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)

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I

CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

Date	Event
April 27, 2013	Protestors are shot outside the gates of Tahoe Resources Inc.'s ("Tahoe") Escobal mine
June 18, 2014	Seven of the protestors file notice of civil claim against Tahoe, the Canadian company which owns the mine
July 9, 2014	Tahoe files jurisdictional response
August 8, 2014	Tahoe files a notice of application re jurisdiction and *forum non conveniens*
January 23, 2015	Plaintiffs file application response re jurisdiction and *forum non conveniens* and serve affidavits in support
February 20, 2015	Tahoe affiant Donald Paul Gray cross examined on affidavit
March 5, 2015	Plaintiff Luis Fernando Garcia Monroy cross examined on affidavit
March 6, 2015	Plaintiffs' expert Carol Zardetto cross examined on affidavit
March 13, 2015	Tahoe serves further affidavits in support and submissions re jurisdiction and *forum non conveniens*
March 30, 2015	Plaintiffs serve response submission re jurisdiction and *forum non conveniens*
April 2, 2015	Tahoe serves further affidavits in support
April 7, 2015	Tahoe serves reply submission re jurisdiction and *forum non conveniens*
April 8-10, 2015	Hearing re jurisdiction and *forum non conveniens*
June 25, 2015	Plaintiffs file notice of application re new evidence
November 9, 2015	Reasons for judgment of Gerow, J. granting a stay of proceedings released
December 24, 2015	Order declining jurisdiction/staying proceedings entered

II

OPENING STATEMENT

On April 27, 2013, security personnel at a Canadian owned mine in Guatemala opened fire on protestors who had gathered on a public road outside the mine gates. The shooting was deliberate and calculated to suppress local opposition to the mine. The injured protestors seek redress against Tahoe, the owner of the mine, in the courts of Canada as they face severe barriers to justice in Guatemala.

The Guatemalan judicial system is weak and lacks judicial independence, resulting in a pervasive problem of impunity for powerful actors. As explained by the affiant Mynor Melgar, the former second in command to the Attorney General of Guatemala:

> The Guatemalan state itself has been forced to deal with international condemnation over the ineffectiveness of its institutions in investigating, trying and punishing those responsible for human rights violations. This condemnation is directed at the various mechanisms used to generate impunity, such as the obstruction of justice (including the use of violent means), the covering up of perpetrators by agents of the State, deficient investigations (particularly with regard to the handling of evidence), lack of impartiality and independence of judges, and unjustified delays or inaction by the justice institutions.
>
> Affidavit #2 of Roger Barany, made January 30, 2015 (“Barany #2”) at Ex. “A”, p. 1

Given state interests in the Tahoe mine at the local, regional and federal level, Mr. Melgar opined that the plaintiffs could not be assured a fair trial in Guatemala. Notwithstanding this evidence, which was not challenged on cross examination, the chambers judge granted a stay of this action on the basis that Guatemala is the more appropriate forum for the trial of this action. This is an appeal from that decision.

The chambers judge incorrectly put the plaintiffs to the test of showing that justice could never be done in Guatemala. The correct test is whether the evidence discloses a real risk of an unfair trial process in the foreign court. Where it does, this factor militates strongly against the issuance of a stay. Here, the evidence of Mr. Melgar and others established such a risk.

III

Contrary to the Supreme Court of Canada ruling in *Van Breda* [1]the chambers judge went on to hold that where the enumerated factors in s. 11 of the *Court Jurisdiction and Transfer of Proceedings Act* point to Guatemala as the more appropriate forum for the litigation, "the question is not whether Canada's legal system is fairer and more efficient than Guatemala's legal system. It is whether the foreign legal system is capable of providing justice".

Van Breda establishes that the normal state of affairs is that Canadian courts will exercise jurisdiction over Canadian resident corporations unless fairness and efficiency dictate otherwise. The court should not exercise its discretion in favour of a stay solely because it finds once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states:

> It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation.[2]

The chambers judge failed to engage in the comparative analysis required by *Van Breda* to determine if the characteristics of the Guatemalan forum were such that it was better placed to dispose of the litigation more fairly and efficiently than the courts of British Columbia.

In Guatemala, the plaintiffs face significant obstacles in accessing important sources of proof and in simply filing suit against Tahoe as Guatemalan procedural rules require the plaintiffs to identify at the outset of the proceeding the evidence they intend to rely on to prove their case but provide no real means to discover this evidence.

The ends of justice are not served by staying these proceedings in favour of a foreign legal system which lacks an assurance of judicial independence and whose procedural rules do not facilitate the search for the truth.

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[1] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, ("*Van Breda*")

[2] *Van Breda, supra* at para 109

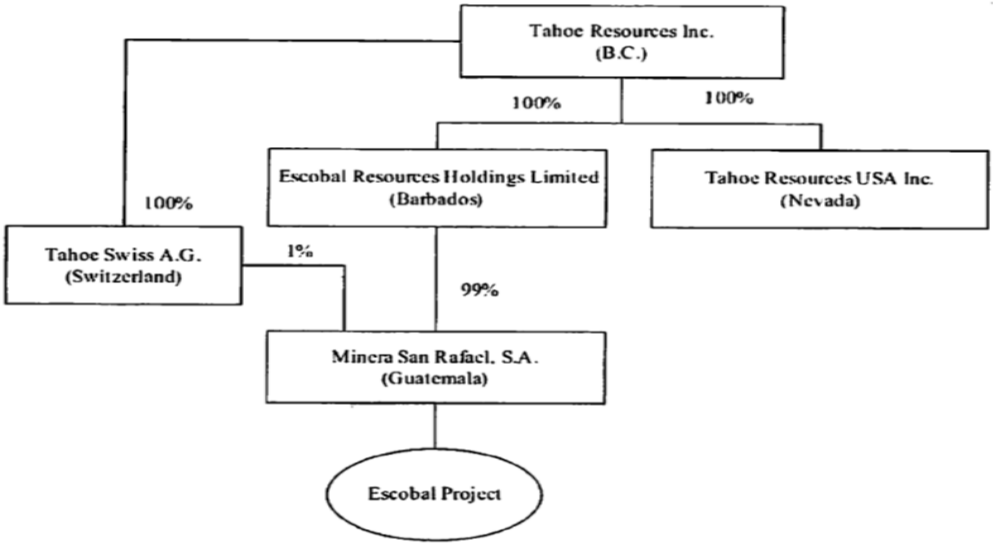
PART 1 - STATEMENT OF FACTS

Background

1. On April 27, 2013, seven men were shot by private security personnel while protesting outside the Escobal mine in San Rafael Las Flores Guatemala.

Reasons for Judgment of Madam Justice Gerow ("Reasons"), at para. 6

2. The Escobal mine is owned by Tahoe, a Canadian company incorporated in Vancouver, through the following structure:



Notice of Civil Claim, at para. 19

3. Prior to and after the shootings, authorities in Guatemala recorded audio intercepts of the phone of Alberto Rotondo Dall'Orso ("Mr. Rotondo"), the head of security at the mine.

Reasons, at para. 70

4. The intercepts were entered as exhibits at the hearing of the *forum non conveniens* motion. The plaintiffs submit that the intercepts establish a good arguable case that the shooting was deliberate, intended to suppress protests in opposition to the mine and contravened Tahoe's corporate social responsibility policies which inform the pleading of negligence and direct liability referenced below:

INTERCEPT No. 4006

Rotondo: Adilio, there are a ton of people here, that are standing in the, in the middle of the intersection, I'm going to force them out of there.

(SHOUTS) Get me all this shit out of here, this ton of shit… remove them, all of them from there. (sic)3

INTERCEPT No. 4007

Rotondo: I've run them out man, it's done.

Unknown: You ran them out?

Rotondo: Yes, I ran them out. They can go to hell. They come here fuckin' starving to death! They should go make a living somewhere else, get a job. We agree?

Unknown: Oh yeah, right. (sic)… Good thing you've sent them fuckin' running, those sons of bitches.

Rotondo: Yes. Si

INTERCEPT No. 4010

Rotondo: Hello

Juan Pablo: Hello, Alberto, good evening.

Rotondo: How are you?

Juan Pablo: Good, thank you, Alberto

Rotondo: Look, I'm calling just to let you know that, about 15 minutes ago, 15 of those sons of bitches came to, from the camp and came out to block me, right.

Juan Pablo: Uh-huh.

Rotondo: The soldiers came out, and we fired a shitload of rubber bullets and gas at them.

…

Rotondo: I ran them out with bullets. (MOCKINGLY) "We're going to bring them the Xalapanes." And they'd better find some Indians so they can defend themselves, I tell them, faggots.

Juan Pablo: (LAUGHS)

Rotondo: Bring on the priest Melgar then, or women and children to defend them, weren't you the real trouble-maker? That's what I told all of them. Well then, sons of bitches! (JUAN PABLO LAUGHS) And I let them have it, but like this, with a load of rubber bullets. Bitch! But I gave them shit, and they're gone now. There is no way I am ever going to allow, I am not going to allow these people to get confident, and they end up on me like in La Puya, right.

INTERCEPT No. 4052

Unknown: Commander

Rotondo: Are you (plural) shooting?

Unknown: Eh, no, that's in the tomatera. (IN BACKGROUND: It was accidental)

Rotondo: In principle, there is cleanup to be done.

Unknown: Yes, it's behind, behind the Quebrada, there by the tomatera or the house of the other old man that lives right there, below the Quebrada. (sic)

Rotondo: We are good. Clean (plural) the guns then.

Unknown: Yes, we are doing them.

Rotondo: Clean them well, we're saying "nothing happened here." There are no recordings. You understand me?

Unknown: Understood.

Rotondo: The version is: they entered and they attacked us. And we repelled them, right?

Unknown: Yes, yes, we're going to do what you say, (ROTONDO SAYS: 'that's good') without any detail that

Rotondo: The people need to be told, that they should not worry, that they come every day to attack us, with machetes and rocks; and so the people have defended themselves. There are, there are the broken shields there. But break another two, so that they see that they attacked us.

Unknown: Yes, very well, Commander. Yes, I'm going to take photos there of a stone injury to the shin, I'm going to take some as well, just in case.

Rotondo: They say that one has a, a bullet wound in the face and… if it exploded in their face, it's with bullets that they learn.

> Unknown: Yes, it could have landed there and exploded; yes.
>
> Retondo: Yes, well, good.
>
> Affidavit #1 of Roger Barany, made January 21, 2015 (Barany #1) at Ex. "A" [footnotes from the translation have been removed]

5. Mr. Rotondo was charged with assault, aggravated assault and obstruction of justice by the Guatemalan prosecuting authorities. No charges were brought against Tahoe or its Guatemalan subsidiary, Minera San Rafael ("MSR") in connection with the shootings.

> Reasons, at para. 25

6. Four of the seven plaintiffs in this action are "querellantes adhesivos" or civil claimants in the criminal proceedings against Mr. Rotondo. Under this process, Mr. Rotondo, if convicted of a criminal offence in Guatemala, could be ordered to pay compensation to his victims.

> Reasons, at paras. 70 and 95

7. At the time of the hearing of the *forum non conveniens* motion in the lower court, Mr. Rotondo was under house arrest in Guatemala, pending trial. As explained in the motion to adduce new evidence, Mr. Rotondo has since fled Guatemala for his home country of Peru. The criminal proceedings against him have been suspended.

Allegations against Tahoe

8. In this case, the plaintiffs allege that the Escobal mine was Tahoe's sole asset and that Tahoe controlled all significant aspects of the operation of MSR and the mine including security policies:

> Tahoe controls all significant aspects of the operation of MSR and the Escobal Mine including the establishment and implementation of security and community relations policies and practices in Guatemala. Particulars of Tahoe's control include:
>
> > (a) Tahoe adopted a corporate social responsibility policy applicable to its activities in Guatemala;
> >
> > (b) Tahoe has committed to the Voluntary Principles on Security and Human Rights and the Ruggie Guiding

> Principles on Business and Human Rights, as described below;
>
> …
>
> (d) the Health, Safety, Environment and Community Committee ("HSEC") of Tahoe's Board of Directors is responsible for monitoring and implementing community relations policies as described below;
>
> (e) Tahoe appoints a Guatemala Country Manager to manage and oversee the daily operations of MSR and the Escobal Mine; and
>
> (f) the Guatemala Country Manager is an employee of Tahoe and also serves as President of MSR.

Notice of Civil Claim, at para. 21

9. The plaintiffs allege that, as part of its corporate social responsibility policy, Tahoe committed to the Voluntary Principles on Security and Human Rights that require Tahoe to:

> (a) ensure that any private security personnel engaged by Tahoe observe Tahoe's policies regarding ethical conduct and human rights;
>
> …
>
> (d) ensure that any private security personnel engaged by Tahoe act in a lawful manner and exercise restraint and caution in a manner consistent with applicable international guidelines regarding the local use of force, including the United Nations Principles on the Use of Force and Firearms by Law Enforcement Officials and the United Nations Code of Conduct for Law Enforcement Officials;
>
> (e) ensure that any private security firms engaged by Tahoe have policies in place regarding appropriate conduct and the local use of force including rules of engagement;
>
> (f) ensure that the practices of any private security personnel engaged by Tahoe be capable of being monitored by Tahoe and/or independent third parties;
>
> (g) ensure that any private security personnel engaged by Tahoe provide only preventative and defensive services and do not engage in activities exclusively the responsibility of state military or law enforcement authorities;

> …
>
> (i) ensure that any private security firm engaged by Tahoe does not employ individuals credibly implicated in human rights abuses to provide security services;
>
> (j) ensure that any private security personnel engaged by Tahoe use force only when strictly necessary and to an extent proportional to the threat;
>
> (k) ensure that any private security personnel engaged by Tahoe do not violate community members' rights of freedom of association
>
> Notice of Civil Claim, at para. 23
>
> Reasons, at para. 21

10. The plaintiffs further allege that security personnel at the Escobal mine were under the authority of Mr. Rotondo and that all material times, Mr. Rotondo was an agent of Tahoe:

> **Tahoe Security Personnel**
>
> 27. Tahoe's security personnel at the Escobal Mine were comprised of Rotondo and private security personnel employed under contract with the security companies Grupo Golan (a.k.a. Alfa Uno) and Counter Risk S.A.
>
> 28. At all material times, the security personnel at the Escobal Mine were under the direction and control of Rotondo.
>
> 29. At all material times, Rotondo and the security personnel were agents of Tahoe. Tahoe is vicariously responsible for their conduct.
>
> 30. At all material times, MSR was an agent of Tahoe for the purposes of implementing security policies and practices. Tahoe is vicariously responsible for MSR's conduct.
>
> 31. Rotondo is a retired Captain in the Peruvian Navy with training and experience in special warfare, mining security and risk management. Rotondo received U.S. military training in Political Theory, Psychological Operations, Counter-Terrorism, Naval Special Warfare and Underwater Demolition as well as U.S. Navy Seal training.
>
> Notice of Civil Claim, at paras. 27-31

11. The plaintiffs advance claims of direct liability against Tahoe as the owner of the mine. The plaintiffs allege that Tahoe owed them a duty of care and breached it. The alleged breaches of the duty of care include failing to conduct adequate background

checks on Mr. Rotondo and the security guards, failing to adequately monitor them, and failing to ensure they adhered to Tahoe's corporate social responsibility policies and internationally accepted standards for the use of private security personnel.

Reasons, at para. 8

12. In the alternative, the plaintiffs allege that Tahoe and MSR expressly or impliedly authorized the use of excessive force by Mr. Rotondo and the security personnel against the plaintiffs and Tahoe is vicariously liable for the conduct of Mr. Rotondo and MSR.

Reasons, at paras. 7 and 8

Tahoe's Operations in Canada

13. Tahoe concedes that the courts of British Columbia have jurisdiction simpliciter.

Reasons, at para. 3

14. Tahoe says that its only activities in Canada are those related to its obligations as a reporting issuer, which include making proper filings and meeting its disclosure operations. Tahoe raised money on the TSX in 2010 to pursue its acquisition of an interest in MSR.

Reasons, at para. 12

15. The chambers judge found that the majority of Tahoe's directors reside in Reno, Nevada. This is not correct. At the time of the shooting, Tahoe had eight directors, five of whom resided in Canada. The remaining three resided in Reno.

Reasons, at para. 14

Affidavit #1 of Sharon Wong, made January 23, 2015 ("Wong #1"), at Exs. "E" and "L", pp.134, 305-306

16. Tahoe's officers, including the President, Chief Operating Officer and General Counsel, are resident in Reno, Nevada and work out of the office of Tahoe's American subsidiary Tahoe Resources USA Inc. ("Tahoe USA"). Tahoe USA provides functions related to investors relations, sales of silver concentrate and technical support to MSR but does not hold any ownership stake in the Escobal mine.

Ownership chart, at para 2 above.

Reasons, at para. 15

Operation of the Escobal Mine

17. From 2010 to 2013, the Escobal mine was under construction. In January 2014, the mine went into commercial operation. During that time, MSR had two business operations in Guatemala: one in Guatemala City and the other at the Escobal mine. At the material time, Don Gray was Tahoe's Guatemala Country Manager and resided in Guatemala[3]. In his role with MSR, Mr. Gray had responsibility for all matters relating to the operation of the Escobal mine and MSR in Guatemala, including security and community relations.

Reasons, at para. 16

18. As of April 2013, MSR had 693 employees who were residents of Guatemala. The contracts between MSR and its employees are in Spanish.

Reasons, at para. 17

19. There were also 28 expatriates who were partners in what is known in Guatemala law as a Contrato. The Contrato invoices MSR for the services performed by the partners. The expatriates that provide services to MSR hold mid to leadership management positions in MSR. Mr. Rotondo (who is a Peruvian national) was a partner in the Contrato and provided services to MSR as the security manager.

Reasons, at para. 17

Security at the Escobal Mine

20. Since 2010, MSR's security activities were carried out by Mr. Gray, other MSR employees or its contractors living in Guatemala. All contracts between MSR and security providers were made in Guatemala and are in Spanish.

Reasons, at para. 18

[3] Mr. Gray left the employment of Tahoe and at the time of the *forum non conveniens* hearing was working and residing in Colombia. Affidavit #1 of Prairie Jolliffe, made March 13, 2015 at Ex. "C", p. 85, lines 29-37

21. Beginning in September 2012, there were a series of protests and incidents, some violent, near the Escobal project. In 2013, MSR had a contract with Grupo Golan to develop and implement MSR's security plan. Grupo Golan has offices and operations in Guatemala. Part of Mr. Rotondo's duties was to manage the security guards, including the employees of Grupo Golan. At any given time 20 to 30 guards were on duty.

Reasons, at paras. 19, 23

22. During April, 2013, Mr. Rotondo reported to Mr. Gray regarding security matters. Mr. Gray in turn reported to Ron Clayton, President and Chief Operating Officer of Tahoe, who was based in Reno, Nevada.

Reasons, at para. 20

23. Subsequent to the hearing, the plaintiffs filed a fresh evidence motion regarding the failure of Mr. Gray and Mr. McArthur, the Chairman of Tahoe, to respond to subpoenas to testify in Guatemala at the trial of a protestor who was charged with allegedly uttering death threats against a manager at MSR. Neither gentleman responded to the subpoenas.

Reasons, at para. 101

The Guatemalan Legal System

24. Both parties led evidence on the Guatemalan legal system. The chambers judge made the following findings regarding the Guatemalan legal system:

> [28] The expert evidence sets out that the following framework exists in Guatemala's legal system:
>
> - Guatemala has a Civil Code. Guatemalan law provides remedies for the claims arising from intentional or negligent acts that cause injury.
>
> - The tort of negligent action requires the plaintiff to prove he suffered a damage or injury; the relationship between the defendant's acts or omission or lack of care owed and the damage the injury caused.

- Battery is considered a crime and any party responsible for a crime or offence is also civilly liable. Under Guatemalan law, a person can be added as a claimant seeking civil reparation/damages from an accused in a criminal proceeding. Damages can include restitution, payment of loss income, and damages for moral and material reparation.

- In a filed criminal claim, claimants seeking civil reparation can seek damages against any person found liable for any alleged physical and/or psychological damages. Other parties potentially responsible for the actions of an accused can be added as parties to the civil claim.

- Vicarious liability exists, but a plaintiff has the burden of proving that the company directed or supervised the acts against them. If the plaintiffs can prove the people who attacked them were acting under the parent company's supervision or direction, then the parent company would be held responsible.

- When a lawsuit related to acts or business in Guatemala is initiated, Guatemalan courts are qualified to summon foreign or Guatemalan individuals or corporations who are not in the country.

- The plaintiffs can also file a civil suit claiming payment for damages. Within the civil procedure, plaintiffs can bring vicarious liability, direct battery and negligence claims. Plaintiffs can claim damages suffered including lost income, lost profit and medical expenses. The concept of damages is not defined in the Code and it is possible to claim compensation for moral or psychological damages suffered.

- Various parties may be plaintiffs or defendants in the same proceedings. Defendants may bring third parties into a suit by joinder.

- Discovery procedures are available prior to a hearing.[4]

- Parties have a right to appeal final judgments of a trial court.

Reasons, at para. 28

Additional Evidence in the Record

25. As will be argued below, the chambers judge failed to apply the correct standard regarding the risk of an unfair trial process in Guatemala and failed to conduct the

[4] As argued below at para. 39, this finding is in error.

comparative analysis required by *Van Breda* to determine if, in light of the characteristics of the Guatemalan legal system, it is better placed to do justice as between the parties.

26. In order to apply those standards, it is necessary to review additional evidence in the record regarding the Guatemalan legal system which was not specifically referenced by the chambers judge. This includes the evidence of:

(a) Mirte Postema, Due Process of Law Foundation;

(b) Mynor Melgar, former Secretary General of the Public Prosecutors Office;

(c) Francisco Chavez Bosque, Guatemalan lawyer and defendant's expert on Guatemalan law; and

(d) Carol Zardetto, Guatemalan lawyer and plaintiffs' expert on Guatemalan law.

Mirte Postema, Due Process of Law Foundation

27. The Due Process of Law Foundation is a Washington, DC based non-profit, non-governmental organization, dedicated to strengthening the rule of law and promoting respect for human rights in Latin America through applied research, strategic alliances and advocacy activities.

Affidavit #1 of Mirte Postema, made January 23, 2015 ("Postema #1")

28. The Due Process of Law Foundation has engaged in extensive monitoring and analysis of judicial appointments and due process in Guatemala.

29. Ms. Postema was at the time of the lower court hearing a lawyer with the Foundation and the author of an amicus curiae brief submitted to the Guatemalan Constitutional Court detailing numerous irregularities in the appointment of appellate judges. Her research includes interviews with lawyers and judges operating in the system.

Postema #1, at paras. 1 and 7

30. Ms. Postema identified government influence over the judiciary as a current reality of the legal landscape in Guatemala:

> The country suffers from weak public institutions, an increasing presence of organized (drug related) crime and high levels of impunity. What is more, Guatemala's institutions tend to be at the service of the more powerful sectors of society, including the government, and those involved in illicit activities and the judiciary does not escape this reality.
>
> Postema #1 at Ex. "A" [footnotes and emphasis from the report have been removed]

31. In the past decade the situation in the Guatemalan judicial system became so extreme the United Nations established a commission against impunity in Guatemala, with far reaching powers to investigate crimes by illegal security forces and clandestine security structures:

> The situation in Guatemala's judiciary is so severe that in the past decade, international pressure led Guatemalan officials and civil society leaders to work with the international community to establish the International Commission Against Impunity in Guatemala (CICIG). Because national institutions such as the Public Prosecutor's Office (MP) and the National Civil Police (PNC) proved unable to effectively investigate crimes committed by members of illegal security forces and clandestine security structures, let alone disband such structures, it was decided that the only way to counter such forces was in creating an independent, international commission with far-reaching investigative (but not prosecutorial) powers.
>
> Postema #1 at Ex. "A"

32. Ms. Postema identified a lack of basic safeguards in Guatemala to ensure judicial independence:

> The structural weaknesses identified severely call into question the existence of basic conditions to guarantee judicial independence in Guatemala. They can be summarized as follows:
>
> • The normative framework in place in Guatemala is not sufficient to effectively guarantee judicial independence and protect judges from pressures originating both outside and inside the judiciary. Although the Constitution (art. 203) and laws (such as art 2 LCJ [Ley de Ia Carrera Judicial - Law on the Judicial Career]) speak of the independence of the judiciary, there are no mechanisms in place to guarantee this independence in practice: there is a lack of both internal and external

> independence, judges lack tenure, and the judicial selection processes are not merit-based.
>
> • There is no real judicial career in Guatemala. Judges are appointed for a period of only five years. This lack of tenure means that judges can, and do, lose their jobs without any justification necessary. This situation leaves judges highly vulnerable to pressures.
>
> • The internal disciplinary system does not respect due process guarantees and arbitrary decisions are therefore highly likely. It is a known problem that judges who make 'unpopular' decisions are subject to disciplinary proceedings and subsequent sanctions.
>
> • The processes for the selection of judges are not transparent or merit-based, but rather, are controlled by special interests--including those involved with organized crime.
>
> • Although there is a system in place for the random assignment of cases to judges, the judges and legal practitioners interviewed for DPLF's study indicated that this system is easily manipulated.
>
> Postema #1 at Ex. “A” [footnotes and emphasis from the report have been removed]

33. Ms. Postema cites the case of Judge Barrios as an example of the external pressures which can be applied to sitting judges:

> In 2014, Judge Yassmin Barrios was sanctioned by the Guatemalan Bar Association (Colegio de Abogados y Notarios de Guatemala) because during trial, she had allegedly 'disrespected' a member of the legal defense team of former dictator Efrain Rios Montt, who was convicted for genocide by the tribunal Judge Barrios presided over.
>
> Even in a country like Guatemala, where infringements on judicial independence are common, this very concerning development of lawyers imposing sanctions on a judge for acts performed in her role as judge, was unprecedented.
>
> Postema #1 at Ex. “A”

34. The case of Judge Barrios is not an isolated example. In late 2014, Judge Claudia Escobar went public with a taped conversation in which a sitting member of Congress promised her favours in the judicial appointment process in exchange for support in a case involving the vice-president. In March 2015 she was forced to leave the country under the protection of the Organization of American States.

Affidavit #2 of Sharon Wong, made March 17, 2015 (“Wong #2”) at Ex. “C”, p. 30

Mynor Melgar, Former Secretary General of the Public Prosecutors Office

35. Mr. Melgar is an important figure in the legal history of Guatemala. As the Secretary General of the Public Prosecutor’s Office in Guatemala, he was the second in command to the Attorney General of the country. He also served as the Legal Advisor for Criminal Matters and Human Rights to the Archdiocese of Guatemala and has been involved as counsel in a number of high profile human rights prosecutions in the country.

Barany #2, at Ex. “C”, pp. 14-15

36. Mr. Melgar confirms that systemic problems in the judicial appointment process persist in Guatemala and despite efforts at reform, impunity for human rights violations remains a current and pervasive feature of the Guatemalan legal system.

Barany #2, at Ex. “A” - Melgar Report (English Version), pp. 1-2

37. Mr. Melgar cited the close economic ties between the mine and multiple levels of political power in Guatemala as creating a very real risk that the plaintiffs would not receive a fair trial in Guatemala:

> Given the above context, and considering the statements contained in the documents provided to me, in particular the affidavit of Donald Paul Gray, I find this to be a case where there are economic interests that transcend the companies that own the project and involve the different levels of political power. Locally, that power is represented by mayors who derive economic benefits for their municipalities, and regionally by parliamentary deputies representing the provinces where the plant Is located; and at a yet higher level, those interests affect the Guatemalan state, whose national budget benefits from a revenue source in the form of royalties, in addition to the potential importance of attracting foreign investment.
>
> With this amalgam of common interests at play, in my opinion and based on my experience, it would be difficult to ensure a fair and impartial trial in a legal contest between those who represent those common interests and a group of seven farmers injured as a result of their actions in opposition to a mining project.
>
> Barany #2, at Ex. “A”, pp. 2-3

Guatemalan Procedural Law

38. The parties led expert evidence on Guatemalan procedural law from practicing lawyers in Guatemala – Carole Zardetto for the plaintiffs and Francisco Chavez Bosque for the defendant. The experts agreed on a significant number of points including the following:

(a) In order to commence a civil proceeding in Guatemala, a party must identify in the initiating document the evidence it intends to rely on to prove its case;

Affidavit #1 of Francisco Chavez Bosque, made November 21, 2014 (Chavez Bosque #1), p. 7

Affidavit #2 of Francisco Chavez Bosque, made February 6, 2015 (Chavez Bosque #2), p. 12, para 12(a),

Affidavit #1 of Carol Zardetto, made January 16, 2015 (Zardetto #1), pp. 11,15

(b) The rules do not provide for discovery. As explained by the defendant's expert, Mr. Chavez Bosque, "discovery process is not contemplated in Guatemalan civil procedure law";

Chavez Bosque #2, p.12, at para. 11(b); Zardetto #1, pp. 12, 15

(c) A party can request access to a document in the possession of the opposing party but must describe the contents of the document and prove it is in the possession of the other party;

Chavez Bosque #2, p.12, at para. 12(d), Zardetto #1, pp. 13, 15

(d) Guatemalan law does not recognize the legitimacy of the doctrine of *forum non conveniens*;

(e) The Guatemalan courts will not accept a transfer of a case dismissed from a foreign court on the basis of *forum non conveniens*. In the event of such dismissal, the plaintiffs would need to commence a new action in Guatemala;

Chavez Bosque #2, p.10, at para. 8(a), Zardetto #1, pp. 5-6

(f) The limitation period to commence an action in Guatemala is one year from the date on which the victim knew of the damage and who had caused it; and

Chavez Bosque #1, p.12, Zardetto #1, p. 8

(g) Tort actions against foreign companies are not common in Guatemala.

Chavez Bosque #2, p.12, at para. 10(b), Zardetto #1, p. 9

PART 2 - ERRORS IN JUDGMENT

39. The chambers judge erred by:

(a) failing to apply the correct legal standard in assessing the risk of an unfair trial process in the foreign court;

(b) failing to apply the correct legal standard to the assessment of whether Guatemala was clearly the more appropriate forum; and

(c) failing to give any or adequate weight to a number of the factors to be considered under s.11(2) of the *CJPTA*.

PART 3 - ARGUMENT

Standard of Review

40. The decision to issue a stay on the basis of *forum non conveniens* is discretionary. A discretionary order may be overturned on appellate review where the court misdirected itself as to the applicable legal standard or where it failed to give any or adequate weight to relevant factors:

Penner v. Niagara (Regional Police Services Board), 2013 SCC 19 (CanLII), at para. 27

Breeden v. Black, 2012 SCC 19 at para. 37

Forum Non Conveniens – General Principles

41. In *Van Breda*, the Supreme Court of Canada established a number of guiding principles which bear directly on the disposition of Tahoe's motion to stay these proceedings:

(a) The burden is on the moving party to establish that the alternative forum is "clearly more appropriate" [para. 108]

(b) The normal state of affairs is that jurisdiction should be exercised once it is properly assumed [para. 109]

(c) The burden is on the party seeking to displace the normal state of affairs to show that in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so [para. 109]

(d) A comparative analysis is required to determine which of the two competing fora is better placed to do justice. A defendant cannot displace its burden by simply pointing to the existence of an alternative forum with similar features to the domestic court. In order to grant a stay of proceedings, the court must determine that the alternative forum is in better position to dispose fairly and efficiently of the litigation [para. 109]

(e) Issues of fact relevant to jurisdiction are to be settled on a prima facie basis [para. 72]

42. The final point is consistent with this Court's restrained and prudential approach to fact finding on issues of jurisdiction. In *Purple Echo*, this Court held that the plaintiff need only establish an arguable case for jurisdiction. The Ontario Court of Appeal has applied a similar approach to issues of both jurisdiction and *forum non conveniens*:

> [31] The third principle is that because a forum non conveniens motion typically is brought early in the proceedings, the motion judge should adopt a prudential, not an aggressive, approach to fact finding….
>
> [33] But, on some motions -- and this is one of them -- the efficiency and fairness considerations at the heart of the forum non conveniens test will

> be tied inextricably to the factual issues in dispute. On these motions, the motion judge will have no choice but to address the competing versions put forward by the parties. In doing so, the motion judge should accept the plaintiff's version as long as it has a reasonable basis in the record. Accepting the plaintiff's version where warranted should not inhibit the motion judge from assessing all the evidence in the record and finding facts regarding the forum non conveniens factors themselves. Where the evidence is disputed the party relying on a fact supporting the application of a factor in its favour will bear the evidential burden of establishing that fact: see Frymer v. Brettschneider (1994), 1994 CanLII 1685 (ON CA), 19 O.R. (3d) 60, [1994] O.J. No. 1411 (C.A.), at para. 60.
>
> [34] However, the important point is that at this preliminary stage of the action, the motion judge's assessment and weighing of the forum non conveniens factors should be based on the plaintiff's claim if it has a reasonable basis in the record, not on the defendant's defence to that claim. This approach makes sense to me because the ultimate question is whether an Ontario court should take jurisdiction over the plaintiff's claim.
>
> *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 ("Purple Echo"), at para. 34
>
> *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.,* 2015 BCCA 200, at para. 34
>
> *Young v. Tyco International Tyco International of Canada Ltd.,* 2008 ONCA 709
>
> *Silvestri v. Hardy,* 2009 ONCA 400, at para. 7
>
> *Lixo Investments Ltd. v. Gowling, Lafleur, Henderson*, 2014 ONCA 114

Real Risk of Unfairness

43. The Supreme Court of Canada did not specifically formulate a test of fairness in *Van Breda*. UK courts considering this question have consistently held that an action in the English courts should not be stayed where there is a real risk of an unfair process in the foreign court. In *AK Investment* the Privy Council expressly rejected the proposition that the plaintiff must establish with certainty that justice would not be done in the foreign court in order to resist a stay of proceedings:

> In *The Abidin Daver* [1984] AC 398, at 411, Lord Diplock said that the "possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained" and gave some examples, none of which is close to this case. He went on to say that a plaintiff in an English action seeking to resist a stay (that being a stay case) upon the ground that "even-handed justice may not be done to him

> in that particular foreign jurisdiction, must assert this candidly and support his allegations with positive and cogent evidence." That was not a case in which this question arose for decision, but it is clear that Lord Diplock was speaking of evidence of risk, and that he was not requiring a higher standard, that justice would not be done.
>
> …
>
> The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances. (emphasis added)
>
> *AK Investment CJSC v Kyrgyz Mobil Tel Ltd.*, 2011 WL 719513 (2011) ("*AK Investment*") at paras. 70, 92

44. The real risk standard has been applied by Canadian courts. In *Norex* Justice Brooker conducted a detailed review of evidence of corruption in the Russian judicial system and held:

> [115] Here, taking all of the evidence into account, I am satisfied that while corruption in the Russian judicial system is not as pervasive as Norex contends, it does exist. Having said that, I adopt the following comments made by Clarke J. at para. 247 of Cherney:
>
> > I should make clear what I am not deciding. I am not deciding that a fair trial can never be obtained in the Russian Arbitrazh system. On the contrary I do not doubt that there are many honest and good judges in the system at every level, who conscientiously seek to do justice according to the relevant legal principles and procedures, who are developing the Arbitrazh system to relate to the commerce of the new Russia, and who do so without improper interference...
>
> [116] In the end, <u>I find that there is a real risk that Norex could be unable to obtain justice in this case from the Russian courts. It is unreasonable to expect that Norex should be obliged to court that risk</u>. That risk does not exist in the Alberta court, the court to which Ingosstrakh has already attorned. I therefore find that there is a definite juridical advantage to Norex which weighs in favour of this court asserting jurisdiction. [Emphasis added]
>
> *Norex Petroleum v Chubb*, 2008 ABQB 442 ("*Norex*"), at paras. 115-116

45. Rather than apply the “real risk” standard, the chambers Judge put the plaintiffs to the test of proving that justice could not be done in Guatemala. This standard was expressly rejected in *AK Investment* and is at odds with *Van Breda.* Under *Van Breda*, the chambers judge was required to determine whether the judicial system of Guatemala provided a fairer and more efficient forum than the courts of British Columbia, not the lesser standard of whether it was capable of providing justice. As noted by Brooker J. in *Norex*, granting a stay in favour of a forum in which there is a real risk of an unfair trial process does not promote the objective of fairness:

> While I am not prepared to find, positively, that Norex’s assertions are fact, i.e. that Norex cannot obtain a fair trial in Russia, I do find that that is a real risk that it will not. Consequently, fairness requires that the Alberta court should not decline to assert jurisdiction over the case.
>
> *Norex, supra* at para. 131
>
> See also, *Sistem Mühendislik v. v. Kyrgyz Republic*, 2012 ONSC 4351, at para. 71

46. In reaching her decision, the chambers judge drew support from a statement taken from the House of Lords decision in *Connelly v. RTZ* to the effect that where the *forum non conveniens* analysis points to a clearly more appropriate forum, the plaintiff must take that forum as he or she finds it.

47. In *Connelly,* there was no suggestion that the foreign judicial system, in that case Namibia, was subjection to corruption, lacked judicial independence or was otherwise incapable of providing a fair trial process. Rather, the House of Lords was concerned solely with the plaintiff’s inability to try the case at all in Namibia due to the lack of experienced counsel and financial assistance in that jurisdiction. All other factors pointed to Namibia as the appropriate forum. It was in this context that House of Lords noted that the plaintiff must take the foreign forum as he finds it unless he can establish that substantial justice cannot be done in the foreign court.

48. In the result, the House of Lords held that the availability of experienced counsel in the UK favoured retention of jurisdiction by the English courts:

> There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for the achievement of substantial justice, and that such representation cannot be achieved in Namibia. In these circumstances, to revert to the underlying principle, the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.
>
> *Connelly v. RTZ Corporation Plc,* [1997] UKHL 30 ("*Connelly*"), p. 348

49. The House of Lords did not require the plaintiff to take the Namibian forum as he found it nor did it establish "take it as you find it" as an informing principle of the *forum non conveniens* analysis. The test in the UK for assessing the risk of an unfair trial process is, as set above, the real risk test confirmed by the Privy Council in *AK Investment*.

50. Further, the "take it as you find it" approach cannot be elevated to a guiding principle of the *forum non conveniens* analysis at it is the inverse of the approach established by the Supreme Court of Canada in *Van Breda*. Under *Van Breda*, the resident Canadian defendant has the burden of proving that the foreign court is "clearly more appropriate" whereas the "take it as you find it" approach suggests that the foreign plaintiff must accept the foreign forum even if it is in an inferior position to do justice between the parties.

51. Citing comity, the chambers judge approached the shortcomings of the Guatemalan judicial system with extreme caution:

> [105] In my view, the public interest requires that Canadian courts proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens. To hold otherwise is to ignore the principle of comity and risk that other jurisdictions will treat the Canadian judicial system with similar disregard.
>
> Reasons, at para. 105

52. The emphasis on comity is misplaced in the circumstances of this case. The international community has repeatedly expressed concerns over impunity and the lack of an effective judicial system to address human rights violations in Guatemala. In fact, these concerns lead the United Nations to take the extraordinary step of establishing a commission against impunity in Guatemala known by its Spanish acronym, CICIG.

Postema #1, at Ex. “A”

53. CICIG has made public statements regarding the dysfunctional nature of the Guatemalan judicial system:

> Based on Guatemala's experience of abuse of judicial remedies, it is possible to identify a strictly procedural impunity. Although this strategy comes from a normative flaw, the abuse of judicial remedies as a dilatory measure turns judicial cases into complex and [sic] procedures, whose result may be unexpected and contrary to legitimate expectations of justice.

Zardetto #1, at Ex. “A”, p.9

54. Similarly, an international non-profit justice organization has described the Guatemalan justice system as being “obstructed by the systematic misuse of exceptional procedures fostered by formalistic literal interpretations of legal statutes, lack of internal judicial independence, and reckless litigation strategies”.

Zardetto #1, at Ex. “A”, pp. 9, 10

55. Comity does not dictate that Canadian courts refrain from assessing the risk of an unfair trial process in a foreign jurisdiction especially in circumstances where United Nations bodies and other organizations have publically reported on the issue.

56. There is a reasonable basis in the record to establish a real risk of an unfair trial process in Guatemala. Ms. Postema and Mr. Melgar confirm that Guatemala lacks the institutional safeguards necessary to ensure judicial independence and prevent government influence over the trial process.

57. The chambers judge concluded that this evidence spoke only to the risk of corruption in “the context of criminal prosecutions against state officials or organized crime syndicates”.

Reasons, at para. 65

58. With respect, this narrow characterization of the evidence cannot be reconciled with either expert’s evidence. Ms. Postema’s evidence speaks to a systemic lack of the conditions necessary for judicial independence and Mr. Melgar specifically identifies the

level of governmental interest in the Escobal mine as giving rise to a risk of an unfair trial process in this particular case.

59. The chambers judge's characterization and consideration of the evidence on this issue reflects a failure to apply the "real risk" test. In *Katanga Mining,* the High Court of Justice refused a stay of English proceedings on the basis of the risk of government interference in the judicial process in the Democratic Republic of the Congo. In so doing, the Court rejected the defendants argument that there was no evidence of corruption or government interference in the judicial district of the DRC where the case would be heard:

> It would in my judgment be a little unrealistic to approach this problem by reference only to what has occurred in one small enclave within the overall judicial system of the DRC. However that may be, the risk of attempted interference within a culture where such conduct apparently flourishes is in my judgment sufficiently unacceptable to render it unjust that the Claimant should be expected to subject itself to that risk. In examining questions of this sort it is with risk that the court is concerned – see *The Abidin Daver* [1984] AC 398 at page 411 per Lord Diplock. Again I emphasise that in reaching this conclusion I cast no aspersion upon the integrity of the judges who sit in the Kolwezi court. My conclusion is rather that a litigant should not be deprived of his opportunity of a trial in England if the only suggested alternative forum is one in which attempted interference with the integrity of justice is apparently widespread and endemic.
>
> *889457 Alberta Inc v Katanga Mining Ltd.,* [2008] EWHC 2679 (Comm) ("*Katanga Mining*"), at para. 34

60. Fairness dictates that the plaintiffs not be put to the risk of finding out if governmental interests will interfere in the prosecution of this case in Guatemala when no such risk exists in this jurisdiction.

Comparative Efficiency of the Guatemala Judicial System

61. Section 11(1) of the *CJPTA* provides that a court may decline to exercise jurisdiction if, "after considering the interests of the parties to a proceeding and the ends of justice" it finds that the foreign court is clearly the more appropriate forum to hear the case. Section 11(2) sets out a non-exhaustive list of factors to be considered in reaching the determination.

Court Jurisdiction and Proceedings Transfer Act, SBC 20013, c. 28 ("*CJPTA")*, at s. 11

Van Breda, *supra* at para.105

62. The court's consideration and weighing of s. 11 factors is discretionary but the exercise of discretion must be guided by the ends of justice and overall purpose of the *forum non conveniens* analysis – to determine if the foreign court is "in a better position to dispose fairly and efficiently of the litigation". This necessarily requires a comparative assessment of each court's ability to access key sources of proof in a fair and efficient manner.

63. In this case, the chambers judge essentially decided that Guatemala was an "imperfect" but adequate forum that "functions in a meaningful way" but failed to assess whether it was clearly the better forum for resolution of this litigation.

Reasons, at para. 66

64. The chambers judge's consideration of s. 11 factors was based on a misapprehension of the evidence and reflects the failure to conduct the required comparative analysis of each court's relative ability to try the case fairly and efficiently. In particular, the chambers judge:

(a) erred in finding that discovery was available in Guatemala;

(b) failed to consider or give sufficient weight to the difficulties which the lack of discovery poses for the plaintiffs in obtaining access to evidence in the possession and control of Tahoe;

(c) failed to consider or give sufficient weight to the difficulties faced by the plaintiffs in simply initiating suit against Tahoe in Guatemalan given the requirements of Guatemalan procedural law to identify, in the initiating pleading, the evidence relied on to prove the claim and the lack of discovery;

(d) failed to consider or give sufficient weight to the restrictions on accessing documents in the possession of third parties in Guatemala;

(e) failed to consider or give sufficient weight to the fact that key sources of evidence of Tahoe's knowledge are located outside of Guatemala and are more readily accessible under the British Columbia Rules of Court;

(f) failed to give sufficient weight to the claim of direct liability as establishing a significant connection to British Columbia; and

(g) failed to give sufficient weight to the failure of two key Tahoe witnesses to respond to subpoenas issued by the Guatemalan courts in another case involving the Escobal mine.

65. Guatemalan civil procedure rules do not permit discovery. As explained by defendant's expert, Mr. Chavez Bosque, "discovery process is not contemplated in Guatemalan civil procedure law". Notwithstanding this clear statement, the chambers Judge found that the evidence did not bear this out:

> [70] The plaintiffs argue they will be unable to obtain discovery in Guatemala. However, that is not borne out by the evidence. CALAS represents four of the seven plaintiffs in the criminal proceeding involving Mr. Rotondo in Guatemala. As counsel, CALAS has a right to a copy of all the evidence in the case. The evidence included the security video from the Escobal mine and audio intercepts of conversations in which the plaintiffs say Mr. Rotondo participated. The security video and audio intercepts were adduced on this application.
>
> Reasons, at para. 70
>
> Chavez Bosque #2, p.12, para. 11(a)

66. Access to documents in the file of a public prosecutor pursuing criminal charges against Mr. Rotondo cannot be equated with a right to civil discovery of documents in the possession of Tahoe, especially as Tahoe is the not the subject of the criminal prosecution. The audio intercepts provide valuable evidence of Mr. Rotondo's motivation for the shooting but do not assist in establishing Tahoe's state of knowledge of Mr. Rotondo's intentions for dealing with protestors.

67. The plaintiffs' ability to access documents in the possession of a defendant in a Guatemala proceeding is extremely limited. As explained by Mr. Chavez Bosque, the plaintiff in a Guatemala proceeding "may request the production of a document by the defendant but it has to describe the general content of such document and prove that the defendant has the document. If defendant refuses to produce the document, then the Judge may consider that the content described by plaintiff is accurate". Such a rule poses obvious challenges to the plaintiffs in seeking to prove that Tahoe was negligent in its hiring and oversight of Mr. Rotondo and security personnel at the Escobal mine. In contrast, the British Columbia Rules of Court provide for extensive discovery of documents in order to facilitate the search for the truth.

> Chavez Bosque #2, p. 12, at para.12(d)

68. The chambers judge failed to consider or give sufficient weigh to the challenges faced by the plaintiffs in simply filing suit against Tahoe in Guatemala given the lack of discovery and the requirements for pleading. As explained by Mr. Chavez Bosque, the initiating complaint (known as a Demanda) must specify the evidence relied on to prove the claim:

> In Guatemala a civil lawsuit commences with the filing of a written complaint. Among other things, a complaint must contain a clear and precise recitation of the facts upon which the complaint is based, a detailed description of the evidence to be presented to prove those facts.
>
> Chavez Bosque #1, p. 7

69. This requirement coupled with the lack of discovery presents a serious obstacle to the plaintiffs pursuit of a claim against Tahoe as a foreign defendant in Guatemala. As explained by the plaintiffs' expert, Carol Zardetto:

> There are very limited procedures available to the plaintiff to obtain evidence from a foreign defendant before filing a Demanda and commencing the case. Basically, the plaintiff would have to petition the court to issue letters rogatory to a foreign court to request production of evidence from the foreign company. This would be a complex and time consuming process with no assurance of success. The request would likely have to be based on Guatemalan rules of procedure, not the foreign procedures, in order to ensure that any evidence obtained in this process could be used in the court case here. As will be described below, there are very real limitations on the ability of a party to compel evidence from the opposing party. The rules require that the requesting party prove the document exists and what its contents are in order to obtain a ruling to produce the document.
>
> Zardetto #1, at Ex. "A", p. 19

70. Efficiency is not served by requiring the plaintiffs to engage in a complex and time consuming letters rogatory process with this court in order to attempt to initiate proceedings in the foreign court when no such impediments exist in this jurisdiction.

71. The plaintiffs face additional obstacles in Guatemala in attempting to access documents in the possession of third parties such as security contractor, Grupo Golan. As explained by plaintiffs' expert, Carol Zardetto:

> Article 181 of Civil and Mercantile Procedures Code establishes that when the parties need to use as evidence documents that are in the possession of a third party, they have to ask the Judge to require the third party to deliver the original documents, or a copy.
>
> Third parties can refuse the order, claiming exclusive ownership of the document. If they do refuse without a justified cause, they can be subject to a claim for damages in favor of the party that needed the evidence but they cannot be forced to disclose the document.
>
> Zardetto #1, at Ex. "A", p. 20

72. While important sources of proof exist in Guatemala, the chambers judge failed to give adequate weight to the severe limitations the parties face in attempting to access these sources in a Guatemalan proceeding. While these restrictions may not be significant in ordinary tort or contract cases in Guatemala, they pose severe challenges to the plaintiffs' ability to investigate and establish the knowledge and lack of oversight by Tahoe which lies at the core of the case as pleaded.

73. At the same time, the chambers judge placed little or no weight on the fact that many important sources of proof outside of Guatemala can be accessed under British Columbia's civil procedures. The chambers judge noted that most of Tahoe's documents and any management and staff are located in Nevada but did not go onto consider the plaintiffs' argument that evidence from these sources would be readily accessible under British Columbia's discovery rules. Documents in the possession of a wholly owned subsidiary are producible as documents in the control of a party.

> Reasons, at para. 45
>
> *Sunnar v. U-Haul Co. (Canada),* 1998 CanLII 5894 (BC SC)

74. The same is true of the knowledge of any officers of Tahoe who are based at the Nevada office. Tahoe's representative on discovery can be asked to inform his or herself of information in the possession of those officers.

75. The chambers judge held that the plaintiffs pleadings do not centre the case on Canada and that based on the evidence, the alleged breach of duties occurred in Guatemala, and perhaps Nevada. This finding fails to give adequate weight to the claim of direct liability and engages in fact finding without a complete factual record. The claim

for direct liability against Tahoe is based the alleged failure of its Board of Directors to provide adequate oversight of security personnel at the mine as required by Tahoe's stated corporate social responsibility policies.

76. UK courts have recognized the claim of direct liability against a parent company for injuries sustained by workers at overseas operations. In *Lubbe*, the House of Lords noted that such claims necessarily turn on information in the possession and control of the parent company:

> Much of the evidence material to this inquiry, would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas, and correspondence.
>
> *Lubbe v. Cape PLC*, [2000] UKHL 41 ("*Lubbe*") at para. 20

77. In *Chandler v. Caple plc*, the English Court of Appeal upheld the trial court's finding of direct parent company liability for failing to protect workers at an overseas facility from exposure to asbestos, holding:

> [69] I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.
>
> [70] The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees
>
> [80] In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees.
>
> *Chandler v Cape plc*, [2012] EWCA Civ 525

78. In *Hudbay,* the Ontario Superior Court of Justice declined to strike out a claim of direct liability against the Canadian owner of the Fenix a mine in Guatemala for alleged abuses against the local population carried out by private security forces in Guatemala.

> *Choc v. Hudbay Minerals Inc.,* 2013 ONSC 1414 ("*Hudbay*")

79. The claim of direct liability necessarily centres the case on the knowledge and conduct of the parent company. On a comparative basis, the British Columbia Rules of Court provide a fairer and more efficient means of accessing important sources of proof required to prosecute the case as pleaded.

80. Notwithstanding that Tahoe argued in favour of the Guatemalan forum as being a more convenient for the resolution of this litigation, the chambers Judge placed no weight on the failure of two key Tahoe witnesses to respond to Guatemalan subpoenas in a criminal proceeding against an Escobal mine protestor. The failure of these witnesses to respond strongly suggests that Guatemala is not in reality a convenient forum for Tahoe's senior management.

81. The remainder of the s. 11 factors do not point conclusively in favour of Guatemala as the clearly more appropriate forum.

82. The chambers judge concluded that any breach of duty alleged in the notice of civil claim would have occurred in Guatemala and accordingly Guatemalan law applies. This finding is premature. In *Douez*, this Court held that the complex issue of choice of law could not be decided at this preliminary stage of the proceedings. In *Pan-Afric* Frankel, J (as he then was) reached the same conclusion and declined to decide where the alleged breaches of duty occurred in a claim of professional negligence claim. Accordingly, this factor is neutral.

> Reasons, at paras. 79 - 80
>
> *Douez v. Facebook*, 2015 BCCA 279 ("*Douez*") at para 83; *Pan-Afric Holdings Ltd. v. Ernst & Young LLP*, 2007 BCSC 685 ("*Pan-Afric*") at para. 36; see also *Huang v. Silvercorp Metals Inc*. 2016 BCCA 100, at paras. 27, 28

83. As will be addressed in the fresh evidence motion, the criminal proceedings in Guatemala against Mr. Rotondo have been suspended so even if a criminal proceeding can be considered under this factor, there is no risk of conflicting decisions or multiplicity of proceedings.

84. The ability to enforce an eventual judgment favours British Columbia. Enforcement of a British Columbia judgment against a company incorporated here will not give rise to potentially protracted litigation over the recognition of a foreign judgment as has happened in other cases dismissed on the basis of *forum non conveniens*.

Chevron Corp. v. Yaiguaje, 2015 SCC 42 at paras. 5-6

Summary

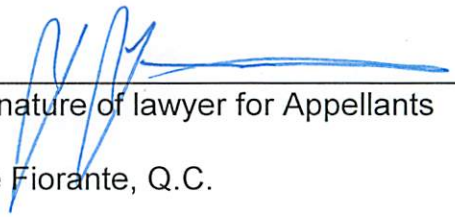
85. The record establishes a real risk of an unfair trial process in Guatemala. At the same time, Guatemala's procedural rules will not facilitate the search for the truth and in fact, may prevent the plaintiffs from being in a position to properly file suit in Guatemala. In these circumstances, the defendant has not met its burden of proving that Guatemala is clearly the more appropriate forum to achieve the ends of justice. The stay of proceedings should be set aside and this case permitted to proceed in British Columbia.

PART 4 - NATURE OF ORDER SOUGHT

86. The Plaintiffs seeks an order that the Order of The Honourable Madam Justice Gerow, made November 9, 2015, be set aside and this matter be permitted to proceed in British Columbia.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: 03/Mar/2016



Signature of lawyer for Appellants

Joe Fiorante, Q.C.

I

LIST OF AUTHORITIES

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III

APPENDIX – ENACTMENTS

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