

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**MARGARITA CAAL CAAL, ROSA ELBIRA COC ICH,
OLIVIA ASIG XOL, AMALÍA CAC TIUL,
LUCIA CAAL CHÚN, LUISA CAAL CHÚN,
CARMELINA CAAL ICAL, IRMA YOLANDA CHOC CAC,
ELVIRA CHOC CHUB, ELENA CHOC QUIB and
IRMA YOLANDA CHOC QUIB**

Plaintiffs

and

**HUBBAY MINERALS INC. and
HMI NICKEL INC.**

Defendants

AMENDED THIS June 1/15 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT A
 RULE/LA RÈGLE 26.02
 THE ORDER OF Master Colubstein
L'ORDONNANCE DU
DATED / FAIT LE 2 Oct. 9/14
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

AMENDED STATEMENT OF DEFENCE

1. The defendants admit the allegations contained in paragraphs numbered 16, 17, 18, 20 (to the extent of the first sentence), 21, 22, 49 (although the full news release is not pleaded), 58 (to the extent of the extract from the January 10, 2007 press release), 79 (to the extent of the first two sentences) and 86 (to the extent that Skye Resources Inc. (“**Skye**”) had a policy document titled “Skye’s Social and Environmental Commitment”) of the Amended Statement of Claim.

2. The defendants deny the allegations contained in paragraphs numbered 1 to 14, 19 (save to admit that at all material times, Compañia Guatemalteca De Niquel S.A. (“**CGN**”) was a subsidiary of Skye), 23, 24 (save to admit that Mynor Ronaldo Padilla Gonzáles (“**Padilla**”) was employed by CGN as the head of security at the Fenix

Project), 25 to 38 (save to say that in September 2006, individuals self-identifying as Mayan Q'eqchi' invaded and occupied lands owned by CGN), 39 to 41 (save to admit the accuracy of the names and job titles in (a) through (c) and (e) through (g)), 42 to 44 (save to admit that Sergio Monzon as the president of CGN was ultimately responsible for overseeing the hiring, training, equipping and monitoring of security personnel for the Fenix Project), 45 to 48, 52 to 56 (save to admit that Skye issued a press release on January 8, 2007 respecting the evictions), 57, 59 to 75, 77, 78, 80 (save to admit that the text quoted comes from the April 2006 IFC Performance Standards), 81 (save to admit that the quoted text comes from the Voluntary Principles on Security and Human Rights), 82 to 84 and 87 to 105 of the Amended Statement of Claim.

3. The defendants have no knowledge of the allegations contained in paragraphs numbered 15, 50, 51, 76, 79 (third sentence only) and 85 of the Amended Statement of Claim.

4. Given the allegations in the Amended Statement of Claim, the proper law governing liability and damages is the law of British Columbia.

The Defendants

5. On January 17, 2007, the defendant, HMI Nickel Inc. ("**HMI**") was operating as Skye, an independent Canadian holding company. CGN was a subsidiary of Skye. Skye was unrelated to the defendant, HudBay Minerals Inc. ("**HudBay**").

6. HudBay acquired Skye, and Skye became HMI, in August 2008. In August 2011, HudBay and HMI amalgamated and continued as HudBay. As a result of

that amalgamation, HudBay acquired the liabilities of Skye, including those allegedly arising from the matters set out in the Amended Statement of Claim.

The Fenix Project

7. CGN is a mining company incorporated in 1960 under the laws of Guatemala. In December 15, 2004, INCO Limited (now VALE INCO) transferred a majority interest in CGN (then named Exploraciones y Explotaciones Mineras Izabel, S.A. d/b/a EXMIBAL) to Skye. Over time, Skye's ownership interest increased to 98%, the remainder being owned by the Government of Guatemala. In or about January 2007, CGN employed approximately 100 individuals. Skye had fewer than 20 employees, including corporate officers.

8. At all material times, CGN's head office was located in Guatemala City, Guatemala. CGN, as well as a subsidiary and an affiliate, owned property located in the Departments of Izabal and Alta Verapaz in eastern Guatemala (the "**CGN Property**"), where CGN carried on business. The Government of Guatemala granted title to what is now the CGN Property by Presidential Decree over 100 years ago.

9. CGN's principal project was the development of a ferro-nickel mine on the CGN Property (the "**Fenix Project**"). The Fenix Project plant and administrative offices were located on CGN Property in and around El Estor in eastern Guatemala.

Unlawful Occupations

10. Beginning in the fall of 2006, several groups of individuals self-identifying as Mayan Q'eqchi' began illegally invading and occupying the CGN Property. In Guatemala, such illegal invasions are frequently employed as a strategy to extract land from private companies or the government. The occupations of the CGN

Property were encouraged and facilitated by national and local non-governmental organizations.

11. “Manto IV” in “Lot 8” (“Lote Ocho” in Spanish) was one of several locations on the CGN Property which was illegally occupied. Lot 8 comprises more than 1000 hectares and is at the most westerly boundary of the CGN Property. Manto IV is an area that contains one of the Fenix Project’s nickel deposits. Manto IV lies largely within Lot 8 but also extends into Cahaboncito Norte, another parcel of land owned by a CGN affiliate.

12. The Manto IV/Lot 8 occupiers came from a local community located just beyond the borders of the CGN Property. In the Manto IV/Lot 8 area, the occupiers created a “community” by planting a few crops and by erecting rudimentary dwellings and a place for group meetings. The occupiers numbered in excess of 80. They would neither vacate the CGN Property voluntarily, nor engage in any discussions with CGN.

Court-Ordered and State-Implemented Evictions

13. The illegal occupation of property is a criminal offence in Guatemala. Instead of pursuing an eviction privately using its security personnel, CGN filed a complaint with the Public Prosecutor’s Office.

14. After investigating the complaint, the Public Prosecutor’s Office initiated court proceedings. Ultimately the Public Prosecutor’s Office obtained eviction orders related to the CGN Property. The occupiers were represented by legal counsel and participated in the court proceedings by, among other things, filing appeals and applications for an *amparo* (an injunction-like remedy).

15. The court eviction orders gave the Public Prosecutor's Office the authority to remove the occupiers and to dismantle any structures they had erected on the CGN Property. Under Guatemalan law, the enforcement of an eviction order is carried out by the prosecutor with the support of the National Civil Police and, if necessary, the National Army. Private security personnel are not used by the prosecutor to remove occupiers from land when eviction orders are enforced.

16. The Guatemalan prosecutor, assisted by the Guatemalan National Civil Police and the National Army, conducted two evictions of the illegal occupiers from the Manto IV/Lot 8 site. The first eviction took place on January 9, 2007. Because some of the illegal occupiers returned, a second eviction took place on January 17, 2007.

(i) January 9, 2007

17. During the January 9, 2007 eviction, the Guatemalan prosecutor was assisted by a large number of National Civil Police officers and National Army soldiers. No uniformed private security defined by the plaintiffs as the "Fenix Security Personnel" attended at, or participated in, the court-ordered and state-implemented eviction as alleged in paragraph 57 of the Amended Statement of Claim.

18. Governmental observers, representatives of a local non-governmental organization (La Defensoria Q'eqchi'), and members of the press were all present during the January 9, 2007 eviction.

19. The illegal occupiers ultimately vacated the area. The structures that they had erected on CGN property were removed. Contrary to the allegations in paragraphs 57, 59 and 87 of the Amended Statement of Claim, the police officers and army soldiers

implemented the eviction peacefully and without the use of undue force. None of the occupiers was physically injured during the eviction.

(ii) January 17, 2007

20. Within days after the first eviction, rudimentary huts began to reappear at Manto IV/Lot 8. The illegal occupiers who returned would have known that their actions were illegal and would lead to another eviction.

21. On January 17, 2007, a second eviction was carried out by the Guatemalan prosecutor who was assisted by officers from the National Civil Police and soldiers from the National Army totaling some 100 personnel.

22. Contrary to paragraphs 62, 63, 64 and 68 to 75 of the Amended Statement of Claim, on January 17, 2007 a large group of police officers, army soldiers and uniformed Fenix Security Personnel did not separate into smaller groups of up to twelve men, trap or seize one of the plaintiffs and physically assault and gang rape her.

22A. Contrary to paragraph 65 of the Amended Statement of Claim, Rosa Elbira Coc Ich was not sexually assaulted by a group of nine men that included several uniformed Fenix Security Personnel on January 17, 2007.

22B. Contrary to paragraph 66 of the Amended Statement of Claim, Margarita Caal Caal was not assaulted and raped by a group of ten men that included Fenix Security Personnel on January 17, 2007.

22C. Contrary to paragraph 67 of the Amended Statement of Claim, on January 17, 2007 Irma Yolanda Choc Cac was not seized by four uniformed Fenix Security Personnel, four police officers and four army soldiers and raped.

23. [removed] No uniformed Fenix Security Personnel attended at, or participated in, the January 17, 2007 eviction. The court-ordered and state-implemented eviction was carried out peacefully and without undue force.

24. None of the illegal occupiers are believed to have been present at the Manto IV/Lot 8 occupation site during the January 17, 2007 eviction. Certainly, no women were observed to be present by the prosecutor and his team of police officers and army soldiers.

25. After the rudimentary structures that had been erected by the occupiers were dismantled, the prosecutor and his team left the area.

Compensation

26. As part of its ongoing efforts to engage with the communities that occupied CGN Property and to resolve the land conflict, CGN initiated a process to provide financial assistance arising from the loss of housing materials and goods the occupiers claimed were caused by the evictions.

27. Within a month of the January 2007 evictions, eighty-four occupiers from the Manto IV/Lot 8 site received a total compensation of Q140,650 (equivalent to approximately US\$19,500). The negotiations between CGN and the occupiers from the Manto IV/Lot 8 site were cordial. During the compensation process, the Manto IV/Lot 8 leaders who negotiated the financial package gave no indication that the horrific gang rapes, now alleged to have taken place, had occurred during the January 17, 2007 eviction.

28. To date, none of the plaintiffs has made a complaint to the Public Prosecutor's Office in Guatemala.

Other Evictions from the CGN Property

29. Contrary to paragraph 91 of the Amended Statement of Claim, the January 8 and 9, 2007 court-ordered and state-implemented evictions were widely publicized and observed, monitored and filmed by government agencies, local and international activists and NGOs, and local and international media.

30. To the extent that any structures illegally erected on CGN property were burned down as alleged in paragraphs 57, 59 and 87 of the Amended Statement of Claim, this was done either on the instruction of the prosecutor as the means to remove the grass roof of an illegal structure, by youth gangs in the area, or by supporters of the occupiers as a political act. The evictions were carried out peacefully and without violence. As set out above, the occupiers were compensated for the loss of housing materials and chattels.

31. Contrary to the allegations in paragraph 55 of the Amended Statement of Claim, there were no forced or other evictions of individuals illegally occupying CGN Property in November 2006. Those occupiers ultimately choose to evacuate the CGN Property voluntarily, after setting fire to the CGN community relations office, the Tz'un'un Ha' Hospital and other buildings.

No Corporate Responsibility

32. As set out above, the defendants deny that the alleged gang rapes occurred, or in the alternative, that any member of the Fenix Security Personnel was in any way involved with such criminal conduct.

(a) No Vicarious Liability

33. In the alternative, to the extent, as the plaintiffs allege, that any member of the Fenix Security Personnel employed by CGN participated in the alleged gang rapes, such conduct would not have been an unauthorized mode of providing assistance to the prosecutor in enforcing an eviction order, but rather an entirely unforeseeable event, with the result that the imposition of vicarious liability would not be justified as a matter of law.

(b) No Liability for the Conduct of Integración Total S.A.

34. To the extent, as the plaintiffs allege, that this criminal conduct was committed by members of Integración Total S.A. carrying on business as Delta Elite (“Delta”), such conduct was entirely unforeseeable, and in any event, Delta was an independent contractor for whose acts neither CGN nor Skye was in law liable.

(c) No Basis to Pierce the Corporate Veil and No Negligence

35. In the further alternative and, in any event, contrary to the allegations set out in paragraphs 100 to 104 of the Amended Statement of Claim, Skye, and consequently HudBay and HMI, have no liability in law for the alleged criminal conduct of the Fenix Security Personnel for the reasons set out in paragraphs 36 to 48 below.

36. CGN was a separate corporate entity, independent from Skye. CGN was not controlled by Skye as alleged in paragraphs 19 and 40 of the Amended Statement of Claim. All of the allegations in the Amended Statement of Claim notwithstanding, no tenable basis has been pleaded to pierce the corporate veil.

37. CGN was not an agent of Skye. As a matter of fact and law, in carrying out its operations in Guatemala, CGN neither had the authority, or held itself out as

having the authority, to conduct business on Skye's behalf, nor did Skye control CGN's actions.

38. Skye, as the parent company of CGN, owed no duty of care to the plaintiffs sounding in negligence.

39. Nothing in any of the multitude of allegations contained in the Amended Statement of Claim as a matter of fact or law constituted Skye's acknowledgment or acceptance of control over (a) the hiring, retention, equipping, training or supervision of the Fenix Security Personnel, or (b) CGN's interaction with members of the plaintiffs' community respecting the occupation of CGN Property, such as to create a duty of care owed by Skye to the plaintiffs.

40. Contrary to the allegations contained, *inter alia*, in paragraphs 77 to 86 of the Amended Statement of Claim, Skye's public statements regarding, for example, its commitment to the Voluntary Principles on Human Rights and Security and other corporate social responsibility principles including its support for building relationships with local stakeholders as a matter of general corporate policy, did not constitute an acknowledgment or acceptance of control, nor did it create a duty of care, as the plaintiffs allege.

41. Even though it may have been the fact that (a) the Fenix Project was financed by Skye, (b) Skye provided oversight or input into the general operations or policies of the Fenix Project, (c) individuals held executive or director positions at Skye and CGN, or (d) Skye contracted directly with third party contractors (as alleged in paragraph 47 of the Amended Statement of Claim), as a matter of law, none of those

facts, either separately or together could form a basis to pierce the corporate veil, or to constitute the acknowledgment or acceptance of control by Skye as the plaintiffs allege.

42. With regard to, (a) the hiring, equipping, training and supervision of security personnel employed by CGN, and (b) the retention of Delta to provide security services as an independent contractor, neither CGN nor any of its representatives (including Sergio Monzon) were negligent. Contrary to paragraphs 28, 29, 88 and 89 of the Amended Statement of Claim, CGN and Delta complied with the applicable governmental authorizations, registrations and licenses respecting security services related to the Fenix Project.

43. Furthermore, CGN's management took all reasonable steps to ensure that the security personnel employed or retained by CGN would conduct themselves at all times with maximum restraint, and in accordance with CGN's security protocols and procedures. CGN's security protocols and procedures which were guided by the Voluntary Principles on Human Rights and Security.

(d) No Proximity

44. For the reasons hereinbefore set out, there was no proximate relationship between the defendants and the plaintiffs capable of giving rise to a duty of care.

(e) No Foreseeability

45. Even if a duty of care theoretically might have been owed by CGN or Skye as the plaintiffs allege, contrary to the allegations contained in the Amended Statement of Claim, the criminal conduct alleged by the plaintiffs, if it occurred (which is not admitted but denied), would have been wholly unforeseeable.

46. With regard to the corporate response to the occupation of CGN Property at the Manto IV/Lot 8 site and the enforcement of the eviction orders, neither CGN nor any of its representatives (including Sergio Monzon) were negligent. When the occupiers refused to engage in any dialogue or negotiations with CGN, the company filed complaints in accordance with the laws of Guatemala and left the matter to the court to decide and for the prosecutor to implement the court's orders in the normal course.

(f) Policy Considerations

47. There are compelling policy considerations that militate against adopting the doctrine of acceptance of control into the common law, and expanding the tort of negligence, in the manner pleaded by the plaintiffs including the following:

- (a) the plaintiffs' proposed legal liability for parent corporations in respect of the operations of their foreign subsidiaries would undermine the bedrock principle of separate corporate personality entrenched in both the common law and federal and provincial corporate statutes and would extend far beyond the narrow exceptions carefully crafted over the past 115 years;
- (b) any proposed radical departure from longstanding corporate law principles should be left to the legislature to consider. It would be particularly inappropriate for the courts to impose the proposed duty of care in light of the fact that attempts to pass legislation to achieve a similar outcome have failed [removed]; and
- (c) the proposed duty of care would expose Canadian companies with foreign subsidiaries to myriad claims [removed].

(g) Other Issues

48. Contrary to the allegations contained, *inter alia*, in paragraphs 35, 87 to 99 of the Amended Statement of Claim, to the extent any of those allegations may be factual, material, not too remote, and not vexatious, it was simply not true that CGN had a “historical involvement in serious human rights abuses” at all, or, in the alternative, that Skye knew about it.

49. The allegations in paragraphs 36 and 37 of the Amended Statement of Claim have no relevance to the claims pleaded against the defendants.

Damages

50. The defendants deny that the plaintiffs are entitled to the damages claimed and put them to the strict proof thereof.

51. Nothing in the conduct of the defendants as alleged in the Amended Statement of Claim would warrant any award of punitive and exemplary damages.

52. The defendants therefore request that this action be dismissed with costs on a full indemnity basis.

February 18, 2014
Amended May 27, 2015

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- and -

HUDBAY MINERALS INC. and HMI NICKEL INC

Defendants

Court File No. CV-11-423077

**ONTARIO
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AMENDED STATEMENT OF DEFENCE

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