

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**GERMAN CHUB CHOC**

Plaintiff

- and -

**HUDBAY MINERALS INC. and COMPAÑÍA  
GUATEMALTECA DE NÍQUEL S.A**

Defendants

**AMENDED STATEMENT OF DEFENCE**

AMENDED THIS DATE PURSUANT TO  
 MODIFIÉ CE 1/15 CONFORMÉMENT À  
 LA RÈGLE 26.02 (Masters Colstein)  
 THE ORDER OF L'ORDONNANCE DU  
 DATED / FAIT LE 09/14  
 REGISTRAR / GREFFIER  
 SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

Although Compañía Guatemalteca De Níquel S.A. (“CGN”) is named as a defendant, the plaintiff has elected not to proceed against CGN. Accordingly, the only claims asserted in the Second Amended Statement of Claim (“**Statement of Claim**”) are against HudBay Minerals Inc. (“**HudBay**”).

2. HudBay admits the allegations contained in paragraphs numbered 8 (to the extent of the first and last sentences), 10 (except that the Fenix Project operates under an exploitation license), 11 (to the extent that in August 2008 HudBay purchased all of the shares of Skye Resources Inc. (“**Skye**”) and that as a result of a subsequent amalgamation Skye became HudBay in August 2011), 12 (only to the extent of the first sentence), 16 (to the extent that HudBay has made certain general statements to its shareholders and others about the Fenix Project), 29 (to the extent that Mynor Ronaldo Padilla González (“**Padilla**”) was employed by CGN as chief of security for the Fenix Project), and 76 to 79 (only to the extent that the statements quoted therein are accurate) of the Statement of Claim.

3. HudBay denies the allegations contained in paragraphs numbered 1 through 5, the balance of 8, 9 (although HudBay admits that CGN at all material times was a wholly-owned subsidiary of HudBay), 13 to 15, 17 to 27, 30 to 34 (except that John Bracale as the President of CGN was the direct supervisor of Padilla), 35 to 39 (except that individuals self-identifying as Mayan Q'eqchi' invaded and occupied several parcels of land owned by CGN and its subsidiaries or affiliates), 40 to 44 (except that Mr. Bracale as the President of CGN interacted with Padilla in the course of CGN's operations), 45 to 47 (except that the so-called protests involved the violent blockading of a public road on September 27, 2009 and subsequent riot which included the destruction of CGN property and a life-threatening attack on the Fenix Project security forces), 48, 49, 52 to 54 (except to acknowledge that Mr. Chub is a paraplegic), 55 through 75, the balance of 76 to 79, and 80 to 97 of the Statement of Claim.

4. HudBay has no knowledge of the allegations contained in paragraphs numbered 7, 28 and 50 of the Statement of Claim.

### **The Defendants**

5. HudBay is a Canadian integrated mining company with assets in North and South America. HudBay is focused on the discovery, production and marketing of base and precious metals.

6. 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 Izabal, 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.

7. Skye was a holding company. In August 2008, HudBay acquired 100% of the issued and outstanding common shares of Skye and changed Skye's name to HMI (such that CGN became an indirect subsidiary of HudBay). On August 15, 2011, HudBay amalgamated with HMI.

8. In September 2011, HudBay sold its ownership interest in CGN and its related affiliates to the Solway Group, a private equity group based in Russia.

### **The Fenix Project**

9. At all material times, CGN's head office was located in Guatemala City, Guatemala. In September 2009, CGN employed approximately 84 individuals. 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.

10. 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.

11. In September 2009, the CGN Property near El Estor contained over one hundred dwellings, the Tz'un'un Ha' Hospital (the "**Hospital**"), a school, a vocational training center and a police barracks used by a local detachment of the Guatemalan National Civil Police (collectively "**La Colonia**").

### **Security Personnel for the Fenix Project**

12. Security for the Fenix Project was provided by several CGN employees (“**CGN Security**”) and a third party independent contractor retained by CGN, Integración Total S.A., carrying on business as Delta Elite (“**Delta**”). Delta was a security company in good standing, licensed by the Guatemalan government. Delta was not CGN’s agent as alleged in the Statement of Claim.

13. As CGN’s chief of security, Padilla was responsible for the training and supervision of CGN Security. Although Delta designated its own supervisor for the Delta security team at the Fenix Project (“**Delta Security**”), CGN provided training and gave directions regarding Fenix Project security matters to Delta Security. Contrary to the allegations in the Statement of Claim, neither CGN, nor Padilla, controlled Delta Security.

14. CGN had protocols and procedures in place regarding weapons, ammunition and the use of force (“**CGN Security Protocols**”) to which CGN Security and Delta Security were required to adhere. The CGN Security Protocols were consistent with international standards including the Voluntary Principles on Security and Human Rights.

15. To the extent that any CGN Security or Delta Security personnel carried firearms, they did so in compliance with the registration and licensing requirements of the Guatemalan government contrary to the allegations in paragraphs 24 and 26 of the Statement of Claim.

## **The Events of September 27, 2009**

### **(i) Unlawful Occupations**

16. The town of El Estor is located less than one kilometre from La Colonia. In September 2009, it had a population of approximately 125,000. The majority of the residents of El Estor supported CGN and the Fenix Project.

17. Since the fall of 2006, CGN had faced numerous illegal occupations of the CGN Property by groups of individuals self-identifying as Mayan Q'eqchi'. In Guatemala, such illegal invasions are frequently employed as a strategy to extract land from private companies or the government.

18. Contrary to the allegations in paragraph 40 of the Statement of Claim, in January 2007, these evictions were carried out peacefully by a Guatemalan prosecutor with the assistance of the National Civil Police and the National Army. Neither CGN Security, nor Delta Security, carried out the evictions or engaged in any of the acts or criminal conduct alleged in paragraph 40 of the Statement of Claim. These court-ordered and state-implemented evictions were widely publicized and monitored by Governmental observers, representatives of a local non-governmental organization (La Defensoria Q'eqchi'), international activists and NGOs, and members of the local and international press.

19. In September 2009, there were 16 separate groups who had invaded CGN Property. Each had created a "community" by, among other things, erecting rudimentary dwellings and other structures on the CGN Property. The occupation sites closest to El Estor on the CGN Property were named "La Union" and "El Chupon". The "Las Nubes" occupation site was located in an area of the CGN Property known as Area 217.

20. Commencing in or about the first quarter of 2007, CGN was involved in a peaceful process through which it attempted to protect its land rights by (a) engaging the occupiers and other stakeholders in dialogue and structured negotiations, and (b) entering into agreements so that the invaders would move away from areas that were important for the development of the Fenix Project.

**(ii) Agreement with Las Nubes**

21. In April 2009, CGN negotiated an agreement with the Las Nubes community regarding the occupation in what is known as Area 217 of the CGN property (northwest of El Estor). This agreement (the “**Las Nubes Agreement**”) provided that the occupiers would leave Area 217. In exchange, CGN agreed to build a school, to fix the main road and to complete a water project in the Las Nubes village located several hundred metres north of the CGN Property boundary. Because the Las Nubes Agreement was certified by the Guatemalan government, the Governor of the Department of Izabal (the “**Governor**”) had an interest in ensuring that all parties complied with its terms.

22. CGN proceeded to fulfill its obligations under the Las Nubes Agreement. A number of the Las Nubes families breached the Agreement, however, and returned to the Area 217 occupation site. In addition, in late September 2009, new illegal occupiers arrived and started to put up rudimentary shelters at the site.

**(iii) Road Blockade**

23. On September 27, 2009, the Governor and her staff attended at Area 217 to confirm that CGN was complying with its obligations under the Las Nubes Agreement and to meet with the occupiers.

24. During her visit, the Governor attempted to resolve the occupation and, at the conclusion of the visit, agreed to a further meeting with the Area 217 occupiers. The Governor and those accompanying her, including CGN representatives, then left Area 217 and were travelling by vehicle on the public highway leading to El Estor, when a large group of people from the invading communities of El Chupon and La Union blocked the road and converged around the Governor's vehicle convoy. Some of them threw rocks and wielded machetes.

25. In excess of forty members of the Guatemalan National Civil Police were dispatched to the scene. Ultimately, the Governor was evacuated by boat across Lake Izabal, a large body of water near El Estor.

**(iv) Attack of La Colonia and the Hospital**

26. Subsequent to the blockading of the road, a larger mob comprising individuals from La Union and El Chupon and others gathered and began to attack the Hospital, the newly rebuilt housing and the police barracks. The Hospital is located immediately south of the La Union illegal occupation. The illegal occupation of El Chupon also is nearby.

27. The Hospital had been previously attacked and damaged significantly in November 2006 by illegal occupiers or their supporters. With funding from CGN, the Hospital had been rebuilt, and only recently re-opened. Because there was costly medical equipment inside, on September 27, 2009 the Hospital was guarded by two members of Delta Security. Two Delta Security members also were posted at a guardhouse at the housing project within La Colonia.

28. Although there were police in the area of La Colonia, they did nothing to stop or curb the initial attack by the mob or to escort the Delta Security to safety. CGN was forced to

respond and sent a Delta Security contingent to rescue the [removed] guards stationed at La Colonia. When the size of the mob increased and the violence escalated, two contingents comprised of CGN Security and Delta Security (the last one of which included Padilla) were dispatched to the area to bring the security personnel to safety.

29. People in the mob wielded machetes and threw rocks and Molotov cocktails. At one point, the mob broke into the police barracks (located approximately 80 metres south of the Hospital) and stole three AK-47 assault rifles with magazines and cartridges along with helmets, shields and other weapons. They also fire-bombed a police vehicle parked near the barracks.

30. The mob ultimately occupied positions to the north and south of the Hospital from where they fired guns, including the AK-47s stolen from the barracks. They fired at the CGN Security and Delta Security personnel who were using the Hospital as protective cover. The CGN Security and Delta Security personnel were significantly outnumbered and surrounded. They could not match the fire power of their attackers. They were unaided by the police who were nearby but did not intervene. They feared for their lives. They eventually managed to escape to safety, although several of them were injured. Thereafter, a contingent of Guatemalan National Civil Police officers, including officers dispatched from Guatemala City, arrived and restored order.

#### **The Shooting of German Chub Choc**

31. The plaintiff, German Chub Choc (“**German Chub**”) alleges that he was shot at close range, on a soccer field just outside La Colonia, in an unprovoked attack by Padilla on September 27, 2009 during the events described above in paragraphs 26 through 30.

32. [removed]



33. German Chub's allegations are false. German Chub was not shot intentionally by Padilla with a handgun in an unprovoked attack as alleged in the Statement of Claim, or at all. Padilla did not shoot German Chub from several metres away as German Chub turned to escape as alleged in the Statement of Claim, or at all. German Chub was unknown to Padilla.

34. German Chub has concocted a story to explain how and by whom he was shot. On September 28, 2009, German Chub gave a statement to the Guatemalan Public Prosecutor in which he said that he was shot while he was running away and that he did not see who shot him. On May 7, 2011, German Chub gave another statement to the Guatemalan Public Prosecutor in which he said that he was shot by "CGN security agents" but he did not identify any specific individual and said he did not know Padilla.

34A. On January 7, 2012, German Chub swore an affidavit in which he testified that Padilla was part of a group of approximately fourteen men wearing the navy blue uniforms of CGN that arrived in a truck and parked on a public road outside La Colonia and that Padilla walked towards German Chub with approximately five other guards and then shot German Chub.

35. There is no substance to the allegation in paragraph 55 of the Statement of Claim that, after shooting German Chub, Padilla shot and killed Adolfo Ich Chamàn in another unprovoked attack.

### **No Corporate Responsibility**

36. In the alternative, and in any event, HudBay denies legal liability for the alleged conduct of Padilla.

37. The proper law of the tort alleged against HudBay is the law of Ontario.

38. HudBay has no legal liability to the plaintiff arising from the alleged shooting of German Chub for the following reasons.

- (i) CGN was a separate corporate entity, independent from HudBay. CGN was not controlled by, and subservient to, HudBay as alleged in paragraphs 11 and 13 of the Statement of Claim. All of the allegations in the Statement of Claim notwithstanding, no tenable basis has been pleaded to pierce the corporate veil;
- (ii) CGN was not an agent of HudBay. As a matter of fact and law, in carrying out its operations in Guatemala, CGN neither had the authority, nor held itself out as having the authority, to conduct business on HudBay's behalf;
- (iii) HudBay, as the ultimate parent of CGN, owed no duty of care to the plaintiff sounding in negligence. Contrary to the allegations contained, *inter alia*, in paragraphs 73 through 81 of the Statement of Claim, HudBay'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 create a duty of care as the plaintiff alleges;
- (iv) Nothing in any of the multitude of allegations in the Statement of Claim as a matter of fact or law constituted HudBay's acknowledgment, or acceptance, of control over the hiring, retention, training or supervision of Padilla, CGN Security or Delta Security, or over such security personnel's interaction with German Chub or other members of the local community generally or on September 27, 2009. This includes by way of example, allegations regarding HudBay's public

statements with respect to 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;

- (v) Even though it may have been the fact that (a) the Fenix Project was financed by HudBay, (b) HudBay provided oversight or input into the general operations or policies relating to the Fenix Project, or (c) John Bracale held a position at CGN and HudBay, 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 acknowledgement or acceptance of control by HudBay as the plaintiff alleges; and
- (vi) Neither Tom Goodman nor John Bracale owed a duty of care to the plaintiff or was negligent as alleged in paragraphs 88 and 89 of the Statement of Claim.

### **No Proximity**

39. For the reasons hereinbefore set out, there was no proximate relationship between HudBay and the plaintiff capable of giving rise to a duty of care.

### **No Foreseeability**

40. Even if a duty of care theoretically might have been owed by HudBay as the plaintiff alleges, contrary to the allegations contained in the Statement of Claim, the unprovoked shooting of German Chub, if it occurred (which is not admitted but denied), would have been wholly unforeseeable.

41. Padilla had an exemplary record as CGN's chief of security. On prior occasions, he had exercised great restraint and not used, or directed other security personnel to use, physical force when he and other security personnel were under threat or attack. For example, on May 25, 2009, when Padilla was attacked with a machete and his thumb almost severed, Padilla did not counter-attack, but maintained a defensive posture and retreated. Similarly, Padilla used defensive tactics in an attempt to defuse a volatile situation on September 25, 2009. There is no substance to the plaintiff's allegation in paragraph 31 of the Statement of Claim that Padilla had engaged in prior material "criminal incidents" of which HudBay was or should have been aware.

42. There is also no substance to the allegation in paragraph 40 that Fenix Project Security personnel had engaged in criminal conduct, including gang rapes of several women in the 2006 and 2007 evictions of occupiers of CGN Property, or that CGN had a strategy of addressing unlawful occupations through the use of force and violence or, in the alternative, that HudBay had any knowledge of this alleged conduct.

### **No Breach of Any Duty of Care**

43. In the alternative, even if a duty of care theoretically might have been owed by HudBay as the plaintiff alleges, contrary to the allegations contained in the Statement of Claim, HudBay and CGN:

- (a) acted appropriately and reasonably in the context of the mob attack on September 27, 2009 and any decisions regarding the deployment of CGN Security or Delta Security were not reckless as alleged in paragraph 46 of the Statement of Claim; and

- (b) took all reasonable steps to ensure that Padilla would conduct himself as head of security with the appropriate restraint, and in accordance with CGN Security Protocols, which included a commitment to the Voluntary Principles on Human Rights and Security.

### **Policy Considerations**

44. 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 plaintiff including the following:

- (a) the plaintiff's 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].

**Other Issues**

45. The allegations in paragraphs 37 and 38 of the Statement of Claim have no relevance to the claims pleaded against HudBay.

46. To the extent any of the allegations in paragraphs 64 through 72 of the Statement of Claim may be factual, material, not too remote and not vexatious, it is not true that CGN had a “historical involvement in serious human rights abuses” at all or, in the alternative, that HudBay knew about it.

**Damages**

47. In the further alternative, HudBay denies that the plaintiff is entitled to the damages claimed and puts the plaintiff to the strict proof thereof.

48. Furthermore, even if German Chub was shot as the plaintiff alleges, nothing in the conduct of HudBay, as pleaded in the Statement of Claim or otherwise, would warrant the imposition of any award of punitive or exemplary damages.

49. HudBay therefore requests that this action be dismissed with costs on a full indemnity basis.

February 18, 2014  
Amended May 27, 2015

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Plaintiff

Defendant

Court File No. CV-11-435841

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