

Court File No.

CV-10-411159

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**ANGELICA CHOC, individually  
and as personal representative of the estate of  
ADOLFO ICH CHAMÁN, deceased**

Plaintiffs

and

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

Defendants

**SECOND AMENDED FRESH AS AMENDED  
STATEMENT OF CLAIM**

**TO THE DEFENDANTS**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the plaintiffs.  
The claim made against you is set out in the following pages.

**IF YOU WISH TO DEFEND THIS PROCEEDING**, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

AMENDED THIS Feb. 6/12 PURSUANT TO  
MODIFIÉ CE 7 CONFORMÉMENT À  
☒ RULE/LA RÈGLE 28.02 ( 7 )  
☐ THE ORDER OF  
L'ORDONNANCE DU  
DATED / FAIT LE Feb. 6/12  
.....  
REGISTRAR GREFFIER  
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

**IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

**IF YOU PAY THE PLAINTIFFS' CLAIM**, and \$10,000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiffs' claim and \$400 for costs and have the costs assessed by the court.

Date: September 24, 2010

Issued by:

*"J. Richards"*

Local Registrar

Address of court office: 393 University Avenue, 10<sup>th</sup> floor  
Toronto ON M5G 1E6

**TO: HUSBAY MINERALS INC.**  
1 Adelaide Street East  
Suite 2501  
Toronto, ON  
M5C 2V9

**TO: HMI NICKEL INC.**  
1 Adelaide Street East  
Suite 2501  
Toronto, ON  
M5C 2V9

**AND TO: COMPAÑÍA GUATEMALTECA DE NÍQUEL S.A.**  
3<sup>rd</sup> Ave 13-78, Zone 10  
Citibank Tower, 4<sup>th</sup> Floor, Office 401  
Guatemala City,  
Republic of Guatemala

## CLAIM

### *I. OVERVIEW*

1. On September 27, 2009, Adolfo Ich Chamán, a respected Mayan Q'eqchi' community leader and an outspoken critic of the harms and human rights violations caused by Canadian mining activities in his community, was hacked and shot to death by private security forces employed by a subsidiary of Canadian mining company HudBay Minerals Inc., near his home in El Estor, Guatemala.
2. The brutal and arbitrary shooting of Adolfo Ich was caused by the negligent management of HudBay Minerals both in Canada and in Guatemala. HudBay Minerals negligently authorized the reckless and provocative deployment of heavily-armed security personnel into Mayan Q'eqchi' communities on September 27, 2009, and negligently authorized the excessive use of force by its security personnel in response to Mayan Q'eqchi' communities that were peacefully opposing the illegal occupation of historic Mayan land.
3. HudBay Minerals was aware that it was operating in a country with very high levels of violence and low levels of accountability for such violence. HudBay Minerals knew that the Fenix Mining Project security personnel were not licensed to provide private security services in Guatemala. HudBay Minerals further knew that Fenix security personnel were using unlicensed and illegal weapons in the course of their duties at the Fenix Project. HudBay Minerals knew that Fenix security personnel had in the past used unreasonable violence against the local Mayan communities that had opposed mining in their community, and knew that there was a very high risk that its security personnel would commit acts of unreasonable violence in the future. Despite this knowledge, HudBay Minerals continued to engage under-trained, inadequately supervised and unlawful security personnel while failing to implement or enforce standards of conduct that would adequately govern and control their conduct.
4. The Plaintiffs therefore assert that HudBay Minerals is directly liable in negligence for causing the assault and death of Adolfo Ich.

5.     The lawsuit also claims, as an alternative basis of liability, that HudBay Minerals is vicariously responsible for battery and wrongful death committed by employees of its formerly owned and wholly-controlled Guatemalan subsidiary Compañía Guatemalteca de Níquel S.A.

## **II. RELIEF CLAIMED**

6.     The Plaintiff Angelica Choc, on her own behalf, claims:
- (a)     General, aggravated and special damages in the amount of \$1,000,000.00;
  - (b)     Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
  - (c)     Costs of this action on a substantial indemnity basis; and
  - (d)     Such further and other relief as this Honourable Court may deem just.
7.     The Plaintiff Angelica Choc, as personal representative of the estate of Adolfo Ich Chamán, deceased, claims:
- (a)     General, aggravated and special damages in the amount of \$1,000,000.00.
  - (b)     Punitive and exemplary damages in the amount of \$10,000,000.00;
  - (c)     Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
  - (d)     Costs of this action on a substantial indemnity basis; and
  - (e)     Such further and other relief as this Honourable Court may deem just.

## **III. THE PARTIES**

8.     Adolfo Ich Chamán (“Adolfo Ich”), deceased, was the President of the Community of La Unión, a respected Mayan Q’eqchi’ leader and a schoolteacher. He lived in the community of La Unión, which is located in the municipality of El Estor, department of Izabal, Republic of Guatemala. He was an outspoken critic of the harms and human

rights violations caused by Canadian mining companies in his community, and a strong advocate for Mayan Q'eqchi' land rights. Adolfo Ich was the father of five children.

9. The Plaintiff Angelica Choc is Adolfo Ich's widow and mother of his children. She resides in the community of La Unión, and is also a respected Mayan Q'eqchi' leader. Angelica Choc brings this action on her own behalf and as a personal representative of Adolfo Ich's estate.
10. The Defendant HudBay Minerals Inc. ("HudBay Minerals" or "HudBay") is a transnational mining company that is incorporated under the laws of Canada, and headquartered in Toronto, Ontario. At all material times, HudBay Minerals owned and operated four mining projects in Canada and one mining project in Guatemala. Shares of HudBay Minerals are listed on the Toronto Stock Exchange.
11. At all material times, the Defendant Compañía Guatemalteca de Níquel S.A. ("CGN") was the wholly-controlled Guatemalan subsidiary of HudBay Minerals.

#### **IV. MATERIAL FACTS**

##### **The Fenix Mining Project**

12. The Fenix Project is a proposed open pit nickel mining operation located in the municipality of El Estor, in the department of Izabal, Republic of Guatemala (the "Fenix Project"). The Fenix Project consists of a mine whose operations have been suspended since 1982, a processing plant and an exploration concession covering almost 250 square kilometers (the "Fenix Property").
13. HudBay Minerals has controlled operations at the Fenix Project since August 2008, when HudBay Minerals purchased all of the shares of the previous owner of the project, Canadian mining company Skye Resources Inc. ("Skye Resources" or "Skye"). After the share purchase, Skye Resources became a wholly-owned subsidiary of HudBay Minerals. Skye Resources was renamed HMI Nickel Inc. ("HMI Nickel"), and all of Skye Resources' managerial and operational functions were transferred to HudBay Minerals,

leaving HMI Nickel solely as a holding corporation for the shares of CGN. On August, 15, 2011, HMI Nickel amalgamated with its parent corporation, HudBay Minerals, under the *Canada Business Corporations Act*.

14. At all material times, the Fenix Project was indirectly owned by HudBay Minerals through HMI Nickel, which in turn owned 98.2% of the shares of Guatemalan company CGN. At all material times, HMI Nickel Inc. was a wholly-owned and controlled holding subsidiary of HudBay Minerals.
15. At all material times, HudBay Minerals and its subsidiaries HMI Nickel and CGN carried on a combined and integrated economic enterprise with the common purpose and intent of constructing and operating an open pit nickel mine at the Fenix Property. At all material times, operations at the Fenix Project were directed, controlled, managed and financed by HudBay Minerals both directly, through HudBay's executives, managers and employees, and indirectly, through HudBay's total control of the management and operation of CGN. At all material times, CGN answered to and was directed, controlled, managed and financed by HudBay Minerals from its head office in Toronto, Ontario. In particular, oversight and direction of the Fenix Project by senior management of HudBay Minerals took place from HudBay's head office in Toronto.
16. HudBay Minerals made key decisions regarding the relationship between the Fenix mining project and Mayan communities located near the Fenix Project. HudBay Minerals formulated corporate responses to Mayan Q'eqchi' claims to contested land and formulated and implemented policies regarding local community relations. HudBay Minerals also decided whether, when and how to deploy Fenix security personnel into communities located near the Fenix Project. Many of these decisions were made at HudBay's head office in Toronto, Ontario.
17. At all material times, HudBay Minerals provided all capital required to conduct all operations at the Fenix Project. The financial arrangement which funded all of the operations at the Fenix Project were established and based in Ontario, and all capital used by CGN came from Ontario.

18. HudBay Minerals has made significant and continued representations to the public about its direct involvement in the affairs of the Fenix Project, about HudBay Minerals' control of corporate relationships with Mayan communities located on or near the Fenix Property, and about HudBay's corporate strategy and policy regarding the ongoing land disputes with local Mayan communities.
19. At all material times, HudBay Minerals conducted its operations at the Fenix Project in large part through HudBay's Country Manager for Guatemala, John Bracale. In addition to being Country Manager for Guatemala for HudBay Minerals at all material times, John Bracale was also President and Legal Representative of CGN, and was responsible for CGN's operations at the Fenix Project. All decisions and actions taken by Mr. Bracale were taken jointly on behalf of HudBay Minerals in his role as HudBay's Country Manager for Guatemala and on behalf of CGN in his role as President and Legal Representative of CGN. Mr. Bracale answered to and was directed by HudBay's senior management in relation to all of his duties at the Fenix Project, including all duties related to community relations, security and security personnel. HudBay's senior management conducted this supervision and direction from HudBay's head office in Toronto, Ontario.
20. HudBay Minerals has appointed a specific executive, Tom Goodman, Senior Vice President, Development, to be responsible for the oversight of Corporate Social Responsibility of all of HudBay's operations, including at the Fenix Project. Mr. Goodman conducted his duties from HudBay's head office in Toronto, Ontario.

#### **HudBay's Fenix Security Forces**

21. Under instructions from and subject to continuing approval by HudBay Minerals, CGN employed private security forces at the Fenix Project on behalf of and for the benefit of HudBay Minerals at all material times. These private security forces were directly or indirectly controlled by HudBay Minerals.

22. From January 7, 2007 until September 28, 2009, under authorization from first Skye Resources and later HudBay Minerals, CGN retained a third party company called Integracion Total S.A. ("Integracion Total") to provide further security at the Fenix Project. CGN retained Integración Total solely through an informal oral agreement.
23. Skye Resources instructed CGN to retain Integración Total in response to the land reclamations undertaken by Adolfo Ich's community and others and with the intention that Integración Total would participate in the forced removal of various communities, including La Unión, in January 2007.
24. Skye Resources, and later HudBay Minerals, had knowledge of and power over the terms of the oral agreement between CGN and Integración Total and in fact approved the terms of the oral agreement. This informal oral agreement failed to include rules of conduct for security personnel, failed to impose standards regarding the appropriate use of force and failed to require adequate training of security personnel.
25. At all material times, all security personnel provided through Integración Total were agents of CGN. CGN's internal security forces and the security forces provided through Integración Total will be hereinafter collectively referred to as the "Fenix Security Forces" or the "Security Forces".
26. HudBay Minerals knew that Guatemalan law requires private security providers to be specifically authorized and licensed prior to providing security services. HudBay Minerals knew that neither CGN nor Integración Total had the required authorization or license to provide private security services in Guatemala and therefore knew that the Security Forces were operating at the Fenix Project illegally.
27. HudBay Minerals further knew that both individuals and private security providers are prohibited from carrying or using firearms without specific authorization from Guatemala's Office for Arms and Ammunition Control. In order to gain authorization, private security providers must, *inter alia*, register and license all weapons used in the provision of security services and conduct background checks on its employees.

28. HudBay Minerals knew that the Fenix Security Forces did not have the required weapons authorization, registration or licenses to acquire, possess, or distribute firearms, and therefore knew that their Security Forces were using firearms at the Fenix Project illegally. In particular, HudBay Minerals knew that Integración Total and CGN failed to conduct the necessary background checks on its employees and failed to register any of the approximately 34 shotguns that were used by the Security Forces at the Fenix Project.
29. As part of HudBay Minerals' background assessment of the risks and responsibilities of continuing to retain Integración Total to provide private security services at the Fenix project, HudBay Minerals knew or should have known that there were common public, serious and credible allegations that Integración Total and its managers were involved in organized crime and were implicated in arms and drug trafficking. HudBay Minerals should have taken this alleged criminality into account when assessing the risks of continuing to retain Integración Total, including its assessment of the likelihood of Integración Total's employees committing potential illegal or inappropriate acts in connection with their duties at the Fenix Project.
30. HudBay's Fenix Security Forces included individuals who were members of the Guatemalan military or paramilitary groups during the time of the civil war. During the war, the Guatemalan Military and paramilitary groups participated in war crimes and crimes against humanity, including genocide, on a large scale.
31. At all material times, the Fenix Security Forces were led and controlled by Mynor Ronaldo Padilla González ("Mynor Padilla"), who was directly employed by CGN as Head of Security at the Fenix Project at the direction of HudBay Minerals.
32. HudBay Minerals knew that Mr. Padilla did not have the necessary license to lawfully acquire, possess or carry a firearm as required by Guatemalan law. HudBay Minerals knew that despite failing to have the required firearms license, Mr. Padilla openly and illegally carried and used a 9mm pistol that had been issued to him by its subsidiary CGN while on duty as Head of Security for the Fenix Project.

33. HudBay Minerals also knew that, prior to the shooting of German Chub, Mr. Padilla had been accused of committing several criminal acts while employed as Head of Security for the Fenix Project. At least three of these incidents resulted in the filing of formal complaints with the Justice Department in Guatemala. These incidents include allegations that:
- (a) Mr. Padilla, along with another CGN employee, issued death threats against community members near El Estor in May 2009 while on duty at the Fenix Project;
  - (b) Mr. Padilla shot his gun recklessly and without cause, causing damage in a Mayan Q'eqchi' community located on contested land while on duty at the Fenix Project in September 2009; and
  - (c) Mr. Padilla issued death threats in the city of Villa Nueva in October 2006.
34. At the relevant times, HudBay Minerals made key decisions regarding the Fenix Security Forces including establishing (or failing to establish) any codes of conduct regarding the use of force; determining the rules of engagement in situations involving force; determining the level of protection of human rights; determining the size and composition of the Security Forces; deciding who would lead the Security Forces; and determining the manner in which the Security Forces were deployed. Many of these decisions were made at HudBay's head office in Toronto, Ontario.
35. HudBay has referred to the Fenix Security Forces as "our own security personnel" on its Canadian-based website.
36. John Bracale, in his role as HudBay's Country Manager for Guatemala, was responsible for and did in fact supervise and direct activities of the Fenix Security Forces deployed at the Fenix Mining Project. Mr. Bracale was responsible for overseeing the hiring, training and equipping of the Fenix Security Forces. Mr. Bracale was also responsible for establishing, implementing and enforcing rules of conduct for the Security Forces. Further, Mr. Bracale was responsible for, and did in fact, supervise and direct the Head of Security for the Fenix Project, Mynor Padilla. Mr. Bracale knew that the Fenix Security

Forces were not licensed or authorized to provide private security services in Guatemala; knew that the Fenix Security Forces, including Mr. Padilla, were not licensed or authorized to carry or use the dozens of weapons that were in fact carried and used by the Security Forces at the Fenix Project; and knew that several allegations of criminal acts had been made against Mr. Padilla.

37. HudBay Minerals has publicly committed to implementing and adhering to specific standards and principles of conduct applicable to security personnel engaged at the Fenix Project. These standards and principles of conduct are contained in corporate social responsibility frameworks including the international Voluntary Principles on Human Rights and Security. Mr. Bracale was nominally responsible for ensuring that the Security Forces adhered to the standards and guidelines set out in the Voluntary Principles on Security and Human Rights. Despite publicly representing that HudBay would abide by these security standards, HudBay did not, in fact, implement or apply these standards in the hiring, directing or supervising of security personnel engaged at its Fenix Project.

#### **Land disputes between HudBay Minerals and Mayan Q'eqchi' communities**

38. Several indigenous Mayan Q'eqchi' farming communities are currently located on a small portion of the Fenix Property. During the period relevant to this lawsuit, HudBay and its subsidiaries claimed that they had valid legal right to this land, while Mayan Q'eqchi' communities claimed and continue to claim that Mayan Q'eqchi' are the rightful owners of the lands which they consider to be their ancestral homeland. The Mayan Q'eqchi' further claim that any apparent rights to the contested land claimed by HudBay or its subsidiaries are illegitimate as these rights were first granted by a dictatorial military government during the Guatemalan Civil War, at a time when Mayan Q'eqchi communities were being massacred and driven off of their land.
39. In 2006, an agency of the United Nations ruled that Guatemala had breached international law by granting mining rights to the Fenix Project without adequately consulting with

local Mayan Q'eqchi' communities. The Defendants and the Guatemalan government ignored this ruling.

40. On February 8, 2011, the Constitutional Court of Guatemala, the highest court in the country, ruled that Mayan Q'eqchi' communities have valid legal rights to the Contested Land, and ordered the Government of Guatemala to formally recognize the community's collective property rights. To date, HudBay Minerals and the Guatemalan government have ignored this ruling.
41. In or around September 2006, Mayan Q'eqchi' who had been expelled from the area around El Estor and their descendants reclaimed several parcels of land near El Estor by moving onto a small part of the land that constitutes the Fenix Property and occupying it. These farmers view their reclamation as a rightful and legal repossession of historical Mayan Q'eqchi' land unjustly taken from them and their families during the Guatemalan Civil War. Adolfo Ich and Angelica Choc were part of this reclamation process.
42. In late 2006 and early 2007, police, military and private security forces conducted a number of forced evictions of these reclaimed communities at the request of HudBay Minerals' predecessor corporation, Skye Resources. Skye Resources has since amalgamated with HudBay Minerals. In the course of these evictions, CGN's private security forces, police and military burnt hundreds of houses to the ground, fired gunshots, stole goods, and in at least one community, gang-raped several women.
43. Immediately after these evictions, evicted community members from the five communities, including Adolfo Ich and Angelica Choc, returned to the land they had been forced to leave. These community members continue to reside and farm on this contested land. HudBay and Skye Resources have repeatedly referred to these land claimants as "squatters" or "invaders", and have refused to recognize or accommodate Mayan Q'eqchi' claims to the land.
44. The Defendant HudBay Minerals noted in corporate documents in November 2008 that the ongoing land conflict represented a material risk to HudBay Minerals' business.

stating that “future incidents [regarding the disputed land] may be larger and more disruptive to the progress of the Fenix Project and may cause significant delays, which could have a material and adverse effect on HudBay’s business and results of operations”.

**The events leading to the murder of Adolfo Ich Chamán**

45. Throughout the time period prior to Adolfo Ich’s murder, HudBay’s managers and executives were briefed regarding the ongoing land dispute, including being advised in 2009 of rising tensions between the company and communities located on contested land.
46. In particular, Mr. Bracale, HudBay’s Country Manager for Guatemala, periodically met or conversed with Mr. Padilla, the head of the Fenix Security Forces, to discuss the ongoing land dispute, to receive reports on security issues, and to give Mr. Padilla directions regarding the conduct of the Fenix Security Forces.
47. On September 11, 2009, approximately two weeks before his murder, Adolfo Ich invited representatives of municipal, departmental and national governments to a meeting in the town of El Estor called on behalf of all communities located on contested land near El Estor. At this meeting, Adolfo Ich publicly reaffirmed his people’s deep historical, cultural and spiritual connection to the land, voiced their concerns regarding the harms caused by mining companies in the region and demanded that HudBay and CGN leave the area. He again noted that the communities had not been consulted as required by international and Guatemalan law, and condemned the violent evictions that were carried out at the request of Skye Resources and CGN in 2006 and 2007.
48. Adolfo Ich’s speech included a call for unity of all local Mayan Q’eqchi’ communities in opposition to the harms and rights violations caused by HudBay and CGN. Adolfo Ich’s attempts to unite community members against the mine represented an ongoing problem for HudBay Minerals’ Fenix Project. As noted in HudBay’s reports to their shareholders, “[e]xploration and mining operations in and around the Fenix Project will depend on the support of local communities.”

49. HudBay Minerals, through its executive and manager Mr. Bracale, authorized the deployment of Fenix Security Forces armed with unlicensed and illegal weapons and led by Mr. Padilla into Mayan Q'eqchi' communities on Sunday, September 27, 2009 during an unannounced, unwelcome and confrontational visit by the Governor of the Department of Izabal to a Mayan Q'eqchi' community.
50. In light of the heightened tensions and increased conflict between the mining company and Mayan Q'eqchi' communities at the time, this authorized deployment of armed Fenix security personnel into Mayan Q'eqchi' communities was reckless and provocative.
51. The intrusion of Fenix security personnel into Mayan Q'eqchi' communities provoked fears of renewed forced and violent evictions and sparked a series of protests that occurred throughout the day of September 27, 2009. These protests included a road blockade as well as a general protest that occurred later that afternoon on the south side of a cluster of buildings owned by CGN located adjacent to the Mayan Q'eqchi' community of La Unión. These buildings housed a police station, police dormitories, as well as company offices and a health clinic (the "Fenix Buildings").
52. At all relevant times, the Fenix Buildings were surrounded by a large field that was enclosed by a barbed-wire fence in some places and a chain-link fence in others (the "Fenix Compound"). The Fenix Compound is approximately 300 metres wide by 400 metres long. Adolfo Ich's community of La Unión is located on the north side of the Fenix Compound.
53. In the early afternoon of September 27, 2009, Adolfo Ich returned home after participating in some of the protests that occurred earlier in the day. He was with his wife at his house in La Unión when he heard gunshots being fired from the direction of the Fenix Compound, not far from his house.
54. As a respected community leader and schoolteacher, Adolfo Ich was concerned about the safety of community members who lived near the Fenix Compound. Accordingly, he

went towards the Fenix Buildings to find out what was going on, to warn people to stay back and to see if he could help restore calm. He was not carrying any weapons.

55. The main protests were occurring on the south side of the Fenix Compound. Adolfo Ich approached the Fenix Compound from the north. As Adolfo arrived at the north side of the Fenix Compound, he encountered several Fenix security personnel, including Mynor Padilla, the Head of Security for the Fenix Project. These men wore CGN uniforms and bullet-proof vests and were heavily armed with a variety of unlicensed and illegal weapons including handguns, shot-guns, machetes, pepper-spray and tear gas. Mynor Padilla recognized Adolfo Ich as a prominent community leader and appeared to invite him to speak with the Security Forces about the community protests.
56. As Adolfo Ich neared the fence that separates the community from the Fenix Compound, approximately a dozen armed members of the Security Forces came through a gap in the fence, surrounded Adolfo Ich and immediately began to beat him. They then dragged him through back through the gap in the fence.
57. Once on the other side of the fence, a member of the Fenix Security Forces struck Adolfo Ich on the right forearm with a machete, nearly severing his arm from his body. Mynor Padilla approached Adolfo Ich and shot him in the head at close range with a handgun.
58. The Security Forces then dragged the severely wounded Adolfo Ich to the Fenix Buildings as he cried out for help. A few community members from La Unión who were also on the north side of the Fenix Compound attempted to come to his aid, but were held back by shots fired by the Security Forces.
59. Adolfo Ich died of his wounds shortly after, while in the custody and control of HudBay's Fenix Security Forces. His injuries included a bullet wound to his throat, fragmented left ear bones, a shattered jaw, a partially severed right forearm, a broken right arm, blunt force trauma wounds to his head and skull and a lacerated left shoulder. The report of the autopsy conducted on Adolfo Ich's body on September 28, 2009

concluded that the cause of death was “lesions of blood vessels and nerves of the left lateral neck, caused by a bullet from a firearm.”

60. At the time of the attack, Adolfo Ich, Mynor Padilla and the relevant Fenix Security Forces were several hundred meters away from the main protest, which was taking place on the public road located on the south side of the Fenix Compound. Adolfo Ich, Mynor Padilla and the relevant Fenix Security Forces were separated from the main protest by several hundred metres and physical barriers including the fenced-in Fenix Compound and the Fenix Buildings.
61. After Adolfo Ich was killed, unknown individuals ransacked the Fenix Buildings.
62. At all material times, all Fenix Security Forces were acting within the course of their duties as employees or agents of CGN on behalf of HudBay Minerals Inc. In particular, Mynor Padilla was acting in the course of his duties as Head of Security for the Fenix Project when he shot Adolfo Ich in the head at close range and killed him. At all material times, Mr. Padilla and the Fenix Security Forces were acting under the control and supervision of Mr. Bracale and HudBay Minerals.

#### **The Defendants' knowledge**

63. HudBay Minerals, CGN and Mr. Bracale knew that excessive and unjustified violence had been used at previous evictions requested by HudBay Minerals' predecessor corporation, Skye Resources, and that were carried out, in part, by Fenix Security Forces in 2007. In particular, executives of HudBay Minerals and CGN had seen photographic and/or video evidence of homes being burned to the ground during these evictions, allegedly by individuals employed by CGN.
64. HudBay Minerals and CGN, knew that Adolfo Ich was the elected leader of one of the five communities located on contested land. The Defendants knew that Adolfo Ich was a forceful and vocal advocate for Mayan Q'eqchi' land rights, and further knew that Adolfo Ich was a prominent critic of operations at the Fenix Project. In particular, Mr. Bracale

knew of Adolfo Ich, his position within the community and the potential negative impact that Adolfo Ich's advocacy could have on the business of HudBay Minerals.

65. HudBay Minerals knew or should have known that there was a significant risk that Mynor Padilla would use unjustified violence in the course of his duties as Head of Security for the Fenix Project. In particular, HudBay Minerals knew that Mr. Padilla had been credibly accused of committing previous criminal acts, including issuing death threats against Mayan Q'eqchi' community members located on contested land and shooting his gun recklessly and without cause.
66. HudBay Minerals knew that Mr. Padilla did not have the firearms license that is required to lawfully acquire or possess a firearm or ammunition in Guatemala. HudBay Minerals further knew that Mr. Padilla had been unlawfully issued a 9mm handgun by its Guatemalan subsidiary, CGN, which Mr. Padilla later used to shoot Mr. Ich.
67. HudBay Minerals knew that the Fenix Security Forces did not have the required license to operate as a private security company, and were therefore providing security at the Fenix Project illegally.
68. HudBay Minerals knew that, for a period of over two years, the Fenix Security Forces were using dozens of unlicensed and illegal weapons at the Fenix Project.
69. HudBay Minerals knew that Integración Total was retained to provide complex armed security of the Fenix mining project in a volatile context solely on the basis of an informal oral agreement and specifically without the benefit of a formal written contract.
70. HudBay Minerals and CGN knew, or should have known, that Guatemala has one of the highest murder rates in the world. The Defendants knew, or should have known, that the murder rate in Guatemala is higher now than it was during the height of the Guatemalan Civil War.

71. The Defendants knew, or should have known, that in Guatemala, targeted violence is often directed against human rights defenders and community leaders such as Adolfo Ich. For example, the United Nations' Special Rapporteur on extrajudicial, summary or arbitrary executions reported in 2007 that "assassinations of human rights defenders are alarmingly common" in Guatemala and that those most frequently assassinated are peasant workers, indigenous leaders and environmental activists.
72. The Defendants knew, or should have known, that in Guatemala, private security forces, police and military often perpetrate such violence.
73. The Defendants knew, or should have known, that private security forces in Guatemala continue to employ the violent tactics that were used during the Guatemalan Civil War, including extra-judicial executions.
74. HudBay knew or should have known that there were common, public, serious and credible allegations that Integración Total and its managers were involved in organized crime and were implicated in arms trafficking and drug trafficking.
75. In particular, HudBay Minerals knew that two of Integración Total's executive managers were at the centre of a notorious and well-publicized espionage scandal in 2008. HudBay Minerals knew that in September 2008, an arrest warrant was issued for the vice-president and co-owner of Integración Total, Gustavo Solano Cerezo Bladimi. HudBay Minerals knew that Mr. Cerezo, who was also employed as a high level intelligence official for the President of Guatemala, was charged with espionage and accused by the Guatemalan state of spying on the President on behalf of organized crime groups after listening equipment was discovered the President's offices and his home. Hudabay Minerals further knew that another Integración Total executive manager, Osman Amílcar Contreras Alvarado, was also implicated in the plot.
76. The Defendants knew that Guatemala's justice system is dysfunctional, and suffers from significant problems with corruption, political interference, and threats and violence against justice officials and witnesses. The Defendant knew or should have known that

the vast majority of violent crime in Guatemala, in particular murder, is not investigated, let alone tried. The international organization Human Rights Watch reports:

More than a decade after the end of the [Guatemalan Civil War], impunity remains the norm for human rights violations. . . . According to official figures, there was 99.75 percent impunity for violent crimes as of 2009. Deficient and corrupt police, prosecutorial and judicial systems, as well as the absence of an adequate witness protection program, all contribute to Guatemala's alarmingly low prosecution rate. In addition members of the justice system are routinely subject to attacks and intimidation.

The Defendants further knew that Guatemala's weak justice system has no appreciable deterrent effect, and therefore knew that there was a greatly increased risk that individuals employed at the Fenix Project would resort to violent tactics to resolve disputes without fear of sanction or punishment, as in fact happened in this case.

77. The Defendants knew, or should have known, that individuals who were former members of the Guatemalan military and paramilitary groups during the Guatemalan Civil War were employed as part of the HudBay's Fenix Security Forces.

78. The Defendants and Mr. Bracale knew about the historical land issues in Guatemala that have led to frequent land reclamations by Mayan Q'eqchi' communities who were displaced during the civil war, and further, knew that armed forced removal of these communities are the typical response to these land reclamations. The Defendants knew, or should have known, that violence is frequently used by security forces when forcibly evicting Mayan Q'eqchi' communities. For example, according to an Amnesty International report published in March 2006:

[There is] a common pattern of human rights violations [during evictions]. One feature is the use of violence. . . . In most cases there are wounded, and sometimes dead, on both sides, although campesino communities, who frequently resist forced evictions, bear the brunt of the violence. . . . The destruction, in particular burning, of homes and personal possessions is common. . . . Private individuals carry out the destruction with the acquiescence of the police and sometimes with their active help.

79. HudBay Minerals knew or should have known that its subsidiary CGN, formerly known as EXMIBAL, was linked to past violence associated with the Fenix Project. The United

Nations-sponsored truth and reconciliation commission, the *Comisión para el Esclarecimiento Histórico*, (the “Truth Commission”) reported that:

- (a) In June 1978, employees of EXMIBAL were involved in the execution of four persons near the El Estor mine site. The Truth Commission classified these murders as arbitrary executions.
- (b) In 1981, police travelling in a vehicle owned by EXMIBAL abducted community leader Pablo Bac Caal from his home near the Fenix mine site. He was later found murdered. Pablo Bac Caal had often spoken out on the issue of the land rights of indigenous peoples. The Truth Commission classified his murder as an arbitrary execution.
- (c) In May 1978, Jose Che Pop and Miguel Sub, protestors from near El Estor, were shot at and wounded by men riding in truck owned by EXMIBAL. The Truth Commission classified this incident as an attack on the civilian population.

80. The Plaintiffs plead that CGN’s historical involvement in acts of serious human rights violations is relevant in assessing legal foreseeability, as well as the Defendants’ duty of care and standard of care. Based on the known historical involvement of CGN in acts of serious human rights abuse, including arbitrary executions, the Defendant HudBay Minerals should have been aware of the increased risk of violence due to the employment of CGN at the Fenix Project, and should have taken increased precautions to ensure that CGN did not continue to be involved in acts of repression and violence.

#### **HudBay Minerals’ public representations**

81. Since acquiring the Fenix Project in 2008, HudBay Minerals has made numerous public representations regarding its concern for Corporate Social Responsibility, and good community relations at its Fenix Project. These representations were made in Ontario.

82. The Plaintiffs plead that these representations are relevant to assessing the legal duty of care owed by HudBay Minerals to the Plaintiffs, the legal standard of care applicable to HudBay Minerals and the legal proximity that exists between HudBay Minerals and the Plaintiffs. The Plaintiffs further plead that by making these representations, HudBay is acknowledging and accepting responsibility for and control over the issue of Corporate Social Responsibility at the Fenix Project and the issue of the relationship between the Fenix Project and local residents, including Adolfo Ich and Angelica Choc.
83. The Plaintiffs further plead that while these public representations are an acknowledgment by HudBay of responsibilities and duties owed by HudBay to Mayan families living on contested land, including Adolfo Ich's family, HudBay did not take any reasonable or appropriate steps to meet these responsibilities or comply with these duties. Rather, the Plaintiffs plead that HudBay used these representations as a public relations exercise to enhance its reputation in the eyes of the Canadian public and Canadian investors.
84. For example, in HudBay Minerals' "Corporate Social Responsibility Report 08" released in 2009, HudBay Minerals states:
- (a) "At HudBay, we embrace our responsibilities through our Company-wide commitment to the welfare of neighbouring communities. . . . Our core values are reflected in every region where we operate, including our new Fenix project in Guatemala which we acquired in 2008."
  - (b) "Our stakeholders include employees of HudBay and its subsidiaries, shareholders, suppliers and service providers, as well as communities [and] Aboriginal groups. . . affected by, or that can affect, HudBay's operations."
  - (c) "Part of the reason we have stayed in business over eight decades is that we take responsibility for our actions. . . We are responsible. . . [sic] to conduct business in a legal and responsible manner, respecting our neighbours. . . . Being responsible is a core Company value."

- (d) “Two of HudBay’s executives have particular responsibility for the oversight of corporate social responsibility issues. Safety, Health and Environment is handled by the Senior Vice President, Development.”
- (e) “At HudBay, we embrace our responsibilities through our Company-wide commitment to the welfare of neighbouring communities, the safety and health of our employees, and the environment. Our corporate governance policies have been enhanced in 2009 aligned with our core values of honesty, openness and transparency.”

85. Further, HudBay has publicly stated that it subscribes to the “Towards Sustainable Mining Principles”, which it calls a “rigorous system for achieving best performance and continuous improvement”. These principles state that, “[i]n all aspects of our business and operations, we will: Respect human rights and treat those with whom we deal fairly and with dignity.”

86. Peter Jones, HudBay spoke publicly on behalf of HudBay in response to Adolfo Ich’s death, stating: “[o]ur number one priority is to ensure the safety and security of all residents and employees in El Estor. . . .We remain committed to working with local residents to reach a fair and equitable solution to land claims and resettlement.”

87. In HudBay Minerals’ “2009 Corporate Social Responsibility Report”, the CEO and President of HudBay writes:

- (a) “In Guatemala, we continued investments in the region of El Estor. . . . Many of these investments are aimed at cementing our relationship with the broader community, whose efficient functioning and support are critical to the long-term success of the company in Guatemala.”
- (b) “. . . we will continue to invest in El Estor. This support is integral to HudBay’s relationship with the community and helps to maintain our social licence to operate.”

- (c) "For 2010, HudBay's commitment to corporate social responsibility remains steadfast."
- (d) HudBay's corporate social responsibility (CSR) reporting "reflects HudBay's commitment to continuous improvement and demonstrates our dedication to achieving high CSR standards."
- (e) "Our track record of supporting the communities in which we work is an extension of the high standards we have established within our operations."
- (f) "HudBay's immediate communities are the population centers near our areas of mining activity."

88. HudBay Minerals has publicly stated in Ontario that it has adopted the Voluntary Principles on Security and Human Rights – a detailed set of international standards applicable to the use of private security forces at resource extractive projects. In adopting these standards, and in publicly and repeatedly declaring that adoption, HudBay has acknowledged and accepted responsibility for policies and practices related to security personnel at the Fenix project in Guatemala. The standards and principles adopted by HudBay Minerals include the following:

- (a) "Private security should observe the policies of the contracting Company regarding ethical conduct and human rights; the law and professional standards of the country in which they operate; emerging best practices developed by industry, civil society, and governments; and promote the observance of international humanitarian law";
- (b) "Private security should maintain high levels of technical and professional proficiency, particularly with regard to the local use of force and firearms";
- (c) **"Private security should act in a lawful manner. They should exercise restraint and caution in a manner consistent with applicable international guidelines regarding the local use of force, including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials, as well as with emerging best practices developed by Companies, civil society, and governments";**

- (d) “Private security should have policies regarding appropriate conduct and the local use of force (e.g., rules of engagement). Practice under these policies should be capable of being monitored by Companies or, where appropriate, by independent third parties. Such monitoring should encompass detailed investigations into allegations of abusive or unlawful acts; the availability of disciplinary measures sufficient to prevent and deter; and procedures for reporting allegations to relevant local law enforcement authorities when appropriate”;
- (e) “All allegations of human rights abuses by private security should be recorded. Credible allegations should be properly investigated”;
- (f) “Consistent with their function, private security should provide only preventative and defensive services and should not engage in activities exclusively the responsibility of state military or law enforcement authorities”;
- (g) “Private security should (a) not employ individuals credibly implicated in human rights abuses to provide security services; (b) use force only when strictly necessary and to an extent proportional to the threat; and (c) not violate the rights of individuals while exercising the right to exercise freedom of association and peaceful assembly, to engage in collective bargaining, or other related rights of Company employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work”;
- (h) “In cases where physical force is used, private security should properly investigate and report the incident to the Company. Private security should refer the matter to local authorities and/or take disciplinary action where appropriate”;
- (i) “Where appropriate, Companies should include the principles outlined above as contractual provisions in agreements with private security providers and ensure that private security personnel are adequately trained to respect the rights of employees and the local community. To the extent practicable, agreements between Companies and private security should require investigation of unlawful or abusive behavior and appropriate disciplinary action. Agreements

should also permit termination of the relationship by Companies where there is credible evidence of unlawful or abusive behavior by private security personnel”;

- (j) “Companies should consult and monitor private security providers to ensure they fulfill their obligation to provide security in a manner consistent with the principles outlined above”; and
- (k) “Companies should review the background of private security they intend to employ, particularly with regard to the use of excessive force.” (emphasis added).

89. After the events of September 27, 2009 described herein, HudBay Minerals has continued to make statements demonstrating that HudBay had assumed responsibility for both resolving the land conflict at the Fenix Project and for implementing and enforcing standards of conduct applicable to security personnel at the Fenix Project. In particular, HudBay Minerals’ 2010 Corporate Social Responsibility Report asserts, “[i]n Guatemala, we implemented the Voluntary Principles [on Security and Human Rights]”. In a section entitled “Addressing Conflict in Guatemala” in the same report, HudBay asserts:

During the time that HudBay had an interest in the Fenix nickel project (from late 2008 to September 2011), we and our subsidiaries worked to resolve an issue of illegal land occupations through peaceful and constructive dialogue. A series of events on September 27, 2009 resulted in the tragic death of a community member and several injuries to others. . . . HudBay is dedicated to promoting and respecting human rights, and implemented the internationally recognized Voluntary Principles on Security and Human Rights for our personnel and contractors in Guatemala. This included extensive training of security personnel [emphasis added].

90. Despite public representations from HudBay Management regarding the company’s commitment to specific and identifiable security standards, HudBay Minerals did not in fact take reasonable or appropriate steps to implement or enforce any standards regarding the use of security forces at HudBay Minerals’ operations in Guatemala, nor was the training that was ostensibly provided sufficient or appropriate. Further, despite its public representations, HudBay Minerals has taken no steps to become a signatory participant as is required to formally participate in the Voluntary Principles.

**CGN's connection to Ontario**

91. At all relevant times, the Defendant CGN was owned, directed, controlled, managed and financed by the Defendant HudBay Minerals from HudBay Minerals' headquarters in Toronto, Ontario. CGN answered to and was directed by senior management of HudBay Minerals. This management and oversight took place from HudBay's head office in Toronto. HudBay Minerals operated its Fenix Project, in part, through CGN.
92. At all material times, CGN depended exclusively on HudBay Minerals to provide the capital needed conduct all of its operations at the Fenix Project. The financial arrangements which funded all of CGN's operations were established and based in Ontario, and all capital used by CGN came from Ontario.
93. At all relevant times, all major decisions regarding CGN's business, management and operations were made in Ontario. These included the development of a business plan; the decision to delay construction of mining facilities at the Fenix Project; the decisions of whether and when to restart construction of the Fenix Project; determining the size of CGN's operations in Guatemala; developing community relations strategies; deciding who CGN will hire as its manager; and determining the size of CGN's workforce.
94. CGN managers, including John Bracale, acting as CGN's President and Legal Representative, and as HudBay's Country Manager for Guatemala, regularly travelled to Ontario to attend and participate in business meetings with HudBay Minerals executives, to provide updates regarding CGN's operations to HudBay Minerals and to receive instructions and orders about future CGN operations from HudBay Minerals. Mr. Bracale also participated in numerous and frequent electronic communications with HudBay corporate headquarters in Ontario by telephone, conference call, email and facsimile.
95. CGN was owned and controlled by corporations based in Canada since its incorporation in 1954 until 2011, first by INCO, later by Skye Resources and most recently by HudBay Minerals. Throughout this time, the corporations based in Canada have used overlapping

executives and boards of directors to retain control of the project. For example, William Keith Service was Chief Financial Officer of Skye Resources at the same time he was Vice President of CGN; Hugh Brooke MacDonald was Vice President Legal Affairs for Skye Resources at the same time he was Secretary of CGN's Board of Directors; William Anthony Enrico was Vice President, Operations of Skye Resources at the same time he was President and Legal Representative of CGN; and David Anthony Huggins was Chief Operating Officer of Skye Resources at the same time he was President of the Board of Directors and Legal Representative of CGN.

96. At all relevant times, CGN conducted business in Ontario in the form of the frequent CGN managerial meetings that were held in Ontario, the frequent and key decisions regarding the operations of CGN that were made in Ontario, and the financing for the CGN project that was provided from Ontario.

## ***V. Legal Claims***

### **Claim against HudBay Minerals for Negligence**

97. Angelica Choc claims on her own behalf against HudBay Minerals for negligence causing the death of her husband Adolfo Ich. In particular, Ms. Choc claims for the loss of guidance, care and companionship, loss of financial support and loss of services caused by the death of her husband, Adolfo Ich.
98. Angelica Choc claims on behalf of the estate of Adolfo Ich against HudBay Minerals for negligence causing physical harm, in particular for Adolfo Ich's tremendous pain and suffering between the time he was first attacked and the time he died.
99. HudBay Minerals, through its Country Manager for Guatemala, as well as other HudBay executives, managers and employees, and through its direct control of CGN, controlled, directed, financed and supervised the Fenix Security Forces at all material times.
100. The Plaintiffs plead that HudBay Minerals is directly liable in negligence for the assault, imprisonment and death of Adolfo Ich. As set out above, HudBay Minerals, through its

employees, managers, executives and directors committed numerous acts and omissions and made numerous decisions both in Canada and in Guatemala that caused the assault, imprisonment and death of Adolfo Ich. These decisions and actions include decisions made and actions taken by John Bracale, HudBay Minerals' Country Manager for Guatemala and President and Legal Representative of CGN as well as other executives and employees of HudBay Minerals.

101. HudBay Minerals knew, or should have known, in all of the circumstances described above, that a failure to act with reasonable care would create a reasonably foreseeable and serious risk that the Fenix Security Forces would use undue force in the exercise of their duties.
102. In making decisions regarding the Fenix Project, HudBay Minerals owed the Plaintiffs a duty to act with reasonable care. With the knowledge particularized above, HudBay Minerals breached that duty by:
  - (a) Authorizing the reckless and provocative deployment of security personnel armed with unlicensed and illegal weapons into communities located on contested land on Sunday, September 27, 2009 with the knowledge that this deployment would likely precipitate violence;
  - (b) Authorizing the distribution of lethal, unlicensed and illegal weapons to Fenix Security Forces, including Mynor Padilla, without adequate training or controls, and in contravention of Guatemalan laws on firearms and ammunition;
  - (c) Failing to investigate and adequately respond to knowledge that, prior to the shooting of Mr. Ich, Mr. Padilla was accused of committing criminal acts, including uttering death threats and shooting his gun recklessly and without cause, while on duty as head of security for the Fenix Project;
  - (d) Negligently directing, controlling, monitoring and supervising the Fenix Security Forces, including the head of security for the Fenix Project, Mynor Padilla;

- (e) Instructing CGN to engage private security forces at its Fenix project without taking reasonable or adequate steps to protect against the use of violence by these Security Forces;
- (f) Providing continued approval and authorization for use of the Fenix Security Forces without taking reasonable or adequate steps to protect against the use of violence by the Security Forces;
- (g) Providing approval to continue to retain Integración Total to provide security at the Fenix Mine site despite knowledge that Integración Total was retained only through an informal oral agreement, and was not legally licensed to provide private security services in Guatemala;
- (h) Failing to establish, implement or enforce a corporate code of conduct that adequately protects the human rights of those impacted by HudBay's Fenix mining project;
- (i) Formulating and directing a corporate response toward communities that escalated tensions and greatly increased the risk of violence, including by pursuing a strategy of clearing contested ancestral land of Mayan Q'eqchi' families, often through use of force and threats of violence;
- (j) Failing to establish, implement or enforce appropriate standards of conduct for its Security Forces;
- (k) Failing to ensure that its Security Forces were adequately trained;
- (l) Failing to ensure that its Security Forces had reasonable levels of technical and professional proficiency;
- (m) Failing to take reasonable steps to ensure that its Security Forces did not include individuals who had previously committed serious human rights violations;
- (n) Failing to establish and implement adequate disciplinary mechanisms designed to prevent and deter unreasonable uses of violence by its Security Forces;

- (o) Failing to investigate known past uses of violence by its Security Forces, including the frequent and liberal use of firearms during evictions requested by CGN HudBay's predecessor corporation, Skye Resources, in 2006 and 2007; and
  - (p) Failing to implement, monitor or enforce the Voluntary Principles on Security and Human Rights as HudBay publicly committed to do.
103. HudBay Mineral's Country Manager for Guatemala, John Bracale, was responsible for directing, controlling, monitoring and supervising the Fenix Security Forces, and in particular the Head of Security at the Fenix Project, Mynor Padilla.
104. The Plaintiffs plead that HudBay Minerals is responsible in law for the negligence of Mr. Bracale, the particulars of which are as follows:
- (a) Negligently directing, controlling, monitoring and supervising the Fenix Security Forces, including Mynor Padilla, the Head of Security for the Fenix Project;
  - (b) Authorizing the reckless and provocative deployment of security personnel armed with unlicensed and illegal weapons on September 27, 2009 into communities located on contested land despite knowledge that this unannounced deployment would likely precipitate violence;
  - (c) Failing to implement or enforce appropriate standards of conduct for the Fenix Security forces despite knowing of the past uses of unreasonable violence by the Fenix Security Forces, and despite knowing of the ongoing risk that Fenix Security Forces would use unjustified violence in the exercise of their duties;
  - (d) Authorizing the use of force by Fenix Security Forces against local communities; and
  - (e) Authorizing the distribution of lethal, unlicensed and illegal weapons to Fenix Security Forces, including Mynor Padilla, without adequate training or controls, and in contravention of Guatemalan laws on firearms and ammunition.
105. Tom Goodman, Senior Vice President, Development for HudBay Minerals, was responsible for the oversight of Corporate Social Responsibility for all of HudBay's

operations, including at the Fenix Project. The Plaintiffs plead that the Defendant HudBay Minerals is responsible in law for the negligence of Mr. Goodman, the particulars of which are as follows:

- (a) Failing to develop, implement and/or enforce an adequate or reasonable corporate social responsibility framework for HudBay's operations in Guatemala; and
- (b) Negligently supervising and directing community relations programs at HudBay's Fenix Project with the knowledge that policies regarding the appropriate use of force and the protection of human rights at the Fenix Project were lacking, inadequate or were not being enforced.

#### **Claim against CGN for Wrongful Death**

- 106. In the course of their duties as members of the Fenix Security Forces, employees of CGN directly and willfully caused Adolfo Ich's death by striking him with machetes and shooting him in the head. CGN is responsible in law for these actions.
- 107. Angelica Choc on her own behalf claims from CGN for the loss of guidance, care and companionship, loss of financial support and loss of services caused by the death of her husband, Adolfo Ich.
- 108. To the extent available under the applicable law, Angelica Choc claims for the wrongful death of her husband, including compensation for the damage and harm caused directly to him.

#### **Claim against CGN for Battery**

- 109. Angelica Choc on behalf of the estate of Adolfo Ich pleads that the actions of employees of CGN, including striking Adolfo Ich with machetes and shooting him in head at close range, were done willfully and intentionally and constitute the tort of battery.
- 110. As a result of the Defendant's conduct, the Plaintiff suffered serious injuries that caused significant pain and suffering.

111. The Plaintiff pleads that CGN is responsible in law for the above actions that constitute battery that were taken by its employees or agents.

**Claim against CGN for False Imprisonment**

112. Angelica Choc on behalf of the estate of Adolfo Ich pleads that the actions of the Fenix Security Forces constitute false imprisonment. These actions include surrounding Adolfo Ich prior to his shooting, dragging him to CGN's buildings, and preventing others from coming to his aid.

113. The Plaintiff pleads that CGN is responsible in law for the above actions that constitute false imprisonment and were taken by its employees or agents.

**Piercing the corporate veil**

114. The Plaintiffs claim that CGN is completely controlled by, subservient to and dependant upon HudBay Minerals, and is an agent of HudBay Minerals. The Plaintiffs plead that it is in the interests of justice to pierce the corporate veil and to impose liability for battery, wrongful imprisonment and wrongful death directly against the parent corporation, HudBay Minerals.

115. This pleading is separate from and in addition to the pleading that HudBay Minerals is directly liable in negligence for the assault, imprisonment and death of Adolfo Ich that were caused by the tortious actions and omissions of HudBay Minerals.

**Punitive damages**

116. The Plaintiffs plead that the Defendants' conduct was malicious and reckless and constitutes a wanton disregard for the Plaintiff's rights. The Plaintiff therefore asserts that it is appropriate, just and necessary to order aggravated and punitive damages against the Defendants.

**Service of the Statement of Claim outside of Ontario under R. 17**

117. The Defendant CGN is a necessary or proper party to a proceeding properly brought against and served upon Ontario defendants HudBay Minerals and HMI Nickel in Ontario.
118. The Defendant CGN carries on business in Ontario.
119. The Plaintiffs rely on the facts and allegations set out above and upon subsections 17.02 (o) and (p) of the *Rules of Civil Procedure* for the purposes of serving this Statement of Claim upon the Defendant CGN outside of Ontario.

**Law Applicable to the Claim**

120. The Plaintiffs contend that Ontario law is applicable in relation the Defendants' liability and to damages for all claims in this action.
121. In the alternative, the Plaintiffs plead that the applicable law is Guatemalan law in relation to the Defendants' liability and Ontario law with respect to damages for all claims in this Action.
122. If Guatemalan law is deemed to apply, the Plaintiff pleads and relies on Guatemalan law from the *Civil Code of Guatemala* and the *Criminal Code of Guatemala* (in relation to civil liability for criminal acts) that is annexed to this document as Schedule "A".

**Location of Trial**

123. The Plaintiffs propose that this action be tried at Toronto, Ontario

Date: September 24, 2010

Amended on: March 31, 2011

Amended on: February 6, 2012

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**Solicitors for the Plaintiffs**

**SCHEDULE A**  
**GUATEMALAN CIVIL CODE**

**Article 24.** Legal persons are civilly responsible for the actions of their representatives when in the exercise of their functions they harm another, or when they violate the law or do not comply with the law; this is without prejudice to appropriate action against the perpetrators of the damage.

....

**SECTION VII**

**Obligations that Result from Unlawful Acts**

**CHAPTER ONE**

**All damage must be compensated**

**Article 1645.** Any persons who cause damage or harm to another, whether intentionally, or due to lack of care or imprudence, are obligated to provide compensation for such damage, except where it can be shown that the damage or harm was produced by the fault or inexcusable negligence of the victim.

**Article 1646.** The person responsible for an intentional or unintentional delict is obligated to compensate the victim for the damage and harm that has been caused to the victim.

....

**Article 1648.** Blame is presumed, but this presumption can be rebutted by evidence to the contrary. The injured person is only obligated to prove the damage or harm suffered.

....

**Bodily injuries**

**Article 1655.** If the damage consists of bodily injuries, the victim has the right to be reimbursed for medical expenses, and to be provided with payment for the damage and harm that results from either partial or total physical inability to work. The judge will determine the amount by examining the following factors:

- 1) Age, civil state, occupation or profession of the person who has been affected:
- 2) Obligation of the person to provide for other people who have the right to be provided for under the law;
- 3) The ability and capacity of the obligated party to pay.

**In the case of death, the heirs of the victim, or those who have the right to be provided for by the victim are able to claim compensation that will be determined in accordance with the foregoing factors.**

....

**Employers' responsibility**

**Article 1663.** The employers or owners of workshops, hotels, business or industrial establishments and, in general, people who have someone under their command must answer for damage or harm caused by their employees or other workers in the context of their jobs.

They are also obligated to answer for acts beyond their control that have to do with the possession or control of an object or thing that they have delivered or transferred to a person that does not offer the necessary guarantees in order to make use of that object or thing.

The one that pays is able, in turn, to claim against the one who actually caused the damage or harm for the amount that he himself paid.

**Legal persons**

**Article 1664.** Legal persons are responsible for the damage or harm caused by their legal representatives in the exercise of their duties.

....

**Illegal imprisonment and constraint**

**Article 1667.** The person who causes illegal imprisonment and constraint, or those who order it, are jointly responsible for the damage or loss caused.

**GUATEMALAN CRIMINAL CODE**

**Criminal responsibility of legal persons**

**Article 38.** Legal persons will be held responsible for crimes committed by directors, managers, executives, representatives, administrators, staff members, or employees who have become involved in an act and without whose participation said act would not have transpired. Legal persons will be punished in the same way as indicated by the Code for individual persons.

....

**SECTION IX**

**Civil Responsibility**

**Responsible persons**

**Article 112.** Each person who is criminally responsible for a delict or fault, is also civilly responsible.

....

**Transmission**

**Article 115.** Civil responsibility derived from a delict or fault, is passed on to heirs of the responsible person; likewise, an action is passed on to the heirs of the victim so that they can continue it.

....

**Extension of civil responsibility**

**Article 119.** Civil Responsibility includes: 1. Restitution; 2. Reparation for material and moral damages. 3. Compensation for damages.

....

**Referral to the civil law**

**Article 122.** With respect to that which has not been covered by this section, the rules from the Civil Code and the Code of Civil and Commercial Procedures that cover this material will be applied.

## **CÓDIGO CIVIL DE GUATEMALA**

**ARTÍCULO 24.** Las personas jurídicas son civilmente responsables de los actos de sus representantes que en el ejercicio de sus funciones perjudiquen a tercero, o cuando violen la ley o no la cumplan; quedando a salvo la acción que proceda contra los autores del daño.

...

### **TÍTULO VII**

#### **Obligaciones que proceden de hechos y actos ilícitos**

##### **CAPÍTULO ÚNICO**

**Todo daño debe indemnizarse**

**ARTÍCULO 1645.** Toda persona que cause daño o perjuicio a otra, sea intencionalmente, sea por descuido o imprudencia, está obligada a repararlo, salvo que demuestre que el daño o perjuicio se produjo por culpa o negligencia inexcusable de la víctima.

**ARTÍCULO 1646.** El responsable de un delito doloso o culposo, está obligado a reparar a la víctima los daños o perjuicios que le haya causado.

....

**ARTÍCULO 1648.** La culpa se presume, pero esta presunción admite prueba en contrario. El perjudicado sólo está obligado a probar el daño o perjuicio sufrido.

....

#### **Lesiones corporales**

**ARTÍCULO 1655.** Si el daño consiste en lesiones corporales, la víctima tiene derecho al reembolso de los gastos de curación y al pago de los daños o perjuicios que resulten de su incapacidad corporal, parcial o total para el trabajo, fijado por el juez en atención a las siguientes circunstancias:

- 1º.** Edad, estado civil, oficio o profesión de la persona que hubiere sido afectada;
- 2º.** Obligación de la víctima de alimentar a las personas que tengan derecho conforme a la ley; y
- 3º.** Posibilidad y capacidad de pago de la parte obligada.

**En caso de muerte, los herederos de la víctima, o las personas que tenían derecho a ser alimentadas por ella, podrán reclamar la indemnización que será fijada de conformidad con las disposiciones anteriores.**

....

#### **Responsabilidad de los patronos**

**ARTÍCULO 1663.** Los patronos y los dueños de talleres, hoteles, establecimientos mercantiles o industriales y, en general, las personas que tienen a otra bajo su dependencia, responden por los daños o perjuicios que causen sus empleados y demás trabajadores en actos del servicio.

También están obligados a responder por los actos ajenos, los que teniendo la posesión o el mando de un objeto o elemento cualquiera, lo entreguen o transfieran a persona que no ofrezca las garantías necesarias para manejarlo.

El que pague puede repetir contra el autor del daño o perjuicio lo que hubiere pagado.

### **Personas jurídicas**

**ARTÍCULO 1664.** Las personas jurídicas son responsables de los daños o perjuicios que causen sus representantes legales en el ejercicio de sus funciones.

....

### **Apremio y prisión ilegales**

**ARTÍCULO 1667.** El que origina un apremio o prisión ilegales y el que los ordena, son responsables solidariamente por el daño o perjuicio que causen.

## **CÓDIGO PENAL DE GUATEMALA**

### **RESPONSABILIDAD PENAL DE PERSONAS JURÍDICAS**

**ARTÍCULO 38.** En lo relativo a personas jurídicas se tendrá como responsables de los delitos respectivos a directores, gerentes, ejecutivos, representantes, administradores, funcionarios o empleados de ellas, que hubieren intervenido en el hecho y sin cuya participación no se hubiere realizado éste y serán sancionados con las mismas penas señaladas en este Código para las personas individuales.

....

## **TITULO IX**

### **DE LA RESPONSABILIDAD CIVIL**

#### **Personas Responsables**

**ARTÍCULO 112.** Toda persona responsable penalmente de un delito o falta, lo es también civilmente.

....

#### **Transmisión**

**ARTÍCULO 115.** La responsabilidad civil derivada de delito o falta, se transmite a los herederos del responsable; igualmente, se transmite a los herederos del perjudicado la acción para hacerla efectiva.

....

#### **Extensión de la responsabilidad civil**

**ARTÍCULO 119.** La responsabilidad civil comprende:

- 1o. La restitución.**
- 2o. La reparación de los daños materiales o morales.**
- 3o. La indemnización de perjuicios.**

....

**Remisión a leyes civiles**

**ARTÍCULO 122.** En cuanto a lo no previsto en este título, se aplicarán las disposiciones que sobre la materia contienen el Código Civil y el Código Procesal Civil y Mercantil.



**ANGELICA CHOC et al.**  
Plaintiffs

v.

**HUDBAY MINERALS INC. et al.**  
Defendants

Court File No.

CV-10-411159

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**SECOND AMENDED**  
**FRESH AS AMENDED**  
**STATEMENT OF CLAIM**

**KLIPPENSTEINS**

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