No. S-144726
Vancouver Registry

In the Supreme Court of British Columbia

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

Plaintiffs

and

Tahoe Resources Inc.

Defendant

PLAINTIFFS' SUBMISSIONS

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

JOE FIORANTE, Q.C.
REIDAR MOGERMAN
Lawyers for the Plaintiffs

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

KAREN L. M. CARTERI
Lawyers for the Defendant

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PART 1: INTRODUCTION

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

2. The shootings were deliberate, malicious and calculated to suppress local opposition to the mine. These men seek justice in Canada against the Canadian company which owns the mine as they have no faith in the Guatemalan legal system to hold the Canadian company accountable.

3. The central issue in this case is whether a Canadian company has any responsibility under Canadian law for the brutal conduct of security personnel hired to protect its prize asset. That question can only be answered in a Canadian court.

4. Tahoe Resources Inc. ("Tahoe") seeks to avoid all judicial scrutiny of its actions by asking this Court to dismiss the case on the basis of *forum non conveniens*. In

so doing, Tahoe seeks to exploit the "governance gap" – gaps in the system of transnational law which allow companies to operate in countries with relatively weak systems of justice with the result that all manner of serious corporate misconduct can occur without adequate sanctioning or reparations.

5. As per former Supreme of Canada Justice Louise Arbour:

> The Honourable Justice Ian Binnie once noted that existing "governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation". Transnational human right litigation can potentially bridge this gap in a manner that international criminal law cannot, thereby providing survivors and victims with an opportunity and forum to bring legitimate human rights claims."
>
> Louise Arbour, "Forward", in François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Irwin Law: Toronto, 2010) at xiv [Larocque].

6. In Guatemala, judicial independence does not exist and the rule of law is extremely weak. Accordingly there is no real prospect that Tahoe can be held accountable there for its conduct.

7. Tahoe's recitation of the facts in support of its motion is inaccurate and incomplete. When reviewed in its entirety, the record establishes that:

   (a) the Guatemalan legal system has a well deserved international reputation for corruption, influence peddling, Kafkaesque procedures and interminable delay which pose real barriers to justice for these seven plaintiffs;

   (b) Tahoe has made numerous pronouncements regarding corporate social responsibility which focus the liability claim squarely on the Board of Directors and Canada;

   (c) key evidence pertaining to the shooting is available to this Court including wiretap transcripts, security camera footage and an internal investigation

by Tahoe (Tahoe has reported the results of the investigation to investors, but has refused plaintiffs' request to produce the report to this Court); and

(d) Tahoe is a Canadian company with extensive business activities in Canada.

8. This motion should be dismissed as Tahoe cannot establish that Guatemala is clearly the better forum to adjudicate the responsibility of a Canadian parent company for its conduct and that of its security personnel in Guatemala.

PART 2: FACTS

The Guatemalan Legal System Lacks Judicial Independence and is Subject to Influence Peddling

9. Tahoe's submissions ignore critical, unchallenged evidence from two experts, Mynor Melgar and Mirte Postema, regarding the current state of the Guatemalan legal system. Taken together, their evidence establishes that the plaintiffs have no assurance of receiving a fair and impartial hearing in Guatemala as the Guatemalan legal system lacks a basic prerequisite for the rule of law: judicial independence.

Mynor Melgar

10. Mynor Melgar is an important figure in the legal history of Guatemala. He is the former Secretary General of the Public Prosecutor's Office in Guatemala (known as the Public Ministry or *Ministerio Publico* in Spanish) and former Legal Advisor for Criminal Matters and Human Rights to the Archdiocese of Guatemala. He has had first-hand involvement in many of the most high profile cases in Guatemalan history including:

(a) as a Special Prosecutor, he was part of the legal team that conducted the first Oral Trial in the legal history of Guatemala;

(b) as Criminal Lawyer for the Archdiocese of Guatemala, he was involved in the investigation and subsequent conviction of:

(i) members of the Presidential Guard for the killing of a civilian citizen Aroldo Sas Rompich;

(ii) members of the National Police who killed university student Alioto Lopez Sanchez; and

(iii) three military officers for the assassination of Bishop Juan Gerardi, Director of the Human Rights Office of the Archdiocese of Guatemala;

(c) as Special Prosecutor, he commenced the investigation into the "Dos Erres" massacre involving the deaths of 300 villagers;

(d) as Special Prosecutor, he obtained the conviction of Colonel Juan Valencia Osorio for the murder of social anthropologist Myrna Mack Chang; and

(e) as Secretary General of the Public Prosecutor's Office, he worked in conjunction with the Attorney General and an operations team to solve:

(i) the massacre by decapitation of 27 peasants in the community of Los Cocos; and

(ii) the killing and dismemberment of Assistant Prosecutor Alan Stolinsky.

Affidavit #2 of Roger Barany, made January 30, 2015 ("Barany #2") at Ex. "C", pp. 14-15

11. The latter investigation lead to the conviction of members of an international drug trafficking cartel known as Los Zetas.

Barany #2 at Ex. "C", p. 15

12. Mr. Melgar is uniquely placed to opine on the quality of justice which can be obtained in Guatemala. Mr. Melgar's evidence is clear - given the government's

strong economic ties to the Tahoe mine, these seven farmers cannot be assured a fair trial in Guatemala.

13. Mr. Melgar's conclusion stems from a well known feature of the Guatemalan judicial system: powerful actors often enjoy impunity. As Mr. Melgar notes, despite efforts at reform, impunity remains a current and pervasive feature of the Guatemalan legal system:

> Despite the serious efforts deployed by the competent authorities, strengthening the institutions of the Guatemalan justice system is an ongoing process. This fact is underscored in the following excerpt from a 2012 report entitled "The Judges of Impunity" (Jueces de la Impunidad, available online), published by the UN-sponsored International Commission against Impunity in Guatemala (CICIG): "The Guatemalan state itself has been forced to deal with international condemnation over the ineffectiveness of its institutions in investigating, trying and punishing those responsible for human rights violations. This condemnation is directed at the various mechanisms used to generate impunity, such as the obstruction of justice (including the use of violent means), the covering up of perpetrators by agents of the State, deficient investigations (particularly with regard to the handling of evidence), lack of impartiality and independence of judges, and unjustified delays or inaction by the justice institutions.
>
> The international community has repeatedly described impunity in Guatemala as a systemic problem."
>
> Barany #2 at Ex. "A" - Melgar Report (English Version), p. 1

14. Tahoe attempts to minimize these serious, systemic problems in the Guatemalan judicial system by arguing, without foundation, that the problems are confined to certain high profile cases involving genocide, mass execution, organized crime and human rights violations. Mr. Melgar's evidence establishes that this is simply not the case.

15. Mr. Melgar recounts in detail how during a trip with the former Attorney General of Guatemala, he encountered first hand the unfair and illegal treatment of protestors at the hands of the judicial system:

> In my capacity as Secretary General of the Public Prosecutor's Office (MP), a position I held from March 2011 to May 2014, I had occasion to

accompany the Attorney General Claudia Paz y Paz on a visit to the province of Huehuetenango where complaints of irregularities had been lodged. During the visit, the Attorney General learned that one of prosecutors working in the Prosecutions Office of the provincial capital, Gilda Isabel Aguilar Rodríguez, had conducted a prison interview of a detainee facing charges of engaging in violent actions against the installation of a hydroelectric plant.

This interview took place in the absence of the detainee's counsel. The prosecution of this individual was being handled by a prosecutor in a different municipality from the one in which Ms. Aguilar Rodriguez was based and the case had not been assigned to the latter. After the interview, Ms. Aguilar Rodriguez asked the judge seized with the matter for a hearing to receive testimony from the detainee. The judge proceeded to hold the hearing, again in the absence of defense counsel, in violation of the country's constitutional and legal precepts. On the sole basis of this testimony, the judge issued arrest warrants against community leaders who were opposed to the installation of the Santa Cruz hydroelectric plant in their rural community of Santa Cruz Barrillas, located in the province of Huehuetenango. Some of the actions carried out by certain leaders opposed to the hydroelectric project were of a violent nature. After the Attorney General took the necessary corrective actions and commenced disciplinary proceedings against the prosecutor in question, the latter opted to resign to avoid her removal. Subsequently, she was invited to make radio and television appearances, and even went abroad to do so, at which she denounced Guatemala's then Attorney General for benefiting persons engaged in violent opposition to the hydroelectric plant.

Barany #2, at Ex. “A”, p. 2

16. One of the plaintiffs in this case, Adolfo Garcia, the father of Luis Fernando Garcia, experienced similar treatment first hand. He was arrested without basis and held in a maximum security prison for five days before being released.

MS. CARTERI:

Q So let's ask the question again and round it out to any cases, civil or criminal cases.

A I can't talk for the other colleagues involved, but my father was detained to -- over protests.

Q When was he detained?

A He was arrested on the 13th of April because of those protests against Minera San Rafael. Yes, he was detained for five days, I believe, and was

released from jail on the 18th of April, but there was nothing that was proved against him. It was all false. It was all lies.

Q And he was released?

A Yes. He was detained for five days in the maximum security prison in Santa Rosa.

Affidavit #1 of Prairie Jolliffe, made March 13, 2015 ("Jolliffe #1") at Ex. "B", p. 69, lines 33-47

17. Systemic problems in the judicial appointment process remain a current feature of the Guatemalan legal landscape. As Mr. Melgar reports:

> In a press release issued in Geneva on October 7, 2014 (available online), the UN Special Rapporteur on the Independence of Judges and Lawyers expressed concerns about the process being used to select judges to sit on Guatemala's Court of Appeals and Supreme Court. She charged that the process was not conducted in accordance with recognized international standards, particularly in terms of objectivity and transparency, thereby compromising judicial independence in the country.
>
> Barany #2 at Ex. "A", p. 2

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

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

19. Mr. Melgar's evidence was not challenged by Tahoe[1] and is backed up by credible international organizations engaged in the study of the judicial system in Guatemala.

Mirte Postema and the Due Process of Law Foundation

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

21. The Due Process of Law Foundation has engaged in extensive monitoring and analysis of judicial appointments in Guatemala. Mirte Postema is a lawyer with the Due Process of Law Foundation and the author of an *amicus curiae* brief submitted to the Guatemalan Constitutional Court detailing numerous irregularities in the appointment of appellate judges.

Affidavit #1 of Mirte Postema, made January 23, 2015 ("Postema #1") at paras. 1 and 7

22. Like Mr. Melgar, Ms. Postema identifies government influence over the judiciary as a current feature of the legal landscape in Guatemala:

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

23. Like Mr. Melgar, Ms. Postema's evidence was not challenged by Tahoe.

24. The Due Process of Law Foundation concluded that Guatemala lacks the basic foundations necessary to ensure judicial independence:

[1] Tahoe's investor briefs tout "business friendly government", "conservative leadership" and "strong local support" as positive features of doing business in Guatemala (Affidavit #1 of Sharon Wong, made January 23, 2015 ("Wong #1") at Ex. "H", p.209)

The structural weaknesses identified severely call into question the existence of basic conditions to guarantee judicial independence in Guatemala. They can be summarized as follows:

- The normative framework in place in Guatemala is not sufficient to effectively guarantee judicial independence and protect judges from pressures originating both outside and inside the judiciary. Although the Constitution (art. 203) and laws (such as art 2 LCJ [*Ley de Ia Carrera Judicial* - Law on the Judicial Career]) speak of the independence of the judiciary, there are no mechanisms in place to guarantee this independence in practice**:** there is a lack of both internal and external independence, judges lack tenure, and the judicial selection processes are not merit-based.

- There is no real judicial career in Guatemala. Judges are appointed for a period of only five years. This lack of tenure means that judges can, and do, lose their jobs without any justification necessary. This situation leaves judges highly vulnerable to pressures. Moreover, although there is a Law on the Judicial Career (*Ley de Ia Carrera judicial*, LCJ) and a special council that is tasked with making decisions pursuant to its norms (such as about transfers of judges), in practice, these decisions continue to be made by the Supreme Court-in blatant disregard of the LCJ. Transfers can be made against the will of the judges involved**,** and any petitions for the reconsideration of such decisions are decided by the same body that ordered the transfer, effectively leaving judges without the possibility to appeal such decisions.

- Administrative powers in the judiciary are concentrated in the Supreme Court, which, for example, is in charge of the appointments, promotions and transfers of judges (first instance and courts of appeal). This increases dependence of lower judges on their superiors. These powers can be used as disciplinary measures in disguise. For instance, in 2014, a judge who denounced having received pressures from the current Vice President, was appointed to a court in a remote mountain region in Guatemala, rather than in his court in the capita.

- 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. However, the interference with judges' independence does not exclusively come from inside the judiciary. In 2014, Judge Yassmin Barrios was sanctioned by the Guatemalan Bar Association (*Colegio de Abogados y Notarios de Guatemala*) because during trial, she had allegedly 'disrespected' a member of the legal

> defense team of former dictator Efrain Rios Montt, who was convicted for genocide by the tribunal Judge Barrios presided over. Even in a country like Guatemala, where infringements on judicial independence are common, this very concerning development of lawyers imposing sanctions on a judge for acts performed in her role as judge, was unprecedented.
>
> - The processes for the selection of judges are not transparent or merit-based, but rather, are controlled by special interests--including those involved with organized crime.
>
> - Although there is a system in place for the random assignment of cases to judges, the judges and legal practitioners interviewed for DPLF's study indicated that this system is easily manipulated.
>
> Postema #1 at Ex. “A” [footnotes and emphasis from the report have been removed]

25. Despite international criticism from a number of bodies as well as legal challenges within Guatemala to the 2014 appointment process, the Guatemalan Constitutional Court ruled that the judges-elect could take office:

> Different national and international authorities expressed their concern about the selection processes: the *Procuraduria de Derechos Humanos* (Ombudsman), the UN Special Rapporteur for the Independence of Judges and Lawyers, and the Inter-American Commission on Human Rights. A number of constitutional (*amparo*) challenges were filed against the selection processes, but on November 19, 2014, the Guatemalan Constitutional Court (*Corte de Constitucionalidad*), declared that the judges-elect could take office.
>
> Postema #1 at Ex. “A” [footnotes and emphasis from the report have been removed]

Judges and Lawyers Are Under Threat in Guatemala

26. Ms. Postema cites the case of Judge Barrios as an example of the external pressures which can be applied to sitting judges. It is not an isolated example.

> Postema #1 at Ex. “A”

27. In late 2014, Judge Claudia Escobar blew the whistle on influence peddling in the judicial appointment process. She went public with a taped conversation in which a sitting member of Congress promised her favours in the judicial appointment process in exchange for support in a case involving the vice-president. In March

2015 she was forced to leave the country under the protection of the Organization of American States.

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

28. Even the Attorney General of Guatemala is not immune from these forces. Claudia Paz y Paz is widely credited with undertaking significant reforms of the judicial system during her tenure as Attorney General. In June 2014, the *Centro de Estudios de Justicia de las Americas* (CEJA) credited the Public Ministry with implementing reforms over the previous three years that had the effect of "significantly improving the criminal prosecutions, reducing impunity for the most serious crimes, increasing the level of transparency and accountability, and strengthening the Public Ministry's institutional functioning".

29. Attorney General Paz y Paz was removed from office by order of the Constitutional Court in May 2014.

30. Tahoe cross examined the plaintiffs' Guatemalan law expert Carol Zardetto on the accomplishments of Ms. Paz y Paz but chose not to question her on the more recent developments in Guatemala since Ms. Paz y Paz was removed from office:

> Q Ms. Zardetto, yesterday I provided your counsel with a copy of a press release issued by Open Society Foundations. Have you been given a copy to peruse before this cross-examination?
>
> A No.
>
> Q Okay. If it's okay I'll hand that over – that copy over.
>
> A Okay.
>
> Q If you haven't read it I'd like to give you a minute to do so.
>
> A Okay. Yes, this document refers to two good things that happened in the public ministry. I want to clarify that I am not a criminal – expert in criminal law, and I am not near what is happening in the public ministry. So I know what every Guatemalan citizen -- well-informed Guatemalan citizen knows, and what I know as a well-informed Guatemalan citizen is that in

the year 2009 there was this -- the attorney general, Amilcar Velasquez -- and then continued by Claudia Paz y Paz -- started to work on the problems that had been diagnosed in the public ministry a lot of years before, you know.

When we started working at -- with NAS at the year 2000 there were already a lot of diagnostics regarding the public ministry, what the problems were, what needed to be done, and nothing had been done. But during these years they started to address the problems, and so the institutions started showing better results than before.

Q Okay.

A I think that that's what this document is about.

Q Okay. So let me just go back on a couple of things. You referred to NAS. That is an acronym for the Narcotics --

A Affairs service.

MS. CARTERI: -- Affairs Service. Thank you. I – so now that you've read that document I would like to mark it as an exhibit for identification purposes so that we've got it in the record, and then I'll give it back to you.

EXHIBIT 1 FOR IDENTIFICATION: Press release issued by Open Society Foundations

Affidavit #1 of Prairie Jolliffe, made March 13, 2015 (Jolliffe #1) at Ex. “A”, pp. 13-14; lines 15-47 and lines 1-11 and Ex. 1

31. On re-examination, Ms. Zardetto confirmed that the recent events involving Judges Barrios and Escobar and Attorney General Paz y Paz are accurately summarized by the Open Society Foundation in its November 11, 2014 statement entitled *Judicial Independence Under Threat in Guatemala*:

Guatemala’s justice system was praised around the world last year for the prosecution of a former dictator for atrocities carried out against his own people. Efraín Ríos Montt was put on trial and convicted of genocide and crimes against humanity, in a painful public examination of a brutal period in the country’s long armed conflict, during which tens of thousands of people were killed or “disappeared.”

What a difference a year makes.

The conviction of Ríos Montt has been followed by a severe backlash. Only days after the verdict, in a divided and controversial ruling,

Guatemala's constitutional court annulled the sentence and left the genocide trial in a state of uncertainty that continues until today.

The lead judge in the genocide trial, Yassmin Barrios, received international respect for presiding over the complex case. She was honored with an award from Michelle Obama, who cited her 18 years as judge in Guatemala, presiding over some of the country's most high-profile cases, including massacres, political assassinations, and drug trafficking.

But in Guatemala, her career is in jeopardy. Early this year, the Guatemalan lawyers association sanctioned Judge Barrios for "ridiculing" the defense attorney during the trial. She appealed the specious ruling—believed to be only the second reprimand issued by the association in the past five years. The country's constitutional court is now considering the case. (The Open Society Justice Initiative has joined eight other regional and international groups in calling for the lawyers association sanction to be rejected.)

Independent prosecutors have also been rebuked. In February, in a ruling relying on out-of-date transitional provisions of the decades-old constitution, the constitutional court ordered the premature end to the tenure of Claudia Paz y Paz, Guatemala's celebrated attorney general. That Paz y Paz was responsible for successes in turning around a public prosecutors' office known largely for turning a blind eye to serious crime was not enough to protect her from reprisal, and in fact may have played a large part in it.

Guatemala is now also in the midst of selecting the country's entire slate of appellate and supreme court justices, a process that takes place every five years. Due to be resolved last month, the final selection of senior judges in Guatemala has been abruptly frozen after allegations of rampant corruption in the process were demonstrated unmistakably. Appeals court judge Claudia Escobar resigned and turned over an audiotape of a Guatemalan legislator seeking her support in a case implicating the vice president, in exchange for the legislator's support in the nomination process. The leaked tape laid bare the crooked state of the judiciary in Guatemala. The constitutional court temporarily suspended all of the judicial nominations and is now considering how the process will proceed.

Amid all these judicial shenanigans, one of the strongest voices for reform has been the International Commission Against Impunity in Guatemala (CICIG), a United Nations-backed institution that was set up to fight organized crime and corruption in Guatemala. CICIG was the institution that Judge Escobar turned to with the tape of the legislator's proposed tit-for-tat. Unfortunately, its current mandate will expire next year, unless renewed.

Recent events have shown that Guatemala's justice system is still subject to powerful political and economic interests.

Wong #2" at Ex. "C", pp. 30-31;

Jolliffe #1, at Ex. "A", pp. 37-39

32. These unchallenged expert reports and the reports of numerous, independent agencies demonstrate that these grave deficiencies in the Guatemalan judicial system are systemic, current and not limited to a handful of cases about genocide and organized crime as asserted by Tahoe.

Carol Zardetto

33. The plaintiffs also filed the affidavit of Carol Zardetto, a practising lawyer in Guatemala City with extensive experience in issues pertaining to reform of the justice system.

34. From 1985 to 1990, Ms. Zardetto was a professor of civil and mercantile procedures at Rafael Landivar University in Guatemala. In 1996, she served as Vice Minister of Education, Guatemalan Ministry of Education. She then served as Consul General for the Ministry of Foreign Affairs in Vancouver.

Affidavit #1 of Carol Zardetto, made January 16, 2015 (Zardetto #1) at Ex. "A"

35. From 2000 to 2006, she was engaged in a number of reform projects aimed at strengthening the rule of law and reducing corruption in Guatemala. From 2000 to 2003, she served as Program Manager for the United States State Department, Narcotics Affair Service and implemented projects with the Public Ministry and judicial authorities aimed at strengthening the judicial system and the rule of law. In 2003, she received an award from the government of the United States for sustained and outstanding performance in the management of the project.

Zardetto #1 at Ex. "A"

36. From 2003 to 2004, Ms. Zardetto served as Regional Coordinator for Central America for Transparency International on a project which aimed to establish a

regional anticorruption program. Her work was aimed at building civil society's capacity to monitor government activity, respond to corruption and act as informed commentator on government actions which relate to the rule of law and use of public funds.

Zardetto #1 at Ex. "A"

37. In 2004, Ms. Zardetto worked on a USAID transparency and anti-corruption project aimed at creating a national agenda to combat corruption. The project included a program to strengthen the Anti-Corruption Office of the Public Ministry (Public Prosecutor's office).

Zardetto #1 at Ex. "A"

38. In 2006, Ms. Zardetto authored a report into judicial corruption for the Due Process of Law Foundation.

Zardetto #1 at Ex. "A"

39. From 2007 to the present, she has written an opinion column for El Periodico while practising law. She is also a playwright and published novelist.

Zardetto #1 at Ex. "A"

40. Ms. Zardetto's analysis of systemic weaknesses in the Guatemalan judicial system is penetrating and mirrors the opinions of Ms. Postema of the Due Process of Law Foundation and the opinion of Mr. Melgar, the former Secretary General of the Public Prosecutor's office. She concludes that there are inherent weaknesses and features of the judicial system in Guatemala which undermine the rule of law and create barriers to justice for common people in Guatemala such as the plaintiffs. These problems include:

- *Inefficiency*
- *Lack of proper investigation skills*
- *A bureaucratic approach that doesn't have justice as its main, interest*

- *Lack of judicial independence including lack of appropriate funding for the judiciary. The judiciary is very much depend[e]nt on the executive branch of government for funding including payment of their salaries.*

- *Lack of transparency*

- *Lack of proper control on the judicial activity*

  Zardetto #1 at Ex. "C"

41. Lack of judicial tenure is particularly problematic:

> • Judges are not independent since they have only a five year appointment that they will need to renegotiate in the political arena. This makes them vulnerable to influences from superior judges or from politicians. The recent election of magistrates was widely questioned for influence peddling and other vices. A recent scandal involving Judge Claudia Escobar who resigned as a judge and went public about her concerns over corruption when she was asked by a representative in Congress to provide a benefit to the Vice-president, in exchange for her election as a magistrate. This is a clear evidence of how judges can be manipulated and how powerful actors can have almost unlimited access to pressure them.

Zardetto #1 at Ex. "C" [footnotes from the report have been removed]

42. These problems are compounded by complex and formalistic procedures which can be used to obstruct and block cases, features of the Guatemalan legal landscape which have been identified and reported on by various international bodies including Impunity Watch and the United Nations Commission Against Impunity in Guatemala (known by its Spanish acronym CICIG).

43. Impunity Watch describes reckless litigation as something of an art form in Guatemala:

> Reckless litigation can be regarded as a judicial tradition in Guatemala. Added to the inherent delay of judicial procedures in the country, every litigation action and mid-term decision is usually followed by a *kafkian* set of appeals and reconsideration pleadings filed at the deciding tribunal and its superiors. This way, the duration of any judicial process becomes irrationally long. Civil, administrative, fiscal, but particularly criminal trials are simply taking too long from start to end. Moreover, the virtual inexistence of sanctions against reckless and/or dilatory litigation strategies (neither the judges nor the Lawyers' Bar impose real sanctions),

apart from the fact that disciplinary trials for lawyers are also very lengthy, make it especially convenient for lawyers and their clients to saturate every single trial with reconsiderations, objections and appeals, buying time for changing judges, exerting the right influence, exhausting the other party, or 'disappearing' evidence.

Zardetto #1 at Ex. "C" [footnotes from the report have been removed]

44. The United Nations CICIG makes similar observations:

Similar observations have been made by CICIG, the International Commission Against Impunity in Guatemala which was established by agreement of the United Nations and the Guatemalan government:

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

The dysfunctional nature of the Guatemalan legal system is accurately summarized by Impunity Watch:

> It is hence clear that Guatemalan justice is de facto obstructed by the systematic misuse of exceptional procedures fostered by formalistic literal interpretations of legal statutes, lack of internal judicial independence, and reckless litigation strategies. Particularly, there is also an abusive misuse of constitutional remedies as a way for delaying and/or reversing adverse judicial decisions. As a consequence of this culture, constitutional human rights are systematically degraded to procedural wildcards to be played in a wide range of unnecessary circumstances.

Zardetto #1 at Ex. "C" [footnotes from the report have been removed]

45. As Ms. Zardetto notes:

The problem is complex but the outcome is very simple - the majority of cases do not solve the issue of providing justice and serving as a tool to shape society by establishing reasonable limits and accountability for trespassing those limits.

Zardetto #1 at Ex. "C" [footnotes from the report have been removed]

46. Ms. Zardetto's analysis is supported by, but not limited to examples from recent Guatemalan legal history - the Dos Erres case, the prosecution of former president General Rios Montt for genocide and the recent scandal involving Judge Claudia Escobar.

47. The Dos Erres case is famous (or infamous) for the use of constitutional challenges known as the *amparo* as a delaying tactic. As Ms. Zardetto notes, the case was interrupted by over 100 *amparos*, causing the Inter-American Court of Human Rights to comment:

> The Court notes amparo legal regulations, the lack of due diligence tolerance by the domestic tribunals when deciding them, as well as the lack of an effective judicial protection, have allowed the abusive misuse of amparo pleadings as a dilatory strategy.
>
> Zardetto #1 at Ex. "C" [footnotes from the report have been removed]

48. As discussed above, judges who attempt to reign in these tactics face enormous pressures. Judge Jasmine Barrios, who presided over the Rios Montt trial, faced sanctions from the bar association.

49. On the other hand, corrupt judges enjoy impunity:

> There is a huge problem of impunity regarding corruption of Judges. The office that has the responsibility to investigate corruption cases has very limited resources and there is a board in charge of hearing corruption cases (Junta Disciplinaria) but it is staffed by judges appointed to that position for one year only. Obviously there is a big problem when they have to judge their peers. The following year, they will return to their position and be vulnerable because some other judge could be judging them. It is significant that even though accusations of corruption are very common, the Public Ministry has not prosecuted one single judge for corruption in the past 10 years.
>
> Zardetto #1 at Ex. "C" [footnotes from the report have been removed]

50. Ms. Zardetto summarizes the current state of the Guatemalan justice system as reflecting the power structure present in the country:

> In summary, the judicial system in Guatemala reflects the organization of power in the country and has little concern for the protection of human rights, the prevalence of rule of law, or the realization of justice. Under

such a system, powerful actors have more chances than vulnerable people, since all the weaknesses operate against making justice prevail.

Zardetto #1 at Ex. “C” [footnotes from the report have been removed]

Guatemala’s Substantive and Procedural Laws Impose Additional Barriers to Justice

51. In addition to identifying systemic barriers to access to justice present in the Guatemalan legal system, Ms. Zardetto provides a detailed analysis of how Guatemala’s formalistic procedural and substantive laws impose additional barriers to justice for these seven plaintiffs in the circumstances of this case. These barriers include:

(a) the fact that a Guatemalan court would not accept a transfer of this case from British Columbia. The plaintiffs would be required to re-commence their claims in Guatemala and run the risk of dismissal on limitations ground;

(b) the requirement that the pleading used to commence a proceeding (known as the “*demanda*”) specify with detail all evidence relied on by the plaintiffs in support of their claims coupled with rules that make it virtually impossible for the plaintiffs to obtain evidence in the custody of the defendants necessary to properly plead the case;

(c) the absolute inviolability of the corporate veil; and

(d) the potential for *amparo* proceedings to delay the proceeding.

Zardetto #1 at Ex. “C” [footnotes from the report have been removed]

52. According to Guatemalan procedural law, the plaintiff must identify in the *demanda* all evidence which he or she intends to rely on to prove the claim against the defendant. Evidence that is not described in the *demanda* may not be submitted to the court at a later date.

Zardetto #1 at Ex. “C” [footnotes from the report have been removed]

53. This requirement coupled with the limited ability of the plaintiffs to access evidence in the possession of Tahoe would make it virtually impossible for the plaintiffs to satisfy the requirements for pleading the case in Guatemala.

54. A party can only request production of documents from the opposing party which it already knows to exist:

> Basically, to obtain documents in the possession of a defendant, the plaintiff must know and be able to prove that the document exists. This is generally done by providing a copy of the document to the Court or indicating the exact contents. If the plaintiff can prove the existence of the document and its contents, the Court will order the defendant to produce the original document within a certain time frame under the warning that if he doesn't comply with the order, the judge will make one of these declarations:
>
> > (a) That the copy that was presented is truthful;
> >
> > (b) That the information that the document contains, as alleged by the interested party, is exact. (Art. 182 Civil and Mercantile Procedures Code)
>
> Zardetto #1 at Ex. “C” [footnotes from the report have been removed]

55. As explained by Ms. Zardetto, the combination of these rules would lead to the bizarre result that the plaintiffs, having had their case dismissed in British Columbia, would need to pursue letters rogatory in British Columbia to compel the evidence necessary to plead the case in Guatemala:

> 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….
>
> Zardetto #1 at Ex. “C” [footnotes from the report have been removed]

56. In addition, the plaintiffs would run the risk of a limitation problem:

> 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.
>
> In other words, the legal situation of the plaintiffs would drop into a limbo where there would be no certainty if the hypothetical claim would be accepted by a Guatemalan Judge due to all the factors stated above.
>
> Zardetto #1 at Ex. “C” [footnotes from the report have been removed]

57. A party also has virtually no ability to compel production of documents in the possession of a third party in Guatemala:

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

58. In summary, Guatemala’s substantive and procedural law would make it virtually impossible to prosecute a claim against Tahoe:

> In my opinion, if the claim is based on documents that need to be retrieved through discovery rights, the way the Guatemalan Civil and Mercantile Procedures Code regulates evidence will be a very powerful limitation to the possibility of establishing the facts and specifically the responsibility that Tahoe could have in the events. In summary, according to Guatemalan law, parties have to:
>
> > 1) Assume the burden to bring to trial evidence of their allegations. They cannot rely on the obligation of the other party to produce documents that are not mentioned or known by the adversary.
> >
> > 2) Enumerate and describe or present all documents that will be part of the evidence in the *Demanda* the moment they file the case.

> 3) In order to obtain documents in the possession of the opposite party, the documents have to be described as to their contents and the party must give evidence that the opposite party has them.
>
> 4) Documents in the possession of a third party can be indicated as evidence (establishing exactly what documents you are referring to), but a third party can refuse to present them and the Judge can't force the delivery.
>
> 5) Letters addressed to third parties are not admissible as evidence.

Zardetto #1 at Ex. “C” [footnotes from the report have been removed]

59. Tahoe cross examined Ms. Zardetto and has launched a barrage of criticisms against her opinions, all of which miss the mark. According to Tahoe:

(a) Ms. Zardetto lacks current litigation experience;

(b) Ms. Zardetto is a published author and playwright and by inference cannot be a senior litigator; and

(c) Ms. Zardetto is not an expert on the current state of corruption in the Guatemalan judicial system or the inner workings of the Public Ministry or the United Nations Commission Against Impunity in Guatemala (CICIG).

60. Ms. Zardetto is a practicing lawyer in Guatemala and has been since 1984 with a number of interruptions to fulfill government postings including a posting as Consul General to Vancouver. The fact that she is also an op-ed columnist, published novelist and playwright does not disqualify her from holding opinions on the current state of the Guatemalan judicial system. Indeed, such a breadth of experience may give her additional insight into the shortcomings of the system.

61. Ms. Zardetto is not an expert on the inner workings of the Public Ministry or United Nations CICIG. She is, however, well informed on current events in the Guatemalan judicial system. That is sufficient to qualify her as an expert for this proceeding.

62. Most importantly, Ms. Zardetto's opinions on the lack of judicial independence and the rule of law in Guatemala are backed up by reference to current reports from credible international bodies including the UN Commission Against Impunity in Guatemala (CICIG), Impunity Watch, the Inter American Court on Human Rights, and the Due Process of Law Foundation. Her conclusions mirror those of Mynor Melgar and Mirte Postema, who are experts on the Public Ministry and the inner workings of the judicial appointment process. Their evidence was not challenged by Tahoe.

63. Tahoe asserts, without foundation, that Ms. Zardetto's criticisms of the Guatemalan judicial system are confined to a few high profile cases involving genocide and mass murder and that such cases are in the past. On cross examination, Ms. Zardetto made clear that the cases she cited were chosen to illustrate problems endemic to the system:

> Q And those cases are important to the conclusions that you've reached in your answer to question 1? Those are the key cases?
>
> A I had mentioned those specific cases to illustrate specific things regarding the bullets. They are not the only emblematic cases in Guatemala. In fact, Guatemala has been condemned by the Inter-American Court of Human Rights in -- I don't know how many cases. Over 100 cases, to say a number. I don't have the exact figure in my head, but Myrna Mack case for the assassination of Myrna Mack is one -- it's another case that illustrates this. Guatemala was condemned as well by the Inter-American Court of Human Rights for that case.
>
> Q Okay.
>
> A So the examples are not only these, or these would be -- or these are not the -- these were just cases that I thought would illustrate certain things, and especially because, like, the genocide case and Claudia Escobal are very recent.
>
> Jolliffe #1 at Ex. "A", pp. 33-34, lines 45-47 and lines 1-18

64. On re-examination, Ms. Zardetto confirmed that the reports by the Open Society Foundation accurately summarize the current situation in Guatemala involving Justices Barrios and Escobar and former Attorney General Paz y Paz. The

treatment of these judges and lawyers speaks volumes about the current situation in Guatemala.

Jolliffe #1 at Ex. “A”, p. 38, lines 1-21

65. Ms. Zardetto candidly explained that in her current practice, she does not sign many pleadings on behalf of clients and therefore, in that sense, she does not “appear” in court proceedings as frequently as she once did. Having challenged her practice activity, Tahoe did not actually challenge Ms. Zardetto’s analysis of Guatemalan substantive and procedural law. The entire cross examination was confined to the question of corruption and lack of judicial independence in the Guatemalan legal system.

Jolliffe #1 at Ex. “A”, pp. 20-21, lines 44-47 and lines 1-3

66. As will be argued below, the opinion of Ms. Zardetto and Mr. Chavez Bosque, Tahoe’s expert on Guatemalan law, do not differ significantly on key aspects of Guatemalan substantive and procedural law:

(a) both agree that under Guatemalan law, the corporate veil is inviolable and cannot be pierced;

(b) both agree that there is no right to discovery of documents in the possession of the opposite party; and

(c) both agree that a Guatemalan court would not accept a transfer of this proceeding from the BC court (an issue first identified by Ms. Zardetto).

67. Moreover, it is Mr. Chavez Bosque, not Ms. Zardetto, who oversteps his qualifications. There is no evidence in the record that Mr. Chavez Bosque has any experience or expertise in criminal matters. Yet, he opines that the plaintiffs could summon Tahoe to be added as a party to the criminal proceeding against Mr. Rotondo:

> Furthermore, Plaintiffs should request any person civilly liable under the law for the caused damages, to be summoned [Article 135 of the Criminal Procedures Code]. That includes juridical persons vicariously liable for

> acts - intentional, by carelessness or imprudence- of their officers or employees that directly caused the damages. Tahoe could be therefore summoned as an alleged civilly liable person, for the acts of her officers or employees, whether intentional, by carelessness or imprudence.
>
> Affidavit #1 of Francisco Chavez Bosque, made November 21, 2014 (Chavez Bosque #1) at p. 14 of Ex. “C”

68. At page 15 of his report, Mr. Chavez Bosque, reiterates that Tahoe can be summoned as a party to the criminal proceeding against Mr. Rotondo:

> Tahoe may be summoned to the criminal proceedings, as an alleged civil liable person under the law, for the alleged Rotondo's acts. Evidence of the relationship between Tahoe and Rotondo would have to be produced to prove Tahoe's vicarious liability.
>
> Chavez Bosque #1, at p. 15 of Ex. “C”

69. This evidence is convenient. It suggests that there is a straightforward process available to the plaintiffs in Guatemala by which to pursue justice against Tahoe. It is also wrong.

70. This opinion is completely undermined by the evidence of Mr. Melgar, a lawyer with extensive criminal law experience and former Secretary General of the public prosecutor’s office. Mr. Melgar’s evidence establishes the following principles:

(a) The power to add parties to a criminal indictment rests exclusively with the presiding judge. While parties can request the addition of a party, they do not have a right to this.

Barany #2 at Ex. “A”, p. 4

(b) The prosecutor cannot expand the indictment to include a new party. To the extent that evidence unearthed during a criminal prosecution suggests the involvement of other parties, a new and separate indictment must be issued against that party.

Barany #2 at Ex. “A”, pp. 4-5

(c) There are serious jurisdictional constraints to adding Tahoe to the criminal proceeding against Mr. Rotondo.

71. The jurisdictional constraints are important to the analysis of this motion:

> In Guatemala, the principle of territoriality of criminal law (article 4, Criminal Code) applies. In order for a foreign company to be included as a party within the criminal proceeding underway in respect of the events of April 27, 2013, there are two necessary conditions in my opinion. The first is that the company has been established in the country in accordance with the national laws, has been duly authorized by the Executive after satisfying the legal requirements (article 28, Civil Code), and has appointed an agent with all general and special powers required by law to answer for the legal and extrajudicial business that is conducted in relation to the company (article 29, Civil Code). The second condition is that one or another of its directors, managers, executives, representatives, administrators, officers or their employees, has participated in the offence by doing an act on Guatemalan soil, absent which the offence would not have been consummated (article 38, Criminal Code).
>
> And given that in the specific proceeding resulting from the events of April 27, 2013, the indictment drawn up by the Public Prosecutor was against a single accused, Alberto Rotondo, with respect of whom the judge has already ordered a public oral trial, if this foreign company had engaged in any acts or omissions that had a bearing on the events of April 27, 2013, the Guatemalan criminal courts would have no jurisdiction to prosecute these acts unless the above-mentioned legal conditions provided for in law are met.
>
> Barany #2 at Ex. “A” at p. 5

72. Simply put, Tahoe cannot be added as a party to the Rotondo criminal proceeding. Mr. Melgar’s analysis of this issue was not challenged in any way by Tahoe. Tahoe neither cross examined him nor filed any rebuttal to his report.

73. This leaves a “standalone” civil claim against Tahoe as the plaintiffs’ only avenue to seek justice in Guatemala against Tahoe. For the reasons discussed below, a civil claim against Tahoe in Guatemala would be virtually impossible to prosecute.

Key Evidence of the Shooting is Available to this Court

74. Important evidence regarding the shooting is available to this Court:

(a) Wiretaps of phone calls made by Mr. Rotondo following the shooting. Tahoe asserts that this evidence is subject to challenge in Guatemala. This assertion again misses the mark. The plaintiffs are suing Tahoe, not Mr. Rotondo. There is no evidence in the record that Tahoe could in any way challenge the use of this evidence in claims against it. Moreover, there is no evidence that the authorization for the wiretaps is actually being challenged by Mr. Rotondo. The evidence from his lawyer is limited to a statement that he believes the wiretaps may have been illegal. Finally, Tahoe apparently reviewed and relied on the wiretaps as part of its own internal investigation into the shooting.

Affidavit #2 of Jose Gudiel Toledo Paz, made February 5, 2015 at para. 13

(b) Video camera footage taken from the mine's security camera. The footage plainly shows that the shooting was not provoked by the plaintiffs or other protestors and that most were shot in the back while leaving the scene. In its motion, Tahoe fails to mention this source of evidence.

(c) Tahoe has conducted its own investigation into the shooting. As with the wiretaps and security camera footage, Tahoe failed to mention this in its motion material. When the plaintiffs requested production of the internal report, Tahoe claimed that it was in fact conducted by Minera San Rafael (MSR), Tahoe's wholly owned subsidiary, and was privileged. This explanation is at odds with letters written by Tahoe's general counsel to an investor, the Norwegian Global Fund, in which General Counsel for Tahoe repeatedly stated that Tahoe conducted the investigation.

Wong #2 at Ex. "B", p. 27

75. This evidence, taken together, dramatically reduces the need to access sources of proof located in Guatemala.

The Audio Intercept Evidence

76. The audio intercepts show the shootings were deliberate, malicious and calculated to suppress local opposition to the mine:

INTERCEPT No. 4006

Speaker

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

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

INTERCEPT No. 4007

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

Unknown: You ran them out?

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

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

Rotondo: Yes. Si

Unknown: Right, understood then.

Rotondo: Right, understood.

INTERCEPT No. 4010

Rotondo: Hello

Juan Pablo: Hello, Alberto, good evening.

Rotondo: How are you?

Juan Pablo: Good, thank you, Alberto

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

Juan Pablo: Uh-huh.

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

Juan Pablo: Who were they? Who knows.

Rotondo: Who knows.

Juan Pablo: I'll send someone right away to check it out. El Moreno is there, because I told him about an hour ago to be there.

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

Juan Pablo: (LAUGHS)

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

INTERCEPT No. 4052

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

Unknown: Yes, we are doing them.

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

Unknown: Understood.

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

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

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

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

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

Unknown: Yes, it could have landed there and exploded; yes.

Rotondo: Yes, well, good.

Unknown: Okay then.

Affidavit #1 of Roger Barany, made January 21, 2015 (Barany #1) at Ex. "A" [footnotes from the translation have been removed]

Security Camera Footage

77. Tahoe also had in its possession the security camera footage which the plaintiffs obtained from the *Ministerio Publico*. In fact, it was Donald Paul Gray, the former Vice President of Operations for Tahoe and its primary affiant in this case, who turned the footage over. Notably, Mr. Gray did not identify the existence of this footage in his affidavit material notwithstanding the fact that he had reviewed the forage prior to swearing the affidavit.

Q Mr. Gray, did you retrieve the security camera footage of the April 27th, 2013 incident?

A By me retrieving it, what do you mean?

Q Well, were you the individual that turned over a copy of the security camera footage to the prosecuting authorities in Guatemala?

A That -- the security information was transmitted to the *ministerio publico* under -- with a transmittal letter, yes.

Q Under your signature?

A Under my signature.

Q And have you -- prior to swearing your affidavit, did you ever review that security camera footage?

A I have reviewed the security camera footage.

Q Was that prior to swearing your affidavit? Do you recall when you reviewed the security camera footage?

A I don't recall when, sorry.

Q Was the first time a relatively short period after the incident? Would that have been the first time you reviewed it?

A I reviewed it a short time after, yes.

Jolliffe #1 at Ex. “C”, pp. 101-102, lines 28-47 and lines 1-2

78. The video footage confirms the use of force was unprovoked and wildly excessive.

Tahoe’s Internal Investigation

79. Tahoe has conducted an internal investigation into the shooting and the conduct of Mr. Rotondo. It has shared the results of that investigation with investors but did not disclose it in its motion material. Tahoe has refused the plaintiffs’ request to produce the report in this proceeding notwithstanding the fact that it is an important source of proof in this case.

80. The investigation is described by Tahoe’s General Counsel in a letter to the Norwegian Global Fund:

> <u>April 27. 2012 Incident</u>
>
> *Events:* On April 17,2013, non-lethal force (rubber bullets and tear gas) was used at the mine gate against protestors armed with large sticks, clubs and machetes who were engaged in impeding traffic to and from the mine. Seven individuals were injured by rubber bullets and were treated and released at local hospitals. The security management contractor, Alberto Rotondo, was later charged with causing injuries and obstruction of justice. Within 24 hours of the incident, Mr. Rotondo was dismissed from his position.
>
> …
>
> *Internal Investigation:* After the incident the Company conducted a thorough internal investigation, including a review of all the evidence presented by the MP at Mr. Rotondo's arraignment. From that investigation, the Company concluded that Mr. Rotondo violated the Company's rules of engagement, security protocols and direct orders from management when he ordered the use of non-lethal force to clear the mine entrance.
>
> Wong #2 at Ex. “B”, p. 27

81. This much is known about the investigation:

(a) it was conducted by Tahoe (“the Company”) not MSR;

(b) the investigation included review of all evidence presented by the *Ministerio Publico* (the Public Prosecutor's office) at the arraignment of Mr. Rotondo, including presumably the wiretaps;

(c) the evidence indicated that it was Mr. Rotondo who ordered the shooting;

(d) the evidence reviewed was sufficient to warrant dismissal of Mr. Rotondo; and

(e) the evidence disclosed that "Mr. Rotondo violated the Company's rules of engagement, security protocols and direct orders from management when he ordered the use of non-lethal force to clear the mine entrance."

Wong #2 at Ex. "B", p. 27

Tahoe's Statements on Corporate Social Responsibility Centre the Case in Canada

82. Tahoe asserts on its website that ultimate oversight for community relations and human rights resides with a committee of the Board of Directors of Tahoe known as the Health, Safety, Environment and Community Committee (the "HSEC Committee").

Wong #1 at para. 10, Ex. "Q"

83. During the relevant time period, two of the three directors on the HSEC Committee were resident in Canada, including Mr. John Bell, a resident of Vancouver. This is enough to centre the liability case in Canada and in the English language.

Wong #1, Ex. "E", p. 133

84. Tahoe also claims to have aligned its social responsibility policies with international human rights standards including the UN Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights:

Starting in June 2013, Tahoe retained the Business for Social Responsibility ("BSR"), an international San Francisco-based CSR

consultancy, to help guide the companies' CSR programs in Guatemala. BSR's mandate included the development of strategies to enhance and formalize MSR's and Tahoe's alignment with current international practices in CSR with particular reference to the Equator Principles, the Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights.

Affidavit #1 of Donald Gray, made November 24, 2014 ("Gray #1") at para. 47

85. Compliance with Tahoe's human rights policy is managed by General Counsel and the company's Corporate Social Responsibility Committee and overseen by the Board of Directors HSEC committee.

Wong #1 at para. 10, Ex. "Q"

86. These policies effectively require Tahoe, not MSR, to supervise and control its private security forces.

Wong #1, at para. 10, Ex. "Q"

87. The Voluntary Principles on Security and Human Rights adopted by Tahoe require that the company incorporate the following principles into its contractual arrangements with private security forces:

(a) Private security should act in a lawful manner. They should exercise restraint and caution in a manner consistent with applicable international guidelines regarding the local use of force, including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials, as well as emerging best practices developed by Companies, civil society and governments.

(b) Private security should have policies regarding appropriate conduct and the local use of force which are capable of being monitored by the company or by third parties.

(c) Private security should use force only when strictly necessary and to an extent proportional to the threat.

(d) Private security should not violate the rights of individuals while exercising the right to freedom of association and peaceful assembly.

Wong #1, at para. 12, Ex. “S”, pp. 506-507

88. The plaintiffs’ allegations against Tahoe also centre the liability case in Canada, not Guatemala. For example, the particulars of negligence place Tahoe’s failure to control Rotondo squarely in issue:

> Tahoe breached the duty of care required of it. Particulars of Tahoe’s negligence include:
>
> (a) failing to conduct an adequate background check on Rotondo prior to selecting or approving him for the position of Guatemala Security Manager;
>
> (b) failing to conduct adequate background checks on the Tahoe security personnel;
>
> (c) failing to institute procedures and safeguards to ensure that Rotondo and private security personnel engaged by Tahoe would comply with international and local guidelines pertaining to the use of force;
>
> (d) failing to establish and enforce clear rules of engagement for Rotondo and the security personnel;
>
> (e) failing to establish and enforce clear rules regarding the use of force against protestors;
>
> (f) failing to adequately monitor Rotondo’s activities and those of the security personnel;
>
> (g) failing to require Rotondo and the private security personnel to adhere to internationally accepted standards on the use of private security personnel;
>
> (h) failing to require Rotondo and the private security personnel to adhere to Tahoe’s corporate social responsibility policy;
>
> (i) failing to adequately monitor the security personnel under Rotondo’s command;
>
> (j) failing to detect or properly act upon the fact that Rotondo did not view his role as Guatemala Security Manager as being strictly defensive in nature; and

(k) failing to detect or properly act upon the fact that Rotondo had an openly hostile attitude toward all local community members opposed to the Escobal Mine.

Notice of Civil Claim, filed June 18, 2014, pp. 17-18, at para. 64

Key Witnesses are Located Outside of Guatemala

89. There are undoubtedly witnesses in Guatemala with knowledge of events leading to the shooting but to the extent those witnesses have documents, Guatemala's civil procedure rules do not provide a means of accessing those documents. In addition it is unclear how much additional relevant evidence they could add to the audio intercepts, security camera footage and internal Tahoe investigation. Notably, Tahoe has not provided any evidence from any witness that would challenge the facts recorded in the video footage and audio files.

90. Importantly, a number of key witnesses involving in the screening and hiring of Mr. Rotondo reside outside of Guatemala including Mr. Gray.

91. At paragraph 108 of its submissions, Tahoe seems to assert that Mr. Gray resides in Guatemala as he is described as "at all material times a resident of Guatemala". Mr. Gray is no longer a resident of Guatemala and no longer employed by Tahoe:

Q And where are you presently residing?

A Currently I'm moving from -- out of Guatemala.

Q Okay. And where will you be located?

A I'll be located in Colombia.

Q Does that mean you're changing employment?

A That's correct.

Q And when will that take effect?

A I'll be in Colombia next week.

Q Okay. Thank you.

Jolliffe #1 at Ex. "C", p. 85, line 29-37

92. His evidence will not be available to the Court in Guatemala except possibly through letters rogatory. In contrast, in B.C., he could be examined for discovery as a former employee of Tahoe and would also be available via letters rogatory.

93. Mr. Gray claims to be the individual within Tahoe responsible for the hiring of Mr. Rotondo. His evidence at cross examination was that he relied for due diligence on International Security & Defense Management, LLC. ("ISDM"), a company resident in California, not Guatemala.

Gray #1 at para. 53
Jolliffe #1 at Ex. "C", p. 96, lines 10-31

94. He was referred to ISDM by a fellow American.

Jolliffe #1 at Ex. "C", pp. 96-97; lines 32-47 and lines 1-9

95. The HSEC Committee is composed of three directors, two of whom were resident in Canada, including Mr. John Bell of Vancouver resident.

Wong #1, Ex. "E", p. 133

96. All but one of members of the CSR steering committee established by Tahoe shortly before the shooting reside outside of Guatemala.

Jolliffe #1 at Ex. "C", pp. 94, lines

97. Representatives of BSR, the company retained to advise Tahoe on corporate social responsibility practices, are based in California, not Guatemala.

Gray #1" at para. 47

98. Members of Tahoe's Board of Directors who according to Tahoe had ultimate oversight responsibility for community relations and human rights reside outside of Guatemala. Five of them were resident in Canada at the material time, including three in the Vancouver area.

Wong #1, Ex. "E", pp. 104-111

Damages Evidence in Guatemala is Accessible and Not Complex

99. Tahoe makes much of the fact that the plaintiffs are farmers and argues that complex agricultural evidence will be required to establish their losses. The reality is the plaintiffs have limited financial means (by Canadian standards), a fact which Tahoe seeks to exploit on this application:

> Q Mr. Garcia, can you personally afford several thousands of dollars to travel and obtain accommodation in Canada -- travel to Canada and obtain accommodation in Canada?
>
> A No.
>
> Q Based on your -- what you know about the other plaintiffs, can they afford that type of cost for travel and accommodation?
>
> A I think perhaps, yes.
>
> Q Who?
>
> A I don't know who, but I do believe that one or more of them -- others of us would be able to travel to Canada.
>
> Q My question, though, is whether any – whether you know whether any of them could afford thousands of dollars to travel to Canada and stay in Canada.
>
> A I don't know.
>
> Jolliffe #1 at Ex. “B”, p. 73, lines 6-23

100. Their income loss claim will not be complex for the simple reason that they do not earn much income.

101. Tahoe has not demonstrated how the limited financial means of the plaintiffs would impede their ability to participate in this case in British Columbia. Mr. Garcia’s cross examination proceeded by video conference without problems and Mr. Garcia has confirmed that he and his co-plaintiffs are willing to travel to Canada as necessary. One plaintiff, Erick Fernando Castillo Pérez, has already travelled to Canada.

> Jolliffe #1 at Ex. “C” p. 71, lines 30 to 34

Tahoe Understates its Connections to Canada

102. Throughout its application materials, Tahoe consistently underplays its connections to and activities in Canada.

103. All of Tahoe's corporate and financing activities are subject to Canadian law:

(a) Tahoe is incorporated in British Columbia and is subject to British Columbia corporations law;

(b) the majority of the Board of Directors are resident in Canada;

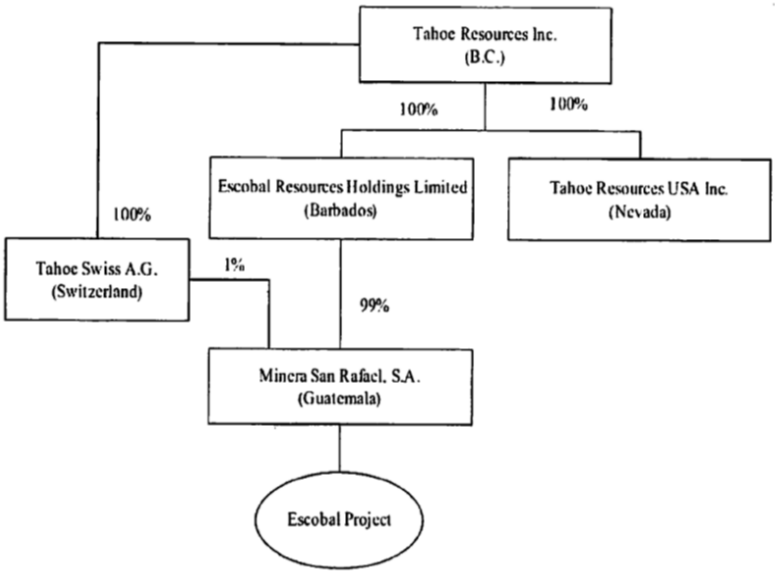
(c) the company is listed on the TSX and engages in extensive financing activities in Canada which are subject to Canadian law; and

(d) the company's auditors are located in Vancouver.

Wong #1, at Ex. "E", p. 134 and Ex. "L", pp. 305-306.

104. Tahoe's corporate website is subject to British Columbia law.

105. It is Tahoe, not its Nevada subsidiary, Tahoe USA which owns the Escobal Mine, a fact which Mr. Gray was hard pressed to admit on cross examination notwithstanding the fact that his affidavit included this ownership chart:



106. Virtually all of Tahoe's cash and near cash assets are held in Canada.

Wong #1, at para. 4(e), Ex. "F"

107. The Nevada subsidiary has only one officer - Mr. Kevin McArthur. In contrast, Ms. Hofmeister, General Counsel and Mr. Clayton, Chief Operating Officer, were at the material times officers of Tahoe Resources Inc., the British Columbia company. To the extent that they were working out of Nevada, they were doing so on behalf of the Canadian company as none of them hold office with Tahoe USA.

Wong #1 at Ex. "A", pp. 3-4

108. Vancouver-based mining company Goldcorp owns 40% of Tahoe. In testimony before the House of Commons Subcommittee on International Human Rights on June 6, 2013, Mr. Brent Bergeron, Senior Vice-President of Corporate Affairs at Goldcorp Inc., confirmed Tahoe is a Canadian company:

> It's a Canadian company. We own 40% of that company, but it is a Canadian company that is listed on the stock market here in Canada.

Wong #1, at para. 14, Ex. "U".

109. Tahoe, not its Nevada subsidiary, has engaged in lobbying activities in Ottawa.

Wong #1 at para. 13 and Ex. "T"

110. The company routinely "flies" the Canadian flag in Guatemala. The Canadian Ambassador has attended at various ceremonies pertaining to the Escobal Mine and MSR is a member of the Canadian Chamber of Commerce in Guatemala.

Jolliffe #1 at Ex. "C", pp. 90-91, lines 43-47 and lines 1-12

111. Canadian Embassy staff have visited the mine and Tahoe has turned to the embassy for help.

Wong #1, paras. 4(b) and 6

PART 3: ARGUMENT

112. Tahoe is a Canadian company. It is incorporated in Canada, is financed in Canada and the key aspects of its corporate existence are governed by

Canadian law. It has the burden of establishing that Guatemala is a fairer and more efficient jurisdiction for the adjudication of this dispute.

113. It cannot meet this burden. The plaintiffs' claim is against Tahoe, not Mr. Rotondo. That claim is centred in Canada, not Guatemala. Guatemala is not a suitable alternative forum for this claim as there is no assurance the plaintiffs can receive a fair trial there.

114. Tahoe unsuccessfully attempts to discredit, narrow or explain away credible expert evidence regarding the existence of serious problems in the Guatemalan judicial system. Efforts at reform have been met with such resistance that judicial independence does not exist in Guatemala and the judicial system remains at times in the service of powerful actors such as the government.

115. Moreover, the Guatemalan courts will not accept a transfer of this case under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*] as Guatemala does not recognize the legitimacy of the doctrine of *forum of non conveniens.* Dismissal of this case on the basis of *forum non conveniens* would place the plaintiffs into a legal limbo where they would face insurmountable roadblocks to pursuing their claims including limitation defences and no effective means of obtaining the evidence necessary to plead their case.

Tahoe's Challenges to the Admissibility of Expert and Wiretap Evidence

Expert Evidence

116. Tahoe's challenges to the plaintiffs' expert evidence are misguided and serve only to highlight the fact that there are serious, systemic problems in the Guatemalan system of justice which Tahoe cannot explain away. The plaintiffs have submitted the evidence of three lawyers:

    (a) Carol Zardetto, a practicing lawyer in Guatemala City, former law professor and government official;

(b) Mynor Melgar, criminal lawyer, human rights lawyer, former prosecutor and former Secretary General of the Public Prosecutor's office (*Ministerio Publico*); and

(c) Mirte Postema, a lawyer with the Due Process of Law Foundation, a Washington, DC based non-governmental organization which has engaged in extensive analysis of the Guatemalan judicial system.

117. Tahoe asserts that Carol Zardetto is not qualified to opine on the current state of the judicial system in Guatemala. As noted above, Ms. Zardetto is a practicing lawyer in Guatemala City with extensive experience in judicial reform projects in Guatemala. She also happens to be a published novelist and playwright. While she is not an expert on the inner workings of the United Nations' CICIG or the Public Prosecutor's office (*Ministerio Publico*) she is nonetheless qualified by virtue of her legal training and experience to offer an opinion on the current state of the rule of law and judicial independence in Guatemala. Any criticisms which Tahoe offers go only to weight not admissibility.

118. Tahoe also asserts that the evidence of Mynor Melgar and Mirte Postema is not helpful to the court. Tahoe's argument is based on its repeated mischaracterization of their evidence as "principally address[ing] concerns about effective public prosecution of organized crime in Guatemala."

119. Ms. Postema's work and analysis is focused on judicial independence or the lack thereof in Guatemala, not the prosecution of organized crime. She plainly states that the conditions necessary for judicial independence do not exist in Guatemala, and that the judicial system tends to be at the service of powerful actors *including the government*:

> The country suffers from weak public institutions, an increasing presence of organized (drug-related) crime, and high levels of impunity. **What is more, Guatemala's institutions tend to be at the service of the more powerful sectors of society, including the government and those involved in illicit activities, and the judiciary does not escape this reality.** [emphasis added]

Postema #1 at Ex. “A” [footnotes from the report have been removed]

120. Ms. Postema was not cross examined by Tahoe.

121. Mr. Melgar has played a role in many of the most important cases in recent Guatemalan legal history. He has extensive experience as a criminal lawyer, human rights lawyer and public prosecutor. He is uniquely placed to opine on the current state of the judicial system in Guatemala. To suggest that his evidence is “not helpful” to this Court is simply absurd.

122. As with Ms. Postema, Mr. Melgar’s evidence cannot fairly be characterized as limited to concerns about the prosecution of organized crime. Mr. Melgar’s evidence:

(a) addresses continuing problems of impunity for powerful actors;

(b) provides an example of the illegal and unjust treatment of protestors at the hands of the judiciary; and

(c) analyzes the constraints on adding Tahoe to the criminal indictment against Mr. Rotondo.

123. He also specifically identifies strong governmental interest in the Escobal mine as a factor undermining the prospects of a fair trial in this case:

> 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.** [emphasis added]

Barany #2 at Ex. “A”, pp. 2-3.

124. The evidence of Mr. Melgar and Ms. Postema is plainly relevant to the issues of whether the plaintiffs can be assured a fair and impartial trial in Guatemala.

125. In assessing the question of whether a plaintiff could be assured a fair trial in Russia, Mr. Justice Brooker of the Alberta Court of Queen’s Bench received and relied on evidence similar to that tendered by the plaintiffs in this case:

> [103] Both parties provided affidavit evidence in support of their views on the Russian courts. Norex provided an affidavit for Professor Bernard Black, a professor of law and business at the University of Texas at Austin, who it describes as “a learned and qualified expert with extensive experience in Russian legal reform”. Professor Black makes a number of assertions in his affidavit, including the following:
>
> > 13. ...Ingosstrakh could procure [a favourable] decision, at any level of the Russian Arbitrazh courts, should it choose to do so.
> >
> > . . .
> >
> > 16. In my opinion:
> >
> > > (a) In Russia, judicial corruption is not a question of yes or no, but instead of more or less. The likelihood of corruption in a particular case will depend on the amount at stake, the identity and political influence of the plaintiff and the defendant, the nature of the case, and the willingness of one or both sides to use extralegal tactics.
> > >
> > > (b) Russia is a corrupt country. Multi-country surveys of corruption routinely list Russia as among the most corrupt countries in the world. ...As President Putin and the chairs of the Russian Supreme Court and Supreme Arbitrazh Court have acknowledged, corruption extends to the judiciary.
> > >
> > > (c) I have personal experience with the pervasive nature of Russian corruption, both during my legal reform work in Russia and through involvement as an expert advisor or

> expert witness in disputes involving major Russian companies. I know many people, including coauthors, professional colleagues, and friends, who have personal knowledge of Russian judicial corruption in general.
>
> (d) The Russian economy is dominated by a handful of powerful oligarchs who control large industrial empires. Oleg Deripaska is one of the most powerful oligarchs in Russia today. If both parties have roughly equal power and influence, there is a reasonable opportunity to obtain a fair decision from the Russian Arbitrazh courts. However, in a case between a major oligarch-controlled company such as Ingosstrakh and a smaller company, especially a foreign company such as Norex, the major company can if it chooses, ensure a favourable judicial decision irrespective of the merits. Based on Deripaska's conduct in other instances, there is a substantial risk that Ingosstrakh would so choose.
>
> . . .
>
> 17. If the question is "Can the Russian Arbitrazh courts reach a reasonable decision in this case?" I concur with Professor Solomon that they can. If the question is Will they?", there is a substantial risk that they will not.

Norex Petroleum Limited v. Chubb Insurance Company of Canada, 2008 ABQB 442 [*Norex*]

126. Notably, the defendant in that case advanced some of the same criticisms of the expert evidence as Tahoe advances here against Ms. Zardetto:

> [104] Ingosstrakh critiques Professor Black's opinion as relying on "inferences" rather than direct knowledge or proof and upon a selective reading of materials. Ingosstrakh notes that upon cross-examination on his affidavit, Professor Black made a number of admissions, including the following:
>
> (a) he has only general knowledge of how the Russian legal system operates;
>
> (b) he is not a scholar of the Russian legal system;

> (c) he has never been qualified as an expert with respect to the Russian judicial system or Russian civil procedure;
>
> (d) the Russian legal system and institutional framework have undergone a period of change since the fall of the old Soviet Union and that the process of change is ongoing; and
>
> (e) that he has no direct knowledge that either Ingosstrakh or Oleg Deripaska has ever improperly influenced a Russian judicial proceeding.

127. Mr. Justice Brooker ultimately concluded, on a review of all of the evidence, that there was a significant risk the plaintiff would not receive a fair trial:

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

128. The plaintiffs urge this Court to take a similar approach. The issue of whether the plaintiffs can be assured a fair and impartial trial in Guatemala should be addressed on the evidence as a whole including the evidence of three highly qualified lawyers. Tahoe's attempt to exclude the evidence of lawyers Zardetto, Melgar and Postema should be rejected.

The Wiretap Transcripts are Reliable, Relevant and Admissible

129. Tahoe also challenges the plaintiffs' use of the wiretap evidence on this application. Tahoe asserts this evidence is neither reliable nor relevant in this application.

130. Regarding reliability, it appears that Tahoe considered and relied on the wiretap evidence in its internal investigation into the shootings as it claims in its letter to the Norwegian Global Fund to have considered all of the evidence presented by prosecutors at the arraignment of Mr. Rotondo. Since Tahoe has refused to produce its internal report in these proceedings, it is fair to infer that Tahoe considered the wiretaps sufficiently reliable to warrant Mr. Rotondo's dismissal.

131. The wiretaps are clearly relevant to issues before the Court on this motion. A basic part of any *forum non conveniens* analysis is to identify the location and ease of access to important sources of proof. The plaintiffs point out that the wiretaps and the security camera footage significantly reduce the need to access sources of proof in Guatemala in order to establish the basic facts surrounding the shooting. Those two sources of proof, taken together, establish that the shootings were unprovoked, excessive and malicious. Tahoe apparently reached a similar conclusion because it advised the Norwegian Global Fund that:

> *Internal Investigation*: After the incident the Company conducted a thorough internal investigation, including a review of all the evidence presented by the MP at Mr. Rotondo's arraignment. **From that investigation, the Company concluded that Mr. Rotondo violated the Company's rules of engagement, security protocols and direct orders from management when he ordered the use of non-lethal force to clear the mine entrance.** [emphasis added]
>
> Wong #2, at Ex. "B", p. 27

132. These sources of proof are available to this Court.

133. Tahoe also seems to assert that the wiretaps are somehow inadmissible in this Court because they may be subject to a legal challenge in Guatemala. There are many problems with this assertion.

134. First, the plaintiffs seek to use the wiretaps against Tahoe, not Mr. Rotondo. There is no evidence in the record that Tahoe could raise any objections under Guatemalan law to the use of the wiretaps against it.

135. Second, there is no evidence that Mr. Rotondo has in fact challenged the legality of the wiretaps in Guatemala. The only evidence in the record is that his counsel considers the wiretaps to be illegal.

136. Third, Canadian law is clear that wiretaps, including those obtained illegally or in breach of the *Charter*, can be relied on in a civil trial. While ultimately an issue for the trial court to determine, it is worth noting that the wiretaps would be admissible in a civil proceeding in Canada regardless of their "legality":

(a) The *Charter* does not apply to exclude evidence gathered by foreign police forces: *R v Hape*, [2007] 2 S.C.R. 292.

(b) In contexts where the *Charter* does not apply, Courts have only limited discretion to refuse to admit evidence that has been obtained improperly or illegally. In civil proceedings, BC and Canadian Courts have in the past admitted both transcripts of phone conversations recorded surreptitiously and other evidence obtained illegally by the police, despite their improper provenance, where the substance of the evidence is relevant to the matter at hand: *Sweeten v. Sweeten*, 1996 CanLII 2972 (B.C. S.C. Master); *Chrysler Credit Canada Limited v. Arnold*, 2006 CanLII 12424 (Ont. S.C.); *Kelly v. Ontario*, 2014 ONSC 3824.

The Jurisdiction Application Should be Dismissed

Overview of Jurisdiction

137. As LeBel J. stated for the unanimous Supreme Court of Canada:

> 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.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 S.C.R. 572 at paras. 103 & 108-109 [*Van Breda*]

180 University Residential Limited Partnership v. Yours Asia Corporation, 2015 BCSC 289 at paras. 18-20 [*180 University*]

138. The plaintiffs are suing Tahoe over its alleged responsibility for the shooting of April 27, 2013. The plaintiffs seek to establish that a Canadian parent company can be directly liable for harm caused by private security personnel hired to safeguard its sole asset in a foreign country or, alternatively, that the corporate veil, separating Tahoe from its holdings in Guatemala, can be pierced. These are important issues of Canadian law which should be decided in Canada.

139. This Court has jurisdiction *simpliciter* over Tahoe. Tahoe is a British Columbia company which has purposely availed itself of British Columbian and Canadian law for all key aspects of its existence as a corporate entity:

(a) it is incorporated in British Columbia with the result that it has a registered office here and all important issues of governance, including the powers and duties of directors, and duties to shareholders and creditors are defined by Canadian law;

(b) it is listed on the TSX with the result that all important issues of financing, including disclosure of mining and financial results, are governed by Canadian law;

(c) a majority of the Board of Directors are resident in Canada including a majority of the HSEC Committee charged with oversight of Tahoe's human rights and community engagement policies;

(d) its auditors are based in Canada;

(e) virtually all of its cash and near cash assets are held in Canada;

(f) its principal shareholder is based in Canada with the result that the three of the company's nine directors are appointed by another British Columbia company;

(g) Tahoe has engaged in lobbying of the federal government; and

(h) Tahoe, not Tahoe USA, owns the Escobal Mine, the company's only asset.

Wong #1 at paras. 4(e),(g) and (h), 5(d) and 13 and Exhibits "A", "E", "F", "H", "I", "L" and "T"

140. Tahoe cannot meet its burden of establishing that Guatemala is a fairer or more efficient forum for the adjudication of this dispute. The record establishes that:

(a) Guatemala lacks the essential safeguards necessary for judicial independence with the result that powerful actors, such as the government often enjoy impunity;

(b) the fairness of proceedings in Guatemala is not assured in this case due to the government's strong connection to the Escobal mine;

(c) in Guatemala, the corporate veil is inviolable and cannot be pierced;

(d) Guatemalan courts will not accept a transfer of a case based on *forum non conveniens*; and

(e) in Guatemala, the plaintiffs would likely be unable to secure access to the evidence needed to properly plead and initiate the case.

Zardetto #1 at Ex. "C"
Barany #2 at Ex. "A", pp. 1-2
Postema #1 at Ex. "A"
Chavez Bosque #1 at p. 6 of Ex. "C"

Framework for Analysis

141. Questions of jurisdiction in BC are governed by the *CJPTA*. There are two stages to the analysis. The Court must first determine if it has territorial competence (or jurisdiction *simpliciter*) over these proceedings and if it does, consider whether it should decline jurisdiction based on consideration of the factors enumerated in section 11(2) of the Act (*forum non conveniens*).[2]

The Court Has Territorial Competence

142. This Court has territorial competence over this action by operation of sections 3 and 7 of the *CJPTA*.

143. Section 3 of the *CJPTA* provides that this Court has territorial competence over any party ordinarily resident in British Columbia. Section 7 deems any company with a registered office in British Columbia to be ordinarily resident here. Accordingly, Tahoe is ordinarily resident in this jurisdiction.

144. Tahoe asserts this Court's territorial competence over this action is "weak". There is no legislative or judicial support for this position. To the contrary, the legislation provides that territorial competence in these circumstance is presumptive.

145. This was confirmed by the Court of Appeal in *Conor Pacific Group v. Canada (Attorney General)*, 2012 BCCA 222 at paras 10-14.

The Court Should Not Exercise Its Discretion to Refuse To Exercise Territorial Competence

146. Tahoe must prove that on proper consideration of the factors enumerated in s. 11 of the *CJPTA*, Guatemala is clearly the more appropriate forum for this action. The analysis is decidedly qualitative not quantitative. Even if most of the enumerated factors pointed to Guatemala, which they do not, dismissal would not be justified. In order to warrant dismissal, this Court must conclude that Guatemala is clearly the more appropriate forum to adjudicate this dispute.

[2] This is in contrast to Ontario, the source of the appeal in *Van Breda*. As a result, while the jurisprudence under the *CJPTA* is generally consistent with the common law as developed in Ontario and under *Van Breda*, there are some differences.

147. As the Supreme Court of Canada made clear in *Van Breda*, the purpose of the analysis of this issue is to ensure "fairness to the parties and the efficient resolution of the dispute". Tahoe's assertion that the purpose of the analysis is to "ensure, if possible, that the action is tried in the jurisdiction that has the closes connection with the action and the parties" is based on outdated law.

Van Breda, *supra* at paras. 105 & 109
180 University, *supra* at para. 19.

148. Mr. Justice Skolrood recently conducted an extensive review of the interplay between s. 11 of the *CJPTA* and the common law test for *forum non conveniens* which provides a useful framework for the analysis of this application:

> [17] The application is brought under section 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA*") which provides as follows:
>
> > 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.

[18] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII) [*Club Resorts*], the Supreme Court of Canada set out the test that must be met by a party arguing *forum non conveniens* (at paras. 103, 108-109):

> [103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.
>
> …
>
> [108] Regarding the burden imposed on a party asking for a stay on the basis of forum non conveniens, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the Civil Code of Québec, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: ". . . it may exceptionally and on an application by a party, decline jurisdiction . . .".
>
> [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.

[19] As suggested in the final sentence of the above passage, the objective of the court in deciding a *forum non conveniens* application is to ensure fairness to the parties and the efficient resolution of the dispute.

[20] That said, the Supreme Court also makes it clear that a party seeking a stay on the basis of *forum non conveniens* has the burden of establishing that another forum is clearly more appropriate for the determination of the matters in dispute.

Analysis

[21] I will consider each of the factors set out ins. 11(2) of the *CJPTA*, keeping in mind the comments of the Supreme Court of Canada in *Breeden v. Black*, 2012 SCC 19 (CanLII) at para. 37:

> … 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.

180 University, supra

Comparative Convenience and Expense Favour British Columbia

The Plaintiffs Cannot Be Assured of a Fair Trial in Guatemala

149. This case cannot be adjudicated at greater comparative convenience in Guatemala for the simple reason that the plaintiffs cannot be assured a fair and impartial trial in Guatemala.

150. The plaintiffs have presented credible evidence from three lawyers, two Guatemalan and one foreign, that serious, systemic barriers to justice exist in Guatemala. Those barriers include:

(a) powerful actors, including the government, may enjoy impunity;

(b) judges lack independence;

(c) judges lack both the financial and physical security necessary for judicial independence;

(d) corruption and influence peddling remain problems within the judiciary;

(e) the use of stalling tactics is something of an art form in Guatemalan litigation;

(f) the judicial appointment process lacks transparency; and

(g) the reforms championed by Attorney General Paz y Paz under whom Mr. Melgar served have stalled out and/or been reversed since the former was forced out of office.

151. Importantly, the plaintiffs' expert evidence is backed up by numerous reports and analyses of a number of international bodies including the United Nations CICIG, Open Society and Impunity Watch.

152. Developments as recent as March 2015 confirm the validity of their assessment. A system in which a sitting judge faces threats to herself and her family for

speaking out against corruption and influence peddling by government officials lacks the basic safeguards needed for a fair trial.

Wong #2 at para. 7 and Ex. "E"

153. To be clear, the plaintiffs do not assert that all trials in Guatemala are unfair, or that justice can never be obtained, or that all judges are corrupt. Some very significant criminal convictions have been secured and there are in fact many lawyers and judges who strive for justice and the rule of law. Justices Barrios and Escobar, former Attorney General Paz y Paz and Mynor Melgar are all prime examples. That said, the unfortunate reality for Guatemalans is the system often does not work to provide a remedy for basic injustices and is still dominated by powerful forces such as the government.

154. Against this, Tahoe relies on the evidence of Mr. Chavez Bosque who asserts, without analysis or supporting evidence, that the plaintiffs will receive a fair trial in Guatemala. His opinion is not supported by a single independent report on the state of the rule of law or judicial independence in Guatemala. He does not cite a single case where common citizens have prevailed over more powerful actors in a civil claim of any description let alone a tort claim against a foreign mining company.

155. As will be argued below, the lack of assurance of a fair and impartial trial in Guatemala weighs heavily in any analysis of the section 11 factors and has been dispositive of *forum non conveniens* cases in the UK.

156. In *89457 Alberta Inc. v. Katanga Mining Ltd.*, [2008] E.W.H.C. 2679 (Comm.) [*Katanga Mining*], the English Court declined to dismiss a share dispute involving a mine in the Democratic Republic of Congo ("DRC") to the DRC on the basis that a fair trial could not be assured in that jurisdiction:

> I have unhesitatingly reached the conclusion that England is clearly and distinctly the more appropriate forum for the resolution of this dispute than is the DRC. Indeed with the greatest of respect to the judiciary of the DRC, I do not regard the DRC as an available alternative forum. Authoritative evidence before the court is to the effect that the normal infrastructure of a

> state does not exist in the DRC. Whilst there is a dispute on the evidence, which I cannot resolve on an application of this sort, as to the extent to which the judicial system is functioning in the DRC, this court cannot in all conscience conclude that the DRC is where the case may be tried suitably for the interests of all the parties, and for the ends of justice.
>
> …
>
> Again I emphasise that in reaching this conclusion I cast no aspersion upon the integrity of the judges who sit in the Kolwezi court. My conclusion is rather that a litigant should not be deprived of his opportunity of a trial in England if the only suggested alternative forum is one in which attempted interference with the integrity of justice is apparently widespread and endemic. [underline added]

157. Similarly, in *Connelly v. RTZ Corporation Plc,* [1997] UKHL 30 [*Connelly*], the House of Lords declined to dismiss the plaintiff's claim for personal injuries arising from his work at a Namibian mine to Namibia despite overwhelming contacts to that country. The House of Lords accepted that, due to the complexity of the case, the plaintiff could not bring it without the financial assistance available in England through either legal aid funding or contingency fees. As a result, his case, as a practical matter, could only proceed in England.

158. Lord Goff, writing for the majority, quoted with approval the lower court decision retaining jurisdiction:

> But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.
>
> *Connelly, supra* at para. 8.

159. Tahoe relies on a series of American decisions in which American courts have, for various reasons, found that Guatemala is a more convenient forum than the US forum at issue. These decisions do not assist Tahoe, for a number of reasons.

160. First, and most importantly, the US approach to *forum non conveniens* is substantially different from the Canadian and UK approaches. In particular, the

US attributes substantial weight to the burden that retaining jurisdiction will place on the US forum. UK and Canadian courts, in contrast, are not concerned with the burden on their judicial systems once they have jurisdiction:

> So it is that national judicial practice differs with regard to the weight an importance each jurisdiction ascribes to the so-called "public interest" factors in the context of the *forum non conveniens* analysis. Since *Gulf Oil*, US courts weigh the interest of the litigants against those of the forum itself when determining the appropriateness of retaining jurisdiction. Such public interest factors include "administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law." Along with these factors, the court in *Re Union Carbide* also considered the financial burden the litigation would impose on New York taxpayers, and the strain on jurors who would be required to "endure continual translations". The court even extended its concern to the jurors' families, employers, and communities and worried about the effect the litigation would likely have on them. UK courts by contrast exclude all questions of administrative difficulties and burden on the judicial system when applying the *Spaliada* test. In Lord Hope's words: "the principles on which the doctrine of *forum non conveniens* rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice."
>
> Larocque, *supra* at 232-233.

161. The Canadian approach is a direct descendant of the UK approach and the *Spaliada* test.

> *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 915 [*Amchem*].

162. Second, it is unclear what evidence was before the American courts on the state of the Guatemalan judicial system at the time those cases were adjudicated but it appears that in at least three of the cases, no expert evidence was led. The evidence before this Court is profound - a fair trial cannot be assured in Guatemala. This Court must decide this application on the basis of the evidence before it regarding the current state of the Guatemalan judicial system. That evidence includes reports of the removal from office of the reform oriented

Attorney General, the widely denounced judicial appointments of 2014, and the campaigns against Justices Barrios and Escobar.

163. Third, the US cases cited by Tahoe are factually different from this case. *Acapolon* and *Lisa SA* are both commercial disputes, qualitatively different cases than this one. *Delgado* is a case about environmental contamination in multiple countries around the world including Guatemala, again involving different overarching concerns. *Polanco* is a wrongful death suit brought by a sister for the death of her brother against one possible manufacturer of glue that he "sniffed".

Acapolon Corp v Ralston Purina Co, 827 SW 2d 189(1992) [*Acapolon*]

Lisa S.A. v Juan Jose Gutierrez Mayorga et al, Chancery Court of Delaware (2009); 240 Fed. App 'x 822, 824 (11th Cir. 2007) [*Lisa SA*]

Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1361 (S.D. Tex. 1995) [*Delgado*]

Polanco v H.B. Fuller Co, 941 F. Supp. 1512; 1996 U.S. Dist. LEXIS 14162 [*Polanco*]

164. *Aldana*, the case which factually is closest to this one, is not helpful to the Court . The 11th Circuit Court of Appeals judgment cited by Tahoe and the underlying District Court judgment both defer entirely to a Florida State court ruling on forum non conveniens. That judgment is a mere six pages long and includes no analysis of the state of the Guatemalan judicial system. The judgment focuses largely on the fact that Guatemala is, in American terms, an "adequate" forum. Moreover, *Aldana* and *Palacios* both demonstrate that when the plaintiffs were forced to re-file in Guatemala, their cases were dismissed.

Order Granting Motion to Dismiss Pursuant to Doctrine of *Forum Non Conveniens* in *Aldana v Del Monte Fresh Produce NA., Inc.* (No. 04-00723 CA 20), filed October 18, 2006

Aldana v Del Monte Fresh Produce NA., Inc., 578 F.3d 1283 (2009)

Aldana v Del Monte Fresh Produce NA., Inc., 741 F. 3d 1349 (2014)

Palacios, et al. v. The Coca-Cola Company, et al., No. 10 Civ. 3120 (S.D.N.Y. 19 Nov. 2010)

165. In *Aldana*, the American courts placed great emphasis on the fact that virtually all of the important evidence was to be found in Guatemala. That is not the case

here. As explained above, this Court already as access to key evidence from Guatemala. Moreover, the plaintiffs have provided detailed expert evidence showing how both practically and procedurally, they cannot pursue a cause of action against Tahoe in Guatemala.

Additional Barriers to Justice in Guatemala

166. The plaintiffs face additional barriers in Guatemala which would make proceeding there inefficient and unfair:

(a) the Guatemalan court will not accept a transfer of this case on the basis of *forum non conveniens* with the result that the plaintiffs would be required to commence a new action and face possible dismissal on limitations grounds;

Zardetto #1 at Ex. “C”

(b) the plaintiffs have a very limited ability to access documentary evidence in the hands of third parties in Guatemala;

Zardetto #1 at Ex. “C”

(c) it is highly unlikely the plaintiffs will be able to obtain sufficient evidence to properly plead the case in Guatemala; and

Zardetto #1 at Ex. “C”

(d) no claim based on piercing the corporate veil could be advanced in Guatemala

Chavez Bosque #1, p. 6 of Ex. “C”

167. The end result of the application of Guatemala civil and procedural law would be a result which is neither fair or convenient. First, no claim based on piercing the corporate veil could be advanced. Second, prior to commencing any action in Guatemala, the plaintiffs would need to bring an application for letters rogatory addressed to the British Columbia court in order to obtain access to documents in the possession of Tahoe which are needed to plead the case in Guatemala. Third, that application would be unlikely to yield sufficient documentary evidence

to properly plead the case with the end result that the case would likely be dead on arrival. As both Ms. Zardetto and Mr. Chavez Bosque confirm, a party in Guatemala is not under any obligation to produce documents in its possession which are damaging to its case. It need only produce documents which the other side can identify in terms of both their contents and existence.

> The basic principle under Guatemalan law is that each party has the burden to produce evidence regarding its allegations (Article 126 Civil and Mercantile Procedures Code). This principle enlightens the orientation of civil procedures in Guatemala. It follows from the general rule that Parties do not have "discovery rights" per se which would enable them to have general access to documents in possession of the other party. Specifically:
>
> - There is no obligation on the opposing party to present evidence that is not directly asked for in a very strict and limited manner.
> - There is certainly no obligation on a party or their lawyers to produce evidence which weakens their claim or supports the allegations of the other side.
> - There is no requirement to list or identify documents in the possession of a party.
> - It is possible to request documents from third parties but the rules supporting this are very weak and documents involving communications with a third party are not admissible as evidence
>
> Zardetto #1 at Ex. “C”

168. In contrast, in British Columbia, the plaintiffs can assert a claim of direct liability against Tahoe as well as one based on piercing the corporate veil.[3]

169. The UK courts have held parent companies directly liable for harm caused at their subsidiary’s operations. In *Chandler v Cape Plc*, the plaintiff brought suit against the English company Cape PLC for injuries arising from exposure to asbestos at the facility of a subsidiary, Cape Products. The Court of Appeal upheld the trial court finding of direct liability based in large part on the role

[3] In the alternative, this is a juridical advantage which can be considered as a separate factor in the analysis of whether to exercise discretion to refuse to exercise territorial competence.

played by the parent company in setting company wide health and safety policies:

> 78. Given Cape's state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken. The scope of the duty can be defined in either way. Whichever way it is formulated, the injury to Mr. Chandler was the result. As the judge held, working on past performance and viewing the matter realistically, Cape could, and did on other matters, give Cape Products instructions as to how it was to operate with which, so far as we know, it duly complied.
>
> 79. In these circumstances, there was, in my judgment, a direct duty of care owed by Cape to the employees of Cape Products. There was an omission to advise on precautionary measures even though it was it was doing research and that research had not established (nor could it establish) that the asbestosis and related diseases were not caused by asbestos dust. Moreover, while I have reached my conclusion in my own words and following my own route, it turns out that, in all essential respects, my reasoning follows the analysis of the judge in paragraphs 61 and 72 to 75 of his judgment.
>
> *Chandler v Cape Plc*, [2011] EWCH 951 (Q.B.), aff'd [2012] EWCA Civ 525 (25 April 2012)

170. In *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 [*Hudbay*], the plaintiffs, Guatemala villagers, sought to hold the Canadian parent company directly liable for alleged abuses carried out by private security forces at the Felix mine in Guatemala. The defendant applied to strike the plea of direct liability on the grounds that it failed to disclose a cause of action. The Ontario Superior Court of Justice declined to strike the claim on the grounds that:

(a) if proven at trial, the facts as pleaded established that the risk of violence and rape was reasonably foreseeable from the use of forced evictions by unlicensed security personnel

(b) public representations concerning Hudbay's relationship with the local communities and commitment to human rights supported a finding of sufficient proximity between the parties; and

(c) there were competing policy reasons concerning the recognition of a duty of care between a Canadian mining company and individuals harmed by security personnel at its foreign operations.

171. Piercing the corporate veil is permitted in Canada in certain circumstances where necessary to avoid a flagrant injustice to third parties:

> As a general rule a corporation is a legal entity distinct from its shareholders…. The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue"….
>
> *Kosmopoulos v. Constitution Insurance Co.,* [1987] 1 S.C.R. 2 at 10.

172. As the Court in *Hudbay* noted, the corporate veil can also be pierced in circumstances where the subsidiary acts as agent for the parent. The plaintiffs in this case have pleaded agency:

(a) some witnesses are resident in Guatemala;

(b) the plaintiffs reside in Guatemala; and

(c) some of the important documents may be in Spanish.

173. None of these factors tip the scale in favour of Guatemala. The fact that some oral or documentary evidence may be need to be translated is not a significant factor in modern litigation. As recently noted by Madam Justice Maisonville, “the use of translators in this Court is an everyday occurrence and not enough to displace the plaintiff’s choice of forum”.

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2014 BCSC 715 at para. 83

Right Business Limited v. Affluent Public Limited, 2011 BCSC 783 at para. 91 [*Right Business*], aff'd 2013 BCCA 375.

174. The plaintiffs do reside in Guatemala but are prepared to travel to Canada for trial.

175. Should travel prove difficult, examinations for discovery or trial evidence, particularly of any collateral witnesses, can also be conducted by video conference. The cross examination of Mr. Garcia for this application was conducted via video conference without difficulty.

Supreme Court Civil Rules, Rules 7-2 (11) and (27) and 7-8.

176. Moreover, as pointed out above, many key witnesses reside outside of Guatemala including:

(a) representatives and employees of ISDM, the California company which Mr. Gray identified as performing due diligence on the selection of Mr. Rotondo for the position of Chief of Security;

(b) Mr. Gray, the former VP of Tahoe who claims to have been responsible for the hiring of Mr. Rotondo, now resides in Colombia;

(c) members of the HSEC committee, two of whom, including John Bell (British Columbia) and Tanya Jakusconek (Ontario) reside in Canada;

(d) members of the CSR steering committee established by Tahoe shortly before the shooting;

(e) representatives of BSR, the company retained to advise Tahoe on corporate social responsibility practices, are based in California, not Guatemala; and

(f) members of Tahoe's Board of Directors who according to Tahoe had ultimate oversight responsibility for community relations and human rights.

177. The fact that none of the key defence witnesses reside in Guatemala, the alternative forum proposed by Tahoe, effectively distinguishes this application from the cases relied on by Tahoe.

Formula Contractors Ltd v. Lafarge Canada Inc., 2009 BCSC 105
Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated, 2014 BCSC 752
Sky Harvest Energy Corp. v. Ireland, 2014 BCSC 472
Kvaerner US. Inc. v. AMEC E&C Services Limited, 2004 BCSC 635

178. In addition, as pointed out above, this Court already has access to two important sources of proof from Guatemala - the wiretaps and the security camera footage. That evidence seriously diminishes the need for eye witness evidence from Guatemala.

179. This Court will also likely have access to Tahoe's internal investigation of the shooting as the letter from Tahoe General Counsel to the Norwegian Global Fund clearly waives privilege over whatever privilege may have originally attached to the investigation.

180. The plaintiffs' claims place the focus of the liability case on Tahoe and, in particular, on its Board of Directors. All of the documents arising from Board meetings and Board oversight of Tahoe's human rights policy are almost certainly in English and retained in electronic form by Tahoe making them easily accessible in this jurisdiction.

181. In addition, British Columbia rules of discovery would allow for easy access to documents in the possession of MSR. Documents which are in MSR's possession will be producible by Tahoe as being within Tahoe's power or control as a majority shareholder of MSR.

Sunnar v. U-Haul Co. (Canada), 1998 CanLII 5894 (BC SC)
Net1 Products (Canada) Ltd. v. Mansvelt and Belamant, 2001 BCSC 906.

182. The courts of Guatemala have no real experience with tort claims against foreign companies. In contrast, the courts of British Columbia have extensive experience

with complex tort claims and have at their disposal a number of rules and practices which can be invoked to streamline the case and achieve the efficient resolution of this dispute.

The Applicable Choice of Law is an Open Question

183. Tahoe asserts that the law of Guatemala will necessarily apply in this action. In reality, choice of law is an open question in this case and there are powerful arguments in favour of applying British Columbia law to the oversight actions of Tahoe's Board of Directors. Further, the choice of law is simply one of the factors that the Court must examine and weigh, and the weight to be placed on it will depend on the circumstances of each case.

184. As Justice La Forest made clear, the rule in *Tolofsen v. Jensen*, [1994] 3 S.C.R. 1022 [*Tolofsen*], was designed for interprovincial application. When the competing jurisdictions are international, he recognized that "a rigid rule on the international level could give rise to injustice, in certain circumstances." As a result he stated that he was "not averse to retaining a discretion in the court to apply our own law to deal with such circumstances." In that context, the question is whether the court should exercise its discretion to depart from the *lex loci delicti* rule where to apply it would work an injustice.

Tolofsen, supra at 307-308; *Wong v. Wei*, 1999 CanLII 6635 (BC SC) at para. 9.

185. British Columbia courts have held that the conduct of professionals should be judged according to the law of the place where the professionals conducted their work and not the place where the damage was suffered. In *Pan-Afric Holdings Ltd. v. Ernst & Young LLP*, 2007 BCSC 685 at para. 36, Frankel J. (as he then was), considered the question of choice of law in the context of an application to decline jurisdiction under the *CJPTA* in a case involving a claim of professional negligence against business valuation experts based in Maryland:

> With respect to the negligence claim, I similarly hold that it is governed by the laws of Maryland. What is in issue here is the conduct of Maryland professionals whose competence should be judged according to the laws

> and professional standards applicable in that jurisdiction. If the alleged tort was committed, then it was committed there, not here [citations omitted].

186. Tahoe is a British Columbia company. Virtually all key aspects of its corporate existence are governed by British Columbia and Canadian law.

187. It is short step from there to applying Canadian law to assess Tahoe's oversight of its own corporate social responsibility program.

188. In fact, Tahoe's own CSR policies support the application of Canadian law as a means of providing appropriate reparation for human rights abuses. Article 22 of the Ruggie Principles which have been adopted by Tahoe requires:

> **REMEDIATION**
>
> **22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.**
>
> Wong #1 at Ex. "R" p. 488

189. Given the dearth of transnational tort cases to have reached trial in Canada, it is a fair statement to say that the law on this point has not fully developed. It is therefore an open question what law would apply at the trial of this case in British Columbia.

There is no "Multiplicity of Legal Proceedings" to Avoid

190. Contrary to Tahoe's assertions, there is no multiplicity of proceedings at play in this case. The plaintiffs are not pursuing any claim against Tahoe in Guatemala (for reasons made obvious by the expert evidence). The plaintiffs are civil claimants in the criminal proceeding against Mr. Rotondo. That is a different action with a different focus which does not raise "multiplicity of legal proceedings" issues.

191. As defined by the Court of Appeal, in order for multiplicity of proceedings issues to arise there must be "litigation between the same parties about the same subject matter in which the roles of plaintiff and defendant were reversed".

Westec Aerospace Inc. v. Raytheon Aircraft Co., 1999 BCCA 243 [*Westec*] at para. 27

192. Further, the existence of multiple proceedings would not be dispositive. As per the Court of Appeal in *Westec,* the analysis to be applied to multiple proceedings would be as follows:

> (1) Are there parallel proceedings underway in another jurisdiction?
>
> (2) If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
>
> (3) Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?

Westec, *supra* at para. 25

193. Even if the criminal proceedings against Mr. Rotondo did constitute "parallel proceedings", the answers to questions 2 and 3 do not assist Tahoe. Guatemala is not an appropriate forum for the resolution of the dispute between Tahoe and the plaintiffs, because, among the other reasons cited above, the plaintiffs cannot be assured of a fair trial in Guatemala. There are also considerable juridical advantages to the plaintiffs in suing Tahoe in BC. This juridical advantage is "of such importance that it would cause injustice to [them] to deprive [them] of it".

194. The fact that there may be some overlap between issues in the Rotondo criminal proceeding and this action is not sufficient to raise the prospect of conflicting decisions since the focus of the two actions is entirely different.

195. In *Environmental Packaging Technologies Ltd. v. Rudjuk*, 2011 BCSC 580 at paras. 42 to 46, aff'd 2012 BCCA 343 at paras. 19 and 35, proceedings were extant in both Russia and in BC. The Russian claim was for unpaid wages. and involved different parties but the issues overlapped to some extent with the BC action The BC proceedings involved allegations that the defendants "subverted the employment relationship and appropriated the respondents' confidential

information". As a result, the multiplicity of proceedings and possibility of conflicting decisions did "not assist" the applicants in having the case dismissed from British Columbia. Similarly, although there may be some factual overlaps between the Guatemalan criminal proceedings and this action, this overlap does not assist Tahoe.

196. Further, the existence of related or even parallel proceedings "would not be disastrous." As Justice Sopinka put it in *Amchem*:

> If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.
>
> Amchem, *supra* at 914

There will be no Conflicting Decisions in Different Courts

197. Since the plaintiffs cannot effectively sue Tahoe in Guatemala, there can be no conflicting decisions in different courts. Further, as noted in *Amchem* above, to the extent that the Guatemalan court rules in the criminal proceeding against Mr. Rotondo, this Court may at the appropriate time hear submissions on whether it may adopt any relevant portions of that ruling in this action.

198. Tahoe has specifically raised the spectre of inconsistent decisions with regard to the admissibility of the wiretap transcripts. This risk arises in any case in which there are ongoing criminal (Guatemala) and civil proceedings (British Columbia) involving the same underlying events and therefore, cannot be a basis for declining jurisdiction. As discussed above at paragraphs 134 to 136, even in cases where both the criminal and civil proceedings are in BC, there may be inconsistent decisions because of differing parties and rules for admissibility. Since this is not a concern when jurisdiction is not in issue, it should not be a concern in the jurisdiction analysis.

It is Not Clear that the Plaintiffs Could Enforce a Guatemalan Judgment Against Tahoe

199. Tahoe claims that, if the plaintiffs were to obtain judgment against Tahoe in Guatemala, it would be a simple matter to enforce that judgment in BC. That argument assumes, first, that it is possible for the plaintiffs to actually bring suit against Tahoe in Guatemala and second, that Tahoe would not raise defenses to enforcement based on irregularities in the Guatemalan proceeding.

200. The Chevron case is a case in point of the complexities which can arise when seeking to enforce a judgment from a system of law that can be challenged as lacking judicial independence and the rule of law.

201. The plaintiffs in *Yaiguaje* v. *Chevron Corporation* are Ecuadorean residents who obtained a judgment against Chevron after a hard-fought battle first in the courts of New York and later in Ecuador. The judgment is from the Ecuadorean court and is for US$9.51 billion. The plaintiffs have sought to enforce it in Ontario against Chevron Corporation and its subsidiary Chevron Canada Limited (together, "Chevron"). Chevron has resisted on the basis that the judgment was fraudulently obtained, through bribery and other means. Chevron Canada also objects on the grounds of piercing the corporate veil.

202. The motion to enforce the judgment has now been through three levels of court in Canada: the Ontario Superior Court of Justice (at 2013 ONSC 2527); the Ontario Court of Appeal (2013 ONCA 758); and, in December 2014, the Supreme Court of Canada, which has reserved judgment.

203. This saga demonstrates that enforcement of foreign judgments may be far from simple. This factor favours retention of jurisdiction in BC.

The Fair and Efficient Working of the Canadian Legal System as a Whole

204. As stated by Tahoe, this is the factor in the jurisdiction analysis which engages public policy. Tahoe argues that a decision to retain jurisdiction would open "the floodgates".

205. In contrast, there are powerful policy powerful arguments favouring retention of jurisdiction. This case raises issues of the governance gap and access to justice. Canadian extractive companies, such as Tahoe, operate in developing countries around the world. Typically they operate through subsidiaries and often in countries where the rule of law is less well established than in Canada with the result that there may be little or no effective oversight over their conduct.

206. The Hon. Ian Binnie, C.C., Q.C. has written at length about these issues and potential solutions:

> …When the reach of business operations was more or less coextensive with the nation states in which they resided, there was no doubt which state was in charge, although in practice the control may have been imperfectly exercised. Today, however, transnational companies have power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood. This has created a challenge for the international community as it seeks to develop remedies for harms arising out of the involvement of such companies in human rights abuses….
>
> Justice Ian Binnie (as he then was), "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report" (2009) *The Brief* 38:4 at 45 [Binnie Legal Redress].

207. Others have commented tort liability “should follow the money” up the corporate chain:

> With respect to the duty of care, it would be odd that profits could travel freely from Guatemala to Canada, while the Canadian beneficiaries would not have to take responsibility for how that money is raised or what activities occur in order to produce the profits. The Ontario Court of Appeal in *Copper Mesa* confirmed as much and was clear in saying that there was no absolute immunity for the Canadian entities.
>
> Shin Imai et al., "Accountability Across Borders: Mining in Guatemala and the Canadian Justice System" (2012) *Comparative Research in Law & Political Economy*, Research Paper No. 26/2012 at 33.

208. As Mr. Binnie points out, Canadian courts may need to have regard to these issues in their consideration of issues such as *forum non conveniens* and choice of law in this new era of transnational torts arising from human rights abuses:

> … freed from the constraints of the bench, I am going to move from the past to present controversies. I will invite you to consider the challenge posed to the courts by globalization, and the problem of enforcing human rights law across national boundaries. Here, the law has a lot of catch-up work to do. Specifically, I will flag the difficult question of the absence of effective remedies against multinational corporations accused of complicity in human rights abuses in the third world. Here again boldness is required. Too often, I think, we praise the giants of our past for their boldness and creativity, but are too timid to follow in their footsteps in confronting the challenges of today.
>
> The Hon. Ian Binnie, C.C., Q.C., "Judging the Judges: "May They Boldly Go Where Ivan Rand Went Before", Coxford Lecture presented at the University of Western Ontario, February 16, 2012, published (2013) 26 Can. J.L. & Juris. 5 at 5-6.

209. In this case, judicial boldness is not required as this Court has territorial competence over Tahoe and this claim. Further, the common law has repeatedly shown itself capable of adopting long standing tort principles to emerging issues. The imposition of direct liability on parent companies is one such example.

210. Nonetheless, it is worth noting that the *CJPTA* invites a certain degree of boldness and shift in our collective legal mindset on jurisdiction by providing for jurisdiction on the basis of the doctrine of forum of necessity. Section 6 of *CJPTA*. provides that:

> A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that:
>
> (a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or
>
> (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

211. Loo J. applied a broad and liberal reading of this section in detail in *Josephson (Litigation Guardian of) v. Balfour Recreation Commission* [*Josephson*] and concluded that .

> A court may take jurisdiction as a forum of necessity when jurisdiction does not otherwise exist, and when proceedings outside the jurisdiction

> cannot possibly be commenced or the commencement of the proceedings cannot reasonably be required.
>
> 2010 BCSC 603, leave to appeal (on other grounds) allowed, 2010 BCCA 339 [Finch C.J.B.C. in Chambers], appeal not heard.

212. The Ontario Court of Appeal considered forum of necessity in *Van Breda v. Village Resorts Limited*, 2010 ONCA 84, 98 OR (3d) 721. The issue was not addressed by the Supreme Court of Canada. At para. 100, Sharpe J.A. emphasized the "access to justice" role of the forum of necessity doctrine, in the context of addressing the content of the real and substantial connection test:

> The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace "forum of last resort" cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. <u>In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.</u>
>
> [underline added].

213. The Ontario Court of Appeal has more recently dealt with the forum of necessity point in *West Van Inc. v. Daisley*, 2014 ONCA 232 [*West Van*]. In *West Van*, Hoy A.C.J.O. accepted at para. 17 Sharpe J.A.'s comments on the role of forum of necessity in providing access to justice, yet set a "high bar" for plaintiffs, who must show that there is "no other forum in which the plaintiff can reasonably seek relief." (at para. 19).

214. The entrenchment of the forum of necessity doctrine into Canadian law, both by statute and via the common law, speaks to the importance of access to justice as an informing principle in the *forum non conveniens* analysis. Canadian courts must carefully weigh the access to justice implications of declining to retain jurisdiction over claims against Canadian resident corporations. Notably, in *Van Breda*, Canadian citizens injured abroad were able to access the Canadian

justice system by bringing suit against a foreign corporation in this country. Here, the plaintiffs seek to access the Canadian justice system to sue a Canadian company in its “home court” - the place where it voluntarily set up business and in so doing availed itself of Canadian law.

215. Tahoe alleges that, should this action be permitted to proceed, “innumerable plaintiffs from around the world will litigate in British Columbia simply because an indirect parent corporation of a local company obtains its financing in Canada.”

216. This argument assumes that a significant number of Canadian mining companies have engaged in tortious conduct abroad and a large number of putative plaintiffs are simply waiting in the wings to file claims in Canada. Tahoe offers no evidence in support of its claim. To the extent there is evidence in the record, it cuts the other way. Despite the large number of mining companies financed in Canada and operating worldwide, there is exactly one other case presently pending in Canada involving analogous claims of abuse of foreign citizens by security personnel – *Hudbay*.

217. Moreover, Tahoe’s argument ignores the deterrent effect which holding Canadian mining companies to account in a Canadian court will have on aberrant corporate behaviour. Mining companies would henceforth operate with full knowledge that a competent Canadian court might actually hold them to their own CSR standards.

218. Tahoe’s floodgates argument also misstates the extent of its activities in Canada. Tahoe is not simply an indirect parent corporation which obtains its financing in Canada. It chose to incorporate in BC. Its Board is centred in Canada and it is subject to British Columbia corporations law. It is Tahoe, not its Nevada subsidiary, that owns the Escobal mine. The mine is its only asset. Virtually all of its cash and near cash assets are held in Canada. Tahoe’s auditors are based in Vancouver. Tahoe has engaged in lobbying of the federal government and has frequently flown the “Canadian” flag.

Conclusion: The Court Should Not Exercise Its Discretion to Decline to Exercise Territorial Competence

219. Tahoe has not met its burden of proving that it would be fairer and more efficient for this action to proceed in Guatemala, not British Columbia.

220. The plaintiffs face a serious risk that they will be unable to obtain a fair and impartial trial in Guatemala. On a qualitative assessment of the s. 11 factors, this factor weighs most heavily. Recent Anglo-Canada cases reinforce that the right to a fair and impartial proceeding is of paramount concern in any *forum non conveniens* analysis. Indeed, in the UK the right to a fair trial is often the definitive consideration.

221. In *AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel*, [2011] UKPC 7 [*AK Investment*], the Judicial Committee of the Privy Council (JCPC) overturned a lower court decision to dismiss a case to the Republic of Kyrgyzstan. Notwithstanding the fact that Kyrgyzstan was the natural forum for the litigation, the JCPC held at para. 151 that:

> …the fundamental point in this case is that, if there is no trial in the Isle of Man, there will be no trial anywhere. It is wholly unrealistic to suppose that the KFG Companies will ever be in a position to assert their civil claims.

222. The JCPC further held that the lower court had erred by focusing on whether the plaintiff would receive a fair trial in Kyrgyzstan rather than the risks that it would not:

> …Second, but more important, was the focus on whether the KFG Companies "would" not obtain justice there, when the correct question was whether there was a risk that they would not obtain justice. In any event, there was substantial evidence of specific irregularities, breach of principles of natural justice, and irrational conclusions, sufficient to justify a conclusion that there was considerably more than a risk of injustice.
>
> *AK Investment, supra* at para. 143

223. As noted above, in *Katanga Mining*, the English Court declined to dismiss a case to a share dispute Democratic Republic of Congo on the basis that a fair trial could not be assured in that jurisdiction:

> Again I emphasize that in reaching this conclusion I cast no aspersion upon the integrity of the judges who sit in the Kolwezi court. My conclusion is rather that a litigant should not be deprived of his opportunity of a trial in England if the only suggested alternative forum is one in which attempted interference with the integrity of justice is apparently widespread and endemic. [underline added]
>
> *Katanga Mining*, *supra* at para. 33

224. Similarly, Lord Goff's analysis in *Connolly* confirms the primacy of a fair trial in the *forum non conveniens* analysis:

> But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.
>
> *Connelly, supra* at para. 8

225. As noted above in *Norex*, the Alberta Court of Queen's Bench declined to dismiss a case to Russia where the evidence established a risk of an unfair trial:

> In the end, I find that there is a real risk that Norex could be unable to obtain justice in this case from the Russian courts. It is unreasonable to expect that Norex should be obliged to court that risk. That risk does not exist in the Alberta court, the court to which Ingosstrakh has already attorned. I therefore find that there is a definite juridical advantage to Norex which weighs in favour of this court asserting jurisdiction.
>
> *Norex*, *supra* at para. 116

226. In *Sistem Mühendislik v. v. Kyrgyz Republic*, 2012 ONSC 4351, the Ontario Superior Court of Justice noted that concerns over corruption of a foreign court system do not work in favour of the applicant:

> …in the present case my analysis of the factors other than juridical advantage indicated that Kyrgyzaltyn had not demonstrated that the Republic clearly was the more appropriate forum to adjudicate the question of the exigibility of the Disputed Shares to satisfy the Judgment. Accordingly, I need not make any specific finding about whether the case could be suitably tried in the Republic's courts for the interests of all the parties and for the ends of justice. However, the evidence concerning the past corruption of the Republic's courts and the present uncertainties surrounding the independence of its judicial system certainly do not

> operate to point to the Republic as the clearly more appropriate forum in which to litigate the ownership of the Disputed Shares.
>
> *Sistem Mühendislik v. v. Kyrgyz Republic*, 2012 ONSC 4351 at para. 71

227. The remaining s. 11 factors favour British Columbia not Guatemala. This court already has access to key sources of proof regarding the shooting thereby greatly diminishing the need to access evidence in that country. Key witnesses are located outside of Guatemala including Tahoe's Board of Directors; the HSEC committee; members of Tahoe's CSR committee; and representatives of ISDM, the California company reported to have conducted due diligence on Mr. Rotondo. At the same time, Guatemalan procedures are not conducive to the efficient disposition of this case. Guatemala's civil procedure rules are not designed to access sources of proof in Guatemala. Importantly, parties are not under any obligation to produce documents in their possession to the other side. A party seeking to access documents in the possession of the opposing party must prove the document exists and that its contents are important to the case. Third parties cannot be compelled to produce documents in their possession. The plaintiffs' inability to access documentary evidence in the hands of Tahoe will severely impair their ability to properly plead the case. In fact, the plaintiffs would likely have to resort to letters rogatory to the court in BC in order to attempt to obtain the evidence necessary to plead the case in Guatemala. The plaintiffs would also face the risk of dismissal on limitations grounds. In short, dismissing this case to Guatemala will not result in a more efficient resolution of this case.

228. Choice of law is at best an open question.

229. There is no risk of conflicting judgments since the plaintiffs are not pursuing any claims against Tahoe in Guatemala.

230. The risk of inconsistent decisions on the use of the audio intercept evidence does not arise from any jurisdictional issue. To the extent any issues arise, it is due to the fact that the audio intercepts were obtained for use in a criminal trial (against Mr. Rotondo) and are being used in a civil trial (against Tahoe).

231. Enforcement of any judgment favours retention of jurisdiction in British Columbia since nearly all of Tahoe's cash and near cash assets are retained in Canada.

232. The policy arguments at best point in both directions. While Tahoe claims that a decision to retain jurisdiction will open the "floodgates", that argument is basically fear mongering and not based on any facts. In contrast, the plaintiffs' concerns over the governance gap and access to justice are real and pressing issues for these plaintiffs.

PART 4: NATURE OF ORDER SOUGHT

233. The plaintiffs ask that Tahoe's application be dismissed with costs payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia this 30th day of March, 2015.

Joe Fiorante, Q.C.
Camp Fiorante Matthews Mogerman

Lawyers for the Plaintiffs