CA43295

Court of Appeal File No. ~~1234556~~
Vancouver Registry

COURT OF APPEAL

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.

Respondents (Defendants)

MEMORANDUM OF ARGUMENT ON AN APPLICATION FOR LEAVE TO INTERVENE

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I. THE APPEAL

1. Amnesty International Canada ("AI") seeks leave to intervene in the Appellants' appeal of the decision of the British Columbia Supreme Court ("BCSC") to stay their action and decline to exercise jurisdiction in this case.

2. The Appellants are Guatemalan citizens. The Respondent company, Tahoe Resources Inc. ("Tahoe"), is domiciled in British Columbia and is the parent company of Minera San Rafael S.A. ("MSR"), which conducts mining activities in Guatemala.

3. The Appellants brought an action before the BCSC against the Respondent claiming that the Respondent was responsible for serious human rights abuses that the Appellants suffered at the hands of security personnel hired by MSR to protect its mine. Specifically, the Appellants allege that they were shot and injured by MSR security personnel, while protesting outside the Escobal mine in San Rafael Las Flores, Guatemala on April 27, 2013. The Respondent conceded that the BCSC had jurisdiction over the Appellants' claims.[1] However, the BCSC accepted the Respondent's argument that it should decline to exercise its jurisdiction because Guatemala was a more appropriate forum. It is this decision that the Appellants now appeal.

4. AI is an international, non-governmental human rights organization with decades of experience and a longstanding interest in ensuring that victims of human rights abuses are ensured access to justice in accordance with Canada's international legal obligations and commitments. AI has worked towards this goal through a variety of means, including interventions in judicial proceedings before this Court and others. AI also has specific expertise in the transnational dimensions of business-related human rights abuses, as well as the principles of international law and approaches of other common law jurisdictions that are relevant to this problem.[2]

5. AI submits that it has expertise in the issues in this appeal and can assist the Court by advancing arguments and a perspective that is distinct from that of the parties on the question of *forum non conveniens* (FNC) as codified at s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*[3] (CJPTA). Access to justice for victims of business-related human rights abuses is a serious

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[1] *Garcia v Tahoe Resources Inc.*, 2015 BCSC 2045 at para 3.
[2] Affidavit of Alex Neve, sworn June 16, 2016 at paras 5-6, 12, 23-25.
[3] SBC 2003, c 28.

problem recognized by the international community, which has led to the development of international legal principles and norms designed to protect and promote respect for human rights and to remedy abuses caused by the business interests of transnational corporations.[4] If granted leave to intervene, AI will submit that these principles and norms should inform this Court's interpretation of s. 11 of the CJPTA to presumptively favor the plaintiffs' choice of forum, and to place the burden on the defendants to show to show that BC is "clearly an inappropriate forum" to adjudicate the plaintiffs' case.

II. INTERVENOR STATUS AT THE COURT OF APPEAL

6. Rule 36 of the *Court of Appeal Rules* provides that a justice may grant leave to intervene for any person interested in an appeal.[5]

7. In *EGALE Canada Inc v Canada (AG)*, Rowles JA summarized the law regarding the criteria to be met in order for a justice to grant a party leave to intervene:

> Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.[6]

8. For the reasons set out below, AI submits that its proposed intervention in the present case satisfies all of these criteria, and that it ought to be granted intervener status.

III. AI HAS A DIRECT INTEREST IN THE APPEAL

9. AI has a strong record as a credible and objective organization that possesses a unique expertise in international human rights. The organization has a real and substantial interest in these cases, as they will affect its longstanding efforts to ensure corporate accountability and access to an effective remedy for human rights abuses. AI's efforts in this area encompass case-specific work, as well as long-term research, analysis and campaigning. AI also has a demonstrated

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[4] Affidavit of Alex Neve, sworn June 16, 2016 at para 31. Also see "Protect, Respect and Remedy" Framework as set out in United Nations, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights* (A/HRC/17/31) 21 March 2011.

[5] *Court of Appeal Rules*, BC Reg 297/2001, Rule 36.

[6] *EGALE Canada Inc v Canada (AG)*, 2002 BCCA 396 at para 7.

interest in ensuring that Canadian domestic law develops and is applied in a manner that is consistent with Canada's international legal obligations.[7] The value of AI's interventions on these matters has been frequently recognized by Canadian courts,[8] including the Ontario Court of Justice in *Choc et al v HudBay Minerals et al*, a case which also involves a claim against a Canadian corporation for human rights abuses in Guatemala.[9]

10. AI's interest in this appeal is evident from its long track record of working to ensure the accountability of companies involved in human rights abuses both domestically and abroad, and access to an effective remedy for the victims of such abuses in accordance with international human rights law and standards. AI's interest is also demonstrated by AI's other advocacy, education, and reporting efforts in the area of business-related human rights, as well as its broader commitment to the defense of human rights wherever they are at risk.[10]

VI. AI'S POSITION ON THE APPEAL

11. AI has reviewed the Appellants' memorandum of argument and takes no position with regard to the legal system in Guatemala or the ultimate outcome of the litigation. Rather, AI seeks leave to intervene with respect to the relevance of international human rights law and norms to the determination of jurisdiction where claims are made against Canadian corporations operating abroad. AI proposes to make submissions on the legal principles relevant to the FNC issue, as developed in other common law jurisdictions[11] and in light of the applicable international legal norms and standards concerning the right to an effective remedy for corporate-related human rights abuses.

VII. OVERVIEW OF SUBMISSIONS TO BE ADVANCED BY AI

12. AI submits that it can assist the Court with the legal issues raised in this appeal. It has expertise in international human rights law and norms, and can provide submissions that will likely not be addressed by the Appellants. Access to justice for victims of business-related human rights abuses is an important issue domestically and internationally that goes beyond the interests of

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[7] Affidavit of Alex Neve, sworn June 16, 2016 at paras 12, 23-28, and 30-31.
[8] Affidavit of Alex Neve, sworn June 16, 2016 at paras16-17.
[9] See *Choc et al v HudBay Minerals et al,* 2013 ONSC 998, where AI was granted leave to intervene, and *Choc et al v HudBay Minerals et al,* 2013 ONSC 1414, where the defendants' motion was dismissed and AI's arguments are considered at paras 32-39.
[10] Affidavit of Alex Neve, sworn June 16, 2016 at paras 23-31.
[11] Affidavit of Alex Neve, sworn June 16, 2016 at paras 34-35.

the parties in the current litigation. If leave to intervene is granted, AI will submit that British Columbia's courts should only exceptionally decline jurisdiction on the basis of FNC, as codified at s. 11 of the CJPTA, where the claim alleges extraterritorial torts or human rights abuses against corporations domiciled in the province.

13. Transnational litigation is a growing phenomenon, which is unsurprising given the dramatic worldwide expansion of markets and businesses. In the context of human rights, there has been increasing international concern about the governance of transnational corporate activity and the accountability gaps for business-related human rights abuses. The United Nations studied the issue for more than two decades, culminating in 2011 with the adoption of the UN's *Guiding Principles on Business and Human Rights*. The Guiding Principles emphasize that access to an effective remedy, particularly through judicial mechanisms, is an essential pillar in a transnational system aimed at preventing and redressing human rights abuses.[12]

14. The right to access an effective remedy for human rights abuses is expressly protected by international human rights law. Canada is a party to the *International Covenant on Civil and Political Rights*, a foundational human rights treaty under which Canada undertakes to ensure that individuals who claim their human rights have been violated will have access to an effective remedy, which includes having their rights thereto determined by a competent judicial or administrative authority.[13] Recently, the UN Human Rights Committee expressed concern that Canada may not be meeting its obligations to ensure an effective remedy for victims who allege human rights abuses by Canadian companies operating abroad.[14]

15. In emphasizing access to an effective remedy, the UN Guiding Principles note that domestic legal systems can sometimes create legal and non-legal barriers that prevent legitimate cases from being brought before the court and heard on their merits. The Guiding Principles highlight that "[m]any of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial

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[12] United Nations, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights* (A/HRC/17/31) 21 March 2011, pp 3-4.

[13] *International Covenant on Civil and Political Rights*, 19 December 1966, Can. TS 1976 No. 47, entered into force 23 March 1976, accession by Canada 19 May 1976, article 2(3).

[14] United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Canada* (CCPR/C/CAN/CO/6) 13 August 2015, para 6, p 2.

resources, access to information and expertise."[15] FNC represents a significant legal barrier that leads to many cases of alleged human rights abuses not being adjudicated on their merits.

16. AI submits that the imbalance of power between victims of human rights abuses and transnational business enterprises is a significant factor that must be considered in a justice-oriented approach to FNC. Consistent with this approach, courts should only exceptionally decline to exercise jurisdiction over a claim of human rights abuse made by a plaintiff against a corporation domiciled in that forum. In *Club Resorts Ltd v Van Breda*[16] ("*Van Breda*"), the Supreme Court of Canada emphasised that "the normal state of affairs is that jurisdiction should be exercised once it is properly assumed." Thus, a court should only decline to exercise jurisdiction "exceptionally" and where the other forum is "clearly more appropriate."[17]

17. Of particular relevance to this appeal, the Court in *Van Breda* stressed that the purpose of the doctrine of FNC is "to assure fairness to the parties and the efficient resolution of the dispute."[18] Because a court may not raise FNC of its own motion, but may only decline to exercise jurisdiction if the doctrine is invoked by the defendant,[19] fairness to the parties is the doctrine's prevailing concern and the lens through which efficient resolution of the dispute must be examined. Moreover, "the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context."[20]

18. If leave to intervene is granted, AI will submit that claims brought by individual plaintiffs against Canadian corporate defendants with respect to extraterritorial torts involving human rights violations constitute a distinct and unique context that warrants a restrictive approach to declining jurisdiction under FNC. The overwhelming power imbalance in such cases entails that denying the plaintiffs' choice of forum will ordinarily result in severe unfairness. To secure the ends of justice and "fairness to the parties" judges must give deference to the plaintiff's choice of forum in this type of case unless the defendant can clearly demonstrate it would suffer exceptional prejudice in a particular case. AI will therefore propose a justice-oriented

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[15] United Nations, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights* (A/HRC/17/31) 21 March 2011, pp 23-24, 24 for quote.
[16] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at para 106.
[17] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at para 109.
[18] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at paras 104, 105 (emphasis added).
[19] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at para 102.
[20] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at para 110.

approach to FNC that gives proper weight, among other factors, to international norms governing the right to an effective remedy.

19. In *Teck Comico Metals*, the Supreme Court of Canada held section 11 of the CJPTA is a codification of the common law test for *forum non conveniens*.[21] Further, the CJPTA should not be rigidly construed. Quite the opposite. As this Honourable Court has emphasised, the factors listed at s 11 are "not exhaustive"[22] and BC courts continue to examine the jurisprudence of other courts (both Canadian and foreign) when considering the origins, scope and purpose of FNC under the CJPTA.[23] In other words, the codification of FNC in British Columbia does not mean that courts are suddenly amnesic of that doctrine's common law origins or indifferent to its evolving international application.

20. AI will argue that a justice-oriented approach to FNC is one that takes into account the unique features of transnational tort and human rights cases involving corporate defendants and the governance problems that this class of litigation seeks to address.[24] These cases tend to pit individual plaintiffs of modest means against powerful multinational corporations that are able to deploy considerable resources in order to parry, extend, delay or displace proceedings, without ever having to offer a proper defense on the merits. Tort law plays an important role not only in regulating the conduct of Canadian corporations, but also in providing access to justice.

21. Moreover, the torts and human rights violations at issue often occur in countries that are conflict-affected areas or weak governance zones where many barriers to justice are likely to exist.[25] Faced with such unfavourable legal risks, the foreign plaintiffs turn to the courts of the corporate defendant's home state for redress, hoping that they might be held accountable in

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[21] *Teck Cominco Metals Ltd v Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 SCR 321 at paras 21-22.
[22] *Douez v Facebook,* Inc., 2015 BCCA 279 at para 15; *Laxton v Anstalt*, 2011 BCCA 212 at para 44; *The Original Cakerie Ltd. v Renaud*, 2013 BCSC 755 at para 52.
[23] *Douez v Facebook,* Inc., 2015 BCCA 279 at para 38 (discussing House of Lords and Privy Council cases to illustrate circumstances in which a stay of proceedings would not likely be granted); *Huang v Silvercorp Metals Inc*, 2015 BCSC 549 at para 33 (discussing the factors that are typically considered by Quebec courts in FNC motions brought under article 3135 of the *Quebec Civil Code*, SQ 1991, c 64); *Lloyd's Underwriters v Cominco Ltd.*, 2007 BCCA 249 at 56-58 (discussing the CJPTA's jurisprudential origins in UK case law).
[24] Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (Routledge 2014) chapter 4.
[25] United Nations, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights* (A/HRC/17/31) 21 March 2011, pp 11-12, 21 and 23.

their place of domicile. In short, transnational tort and human rights claims are not garden-variety lawsuits and, as such, they call out for a different approach to the CJPTA and to FNC.

22. It is AI's position that the BC courts should consider adopting the Australian approach to FNC when interpreting s. 11 of the CJPTA in transnational tort and human rights proceedings. Under this approach, rather than requiring the defendant to identify another forum that is "more appropriate"[26] to hear the action, the corporate defendant would bear the burden of showing that BC is "clearly an inappropriate forum" to hear the plaintiff's claim.[27]

23. This approach focuses the FNC analysis on the plaintiff's choice of forum and on "the advantages and disadvantages arising from the continuation of the proceedings in the selected forum rather than on the need to make a comparative judgement between two forums."[28]

24. Such an approach to s. 11 of the CJPTA is founded on a recognition that individual plaintiffs are systematically disadvantaged in transnational tort and human rights proceedings against multinational and transnational corporations that are very well resourced and operate across many jurisdictions. Given the fundamental power imbalance involved, the most appropriate forum is presumptively the one the plaintiff chooses – as long as substantial justice can be done in that forum. In cases such as the one on appeal, the most appropriate forum is not the forum possessing the highest number of territorial connecting factors to the claim. Indeed, such a mechanical approach to FNC would frustrate the doctrine's purpose of ensuring fairness between the parties. Accordingly, where jurisdiction over a corporate defendant is properly asserted in its forum of domicile, the presumption in favour of the plaintiffs' choice of forum should not be disturbed absent exceptional prejudice to the defendant.

25. This approach is consistent with the Supreme Court of Canada's guidance on underlying principles of FNC. In *Spar Aerospace Ltd v American Mobile Satellite Corp*, the Supreme Court directed that the doctrine of FNC be applied exceptionally, noting that "[t]he starting point should be the principle that the plaintiff's choice of forum should only be declined

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[26] CJPTA, s 11(1).
[27] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988), [1988] 79 ALR 9, 165 CLR 197 (HCA) at pp 45-46; *Voth v Manildra Flour Mills Pty Litd* (1990) 97 ALR 124 at 124-125 (HCA). See also Peter Prince, "Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach is Better" (1998) 47 ICLQ 573.
[28] *Voth v Manildra Flour Mills Pty Litd* (1990) 97 ALR 124 at 137 (HCA).

exceptionally, *when the defendant would be exposed to great injustice as a result*."[29] The rare and exceptional application of FNC is also supported by the International Law Association in the Sophia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations adopted in 2012.[30] Under AI's proposed approach, the corporate defendant would bear the burden of showing that pursuing the matter in BC "would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging', or, vexatious, in the sense of 'productive of serious and unjustified trouble and harassment'."[31]

26. Canadian society has a strong interest in ensuring that Canadian corporations respect human rights in their global and domestic activities, and it is important to Canada's international reputation as a proponent of international human rights law that Canadian courts be accessible to victims of wrongdoing by Canadian companies wherever they operate.

27. AI's proposed approach is consistent with Canada's international and constitutional obligations to ensure access to justice through its civil courts.[32] As Sir Thomas Bingham MR (as he then was) stated in *Connelly,* in considering a plea of FNC "it seems to me right to bear the international obligations of the United Kingdom in mind when the court is invited to make an order which would have the practical effect of preventing a plaintiff from pursuing his rights anywhere."[33] This sound policy also applies to British Columbia.

VIII. AI'S SUBMISSIONS ARE DISTINCT AND USEFUL TO THE COURT

28. AI's perspective in this case is unique: none of the other parties address the international human rights law arguments AI proposes to make, nor do they share AI's extensive expertise in this area. In *Choc et al v HudBay Minerals Inc*, the Ontario Superior Court of Justice considered

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[29] *Spar Aerospace Ltd. v American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 SCR 205 at para 79 (emphasis added).

[30] ILA, Sophia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations (August 2012) Article 2.5.

[31] *Régie Nationale des Usines Renault SA v Zhang*, [2002] HCA 10 at 25, citing *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988), [1988] 79 ALR 9, 165 CLR 197 (HCA) at pp *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988), [1988] 79 ALR 9, 165 CLR 197 (HCA) at pp *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988), [1988] 79 ALR 9, 165 CLR 197 (HCA).

[32] *International Covenant on Civil and Political Rights,*19 December 1966, Can. TS 1976 No. 47, entered into force 23 March 1976, accession by Canada 19 May 1976, article 2(3). And see United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Canada* (CCPR/C/CAN/CO/6) 13 August 2015, para 6, p 2.

[33] *Connelly v RTZ Corporation Plc,* (1996) Times, 12 July at p 504 (CA). The House of Lords expressed no disagreement with this approach.

AI's experience and expertise in international law and transnational human rights litigation, and concluded,

> I am satisfied that (Amnesty) can bring a perspective different from that of the parties, particularly given its expertise in the areas of international human rights abuse, international and transnational business accountability, and as a result of its involvement in and consultation with the UN Special Representative on the Issue of Human Rights and Transnational Corporations…While the actions involve private disputes, namely actions involving individuals and an international Corporation, with operations in the plaintiffs' home state, the issues involved have international, transnational and public policy overlays which make them appropriate for intervention by Amnesty, which, I find, can make a useful legal contribution.[34]

29. AI's proposed intervention will assist this Court in effectively determining the issues arising in this appeal; it will not raise new issues nor delay the proceedings; and it is in the interests of justice. AI respectfully submits that its proposed participation in this case meets the test for intervention, and requests that this motion for leave to intervene be granted.

IX. ORDER REQUESTED

30. AI requests that it be granted leave to intervene in this appeal on the following terms:

a. AI may file a factum of not more than 20 pages on or before a date to be specified by this Honourable Court;

b. AI's factum shall not duplicate arguments made by the Appellants and shall be strictly limited to making submissions on issues of foreign and international legal norms and standards concerning *forum non conveniens*;

c. AI may present oral argument at the hearing of the appeal not to exceed thirty minutes in length; and

d. No costs will be awarded to AI and no costs will be awarded against AI.

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[34] *Choc v. Hudbay Minerals Inc. et al.*, 2013 ONSC 998 at para 12. Also see *Equusketk Solutions Inc v Google Inc*, 2014 BCCA 448 at para. 22 where this Honourable Court granted leave to the Canadian Civil Liberties Association to intervene on international law issues that may inform the domestic case.

All of which is respectfully submitted.

Dated: ~~March 18th, 2016~~ June 17, 2016 M.M.

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LIST OF AUTHORITIES

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