COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Garcia v. Tahoe Resources Inc.,*
2017 BCCA 39

Date: 20170126
Docket: CA43295

Between:

Adolfo Agustin Garcia, Luis Fernando Garcia Monroy, Erick Fernando Castillo Pérez, Artemio Humberto Castillo Herrera, Wilmer Francisco Pérez Martinez, Noé Aguilar Castillo, and Misael Eberto Martinez Sasvin

Appellants
(Plaintiffs)

And

Tahoe Resources Inc.

Respondent
(Defendant)

And

Amnesty International Canada

Intervenor

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated November 9, 2015 (*Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045, Vancouver Docket S144726).

Counsel for the Appellants: J. Fiorante, Q.C.
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Intervenors, Amnesty International Canada: P. Champ
J. Klinck

Place and Date of Hearing:	Vancouver, British Columbia November 1, 2016
Place and Date of Judgment:	Vancouver, British Columbia January 26, 2017

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Dickson

Summary:

The appellants appeal from a chambers order granting the respondent's application for a stay based on forum non conveniens under s. 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28. The chambers judge held that an extant criminal proceeding and a potential civil suit in Guatemala made Guatemala clearly the more appropriate forum for the appellants' claims. The chambers judge also found that the appellants had not established that justice could not be done in Guatemala. On appeal, the appellants seek admission of new evidence relevant to the extant criminal proceeding and to the risk of unfairness in the Guatemalan judiciary. The appellants say the chambers judge erred in the legal test she applied when considering the appellants' evidence of corruption and injustice in the Guatemalan judiciary. Held: appellants' application to admit new evidence granted in part; appeal allowed; respondent's application for a stay dismissed. The new evidence concerning the extant criminal proceeding casts doubt on whether the proceeding will go forward in a timely manner or at all; this evidence is admitted because it is likely to have affected the outcome of the chambers judge's decision. The new evidence leads to the inescapable conclusion that the extant criminal proceeding is not a clearly more appropriate forum for the appellants' claims. The judge erred in concluding that a potential civil suit in Guatemala is also clearly a more appropriate forum. Three factors weigh against such a finding: (1) the limited discovery procedures available to the appellants; (2) the expiration of the limitation period for bringing a civil suit; and (3) the real risk that the appellants will not obtain justice in Guatemala. Evidence of corruption and injustice in a defendant's proposed alternate forum should be considered as a single factor among all relevant factors and concerns to be weighed together in one stage in the forum non conveniens analysis with the overall burden on the defendant to establish that the alternate forum is in a better position to dispose of the litigation fairly and efficiently. The judge erred by placing the onus on the appellants to prove that Guatemala was incapable of providing justice.

Reasons for Judgment of the Honourable Madam Justice Garson:

[1] On April 27, 2013, private security personnel employed at a Canadian-owned mine in Guatemala allegedly shot and injured Adolfo Agustin Garcia as well as six other Guatemalan individuals during a protest outside the Escobal mine. The mine is owned by the respondent, Tahoe Resources Inc., through its wholly owned subsidiaries. The seven plaintiffs commenced an action for damages against Tahoe in the Supreme Court of British Columbia. Tahoe, a British Columbia company, conceded that the Court had jurisdiction over the claim but applied for an order that the court exercise its discretion to decline jurisdiction on the grounds that Guatemala was the more appropriate forum for adjudicating the plaintiffs' claims. Madam Justice

Gerow granted the *forum non conveniens* application sought by Tahoe and stayed the British Columbia action.

[2] The application primarily turned on the judge's assessment of the plaintiffs' ability to obtain a fair trial in Guatemala. The judge concluded that they could. The plaintiffs appeal from the judge's order. (For consistency, I will refer to them as "the appellants" hereafter, even when discussing their role as plaintiffs in the Guatemala and British Columbia proceedings.)

[3] On this appeal, the appellants contend that the judge erred in law in imposing on them the burden of proving that justice could never be done in Guatemala; they say that the correct test is "whether the evidence discloses a real risk of an unfair trial process in the foreign court". Tahoe says that the appellants' arguments demonstrate a "parochial attitude towards countries that follow the civil law procedural tradition". It says that the judge properly concluded that the appellants' evidence did not meet the necessary standard of proof to justify a refusal to decline jurisdiction.

[4] On appeal, the appellants seek to introduce new evidence. This evidence touches upon developments in the related criminal proceeding in Guatemala and provides further opinions concerning the Guatemalan legal system. Tahoe opposes the introduction of the new evidence.

[5] Amnesty International Canada intervenes. It supports the appellants' contention that the judge erred in her articulation of the legal test to be applied in assessing the risk that the appellants could not obtain a fair trial in Guatemala.

I. Background Facts to the Claim

A. The April 27, 2013, Incident

[6] Through its wholly owned subsidiaries, Tahoe manages and controls all significant aspects of the operation of the Escobal mine, a silver, gold, lead, and zinc mine in Southeast Guatemala in the municipality of San Rafael Las Flores.

[7] Six of the appellants are farmers and one is a student; they are all residents of San Rafael Las Flores.

[8] On April 27, 2013, the appellants participated in a protest outside the gates of the mine.

[9] Tahoe's security manager, Alberto Rotondo Dall'Orso, was concerned that the protestors would interfere with the operation of the mine. He and Tahoe were aware of strong opposition to the mine within the local community. Leading up to the day of the incident, there had been a number of violent conflicts at several mines between protestors, mine staff, and local officials. On the evening of April 27, 2013, the protestors assembled in front of the gates to the mine. In their notice of civil claim, the appellants allege that security guards opened the mine gates and "opened fire on the protestors using weapons that included shotguns, pepper spray, buckshot and rubber bullets".

[10] The appellants plead that the shooting was planned, ordered, and directed by Rotondo and that Tahoe "expressly or implicitly authorized the use of excessive force by Rotondo and other security personnel, or was negligent in failing to prevent Rotondo and other security personnel from using excessive force".

[11] The appellants allege that the security personnel acted at the direction of Rotondo, the Security Manager at the mine.

[12] The appellants allege that, after the incident, Rotondo instructed security personnel to falsify accounts of the shooting and destroy or cover up evidence.

B. Criminal Proceedings

[13] A Guatemalan prosecutor charged Rotondo with assault, aggravated assault, and obstruction of justice. No charges were brought against Tahoe or its Guatemalan subsidiary, Minera San Rafael S.A. ("MSR"), in connection with the shootings.

[14] At the appellants' request, they were joined as civil complainants in the criminal proceeding (as is permitted under Guatemalan law), and, within that derivative proceeding, they seek compensation.

C. Escobal Mine Ownership and Management Structure

[15] Three of Tahoe's directors reside in Reno, Nevada, and five reside in Canada. The President, Chief Operating Officer, and General Counsel of Tahoe all reside in Reno and work from Tahoe's U.S. offices. Tahoe has no office in British Columbia other than a registered and records office necessary to meet its statutory requirements as a reporting British Columbia company. Tahoe has no officers or employees employed in British Columbia. Tahoe holds its annual general meetings in either Vancouver or Toronto. Its directors meet once or twice a year in Vancouver.

[16] Don Gray, the General Manager and Country Manager of MSR at the time of the incident and current Vice President of Operations for Tahoe, is a resident of Guatemala.

[17] Tahoe is the parent company of MSR, a Guatemalan company which owns the Escobal mine.

[18] Gray has responsibility for the day-to-day operation of the mine. Rotondo reported to Gray. On security matters, Gray reported to Ron Clayton, the President and Chief Operating Officer of Tahoe who is based in Reno.

[19] The employment contracts concerning Rotondo and other security personnel are in Spanish.

D. Tahoe's Corporate Social Responsibility Initiatives

[20] The appellants plead that Tahoe has direct responsibility for the conduct of Rotondo. As part of that liability they refer to Tahoe's Corporate Social Responsibility ("CSR") initiatives.

[21] Gray deposed that "[a]s a demonstration of genuine commitment to the region and sensitivity to socio-economic issues in the communities in which MSR operates,

numerous CSR initiatives have been implemented...” He describes how “Tahoe’s Board of Directors formed a Health, Safety, Environment, and Community Committee (“HSEC”) to oversee health, safety, environmental and other community issues at a high level”. Tahoe also established a CSR Steering Committee which includes executive officers of Tahoe. Tahoe has retained CSR consultants to assist it in complying with various business and human rights conventions. MSR also employs personnel locally to build relations with the local community.

II. Pleadings

[22] On June 18, 2014, the appellants filed a notice of civil claim against Tahoe in the Supreme Court of British Columbia.

[23] The appellants plead three causes of action against Tahoe for which they seek damages, including punitive damages: (1) direct liability for battery; (2) vicarious liability for battery; and (3) negligence.

[24] On the direct liability claim, the appellants plead that Tahoe controls all significant aspects of MSR and the Escobal mine and expressly or implicitly authorized the unlawful conduct of Rotondo and the security personnel.

[25] On the vicarious liability claim, the appellants plead that MSR expressly or implicitly authorized the unlawful conduct of Rotondo and the security personnel and that, as the parent company of MSR, Tahoe is vicariously liable for the battery. Alternatively, the appellants assert that Tahoe is vicariously liable for the battery committed by Rotondo and the security personnel as parent company of MSR who contracted for their services.

[26] On the negligence claim, the appellants plead that Tahoe owed them a duty of care because it controlled all significant aspects of the operation of MSR and the Escobal mine, including establishment and implementation of security and community relations policies and practices in Guatemala and strategies for dealing with opposition to the mine. They also plead that Tahoe owed them a duty of care given Tahoe’s knowledge of the extensive local opposition to the mine and the risk

of harm to protesters if Tahoe's security personnel did not adhere to its CSR policies. The appellants assert that Tahoe breached its duty of care by failing to conduct adequate background checks on Rotondo and the security personnel, failing to establish and enforce clear rules of engagement for them, failing to adequately monitor them, and failing to ensure they adhered to Tahoe's CSR policies. They allege that Tahoe's CSR policies governed the manner in which it supervised its operations and its security personnel. That policy bound Tahoe to observe international humanitarian law and local law, including the proportional use of force, and the adoption of policies respecting human rights. The location where Tahoe implemented and oversaw its alleged CSR policies – Reno, Nevada, or British Columbia or both – is important to the analysis that follows.

[27] The appellants claim punitive damages for the alleged "malicious, arbitrary, highly reprehensible" conduct of Tahoe.

III. Tahoe's *Forum Non Conveniens* Application

[28] On August 8, 2014, Tahoe filed a notice of application seeking an order staying the proceeding on the grounds that Guatemala was a more appropriate forum for the action.

IV. Reasons for Judgment

[29] The judge granted Tahoe's *forum non conveniens* application and ordered a stay of proceedings because she found that Tahoe had satisfied its burden of establishing that Guatemala was clearly the more appropriate forum for determination of the matters in dispute.

[30] She noted that the appellants characterized the central issue as whether Tahoe "has responsibility under Canadian law for the brutal conduct of security personnel hired to protect its prize asset" (at para. 4). She noted that the appellants said that question can only be answered in a Canadian court "as they have no faith in the Guatemalan legal system to hold the company accountable" (at para. 4).

[31] She noted that the onus was on the defendant Tahoe to show why the court should decline to exercise its jurisdiction (at para. 31).

[32] The judge found that s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], sets out the principles which govern the Supreme Court's discretion to decline jurisdiction over a proceeding when there is a more appropriate forum for the action. Section 11(2) of the *CJPTA* provides a non-exhaustive list of factors relevant to the proceeding to consider when determining whether to decline jurisdiction. What emerges from the s. 11(2) analysis is that the defendant must establish an alternate forum that is clearly more appropriate: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 103, 108 and 110.

[33] The judge began her analysis of the s. 11(2) factors by noting that all the appellants reside in Guatemala, their alleged injuries and losses occurred in Guatemala, and the evidence is in either Guatemala or Nevada. She noted that all the evidence of the appellants is in Spanish. MSR, the direct operator of the mine, is a Guatemalan company and all of its employees are resident in Guatemala or Reno. MSR carries on business in Guatemala. She noted that Tahoe carries on business in Reno, Nevada, and that its operating officers were located there, not in British Columbia.

[34] The judge decided that the ordinary factors set out in the *CJPTA* pointed to Guatemala as the more appropriate forum. She rejected the appellants' assertion that systemic corruption in the Guatemalan legal system posed a serious risk that they would not obtain a fair trial. She identified the issue as whether the foreign legal system is capable of providing justice. She said:

> [64] In my view, where the ordinary factors set out in the *CJPTA* and case law point to Guatemala as the more appropriate forum, 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. As stated in *Connelly*, where the *forum non conveniens* analysis points to a clearly more appropriate forum, then the plaintiff must take the forum as he finds it even if it is in certain respects less advantageous to him unless he can establish that substantial justice cannot be done in the appropriate forum.
>
> [Emphasis added.]

[35] She found that the evidence of corruption within the Guatemalan criminal justice system was not relevant to the appellants' civil claims for personal injury:

> [65] The plaintiffs' experts refer to corruption in the context of criminal prosecutions against state officials or organized crime syndicates, not cases involving claims for personal injuries such as this one.
>
> [66] It is clear from the evidence that Guatemala has some problems with its legal system. However, the evidence, even from the plaintiffs' experts, is that Guatemala has been involved in justice reform since the early 2000s. While its justice system may be imperfect, it functions in a meaningful way. It provides laws and procedures through which parties can, and do, pursue rights and remedies such as the ones raised by the plaintiffs in their notice of civil claim. Further, Guatemalan citizens who have lesser means to pursue their claims are supported by organizations like El Centro de Accion Legal-Ambiental y Social de Guatemala (CALAS), which provides free legal assistance to claimants. The plaintiffs in this case have the benefit of such representation and are using it.

[36] She concluded:

> [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. In this case, as noted earlier, Guatemala has a functioning legal system for both civil and criminal cases, and the plaintiffs are already seeking compensation for their injuries in Guatemala.

[37] She found that the alleged battery and breaches of duty by Tahoe occurred in Guatemala and perhaps Nevada.

[38] She determined that Tahoe could be added to the criminal proceeding against Rotondo or sued civilly:

> [71] The plaintiffs assert Tahoe will not be a party to the action in Guatemala and that is a very significant factor in determining Guatemala is not a convenient forum. However, the evidence is that parties can be added to both the criminal proceedings and that a separate civil suit can be commenced. The expert evidence is that Tahoe can be held vicariously liable if its personnel directed or supervised the alleged battery. MSR could also be found vicariously liable.
>
> [72] This is not a case where the plaintiffs will not have a trial or hearing in the other jurisdiction. They are advancing a claim for compensation for their injuries in the criminal proceedings in Guatemala. They are able to add other parties. The plaintiffs can also commence a civil action in Guatemala.
>
> [Emphasis added.]

[39] She noted that Mr. Gray was responsible for overseeing all national and local CSR initiatives and that all those activities occurred in Guatemala.

[40] She held that the choice of law (Guatemala), the desirability of avoiding multiplicity of legal proceedings and conflicting decisions, and the ability to enforce an eventual judgment all favoured Guatemala.

[41] She noted that six of the seven appellants were joined to the criminal proceeding and could obtain compensation for their injuries in that proceeding. She considered the appellants' argument that in Guatemala they cannot advance a claim directly against Tahoe for its negligence or for vicarious liability by piercing the corporate veil, and therefore, there is a juridical advantage to proceeding in British Columbia. The judge noted that it was far from clear whether such a novel negligence claim against a parent company for the activities of its subsidiary could succeed in a Canadian court: *Piedra v. Copper Mesa Mining Corp.*, 2010 ONSC 2421 aff'd. 2011 ONCA 191.

[42] She rejected the appellants' argument that the lack of a Guatemalan document discovery process similar to that provided for under British Columbia rules was an impediment.

[43] She concluded that there are two types of procedures by which the appellants may obtain civil compensation in Guatemala: a stand-alone civil suit; and through a criminal proceeding in which both the accused Rotondo and other liable parties can be ordered to pay compensation:

> [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.
>
> * Parties have a right to appeal final judgments of a trial court.
>
> …
>
> [96] … As noted earlier, the plaintiffs would have to establish that Tahoe either directed or supervised the actions of the wrongdoers in order to establish liability on the part of Tahoe.
>
> [97] The fact that the plaintiffs would not be able to advance claims based on agency in Guatemala is a factor in favour of British Columbia as the appropriate jurisdiction. I note that the plaintiffs would also face impediments in British Columbia in piercing the corporate veil; however, I agree the law in that regard appears less restrictive in British Columbia.

[44] The judge did not consider that the expiration of the one-year limitation period to commence a civil suit would impede the appellants from bringing a civil suit against Tahoe in Guatemala if British Columbia had declined jurisdiction on the basis of *forum non conveniens* (at para. 87).

[45] After considering all the s. 11(2) *CJPTA* factors, the judge concluded that Guatemala was clearly the more appropriate forum for adjudication of the dispute. She granted Tahoe's application for a stay of the British Columbia proceedings.

V. Application to Admit New Evidence on Appeal

[46] I shall refer to the application to admit new evidence on appeal in more detail below. Put briefly, the evidence relates to the indefinite adjournment of the criminal proceeding in Guatemala owing to Mr. Rotondo's flight to Peru. This has implications for the appellants' derivative claim for compensation within the criminal proceeding. The appellants also submit new evidence concerning judicial corruption in Guatemala.

VI. Issues on Appeal

[47] I would state the issues on this appeal in the following way:

- Should new evidence concerning the Guatemalan criminal proceeding against Rotondo be admitted?
- In light of the new evidence, is the criminal proceeding still a more appropriate forum for the action?
- Did the judge err in finding that a potential stand-alone civil suit in Guatemala is a more appropriate forum?
- Did the judge misapprehend the expert evidence regarding the effect that the expiration of the Guatemalan limitation period for bringing a civil claim would have on the appellants' claim against Tahoe in a stand-alone civil suit?
- Did the judge err in her application of the *forum non conveniens* analysis? More specifically, did the judge properly consider all factors that she was required to consider?
- Should new evidence concerning corruption in the Guatemalan judiciary be admitted?
- How should evidence regarding corruption in a defendant's proposed forum be assessed in an application of the *forum non conveniens* analysis?

VII. Discussion

[48] In the analysis that follows, I consider, in light of new evidence, whether the Guatemalan criminal proceeding – in which the appellants have a derivative civil claim – is a more appropriate forum for the dispute. I conclude that it is not. Turning to the potential stand-alone civil suit in Guatemala, I discuss three factors: (1) the limitation period for bringing civil suits in Guatemala; (2) the Guatemalan discovery procedures for civil suits; and (3) the risk of unfairness in the Guatemalan justice system.

[49] I conclude that those three factors all weigh against finding that Guatemala is clearly the more appropriate forum for the action.

A. Statutory Provisions

[50] Jurisdictional applications of this type are governed by Rule 21–8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The pertinent part of the Rule permits a defendant to apply to strike out, or stay a proceeding, where the defendant seeks an order declining jurisdiction:

> **21 – 8 Disputed jurisdiction**
>
> (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,
>
> > (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
> >
> > (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
> >
> > (c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.
> >
> > [am. B.C. Reg. 119/2010, Sch. A, s. 35.]
>
> **Order declining jurisdiction may be sought**
>
> (2) Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the

> proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

[51] Sections 7 and 11 of the *CJPTA* are pertinent to this application and appeal. Section 7 provides that a corporation is ordinarily resident in British Columbia if the corporation has a registered office in British Columbia. Tahoe concedes that it has a registered office in British Columbia and that the Supreme Court therefore has jurisdiction *simpliciter*. However, it argues that British Columbia is not the most appropriate forum.

[52] Section 11 of the *CJPTA* governs the exercise of the Court's discretion to decline jurisdiction and stay a proceeding on the grounds that another jurisdiction – in this case, Guatemala – is the more appropriate forum for adjudication of the claim. Section 11 provides:

> **Discretion as to the exercise of territorial competence**
>
> **11** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[53] The factors enumerated in s. 11(2) are not exhaustive. As Mr. Justice LeBel noted in *Van Breda*, a diverse array of context-specific factors and concerns may be considered by the court in deciding whether to apply *forum non conveniens* (at paras. 105, 110).

B. Burden of Proof and Standard of Review

[54] Writing for the Court in *Van Breda*, LeBel J. explained that the burden of proof in a *forum non conveniens* analysis is on the party who seeks the stay of proceeding (at para. 109):

> The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this 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 and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. 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. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.
>
> [Emphasis added.]

[55] In *Black v. Breeden*, 2012 SCC 19, LeBel J. again writing for the Court summarized the application of the *forum non conveniens* analysis and the standard of review on appeal, at para. 37:

> In the end, some of the factors relevant to the *forum non conveniens* analysis favour the Illinois court, while others favour the Ontario court. The *forum non conveniens* analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as *clearly* more appropriate. The party raising *forum non conveniens* has the burden of showing that his or her forum is *clearly* more appropriate. Also, the decision not to exercise jurisdiction and to stay an action based on *forum non conveniens* is a discretionary one. As stated in *Club Resorts*, the discretion exercised by a motion judge in the *forum non conveniens* analysis "will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts" (para. 112). In the absence of such an error, it is not the role of this Court to interfere with the motion judge's exercise of his discretion.
>
> [Emphasis added.]

[56] Therefore, on this appeal, the standard of review is deferential insofar as this Court is reviewing the judge's weighing of the *forum non conveniens* factors. But it is a correctness standard where the basis of the point on appeal is a question of law: *Housen v. Nikolaisen*, 2002 SCC 33.

C. Criminal Proceeding Against Rotondo

i. New Evidence Concerning the Criminal Proceeding

[57] The appellants seek to introduce new evidence concerning the Guatemalan criminal proceeding against Mr. Rotondo. This evidence is set out in affidavits from: the appellants' legal expert, Mynor Melgar; the appellants' CALAS legal representative in Guatemala; a translator, Roger Barany; and a paralegal in the office of the appellants' British Columbia lawyers. The affidavits describe events relevant to the criminal proceeding that have occurred subsequent to the judge's order under appeal.

[58] Mr. Rotondo had been under house arrest in Guatemala City awaiting trial. The guard posted at the front gate of his residence went off duty. When he returned three days later he did not see Mr. Rotondo. On November 29, 2015, the police obtained permission to enter the residence at which time it was discovered that Mr. Rotondo was not in the home. After Mr. Rotondo escaped from house arrest, he travelled to Peru, his birthplace and country of origin. The Guatemalan authorities are seeking his extradition from Peru. There is no evidence as to when or if that will occur. The evidence of the public defenders acting for the appellants in Guatemala is that on December 1, 2015, the Guatemalan court declared Mr. Rotondo in contempt, ordered his arrest, and suspended the trial. Mr. Rotondo has been arrested in Peru and is under house arrest in Peru.

[59] Tahoe does not dispute the veracity of any of the new evidence about the Guatemalan criminal proceedings against Mr. Rotondo.

[60] The appellants contend that the whole underpinning of the order under appeal was the existence of the criminal proceeding through which the appellants could apply for compensation for their injuries. Importantly, the judge held that:

> [72] This is not a case where the plaintiffs will not have a trial or hearing in the other jurisdiction. They are advancing a claim for compensation for their injuries in the criminal proceedings in Guatemala. They are able to add other parties.

[61] The new evidence casts serious doubt on that conclusion. I agree with the appellants that the existence of the ongoing criminal proceeding in Guatemala was a significant, if not pivotal, point in the judge's decision to grant a stay.

[62] The test for the admission of new evidence on appeal is a stringent one. Writing for the Court in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, Mr. Justice McIntyre set out the following test:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[63] New evidence may be considered by the court only in exceptional circumstances. The evidence must be considered "likely to affect the result" and "its admission must be clearly in the interests of justice": *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2015 BCCA 148 at para. 10. The test is somewhat more flexible where the order is interlocutory in character: *Kaynes v. BP P.L.C.*, 2016 ONCA 601.

[64] The appellants say that the order under appeal is a stay which could be lifted and therefore it is interlocutory in character. As already noted, the appellants

contend that this new evidence goes to the very underpinnings of the order under appeal and is likely to have affected the outcome.

[65] Tahoe says that the order under appeal is not an interlocutory order. It says that the result of the judge's order is the end of the British Columbia proceeding. Tahoe relies on *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R (3d) 201, for the proposition that new evidence is almost never admitted in the interests of finality in litigation.

[66] In my view, *Lunde* is not applicable to this case. The premise of the order staying the British Columbia proceeding was that there was an ongoing criminal proceeding which was a more appropriate forum to adjudicate the dispute. As it is now doubtful whether that proceeding will go forward in a timely manner or at all, contrary to the assumption made by the judge, the evidence should be before the Court.

[67] Tahoe argues that the Guatemalan proceedings, including the extradition request to Peru, should be left to run their course. Tahoe argues in its written submissions on the new evidence application that:

> The further delay in returning Mr. Rotondo to Guatemala for trial is a function of due process as to extradition between Guatemala and Peru; it does not follow that this should cause the Guatemalan legal system to be viewed in a negative light. Indeed, Mr. Melgar concedes that Mr. Rotondo "has every right to exhaust all available legal remedies in his country of origin, and it is impossible to foresee with absolutely legal certainty the outcome of these domestic proceedings or how long they are likely to take...". Tahoe submits that this conclusion could be made regarding extradition proceedings involving any two countries and is not germane to the matter under appeal.

[68] The burden of the evidence sought to be admitted as new evidence on appeal is that Mr. Rotondo has fled Guatemala and is now in Peru. It is uncertain if he will be successfully extradited to Guatemala. As I have said, the underlying basis of the judge's decision to stay the proceeding in British Columbia was that there was an adequate extant proceeding in Guatemala in which the appellants' civil compensation claims against Tahoe and others could proceed. Now the appellants

say that there is doubt as to whether the criminal proceeding will proceed in a timely way or at all.

[69] The new evidence establishes that the criminal proceeding against Rotondo is adjourned indefinitely. Tahoe did not adduce evidence to suggest when or if it is likely to resume. Resumption is dependent on Peruvian extradition proceedings about which there is no evidence.

[70] The evidence of Mr. Rotondo's flight, the subsequent adjournment of the criminal proceeding, his arrest in Peru, and his stated intention to oppose extradition is relevant and affects the outcome of the *forum non conveniens* analysis. I would admit this evidence on appeal.

ii. Conclusion Regarding Criminal Proceeding

[71] Admission of the new evidence leads to the inescapable conclusion that the Guatemalan criminal proceeding – to which the appellants' civil compensation claims have been joined – is not a more appropriate forum for adjudicating the dispute.

D. Stand-alone Civil Suit

[72] Although the judge's primary focus was on the existence of the derivative claims joined to the criminal proceeding, she also found that a potential stand-alone civil suit in Guatemala was a more appropriate forum. I therefore turn to a consideration of whether the judge erred in her finding that the availability of a civil action established Guatemala as a more appropriate forum.

[73] The appellants contend that she erred in so finding. They advance three main grounds to support this aspect of their appeal:

1) Inadequate discovery rules and other procedural difficulties make Guatemala a wholly inconvenient and inefficient forum;

2) The limitation period to commence a civil suit in Guatemala has expired; and

3) The Guatemalan judicial system is corrupt and there is a real risk they cannot obtain a fair trial. The appellants seek the admission of new evidence to support this third ground of appeal.

[74] Below, I discuss how Canadian jurisprudence establishes that the relevant *forum non conveniens* factors should be considered and weighed together in one stage when determining whether a defendant has proven that its proposed alternate forum is clearly the more appropriate forum.

i. Guatemalan Discovery Procedures

[75] The appellants say that there are important differences in the available discovery procedures in Guatemala compared to those available in British Columbia which would put them at a distinct disadvantage in Guatemala.

[76] The appellants submit expert evidence from Carol Zardetto, a Guatemalan lawyer practicing for over 25 years. She describes these difficulties in her report:

> A civil claim is commenced in Guatemala by filing a document known in Spanish as a *Demanda.* There are very specific rules for the *Demanda.* First, Article 105 of the Civil and Mercantile Procedures code indicates that it must specify the evidence which the party intends to rely on to prove the claim. Evidence that is not described in the *Demanda* may not be submitted to the court later. Second, Article 108 requires that the essential documents that constitute the basis of the claim must be presented with the *Demanda* or described in detail, indicating where the originals are. Third, Article 108 establishes that if the documents are not presented with the *Demanda* they will not be accepted afterwards, except if there is a justified reason for not possessing them. Fourth, article 109 permits the Judge to reject a claim that doesn't comply with these requirements. In addition, the evidence referenced in the *Demanda* must be sufficient to establish the legitimacy of the claim. In practice, these rules mean the plaintiff must know the evidence he or she intends to rely on to prove the case at the beginning of the case.
>
> 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 requesting party to prove the document exists and what its contents are in order to obtain a ruling to produce the document.

[77] Tahoe's expert, Francisco Chávez Bosque, is a Guatemalan lawyer practicing for over 40 years. He did not contradict any of Ms. Zardetto's evidence on this issue.

[78] The judge considered the differences between Guatemalan and British Columbia discovery procedures and nevertheless concluded that they did not rise to a level that could alter her conclusion about the choice of forum. The judge made the following findings:

> [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.
>
> …
>
> [98] The plaintiffs argue there is a juridical advantage to the plaintiffs in proceeding in British Columbia because otherwise they will be unable to obtain the documents to pursue their claims against Tahoe.
>
> [99] However, as noted earlier, the plaintiffs have been able to obtain documents in Guatemala. Most of the other evidence relevant to the plaintiffs' claims is in the possession of the MSR and its employees in Guatemala, such as evidence of security protocols, interaction between head office and MSR, etc. As well, the majority of the damage documents are in Guatemala with the plaintiffs for their wage loss claims, and the plaintiffs' medical care providers and caregivers for their general damages and future cost of care claims.
>
> [100] There is evidence from Tahoe's expert outlining the procedures for obtaining and submitting evidence in civil procedures, including obtaining declarations of material witnesses and conducting depositions. While the plaintiffs' experts point to the fact there may be challenges, the procedures outlined resemble those used in other civil law jurisdictions and are available to the plaintiffs.

[79] The appellants submit that the judge erred by equating the appellants' access to documents in the prosecutor's file in the criminal proceeding with a right to civil discovery of documents possessed by Tahoe. I agree. In my view, the judge did not give adequate consideration to the difficulties the appellants will face in bringing a stand-alone civil suit against Tahoe in Guatemala when they cannot discover

documents in Tahoe's possession without going through a "complex and time consuming process" of petitioning a Guatemalan court to issue letters rogatory requesting that a British Columbia court require Tahoe to produce the documents. This lack of consideration on the judge's part can be explained, in part, by the fact that the judge considered the stand-alone civil suit as an adjunct to the existing criminal proceeding. As that criminal proceeding is now mired in uncertainty, closer scrutiny must be given to the stand-alone civil suit.

[80] I am mindful that in *Van Breda*, the Court cautioned against placing too much emphasis on procedural variances between Canada and other jurisdictions when assessing the juridical advantage factor. As the Court said, "[d]ifferences should not be viewed instinctively as signs of disadvantage or inferiority" (at para. 112). In this case, however, the evidence regarding civil discovery procedures in Guatemala points away from finding that Guatemala is clearly the more appropriate forum for bringing tort claims against a British Columbia corporate defendant, particularly in light of the fact that new evidence shows the criminal proceeding has stalled.

ii. Limitation Period

[81] The parties all agree that the applicable limitation period under Guatemalan law for the appellants to commence a civil suit against Tahoe is one year. This period has long since expired. Tahoe contends that the expiration of the limitation period should not factor in favour of the appellants in the *forum non conveniens* analysis. Tahoe also contends that a judge might exercise his or her discretion under Guatemalan law to permit such a claim notwithstanding the expiration of the primary limitation period.

[82] I turn first to this question of whether the limitation period may be extended.

[83] The judge found that the expiration of the limitation period in Guatemala would not bar the appellants from bringing a civil suit against Tahoe. I find that the expert evidence does not support such a finding.

[84] In Mr. Bosque's first report, he said the following regarding limitation periods:

> In case of damages caused intentionally or by carelessness or imprudence, which are civil damages that can be pursued in a civil claim, the right to claim damage compensation expires in one year as of the day the damages were caused or as of the day the victim knew of the damage and who had caused it [Article 1673 of the Civil Code]. The same limitation period applies both to the direct damage authors and to those vicariously liable.
>
> …
>
> The statute of limitation must be raised as a defence and cannot be applied officiously by the Courts of law. Notwithstanding the aforementioned, the party that benefits from the limitation period may waive it in several ways: by an express waiver; by acknowledging the Plaintiffs right to the claim; and by not raising the statute of limitations defence.

[85] Tahoe has not undertaken to waive the limitation period.

[86] In Ms. Zardetto's report, she said:

> In my opinion, recommencing such a case in Guatemala would face an additional problem that the limitations period in Guatemala for damage claims of one year may have expired. It is impossible to know if a Guatemalan judge would consider the limitations period interrupted by an action filed in BC and dismissed under such basis as the inconvenience of the forum, especially when Guatemala doesn't recognize the validity of this doctrine.

[87] In Mr. Bosque's reply report to Ms. Zardetto's report, he did not address the limitation period issue at all. In response to Ms. Zardetto's assertion that Guatemala cannot accept a transfer of the case from British Columbia because, once a claim is validly filed in a foreign jurisdiction, Guatemalan courts are no longer competent to consider it, Mr. Bosque said:

> a. Ms. Zardetto is correct in stating that a Guatemalan Court cannot accept a *transfer* of a case. If a civil complaint is not heard in a foreign court for a *forum non conveniens* decision, the Guatemalan plaintiff must file a new complaint in Guatemala under Guatemalan procedural rules and requirements, and Guatemalan courts have the obligation to hear the case. Refusing to hear a case concerning damages caused in Guatemala could be construed as a negation of justice. Congress Decree 34-97 does not bar the filing of a new lawsuit in Guatemala in case a foreign court has decided to accept the *forum non conveniens* defense.
>
> b. The difficulties Plaintiffs may encounter in succeeding in their complaint do not counter the fact that Guatemalan courts have jurisdiction over the case and that Guatemalan laws rule over the acts that allegedly took place in Guatemala.
>
> [Emphasis added.]

[88] The judge found:

> [87] Although the plaintiffs argue they may not be able to commence a civil action because the limitations period had passed, the evidence indicates that a law suit can be filed in Guatemala if it is determined that the British Columbia courts will decline jurisdiction on the basis of *forum non conveniens*. As noted earlier, similar causes of actions to the one pleaded in this action are available under Guatemalan law.
>
> [Emphasis added.]

[89] Regarding the judge's above finding, I infer two possibilities: (1) the judge misapprehended Mr. Bosque's evidence in his reply report and found that Guatemalan courts would be obligated to hear a civil suit against Tahoe notwithstanding the expiration of the limitation period; or (2) the judge simply found that the appellants could file a civil suit in Guatemala but made no finding on how the raising of a limitation period defence might affect that claim. It is not clear what the judge understood. As the party seeking a stay, Tahoe has the burden of proof to establish that the limitation period does not foreclose the appellants from suing in Guatemala. The expert evidence is not clear on this point. In my view, the judge erred in her conclusion.

[90] The next question is how the possible expiration of the limitation period factors into the analysis.

[91] In a *forum non conveniens* analysis, facts regarding limitation periods are considered under the "juridical advantage" factor: see *Tolofson v. Jensen*, [1992] 3 W.W.R. 743 (B.C.C.A.); *Gotch v. Ramirez*, [2000] O.J. No. 1553 at para. 16 (S.C.). Many courts have found that the expiration of a limitation period in the other jurisdiction is a juridical disadvantage to the plaintiff that weighs against granting a stay of proceedings based on *forum non conveniens*: see *Tolofson*; *Gotch*; *Butkovsky v. Donahue* (1984), 52 B.C.L.R. 278 (S.C.); *Ang et al. v. Trach et al.*, [1986] O.J. No. 1117 (S.C.); *Jordan v. Schatz*, 2000 BCCA 409 at para. 28. However, some courts have found that a plaintiff's failure to bring an action within time in the other jurisdiction militates against attaching any weight to the juridical advantage factor because, in some circumstances, a plaintiff could successfully

oppose a defendant's *forum non conveniens* application in one jurisdiction by simply allowing the limitation period to expire in the other jurisdiction: see *Kennedy v. Hughes*, [2006] O.J. No. 3870 at para. 12(v)-(vi) (S.C.); *Hurst v. Société Nationale de L'Amiante*, 2008 ONCA 573 at paras. 51-52.

[92] It appears that the weight attached to the juridical advantage factor when considering the expiration of a limitation period in another jurisdiction is a case-specific inquiry that turns on the facts.

[93] In its factum, Tahoe cites *Breeden* where the Court cautioned that "a focus on juridical advantage may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect, or courts may be drawn too instinctively to view disadvantage as a sign of inferiority and favour their home jurisdiction" (at para. 26).

[94] In view of the fact that the appellants have been joined to the criminal proceeding and have also commenced an action against Tahoe in British Columbia, it cannot be said that they have not diligently pursued their claims. Nor can it be said that the appellants are "forum shopping" by bringing a claim in British Columbia; I find that they have sought legitimate juridical advantages by commencing their claim here against a British Columbia corporate defendant. In my view, the appellants' failure to sue Tahoe in Guatemala within the limitation period should not militate against attaching any weight to the juridical advantage factor when the appellants have actively sought remedies in dual jurisdictions.

[95] Put in other words, the judge misapprehended the evidence on the potential impact of the limitation period (i.e., she either thought the Guatemalan court would have to hear the civil suit despite the expired limitation period or she ignored the possible impact of the expired limitation period). As a result of her misapprehension, she failed to account for the juridical advantage to the plaintiff that weighs against granting the stay. This is not one of those cases in which the juridical advantage factor should have no weight because the appellants have been diligent and are not

forum shopping. For that reason, I conclude the judge erred in failing to weigh this significant factor in the balance.

[96] I conclude that the expiration of the limitation period factors against finding that Guatemala is clearly a more appropriate forum. I attach significant weight to this factor because it casts doubt on whether the appellants will be able to pursue a civil suit against Tahoe in Guatemala at all.

iii. Risk of Unfairness in the Guatemalan Justice System

a. New Evidence Concerning Judicial Corruption

[97] The appellants adduce new evidence concerning judicial corruption set out in a further affidavit of their expert, Mynor Melgar, in which he describes recent events involving arrests of members of the judiciary. This new evidence underscores the evidence already before the judge but is not qualitatively different from it. I would not admit it on appeal because it cannot affect the outcome, and therefore, does not meet the test for admission of new evidence.

b. Evidence that was before the Chambers Judge

[98] The judge considered expert evidence submitted by the parties on the climate of the Guatemalan justice system.

[99] The appellants submit that their evidence shows the structural weakness of the Guatemalan judiciary and the real risk that they may not receive justice in Guatemala. The evidence of the appellants' expert Mr. Melgar, a former Secretary General of the Public Prosecutor's office, is relevant to the question of whether the appellants' claim should be considered in a broader context. Mr. Melgar's report was not specifically challenged by Tahoe's expert, Mr. Bosque. While the judge held that the claims against Tahoe were personal injury claims, Mr. Melgar's evidence highlights the political context of the dispute and the large power imbalance between the parties. Mr. Melgar asserts that "the close economic ties between the mine and multiple levels of political power in Guatemala" create a very real risk that the

appellants will not receive a fair trial in Guatemala. The appellants cite from Mr. Melgar's report in their factum to illustrate their point:

> 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.

[100] The appellants argue that the expert evidence shows that endemic corruption in the Guatemalan legal system is not isolated to high profile criminal prosecutions but reaches all levels of the Guatemalan judicial system. The appellants rely on the expert evidence of Mirte Postema in this regard. Ms. Postema is a lawyer with the Due Process of Law Foundation in Washington, D.C., an organization which promotes the rule of law and human rights in Latin American countries. Her evidence describes the commission established by Guatemalan officials and members of the international community to investigate powerful criminals and corrupt politicians because of the Guatemalan criminal justice system's endemic weakness. In her report she says:

> 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.

[101] The appellants also refer to Ms. Postema's evidence regarding the lack of judicial independence which notes that judges do not have tenure. Judges who make unpopular decisions may be subject to disciplinary proceedings and subsequent sanctions. Ms. Postema says there is a lack of basic safeguards in Guatemala to ensure judicial independence. In her report, she says:

> 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 la 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.

[102] The appellants further rely on the report of Ms. Zardetto. She has also been involved in law reform in Guatemala. She opines that there is no assurance of a fair and impartial legal proceeding in Guatemala. She characterizes Guatemala's legal system as dysfunctional, formalistic, lacking in internal judicial independence, demonstrating little concern for human rights, and favouring the powerful. She says that a civil case is generally conducted by a judicial officer and not a judge. The system is slow. Lawyers can act without a strict ethical posture and use many tactics to cause delay, making justice "almost impossible to attain". In addition, Ms. Zardetto

says that there are “virtually no reported cases” in which Guatemalan individuals have sued a foreign corporation in tort.

[103] Tahoe relies on the evidence of Mr. Bosque for the proposition that the kind of corruption addressed by the appellants’ experts is anecdotal and inapplicable to this kind of case.

[104] Although Mr. Bosque does not disagree that tort actions against foreign corporations are extremely uncommon in Guatemala, he explicitly disagrees with Ms. Zardetto’s opinion regarding corruption. He says that Guatemala has a functioning civil justice system and that the appellants “can be assured of a fair and impartial proceeding in Guatemala against Tahoe as any plaintiff can be in a Guatemalan court of law”. He estimates that a civil case may take 4–6 years from the time the claim is brought to the time the Court of Appeals releases its decision. As I understand his response to Ms. Zardetto’s description of the need for the CICIG, he suggests that corrupt judges are few in number.

[105] Tahoe characterizes the appellants’ expert evidence of corruption as anecdotal, not systemic. Tahoe says that courts should, as the judge did, reject such limited anecdotal evidence as a ground for refusing to recognize comity: *Standard Chartered Bank (Hong Kong) Ltd v. Independent Power Tanzania Ltd*, [2015] E.W.H.C. 1640 (Comm.) at para. 174.

[106] The appellants say that these expert opinions should have led the judge to conclude that, despite reforms, systemic weaknesses in the Guatemalan judicial system persist, and impunity for human rights violations remains a current and pervasive feature.

[107] The intervenor, Amnesty International Canada, notes that the context of this case is important. It disagrees with the judge’s characterization of the case as a personal injury case. Amnesty emphasizes that the context of this claim involves a transnational company embroiled in human rights violations. I do not understand Amnesty to disagree that this is a tort claim, nor to suggest international laws should

govern. I understand it simply to contend that, in considering the risk of not receiving a fair trial, the context of the dispute should be taken into consideration.

[108] The judge's analysis on this question of corruption in the Guatemalan legal system is found at paras. 65-66 of her reasons for judgment (set out above). She determined that the evidence of corruption referred to in the expert reports was relevant to criminal prosecutions against state officials and organized crime syndicates but not to personal injury claims such as the one before her. The judge accepted the appellants' expert evidence showing that "Guatemala has some problems with its legal system", but she concluded that Guatemala's justice system has been undergoing positive reform since the early 2000s and that "it functions in a meaningful way".

[109] I agree with the appellants and the intervenor that in characterizing the appellants' claim as a personal injury case, the judge was insufficiently attentive to the context in which the conflict arose. This claim is not akin to a traffic accident. Rather, it arose in a highly politicized environment surrounding the government's permitting of a large foreign-owned mining operation in rural Guatemala. The protest that led to the battery at issue in this case was not an isolated occurrence, as I have mentioned above. However, I am sensitive to Tahoe's submission that the expert evidence is anecdotal and does not establish specific risks of corruption. I agree that the appellants' expert evidence is of a general nature. The appellants have not produced detailed evidence showing instances where the Guatemalan judiciary has been corrupted by the power of foreign corporations. Indeed, a key point of the appellants' evidence is that tort cases between individuals and transnational corporations are virtually unknown in Guatemala. While it is logical to infer that, in a country that has significant issues with judicial independence, there is an increased risk of corruption in the politicized context of this case, doing so is a somewhat speculative exercise.

[110] In the UK and Canadian case authorities put before the judge where corruption was a determinative factor in the *forum non conveniens* analysis, detailed evidence was relied upon by the courts.

[111] In *889457 Alberta Inc v. Katanga Mining Ltd*, [2008] E.W.H.C. 2679 (Comm.), the judge concluded that the Democratic Republic of Congo ("DRC") was not an available forum for the dispute because the evidence established that the normal infrastructure of a justice system did not exist there. The judge also found that even if the DRC was an available forum, he would have concluded that it was not the more appropriate forum because there was a real risk of corruption in the DRC judiciary. The judge based this conclusion on expert evidence which drew on "respected, independent and authoritative sources". These sources included reports of various organizations such as: the Foreign Commonwealth Office; the Border and Immigration Agency of the Home Office; the Special Rapporteur to the UN General Assembly on the Independence of Judges and Lawyers; the US State Department; Transparency International; and the Global Witness and Human Rights Watch.

[112] In *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, 2008 ABQB 442, the judge found that there was a risk the appellants would not obtain justice in Russian courts. The appellants' expert evidence was that one of the defendant corporations was controlled by a powerful Russian oligarch. This same Russian oligarch had been a defendant in a recent English case where the court had declined to grant a stay in favour of the Russian forum because there was a risk that this oligarch would improperly influence the Russian proceedings.

[113] In contrast to the above cases, the expert evidence provided by Tahoe is less detailed and does not point to any instance where Tahoe or any other foreign corporation improperly influenced the Guatemalan judiciary. It does, however, show that corruption in the Guatemalan justice system is widespread and Guatemala does not have normative structures in place to ensure judicial independence.

c. Legal Test for Risk of Unfairness in Foreign Judiciary

[114] The test the judge applied was whether the foreign court was "capable of providing justice". The judge concluded that to hold otherwise would be to ignore the principles of comity (at para. 105).

[115] The appellants say that the judge erred in describing the legal test. The appellants submit – and in oral submissions, Tahoe concedes – that the correct test is whether there is a real risk of an unfair process in the foreign court: *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* (2011), [2012] 1 W.L.R. 1804 at 1828. In their factum, the appellants say:

> 39. 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.]

[116] The intervenor, Amnesty International Canada, endorses the *AK Investments* "real risk" articulation of the test.

[117] In considering whether the judge applied the correct legal test, I must consider the differences between the English and Canadian approaches to the *forum non conveniens* analysis.

[118] In England, a defendant must establish that its proposed alternate forum is more appropriate; if this burden is met, then a stay will ordinarily be granted *unless* the plaintiff can establish other circumstances which make the granting of a stay adverse to the interests of justice: *Spiliada Maritime Corp v. Cansulex Ltd* (1986), [1987] A.C. 460 at 478. One such circumstance is the real risk that the plaintiff will not obtain justice in the alternate forum: *AK Investment* at 1828. Consequently, in the English application of the *forum non conveniens* analysis, consideration of corruption and injustice in the alternate forum comes at a secondary stage with a reverse onus on the plaintiff to show that granting a stay would be adverse to the interests of justice.

[119] By contrast, the Canadian jurisprudence reflects a more unified approach to the application of the *forum non conveniens* analysis. Writing for the Court in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 919-20, Sopinka J. said:

> In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum. The existence of two conditions is based on the historical development of the rule in England which started with two branches at a time when oppression to the defendant and injustice to the plaintiff were the dual bases for granting or refusing a stay. The law in England has evolved by reworking a passage from the reasons of Scott J. in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, [1936] 1 K.B. 382, which contained two conditions. In its original formulation the second condition required the court to ensure that there was no injustice to the plaintiff in granting the stay. No doubt this was because the oppression test concentrated largely on the effects on the defendant of being subjected to a trial in England. When the first condition moved to an examination of all the factors that are designed to identify the natural forum, it seems to me that any juridical advantages to the plaintiff or defendant should have been considered one of the factors to be taken into account. The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other

> hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.
>
> [Emphasis added.]

[120] Writing for the Court in *Van Breda,* LeBel J. affirmed that *Amchem* provided the structure for the Canadian application of the *forum non conveniens* analysis and described the application as a weighing of "all relevant concerns and factors" (at paras. 104, 109). Thus, the Canadian approach to *forum non conveniens* is not a two-stage analysis as in England. All factors and concerns must be weighed together in one stage with the overall burden on the defendant to establish that the proposed alternate forum "is in a better position to dispose fairly and efficiently of the litigation": *Van Breda* at para. 109.

[121] Given the differences between the English and Canadian applications of the *forum non conveniens* analysis, I find it unhelpful to frame the issue as whether the judge applied the correct legal test for assessing evidence of corruption and injustice. It is more appropriate to frame the issue as whether the judge correctly defined a factor which she was required to consider in the overall *forum non conveniens* analysis. In other words, should the judge have considered the "capability" of the alternate forum to provide justice, or should she have considered the "likelihood" that the alternate forum would provide justice (i.e., whether there was a real risk that justice would not be done)?

[122] The judge's approach to the analysis reflects the English approach. Though the judge addressed the corruption evidence under the *CJPTA s.* 11(2)(a) "comparative convenience" factor, the judge's reasoning shows that she viewed the question of whether the appellants could obtain justice in Guatemala as a secondary stage in the analysis. At para. 64 of her reasons, she said:

> …As stated in *Connelly*, where the *forum non conveniens* analysis points to a clearly more appropriate forum, then the plaintiff must take the forum as he finds it even if it is in certain respects less advantageous to him unless he

> can establish that substantial justice cannot be done in the appropriate forum.
>
> [Emphasis added.]

[123] In my view, the judge erred in considering the issue of corruption and injustice in the Guatemalan judiciary as a secondary stage in the analysis with the burden on the appellants to rebut her *prima facie* determination that Guatemala was the more appropriate forum. In addition, the judge erred in defining the question as whether Guatemalan courts were "capable" of providing justice.

[124] There is no binding authority on this Court concerning the correct question to ask when considering evidence of corruption and injustice in a defendant's proposed alternate forum. In light of the fact that the application of *forum non conveniens* focusses on whether an alternate forum is better equipped than Canada to dispose of the litigation fairly and efficiently, I find that it is inadequate to ask whether the alternate forum is "capable" of providing justice. On the other hand, the principle of comity requires that Canadian courts be cautious in determining that a foreign court is unlikely to provide justice. The "real risk" test articulated in *AK Investment* was formulated with these considerations in mind. Though the English analysis is structured differently, as I have noted above, I find the "real risk" standard helpful and I would adopt it. Where a plaintiff presents evidence of corruption and injustice in the defendant's proposed alternate forum, the court must ask whether the evidence shows a real risk that the alternate forum will not provide justice. I note that two lower court decisions in Canada have considered the real risk that justice will not be done in the alternate forum when applying *forum non conveniens* : see *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, 2008 ABQB 442 at paras. 115-116; *Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, 2012 ONSC 4351 at para. 71.

[125] I am mindful of the fact that the evidentiary standard to establish "real risk" is a high bar in England. As Tahoe points out, sweeping, generalized evidence of corruption in the alternate forum does not meet that standard: *Ferrexpo AG v. Gilson Investments Ltd*, [2012] E.W.H.C. 64 (Comm.); *Mengiste v. Endownment Fund for*

the Rehabilitation of Tigray, [2013] E.W.H.C. 599 (Ch.). In the two-stage English application of the *forum non conveniens* analysis, it is necessary for the plaintiff to satisfy a high evidentiary threshold at the second stage because, at the first stage, the court made a finding that the alternate forum is *prima facie* more appropriate for the dispute. In Canada, however, it is not necessary to stipulate a specific evidentiary threshold for the risk of unfairness since it is just one factor of many to weigh in a unified *forum non conveniens* analysis. The quality of evidence regarding the risk of unfairness should dictate the weight that is attached to that factor. Broad assertions of corruption should be given limited weight, whereas detailed and cogent evidence of corruption should attract significant weight.

[126] In my view, the judge erred by considering the risk of unfairness as a secondary stage in the *forum non conveniens* analysis and by defining the question as whether Guatemala was “capable” of providing justice. As a result, she gave insufficient weight to the evidence of weakness and lack of independence in the Guatemalan justice system in her discretionary weighing of the factors, particularly given the context in which the alleged shooting occurred. The evidence of weakness in the Guatemalan justice system ought not to be ignored. A discretionary decision may be reversed where the lower court gives no, or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. Based on the judge’s errors, it is open to this Court to reverse her discretionary decision. Though the appellants’ evidence regarding the risk of unfairness in Guatemala is of a general nature, I am of the view that the evidence factors against finding Guatemala is clearly the more appropriate forum. I place moderate weight on this factor given the quality of the appellants’ evidence.

v. Conclusion Regarding Stand-alone Civil Suit

[127] As LeBel J. said in *Breeden*, the *forum non conveniens* analysis does not require that all factors point to the defendant’s proposed alternate forum, but it does require that the defendant establish that the alternate forum is *clearly* more appropriate. In this case, the judge found that Tahoe had established that Guatemala was clearly the more appropriate forum. However, in my view, the three

factors discussed above weigh against such a finding with regards to the stand-alone civil suit. The judge erred in finding that these three factors did not weigh against the suitability of Guatemala. The first factor is the limited discovery procedures available to the appellants in Guatemala; the second is the marked uncertainty as to how the expiration of the limitation period will be treated by Guatemalan courts; and the third is the real risk that the appellants will not obtain justice in Guatemala given the context of the dispute and the evidence of endemic corruption in the Guatemalan judiciary.

[128] I conclude that the judge did not give adequate consideration to the difficulties the appellants will face in bringing suit against Tahoe given the limited discovery procedures available in Guatemala. This factor weighs against a finding that Guatemala is the more appropriate forum.

[129] I find that the judge erred by concluding that the expiration of the limitation period for bringing a civil suit in Guatemala would not affect the appellants' claim. The expert evidence does not support such a conclusion. In my view, the uncertainty occasioned by the expiration of the limitation period is a juridical advantage factor that weighs heavily against a conclusion that Guatemala is the more appropriate forum. This is a significant factor because it casts doubt on whether the appellants will be able to advance a claim against Tahoe in Guatemala at all.

[130] I conclude that the judge erred by ignoring the context of this dispute and placing insufficient weight on the risk that the appellants will not receive a fair trial in Guatemala. That risk should not be ignored. In reaching this conclusion, I make no general pronouncement on Guatemala's legal system. Rather, I simply conclude that there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state. This factor points away from Guatemala as the more appropriate forum.

[131] In the result, I conclude the judge erred in finding that Tahoe had established that Guatemala was clearly a more appropriate forum than British Columbia for adjudication of the appellants' claims.

VIII. Disposition

[132] I would admit the new evidence concerning the criminal proceedings against Rotondo, but I would not admit the new evidence concerning judicial corruption. I would allow the appeal and dismiss Tahoe's application for a stay of the British Columbia proceeding.

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Dickson"