the Mine. *Supra* note 104 at 4. The Tanzanian government's 2016 inquiry though reported that "65 people have been killed and 270 people injured by police responsible for mine security." *Supra* note 1053 at 2.
[110] See Acacia, *Community Grievance Process: Standard Operating Procedure* (2017) at 12, 30 online (pdf): *Acacia* <https://web.archive.org/web/20180403160946/http://www.acaciamining.com/~/media/Files/A/Acacia/documents/grievance/community-grievance-process-sop-20171208.pdf> ; see also *supra* note 1043 at 3.

Development (RAID), the organization found that the complaint mechanism "subjects those harmed … to a disempowering and often humiliating process."[111]

Among other things, the mechanism established the company itself as the investigator and decision-maker for human rights abuses committed by its security forces. Furthermore, to be eligible for compensation, the complaint mechanism required claimants to waive their right to initiate legal proceedings.[112] Arguably, this arrangement bolstered the company's ability to commit abuses that can then be investigated and resolved internally. Payouts within the complaint mechanism were negotiated between the company and aggrieved workers or family members without the involvement of courts and lawyers.[113]

RAID's 2019 report characterized BGC's use of internal investigations following a violent incident as a means to avoid accountability. It stated that "[c]ompanies [such as BGC] employ strategies for substituting internal, privatised investigations into in-house and contractual security to pre-empt and seemingly obviate the need for official investigations into these private aspects of operations, leaving space only for the culpability of state actors."[114] In other words, BGC and its Tanzanian subsidiaries used the complaint mechanism as a smoke screen to give the allusion that they were attempting to remedy human rights abuses at the Mine. However, in effect, the mechanism thwarted public dispute resolution processes and muted the possibility that abuses would encourage the company to change its policies and practices with respect to its security

[111] MiningWatch Canada, *supra* note 104 at 3. By RAID's estimates, 82% of the 163 security-related complaints were rejected outright. RAID, *Briefing Paper: Police Violence at the North Mara Gold Mine* (March 2022) at 19, online (pdf): *RAID* <https://www.raid-uk.org/sites/default/files/barrick-north-mara-police-violence-briefing-march-2022.pdf>.
[112] "Acacia Mining (African Barrick Gold) and North Mara", online: *RAID* <https://www.raid-uk.org/content/acacia-mining-african-barrick-gold-and-north-mara>.
[113] RAID, *supra* note 1044 at 40.
[114] RAID, *Principles without justice: The corporate takeover of human rights* (March 2016) at 48, online (pdf): *RAID* <https://www.raid-uk.org/sites/default/files/principles_without_justice.pdf>.

forces. Worse yet, a March 2022 Briefing Paper published by RAID reported that after BGC acquired NMGM from Acacia Mining in 2019 the company ended the grievance mechanism, alleging to have "resolved the majority of the outstanding grievances."[115] According to that Briefing Paper, even though instances of harm related to the Mine persisted after 2019—and were known by the Mine's management personnel—there were no documented remedies that resulted therefrom.[116]

For its 2019 report, RAID interviewed 26 claimants who had signed settlement agreements as part of the complaint mechanism. Its report stated that "[a]ll have expressed their dissatisfaction with: flaws in the process by which the agreements have been drawn up and agreed; deficiencies in the way in which the agreements have been implemented; and the hostile or indifferent stance adopted by the company and its agents."[117] As an indication of that last point, the complaint mechanism did not envision accountability for the implicated police forces.[118] In fact, according to RAID's 2022 Briefing Paper, harmed individuals were not aware of any police officers who had been subject to discipline or prosecution for using excessive force.[119]

Less than a decade after the first British suit was settled and the Tanzanian government urged BGC and its subsidiaries to ensure there would be no further fatalities in the Mine, another group of Tanzanian plaintiffs commenced a British civil suit in 2020. In large part, that suit mirrors the 2013 suit.[120] It alleges violence on the part of Tanzanian police forces contracted by BGC that resulted

[115] RAID, *supra* note 111 at 20.
[116] *Ibid*.
[117] RAID, *supra* note 104 at 4.
[118] *Ibid* at 34.
[119] RAID, *supra* note 111 at 16.
[120] Geoffrey York "UK: High Court orders Barrick Gold's subsidiaries to disclose documents about police shootings & security-related violence at its North Mara mine in Tanzania", *The Globe and Mail* (14 April 2022) online: <https://www.theglobeandmail.com/business/article-barrick-ordered-to-produce-thousands-of-documents-related-to-police/>.

in death and serious injuries to employees and local community members.[121] Also, like the 2013 claim, the 2020 action has been brought against BGC's subsidiary, Barrick Tz Ltd. (formerly Acacia Mining). In defence of itself, BGC has argued that it inherited the current set of allegations as it only regained full control of the subsidiary responsible for the Mine in 2019.[122]

Irrespective of BGC's reasons for the continued abuses in the Mine after the 2015 settlement, there is nothing to suggest that any of the corporate actors involved have radically altered their policies or day-to-day practices with respect to the use of private security forces, the safety of Mine workers, or the treatment of detainees who are held by the security forces for unlawfully breaching the Mine's perimeter.[123] Plainly, the 2015 settlement provided little, if any, external force for the implicated corporate actors to modify their behaviour. In fact, as seen by BGC's efforts after the 2015 settlement to internalize and largely conceal complaints that resulted from human rights abuses by its security and police personnel, the settlement bolstered BGC's impetus to avoid legal liability. Yet, it spurred little action when it comes to mitigating human rights abuses at the Mine. RAID's 2019 report stated that in the preceding three years it "collected first hand testimony and other evidence on 22 cases of alleged unlawful killings by police or mine security personnel, *most of which have occurred since 2014*."[124] In other words, there was no indication that BGC's abuses ended or even decreased on an annual basis.

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[121] RAID "Tanzanian Victims Commence Legal Action in UK against Barrick", (10 February 2020), online: *Business & Human Rights Resource Centre* <https://www.business-humanrights.org/en/latest-news/tanzanian-victims-commence-legal-action-in-uk-against-barrick/>.

[122] Barrick, *Sustainability Report* (2021) at 84, online (pdf): *Barrick* <https://s25.q4cdn.com/322814910/files/doc_downloads/sustainability/Barrick_Sustainability_Report_2021.pdf.>.

[123] See e.g. RAID, *Briefing Paper: Police Violence at the North Mara Gold Mine* (2022), online (pdf):<https://www.raid-uk.org/sites/default/files/barrick-north-mara-police-violence-briefing-march-2022.pdf>; "New Killings and Assaults at Barrick Gold's Tanzania Mine Shatter Company's Radical Improvement Claims" (14 March 2022), online: *RAID* <https://www.raid-uk.org/barrick-gold-tanzania-mine-north-mara-police-violence>.

[124] RAID, *supra* note 1121 at 2. [emphasis added].

BGC alleges that its relation with Tanzanian workers and community members have been "radically repaired" since it took control of the Mine in 2019.[125] However, RAID's March 2022 Briefing Paper outlined continued violence on the part of BGC's hired security personnel that has persisted up until the present. It specifically stated that "10 of the 11 killings and assaults by police in mine security operations documented by RAID since Barrick took operational control occurred in the last 12 months."[126] RAID reported that since September 2019 when BGC assumed control of the Mine, its security forces have been involved in at least four people being killed and seven others being seriously injured.[127] In one incident, a nine-year old was struck and killed by a vehicle used in the mine and operated by BGC's security personnel. To make matters worse, BGC's security forces fired upon four women while they gathered the girl's body. In January 2022, Tanzanian police guarding the Mine fired teargas at children walking to school.[128] And in February 2022 the Mine's security personnel fired teargas and live ammunition at local shops in the Nyabichune village that sits adjacent to the Mine.[129]

BGC's security forces have also recently been accused of invading residential areas near the Mine and forcing their way into homes without a warrant. There have been several accounts of arbitrary arrests and of residents being beaten indiscriminately without provocation. Victims of violence on the part of BGC's security personnel have also been barred from seeking medical assistance. RAID's 2022 Briefing Paper noted that victims of non-fatal shootings or beatings were left untreated or, even worse, detained while requiring medical aid.[130] BGC's security forces have also

[125] RAID *supra* note 1233 at 17.
[126] *Ibid* at 19.
[127] *Ibid* at 1.
[128] *Ibid* at 2.
[129] *Ibid* at 2.
[130] *Ibid* at 8.

been known to deny victims PF3 forms that are required by Tanzanian hospitals before they can admit a patient.[131]

With the above facts in mind, the justifiable question may arise as to whether continued abuses at the Mine would have been any different if the 2013 claim had resulted in a liability determination as opposed to a confidential settlement. Even if there had been a liability determination in the 2013 claim, BGC's hired police forces may have continued to commit abuses against mine workers and adjacent community members. BGC / Acacia's negligence in allowing abuses by private security forces employed at the Mine may have continued even in the face of a liability determination. However, the difference with that scenario, as Fiss pointed out, is that there would have been a judicial decision in the public record. That decision would have not only disseminated the important facts, but also the legal principles foundational to liability. The latter would then be applicable to future legal proceedings, like the claim commenced in 2020 in the British courts.

Menkel Meadow wrote that "Fiss fails to deal with what is perhaps the most effective argument made on behalf of settlements. If the parties make their own agreement they are more likely to abide by it, and it will have greater legitimacy than a solution imposed from without."[132] In light of BGC's conduct after the 2015 settlement, that sentiment is not always true. Arguably, a confidential settlement, in effect, perpetuates a vacuum in liability and renders a civil proceeding as if it had never taken place. In the context of this case study and contrary to Menkel Meadow's view, a judicial decision concerning liability around BGC / Acacia's policies with respect to security and police personnel—even if there was no liability finding—would have served as an external check on the company's post-2015 behaviour. Currently, there is no external proclamation

[131] *Ibid* at 9.
[132] Menkel-Meadow, *supra* note 26.

of censure or any discernible insights into the boundaries of acceptable conduct on the part of the companies involved.

Furthermore, as a result of the 2015 settlement, there has *never* been any public admission of fault or information available as to the amount of the confidential settlement. The opacity of that settlement requires the plaintiffs and their lawyers in the 2020 suit to essentially reinvent the wheel. In other words, the argument in this part is not that a liability finding, as opposed to a settlement, would necessarily mean the end of abuses in the TBHR context. Rather, a liability determination (that would also collate the facts and relevant legal principles into one source) would be a legitimate check on a company's future conduct. It would set out distinct parameters of acceptable conduct to which the company would, from then on, have to adhere. A judicial decision around liability would, in effect, constrict a company within behavioural bounds that, if breached, could again bring that company before the courts. Though, in that circumstance—as opposed to the one that currently exists—there would be a standing precedent off which to build a plaintiff's argument and, correlatively, the doctrinal principles implicated in the case.

In Gillian Hadfield's terminology, in this dispute law's "democratic function" has succumbed to its "market function."[133] The individual rights of those harmed have become secondary to market efficiencies. Confidential settlements tend to create a vacuum of legal principles that can then be filled by companies themselves (in both pre-harm and post-harm scenarios) in a way that maintains their profitability and reputation. Here, BGC and its subsidiaries used the 2013 suit as a basis to restructure their complaint mechanism that then barred victims from accessing external legal proceedings and essentially permitted security forces to interact with Mine workers in much the

[133] Gillian K Hadfield, "Privatizing Commercial Law: Lessons from ICANN" (2002) 6 J Small & Emerging Bus L 258 at 263.

same way as they had done before the suit. A settlement in the 2020 claim would maintain the liability vacuum from which the company has benefited. On the other hand, a merits decision on liability, in either direction, would enhance what remains an almost silent public record. In short, even if a British court were to find that BGC is not liable for the recent acts of violence on the part of its security and police forces, that result—at least for the broader public—would be superior to the current state of affairs in which settlement has squeezed out potentially useful analysis around liability.

V. Side-Stepping Corporate Accountability (Tahoe Resources)

The final TBHR case study canvassed here that elicits some of Fiss's concerns around settlement comes out of litigation against the Canadian mining company Tahoe Resources Inc. In April 2013, Guatemalan citizens who had been protesting outside the Escobar mine in San Rafael Las Flores alleged they were shot and injured by security forces employed by the Guatemalan subsidiary of the Canadian-based parent company. The plaintiffs commenced an action in the B.C. courts pleading both negligence and intentional torts. Prior to any judicial consideration of those causes of action, the defendant MNC brought an FNC motion arguing that Guatemala was a more appropriate forum to adjudicate the transnational corporate human rights claim.

The B.C. Supreme Court allowed the defendant's FNC motion.[134] It held that Tahoe Resources Inc. had satisfied the factors enumerated under section 11 of the *Court Jurisdiction and Proceedings of Transfer Act* (CJPTA).[135] Those factors include the comparative convenience and expense to the parties and witnesses of litigating the transnational matter in the MNC home state

[134] See *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045 at para 87 [*Tahoe Resources I*].
[135] *Ibid* at paras 30-33, 106. See also *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 11 [CJPTA].

versus where the alleged violations took place. They also include the law to be applied, the desirability to avoid multiple legal proceedings and conflicting decisions, the potential for enforcement after judgment, and general fairness and efficiency considerations.[136]

In a 2017 decision, the B.C. Court of Appeal overturned the lower court's FNC ruling. It concluded that the transnational dispute should be adjudicated in Canada.[137] After the Court of Appeal allowed the plaintiffs to submit fresh evidence that related to concurrent criminal proceedings that would take place in Guatemala, it questioned whether a Guatemalan civil suit would proceed in a timely manner. Moreover, the Court surmised Guatemala's discovery rules as being too restrictive in comparison to the relatively expansive discovery that could take place in the B.C. proceedings.[138] In addition, Guatemala's limitations period would have expired by the time the proceedings were to be commenced there. The Court was also swayed by the prevalence of judicial and political corruption that threatened to taint the putative proceedings in Guatemala.[139] Finally, the Court was aware that Guatemalan law would not allow the plaintiffs to pierce the corporate veil to impute liability on the B.C.-based parent company.[140]

In 2019, two years after the Court of Appeal decided that the transnational dispute should remain in the B.C. courts, the Canadian company Pan American Silver acquired Tahoe Resources Inc. Only months after the change in ownership, Pan American Silver entered into a confidential settlement with the plaintiffs and offered a public apology.[141] In a press release concurrent with

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[136] CJPTA, *ibid*, s 11.
[137] See *Garcia v. Tahoe Resources Inc.,* 2017 BCCA 39 at para 131 [*Tahoe Resources II*].
[138] See *ibid* at paras 75-80.
[139] See *ibid* at para 113.
[140] See *ibid* at para 41.
[141] "Guatemalan protestors receive public apology from Pan American Silver after reaching landmark conclusion in Canadian court" *Business and Human Rights Resource Centre* (30 July 2019), online: <https://www.business-humanrights.org/en/latest-news/guatemalan-protestors-receive-public-apology-from-pan-american-silver-after-reaching-landmark-conclusion-in-canadian-court/#:~:text=Pan%20American%20Silver%20conceded%20on,and%20to%20the%20community...>.

the settlement, Pan American Silver stated, "the shooting on April 27, 2013, infringed the human rights of the protestors."[142] One of the plaintiffs went on the record to say that the settlement and public apology "is an important victory for us and our community … it vindicates our right to protest and to continue our resistance against mining operations in our community."[143]

Unlike *Nevsun*, this case study is not an instance in which the law remains ambiguous with the potential for legal principles to be incorrectly interpreted and applied in future cases. Likewise, Pan American Silver has not necessarily persisted with bad practices in the way that BGC and its Tanzanian subsidiaries have done after settling with miners who were harmed by hired security forces. Here, the MNC at issue acknowledged wrongdoing on the part of its predecessor. It recognized that Tahoe Resources Inc. had aggrieved the people and communities with whom it interacted in the course of profiting off of the Escobal Mine. But, the confidential settlement and public apology in this instance erects a strawman of which Fiss was aware when he asserted that settlement opts for peace rather than justice.[144]

Put simply, a settlement and apology are not the same as corporate liability as it is understood within the sphere of private law. Although the apology from Pan American Silver may have been sincere and provided the victims with a measure of vindication and solace, it is distinct from a liability determination by a state-sanctioned court that identifies wrongdoing on the part of the corporate defendant and awards remedies to the aggrieved party. The fact the corporate defendant entered into a settlement and offered an apology does not supplement or change existing legal principles. And as stated in regard to the previous case study, a settlement can even be viewed as

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[142] Pan American Silver Corp, News Release, "Pan American Silver Announces Resolution of Garcia v. Tahoe Case" (30 July 2019), online: *Pan American Silver Corp* <https://www.panamericansilver.com/news/pan-american-silver-announces-resolution-of-garcia-v-tahoe-case/>.
[143] *Tahoe Resources I*, *supra* note 1414.
[144] Fiss, "Against Settlement", *supra* note 4 at 1085.

nullifying that a legal proceeding was commenced in the first place. As Fiss remarked, settlement indicates that another case has been moved along; that "the agony of judgment has been avoided."[145]

Professor Bilsky's book, *The Holocaust, Corporations, and the Law*, about the virtues of settlement in TBHR litigation is applicable to this case study. She examines 1990s transnational Holocaust litigation (THL) in U.S. courts against a number of Swiss and German banks.[146] All claims as part of that litigation eventually settled. Bilsky employs Nancy Fraser's model of 'abnormal justice'—areas of the law in which there is no consensus around proper fora, legal standards, or discernible constituent interests—to argue that "a legal settlement was transformed from a barrier to justice into a key mechanism that can enable a belated justice to take place."[147] Bilsky views settlement as falling within an expansive notion of corporate accountability. For her, settlement in transnational corporate claims "encompasses … legal, moral, and political responsibility."[148] For some of the following reasons related to the settlement in the litigation against Tahoe Resources Inc., I disagree with Bilsky's sentiment. In short, settlement exists apart from accountability. And it arguably obviates the potential for accountability that has been rendered almost completely absent in the context of TBHR litigation.

There are a number of consequences that flow from the settlement in *Tahoe Resources.* For one, since the matter did not proceed to the point of further judicial decisions by the B.C. courts after the FNC issue was decided, there was no judicial analysis around the facts of this particular incident or, otherwise, a broader appreciation of the systemic policies and practices of the Canadian

[145] *Ibid.*
[146] Bilsky, *supra* note 8.
[147] *Ibid* at 2.
[148] *Ibid* at 170.

parent company and its overseas subsidiary. Furthermore, the parties were unable to partake in documentary and oral discovery so that statements, emails, guidelines, policies, and the like could be put on the public record. Not only would discovery have provided a better indication of the potential quantum of damages that were potentially owed to the Guatemalan plaintiffs, it would have fleshed out the factual matrix so as to compare and contrast this transnational scenario with past and future ones.[149]

Another consequence here of settling rather than proceeding to a consideration of the MNC's liability is that Pan American Silver came off to its shareholders as a benevolent actor that exhibited remorse over its predecessor's actions. All the while, there has never been recognition by a public body that the MNC has contravened established legal principles such that it should compensate the plaintiffs for an amount to be known by the public. Plainly, Pan American Silver's perceived benevolence after its July 2019 settlement was good for business. Six months after the settlement, the company's share price jumped 70%.[150] And one year after the company settled and issued an apology, its stock hit a record high of over $50 per share.[151] Even though large judgments in common law jurisdictions against, for instance, pharmaceutical and tobacco companies have only resulted in temporary stock dips, their share prices were not bolstered by a court decision that

[149] See e.g. Matthew A Shapiro, "The Indignities of Civil Litigation" Boston University Law Review (2020) 100 BU L Rev 50 and Paul Stancil "Discovery and the Social Benefits of Private Litigation" (2018) 71 Vanderbilt L Rev 2172 on the benefits of discovery in civil litigation.
[150] Pan American's share price was $17.02 in July 2019 and $29.44 in January 2020. See "Pan American Silver, Charts" (last visited 7 November 2022), online: *The Globe and Mail* <https://www.theglobeandmail.com/investing/markets/stocks/full-chart/PAAS-T/>.
[151] See *ibid.*

concerned actual or potential wrongdoing in the same manner as Pan American Silver's share price increased after the settlement.[152]

The above paragraphs do not discount all of Bilsky's argument. Pan American issued a public apology and vowed to ameliorate its conduct with respect to private security forces—a distinct approach from the one taken by BGC and its subsidiaries in Tanzania. In that regard, the settlement may have positive effects. However, as noted above, that result should not be conflated with legal liability. Doing as such stands to perpetuate what has already happened in TBHR litigation—an imbalance in the frequency of settlement and litigation. Merits-based decisions on liability are almost absent in TBHR litigation. In her empirical study of transnational claims in U.S. courts, Tonya Putnam found that as of 2016 "no U.S. federal court has yet handed down a [liability] decision against a corporate defendant."[153]

Bilsky confuses the mere resolution of a dispute with accountability. From the case studies in this article, a resolution leaves a corporate defendant largely unscathed. It serves as implicit permission to continue business as usual. As mentioned, accountability builds the public record. It provides an external check on a corporation's behaviour that cannot be covered up in the same manner as internal investigations and adjudication. Additionally, even if the terms are confidential, settlement fails to sufficiently affect a company's revenues. Sara Joseph makes the same point and adds that

[152] See e.g. Damon van der Linde "$15B tobacco ruling barely dents stocks as analysts predict penalty will come down" (2 June 2015), *Financial Post,* online:<https://financialpost.com/investing/15b-tobacco-ruling-barely-dents-stocks-as-analysts-predict-penalty-will-come-down>; Jenny McCall, "3M stock price dips as MMM settles $54m 'forever chemicals' class suit, veterans' earplug case ongoing" (22 September 2022), *Capital.com*, online <https://capital.com/3m-stock-price-mmm-forever-chemicals-class-suit-settlement>.

[153] Tonya Putnam, *Courts without Borders: Law, Politics and US Extraterritoriality* (Cambridge, Cambridge University Press, 2016) at 232. Also, see Francois Larocque, *Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort*, 46 OSGOODE HALL LAW J. 605, 628 (2008) ("to my knowledge, not a single decision on the merits has yet been rendered against a corporate defendant in relation to allegations of extraterritorial human rights violations"). As Simons and Macklin note "[t]he result of [such] … obstacles is that many of these [home state] cases will never be heard on their merits." Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive industries, human rights and the home state advantage* (New York: Routledge, 2014) at 255.

the mere potential for liability in a merits-based decision can impact a corporate defendant in myriad other ways:

> They [civil litigation claims] can lead to a thorough investigation and airing of salient facts, which may have critical consequences for a corporation's reputation even in the absence of a finding of legal liability, as 'embarrassing mismatches' between corporate rhetoric and their actions on the ground may be exposed. They can have a significant adverse effect on a corporation's share price. Litigation can also raise the profile of relevant concurrent NGO campaigns, giving campaigners much-needed publicity and leverage.[154]

Like the dispute in *Nevsun* around CIL-related torts, another consequence of the settlement in *Tahoe Resources* is that there are a number of important doctrinal issues that were never litigated. Without judicial pronouncements, doctrines that relate to TBHR litigation have remained under-analyzed and effectively shielded MNCs from accountability in Canadian and other common law home state courts. For instance, how would the B.C. courts have construed the corporate veil between the Canadian parent company and Guatemalan subsidiary? The Court of Appeal acknowledged that piercing doctrines do not exist in Guatemala.[155] Yet, the veil continues to be a barrier in Canadian courts for foreign plaintiffs who are seeking private law remedies against Canadian-domiciled corporations.[156]

In this case, the Guatemalan corporation owned the mine and hired the security personnel that shot and injured the protestors.[157] Could the Canadian parent company have been liable in tort for its control over the Guatemalan subsidiary? In two recent decisions, the U.K. Supreme Court has affirmed control tests to pierce the corporate veil in similar transnational scenarios.[158] That analysis

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[154] Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, 1st ed (Oxford, UK.; Portland, Or: Hart Publishing, 2004) at 14–15.
[155] See *Tahoe Resources II*, *supra* note 1377 at para 44.
[156] See *Yaiguaje v Chevron Corp*, 2018 ONCA 472 at para 10.
[157] See *Tahoe Resources I*, *supra* note 1344 at para 1.
[158] See *Vedanta*, *supra* note 7; *Okpabi*, *supra* note 7.

has yet to enter the fray of Canadian jurisprudence, partly because settlements have removed the judicial capacity to opine on the corporate veil between a Canadian parent and foreign subsidiary.

Relatedly, how would the B.C. courts in this case have engaged with the Ontario Court of Appeal's 2018 decision in *Yaiguaje* that concerned the enforcement of an Ecuadorian judgment against Chevron's Canadian subsidiary.[159] In *Tahoe Resources,* would the courts have pierced the veil since the parent company was domiciled in Canada and had direct ties with the corporate entity that committed the alleged harm abroad? That was not the scenario in *Yaiguaje*. There, it was the parent company that was found liable in the Ecuadorian courts.[160] The overall point is that the law of veil piercing in transnational scenarios remains under-analyzed, in part, because this dispute was settled before a court could render decisions that went beyond the appropriate forum for the litigation to take place.

Another question that has gone unanswered as a result of the settlement in *Tahoe Resources* is how the B.C. courts would consider direct parent company liability. This refers to a court's ability to impute liability on a Canadian-based parent company without piercing the veil between the parent company and foreign subsidiary. In that instance, a court would conclude that the parent company owed the foreign plaintiffs a duty of care because the plaintiffs suffered harm as a result of policies and practices promulgated by the parent company itself, rather than via the host state subsidiary. Were there facts around Tahoe Resources Inc.'s security practices concerning the Escobal mine that would have rendered the parent company directly liable? To date, the Ontario Superior Court's 2013 decision in *Choc v. Hudbay Minerals* remains the only Canadian decision that has recognized

[159] See *Yaiguaje*, *supra* note 7.
[160] See *ibid.*

direct parent company liability.[161] Since that ruling, there has been no further judicial explication on the doctrine which, like CIL-related torts envisioned in *Nevsun*, begs for further analysis.

Without the law of transnational corporate tort liability analyzed in a way that can systematically apply to future MNCs (in Canada or in other common law jurisdictions), there may be a greater impetus for MNCs implicated in host state harms to be reticent to settle or to settle for less than they would if there were a greater number of merits-based judicial decisions. Uncrystallised doctrinal principles inhere to the benefit of corporate defendants that are then bolstered to oppose TBHR litigation in light of continuing ambiguities in the law.

Parties that settle implicitly choose to overlook the nuances and complexities of a factual matrix and the legal principles associated with a particular case. Additionally, they remove the potential for fallout from a transnational dispute that may have long-term impacts on an MNC's bottom line and reputation. And they prevent meaningful effects on similar disputes that come before domestic courts in the future. With that said, plaintiffs who accept offers to settle before a consideration of corporate liability or compensatory remedies are not necessarily being selfish. It is a litigant's right to accept an offer to settle from a defendant. However, as a systemic method of resolving mass harm claims, settlement thwarts the advancement of the common law around corporate accountability in a way that would compel MNCs that operate in failed and fragile states to change their behaviour.[162] To date, the common law has not developed to a point where personal or environmental harm on the part of a western-domiciled MNC will be met with a liability determination that meaningfully impacts an MNC's bottom line and, consequently, its future conduct.

[161] See *Choc v. Hudbay* Minerals, 2013 ONSC 1414.
[162] For a domestic example of this point, see Farrow, *supra* note 6 at 226-228 (discussing the Ontario Lottery and Gaming Corporation's myriad settlements with "problem gamblers.").

Conclusion

This article has set out to engage a decades-long debate on the merits of settling contentious civil disputes rather than litigating them to the point where a court would be able to rule on the merits of a claim. In the context of TBHR litigation that is increasingly commenced in common law home states (Canada and the U.K. addressed here), I have largely adhered to Fiss's argument that settlement in disputes that concern areas of the law that remain novel or ambiguous ought to not be the default approach upon which litigants rely.

In private law litigation that has broader public consequences—both in the present and with regard to future civil disputes—confidential settlements stifle the law's path to greater clarity, implicitly permit the continuation of bad practices, and are, in effect, a smoke screen for liability determinations by a state-sanctioned court. I have illustrated these consequences through three TBHR case studies, each of which ended in confidential settlements and provided some modicum of redress for the individual plaintiffs. Despite that laudable result, those cases elicit longer-term impacts that arguably outweigh immediate success in any one claim.

As one final remark alluded to earlier, this article—like other literature around settlement—has weighed in on the impacts of settlement in contentious civil disputes, of which TBHR litigation is one example. However, it has stayed clear of how the negative consequences of settlement in TBHR and analogous areas of litigation would be operationalized such that more cases can be heard on their merits.[163] The stark reality remains that litigation is governed by a fiduciary relationship that exists between a lawyer and a client.[164] A lawyer acts in the best interests of a

[163] Climate change litigation is one analogous area that appears to be on the cusp of coming before Canadian judges more frequently. For examples of the contentious doctrinal principles that accompany climate change litigation, see *La Rose et al v Attorney General of Canada*, 2020 FC 1008; *Mathur v Ontario*, 2020 ONSC 6918.

[164] See e.g. Adam M Dodek, "Reconceiving Solicitor-Client Privilege" (2009-2010) 35 Queen's LJ 493; Gloria Geddes, "The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege**"** (1999) 47 Can Tax J 799

client and executes a client's instructions, even if those instructions differ from what a lawyer would opt to do in their absence. Mass tort or class actions claims do not alter that fundamental relationship.

Although not categorially, it would be difficult to convince already marginalized and/or indigent clients in TBHR litigation to forego a respectable compensatory sum on the speculative basis that they may be able to recover a greater sum after a liability determination. Presumably, it would be even more difficult to convince clients to forego a settlement on the basis that doing so may mitigate some of the negative consequences discussed in this paper. This 'conflict of interest' does not have any bearing on the entrenched lawyer-client relationship that continues to afford decision-making power completely to litigants as parties to a suit. And that says nothing about what is likely the actual scenario in many contentious claims: lawyers want to settle as much as their clients in order to be compensated and avoid 'the agony of litigation' that may ultimately fail. Whereas settlement may result in one or more of the consequences discussed in this article, an adverse judicial decision includes those consequences as well as a failure to recover *any* compensation for the plaintiffs.

As a thought exercise, there may be some ways to address the fiduciary lawyer-client relationship such that a greater number of novel or contentious cases progress to the point where a court can hear them on their merits. For instance, legislatures may enact statutory amendments to Solicitors Acts or Law Society Acts to allow for a public interest exception. Under that framework, a party to a civil suit would be able to approach a court to request that the matter be barred from resulting in a settlement in favour of a full trial or summary judgment motion that would consider the

defendant's liability and any applicable remedies.[165] Statutory exceptions based on public interest grounds can also be enacted with regard to class actions legislation that requires a court to approve a settlement.[166]

Otherwise, how the lawyer-client relationship is viewed in light of the decision to settle can be addressed by provincial law societies, particularly through codes of conduct that can be amended to provide lawyers a restricted ability to part ways with a client's desire to settle in favour of litigating a claim to the point of a merits decision. Of course, one problem with affording lawyers that discretionary ability would be that they may make self-interested decisions that prioritize their financial compensation from settlement versus the likelihood of higher compensation pursuant to a judicial decision. As this and the other potential instruments to avoid settlement do not yet exist, the litigation-settlement debate persists in a theoretical space in which disputes that are settled are accompanied by some combination of negative and positive consequences.

[165] See e.g. Joanna Langille, "Frontiers of Legality: Understanding the Public Policy Exception in Choice of Law" (2022) U of Toronto LJ (advance access), online: <https://doi.org/10.3138/utlj-2021-0085> for recent analysis on a public interest exception.

[166] See e.g. Deanna J Mouser, "Analysis of the Public Policy Exception after Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator" (1990) 12 Industrial Relations LJ 89.