

Court of Appeal File No. COA-25-CV-0229
Court File No. CV-22-00-690649-0000
Court File No. CV-24-00-714148-0000

COURT OF APPEAL OF ONTARIO

B E T W E E N :

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA

Plaintiffs
(Appellants)

and

BARRICK GOLD CORPORATION

Defendant
(Respondent)

And Between

ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA W ANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI

Plaintiffs
(Appellants)

and

BARRICK GOLD CORPORATION

Defendant
(Respondent)

FACTUM OF THE PLAINTIFFS (APPELLANTS)

CFM LAWYERS LLP
400-856 Homer Street
Vancouver, BC V6B 2W5
Tel: (604) 689-7555

Joe Fiorante, K.C.
(LSBC #9197/LSO # 863420)
jfiorante@cfmlawyers.ca
Jen Winstanley (LSBC #508967)
jwinstanley@cfmlawyers.ca

**PHILLIPS BARRISTERS
PROFESSIONAL CORPORATION**
36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5
Tel: 647-261-4486

**John Kingman Phillips (LSO No.:
8295/46206E)**
john@phillipsbarristers.ca
W. Cory Wanless (LSO No.: 57288M)
cory@phillipsbarristers.ca
Patti Shedden (LSO No.: 46210W)
patti@phillipsbarristers.ca

Lawyers for the Plaintiffs/Appellants

TO:

DAVIES WARD PHILLIPS & VINEBERG LLP

Barristers and Solicitors
155 Wellington Street West
37th Floor
Toronto, ON M5V 3J7

Kent E. Thompson (LSO No.: 24264J)

kentthomson@dwpv.com

Stephen G. Frankel (LSO No.: 58892E)

sfrankel@dwpv.com

Tel: 416-863-0900

Lawyers for the Defendant/Respondent

TABLE OF CONTENTS

PART I - OVERVIEW - 1 -

PART II - FACTS - 4 -

 A. Plaintiffs’ two distinct claims of liability..... - 4 -

 B. Barrick has ultimate authority over human rights and security at its mines..... - 6 -

 C. Barrick’s direct role in security at North Mara..... - 11 -

 D. Barrick has full access to North Mara information, documents, and evidence - 12 -

 E. Real risk of unfairness to the Plaintiffs in Tanzania..... - 13 -

PART III - ISSUES & THE LAW - 22 -

 A. Standard of review - 22 -

 B. Errors..... - 22 -

 C. Jurisdiction *Simpliciter* - 23 -

 D. *Forum Non Conveniens* - 24 -

 (i) The motion judge erred in applying a summary judgment “best evidence” standard - 25 -

 (ii) The motion judge erred in characterizing the plaintiffs’ claims as a personal injury case and failing to take into account the human rights context - 26 -

 (iii) The motion judge erred in analyzing fairness to the plaintiffs - 28 -

PART IV - ORDER REQUESTED..... - 31 -

CERTIFICATE..... - 34 -

SCHEDULE “A” - JURISPRUDENCE..... i

SCHEDULE “B” - LEGISLATION..... ii

PART I - OVERVIEW

1. This case raises important issues of presence-based jurisdiction over Ontario-headquartered companies and access to justice in transnational human rights cases. It arises in the context of a decades-long conflict between artisanal miners and armed police forces at Barrick Gold Corporation's North Mara gold mine in Tanzania which has claimed the lives of approximately 100 people over the past decade.

2. The respondents are artisanal miners or the surviving family members of artisanal miners who were injured or killed by Tanzanian police contracted to provide security at the mine. They have very limited economic means through which to pursue their claims but seek to hold Barrick accountable for corporate security practices which involve the use of lethal force in response to community members entering the mine's waste rock dumps to search for gold.

3. Barrick is a multinational mining company headquartered in Toronto. Through offshore subsidiaries, it owns 84% of the North Mara mine. Barrick claims to have "zero tolerance for human rights abuses wherever it operates".¹ Barrick controls its global operations, including the North Mara mine, through corporate policies and directives issued, monitored, and enforced by the parent company.

4. Those corporate policies contain specific provisions for the management of human rights and security issues at the mine site level and place overall responsibility for enforcement and compliance on Barrick's senior management and Board of Directors. Senior Barrick executives receive compensation calculated in part on achieving human rights objectives.

5. As pleaded, the respondents advance claims for accountability based on two legal theories: direct parent company liability for Barrick's involvement in the establishment, monitoring, and

¹ Annual Report 2020 ["2020 Report"], p 31, Appeal Book and Compendium ["ABC"], vol 1, Tab 17, p 229.

failure to enforce corporate human rights and security policies at the mine site; and aiding and abetting violations of the customary international law prohibitions on extra-judicial killings and torture. The former is based on direct parent company liability in negligence, the latter on the Supreme Court of Canada's decision in *Nevsun v. Araya*.

6. The motion judge dismissed the case by finding that the Court did not have jurisdiction over a company whose self-declared global headquarters are in Toronto. In reaching this decision, the motion judge erroneously found that Barrick was based in Vancouver and incorrectly applied the legal test for assumed jurisdiction not presence-based jurisdiction.

7. The motion judge held in the alternative that he would have also dismissed the case on the basis of *forum non conveniens* ("FNC"). Dismissal on this basis requires a finding that the defendant has met its high burden of establishing that the foreign court is the clearly more appropriate forum for the fair and efficient determination of the dispute.

8. The motion judge's ruling on FNC was the product of a deeply flawed analysis in which he applied the wrong evidentiary standard, misapprehended or failed to take account of key factual evidence, and ignored important guidance provided by the Supreme Court of Canada in the cases of *Nevsun*, *Haaretz.com v. Goldhar*, and *Club Resorts Ltd. v. Van Breda*.

9. In *Haaretz*, the Supreme Court of Canada emphasized the importance of pleadings in the FNC analysis but the motion judge re-characterized the case before him as a claim in simple negligence:

This is not a case where Canada is needed to ensure that the law "percolates down from the international to the domestic sphere", as Justice Abella put it in *Nevsun* SCC, at para. 71. It is a negligence case about allegedly wrongful corporate and/or police conduct, for which the domestic Tanzanian legal system appears as well equipped as Canada's legal system.²

² Morgan J. Reasons, ¶77 ["Reasons"].

10. By doing so, he stripped the case of its vital human rights context, ignoring the Supreme Court of Canada's admonition in *Nevsun* that traditional tort law may provide an inadequate basis upon which to vindicate internationally recognized human rights.

11. The motion judge went on to find that Barrick's global human rights and security policies were mere "platitudes" and analogized them to promotional materials of an international hotel chain notwithstanding clear evidence from Barrick executives that such policies are fundamental to how Barrick operates and are implemented through a detailed communication and management system for which Barrick's executives are responsible.

12. Having re-characterized the case as a simple negligence claim, the motion judge went on to find that the case could be fairly litigated in Tanzania. He rejected the plaintiffs' contention that they faced a real risk of unfairness in Tanzanian due to their very limited economic means, inability to access sources of proof, and inability to retain and pay counsel of their choosing.

13. The motion judge found that the plaintiffs would not be disadvantaged by having to seek legal representation in Tanzania through legal aid. In reaching this conclusion, the motion judge relied exclusively on limited evidence presented by Barrick and failed to even consider very detailed evidence of Joseph Oleshangay, litigation counsel at the largest legal aid provider in Tanzania.

14. Mr. Oleshangay's evidence disclosed severe limitations of the legal aid system in Tanzania. The vast majority of legal aid resources in the country are directed to legal education and empowerment of self-represented parties, not representation by counsel in complex civil cases. At Mr. Oleshangay's organization, the yearly budget for legal aid was \$50,000 USD which it used to provide aid to approximately 20,000 clients annually.

15. Mr. Oleshangay concluded that it was highly unlikely that the plaintiffs would be able to obtain representation by a legal aid lawyer at trial in Tanzania. His analysis was not rebutted by Barrick's expert, former Chief Justice Othman, on whom the motion judge heavily relied, and is nowhere to be found in the motion judge's reasons.

16. An exercise of discretion based on the wrong evidentiary standard and improper re-framing of the case, and which fails to address and engage with evidence lead by both sides on a contested issue, constitutes reversible error.

17. Simply put, it cannot be fairer and more efficient to require these plaintiffs to litigate a complex human rights claim against a Canadian corporation using only whatever minimal legal resources may be provided through an overtaxed legal aid system.

PART II - FACTS

A. Plaintiffs' two distinct claims of liability

18. The plaintiffs bring claims against Barrick in direct negligence as the parent company with ultimate authority over human rights and security matters at the North Mara mine.

19. The claim of direct negligence is set out in detail at paragraphs 44-66 and 148-153 of the 2022 Statement of Claim where the plaintiffs pleaded Barrick's control, oversight, management, and implementation of security, human rights, and sustainability policies at the North Mara mine.³

The claim is informed both by claims successfully litigated in Canadian courts against Canadian corporations for human rights violations abroad (namely *Nevsun*,⁴ *Choc v. HudBay*,⁵ and *Garcia v Tahoe*⁶), and a series of UK cases including, most importantly, the UK Supreme Court ruling in *Vedanta Resources PLC v Lungowe and others*, 2019 UKSC 20 ("Vedanta").

³ Matiko John Statement of Claim ["First SOC"], ¶44-66, 148-153, ABC, vol 1, Tab 4, pp 58-72, 93-97.

⁴ *Nevsun Resources Ltd v Araya*, [2020 SCC 5](#) [*Nevsun*].

⁵ *Choc v Hudbay Minerals Inc*, [2013 ONSC 1414](#).

⁶ *Garcia v Tahoe Resources Inc*, [2017 BCCA 39](#) [*Garcia*].

20. In *Vedanta*, the Supreme Court surveyed the development of direct parent company liability in English jurisprudence and rejected the argument that the claim of direct parent company liability raised novel issues of law:

But the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence.... Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. [emphasis added]⁷

21. The Court upheld the finding of the lower courts that it was arguable the parent company owed a duty of care to local residents of its mine in Zambia. The Court rejected, as had the lower courts, the argument that the mere existence of group-wide corporate policies was insufficient to ground a duty of care:

Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision, and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.⁸

22. In this case, the plaintiffs plead that Barrick created, directs, implements, and supervises the security strategy and human rights policy at the North Mara mine, and Barrick's negligence led to the deaths and injuries to community members.⁹ Further, it is alleged that Barrick has retained control over human rights and security policies applicable to North Mara at all material

⁷ [Vedanta Resources PLC v Lungowe and others](#), 2019 UKSC 20 [*Vedanta*], ¶49.

⁸ [Vedanta](#), ¶53.

⁹ First SOC, ¶15, ABC, vol 1, Tab 4, p 53; Nyangi Petro Statement of Claim ["Second SOC"], ¶15, ABC, vol 1, Tab 5, p 111.

times.¹⁰ There is significant evidence in the record, reviewed below, that establishes a factual basis for these allegations.

23. The plaintiffs also bring claims based on breach of customary international law set out at paragraphs 154-162 of the First Statement of Claim. These claims are based directly on the Supreme Court of Canada's landmark ruling in *Nevsun* which held that claims against corporations for aiding and abetting violations of customary international law may be actionable under Canadian law.¹¹ In reaching this conclusion, the Court emphasized that traditional torts may not provide an adequate legal foundation to address such violations.

24. Writing for the majority, Justice Abella stressed the importance generally of enforcing human rights norms:

This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.¹²

25. In contrast, there are no cases in Tanzania that have considered the application of customary international law in a tort case.¹³

B. Barrick has ultimate authority over human rights and security at its mines

26. The motion judge's characterization of Barrick's corporate policies on human rights and security at its mine sites as mere "platitudes"¹⁴ analogous to promotional materials of an

¹⁰ First SOC ¶54, ABC, vol 1, Tab 4, p 61; Second SOC, ¶46, ABC, vol 1, Tab 5, p 118.

¹¹ *Nevsun*, ¶ 1.

¹² *Ibid.*

¹³ Expert Report Joseph Oleshangay ["*Oleshangay Report*"], ¶25, 201, ABC, vol 1, Tab 36, pp 311, 326; Cross-Examination Transcript Leonard Paulo Shaidi ["*Shaidi Transcript*"], q 26, pp 10-11, ABC, vol 2, Tab 65, pp 755-756.

¹⁴ Reasons, ¶15, 169.

international hotel chain¹⁵ misapprehends both the legal and factual import of the policies. Legally, such policies are the centre of the direct parent company liability claim. Factually, senior Barrick executives confirmed that the policies accurately describe the actual operations of the company.¹⁶

27. As pleaded, the policies place the ultimate responsibility for human rights and security compliance on Barrick’s board and senior management. As described below, there is substantial evidence that these policies are foundational to Barrick’s global business as reflected in Barrick’s corporate oversight structures, committees, and compensation practices.

28. Unless otherwise stated, all facts below regarding Barrick and its operations come directly from Barrick’s own evidence, in the form of affidavits filed by Barrick witnesses, answers by Barrick witnesses on cross-examinations, or Barrick’s corporate filings.

29. Barrick is headquartered in Toronto, not Vancouver.¹⁷ Barrick’s corporate filings repeatedly and unvaryingly confirm that “Barrick’s head office is located at... 161 Bay Street, Suite 3700, Toronto, Ontario”.¹⁸

30. Over the last ten years, every Barrick annual meeting was held in Toronto or remotely.¹⁹ Barrick is listed on the TSX, and is required to file corporate records with Canadian securities regulators.²⁰ Barrick’s witnesses acknowledged that these filings are required by law to be, and are, factually correct.²¹

¹⁵ Reasons, ¶144.

¹⁶ Cross-Examination Transcript Sebastiaan Bock [“**Bock Transcript**”], qq 44-56, pp 19-21, **ABC, vol 2, Tab 55, pp 560-562.**

¹⁷ Reasons, ¶4; Barrick Report UN Global Compact, p 9, **ABC, vol 1, Tab 29, p 279.**

¹⁸ Barrick 2022 Annual Information Form [“**2022 AIF**”], p 15, **ABC, vol 1, Tab 18, p 232**; Barrick 2021 Annual Information Form [“**2021 AIF**”], p 15, **ABC, vol 1, Tab 19, pp 237**; Barrick 2020 Annual Information Form [“**2020 AIF**”], p 15, **ABC, vol 1, Tab 20, p 240.**

¹⁹ Barrick Information Circular 2023 [“**2023 Information Circular**”], p 1, **ABC, vol 1, Tab 21, p 243**; Bock Transcript qq 254-258, pp 79-80, **ABC, vol 2, Tab 55, pp 585-586.**

²⁰ Bock Transcript qq 44-47, p 19, **ABC, vol 2, Tab 55, pp 560.**

²¹ Bock Transcript qq 44-56, pp 19-21, **ABC, vol 2, Tab 55, pp 560-562.**

31. None of Barrick’s senior executives are located in Tanzania, and Barrick the parent company does not have an office in Tanzania.²²

32. While Barrick is a Canadian corporation, it operates globally through a series of subsidiaries that are required to follow company-wide policies issued by Barrick.²³ The policies “apply to all of Barrick’s operations” including the North Mara mine.²⁴ Compliance is mandatory at all its mines.²⁵ The policies are developed, reviewed, implemented, and monitored by senior management of Barrick including multiple committees of the Board of Directors.²⁶

33. Barrick’s policies require compliance with numerous international standards including the Voluntary Principles on Security and Human Rights. Barrick was “the first Canadian mining company to join” the Voluntary Principles in 2010,²⁷ and Barrick follows them “in our dealings with public and private security providers, local communities and potential victims of human rights violations.”²⁸ Barrick, not its subsidiaries, is the member of the Voluntary Principles.²⁹

34. Respect for human rights is one of four pillars of Barrick’s sustainability policy, and “[s]ustainability is entrenched in our DNA: our sustainability strategy is our business plan.”³⁰

²² Bock Transcript q 108, p 34, **ABC, vol 2, Tab 55, pp 571**; Cross-Examination Transcript Grant Beringer, held May 29, 2024 [**“Beringer Transcript”**], q 106-107, pp 37-38, **ABC, vol 2, Tab 56, pp 664-665**.

²³ Bock Transcript qq 57-75, 147-153, pp 21-25, 43-45, **ABC, vol 2, Tab 55, pp 562-566, 574-576**; Beringer Transcript qq 118-121, pp 41-42, **ABC, vol 2, Tab 56, pp 668-669**.

²⁴ Bock Transcript q 148, pp 43-44, **ABC, vol 2, Tab 55, pp 573-574**; Beringer Transcript qq 167-172, pp 55-57, **ABC, vol 2, Tab 56, pp 682-684**.

²⁵ Beringer Transcript qq 118-120, pp 41- 42, q 172, p 57, **ABC, vol 2, Tab 56, pp 684**.

²⁶ 2023 Information Circular, p 117, **ABC, vol 1, Tab 21, p 245**; Barrick 2021 Sustainability Report [**“2021 Sustainability”**], p 18, **ABC, vol 1, Tab 23, p 253**; Bock Transcript q 259-271, pp. 80-82, **ABC, vol 2, Tab 55, pp 586-588**.

²⁷ Grant Beringer Affidavit [**“Beringer Affidavit”**], ¶28, **ABC, vol 1, Tab 39, pp 378-379**.

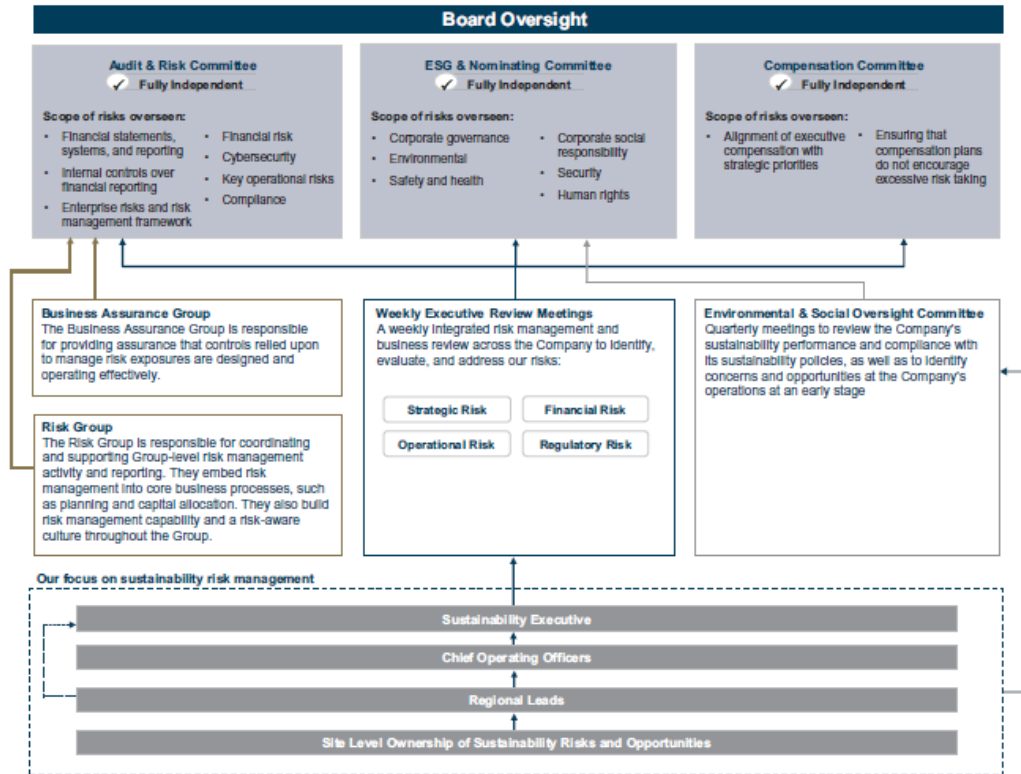
²⁸ Barrick Human Rights Policy [**“HRP”**], ¶3, **ABC, vol 2, Tab 41, pp 389-391**.

²⁹ 2022 Report to the Voluntary Principles on Security and Human Rights, p 2, **ABC, vol 1, Tab 26, p 266**; Voluntary Principles on Security and Human Rights Members, p 2, **ABC, vol 2, Tab 40, p 386**; Beringer Transcript, qq 135-141, pp 46-47, **ABC, vol 2, Tab 56, pp 673-674**; Cross-Examination Transcript Apolinary Lyambiko [**“Lyambiko Transcript”**], qq 237-242 pp 61-62, **ABC, vol 2, Tab 54, pp 528-529**.

³⁰ Barrick 2022 Annual Report, p 67, **ABC, vol 1, Tab 16, p 225**; Lyambiko Transcript, qq 142-143, 154-156 pp 39-40, 43-44, **ABC, vol 2, Tab 54, pp 513-514**.

35. Barrick’s Board of Directors, none of whom are in Tanzania, retains ultimate oversight of issues relating to human rights performance³¹ as depicted in Barrick’s corporate filings:³²

The diagram below summarizes our enterprise-wide approach to risk oversight and the allocation of risk oversight responsibilities.



36. Barrick’s global sustainability activities are coordinated by the Board’s Environmental & Social Oversight Committee (“E&S Committee”) which “connects site-level ownership of sustainability to our Executive Officers and our Board of Directors”.³³ It creates a “regular upward cascade of data [that] ensures that everyone from site to the region and group, understands our relative performance and progress” on sustainability issues.³⁴

³¹ Beringer Affidavit, ¶39, ABC, vol 1, Tab 39, pp 382-383; Lyambiko Transcript, q 169, p 46, ABC, vol 2, Tab 54, p 520.

³² 2023 Information Circular, p 117, ABC, vol 1, Tab 21, pp 245; Bock Transcript, qq 259-268, pp 80-82, ABC, vol 2, Tab 55, pp 586-588.

³³ 2021 Sustainability, p 18, ABC, vol 1, Tab 23, p 253; Bock Transcript, qq 233-234, pp 74-75, ABC, vol 2, Tab 55, pp 583-584; Lyambiko Transcript, qq 162-169, pp 45-46, ABC, vol 2, Tab 54, pp 519-520.

³⁴ Barrick 2020 Sustainability Report, p 12, ABC, vol 1, Tab 24, p 259; Lyambiko Transcript, qq 199-201 pp 51-52, ABC, vol 2, Tab 54, pp 525-526.

37. Barrick's CEO reviews E&S Committee reports with the Board's Environmental, Social, Governance & Nominating Committee, bringing "Executive and Board level attention to key sustainability issues" so "we can identify concerns and opportunities at an early stage, remedy them and drive continual improvements."³⁵

38. Barrick exercises control at its African operations through executives who testified on this motion, including Group Sustainability Executive Grant Beringer, and COO for the Africa region, Sebastiaan Bock. Mr. Beringer is "one of Barrick's most senior leaders"³⁶ and has "day to day responsibility" and is "ultimately responsible for ensuring that human rights abuses do not happen" at Barrick's mines.³⁷ Mr. Beringer holds executive office with Barrick not the local subsidiaries he oversees.³⁸

39. Mr. Bock has "overall responsibility for overseeing operations" at Barrick's African mines.³⁹ Any material issue on human rights at an African mine is escalated to Mr. Bock and Mr. Beringer.⁴⁰ Through Barrick's Human Rights Reporting Procedure that applies at all sites,⁴¹ Barrick's General Counsel, CEO, Mr. Beringer, and Mr. Bock are all promptly alerted.⁴²

40. Barrick's Human Rights Policy is applicable "at every site that we operate"⁴³ and is overseen by Mr. Beringer under the direction of the Board's Audit and Risk Committee.⁴⁴

³⁵ 2021 Sustainability, p 18, **ABC, vol 1, Tab 23, p 253.**

³⁶ Beringer Affidavit, ¶8, **ABC, vol 1, Tab 39, p 373.**

³⁷ Beringer Transcript, qq 11, 27, pp 7, 21, **ABC, vol 2, Tab 56, pp 642, 651.**

³⁸ Beringer Transcript, q 9, p 6, **ABC, vol 2, Tab 56, p 641.**

³⁹ Bock Transcript, q 164 p 50, **ABC, vol 2, Tab 55, p 581.**

⁴⁰ Bock Transcript, qq 152-153, pp 44-45, **ABC, vol 2, Tab 55, pp 575-576.**

⁴¹ Lyambiko Transcript, qq 259-262, pp 67-68, **ABC, vol 2, Tab 54, pp 531-532**; Barrick 2021 Annual Report to the Voluntary Principles on Security and Human Rights ["2021 VPR"], p 6, **ABC, vol 1, Tab 27, p 270.**

⁴² Beringer Transcript, qq 84-86, 88-89, pp 29-31, **ABC, vol 2, Tab 56, pp 659-661**; 2021 VPR, p 6, **ABC, vol 1, Tab 27, p 270.**

⁴³ Beringer Affidavit, ¶29, **ABC, vol 1, Tab 39, p 379**; HRP, ¶4, **ABC, vol 2, Tab 41, p 391.**

⁴⁴ HRP, Appendix A, ¶19, **ABC, vol 2, Tab 41, p 397.**

41. Barrick developed a Use of Force Standard for how force can be used by security personnel at its mines.⁴⁵

42. Barrick, not its subsidiary, hired North American companies to conduct human rights assessments at North Mara⁴⁶ and provide human rights training to Tanzanian police.⁴⁷

43. Compensation of senior Barrick executives, approved at meetings in Toronto,⁴⁸ is tied in part to human rights performance.⁴⁹ This is because “[a]s an executive team, we have overall responsibility for the performance of the group and to hold the operations to account to the polices that we have implemented” including human rights.⁵⁰

C. Barrick’s direct role in security at North Mara

44. At Barrick’s direction, its subsidiary at North Mara, NMGML, maintains a memorandum of understanding with the Tanzania Police Force (“TPF”) to provide security at the mine.

45. Under the current MOU (“2022 MOU”), NMGML pays wages to individual police officers; provides fuel, vehicles, food, and lodging; and transferred legal title for a TPF barracks.⁵¹

In exchange, the TPF provides a heavily armed security force at North Mara with 142 officers and 3 liaison officers working in the mine’s security office.⁵²

⁴⁵ Beringer Transcript, qq 90-93, pp 31-33, **ABC, vol 2, Tab 56, pp 661-663**; Barrick Human Rights Report, p 49, **ABC, vol 2, Tab 42, p 402**; Press Release, December 10, 2021, **ABC, vol 1, Tab 22, pp 247-248**.

⁴⁶ 2020 Report, p 31, **ABC, vol 1, Tab 17, p 229**; Conflict-Free Gold Report, p 3, **ABC, vol 1, Tab 25, pp 263**; Barrick 2020 Annual Report to the Voluntary Principles on Security and Human Rights [“2020 VPR”], p 3, **ABC, vol 1, Tab 28, p 274**; Beringer Transcript, qq 74, 129-131, 155-160, pp 27,45, 50-52, **ABC, vol 2, Tab 56, pp 657, 672, 677-679**; Lyambiko Transcript qq 359-391, pp 88-95, **ABC, vol 2, Tab 54, pp 550-557**.

⁴⁷ Bock Transcript qq 375-377, pp 113-114, **ABC, vol 2, Tab 55, pp 616-617**.

⁴⁸ 2023 Information Circular, pp 1, 20, **ABC, vol 1, Tab 21, pp 243-244**.

⁴⁹ Beringer Transcript, qq 32-33, pp 14-15, **ABC, vol 2, Tab 56, pp 644-645**; Bock Transcript, qq 285-291, p 84-87, **ABC, vol 2, Tab 55, pp 590-593**; 2023 Information Circular, p 20, **ABC, vol 1, Tab 21, pp 244**; 2021 Sustainability, p 13, **ABC, vol 1, Tab 23, p 251**.

⁵⁰ Bock Transcript, q 291, p 87, **ABC, vol 2, Tab 55, pp 593**.

⁵¹ Memorandum of Understanding May 2022 [“2022 MOU”], ss 6.1, 6.3, 17, **ABC, vol 2, Tab 46, pp 144-145, 150**; Bock Transcript, qq 402-405, pp 123-124, **ABC, vol 2, Tab 55, pp 626-627**.

⁵² 2022 MOU, s 5.1, **ABC, vol 2, Tab 46, p 143**; Bock Transcript, qq 345-353, pp 104-106, **ABC, vol 2, Tab 55, pp 607-609**.

46. Barrick's regional General Counsel and Sustainability Team helped negotiate the 2022 MOU.⁵³ Barrick senior executives including the CEO, Mr. Beringer, and Mr. Bock reviewed the 2022 MOU before signing.⁵⁴ Mr. Bock and another Barrick executive signed the 2022 MOU.⁵⁵

47. Barrick itself has rights under the 2022 MOU separate from NMGML's rights.⁵⁶

D. Barrick has full access to North Mara information, documents, and evidence

48. Barrick has a robust information system allowing Barrick executives to manage human rights and security at mine sites. Mr. Beringer is "absolutely" confident he gets "access to documents and access to personnel as required" at all Barrick mines.⁵⁷ If Mr. Bock asks North Mara employees for information or documents, they are provided.⁵⁸

49. Evidence available to Barrick includes CCTV footage. The North Mara mine has "an extensive network of closed-circuit television, thermal and infrared cameras around the Mine site".⁵⁹ CCTV monitors Tanzanian police whenever they come on site.⁶⁰

50. Barrick has access to substantial police evidence. The 2022 MOU requires police to promptly advise the mine about any use of weapons or force, or any human rights violation.⁶¹ This is reported to Barrick executives.⁶² This information sharing is contractually required and in fact occurs.⁶³

⁵³ Lyambiko Transcript, qq 328-336, pp 82-84, **ABC, vol 2, Tab 54, pp 546-548.**

⁵⁴ Bock Transcript, qq 335-336, pp 100-101, **ABC, vol 2, Tab 55, pp 603-604.**

⁵⁵ 2022 MOU, p 18, **ABC, vol 2, Tab 46, p 152**; Bock Transcript, qq 329-333, pp 98-99, **ABC, vol 2, Tab 55, pp 601-602.**

⁵⁶ 2022 MOU, ss 7(b), 11, **ABC, vol 2, Tab 46, pp 146, 148**; Bock Transcript qq 378-380, pp 114-115, **ABC, vol 2, Tab 55, pp 617-618.**

⁵⁷ Beringer Transcript, qq 28-31, pp 13-14, **ABC, vol 2, Tab 56, pp 643-644.**

⁵⁸ Bock Transcript, qq 93-95, pp 31-32, **ABC, vol 2, Tab 55, pp 568-569.**

⁵⁹ Affidavit Apolinary Lyambiko ["Lyambiko Affidavit #1"], ¶32(e), **ABC, vol 2, Tab 44, p 412.**

⁶⁰ 2020 VPR, p 5, **ABC, vol 1, Tab 28, p 276.**

⁶¹ 2022 MOU, s 11, **ABC, vol 2, Tab 46, p 148.**

⁶² Bock Transcript q 384, p 116, **ABC, vol 2, Tab 55, pp 619**; Lyambiko Transcript, q 342, p 85, **ABC, vol 2, Tab 54, pp 549.**

⁶³ Bock Transcript, qq 390-392, pp 120-122, **ABC, vol 2, Tab 55, pp 623-625**; Lyambiko Transcript, qq 297-303, 341, pp 76-77, 85, **ABC, vol 2, Tab 54, pp 540-541, 549.**

51. In this lawsuit, NMGML will provide any documents, access to witnesses, and other information that are requested by Barrick or Barrick’s legal counsel.⁶⁴

52. On this motion, Barrick elected not to enter into evidence any CCTV footage and police records.⁶⁵

E. Real risk of unfairness to the Plaintiffs in Tanzania

53. Plaintiffs Elizabeth Irondo and Charles Nyakina have very limited economic means and cannot afford to hire a lawyer.⁶⁶

54. All experts agree contingency fees are prohibited under Tanzanian law.⁶⁷ Tanzanian lawyers are also prohibited from charging fees below a minimum amount specified in regulations, known as “undercutting”.⁶⁸

55. Neither Elizabeth nor Charles has ever been interviewed by police regarding the deaths of their relatives.⁶⁹ Despite a history of violence involving police at the North Mara mine confirmed by Barrick witnesses,⁷⁰ they were unaware of any lawsuits brought in Tanzania regarding deaths at the mine caused by police.⁷¹ Elizabeth estimated as many as 100 people have been killed by

⁶⁴ Bock Transcript, qq 315-316 pp 92-93, **ABC, vol 2, Tab 55, pp 598-599.**

⁶⁵ Although the motion judge concluded that “the record indicates that a number of the incidents in issue occurred outside of the Mine’s CCTV range”, there is no evidence in the record to support this; Reasons, ¶52.

⁶⁶ Affidavit Elizabeth Matiko Irondo [“**Irondo Affidavit**”], ¶24-26, **ABC, vol 1, Tab 8, pp 180-181**; Affidavit Charles Daniel Nyakina [“**Nyakina Affidavit**”], ¶15-16, **ABC, vol 1, Tab 7, p 168.**

⁶⁷ Oleshangay Report, ¶76, **ABC, vol 1, Tab 36, p 313**; Expert Report Jebra Kambole [“**Kambole Report**”], ¶26-28, **ABC, vol 1, Tab 38, p 359**; Reply Expert Report Leonard Shaidi [“**Shaidi Report #2**”], ¶22, **ABC, vol 2, Tab 50, p 500**; Cross-Examination Transcript Dr. Wilbert Kapinga, [“**Kapinga Transcript**”], qq 25-31, pp 10-11, **ABC, vol 2, Tab 58, pp 697-698.**

⁶⁸ Kambole Report, ¶29, **ABC, vol 1, Tab 38, p 360**; Cross-Examination Transcript Jebra Kambole [“**Kambole Transcript**”], q 815, pp 185-186, **ABC, vol 2, Tab 57, pp 687-688**; Shaidi Transcript, qq 398-400, pp 111-112, **ABC, vol 2, Tab 65, pp 763-764.**

⁶⁹ Irondo Affidavit, ¶22, **ABC, vol 1, Tab 8, p 180**; Nyakina Affidavit, ¶14, **ABC, vol 1, Tab 7, p 168.**

⁷⁰ Bock Transcript, qq 457-464, pp 141-142, **ABC, vol 2, Tab 55, pp 630-631**; Lyambiko Affidavit #1, ¶28, 43, **ABC, vol 2, Tab 44, pp 411-414**; Reply Affidavit Apolinary Lyambiko, April 4, 2024, [“**Lyambiko Affidavit #2**”], ¶9, **ABC, vol 2, Tab 45, p 419**; Statement, September 28, 2023, **ABC, vol 2, Tab 45, p 421**; Press Release, November 27, 2023, **ABC, vol 2, Tab 45, p 423**; Press Release, December 19, 2023, **ABC, vol 2, Tab 45, p 425.**

⁷¹ Kapinga Transcript, qq 10-12, pp 7-8, **ABC, vol 2, Tab 58, pp 695-696**; Beringer Transcript, qq 173-176, pp 57-58, **ABC, vol 2, Tab 56, pp 684-685**; Shaidi Transcript, q 264, p 79, **ABC, vol 2, Tab 65, p 762.**

police since the North Mara mine opened.⁷² She likewise is not aware of anyone filing a case in a Tanzanian court about a police shooting at the mine.⁷³

56. There has never been a legal case in Tanzania of this kind. The motion judge erred in finding that similar cases had been brought in Tanzania. No expert report asserted any of the following:

- a. “In terms of a multiplicity of proceedings, other cases have already been brought against Barrick in the Tanzanian courts.”⁷⁴ There is no evidence that Barrick, the Canadian parent company, has been sued in Tanzania. Former Chief Justice Othman cited a single tax case against a UK subsidiary of Barrick.⁷⁵
- b. “In fact, the record establishes that there have been previous cases against Barrick in Tanzania that were funded by legal aid.”⁷⁶ Plaintiffs’ expert Joseph Oleshangay was cross-examined about a few examples where LHRC assisted people who received compensation related to land disputes at North Mara. Those were not the result of litigation or legal aid but were done through LHRC’s advocacy unit.⁷⁷
- c. “Chief Justice Othman also cites multiple cases in the Tanzanian courts in which individuals have successfully sued the TPF, including a number of past claims arising out of events at the North Mara mine.”⁷⁸ [emphasis added] Former Chief Justice Othman did not cite any cases in Tanzania related to police shootings at the

⁷² Irondo Affidavit, ¶10, ABC, vol 1, Tab 8, p 177. See also Correspondence between Barrick and RAID [“Barrick/Raid Correspondence”], p 46, ABC, vol 1, Tab 30, p 280.

⁷³ Irondo Affidavit, ¶25, ABC, vol 1, Tab 8, pp 180.

⁷⁴ Reasons, ¶152.

⁷⁵ Expert Report Mohamed Othman [“Othman Report #1”], ¶112, ABC, vol 2, Tab 47, p 460.

⁷⁶ Reasons, ¶107.

⁷⁷ Oleshangay Transcript, qq 226-267, pp 49-58, ABC, vol 2, Tab 63, pp 739-748.

⁷⁸ Reasons, ¶101.

North Mara mine.⁷⁹ Barrick's witnesses confirmed that no such cases have been filed.⁸⁰

57. Notably, previous claims arising from alleged shootings and abuses by police at the mine have been litigated in the courts of England, where the litigation defence was directed by Barrick's U.S.-based general counsel.⁸¹ Those claims were brought against the Tanzanian subsidiary, NMGML, as well as Barrick's UK subsidiary (which, until 2019, operated the mine).⁸² Barrick did not denounce the English litigation as forum shopping; it accepted the jurisdiction of the English courts and eventually successfully resolved the claims.⁸³

58. Tanzania does not have government-funded legal aid for civil cases.⁸⁴ The vast majority of legal aid providers are staffed by paralegals or devoted to legal education and assistance in filing documents for indigent claimants so they can represent themselves.⁸⁵

59. Barrick asserts that the plaintiffs can obtain legal representation in Tanzania through legal aid. It tendered evidence of former Chief Justice Othman and Professor Shaidi, both of whom made generalized statements about the availability of legal aid. Former Chief Justice Othman provided a list of legal aid centres in Tanzania, the first being the Legal and Human Rights Centre ("LHRC").⁸⁶ Professor Shaidi identified only LHRC.⁸⁷

⁷⁹ See Othman Report #1, ¶72-81, ABC, vol 2, Tab 47, pp 454-457.

⁸⁰ Kapinga Transcript, qq 10-12, pp 7-8, ABC, vol 2, Tab 58, pp 695-696; Beringer Transcript, qq 173-176, pp 57-58, ABC, vol 2, Tab 56, pp 684-685; Shaidi Transcript, q 264, p 79, ABC, vol 2, Tab 65, p 762.

⁸¹ Bock Transcript, qq 138, 466-478, pp 41, 143-148, ABC, vol 2, Tab 55, pp 632-637.

⁸² Bock Transcript, q 471, p 146, ABC, vol 2, Tab 55, pp 635.

⁸³ 2021 Sustainability, p 84, ABC, vol 1, Tab 23, p 256; Barrick/RAID Correspondence, p 98, ABC, vol 1, Tab 31, p 283; 2020 VPR, p 4, ABC, vol 1, Tab 28, p 275; Bock Transcript, q 479, p 148, ABC, vol 2, Tab 55, p 637.

⁸⁴ Oleshangay Report, ¶22, 86, ABC, vol 1, Tab 36, pp 310, 315; Kambole Report, ¶33, ABC, vol 1, Tab 38, p 361; Expert Report Ulimboka Mwasomola ["Mwasomola Report"], ¶56, ABC, vol 2, Tab 52, p 507.

⁸⁵ Oleshangay Report, ¶22, 90-91, 100, ABC, vol 1, Tab 36, pp 310, 316, 318; Cross-Examination Transcript Ulimboka Mwasomola ["Mwasomola Transcript"], qq 123-126, pp 29-30, ABC, vol 2, Tab 62, pp 734-735.

⁸⁶ Othman Report #1, ¶97, ABC, vol 2, Tab 47, pp 458-459.

⁸⁷ Expert Report Leonard Paulo Shaidi ["Shaidi Report #1"], ¶74(d), ABC, vol 2, Tab 49, p 497.

60. In response, the plaintiffs tendered evidence from lawyers in the legal aid system including Joseph Oleshangay of LHRC. Mr. Oleshangay is responsible for legal aid at LHRC's centre that covers the Mara region where the plaintiffs live.⁸⁸ He deposed that LHRC is, by far, the largest and most established legal aid organization in Tanzania.⁸⁹ There are only two other registered legal aid providers in Mara, neither of which provides legal aid on a daily basis.⁹⁰

61. It is rare for legal aid providers to provide representation by a lawyer through to trial.⁹¹

62. In 2024, LHRC's legal aid budget was \$50,000 USD which it used to provide aid to approximately 20,000 clients.⁹² Mr. Oleshangay handled 4000 claimants in 2023 alone, the majority of whom he merely empowered for self-representation.⁹³ When LHRC does provide litigation counsel, it concentrates on land cases that do not require extensive fact-finding.⁹⁴

63. Mr. Oleshangay deposed:

In my opinion, even if the Plaintiffs seek out legal aid, it is highly unlikely that the legal aid provider would be able to provide legal representation by an Advocate through to trial. Most legal aid providers face overwhelming demand for assistance with only limited resources to respond and therefore focus on empowering and educating litigants to represent themselves. As explained above, LHRC is the largest and most established legal aid provider in the country, and from the nature of the case it would be difficult for the plaintiffs to collect necessary evidence to support the drafting of the case, nor would LHRC have available sufficient resources to guarantee through to trial legal representation.⁹⁵

64. In his reply report, former Chief Justice Othman did not address or rebut Mr. Oleshangay's evidence on legal aid.⁹⁶ Instead, Barrick presented Ulimboka Mwasomola, a junior lawyer, of the

⁸⁸ Oleshangay Report, ¶8, ABC, vol 1, Tab 36, p 308.

⁸⁹ Oleshangay Report, ¶96, ABC, vol 1, Tab 36, p 317.

⁹⁰ Oleshangay Report, ¶84, ABC, vol 1, Tab 36, p 315.

⁹¹ Oleshangay Report, ¶90-108, ABC, vol 1, Tab 36, pp 316-317; see also Mwasomola Transcript, q 123, pp 29-30, ABC, vol 2, Tab 62, pp 734-735.

⁹² Oleshangay Report, ¶102, ABC, vol 1, Tab 36, p 318.

⁹³ Oleshangay Report, ¶105, ABC, vol 1, Tab 36, pp 318-319.

⁹⁴ Oleshangay Report, ¶106, 111, ABC, vol 1, Tab 36, p 319.

⁹⁵ Oleshangay Report, ¶129, ABC, vol 1, Tab 36, p 323.

⁹⁶ Reply Expert Report Mohamed Othman ["Othman Report #2"], ABC, vol 2, Tab 48, pp 465-491.

University of Dar es Salaam Legal Aid Clinic, as a rebuttal witness. His cross-examination evidence showed that:

- a. Most of his clinic's cases had limited or no appearances by a lawyer;⁹⁷
- b. The cases at his clinic included an uncontested adoption order and a dispute over a land purchase agreement, with no examples of complex civil litigation;⁹⁸
- c. His clinic does not act on matters outside the largest city, Dar es Salaam, and has no offices in the Mara region.⁹⁹

65. In cross-examination, former Chief Justice Othman, confirmed that there is a “justice gap” for poor and rural Tanzanians,¹⁰⁰ and Tanzania has tried to “cover the gap between the qualified lawyer and somebody who can give Legal Aid advice” by legislating “paralegals who assist indigent persons in terms of advising them about marriage issues, on inheritance issues, and so on.”¹⁰¹

66. A plaintiff attempting to prosecute a case of this nature in Tanzania would encounter additional challenges not present in Ontario. As confirmed by Barrick's expert, Professor Shaidi, under Tanzanian law, victims' families do not have access to police evidence.¹⁰² The plaintiffs' expert, lawyer Jebra Kambole, deposed that his clients “routinely encounter difficulties obtaining copies of government records such as police reports and hospital records” which “has serious impacts on a lawyer's ability to gather evidence to present a case”.¹⁰³

⁹⁷ Mwasomola Transcript, qq 58-118, 136-137, pp 17-28, 31-32, **ABC, vol 2, Tab 62, pp 722-733, 736-737.**

⁹⁸ Mwasomola Transcript, qq 58-118, pp 17-28, **ABC, vol 2, Tab 62, pp 722-733.**

⁹⁹ Mwasomola Transcript, qq 120-121, 131-134, pp 29, 31, **ABC, vol 2, Tab 62, pp 734, 736.**

¹⁰⁰ Cross-Examination Transcript Mohamed Chande Othman, [“**Othman Transcript**”] qq 42-43, pp 20-21, **ABC, vol 2, Tab 64, pp 750-751.**

¹⁰¹ Othman Transcript, qq 81, p 36, **ABC, vol 2, Tab 64, pp 753.**

¹⁰² Shaidi Report #2, ¶36, **ABC, vol 2, Tab 50, p 501**; Shaidi Transcript qq 75-81, pp 24-26, **ABC, vol 2, Tab 65, pp 757-759.**

¹⁰³ Kambole Report, ¶23-24, **ABC, vol 1, Tab 38, p 358.**

67. Discovery in Tanzania is very limited. There is no equivalent to Ontario Rule 30.02(1) which requires parties to produce all relevant documents,¹⁰⁴ or a requirement to produce documents injurious to a party's legal position.¹⁰⁵ There is no right to oral discovery of a party.¹⁰⁶

68. Barrick's expert Audax Vedasto explained that these restraints are designed to limit the amount of documentary evidence in cases:

Litigation would become far more expensive and time-consuming if every litigant were automatically required to search for, collect, review, disclose and produce every single document in their possession, control or power that may be relevant to any matter in issue. Moreover, doing so is rarely necessary to achieve justice in civil disputes, most of which turn on or involve a relatively small number of documents.¹⁰⁷ [emphasis added]

69. Experts for both parties identified only one legal case ever in Tanzanian courts concerning violence at the North Mara mine; it alleged abuse by *private* security guards not the TPF.¹⁰⁸ That case demonstrates the challenges plaintiffs face in accessing documentary evidence. The Court of Appeal dismissed the case based in part on the plaintiffs' lack of evidence about the attackers' identities. Only three documents were entered into evidence, all by the plaintiff. The mine, as defendant, did not file any documentary evidence or produce any report on the incident.¹⁰⁹

70. There is no evidence that a Tanzanian court can issue letters rogatory to foreign courts to compel witnesses outside Tanzania. Former Chief Justice Othman deposed that the only relevant

¹⁰⁴ Expert Report Audax Vedasto ["Vedasto Report"], ¶20, ABC, vol 2, Tab 53, pp 509; Expert Report Scott Dodson ["Dodson Report"], ¶18, 38, ABC, vol 2, Tab 51, pp 504-505; Oleshangay Report, ¶19, 26, ABC, vol 1, Tab 36, pp 309-311; Kambole Report, ¶14, ABC, vol 1, Tab 38, p 355.

¹⁰⁵ Kambole Report, ¶14, ABC, vol 1, Tab 38, p 355.

¹⁰⁶ Vedasto Report, ¶59, ABC, vol 2, Tab 53, p 510; Kambole Report, ¶18, ABC, vol 1, Tab 38, pp 356-357; Oleshangay Report, ¶20, 55, ABC, vol 1, Tab 36, pp 310, 312; Cross-Examination Transcript Audax Vedasto ["Vedasto Transcript"], q 53-54, p 19, ABC, vol 2, Tab 66, p 766.

¹⁰⁷ Vedasto Report, ¶20, ABC, vol 2, Tab 53, p 509.

¹⁰⁸ Oleshangay Report, ¶193, ABC, vol 1, Tab 36, p 193; Oleshangay Report, Appendix A, Tab 18 (*North Mara Gold Mine Limited v. Emmanuel Mwita Magesa*), ABC, vol 1, Tab 37, pp 327-352; Othman Report #1, ¶113, ABC, vol 2, Tab 47, p 460.

¹⁰⁹ Oleshangay Report, ¶23, 190-191, ABC, vol 1, Tab 36, pp 310, 325.

provision in the Civil Procedure Code does not authorize Tanzanian courts to act because Tanzania has never passed an enabling statute.¹¹⁰

71. The plaintiffs would be unable to compel the crucial evidence of Barrick directors, executives, former employees, and independent consultants who reside outside Tanzania. These include Barrick's CEO (Mauritius);¹¹¹ CFO (Jersey);¹¹² regional COO (South Africa);¹¹³ Group Sustainability Executive (South Africa)¹¹⁴ and his three direct reports (Alberta, British Columbia, England);¹¹⁵ current and former appointees on the NMGML Board (South Africa, England);¹¹⁶ members of the ESG & Nominating Committee (Jersey, United States, South Africa, England, Hungary, Dominican Republic);¹¹⁷ Senior Vice President, Business Assurance, responsible for oversight and implementation of Barrick's human rights compliance (England);¹¹⁸ current regional general counsel (England) and his predecessor (Jersey);¹¹⁹ executive General Counsel (United States);¹²⁰ former regional sustainability lead involved in the 2022 MOU (Côte d'Ivoire);¹²¹ current regional sustainability lead (South Africa);¹²² regional commercial lead involved in replacing private security at North Mara (South Africa);¹²³ and employees in Strategic Matters involved in

¹¹⁰ Othman Report #1, ¶133, 138, **ABC, vol 2, Tab 47, pp 463-464.**

¹¹¹ Beringer Affidavit, ¶20, **ABC, vol 1, Tab 39, p 376.**

¹¹² *Ibid.*

¹¹³ Bock Transcript, q 154, p 45, **ABC, vol 2, Tab 55, p 576.**

¹¹⁴ Beringer Affidavit, ¶1, **ABC, vol 1, Tab 39, p 370.**

¹¹⁵ Beringer Transcript, qq 34-35, pp 16-18, **ABC, vol 2, Tab 56, pp 646-648**; Undertakings, Advise-ments and Refusals Arising from Grant Beringer's Cross-Examination, no 3, p 11, **ABC, vol 2, Tab 67, p 767.**

¹¹⁶ Bock Transcript, qq 294, 306-308, pp 88, 90, **ABC, vol 2, Tab 55, pp 594, 596**; Bock Affidavit ¶8, 26, **ABC, vol 2, Tab 43, pp 407-409.**

¹¹⁷ Beringer Affidavit, ¶20, **ABC, vol 1, Tab 39, p 376**; 2022 AIF, p 182, **ABC, vol 1, Tab 18, p 234**; Bock Transcript, q 268, p 81, **ABC, vol 2, Tab 55, p 587.**

¹¹⁸ Beringer Transcript, qq 115-117, p 41, **ABC, vol 2, Tab 56, p 668**; 2022 AIF, p 52, **ABC, vol 1, Tab 18, p 233.**

¹¹⁹ Lyambiko Transcript, qq 268-271, 437-442, pp 69-70, 108, **ABC, vol 2, Tab 54, pp 533-534, 558.**

¹²⁰ Bock Transcript, qq 138-139, p 41, **ABC, vol 2, Tab 55, p 572.**

¹²¹ Lyambiko Transcript, qq 332-336, pp 83-84, **ABC, vol 2, Tab 54, pp 547-548**; Beringer Transcript, q 44, pp 19-20, **ABC, vol 2, Tab 56, pp 649-650.**

¹²² Beringer Affidavit, ¶26, **ABC, vol 1, Tab 39, p 378.**

¹²³ Bock Transcript, qq 427-430, pp 131-132, **ABC, vol 2, Tab 55, pp 628-629.**

negotiations with the Government of Tanzania (Ontario).¹²⁴ They also include human rights assessors and trainers from Canada and the United States.¹²⁵

72. At the same time, international organizations have raised concerns about attacks on prominent members of the Tanzanian bar. In 2023, the Canadian Bar Association denounced the “harassment and detention of lawyers in Tanzania.”¹²⁶ Human Rights Watch reported that the government’s “suppression of its critics” is a “troubling sign of its low tolerance for dissenting views.”¹²⁷ The Law Society of England and Wales expressed that it was “gravely concerned about attacks on lawyers and the independence of the legal profession in Tanzania”.¹²⁸

73. A prominent example cited by witnesses for both parties is lawyer Tito Magoti, who was employed at LHRC. Mr. Magoti was arrested for over a year without trial and charged with crimes for which bail is unavailable.¹²⁹ Barrick’s witness cited Mr. Magoti’s case as an example of non-bailable offences “being abused by the government to extort people.”¹³⁰ The American Bar Association concluded, “The apparent targeting of citizens, such as Magoti ... for engaging in matters of public interest contributes to a reported climate of fear and self-censorship.”¹³¹ Curiously, the motion judge referred to Mr. Magoti as an affiant in this matter.¹³² He was not.¹³³

¹²⁴ Beringer Transcript, qq 109-111, pp 38-39, **ABC, vol 2, Tab 56, pp 665-666**; Beringer Affidavit, ¶19, **ABC, vol 1, Tab 39, pp 375-376**.

¹²⁵ Beringer Transcript, qq 131, 155-156, pp 45, 50-51, **ABC, vol 2, Tab 56, pp 672, 677-678**.

¹²⁶ Expert Report Donald Omondi Deya [**“Deya Report”**], Exhibit 34, **ABC, vol 1, Tab 34, p 303**.

¹²⁷ Deya Report, Exhibit 39, **ABC, vol 1, Tab 35, pp 304-306**.

¹²⁸ Law Society of England Statement, p 1, **ABC, vol 1, Tab 10, p 192**.

¹²⁹ Kambole Transcript, qq 1045-1051, pp 232-233, **ABC, vol 2, Tab 57, pp 689-690**; Kambole Report, ¶51(c), **ABC, vol 1, Tab 38, p 366**.

¹³⁰ Kapinga Transcript, Exhibit 13, p 51, qq 62-70, pp 19-21, **ABC, vol 2, Tab 58, pp 699-701**; Deya Report, Exhibit 28, **ABC, vol 1, Tab 32, pp 284-297**; Affidavit of Fatma Amani Karume [**“Karume Affidavit”**], ¶28, **ABC, vol 1, Tab 9, p 190**.

¹³¹ Deya Report, Exhibit 28, **ABC, vol 1, Tab 32, pp 284-297**.

¹³² Reasons, ¶117.

¹³³ Kambole Transcript, q 1053, p 233, **ABC, vol 2, Tab 57, p 690**.

74. Mr. Oleshangay deposed that he has received death threats, gone into hiding, and suffered ongoing police harassment into 2024.¹³⁴

75. The Attorney General filed a disciplinary application against Mr. Kambole alleging that a social media post had “seditious intention”.¹³⁵ This caused the ABA to report that Mr. Kambole’s case raised “concerns that the disciplinary proceedings will have a chilling effect on lawyers’ freedom of expression and ability to robustly undertake their professional duties.”¹³⁶

76. Mr. Kambole deposed that in 2023, he was present when a previous president of the Tanganyika Law Society (“Law Society”) reported to police that he had received death threats related to his advocacy against a key government initiative.¹³⁷

77. Boniface Mwabukusi deposed that he was the lead lawyer on a petition in the High Court challenging the same government initiative.¹³⁸ He has been arrested multiple times and threatened with treason charges.¹³⁹

78. Fatma Karume, also a former president of the Law Society, deposed that she represented another Law Society president who was criminally charged with sedition.¹⁴⁰ Her law office was bombed, and no arrests were made.¹⁴¹ Her client survived an assassination attempt and fled the country.¹⁴²

¹³⁴ Oleshangay Report, ¶79, 109-110, **ABC, vol 1, Tab 36, pp 313, 319**; Supplementary Affidavit Joseph Oleshangay, sworn May 6, 2024, ¶2, 7, 24-28, **ABC, vol 1, Tab 13, pp 210-211, 216-217**; Legal and Human Rights Centre Public Statement, **ABC, vol 1, Tab 15, p 222**.

¹³⁵ Kambole Report, ¶52, **ABC, vol 1, Tab 38, pp 366-367**.

¹³⁶ Deya Report, Exhibit 29, p 5, **ABC, vol 1, Tab 33, p 303**.

¹³⁷ Kambole Report, ¶51(e), **ABC, vol 1, Tab 38, p 366**; Kambole Transcript, qq 1061-1065, pp 235-236, **ABC, vol 2, Tab 57, pp 692-693**. See also Shaidi Transcript, qq 110-120, pp 35-36, **ABC, vol 2, Tab 65, pp 760-761**.

¹³⁸ Affidavit Boniface Mwabukusi [“Mwabukusi Affidavit”], ¶4, **ABC, vol 1, Tab 11, p 199**; Cross-Examination Transcript Boniface Mwabukusi [“Mwabukusi Transcript”], q 143, pp 37-38, **ABC, vol 2, Tab 61, pp 715-716**.

¹³⁹ Mwabukusi Affidavit, ¶3, 22-29, **ABC, vol 1, Tab 11, pp 199, 201-202**; Amnesty International Statement, **ABC, vol 1, Tab 12, pp 204-208**; Mwabukusi Transcript, qq 500, 521-522, pp 165, 171-172, **ABC, vol 2, Tab 61, pp 717-720**.

¹⁴⁰ Karume Affidavit, ¶13, **ABC, vol 1, Tab 9, p 186**.

¹⁴¹ Karume Affidavit, ¶15, **ABC, vol 1, Tab 9, p 187**; Cross-Examination Transcript Fatma Karume, qq 177-178, p 51, **ABC, vol 2, Tab 60, p 713**.

¹⁴² Karume Affidavit, ¶16, 18, **ABC, vol 1, Tab 9, pp 187-188**.

79. The motion judge ignored this evidence entirely. Instead, at the invitation of the defendant, he engaged in the re-litigation of professional disciplinary proceedings brought against Ms. Karume and Mr. Mwabukusi without referencing these serious attacks against lawyers.¹⁴³

PART III -ISSUES & THE LAW

A. Standard of review

80. The applicable standard of review was set out by this Court in *Kyko Global Inc. v. M/S Crawford Bayley & Co.*, following *Haaretz*:

The application of *forum non conveniens* is an exercise of discretion reviewable in accordance with the principle of deference to discretionary decisions. An appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision. Errors of law and clear and serious errors of fact may also give grounds for intervention. [citations omitted]¹⁴⁴

B. Errors

81. In this case, the motion judge committed a serious error of fact in placing Barrick's headquarters in Vancouver instead of Toronto, and an error of law in applying the wrong jurisdictional test.

82. He applied the wrong evidentiary standard to the FNC motion, improperly reframed the case as a mere negligence claim, misapprehended the legal and factual significance of Barrick's global human rights and security policies, and failed to take account of the plaintiffs' evidence on the serious limitations of Tanzania's legal aid system.

¹⁴³ Reasons, ¶111-120.

¹⁴⁴ *Kyko Global Inc v M/S Crawford Bayley & Co*, [2021 ONCA 736](#), ¶ 14 [*Kyko*].

C. Jurisdiction *Simpliciter*

83. The motion judge erroneously found that Barrick’s head office is in Vancouver.¹⁴⁵ Although Barrick has a registered office in Vancouver, its head office has always been in Ontario,¹⁴⁶ as detailed above.

84. As the Supreme Court of Canada made clear in *Van Breda*, “a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).”¹⁴⁷

85. In the lower court, the plaintiffs were clear that they were relying on Barrick’s head office being in Ontario as the first ground for establishing traditional, presence-based jurisdiction.¹⁴⁸ The motion judge erred in law by conflating presence-based jurisdiction and assumed jurisdiction,¹⁴⁹ and in applying the real and substantial connection test despite *Van Breda*’s clear language that the “real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.”¹⁵⁰

86. Even if Barrick were headquartered outside Ontario, presence-based jurisdiction is still established over an out-of-province corporate defendant that is “carrying on business” in Ontario at the time of the action.¹⁵¹ This is defined by the Supreme Court of Canada in *Chevron* as “some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time.”¹⁵² The Court found that maintenance of physical

¹⁴⁵ Reasons, ¶4.

¹⁴⁶ 2022 AIF, p 15, ABC, vol 1, Tab 18, p 232; 2021 AIF, p 15, ABC, vol 1, Tab 19, p 237; 2020 AIF, p 15, ABC, vol 1, Tab 20, p 240.

¹⁴⁷ *Club Resorts Ltd v Van Breda*, 2012 SCC 17, ¶ 86 [*Van Breda*].

¹⁴⁸ Plaintiffs’ Factum, ¶88-95, ABC, vol 2, Tab 69, pp 846-848.

¹⁴⁹ Reasons, ¶136-138. On the difference between presence-based and assumed jurisdiction, see *HMB Holdings Ltd v Antigua and Barbuda*, 2021 SCC 44, ¶ 39-40.

¹⁵⁰ *Van Breda*, ¶ 79.

¹⁵¹ *Chevron Corp v Yaiguaje*, 2015 SCC 42, ¶ 85 [*Chevron*]. See also *Vale Canada Limited v Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862, ¶ 85.

¹⁵² *Chevron*, ¶ 85.

business premises (a “bricks and mortar office”) was sufficient.¹⁵³ Barrick has conceded that it is carrying on business in Ontario “because it maintains a corporate office in Toronto.”¹⁵⁴

87. *Chevron* makes clear that where presence-based jurisdiction is established, the courts do not examine whether jurisdiction has been rebutted through the real and substantial connection test:

As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant’s presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists. In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case. [citations omitted] [emphasis added]¹⁵⁵

88. By operating a place of business in Ontario, Barrick, like Chevron Canada, should have “expected that it might one day be called upon to answer to an Ontario court’s request that it defend against an action.” In those circumstances, “the Ontario courts have an interest in the defendant and the disputes in which it becomes involved.”¹⁵⁶

D. *Forum Non Conveniens*

89. Barrick has the burden of showing “that the alternative forum is clearly more appropriate” for the fair and efficient resolution of the dispute.¹⁵⁷ The burden on a defendant is high.¹⁵⁸ It is not a matter of flipping a coin.¹⁵⁹ Where a court has jurisdiction, the normal state of affairs is for the court to exercise that jurisdiction.¹⁶⁰

¹⁵³ *Ibid.*, ¶ 85-86.

¹⁵⁴ Defendant’s Factum, ¶43, **ABC, vol 1, Tab 68, pp 787**. See also Beringer Affidavit, ¶11, **ABC, vol 1, Tab 39, p 374**.

¹⁵⁵ *Ibid.*, ¶ 87. See also *778938 Ontario Limited v EllisDon Corporation*, [2023 ONCA 182](#), ¶ 12, fn 1.

¹⁵⁶ *Chevron*, ¶ 89.

¹⁵⁷ *Van Breda*, ¶ 108.

¹⁵⁸ *Black & McDonald Limited v Eiffage Innovative Canada Inc.*, [2023 ONCA 91](#), ¶ 27.

¹⁵⁹ *Van Breda*, ¶ 109.

¹⁶⁰ *Ibid.*

90. There is no definitive list of factors on a *forum non conveniens* motion; rather, parties may raise “diverse facts, considerations and concerns”.¹⁶¹ The doctrine “focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient.”¹⁶² In this case, the key factors are access to justice through representation by experienced and well-resourced legal counsel, access to sources of proof, and enforcement of an eventual judgment.

(i) The motion judge erred in applying a summary judgment “best evidence” standard

91. In *Young v. Tyco International of Canada Ltd.*, this Court cautioned that “because a forum non conveniens motion typically is brought early in the proceedings, the motion judge should adopt a prudential, not an aggressive, approach to fact finding.”¹⁶³ In particular, the motion judge should not draw conclusions or make findings on important factual or legal disputes relating to the merits.¹⁶⁴

92. Notwithstanding this, here the motion judge applied an evidentiary standard reserved for summary judgment motions:

[O]ne can surmise that this record contains the Plaintiffs’ best evidence.... As in a summary judgment proceeding, the Court is “entitled to proceed on the basis that the parties have put into the record all [or at least *some*] of the evidence that would be forthcoming at trial”. [citations omitted] [emphasis in original]¹⁶⁵

93. The motion judge added the parenthetical “or at least *some*” which does not exist in the summary judgment case he cited, *Switzer v. Petrie*.¹⁶⁶

¹⁶¹ *Ibid.*, ¶ 105, 110.

¹⁶² *Ibid.*, ¶ 105.

¹⁶³ *Young v Tyco International of Canada Ltd.*, [2008 ONCA 709](#), ¶ 31 [*Tyco*].

¹⁶⁴ *Ibid.*

¹⁶⁵ Reasons, ¶ 34-35.

¹⁶⁶ *Switzer v Petrie*, [2024 ONCA 474](#), ¶ 8.

94. The invocation of the evidentiary standard for summary judgment is confounding because the merits of the underlying action are not in issue on this motion. Nonetheless, the motion judge appears to have ruled that each of the 29 named plaintiffs were required to provide affidavits regarding their knowledge of the underlying events giving rise to the claims asserted in order to provide “context”. But as *Haaretz* made clear, it is the pleadings which frame the case and provide context for the analysis of the assumption and exercise of jurisdiction:

It is well established that the statement of claim, which in this case was amended by experienced counsel, defines the issues and informs the opposing parties of the case they have to meet. It frames the action for the purposes of analysing the assumption and exercise of jurisdiction. [citations omitted]¹⁶⁷

95. Accordingly, the plaintiffs’ evidence was directed at the challenges faced by members of the local community in pursuing accountability through the courts of Tanzania, not the merits of all 29 claims.

96. At the same time, the motion judge did not hold Barrick to the same standard. The evidence on this motion established that Barrick has access to extensive CCTV footage and police reports on shootings at the mine but the motion judge took no issue with Barrick’s failure to bring any of this evidence forward.

(ii) The motion judge erred in characterizing the plaintiffs’ claims as a personal injury case and failing to take into account the human rights context

97. The pleadings advance clearly defined claims for aiding and abetting breaches of customary international law based on *Nevsun*.

98. Nonetheless, the motion judge characterized the case as “essentially a negligence claim”.¹⁶⁸ Though he acknowledged that the claims are “articulated in the language of human

¹⁶⁷ *Haaretz.com v Goldhar*, [2018 SCC 28](#), ¶ 21 [*Haaretz*].

¹⁶⁸ Reasons, ¶[37](#), [77](#).

rights law” he still rejected the proper context of the case, finding that a “trial in Ontario ... would focus its efforts on platitudes about human rights and corporate responsibility without delving into the actual facts at issue in the claim.”¹⁶⁹

99. He minimized the legal significance of the *Nevsun*-based claims, describing them as a nuanced development in Canadian tort law of limited import in the FNC analysis:

If contingency fee arrangements are relatively new introductions to the Ontario civil litigation system, claims based on international law are even more recent. *Nevsun*, the Plaintiff’s source for the claim, was only decided by the Supreme Court in 2020. The *forum non conveniens* analysis does not size up the substantive law in the competing jurisdictions in order to measure whether the foreign law is keeping up with every new nuance announced by the Canadian courts. The pre-2020 law of Ontario was perfectly capable of trying a case alleging wrongful death by the police, and the post-2020 law of Tanzania is equally capable.¹⁷⁰

100. In fact, the Supreme Court of Canada signaled in *Nevsun* that traditional tort law may not provide an adequate foundation upon which to vindicate internationally recognized human rights:

Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical “private law action in the nature of a tort claim”. The objectives associated with preventing violations of jus cogens and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches. [citations omitted]¹⁷¹

101. Notwithstanding this, the motion judge appears to have pre-judged the merits of the customary international law claims for aiding and abetting torture and extra-judicial killings by making a merits finding that “no corporation, including a global giant like Barrick, is responsible

¹⁶⁹ Reasons, ¶169.

¹⁷⁰ Reasons, ¶99.

¹⁷¹ *Nevsun*, ¶129.

for violence and/or deaths caused by others or contributorily caused by the claimants themselves.”¹⁷²

102. By reframing the case as essentially a claim purely in “negligence” and pre-judging claims for breach of customary international law, the motion judge fundamentally altered the contextual lens through which issues of fairness and efficiency in the exercise of jurisdiction are to be assessed.

103. In *Garcia*, the BC Court of Appeal overturned the lower court’s dismissal of a similar case on FNC grounds. Like this case, *Garcia* involved the shooting of individuals near a mine. The BCCA held that, among other errors, the motion judge had, “erred by ignoring the context of this dispute”.¹⁷³ As per the BCCA, “the context of this claim involves a transnational company embroiled in human rights violations [and ...] the context of the dispute should be taken into consideration.”¹⁷⁴

104. Here, by reframing the case as a simple personal injury matter devoid of a human rights context, the motion judge found the plaintiffs are not disadvantaged by being deprived of the counsel of their choice in their forum of choice (Ontario) but instead, he found it fair that the plaintiffs should proceed in Tanzania with whatever limited legal resources may be provided by legal aid.

(iii) The motion judge erred in analyzing fairness to the plaintiffs

105. As part of the FNC analysis, the motion judge was required to assess whether the plaintiffs faced a real risk of unfairness in the foreign court process. The “real risk” test is the Canadian

¹⁷² Reasons, ¶170. A jurisdiction motion is “not the appropriate proceeding for scrutinizing in detail the adequacy of the pleadings, nor is it the proper place for engaging in a rigorous assessment of whether the plaintiff’s claim will ultimately succeed” (*Ontario (Attorney General) v Rothmans Inc*, [2013 ONCA 353](#), ¶ 118).

¹⁷³ *Garcia*, ¶ 130.

¹⁷⁴ *Ibid*, ¶ 107.

approach set by the BC Court of Appeal in *Garcia*¹⁷⁵ and closely aligns with the well-developed UK approach.¹⁷⁶

106. The motion judge was of the view that the risk of unfairness only arises where the alternative forum is a “non-democratic, non-rule of law country” like Eritrea.¹⁷⁷ But the UK courts consider access to experienced, well-resourced counsel to be a significant factor in the application of this test even where the foreign court has well established procedures for litigation.

107. The UK Supreme Court in *Vedanta*, in upholding the lower court’s determination that an English case should not be dismissed in favour of Zambia, pointed to the lack of case financing and access to experienced counsel as critical “substantial justice” and “access to justice” factors:

In the present case the judge described this as an “access to justice” issue. By this he meant that the real risk (in his view a probability) that substantial justice would be unavailable in Zambia had nothing to do with any lack of independence or competence in its judiciary or any lack of a fair civil procedure suitable for handling large group claims. Rather, it derived essentially from two factors: first, the practicable impossibility of funding such group claims where the claimants were all in extreme poverty; and secondly, the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively, in particular against a defendant (KCM) with a track record which suggested that it would prove an obdurate opponent.¹⁷⁸

108. The UKSC found that although the connecting factors favoured Zambia,¹⁷⁹ this did not overcome the access to justice hurdles.

109. Similarly, the Court of Appeal of England and Wales recently overturned a lower court’s dismissal on FNC grounds of a case brought against UK corporations for alleged abusive labour practices at their factories in Malaysia.¹⁸⁰ The lower court had found Malaysia the preferable forum in part because partial contingency fee agreements were permitted.¹⁸¹ The Court of Appeal rejected

¹⁷⁵ *Ibid*, ¶ 115.

¹⁷⁶ *Ibid*, ¶ 124-126; [Vedanta](#) ¶88.

¹⁷⁷ Reasons, ¶172.

¹⁷⁸ [Vedanta](#), ¶89.

¹⁷⁹ [Vedanta](#), ¶85.

¹⁸⁰ [Limbu and others \(Respondents\) v Dyson Technology Limited and others](#), [2024] EWCA Civ 1564.

¹⁸¹ [Limbu](#), ¶29

this, concluding that where there is “a huge imbalance between the impoverished and vulnerable claimants and the well-resourced and commercially experienced defendants, and the allegations are of very serious human rights abuses, there is a particular need to ensure equality of arms in the conduct of litigation if justice is to be served.”¹⁸²

110. Notwithstanding the possibility of partial contingency fees, funding from NGOs, and undertakings by the defendants in Malaysia, the Court of Appeal concluded:

Accordingly the claimants will not be able to bring the claims in Malaysia. At the lowest there is a serious risk that that is the case.... This is not in any sense a criticism of the Malaysian justice system, for which this court has the highest regard, but arises out of the particular and unusual features of the case.¹⁸³

111. In contrast, here the motion judge considered it fair that the plaintiffs be required to seek legal representation through legal aid to pursue the case in Tanzania.

112. The motion judge focused the fairness analysis almost exclusively on unfairness to Barrick in potentially being unable to compel Tanzanian witnesses – particularly police – to testify in Ontario,¹⁸⁴ concluding that “Tanzania sits in the same position with respect to letters of request as Israel did in the *Haaretz* case.”¹⁸⁵

113. This case is factually distinct from *Haaretz*. There are no reported cases addressing the power of Tanzanian courts to enforce foreign letters of request.¹⁸⁶ The evidence of former Chief Justice Othman indicated that it is “highly uncertain” and “unlikely” that Tanzanian courts would assist a foreign court.¹⁸⁷

¹⁸² *Limbu*, ¶59

¹⁸³ *Limbu*, ¶63.

¹⁸⁴ Reasons, ¶125-126, 164.

¹⁸⁵ Reasons, ¶126.

¹⁸⁶ Othman Report #1, ¶125, ABC, vol 2, Tab 47, p 462; Shaidi Report #1, ¶72-73, ABC, vol 2, Tab 49, pp 494-495.

¹⁸⁷ Othman Report #1, ¶124, ABC, vol 2, Tab 47, pp 462.

114. In sharp contrast to *Haaretz*,¹⁸⁸ Barrick presented no evidence about Tanzanian witnesses that clearly shows: a) their identities, b) how many there are, c) that they would be unwilling to cooperate with the case in Ontario by appearing voluntarily, or d) whether their evidence is needed in light of other evidence, including CCTV footage and Barrick's access to police records.

115. In *Haaretz*, the court had concrete evidence that specific witnesses would not testify voluntarily in Ontario.¹⁸⁹

116. Additionally, as particularized above, the motion judge did not weigh this factor against the plaintiffs' inability to compel key Barrick witnesses outside Tanzania.

117. As pleaded, this is a complex transnational human rights case in which the plaintiffs seek accountability from a "giant" Canadian corporation in the courts of its home jurisdiction. It cannot realistically be litigated using the limited legal resources that may be available in Tanzania's overstressed legal aid system. Barrick did not meet its burden of establishing that it is fairer to proceed in Tanzania.

PART IV - ORDER REQUESTED

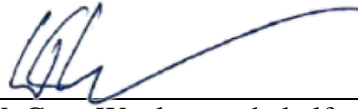
118. The plaintiffs respectfully request:

- a. An order allowing this appeal; setting aside the decision of the motion judge; and dismissing Barrick's motion seeking an Order dismissing or permanently staying this proceeding on the basis that the Court lacks jurisdiction, and Barrick's motion seeking an Order dismissing or permanently staying this proceeding on the basis of the doctrine of *forum non conveniens*;
- b. An order for costs of this appeal.

¹⁸⁸ *Haaretz*, ¶ 54, 63. See also *Kyko*, ¶ 40.

¹⁸⁹ *Haaretz*, ¶ 63.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May, 2025.



W. Cory Wanless on behalf of counsel for
the appellants

**PHILLIPS BARRISTERS
PROFESSIONAL CORPORATION**

36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5
Tel: 647-261-4486

**John Kingman Phillips (LSO No.:
8295/46206E)**

john@phillipsbarristers.ca

W. Cory Wanless (LSO No.: 57288M)

cory@phillipsbarristers.ca

Patti Shedden (LSO No.: 46210W)

patti@phillipsbarristers.ca

CFM LAWYERS LLP

400-856 Homer Street
Vancouver, BC V6B 2W5
Tel: (604) 689-7555

Joe Fiorante, K.C.

(LSBC #9197/LSO # 863420)

jfiorante@cfmlawyers.ca

Jen Winstanley (LSBC #508967)

jwinstanley@cfmlawyers.ca

Lawyers for the Plaintiffs/Appellants

Court of Appeal File No. COA-25- CV-0229
Court File No. CV-22-00-690649-0000
Court File No. CV-24-00-714148-0000

COURT OF APPEAL OF ONTARIO

B E T W E E N :

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA

Plaintiffs
(Appellants)

and

BARRICK GOLD CORPORATION

Defendant
(Respondent)

And Between

ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA W ANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI

Plaintiffs
(Appellants)

and

BARRICK GOLD CORPORATION

Defendant
(Respondent)


CERTIFICATE

I estimate that 2.5 hrs will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required. The factum complies with the Order of Justice Simmons issued on May 1, 2025. There are 10,634 words in Parts I to V.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT Toronto, Ontario this 2nd day of May, 2025.

Date May 2, 2025



Signature

SCHEDULE “A” - JURISPRUDENCE

Tab	Title	Pinpoints
1	<u><i>Nevsun Resources Ltd v Araya</i></u> , 2020 SCC 5	1, 129
2	<u><i>Choc v Hudbay Minerals Inc</i></u> , 2013 ONSC 1414	
3	<u><i>Garcia v Tahoe Resources Inc</i></u> , 2017 BCCA 39	107, 115, 124-126, 130
4	<u><i>Kyko Global Inc v M/S Crawford Bayley & Co</i></u> , 2021 ONCA 736	14, 40
5	<u><i>Club Resorts Ltd v Van Breda</i></u> , 2012 SCC 17	79, 86, 105, 108- 110
6	<u><i>HMB Holdings Ltd v Antigua and Barbuda</i></u> , 2021 SCC 44	39-40
7	<u><i>Chevron Corp v Yaiguaje</i></u> , 2015 SCC 42	85-87, 89
8	<u><i>Vale Canada Limited v Royal & Sun Alliance Insurance Company of Canada</i></u> , 2022 ONCA 862	85
9	<u><i>778938 Ontario Limited v EllisDon Corporation</i></u> , 2023 ONCA 182	12
10	<u><i>Black & McDonald Limited v Eiffage Innovative Canada Inc</i></u> , 2023 ONCA 91	27
11	<u><i>Young v Tyco International of Canada Ltd</i></u> , 2008 ONCA 709	31
12	<u><i>Switzer v Petrie</i></u> , 2024 ONCA 474	8
13	<u><i>Haaretzcom v Goldhar</i></u> , 2018 SCC 28	21, 54, 63
14	<u><i>Ontario (Attorney General) v Rothmans Inc</i></u> , 2013 ONCA 353	118

SCHEDULE "B" - LEGISLATION

N/A

SOPHIA MATIKO
JOHN et al.
Plaintiffs/Appellants

-and- BARRICK GOLD CORPORATION
Defendant/Respondent

Court of Appeal File No. COA-25- CV-0229
Court File No.: CV-22-00-690649-0000
Court File No. CV-24-00-714148-0000

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE PLAINTIFFS (APPELLANTS)

CFM LAWYERS LLP

#400-856 Homer Street
Vancouver, BC V6B 2W5

JOE FIORANTE, K.C. (LSO #863420)

jfiorante@cfmlawyers.ca
Tel: (604) 689-7555

PHILLIPS BARRISTERS PROFESSIONAL CORPORATION

36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5

W. Cory Wanless

cory@phillipsbarristers.ca
Tel: 647.261.4486

Lawyers for the Plaintiffs/ Appellants