IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Garcia v. Tahoe Resources Inc.,*
2015 BCSC 2045

Date: 20151109
Docket: S144726
Registry: Vancouver

Between:

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

Plaintiffs

and

Tahoe Resources Inc.

Defendant

Corrected Judgment: This judgment corrected throughout on November 13, 2015.

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for Plaintiffs:	J. Fiorante, Q.C. R. Mogerman
Counsel for Defendant:	K. Carteri A. Sandhu K. Meyer
Place and Date of Hearing:	Vancouver, B.C. April 8-10, 2015
Place and Date of Judgment:	Vancouver, B.C. November 09, 2015

Introduction

[1] Adolfo Agustin Garcia, Luis Fernando Garcia Monroy, Erick Fernando Castillo Pérez, Artemio Humberto Castillo Herrera, Wilmer Francisco Pérez Martinez, Noé Aguilar Castillo, and Misael Eberto Martinez Sasvin (collectively, "the plaintiffs") are Guatemalan citizens. They were protesting outside the Escobal mine in San Rafael Las Flores, Guatemala on April 27, 2013, when they were allegedly shot and injured by security personnel employed to protect the mine. They commenced this action against Tahoe Resources Inc. ("Tahoe"), the parent company of a Guatemalan company named Minera San Rafael S.A. ("MSR"), which owns the mine.

[2] The plaintiffs filed their notice of civil claim in this action on June 18, 2014. Tahoe filed a jurisdictional response on July 9, 2014, challenging the jurisdiction of this Court to determine the plaintiffs' claims. On this application, Tahoe seeks to have the court exercise its discretion to decline jurisdiction and stay the action.

[3] Tahoe concedes this court has jurisdiction *simpliciter*. However, Tahoe takes the position that Guatemala is clearly the more appropriate forum for determining the claims of the plaintiffs in these proceedings.

[4] The plaintiffs oppose the application. They assert the central issue is whether a Canadian company has any responsibility under Canadian law for the brutal conduct of security personnel hired to protect its prize asset. The plaintiffs submit that question can only be answered in a Canadian court. They seek justice in Canada against the Canadian company that owns the mine as they have no faith in the Guatemalan legal system to hold the company accountable.

[5] For the following reasons, I find that Tahoe has established that Guatemala is clearly the more appropriate forum for the determination of the matters in dispute.

Background

[6] All of the plaintiffs reside in San Rafael Las Flores, Guatemala. All of them work in Guatemala as farmers. None speak English. At the time of the incident, they were protesting the construction of the Escobal mine. The plaintiffs allege they were

shot at close range by Tahoe security personnel while protesting peacefully on the road outside the gates of the Escobal mine.

[7] The plaintiffs allege the shooting was planned, ordered and directed by Tahoe's Guatemala Security Manager, Alberto Rotondo Dall'Orso ("Mr. Rotondo"). The plaintiffs allege that Tahoe expressly or implicitly authorized the use of excessive force by Mr. Rotondo and security personnel against the plaintiffs or was negligent in failing to prevent the use of excessive force against the plaintiffs. In the alternative, the plaintiffs allege that MSR expressly or impliedly authorized the use of excessive force by Mr. Rotondo and the security personnel against the plaintiffs and Tahoe is vicariously liable for the conduct of MSR. In the further alternative, the plaintiffs allege that Tahoe is vicariously liable for the battery committed by Mr. Rotondo and the security personnel.

[8] The plaintiffs further allege that Tahoe owed them a duty of care and breached it. The alleged breaches of the duty of care include failing to conduct adequate background checks on Mr. Rotondo and the security guards, failing to adequately monitor them, and failing to ensure they adhered to Tahoe's corporate social responsibility policies and internationally accepted standards for the use of private security personnel.

[9] The plaintiffs seek damages against Tahoe for the injuries they sustained. The plaintiffs allege they suffered serious injuries as a result of the shooting, including wounds to their backs, faces, feet and legs. The plaintiffs have been treated for their injuries in Guatemala. They seek general damages as well as damages for loss of income and earning capacity, loss of opportunity, future care, and punitive damages.

[10] Tahoe is a company registered in British Columbia. Its business headquarters are in Reno, Nevada. Tahoe's business is centered on its interests in MSR. MSR owns and controls the Escobal mine, a silver, gold, lead and zinc mining project in southeast Guatemala in the municipality of San Rafael Las Flores. In their notice of civil claim, the plaintiffs allege Tahoe owns, manages and controls the Escobal mine.

[11] Tahoe's shares are listed for trading on the Toronto Stock Exchange (TSX), and on the New York Stock Exchange. Tahoe is regulated in Canada by the British Columbia Securities Commission and conducts its annual general meeting in Vancouver, B.C.

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

[13] Currently, Tahoe's only commercial operation is its interest in the Escobal project. MSR owns the Escobal project, which is now a producing mine. MSR is owned by Tahoe Swiss A.G. and Escobal Resources Holdings Limited (Barbados). Tahoe owns both of these companies.

[14] Tahoe has no officers or employees in British Columbia. The majority of Tahoe's directors reside in Reno, Nevada. There are three directors who reside in British Columbia, and two who reside in Ontario.

[15] Tahoe Resources USA Inc. (Tahoe USA) was incorporated under the laws of Nevada on February 2, 2010, and is based in Reno, Nevada. Reno is the head office for all Tahoe operations. Tahoe USA employs all Tahoe's officers as well as 26 employees. The officers and employees provide functions relating to investor relations, sales of silver concentrate, and technical support to MSR.

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

[17] In April 2013, MSR had 693 employees who were residents of Guatemala. The contracts between MSR and its employees are in Spanish. There were also 28 expatriates who were partners in what is known in Guatemala law as a Contrato. The Contrato invoices MSR for the services performed by the partners. The expatriates that provide services to MSR hold mid to leadership management positions in MSR. Mr. Rotondo was a partner in the Contrato and provided services to MSR as the security manager.

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

[19] In 2013, MSR had a contract with Grupo Golan to develop and implement MSR's security plan. Grupo Golan has offices and operations in Guatemala. Part of Mr. Rotondo's duties was to manage the security guards, including the employees of Grupo Golan. At any given time 20 to 30 guards were on duty.

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

[21] During the relevant time, Tahoe had a corporate social responsibility policy (CSR). Tahoe developed the CSR policy in February 2011, for implementation by Tahoe and MSR.

[22] On April 3, 2013, the Ministry of Energy and Mines in Guatemala granted Tahoe an exploitation license for the Escobal mine. Soon after that Tahoe established a CSR steering committee of which Mr. Gray was a member. During the relevant period, Mr. Gray oversaw all MSR's national and local CSR policies and initiatives.

[23] Beginning in September 2012, there were a series of protests and incidents, some violent, near the Escobal project. On April 27, 2013, the plaintiffs were part of a group who were protesting on the road outside the Escobal mine.

[24] The plaintiffs entered into evidence a video of the incident on this application. As well, they provided transcripts of audio intercepts which they argue show that the shootings were deliberate, malicious and calculated to suppress local opposition to the mine. They assert that the video and the audio intercepts indicate that the security personnel planned to shoot at the plaintiffs with rubber bullets.

[25] Following the incident, Mr. Rotondo was charged with assault, aggravated assault and obstruction of justice by the Guatemalan prosecuting authorities. The criminal proceedings are ongoing.

[26] The plaintiffs in this action appeared in the criminal proceedings against Mr. Rotondo starting in May 2013. In June 2013, six of the plaintiffs in this action were added as joint plaintiffs in the proceeding against Mr. Rotondo seeking compensation for his alleged wrongdoing.

Expert Evidence

[27] Both parties have provided expert evidence regarding the Guatemalan legal system.

[28] The expert evidence sets out that the following framework exists in Guatemala's legal system:

- Guatemala has a Civil Code. Guatemalan law provides remedies for the claims arising from intentional or negligent acts that cause injury.
- The tort of negligent action requires the plaintiff to prove he suffered a damage or injury; the relationship between the defendant's acts or omission or lack of care owed and the damage the injury caused.
- Battery is considered a crime and any party responsible for a crime or offence is also civilly liable. Under Guatemalan law, a person can be added as a claimant seeking civil reparation/damages from an accused in a criminal proceeding. Damages can include restitution, payment of loss income, and damages for moral and material reparation.

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

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

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

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

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

- Discovery procedures are available prior to a hearing.

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

Legal Framework

[29] Tahoe applies pursuant to Rule 21-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The applicable portions of the Rule provide:

> (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,

> (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
>
> (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
>
> (c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.
>
> **Order declining jurisdiction may be sought**
>
> (2)Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

[30] The *Court Jurisdiction and Proceedings of Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], provides that the court has territorial competence in an action that is brought against a person who is ordinarily resident in British Columbia at the time of the commencement of the proceeding. Section 7 of the *CJPTA* provides that a corporation is ordinarily resident in British Columbia if the corporation has a registered office in British Columbia. As noted earlier, Tahoe concedes that the British Columbia courts have jurisdiction *simpliciter*.

[31] Once jurisdiction is established, the defendant can raise the issue of *forum non conveniens*. The onus is on the defendant to show why the court should decline to exercise its jurisdiction. The principles governing the decision to decline jurisdiction are set out in s. 11 of the *CJPTA*. Section 11 codifies the traditional common law factors in the *forum non conveniens* analysis. Section 11 provides:

> 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,
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> (b) the law to be applied to issues in the proceeding,
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> (c) the desirability of avoiding multiplicity of legal proceedings,
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> (d) the desirability of avoiding conflicting decisions in different courts,
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> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[32] The factors set out in s. 11(2) of the *CJPTA* are not exhaustive: *Laxton v. Anstalt*, 2011 BCCA 212, at para. 44. In *Huang v. Silvercorp Metal Inc.*, 2015 BCSC 549 at para. 33, discussed the additional factors set out in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, which include:

> (a) the residence of the parties, witnesses, and experts;
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> (b) the location of material evidence;
>
> (c) the place where the contract was negotiated and executed;
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> (d) the existence of proceedings pending between the parties in another jurisdiction;
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> (e) the location of the defendant's assets;
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> (f) the applicable law;
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> (g) advantages conferred on the plaintiff by its choice of forum, if any;
>
> (h) the interests of justice; and
>
> (i) the interests of the parties.

[33] The weight to be attributed to the various factors is a matter of discretion. The 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: *Breeden v. Black,* 2012 SCC 19 at para. 37.

[34] The defendant must establish an alternate forum is clearly more appropriate and should be preferred. As stated in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 103:

> 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.

[35] The objective of the court in deciding a *forum non conveniens* application is to ensure fairness to the parties and a more efficient resolution of their dispute. In *Van Breda*, the Court stated at paras.108-110:

> 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.
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> 110 As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact

> of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

Discussion

[36] I will consider each of the factors set out in s. 11(2) of the *CJPTA* keeping in mind that the list is non-exhaustive, that not all factors need point to a single forum and that it is not a simple tallying up of the factors. Rather, Tahoe must establish that Guatemala is the clearly more appropriate forum.

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

Plaintiffs' position

[37] The plaintiffs argue this factor favours British Columbia. The plaintiffs assert the case cannot be adjudicated at greater comparative convenience and expense in Guatemala because they cannot be assured a fair and impartial trial in Guatemala.

[38] The plaintiffs say they have provided 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 stalling tactics are used frequently in Guatemalan litigation;

f) the judicial appointment process lacks transparency; and

g) reforms have stalled and/or been reversed recently.

[39] The plaintiffs say they do not assert that all trials in Guatemala are unfair, or that justice can never be obtained, or that all judges are corrupt. The plaintiffs concede that some very significant criminal convictions have been secured and many lawyers and judges strive for justice and the rule of law. However, the plaintiffs submit the expert evidence establishes that the system often does not provide a remedy for basic injustices and is still dominated by powerful forces such as the government.

[40] The plaintiffs argue the lack of assurance of a fair and impartial trial in Guatemala weighs heavily in any analysis of the s. 11 factors and has been dispositive of *forum non conveniens* cases in the United Kingdom.

Defendant's Position

[41] Tahoe takes the position that the factors set out in s. 11(2) of the *CJPTA* favour the determination of this dispute by the courts of Guatemala. A proceeding in British Columbia as opposed to Guatemala is inconvenient and will cause unnecessary expense to the parties and their witnesses. The direct and indirect costs of language translation are also a barrier. Most of the witnesses will speak Spanish and most of the documents are in Spanish.

[42] Tahoe says the evidence demonstrates the plaintiffs are able to pursue their personal injury claims in Guatemala, and are doing so. Tahoe submits that the evidence establishes the plaintiffs will be able to have a fair trial in Guatemala. The evidence establishes that Guatemala has a functioning legal system, with procedures to try both criminal and civil claims.

Analysis

[43] It is apparent that trying this action in British Columbia will result in considerably greater inconvenience and expenses for the parties and dozens of witnesses. All the evidence relating to the events alleged in the notice of civil claim is located outside of British Columbia. The evidence is in Guatemala and Reno.

[44] The alleged battery occurred in Guatemala. All of the plaintiffs reside in Guatemala, and their injuries and losses occurred there. None of the plaintiffs speak English. All of the records needed to assess their claims for general damages, loss of past and future income, loss of opportunity, and past and future care are in Guatemala, and most, if not all, are in Spanish.

[45] The evidence establishes that while Tahoe is incorporated in British Columbia, it does not carry on its operations in B.C. The majority of Tahoe's management and staff, who might be called as witnesses, live and work in Reno, Nevada. The majority of Tahoe's documents will be in Nevada.

[46] All of MSR's employees are resident in Guatemala or Reno, and MSR carries on business in Guatemala.

[47] Most, if not all, of the witnesses will have to travel to Vancouver from Guatemala and Reno, and many will only speak Spanish.Obtaining and translating evidence will be a significant challenge. This will be inconvenient, and will undoubtedly considerably lengthen the trial.

[48] As set out, the plaintiffs argue that the case cannot be adjudicated at greater comparative convenience in Guatemala because they cannot be assured a fair and impartial trial in Guatemala.

[49] In support of their arguments, the plaintiffs refer to a number of cases where the court has retained jurisdiction over another more convenient forum when the plaintiff has established that they would suffer a denial of justice in the foreign forum.

[50] The plaintiffs rely on *889457 Alberta Inc. v. Katanga Mining Ltd.*, [2008] E.W.H.C. 2679 (Comm.) and *Connelly v. RTZ Corporation Plc,* [1997] UKHL 30 (H.L.), in which the English courts declined to stay or dismiss actions.

[51] In the *Katanga Mining* case, 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. The court found

the evidence established that the normal infrastructure of a state did not exist in the DRC. The evidence was that for the last ten years a war had been imposed on the DRC by its neighbours. Nearly 90 percent of the population lived on $1USD per day and 70 percent of the population were undernourished. Hospitals, schools and factories were in ruins. The DRC was unable to provide its citizens with even the most basic services and could not protect citizens or guarantee their security. Judges did not have the physical facilities to perform their duties. The Court held that in light of the evidence it could not conclude that the DRC was a forum where a case could be tried suitably for the interests of all of the parties and for the ends of justice. At paragraph 33, the court noted its conclusion was based upon "the absence of a developed infrastructure within which the rule of law could confidently and consistently be upheld".

[52] In *Connelly*, the plaintiff was employed by the defendant as a foreman fitter in a uranium mine in Namibia. On his return to Scotland, the plaintiff developed throat cancer. The plaintiff filed a claim under the workers compensation legislation in Namibia but it was rejected. The plaintiff contended he could not fund litigation in Namibia, whereas he had legal aid available to him in England. The court found in the exceptional circumstances, the availability of financial assistance was a relevant factor whereby the plaintiff could establish substantial injustice would be done if he had to proceed in a forum where no financial assistance was available.

[53] In *Norex Petroleum Limited v. Chubb Insurance Co.*, 2008 ABQB 442, at paras. 115-116, the court found that there was a real threat of corruption in the circumstances of the case. The expert evidence was that the defendant was controlled by a powerful oligarch, and based on the oligarch's past conduct there was a substantial risk he would chose to ensure a favourable result.

[54] In *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anomin Sirketi v. Kyrgyz Republic*, 2012 ONSC 4351, the court found the defendant had not demonstrated the Republic was the clearly more appropriate forum to adjudicate the matter. The issue was whether disputed shares were exigible to satisfy a judgment the plaintiff

had obtained. As a result, the court did 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.

[55] In *Huang v. Silvercorp Metals Inc*., the plaintiff, who was a Canadian citizen, commenced an action alleging the defendant and its subsidiary had engaged in misconduct and wrongful acts towards him. In particular, he alleged the defendant had committed the torts of false imprisonment and defamation. The plaintiff had been detained, investigated and imprisoned in China. The defendant conceded the court had jurisdiction *simpliciter* and was the more appropriate forum in which to try the defamation action. The defendant sought to have the court exercise its discretion to decline jurisdiction to determine the issue of whether there had been a false imprisonment on the basis that China was the more appropriate forum in which to litigate those allegations. The evidence was that the plaintiff was prohibited from travelling to China to prosecute his claim. As well, the plaintiff could not sue for false imprisonment in China as there was no such tort. The defendant's position would have entailed proceedings in both China and British Columbia concerning essentially the same matter. In the circumstances, the court found the defendant had not established that China was the clearly more appropriate forum and dismissed defendant's application.

[56] 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 United States forum in issue. The plaintiff argues the decisions do not assist Tahoe because the United States approaches *forum non conveniens* differently from the United Kingdom and Canada.

[57] The plaintiff argues that the United States attributes substantial weight to the burden placed on the American forum if it retains jurisdiction. United Kingdom and Canadian courts, in contrast, are not concerned with the burden on their judicial systems once they have jurisdiction.

[58] In support the plaintiffs state they rely on the test set on *Spiliada Maritime Corporation v. Cansulex*, [1987] A.C. 460, which they say was adopted in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at para. 915. The plaintiffs say that the courts of the United Kingdom and Canada exclude all questions of administrative difficulties.

[59] However, it is clear from the *CJPTA* and the case law, including *Amchem*, that factors affecting convenience or expense, the law to be applied, and the places where the parties reside or carry on business are to be considered in determining the appropriate forum.

[60] The plaintiffs submit that it is unclear what evidence was before the American courts on the state of the Guatemalan judicial system but it appears that in at least three of the cases, no expert evidence was led. The plaintiffs say they have submitted evidence that a fair trial cannot be assured in Guatemala. Finally, the plaintiffs point to the fact that United States cases cited by Tahoe are factually different from this case.

[61] I agree with the plaintiffs that the cases Tahoe provided are factually different, as are the cases the plaintiffs provided. It is apparent that each cases turns on its own facts, and a consideration of the factors set out in the *CJPTA* and the case law.

[62] The plaintiffs in this case advance claims for personal injury as a result of the battery on them. Their claim includes a claim for punitive damages

[63] As noted by Tahoe, the plaintiffs' submissions consist almost entirely of an attack on the Guatemalan justice system. However, as stated earlier, 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.

[64] In my view, where the ordinary factors set out in the *CJPTA* and case law point to Guatemala as the more appropriate forum, the question is not whether Canada's legal system is fairer and more efficient than Guatemala's legal system. It is whether the foreign legal system is capable of providing justice. As stated in

Connelly, where the *forum non conveniens* analysis points to a clearly more appropriate forum, then the plaintiff must take the forum as he finds it even if it is in certain respects less advantageous to him unless he can establish that substantial justice cannot be done in the appropriate forum.

[65] The plaintiffs' experts refer to corruption in the context of criminal prosecutions against state officials or organized crime syndicates, not cases involving claims for personal injuries such as this one.

[66] It is clear from the evidence that Guatemala has some problems with its legal system. However, the evidence, even from the plaintiffs' experts, is that Guatemala has been involved in justice reform since the early 2000s. While its justice system may be imperfect, it functions in a meaningful way. It provides laws and procedures through which parties can, and do, pursue rights and remedies such as the ones raised by the plaintiffs in their notice of civil claim. Further, Guatemalan citizens who have lesser means to pursue their claims are supported by organizations like El Centro de Accion Legal-Ambiental y Social de Guatemala (CALAS), which provides free legal assistance to claimants. The plaintiffs in this case have the benefit of such representation and are using it.

[67] The plaintiffs' assertion that the case is centered on Canada is not supported by their pleadings. The plaintiffs claim is for damages for personal injuries suffered in the alleged battery, i.e. the shooting of the protestors by the security guards. The damage claim includes a claim for punitive damages based on the intentional tort of battery. The plaintiffs advance claims against Tahoe directly for the battery, as well as on the basis of vicarious liability, and for negligence for breaches of the duty of care it owed to them, including ensuring that Mr. Rotondo and the security guards complied with its CSR policies. The evidence is that both the alleged battery and the alleged breaches of duty on the part of Tahoe occurred in Guatemala, and perhaps Nevada.

[68] The expert evidence is that damages to compensate a claimant for battery and negligence, including moral culpability (which is akin to punitive damages), are available in Guatemala.

[69] The evidence is that Mr. Rotondo is being prosecuted for the shooting in Guatemala. Six of the seven plaintiffs in this action were admitted as joint plaintiffs to the criminal action against Mr. Rotondo on June 7, 2013, and are seeking compensation in the criminal proceedings for the injuries they sustained in the attack.

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

[71] The plaintiffs assert Tahoe will not be a party to the action in Guatemala and that is a very significant factor in determining Guatemala is not a convenient forum. However, the evidence is that parties can be added to both the criminal proceedings and that a separate civil suit can be commenced. The expert evidence is that Tahoe can be held vicariously liable if its personnel directed or supervised the alleged battery. MSR could also be found vicariously liable.

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

[73] Having considered the case law, the evidence, including the expert evidence, and the submissions, I conclude the comparative convenience and expense for the parties and their witnesses favours Guatemala as the appropriate forum.

The law to be applied to issues in the proceeding

[74] The plaintiffs submit the choice of law is an open question, and there are powerful arguments in favour of applying British Columbia law to the oversight actions of Tahoe's board of directors. The plaintiff argues the choice of law is merely one of the factors that the Court must examine and weigh.

[75] Tahoe takes the position that the law to be applied to the plaintiffs' claims for personal injuries is Guatemalan law.

[76] The plaintiffs in this case allege that Tahoe is liable, either directly or vicariously, for battery and directly for negligence. Usually, the law applicable to the tort claims is the law of the place where the activity occurred: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at paras. 43 and 44. As well, the issue of vicarious liability is to be determined by the law of the jurisdiction of the tort in question: *Yeung (Guardian ad litem of) v. Au*, 2006 BCCA 217, at paras. 15-17.

[77] In this case, the torts alleged occurred in Guatemala and/or Reno. The intentional tort alleged, i.e. the battery, occurred in Guatemala.

[78] The negligence the plaintiffs allege against Tahoe is that it owed a duty of care to the plaintiffs and that it breached its duty. The alleged breaches of duty include: failing to conduct adequate checks on Mr. Rotondo and the security staff; failing to institute procedures and safeguards to ensure Mr. Rotondo and the security personnel complied with international and local guidelines regarding the use of force; failing to adequately monitor Mr. Rotondo's and the security guards' activities; and failing to require that Mr. Rotondo and the security guards adhere to Tahoe's CSR policies.

[79] Mr. Gray was responsible for overseeing all national and local CSR initiatives on behalf of MSR, and the implementation of security and the CSR policies at the Escobal mine. Mr. Gray deposes that all MSR's security activities and decisions occurred in Guatemala and were carried out by MSR employees and contractors working in Guatemala. The evidence is that Mr. Gray resided in Guatemala at the

relevant time. As a result, the breaches of duty alleged in the notice of civil claim would have occurred in Guatemala.

[80] In the circumstances, I conclude that the factor of which law to be applied suggests Guatemala is the more appropriate forum.

The desirability of avoiding multiplicity of legal proceedings and conflicting decisions in different courts

[81] In my opinion, these factors favour Guatemala as the appropriate forum. As noted earlier, there is already a criminal prosecution in Guatemala against Mr. Rotondo in which most of the plaintiffs in this action are participating. In that action, the plaintiffs are advancing claims for compensation for the damages, including punitive damages, they suffered as a result of being shot.

[82] Although the plaintiffs have not named Mr. Rotondo in this action (or Grupo Golan or MSR), they seek damages against Tahoe for the same injuries arising out of the same incident. As a result, there is a possibility of reaching conflicting decisions and a multiplicity of legal proceedings arising out of the same cause of action. This factor favours Guatemala as the more appropriate forum.

Ability to the enforce an eventual judgment

[83] The plaintiffs seek a monetary judgement against Tahoe. There is no evidence to suggest that if the plaintiffs are awarded a judgment by a Guatemalan court there will be any difficulty in enforcing a judgment in British Columbia. British Columbia courts would recognize and enforce the judgment of a Guatemalan court unless Tahoe can establish that a defence bars its enforcement: *Beals v. Saldanha*, 2003 SCC 72, at para. 79.

The fair and efficient working of the Canadian legal system as a whole

[84] In considering the fair and efficient workings of the Canadian legal system, the courts consider whether there is any juridical advantage to the plaintiff or disadvantage to the defendant in this jurisdiction.

[85] As noted in *Van Breda,* at paras. 74 and 112, the modern conflicts system rests on the principle of comity and its goal is to facilitate exchanges and communications among people in different jurisdictions subject to various legal systems. In the *forum non conveniens* analysis, comity and respect for the courts and legal systems of other countries is appropriate. As noted at para. 112:

> … Differences should not be viewed instinctively as signs of disadvantage or inferiority. This factor obviously becomes more relevant where foreign countries are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction….

[86] As set out earlier, the evidence is that Guatemala has a functioning justice system. Six of the seven plaintiffs in this action have been added as plaintiffs to the criminal law proceeding against Mr. Rotondo and are seeking compensation for their injuries in Guatemala.

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

[88] The plaintiffs rely on *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, for the proposition that they may have a cause of action directly against Tahoe for negligence as well as one based on piercing the corporate veil. In *Choc*, the plaintiffs were an indigenous group from El Estor, Guatemala. They brought three actions against a mining company and its subsidiaries alleging that security personnel working for Hudbay's subsidiaries committed human rights abuses. The allegations of abuse included a shooting, a killing, and gang rapes committed in the vicinity of a mining project. The defendants brought motions to strike the plea for direct liability on the grounds it failed to disclose a cause of action. The court declined to strike the claim on those grounds, stating:

> A novel claim of negligence should only be struck at the pleadings stage where it is clearly unsustainable. In this case, it cannot be said that it is clearly unsustainable or untenable. The plaintiffs have properly pleaded the elements necessary to recognize a novel duty of care. The plaintiffs have also pleaded that the defendants breached the duty of care and that the breach caused the plaintiffs' losses.

[89] The plaintiffs assert that no such claim could be advanced in Guatemala and therefore there is a juridical advantage to proceeding in British Columbia. The plaintiffs also point to the fact they will be unable to pierce the corporate veil in Guatemala based on an argument that MSR was acting as an agent for Tahoe.

[90] However, in terms of the direct liability alleged against Tahoe in the notice of civil claim, it is far from clear based on *Choc* that such a duty will be established. As noted in *Choc* it is a novel claim.

[91] In *Piedra v. Copper Mesa Mining Corp*. 2010 ONSC 2421, aff'd 2011 ONCA 191, the court dealt with an application to strike an action against a mining company listed on the TSX and doing business in Ecuador. The plaintiffs claimed they were assaulted or threatened in Ecuador by the security forces or agents of the defendant and its subsidiaries. The plaintiffs took the position that the defendant, its directors and the TSX were aware there was opposition and confrontation regarding the mine, and failed to take any steps to avoid violence between those who were associated or contracted by the Copper Mesa mine and the plaintiffs.

[92] In granting the motion to strike the court stated at paras. 51 - 53:

> 51 I can well understand the concern on the part of citizens of countries in which Canadian companies do business to ensure that the actions of those companies are carried out with the same kind of care and attention as if they were conducted in Canada.
>
> 52 In the materials submitted on behalf of the Plaintiffs, reference was made to a number of statements of human rights principles, including remarks of an eminent Canadian jurist. Such personal comments are not sufficient to found a policy duty, particularly when one considers the limited statutory-based mandate of the TSX and the very limited involvement of two non-management directors of a company that does not do business in Ontario. I am not satisfied there are any policy considerations that would at this stage argue in favor of extending liability.

> 53 If there were to be policy considerations that would favor extending liability as sought by the Plaintiffs, such policy would appropriately be a matter for legislatures and not the courts, at least on these facts.

[93] In this case, the plaintiffs advance similar arguments based on human rights principles as supporting their arguments that they cannot be assured of a fair trial in Guatemala against Tahoe.

[94] The plaintiffs allege three causes of action against Tahoe for which they seek damages: (i) negligence; (ii) direct battery; and (iii) vicarious liability for battery.

[95] The expert evidence establishes that there are two types of procedures to obtain civil compensation in Guatemala: (i) through a regular civil claim; and (ii) through criminal proceedings where both the accused and other parties who are found to be liable for the wrongful actions of the accused can be ordered to pay compensation.

[96] Under Guatemalan tort law, in a personal injury civil claim for negligence, if the plaintiffs establish that they suffered injuries and damages, the burden shifts to the defendant to prove that it discharged its duties or obligations or that it did not cause the injuries. The concept of a corporate veil does not factor into the direct negligence claim or the direct battery claim under Guatemalan law. As noted earlier, the plaintiffs would have to establish that Tahoe either directed or supervised the actions of the wrongdoers in order to establish liability on the part of Tahoe.

[97] The fact that the plaintiffs would not be able to advance claims based on agency in Guatemala is a factor in favour of British Columbia as the appropriate jurisdiction. I note that the plaintiffs would also face impediments in British Columbia in piercing the corporate veil; however, I agree the law in that regard appears less restrictive in British Columbia.

[98] The plaintiffs argue there is a juridical advantage to the plaintiffs in proceeding in British Columbia because otherwise they will be unable to obtain the documents to pursue their claims against Tahoe.

[99] However, as noted earlier, the plaintiffs have been able to obtain documents in Guatemala. Most of the other evidence relevant to the plaintiffs' claims is in the possession of the MSR and its employees in Guatemala, such as evidence of security protocols, interaction between head office and MSR, etc. As well, the majority of the damage documents are in Guatemala with the plaintiffs for their wage loss claims, and the plaintiffs' medical care providers and caregivers for their general damages and future cost of care claims.

[100] There is evidence from Tahoe's expert outlining the procedures for obtaining and submitting evidence in civil procedures, including obtaining declarations of material witnesses and conducting depositions. While the plaintiffs' experts point to the fact there may be challenges, the procedures outlined resemble those used in other civil law jurisdictions and are available to the plaintiffs.

[101] Since the hearing, the plaintiffs applied to submit a further affidavit from an employee of CALAS regarding the conduct of a case in Guatemala involving Oscar Morales. Mr. Morales is the coordinator of the Committee in Defense of Life and Peace in San Rafael Las Flores. He has been charged for allegedly uttering threats against a manager at MSR. In the Morales case, subpoenas were issued requiring Mr. Gray and Mr. McArthur to attend to testify in court. Neither has responded to the subpoenas. The plaintiffs argue this supports their arguments that there is a real risk of key witnesses not being available in Guatemala.

[102] Tahoe objects to the late delivery of the affidavit, and takes the position that the material is not relevant. Tahoe points to the fact that both parties have already addressed the issue of whether foreign witnesses can be compelled to attend proceedings in Guatemala. The Morales criminal proceeding is unrelated to this claim, and there is no evidence that either MSR or Tahoe are parties to it.

[103] The issue of compelling foreign witnesses and the possibility witnesses would be unwilling to attend in either Guatemala or British Columbia was addressed at the hearing of this application. There is evidence from the plaintiffs' and Tahoe's experts that there is a process in Guatemala for using letters rogatory to obtain evidence

from a foreign witness. There is no evidence about any use of letters rogatory in order to obtain evidence in the Morales action.

[104] As noted earlier, it is apparent if this matter were to proceed in British Columbia non-party witnesses would have to be compelled from Guatemala or other jurisdictions which will present significant challenges. Witnesses may not be willing to testify. The Supreme Court Civil Rule 7-8 provides for applications to be made if a person residing outside of British Columbia is unwilling to testify which are similar to the processes available in Guatemala, as described by experts.

[105] In my view, the public interest requires that Canadian courts proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens. To hold otherwise is to ignore the principle of comity and risk that other jurisdictions will treat the Canadian judicial system with similar disregard. In this case, as noted earlier, Guatemala has a functioning legal system for both civil and criminal cases, and the plaintiffs are already seeking compensation for their injuries in Guatemala.

Conclusion

[106] Having considered the factors set out in s. 11(2) of the *CJPTA*, the case law, the evidence and the submissions, I conclude that Guatemala is clearly the more appropriate forum for the determining the matters in dispute. I therefore exercise my discretion to decline jurisdiction in this case. Accordingly, I am allowing Tahoe's application and staying the plaintiffs' action.

"Gerow, J."