

Court File No. CV-11-423077

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

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

Plaintiffs

and

**HUDBAY MINERALS INC. and
HMI NICKEL INC.**

Defendants

SECOND 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.

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: March 28, 2011

Issued by: _____

Local Registrar

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

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

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

CLAIM

I. OVERVIEW

1. On January 17, 2007, at the request of HudBay Mineral's predecessor corporation, Skye Resources Inc., hundreds of mine security personnel, police and military forcibly expelled members of the remote indigenous Mayan community of Lote Ocho from land that community members consider to be their ancestral home in eastern Guatemala. During these armed evictions, eleven Mayan Q'eqchi' women were gang-raped by police, military and mine security personnel. Skye Resources requested and authorized these forced evictions, provided considerable funding to secure the police and military's participation in these forced evictions, and, together with the police and military, jointly managed the conduct of the forced evictions. The mine security personnel who committed the rapes were deployed at Skye Resources' Fenix mining project, and were under the control and direction of Skye Resources. Skye Resources has since amalgamated with and is now a part of HudBay Minerals.
2. The Plaintiffs allege that these rapes committed by police, military and mine security personnel were caused by the negligence of HudBay Minerals' predecessor corporation, Skye Resources. In particular, the Plaintiffs allege that Skye Resources was negligent in its direction and supervision of the security personnel who committed the rapes. The Plaintiffs further allege that Skye Resources was negligent in requesting and authorizing the forced evictions of Lote Ocho without taking adequate and reasonable steps to guard against the use of violence by the men who conducted the evictions, including specifically police, military and company security personnel ~~during this eviction~~. As a result of Skye Resources' negligence, the Plaintiffs suffered serious physical and psychological harm.
3. The Plaintiffs further allege that, as a result of corporate amalgamations, HudBay Minerals is fully liable for the obligations of its predecessor corporation Skye Resources, including the liability arising from this claim.

II. RELIEF CLAIMED

4. The Plaintiff Margarita Caal claims:
 - (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.

5. The Plaintiff Rosa Elvira ~~Elbira~~ Coc Ich claims:
 - (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.

6. The Plaintiff Olivia Asig Xol claims:
 - (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.

7. The Plaintiff Amalía Cac Tiul claims:
 - (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;

- (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.
8. The Plaintiff Lucia Caal Chún claims:
- (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.
9. The Plaintiff Luisa Caal Chún claims:
- (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.
10. The Plaintiff ~~Carmela Carmelina~~ Carmela Caal Ical claims:
- (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.
11. The Plaintiff Irma Yolanda Choc Cac claims:

- (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.
12. The Plaintiff Elvira Choc Chub claims:
- (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.
13. The Plaintiff Elena Choc Quib claims:
- (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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.
14. The Plaintiff Irma Yolanda Choc Quib claims:
- (a) General, aggravated and special damages in the amount of \$1,000,000.00;
 - (b) Punitive and exemplary damages in the amount of \$4,000,000.00;
 - (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

15. The Plaintiffs Rosa ~~Elvira~~ Elvira Coc Ich, Margarita Caal, Olivia Asig Xol, Amalía Cac Tuil, Lucia Caal Chún, Luisa Caal Chún, ~~Carmelina~~ Carmela Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib and Irma Yolanda Choc Quib (“the Plaintiffs”) are all indigenous Mayan Q’eqchi’ women who reside in a mountain community known as Lote Ocho, located near El Estor, in the Republic of Guatemala. The Plaintiffs and their families engage in and depend upon subsistence farming for their livelihood.
16. The Defendant HudBay Minerals Inc. (“HudBay Minerals” or “HudBay”) is a Canadian mining company that is incorporated under the laws of Canada, and headquartered in Toronto, Ontario. HudBay Minerals owns and operates mining projects in Canada and Latin America. Shares of HudBay Minerals are listed on the Toronto Stock Exchange.
17. At the time that this Action was issued, the Defendant HMI Nickel Inc. (“HMI Nickel”, formerly named Skye Resources Inc.) was a Canadian holding company and a wholly-owned subsidiary of HudBay Minerals that was headquartered in Toronto, Ontario. Since that time, however, HMI Nickel has amalgamated with the Defendant HudBay Minerals to form one corporation also called HudBay Minerals Inc.

IV. MATERIAL FACTS

The Fenix Mining Project

18. 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”).

19. At the time of the events described herein, the Fenix Mining Project was owned, operated and controlled by HudBay's predecessor corporation, Skye Resources Inc. ("Skye Resources" or "Skye"), a mining company headquartered and incorporated in Canada. This operation and control was exercised both directly through Skye Resources managers, executives and employees, and indirectly through Skye's wholly-controlled Guatemalan subsidiary, Compañia Guatemalteca de Níquel ("CGN"). At all material times, Skye Resources owned 98.2% of the shares of CGN, and directed, controlled, managed and financed all aspects of CGN's operations.
20. At all material times, all of Skye Resources' activities were focused on the Fenix Project, which was Skye Resources' sole business interest. Skye's corporate filings noted that "Skye's business is completely dependant on its foreign operations at the Fenix Project in Guatemala. Skye's only mineral property is in Guatemala."

Corporate History

21. In August 2008, HudBay Minerals acquired all of Skye Resources' shares, thereby converting Skye Resources into a wholly-owned and wholly-controlled subsidiary of HudBay Minerals. As part of this acquisition, HudBay Minerals caused Skye Resources to amalgamate with numbered company 0828275 B.C. Ltd., to form an amalgamated corporation called HMI Nickel Inc. HMI Nickel, as a continuation of Skye Resources, remained liable for all of obligations of Skye Resources, including any potential liability arising from the claims in this lawsuit. From August 2008 until August 2011, HMI Nickel was holding company of HudBay Minerals with head offices in Toronto, Ontario.
22. On August 15, 2011, HudBay Minerals caused HMI Nickel to amalgamate with HudBay Minerals Inc. to form an amalgamated corporation also called HudBay Minerals Inc. As a continuation of HMI Nickel, the Defendant HudBay Minerals Inc. remains liable for all of the obligations of HMI Nickel and Skye Resources including any potential liability arising from the claims in this lawsuit.

Fenix Security Personnel

23. Under instructions from and subject to continuing approval by Skye Resources, CGN employed private security personnel at the Fenix Project on behalf of and for the benefit of Skye. Some of these security personnel were direct employees of CGN, while others were hired through third party security providers. The security personnel were directly or indirectly controlled by Skye from its head-offices in Canada.
24. At all material times, CGN employed Mynor Ronaldo Padilla Gonzáles (“Mynor Padilla”) as the Head of Security at the Fenix Project on behalf of and for the benefit of Skye Resources. Mynor Padilla supervised and controlled all security personnel at the Fenix Project whether provided internally or through third parties. Mynor Padilla was hired and supervised by employees and executives of Skye.
- 24.1 As of January 17 2007, CGN had retained at least two third party companies to provide security and related services at the Fenix Project on behalf of and for the benefit of Skye – “Wakenhut”, and a company referred to variously as “Integracion Total”, “Delta Elite” and “SPS” (henceforth collectively “Integración Total”).
- 24.2 In August 2006, Skye Resources instructed CGN to retain Wakenhut to provide security and related services at the Fenix Project on behalf of and for the benefit of Skye. Skye Resources had knowledge of and power over the terms of the agreement between CGN and Wakenhut and in fact approved the terms of the agreement. This 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. Neither Skye Resources nor CGN conducted any screening or background checks to ensure that neither Wakenhut nor its employees were credibly implicated in past human rights abuses or acts of violence.
25. In January 2007, Skye Resources instructed CGN to retain ~~a third party company called Integración Total S.A. (“Integración Total”)~~ to provide security and related services ~~further security personnel~~ at the Fenix Project on behalf of and for the benefit of Skye.

Skype instructed CGN to retain Integración Total with the intention that Integración Total would participate in the land evictions of various communities, including Lote Ocho, in January 2007. CGN retained Integración Total solely through an informal oral agreement.

26. Skype Resources 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. Neither Skype Resources nor CGN conducted any screening or background checks to ensure that neither Integración Total nor its employees were credibly implicated in past human rights abuses or acts of violence.

27. CGN's internal security personnel and personnel providing security and related services through any third party company at the Fenix Project as at January 17, 2007 the security personnel provided through Integración Total will be hereinafter collectively referred to as "Fenix Security Personnel" or "Security Personnel".

28. Skype Resources knew that Guatemalan law requires private security providers to be specifically authorized and licensed prior to providing security services. Skype knew that neither CGN nor Integración Total had the required authorization or license to provide private security services in Guatemala, and therefore knew that Fenix Security Personnel were operating at the Fenix Project illegally.

29. Skype Resources further knew that both private security providers and individuals are prohibited from carrying or using firearms without specific authorization from the 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.

30. Skype Resources knew that the Fenix Security Personnel did not have the required weapons authorization, registration or licenses from the Office of Arms and Ammunition Control to acquire, possess or distribute firearms, and therefore knew that the Security

Personnel were using firearms at the Fenix Project illegally. In particular, Skye Resources 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 Personnel at the Fenix Project.

31. As part of Skye Resources' background assessment of the risks and responsibilities of retaining Integración Total to provide private security services at the Fenix project, Skye Resources 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. Skye Resources should have taken this alleged criminality into account when assessing the risks of retaining 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.
32. Skye Resources made key decisions regarding the Fenix Security Personnel 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 procedures for protecting human rights; determining the size and composition of its private security forces; determining whether and how the Security Personnel were deployed; and determining the level of participation of its Security Personnel in forced evictions.
33. At and around the time of events described herein, Skye Resources had publicly committed to adhere to and implement a number of specific standards and principles of conduct applicable to Security Personnel engaged at the Fenix Project and contained in corporate social responsibility frameworks including both the International Finance Corporation's Performance Standards ("IFC Performance Standards") and the international Voluntary Principles on Security and Human Rights. Despite publicly representing that Skye Resources would abide by these commitments, Skye did not, in fact, implement or apply these standards in the hiring, directing and supervising of Security Personnel engaged at its Fenix Project.

Land disputes between Skye Resources and Mayan Q'eqchi' communities

34. There are currently several indigenous Mayan Q'eqchi' farming communities located on a small portion of the Fenix Property (the "Contested Land"). During the period relevant to this lawsuit, Skye Resources and CGN claimed that they had valid legal right to the Contested Land, while Mayan Q'eqchi' communities claimed and continue to claim that they are the rightful owners of the lands which they consider to be their ancestral homeland. The Mayan Q'eqchi' further claimed that any apparent rights to the Contested Land claimed by Skye or CGN 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.
35. According to the United Nations' sponsored truth commission, *Comisión para el Esclarecimiento Histórico* (the "Truth Commission") Mayan populations were particularly targeted during the Civil War, resulting in the "extermination, en masse, of defenceless Mayan communities purportedly linked to the guerrillas – including children, women and the elderly – through methods whose cruelty has outraged the moral conscience of the civilised world."
36. In 2006, an agency of the United Nations ruled that Guatemala had breached international law by granting mining rights to the Fenix Project to CGN and Skye without adequately consulting with local Mayan Q'eqchi' communities. The Guatemalan government and Skye Resources have ignored this ruling.
37. On February 8, 2011, the Constitutional Court of Guatemala, the highest court in the country, has ruled that neighbouring Mayan Q'eqchi' communities have valid legal rights to the Contested Land, and ordered the Government of Guatemala to formally recognize the communities' collective property rights.
38. In or around September 2006, Mayan Q'eqchi' who had been expelled from the area around El Estor during the Guatemalan Civil War and their descendants reclaimed several small parcels of land near El Estor by moving onto the Contested Land, building

homes and planting crops. These indigenous Mayan Q'eqchi' view their reclamation as a rightful and legal repossession of ancestral homeland unjustly taken from them.

39. The community of Lote Ocho is related to but also distinct from other communities that participated in land reclamations. While several additional families joined Lote Ocho in September 2006 as part of the reclamations described above, many of the families of Lote Ocho, including the families of several of the Plaintiffs, have lived and farmed on this land for decades. Skye Resources claims that it has legal rights to exclusive possession of the land occupied by the community of Lote Ocho.

Skye Resources' control and management of the Fenix Mining Project

40. During the time period relevant to this action, all aspects of the operation of the Fenix Project were directed, controlled, managed and financed by Skye Resources, both directly through Skye's executives, managers and employees, and indirectly through Skye's total control of the management and operation of CGN. Much of this direction, control, management and financing was exercised from Canada. At the relevant time, Skye had 20 employees, including 13 corporate officers, all focused solely on the development of the Fenix mining project.
41. Many of Skye Resources' executives and managers were assigned duties and responsibilities directly related to the detailed on-the-ground management and operation of the Fenix Project, including both the management and operation of mine Security Personnel and managing relationships with local communities. According to Skye:
- (a) William Anthony Enrico, Vice President Operations of Skye, was responsible for "all operational activities at the Fenix Project in Guatemala" and for providing "overall leadership and coordination for the project's development";
 - (b) Rick Killam, Vice President Environment, Health, Safety and Community Affairs of Skye, was responsible for managing environmental sustainability, corporate social responsibility and Skye's relationships with local communities;

- (c) Hugh S. Duncan, Project Director at Skye, was responsible for leading and managing the development of the Fenix Project;
 - (d) Sergio Gabriel Monzon Ordonez, Country Manager for Skye, was responsible for the day-to-day operations of CGN, as well as managing aspects of Skye's administration, corporate social responsibility strategy and relations with indigenous communities and government institutions in Guatemala;
 - (e) Geoffrey Bach, Vice President Finance of Skye, was responsible for "the financial planning required to take the Company's Fenix project through its development and construction phases into production";
 - (f) Colin McKenzie, Vice President Exploration of Skye, was responsible for all exploration activities related to the Fenix Project; and
 - (g) David Neudorf, Vice President Technology and Development for Skye, was responsible for technology development and project development activities, including the design and engineering of the Fenix Project's processing plant.
42. Skye Resources, through its executives, managers and employees, the majority of whom were based in Canada, was directly involved in and exercised ultimate control over various decisions and actions directly related to the community of Lote Ocho. In particular, Skye:
- (a) formulated corporate responses to Mayan Q'eqchi' claims to Contested Land, including the decisions to engage security personnel at the Fenix Project, and to retain third party security personnel;
 - (b) decided whether, when and how to seek the forced removal of the communities located near the Fenix Project, including Lote Ocho;
 - (b.1) made the final decision of whether and how Lote Ocho would be forcefully removed by police, military and private security forces on January 9 and 17, 2007;

- (b.2) authorized payments from CGN to the police and military for their participation in the forced eviction of Lote Ocho on January 9 and 17, 2007;
 - (b.3) authorized the provision of logistical support by CGN, including transportation and helicopter recognizance, to the police and military who participated in the forced eviction of Lote Ocho on January 9 and 17, 2007;
 - (c) determined the level of involvement of Fenix Security Personnel in those forced removals, including the eviction of Lote Ocho;
 - (d) identified the specific communities to be forcefully removed, including Lote Ocho;
 - (e) formulated, supervised and implemented policies regarding community relations;
 - (f) communicated with and sought support from the Canadian embassy in Guatemala and the Canadian Ambassador to Guatemala regarding enforcement of Skye's claimed right to exclusive possession of the Contested Land, including the land occupied by Lote Ocho; and
 - (g) communicated with and sought support from the President of Guatemala and other Guatemalan government officials regarding enforcement of Skye's claimed right to exclusive possession of the Contested Land, including the land occupied by the community of Lote Ocho.
43. Skye Resources appointed specific managers and executives to oversee the Security Personnel engaged at the Fenix Project. Sergio Monzon, in his role as Skye's Country Manager; Rick Killam, in his role as Skye's Vice President Environment, Health, Safety and Community Affairs; and William Anthony Enrico, Skye Vice President Operations, were responsible for, and did in fact, supervise and direct activities of the Security Personnel deployed at the Fenix Project.
44. Mr. Monzon and Mr. Enrico were responsible for overseeing the hiring, training, equipping and monitoring of Security Personnel. Mr. Killam, Mr. Enrico and Mr. Monzon were also responsible for ensuring that security personnel adhered to the

standards and guidelines set out in the IFC Performance Standards and the Voluntary Principles on Security and Human Rights.

45. Further, Skye Resources controlled its subsidiary CGN through key Skye executives, who were also at the same time key executives and directors of CGN. For example, David Anthony Huggins served as Skye's Chief Operating Officer at the same time that he served as CGN's President and Legal Representative. William Keith Service served as Skye's Chief Financial Officer at the same time that he served as Vice President of CGN. Hugh Brooke MacDonald was Vice President, Legal Affairs, and Secretary of Skye at the same time that he served as CGN's Secretary. William Anthony Enrico served as Vice President, Operations, for Skye at the same time that he served as President and Legal Representative of CGN.
46. Many of the decisions taken by these executives were taken jointly on behalf of both Skye and CGN.
47. Skye Resources directly contracted with third party corporations for the provision of on-the-ground services at the Fenix Project. These contracts and agreements include:
- (a) retaining Canadian consultancy firm Klohn Crippen and Berger to conduct a Social Environmental Assessment of the Fenix Project in accordance with the IFC Performance Standards and the Equator Principles. The retainer also required Klohn Crippen and Berger to establish a community development plan for Skye and to advise Skye on consultation with and engagement of the predominantly indigenous Mayan local communities;
 - (b) concluding and executing several agreements and contracts with Ontario-based engineering firm, Hatch Ltd., including a "scoping" study in 2004, a feasibility study in 2006, basic engineering in 2007, and a contract for engineering, procurement, and construction management services for the Fenix Project in 2007.

Evictions of Mayan Q'eqchi' Communities

48. In the four months leading up to the evictions, Skye Resources made numerous public representations regarding Skye's approach to resolving the ~~the~~ land dispute with Mayan Q'eqchi' subsistence farmers, including the land dispute with the Plaintiff's community of Lote Ocho. The Plaintiffs plead that these representations are relevant to assessing the duty of care owed by Skye to the Plaintiffs, the legal standard of care applicable to Skye, and the legal proximity that exists between Skye and the Plaintiffs. The Plaintiffs further plead that by making these representations, Skye is acknowledging and accepting responsibility for and control over the land dispute at the Fenix Project, including the dispute with Lote Ocho.

49. In a news release issued on September 19, 2006 entitled Skye's Project Unaffected by Land Occupation", Skye states:

Skype Resources Inc. (TSX:SKR) --- ("Skype") confirms that a number of Mayan Indian families have occupied lands associated with Skye's Fenix project, with the intention of establishing subsistence farming communities. The three parcels of land they have occupied lie in a valley a considerable distance from the Fenix nickel deposits. The situation on the ground is peaceful and is not affecting project activities, including the ongoing drill program. The Company has attempted to hold discussions with representatives of the groups but was not successful. The Company will continue to seek dialogue and is also perusing legal avenues. . . .The Fenix project will meet all key international benchmarks in particular the Equator Principles. The project will comply with all relevant Guatemalan laws and the International Finance Corporation (IFC) Performance Standards.

50. On September 22, 2006, Mr. Austin, the President and Chief Executive Officer of Skye Resources, stated in a newspaper article that Skye was keen to defuse tension and avoid confrontation. He is quoted as saying: "[o]ur approach has been to try to talk with the community and the people in the area and to develop a win-win situation."

51. On December 19, 2006, Mr. Austin released a public letter regarding Skye's approach to the land issue:

The people of Skye Resources remain committed to open and transparent communication on all issues and concerns related to the Fenix Project. . . .

We are taking whatever steps we can to build trusting relationships with our neighbors and to respond to their fears and concerns. In particular, Skye has been working with management in Compañía Guatemalteca de Niquel S.A. (CGN) . . . to assist them in resolving issues relating to the recent series of land invasions.

52. During this time, however, Skye Resources, through its executives, made clear that Skye believed it had exclusive legal rights to the land, and would seek forced evictions if the communities did not leave of their own accord.

53. At the same time, according to Skye's communications with investors in Canada and elsewhere, there was no pressing need to resort to force to resolve the land dispute as the land reclamations were not impacting Skye's activities. In corporate documents dated September 30, 2006, Skye wrote:

[T]hese occupations have caused no interruption of the project, although some remediation of exploratory drill sites has been delayed until the invasion of one site has been resolved. One invasion area is located in an area to be mined in the seventh year of operations and another invaded area covers part of our limestone exploitation licence. The other invaded areas are not on essential project land.

54. Despite Skye Resources' publicly claimed desire to resolve the land dispute through dialogue, and despite there being no pressing need to rush the resolution of the conflict, Skye vigorously sought immediate forced evictions. These efforts included high-level meetings conducted by Skye executives and employees with the government of Guatemala to secure its support, and meetings with the Canadian Ambassador at the Canadian Embassy in Guatemala City to request that the Canadian Embassy lobby the Guatemalan government on behalf of Skye.

54.1 Skye explicitly adopted a policy of refusing to engage in dialogue or negotiations with Lote Ocho and other Mayan Q'eqchi' communities involved in the land dispute. Specifically, Skye rejected proposals for dialogue made by the Catholic Church and agencies of the Guatemalan government. Skye maintained this policy of "no negotiations" until after Mayan Q'eqchi' communities had been violently evicted from their homes in January 2007.

55. In November 2006, Guatemalan police conducted forced evictions of some communities located on the Fenix Property without a court order. After these evictions, Skype Resources' executives and managers became aware of credible allegations of violent abuses committed by police during these evictions, including allegations regarding community member José Chocooj Pan, who was allegedly dumped at the side of a road unconscious after being badly beaten by police.

55.1 The *Secretaría de Asuntos Agrarios de la Presidencia de la República de Guatemala* (the "Secretariat of Agrarian Affairs of the Presidency of the Republic of Guatemala", henceforth the "Secretariat of Agrarian Affairs") was the Guatemalan government agency specifically tasked with resolving land conflicts in Guatemala through mediation. Throughout late 2006 and early 2007, Skype Resources adopted a strategy of explicitly avoiding and sidelining the Secretariat of Agrarian Affairs out of a concern that the government agency would side with the Mayan Q'eqchi' communities in the land dispute. In late 2006, the Secretariat of Agrarian Affairs proposed a formal process for discussion and negotiation to attempt to resolve the land conflict between the Mayan Q'eqchi communities and CGN. This process was strongly supported by the Catholic Church, and the Embassies of both Canada and the Netherlands. Skype directed CGN not to participate in this process.

55.2 The Catholic Church, through the Bishop of Izabal, made several attempts to initiate discussions between CGN and the Mayan Q'eqchi' communities, and offered to personally mediate the land conflict. On the directions of Skype, CGN refused to engage in this process in good faith and instead adopted a strategy of avoidance, stonewalling, and delay. For example, on or around December 12, 2006, CGN employee Roberto Dala, under the instructions of Skype, met with the Bishop, representatives of the Mayan Q'eqchi' communities and other organizations to discuss a possible negotiated and peaceful resolution to the land conflict. At the close of that meeting, CGN and Skype agreed to meet and continue the dialogue on January 11, 2007. Despite their agreement to meet to discuss a negotiated and peaceful resolution to the land dispute on January 11, 2007, CGN and Skype instead arranged for forced evictions to be conducted on January 8

and 9, 2007, as set out below. On January 5, 2007, the Bishop called CGN and urged the company not to conduct the planned forced evictions, and instead return to negotiations on January 11, 2007 as previously agreed. Skye and CGN ignored these urgings and instead went ahead with the forced evictions.

55.3 Instead of entering into negotiations for the peaceful resolution of the land conflict through mediation by the Catholic Church or the Secretariat of Agrarian Affairs, Skye chose to respond to the land conflict by seeking forced evictions by police, military and private security.

55.4 With the knowledge and approval of Skye, CGN retained Guatemalan legal counsel, one Hector Muñoz, to actively seek to obtain court orders for the eviction of the Mayan Q'eqchi' communities including Lote Ocho. Skye Resources and CGN retained Mr. Muñoz despite the fact that Mr. Muñoz had been involved in multiple previous forced evictions in which police and military used violence against indigenous peoples, and burned villages to the ground.

55.5 Skye executives, in particular Brooke Macdonald, Vice President Legal Affairs, met with and instructed Mr. Muñoz regarding the legal process to obtain eviction orders. In the months leading up to the forced evictions, Mr. Muñoz, as instructed by Mr. Macdonald and other Skye executives, played an active and hands-on role in securing the eviction orders, and determining the timing and manner of their execution.

55.6 There were numerous irregularities in the manner in which CGN sought forced evictions, including in its legal request for the eviction orders themselves. Skye was aware of these problems. For example, Mr. Muñoz and CGN employee Sergio Monzon had private *ex parte* meetings with the Guatemalan judges that ultimately issued the eviction orders on a number of occasions in order to lobby them for their support. CGN submitted affidavits to court that falsely asserted that the affiants had personally witnessed members of the community of Lote Ocho using force to occupy their village when in fact the affiants had never been to Lote Ocho. Similarly, in affidavits submitted to court in support of the

eviction orders, CGN reused the same list of “occupants” for all occupation sites despite the fact that each community consisted of entirely different individuals.

55.7 Skye, through Mr. Muñoz, engaged in an explicit strategy to deny the Mayan Q’eqchi’ communities and government agencies the opportunity to participate in the legal process prior to the forceful removal of people from their homes. In late December 2006, the Mayan Q’eqchi’ communities filed a legal request similar to an interim injunction (known in Guatemalan law as an “amparo”) to attempt to stop the eviction. Eventually, two government agencies, the Secretariat for Agrarian Affairs and the “Procurador de los Derechos Humanos” (the Human Rights Office), intervened in the amparo process on the side of the Mayan Q’eqchi’ communities. In response, Skye Resources explicitly adopted a strategy of procedural delay so that the request for an interim injunction would not be judicially considered until after the forced eviction had been carried out in January 2007. Skye’s strategy was successful, and Mayan Q’eqchi’ communities were not able to make any legal submissions regarding the land dispute prior to being forcefully removed from their homes.

55.8 On or around December 1, 2006, in response to concerns that CGN was having difficulties obtaining the court eviction order pertaining to Lote Ocho, Skye arranged for the judge in charge of the case to be personally pressured to grant the eviction order. The court issued the eviction order for Lote Ocho a week later.

55.9 Throughout the period leading up to the evictions in January 2007, CGN, acting on instructions from Skye, conducted low flyovers of Lote Ocho and the other Mayan Q’eqchi’ communities with the company’s helicopter and plane with the specific intent of intimidating and putting psychological pressure on the Mayan Q’eqchi’ communities. Skye specifically chose this tactic because it knew that Mayan Q’eqchi’ communities would be especially intimidated by helicopter flyovers because of the extensive use of helicopters in attacks against Mayan villages during the recent Guatemalan Civil War, including in the commission of massacres in many villages during that war.

55.10 In the period leading up to the forced evictions in January 2007, Skye Resources engaged various consultants to advise it regarding the best way to deal with the land conflict. These consultants included “Monkey Forest”, a company that provided consultation on conflict resolution and managing community relationships, and Hank Morris, a security and human rights consultant. In the immediate lead up to the evictions in January 2007, both Mr. Morris and Monkey Forest advised Skye not to go forward with forced evictions, in large part because of the serious risk that police, military and private security would use violence against community members at such an eviction. Monkey Forest strongly advised that if the evictions were to go ahead, that human rights monitors be present to guard against the use of violence by the men conducting the evictions. Despite this advice, Skye took no steps to delay or stop the evictions, to ensure that human rights monitors were present in Lote Ocho during the evictions, or to otherwise prevent the use of violence at the forced evictions.

55.11 Throughout this time, Skye was well aware that extreme violence is committed by police and the military at forced evictions in Guatemala with alarming regularity, and that community members are injured or killed at virtually every forced eviction. Given this pattern, Skye knew or should have known that Skye and CGN would necessarily need to take substantial proactive steps in order to manage their relationship with police and military in a manner that would ensure that violence would not occur during the evictions of the community of Lote Ocho.

55.12 Skye and CGN were aware of serious and ongoing issues with corruption and human rights abuses associated with the Guatemalan police and the Guatemalan military. Skye was aware that the Guatemalan police had recently been involved in murder, extra-judicial killings, rape, kidnapping, extortion and corruption. Skye was well aware of the importance of having memorandums of understandings and protocols with police and military in order to manage the relationship between CGN and the police and military and to set out the expected conduct of police and military. Skye knew that such agreements were especially important in cases in which the police and military would be providing

services at Skye and CGN's request, and in which Skye or CGN would be paying, and providing logistical support to, the police and military.

55.13 CGN, with the knowledge and approval of Skye, unofficially retained three agents to assist with CGN's relationship with police and the military in the lead up to forced evictions. These middlemen included unofficial police liaisons Ranulfo Gil and Armando Hernandez, and a retired Guatemalan Colonel named Rolando Augusto Diaz Barrios, who was hired for his contacts with the military. These unofficial police and military liaisons facilitated illegitimate and unofficial payments to the military and the police, participated in the co-ordination and planning of the evictions, met with military and police before and after the evictions, and were present at the evictions themselves.

55.14 In the lead up to the evictions, Skye and CGN sought and secured military and police reinforcements in the area around El Estor by paying and providing logistical support to the military and the police. Starting in October 2006 and continuing until January 2007, CGN, with the explicit knowledge and approval of Skye, made regular payments totaling well over US \$100,000.00 to the police and military related to the land conflict and the evictions themselves. None of these payments were official or legitimate. Neither Skye nor CGN had any contracts or agreements governing the payments made to the police and military. All payments were made by CGN through unofficial "liaisons" in cash or direct transfers to personal bank accounts with no form of accountability. No invoices or receipts were ever issued for these payments.

55.15 Skye Resources had full *de facto* control over whether and when the forced eviction of Lote Ocho and the other communities would be carried out, and had the *de facto* power, if it so chose, to delay enforcement of the eviction order for Lote Ocho indefinitely.

55.16 The forced evictions themselves were conducted with CGN's full participation and support. With the knowledge and approval of Skye, CGN engaged in extensive coordination with the military and police regarding the conduct of the evictions on January 8, 9 and 17, 2017. Prior to the evictions, CGN engaged in planning sessions with the military and the police, and arranged for police to fly on recognizance missions in

CGN's helicopter. CGN provided air transportation to top police and military officials in the company's plane. CGN's lawyer, Mr. Muñoz, personally attended at the evictions.

55.17 On the morning of each eviction, including the eviction on January 17, 2007, the police, military and private security gathered together at CGN's facilities before setting out to conduct the evictions. CGN provided transportation and other logistical support to the police and military in the form of trucks to transport police and military personnel to the eviction sites, and fuel for police and military vehicles. Each day, pre-eviction planning sessions and post-eviction debriefs were held in CGN's offices with full participation of CGN's police and military liaisons and CGN employees, including Mynor Padilla.

56. On January 8, 2007, Skye Resources issued a press release announcing the forced evictions, stating that the evictions were being carried out by individuals who had been specially trained to "avoid violence in such situations". Mr. Austin, Skye's President and CEO, is quoted as saying "we are thankful that the Guatemalan government has upheld the company's rights to the land and we remain committed to working with community leaders to find solutions to this important issue."

57. On January 8 and 9, 2007, at the request of Skye Resources, Fenix Security Personnel, police and military conducted forced evictions in at least five Mayan communities located on the Contested Land, including the community of Lote Ocho. In the course of these evictions, Fenix Security Personnel, police and military burned dozens of houses to the ground, fired gunshots and stole goods. Skye took no steps to determine whether any of the individuals who participated in these evictions were "specially trained".

57.1 Late in the day on January 9, 2007, armed men consisting of Fenix Security Personnel, police and military arrived in Lote Ocho to evict over one hundred Mayan Q'eqchi' families from their homes, in the pouring rain. The men conducting the eviction fired tear gas canisters into the community before dousing homes with gasoline and burning them to the ground. The families of Lote Ocho had nowhere to go after their homes had been destroyed, and spent the night in the forest trying to find shelter from the rain.

58. On January 10, 2007, Skye published a press release confirming the first round of evictions, again emphasizing that “specially trained” individuals carried out the evictions. Skye’s President and CEO Mr. Austin is quoted as saying:

[w]e are grateful to the Guatemalan Public Ministry and the National Police Force for the professional manner in which this unfortunate situation was resolved. . . .We also would like to thank the stakeholders on both sides of this dispute for maintaining a peaceful atmosphere during this action. We regret that our previous attempts at settlement of this issue through dialog were unsuccessful, but we also reaffirm our commitment to continue our discussions on matters of concern with the local communities in the El Estor region.

59. After this first round of evictions, Skye Resources, through its CEO and President, Mr. Austin, and other executives and managers were informed and became aware that the evictions were not as peaceful as they had initially been portrayed by Mr. Austin. In particular, executives of the company knew that during some of the evictions, homes had been burned to the ground. Executives of Skye Resources, including Mr. Austin, saw photographic and/or video evidence of homes being burned down during some of these evictions, and heard credible allegations of undue force used during the evictions.

60. Skye took no steps after the evictions of January 8 and 9 to investigate alleged uses of violence during these evictions. Skye did not reconsider or modify its strategy of seeking forced removal of communities located on the Contested Land in light of these allegations of violence, ~~and~~ took no steps to modify or strengthen any of its policies or standards relating to the conduct of the Fenix Security Personnel or the protection of human rights, and took no steps to reconsider its relationship with the police and military in light of homes being burned down and violence being committed at the evictions on January 8 and 9.

61. In the week that followed, the community of Lote Ocho returned to the land and began to rebuild their homes.

61.1 Upon learning that the families of Lote Ocho were rebuilding their homes, Skye Resources immediately decided that another forced eviction of Lote Ocho was necessary.

Skye Resources had full *de facto* control over whether and when the second forced eviction of Lote Ocho would be carried out. Skye instructed CGN and its Guatemalan lawyer, Mr. Muñoz, to take all necessary steps to secure a second forced eviction as soon as possible. As a result of Skye's request, a second eviction was scheduled for January 17, 2007. Skye and CGN instructed police and private security personnel to remain at the site of Lote Ocho after the second eviction was complete to prevent the community from returning to rebuild their homes again.

61.2 Skye Resources specifically arranged for a second forced eviction of Lote Ocho despite there being no pressing need for such an eviction, and without taking any precautions to ensure that the second eviction would be conducted peacefully. Despite the use of violence during earlier evictions in November and January (and in particular the burning of homes down to the ground with gasoline), neither Skye nor CGN took any steps to re-evaluate the strategy of seeking forced evictions, or the role that the police and military would play at the second eviction of Lote Ocho on January 17, 2007. Neither Skye nor CGN took any steps to ensure that the police or military agreed to or would comply with human rights policies or international laws and guidelines nor did Skye or CGN take any steps to ensure that the police, military and private security who conducted the second forced eviction of Lote Ocho were properly trained and had not been credibly implicated in past human rights abuses.

Assaults suffered by the Plaintiffs

62. On January 17, 2007, hundreds of members of the police and military and Fenix Security Personnel returned to Lote Ocho to conduct a second eviction of the community, again at the request of Skye Resources. Neither Skye nor CGN arranged for there to be any human rights monitors or observers at the eviction on January 17, 2007, despite being urged to do so by their own consultants.

63. When the Security Personnel, police and military arrived in the village, the men of the village were not present. The intruding security forces (consisting of Security Personnel, police and military) trapped the Plaintiff women in and around their homes. Some of the

Plaintiffs were seized as they tried to flee with their children, while others were trapped inside their homes as they tried to gather their belongings.

64. All the Plaintiffs were then each physically assaulted and gang-raped by groups of men consisting of members of the Fenix Security Personnel, members of the police and members of the military. During the gang rapes, the members of the Fenix Security Personnel were wearing uniforms bearing the logo and initials of CGN. This logo is substantially similar to the logo used by Skye Resources.
65. The Plaintiff Rosa ~~Elvira Elvira~~ Coc Ich was sexually assaulted by nine men, including several uniformed Fenix Security Personnel. At first, a police officer drew a pistol and put it to her head and asked her where her husband was. When she was unable to tell him, he said he was going to kill her. All nine men, including uniformed Security Personnel, then held her down and raped her. ~~Because of injuries sustained from the gang rape, Ms. Coc is no longer able to have children.~~
66. The Plaintiff Margarita Caal Caal was six months pregnant when she was assaulted and raped by ten men, including police, military and uniformed Fenix Security Personnel. After the rape, Ms. Caal was very sick, and had trouble walking. Three months later, Ms. Caal gave birth to a baby who was stillborn, possibly due to complications arising from the physical violence of the rape.
67. The Plaintiff Irma Yolanda Choc Cac was with her 10-year-old daughter when four police officers, four soldiers and four uniformed Fenix Security Personnel seized her. All twelve men, including uniformed Fenix Security Personnel, then raped her. At the time of the rape, Yolanda Choc Cac was three months pregnant. As a result of the physical violence of the rape, Ms. Choc suffered a miscarriage.
68. The Plaintiff Elena Choc Quib was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.

69. The Plaintiff Olivia Asig Xol was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
70. The Plaintiff Amalía Cac Tiul was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
71. The Plaintiff Lucia Caal Chún was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
72. The Plaintiff Luisa Caal Chún was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
73. The Plaintiff ~~Carmelina~~ Carmela Caal Ical was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
74. The Plaintiff Elvira Choc Chub was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
75. The Plaintiff Irma Yolanda Choc Quib was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
76. On January 17, 2007, the same day the Plaintiffs were raped during the forced eviction requested and authorized by Skye Resources, Skye President and CEO Mr. Austin released a public letter in Canada regarding the evictions:

We have been working with management in Compañía Guatemalteca de Niquel S.A. (CGN), Skye's subsidiary in Guatemala . . . to assist them in resolving issues relating to the land invasions that started a few months ago and subsequent evictions I would like to emphasize that these evictions were not the preferred course of action to settle the land invasions. **The company did everything in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights.** (emphasis added)

Skye Resources' public commitments and representations

77. The Defendant Skye Resources has made various representations regarding standards that it claims to have agreed to apply to operations at the Fenix Project. The Plaintiffs plead that Skye's representations are relevant in assessing the legal duty of care that Skye owed to individuals who reside in communities near the Fenix Project, the standard of care applicable to Skye Resources, and the legal proximity between Skye Resources and the Plaintiffs. The Plaintiffs plead that by making these representations, Skye is acknowledging and accepting its responsibility for issues related to security at the Fenix Project.
78. The Plaintiffs further pleads that while these public representations are an acknowledgment by Skye Resources of responsibilities and duties owed by Skye to the Mayan community of Lote Ocho, Skye did not take any reasonable or appropriate steps to meet these responsibilities or comply with these duties. Rather, the Plaintiffs plead that Skye Resources used these representations as a public relations exercise to enhance its reputation in the eyes of the Canadian public and Canadian investors.
79. For example, Skye Resources publicly stated that "the Fenix project will meet all key international benchmarks, in particular the Equator Principles. The project will comply with all relevant Guatemalan laws and the International Finance Corporation (IFC) Performance Standards". Further, Mr. Austin, Skye's President and CEO publicly stated that "we will ensure that our activities are transparent, adhere to Guatemalan and international law, and are guided by our commitment to the Voluntary Principles on Human Rights and Security".
80. As part of Skye's publicly claimed commitment to IFC Performance Standards at the Fenix Project, Skye agreed to and was required to abide by specific standards applicable to Security Personnel deployed at the Fenix Project. In particular, the IFC Performance Standards required Skye, in relation to Fenix Security Personnel, to:

- (a) **“Assess risks** to those within and outside the project site **posed by its security arrangements”**.
- (b) **“be guided by the principles of proportionality**, good international practices in terms of hiring, rules of conduct, training, equipping and monitoring of such personnel, and applicable law”;
- (c) **“make reasonable inquiries to satisfy itself that those providing security are not implicated in past abuses**, . . . train them adequately in the use of force (and where applicable, firearms) and appropriate conduct toward workers and the local community, and require them to act within the applicable law”;
- (d) **“not sanction any use of force except when used for preventive and defensive purposes** in proportion to the nature and extent of the threat”;
- (e) **establish “a grievance mechanism**. . . [that] allow[s] the affected community to express concerns about the security arrangements and acts of security personnel”;
- and
- (f) **“investigate any credible allegation of unlawful or abusive acts of security personnel, taking action to prevent recurrence** and report unlawful and abusive acts to public authorities when appropriate” (emphasis added).

81. Skye Resources has publicly stated 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 extraction projects. In adopting the Voluntary Principles on Security and Human Rights, and in publicly and repeatedly declaring that adoption, Skye 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 Skye Resources for use of private Security Personnel at the Fenix Project 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).

82. Despite public representations from the highest levels in Skye Resources’ management regarding the company’s claimed commitment to specific and identifiable security standards, Skye did not take reasonable, appropriate or necessary steps to implement or enforce any standards regarding the use of security personnel at Skye’s operations in Guatemala. Further, despite its public representations, Skye Resources has taken no steps to become an actual “signatory participant” as is required to formally participate in the above principles.

83. Further, the Skye Resources made frequent public representations about the direct relationship between Skye and neighbouring communities, especially communities that faced evictions, including Lote Ocho. The Plaintiffs plead that by making these representations, Skye is acknowledging and accepting its responsibility regarding the impact of the Fenix Project on neighbouring Mayan Q'eqchi' communities.

84. Examples of these public representations include (but are not limited to):

- (a) “The people of Skye Resources remain committed to open and transparent communication on all issues and concerns related to the Fenix Project. . . . We are taking whatever steps we can to build trusting relationships with our neighbors and to respond to their fears and concerns.”
- (b) “Skye has maintained a strong community relations effort in the El Estor region for two years. As a result of recent events, Skye reaffirms it’s [sic] commitment to an open dialog with the local communities and to working with local stakeholders to seek solutions to outstanding issues.”
- (c) “Over the past two years, Skye commenced a number of on-the-ground activities including participation in the Center for Social Responsibility within Guatemala, and the formation of a formal community relations team.”
- (d) “Skye remains committed to building good relationships with the local community.”
- (e) “Support from the local community is paramount to Skye’s success in Guatemala. We are committed to building a foundation of trust and to open and transparent communications on all issues and concerns related to the Fenix Project.”
- (f) Skye’s strategy is to “apply best practices in community relations and environmental management.”
- (g) “Skye has focused on understanding and responding to community issues and concerns in enhancing relationships with the communities adjacent to the mining area.”

- (h) “We have also expanded Skye’s community relations group which has been active in enhancing relationships with the communities adjacent to the mining area.”
- (i) “Our exploration, mining and processing operations will have an impact on the communities in which they are situated and depend for their success on the support of those communities. We are committed to consulting and working constructively with local communities on such grounds as safety and health, opportunities for local people and long term sustainability.”
- (j) “Since Skye commenced its activities in Guatemala in 2005, we have focused enormous efforts on understanding the complex issues facing local communities.”

85. Many such public representations were made by Skye President and CEO, Mr. Austin, on behalf of his company. Examples include (but are not limited to):

- (a) “I would like to assure you that in our efforts to peacefully and lawfully resolve what are historical land issues, we will ensure that our activities are transparent, adhere to Guatemalan and international law, and are guided by our commitment to the Voluntary Principles on Human Rights and Security.”
- (b) “Our approach has been to try and talk with the community and the people in the area and to develop a win-win situation.”
- (c) “Over the past one and a half years, we have embarked on a community engagement program based on open, transparent and meaningful dialogue with all stakeholders. Continuing to enhance this process is important and we will take advantage of all opportunities to improve the effectiveness of dialogue and feedback with communities based on the principals of trust, respect and understanding.”
- (d) “The people of Skye Resources are committed to open and transparent communication on all issues and concerns related to the Fenix Project. We believe that transparency and extensive continuing public consultation will lead to the creation of a world class project in El Estor, Guatemala which will provide wide-ranging benefits to the people of that region. We are taking whatever steps we can

to build trusting relationships with our neighbors and to respond to their fears and concerns.”

- (e) “We as a company moved into Guatemala in late 2004, and we have been working with communities since then as we try to reactivate the project we have down there. . . . We tried to have dialogue with people because we have constantly sought dialogue over confrontation. . . . [W]e are working with [the communities] cooperatively to try to deal with some of the very complex and very real land issues that there are in Guatemala. We knew about that from day one when we got there. . . . [W]e recognize that we are going to be in this country for a long time, and we want to work with these communities to resolve these problems. . . . What we have done as a company since we moved into Guatemala in 2004, is to try to work with the local people to look forward to create a future for those people.”

86. Skye Resources also issued a statement of principles called the “Environmental and Social Commitment” which concern Skye’s “environmental and social responsibility and its conduct wherever it conducts business.” According to Skye, the “ESC includes commitments regarding community engagement, human rights, economic development and environmental responsibility.”

Skye Resources’ knowledge

87. Prior to the violent eviction on January 17, 2007, executives of Skye Resources knew that violence had been used during previous evictions that Skye had requested and that had occurred on January 8 and 9, 2007, including in the Plaintiffs’ community of Lote Ocho. In particular, these executives had seen photographic and video evidence of homes being burnt down. Further, Skye executives knew of credible allegations that violence had been committed by Guatemalan police in November 2006 during another eviction related to the Fenix Project.

88. Skype Resources knew that the Fenix Security Forces did not have the required license to provide private security services, and were therefore providing security at the Fenix Project illegally.
89. Skype Resources knew that the Fenix Security Forces were using dozens of unlicensed and unlawful weapons at the Fenix Project, and further knew that unlicensed and illegal weapons were used during the evictions of January 2007.
90. Skype Resources knew that Integración Total was retained to participate in forced evictions and 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.
91. Skype Resources knew, or should have known, that there was a serious and high risk that more extreme forms of violence would be used during the eviction of remote communities where human rights violations would not be observed or reported to the outside world.
92. Skype Resources knew about the historic land issues in Guatemala that have lead both to frequent land reclamations and to forced removal of Mayan communities from land. Further, the Skype knew, or should have known, that police, military and private Security Personnel ~~security personnel~~ frequently use violence when conducting these forced removals. For example, an Amnesty International report published in March 2006 states:
- [There is] a common pattern of human rights violations [during forced removals]. 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.
93. Skype Resources knew, or should have known, that during the Guatemalan Civil War, which ended in 1996, rape of women from indigenous populations occurred on a massive scale. According the UN-sponsored Truth Commission, “the rape of women, during

torture or before being murdered, was a common practice. . . . The majority of rape victims were Mayan women.” Similarly, according to the report of the Project for the Reclamation of the Historic Memory (“REMHI”), the truth commission established by the Catholic Church, “[t]he rape of women was a systematic practice in military operations Massive violations were very common in the rural areas”, so much so that it led to the “normalization of rape” in which women were considered part of the “spoils of war”.

94. Skye Resources knew, or should have known, that individuals who were former members of the Guatemalan military and paramilitary groups during the Guatemalan Civil War participated in the evictions either as part of the military, the police or as ~~were employed~~ as part of Skye’s Fenix Security Personnel.

95. Skye Resources knew, or should have known, that both private and public security personnel in Guatemala continue to employ the violent tactics that were used during the Guatemalan Civil War.

96. Skye Resources knew, or should have known, that the level of violence against women, including rape, continues to be very high in Guatemala. The international medical organization Doctors Without Borders has referred to the high rate of sexual violence against women in Guatemala as a “humanitarian crisis”, stating that “[t]he level of this problem is similar to the levels during the war. [There is] conflict-level violence against women in what is supposedly a post-conflict country.”

97. Skye Resources knew that Guatemala’s justice system is dysfunctional, and suffers from serious and debilitating problems with corruption, political interference and threats and violence against justice officials and witnesses. HudBay knew, or should have known, that the vast majority of violent crime in Guatemala is not investigated, let alone tried in court. 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.

98. Skye Resources knew or should have known that its subsidiary CGN, which was called EXMIBAL prior to its acquisition by Skye in 2004, was linked to past violence associated with the Fenix Project. The United Nations-sponsored 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; and
- (c) in May 1978, Jose Che Pop and Miguel Sub, protestors from near El Estor, were shot at and wounded by men riding in a truck owned by EXMIBAL. The Truth Commission classified this incident as an attack on the civilian population.

99. 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, Skye should have been aware of the serious 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.

V. Legal Claims

Claim against HudBay Minerals for the Negligence of its corporate predecessors

100. The Plaintiffs claim against HudBay Minerals directly for the negligence of its corporate predecessor, Skye Resources. The Plaintiffs assert that the negligence of Skye Resources caused catastrophic physical and psychological harm to the Plaintiffs. The Plaintiffs assert that HudBay Minerals is liable for this negligence as a result of corporate amalgamations under the British Columbia *Business Corporations Act*, and the *Canada Business Corporations Act*.

100.1 Skye Resources, through its own executives, managers and employees, and through its direct control of CGN, requested, authorized, financed, managed and participated in the eviction conducted of Lote Ocho on January 17, 2017, including by financing and providing material support to, and coordinating with, the military and the police.

101. Skye Resources, through its own executives, managers and employees and through its direct control of CGN, controlled, directed, financed and supervised the Fenix Security Personnel at all material times.

102. As set out above above, Skye Resources, through the acts, omissions, decisions and directions of its employees, agents, executives and directors, occurring both in Canada and in Guatemala, caused the harm suffered by the Plaintiffs. Skye knew or should have known, in all the circumstances described above, that its acts, omissions, decisions and directions would likely cause the kind of harm that was in fact suffered by the Plaintiffs.

103. In making decisions and taking actions regarding the Fenix Project, Skye Resources owed the Plaintiffs a duty to act with reasonable care. With the knowledge particularized above, Skye breached that duty by:

- (a) Authorizing and actively seeking forced evictions of communities from Contested Land, including Lote Ocho, in January 8, 9 and 17, 2007 without taking adequate steps to guard against the use of unjustified violence during these evictions;

- (b) Negligently requesting and authorizing the second eviction of Lote Ocho that occurred on January 17, 2007 without taking adequate steps to guard against the use of violence during this eviction despite knowledge that credible allegations had been made regarding the use of violence by Fenix Security Personnel, police and military during the evictions of November 2006 and January 8 and 9, 2007;
- (c) Negligently formulating, directing and implementing a corporate response toward Mayan Q'eqchi' communities that escalated tensions and greatly increased the risk of violence, including by pursuing a strategy of clearing the Contested Land of inhabitants through the use of forced evictions and threats of violence;
- (c.1) Negligently facilitating, planning and coordinating the forced eviction of January 17, 2007 jointly with the military and the police without taking reasonable steps to prevent the use of violence during the course of the eviction;
- (c.2) Providing funding and material support to the military and police to participate in the forced evictions without taking reasonable steps to ensure that the military and police would not use violence in the course of conducting the evictions;
- (c.3) Requesting that the military and police participate in the forced evictions of Lote Ocho without entering into an agreement with the police and military setting out a code of conduct and human rights standards applicable to police and military during the forced evictions, along with mechanisms for compliance and enforcement;
- (c.4) Failing to take reasonable steps to ensure that the military and police participating in the evictions did not include individuals who had previously committed serious human rights violations;
- (d) Authorizing the distribution of lethal and unlawful weapons to Fenix Security Personnel without adequate training or controls, and in contravention of Guatemalan laws on firearms and ammunition;
- (e) Failing to investigate credible allegations that violence had been used by Fenix Security Personnel, police and military during previous forced evictions requested by Skye Resources;

- (f) Through its country manager for Guatemala, Sergio Monzon, negligently engaging Security Personnel at its Fenix project without establishing adequate risk management procedures and systems to manage the risk of violence committed by Security Personnel;
 - (g) Providing approval to retain ~~Integración~~ Integración Total to provide security at the Fenix Project with the knowledge that Integración Total was not legally licensed to provide private security services in Guatemala and did not have proper authorization to possess, use or distribute firearms;
 - (h) Providing approval to retain Integración Total to provide complex security services in a volatile context solely on the basis of an oral contract;
 - (i) Negligently directing, controlling, monitoring and supervising Fenix Security Personnel;
 - (j) Failing to establish, implement or enforce appropriate standards of conduct for its Security Personnel;
 - (k) Failing to ensure that its Security Personnel were adequately trained;
 - (l) Failing to ensure that its Security Personnel had reasonable levels of technical and professional proficiency;
 - (m) Failing to take reasonable steps to ensure that its Security Personnel 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 Personnel;
 - (o) Failing to implement, monitor or enforce the International Finance Corporation Performance Standards, or the Voluntary Principles on Security and Human Rights as Skye publicly had committed to do;
104. As a result of Skye Resources' conduct and the resulting assaults and gang-rapes, the Plaintiffs suffered serious physical and psychological harm for which the Plaintiffs claim

damages. In particular, the Plaintiffs claim damages for pain and suffering, serious emotional and mental distress, nervous shock and loss of amenity of life.

Punitive damages

105. 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.

Law Applicable to the Claim

106. The Plaintiffs contend that Ontario law is applicable in relation to the Defendants' liability and damages for all claims in this action.

107. In the alternative, the Plaintiff pleads that British Columbia law is applicable in relation to the Defendants' liability and Ontario law is applicable in relation to damages.

108. In the further alternative, the Plaintiff pleads that the applicable law is Guatemalan law in relation to the Defendants' liability, and Ontario law in relation to damages.

109. If Guatemalan law is deemed to apply, the Plaintiffs plead and rely 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

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

Date: March 28, 2011
Amended on: February 6, 2012
Second Amendment on: ****

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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:

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