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**COURT OF APPEAL
REGISTRY**

Court of Appeal File No.: CA43295
Supreme Court File No.: S-144726
Supreme Court Registry: Vancouver

COURT OF APPEAL

*(On Appeal from the order of Madam Justice Gerow of the Supreme Court of
British Columbia, pronounced on November 9, 2015)*

Between

**Adolfo Agustín García, Luis Fernando García Monroy,
Erick Fernando Castillo Pérez, Artemio Humberto
Castillo Herrera, Wilmer Francisco Pérez Martínez, Noé
Aguilar Castillo, and Misael Eberto Martínez Sasvín**

Appellants
(Plaintiffs)

and

Tahoe Resources Inc.

Respondent
(Defendant)

APPELLANTS' REPLY

**CAMP FIORANTE MATTHEWS
MOGERMAN**
400 – 856 Homer Street
Vancouver, BC V6B 2W5
Tel: (604) 689-7555
Fax: (604) 689-7554
Email: service@cfmlawyers.ca

**JOE FIORANTE, Q.C.
REIDAR MOGERMAN**
Lawyers for the Appellants

MCMILLAN LLP
Royal Centre, 1055 W. Georgia St.
Suite 1500, PO Box 11117
Vancouver, BC V6E 4N7
Tel: 604.689.9111
Fax: 604.685.7084
Email: karen.carteri@mcmillan.ca

**PETER REARDON; and
AMANDEEP SANDHU**
Lawyers for the Respondent

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Overview

1. There are two pervasive themes throughout the respondent Tahoe's factum: first, that this is a routine personal injury case, and second, that to exercise jurisdiction in this case on the basis that there is a real risk of an unfair trial in Guatemala would "seriously undermine the international legal order" and "unfairly tar the reputation of the entire Guatemalan judiciary and of most countries with the civil law tradition". The first is simply incorrect, and the second is incorrect but also sensationalist and an attempt to deter this court from engaging in the necessary analysis on the basis that doing so will somehow offend all civil law jurisdictions.

Respondent's Factum, at paras para 23(g), 27, 33, 34; Respondent's Factum, overview, at para 77

This is not a routine personal injury case

2. This is not a routine personal injury case. Tahoe repeatedly characterizes it as one to support its argument that this type of claim is common in Guatemala and the courts of Guatemala have experience with similar claims.

Respondent's Factum, at para 23(g), 27, 33, 34

3. This a human rights case. The audio intercepts from before and after the incident show the shootings were deliberate, malicious and calculated to suppress local opposition to the mine. The risk of corporate private security forces violating civilians' right to assembly in precisely these circumstances is specifically identified as a human rights issue in the Voluntary Principles on Security and Human Rights which Tahoe claims adherence to.

Notice of Civil Claim, at paras 21(b) and 23, AR, Tab 1, pp. 5-6; Wong #1, at Ex. "S", pp. 769-770; Respondent's Factum, at paras. 11, 13(a)

4. Moreover, there does not appear to be any such thing as a "garden variety" tort involving foreign corporations as, contrary to Tahoe's assertion at paragraph 24(g), a tort claim against a foreign corporation in Guatemala would be extremely unusual.

Chavez Bosque #2, JAB, Vol. 3, Tab 12B, p. 935; Zardetto #1, JAB, Vol. 3, Tab 16C, p. 1142 ("There are virtually no reported civil cases of this nature against foreign corporations in Guatemala.")

Exercising jurisdiction will not undermine the international legal order

5. Tahoe argues that the fundamental issue on this appeal is whether the principle of comity is discarded when there are allegations that the judges of a foreign country will not provide a fair trial. By characterizing the issue in this manner, Tahoe seeks to avoid scrutiny by this court of the fairness of the Guatemalan judicial system.

6. The test for assessing the fairness of a foreign legal system in the context of a *forum non conveniens* dispute is well understood and consonant with the notion of comity. As Lord Diplock noted in *The Abidin Daver*, the “possibility cannot be excluded that there are still some countries in whose courts there is a risk justice will not be obtained”. In such cases, the party advancing this argument “must assert this candidly and support his allegations with positive and cogent evidence”. Comity requires only that the court proceed with caution in assessing the situation, not that it refrain entirely from doing so. Contrary to Tahoe’s assertions, the plaintiffs’ evidence is directed at the current state of the judicial system in Guatemala, not all civil systems of law in the world. So far as the plaintiffs are aware, Guatemala is the only civil law system in the world that is under direct supervision by a resident United Nations body.

AK Investments, at para. 97

7. Tahoe again mischaracterizes the test when it asserts that the plaintiff must show he “could not obtain justice” (*Connelly, Katanga Mining*) or that there is a risk of injustice “in the specific circumstances of the case”, for example by showing that they had already suffered mistreatment in prior decisions (*AK Investment*) or as a result of the defendant’s past conduct before the foreign court (*Norex*). This gloss on the authorities is a thinly veiled attempt to confine those cases to their facts because the outcome of those cases is unhelpful to Tahoe’s position. Further, the submission on this point ignores the fact that under *Van Breda*, the burden is on Tahoe to demonstrate that Guatemala is clearly a superior forum. A forum in which there is a real risk of unfairness due to corruption, lack of judicial independence or other systemic problems is unlikely to be superior to the courts of this province for the adjudication of a dispute involving a resident British Columbia corporation.

Factual Errors

8. Tahoe's factum contains a number of factual errors and misleading characterizations of the evidence.

9. The plaintiffs' claims do not arise from "an altercation between the protestors and security personnel." The audio intercept evidence is unambiguous. The plaintiffs' claims arise from an unprovoked attack by Tahoe's security personnel on protestors assembled on public property.

Respondent's Factum, at para 12, Barany #1, at Ex. "A", JAB, Vol. 1, Tab 4A, pp 205-230

10. Tahoe claims the plaintiffs "acknowledge" that they have "access to counsel in a functioning judicial system." This statement is incorrect. The plaintiffs do not acknowledge that they have access to counsel for the purposes of a civil claim against Tahoe in Guatemala, nor do they acknowledge that Guatemala has a "functioning judicial system". The evidence is that the plaintiffs are participating in the criminal proceeding in order to obtain information about the prosecution and the shooting and because it is free. In contrast, a civil trial is expensive and long, and all expenses including evidence gathering, travel expenses and witness expenses would have to be paid for by the plaintiffs.

Respondent's Factum, at paras 18, 55; Affidavit #1 of Luis Fernando Garcia Monroy, made January 21, 2015, at para 3, JAB, Vol. 3, Tab. 8, p. 891; Zardetto #1, JAB, Vol. 3, Tab 16C, pp.1136, 1151

11. Tahoe incorrectly suggests that the plaintiffs can simply add or "choose to join" Tahoe to the criminal proceedings against Mr. Rotondo (assuming the proceedings ever resume). The power to add parties to the criminal indictment rests exclusively with the presiding judge.

Respondent's Factum, at para 18, 24(e); Barany #2, at Ex. "A" - Melgar Report (English Version), pp. 15-16, JAB, Vol. 3, Tab 6A, pp. 830-831

12. Tahoe incorrectly states that the plaintiffs' objections to the initial judge appointed to adjudicate the criminal proceedings was sustained. The challenge was dismissed by

the Court of Appeals of Jalapa . However, the judge still opted to resign from hearing the proceedings against Mr. Rotondo.

Respondent's Factum, para 19(c); Affidavit #2 of Jose Gudiel Toledo Paz, made February 5, 2015, at paras. 10-11, JAB, Vol. 3, Tab. 11, p.100

13. Finally, Tahoe suggests at paragraph 37 that delays due to assertion of constitutional rights for those charged with serious crimes ("*amparos*") "hardly demonstrates that the Guatemalan justice system cannot deal with civil cases in a timely manner." Abuse of *amparo* remedies is not confined to criminal cases. Further, Mr. Rotondo has been charged with serious crimes and the plaintiffs' claim to civil damages from Mr. Rotondo is inextricably linked to that prosecution. The abuse of *amparo* proceedings is therefore directly relevant to the plaintiffs' civil damages claims in Guatemala.

Chavez Bosque #2, at Ex. "B", p. 8, JAB, Vol. 3, Tab 12B, p. 931 ("Filing of *amparo* remedy is common in both civil and criminal lawsuits and in some cases parties may abuse in their filings to delay the procedure."); Zardetto #1, Ex. "C", JAB, Vol. 3, Tab 16C, pp. 1137

Discovery procedures in Guatemala

14. Tahoe contends that the fact-finding procedures available in Guatemala are "not materially disadvantageous" to the plaintiffs. Tahoe seeks to characterize the requirement that all evidence in support of a claim be listed in the initiating document (the "*demanda*"), as "a simple disclosure statement" and incorrectly asserts that the plaintiffs "have not proven that they cannot comply with such a routine procedural requirement of civil law systems". In fact, plaintiffs' expert Carol Zardetto¹ provided extensive analysis of how the specific requirements of the Guatemalan system would negatively impact the ability of the plaintiffs to pursue an action against Tahoe as a non-resident corporation (JAB 1148-1151). Tahoe's expert describes these requirements as "formal requirements" which must be met and notes that amendments to modernize the process have not yet been enacted (JAB 925, 935)

¹ Tahoe seems to suggest that Ms. Zardetto's extensive legal credentials are somehow diminished by the fact that she is also a published children's author. In addition to holding senior positions in the Guatemalan government, Ms. Zardetto was a professor of civil procedure for five years.

15. In summary, Guatemalan procedural and evidentiary rules pose major obstacles to the plaintiffs' ability to prosecute a claim against Tahoe in Guatemala. As Ms. Zardetto states specifically about the Guatemalan system, it is "not based on the notion of searching for the objective truth" but is instead "archaic, formalistic and ritualistic."

Respondent's Factum, overview, para 24(b) and (c); Respondent's Factum, para 24(a); Zardetto #1, JAB, Vol. 3, Tab 16C, p.1144

16. Tahoe misstates Guatemalan procedural rules on document production when it asserts a party would "only need to identify requested documents in general terms and the court will draw an adverse inference from a refusal to produce relevant documents in the defendant's position". The content of the documents must be described by the moving party. As Mr. Chavez Bosque explains, the remedy for the failure to produce to a document is the Court will accept the plaintiff's description of the contents of the document as accurate. Such a remedy, by definition, requires that the moving party identify the specific contents of the documents in issue. Tahoe offers no explanation as to how parties in the position of the plaintiffs could prove the existence of documents they have never seen such as corporate emails, board minutes and internal company memos, let alone describe their contents.


Respondent's Factum, at para 24(c); Chavez Bosque #2, at Ex. "B", paras 11(a),(b) and 12(d), JAB, Vol. 3, Tab 12B, pp. 935 and 936

Conclusion

17. The interests of justice require that a Canadian court should proceed extremely cautiously in requiring a plaintiff to take the risk of an unfair trial in a foreign jurisdiction against a Canadian resident corporation. Translation costs and the location of witnesses cannot and should not take precedence over the plaintiffs' right to a fair trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: 16/Jun/2016


 Signature of lawyer for Plaintiffs/Appellants
 For
 Joe Fiorante, Q.C.

LIST OF AUTHORITIES

TAB	CASES	PARA(S)
1	<i>889457 Alberta Inc v Katanga Mining Ltd.</i> , [2008] EWHC 2679 (Comm)	7
1	<i>AK Investment CJSC v Kyrgyz Mobil Tel Ltd.</i> , 2011 WL 719513	6-7
2	<i>Connelly v. RTZ Corporation Plc</i> , [1997] UKHL 30	7
3	<i>Norex Petroleum v Chubb</i> , 2008 ABQB 442	7

APPENDIX – ENACTMENTS

1. *Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28*