DATE: June 29, 2015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Angelica Choc et al v. HudBay Minerals Inc. et al. (CV-10-411159)**
Margarita Caal Caal et al. v. HudBay Minerals Inc. et al. (CV-11-423077)
German Chub Choc v. HudBay Minerals Inc. et al. (CV-11-435841)

Counsel: C. Wanless (plaintiffs) Fax no.: 416-598-9520
R. Harrison, T. Pratt and V. Maric (defendants) Fax no.: 416-364-7813

Heard by: Master Graham **Event date:** June 25, 2015.

ENDORSEMENT
(Plaintiffs' motion to settle discovery plans)

[1] The nature of the cases before me are well summarized in the Reasons of Brown J. released on July 22, 2013 (2013 ONSC 1414) at paragraphs 4–10:

> [4] The plaintiffs are indigenous Mayan Q'eqchi' from El Estor, Guatemala. They bring three related actions against Canadian mining company, Hudbay Minerals, and its wholly controlled subsidiaries. They allege that security personnel working for Hudbay's subsidiaries, who were allegedly under the control and supervision of Hudbay, the parent company, committed human rights abuses. The allegations of abuse include a shooting, a killing and gang-rapes committed in the vicinity of the former Fenix mining project, a proposed open-pit nickel mining operation located in eastern Guatemala.
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> [5] The case of *Margarita Caal Caal v. Hudbay Minerals Inc.* (the "Caal action") is brought by 11 women against Hudbay Minerals and HMI. The plaintiffs assert that on January 17, 2007, they were each gang-raped by mining company security personnel, police and the military during their forced removal from their village of Lote Ocho, requested by Canadian mining company Skye Resources (subsequently acquired by Hudbay) in relation to its Fenix mining project.
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> [6] In the case of *Angelica Choc v. Hudbay Minerals Inc.* (the "Choc action"), the plaintiffs bring an action against Hudbay Minerals and its subsidiaries, HMI Nickel and CGN, alleging that Angelica Choc's husband, Adolfo Ich, a respected indigenous leader and outspoken critic of mining practices, was beaten and shot in the head by CGN's security personnel. In particular, the pleadings allege that the chief of security for the Fenix mining project, Mynor Padilla, shot and killed Adolfo Ich on September 27, 2009 at close range, in the context of a land dispute.
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> [7] In *German Chub Choc v. Hudbay Minerals Inc.* (the "Chub action"), the plaintiff brings this action against Hudbay Minerals and CGN regarding a gunshot wound sustained on September 27, 2009 that left him paralyzed from the chest down. The pleadings assert that German Chub was shot in an unprovoked attack

by security personnel employed at Hudbay's Fenix mining project, in the context of a land dispute. [page679]

[8] Hudbay Minerals is a Canadian mining company headquartered in Toronto, incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, with mining properties in South and North America. During the times relevant to the Choc and Chub actions, Hudbay Minerals owned the Fenix mining project through CGN.

[9] HMI Nickel Inc, is a former Canadian mining company which was previously named Skye Resources Inc. Skye Resources owned and operated the Fenix mining project during the time relevant to the Caal action. Since these actions were filed, HMI Nickel Inc. amalgamated with Hudbay Minerals. As a result of this amalgamation, Hudbay is now legally responsible for all of the legal liabilities of Skye Resources.

[10] CGN owned and operated the Fenix mining project in El Estor, Guatemala. At all material times, CGN was a wholly controlled and 98.2 per cent owned subsidiary of Hudbay Minerals. In August of 2011, Hudbay Minerals sold CGN and the Fenix project. However, it agreed, as part of the purchase and sale agreement, to remain responsible for and retain control over the conduct of any litigation against CGN regarding the events of September 27, 2009, regardless of where it occurs. CGN, by agreement, is required to co-operate with Hudbay Minerals, including by making employees available and providing records and information to Hudbay as required. In other words, Hudbay, as a matter of contract, controls the conduct of any litigation against CGN regarding the death of Adolfo Ich.

[2] The motion before me is to resolve disputes with respect to the parties' discovery plans, required under rule 29.1 of the Rules of Civil Procedure.

[3] Counsel have agreed to the scope of production with respect to documents relating to the events of January 17, 2007 and September 27, 2009 described in the statement of claim. Counsel have also agreed to the scope of production with respect to the provision of physical security at the Fenix Project in 2007 and 2009, with the exception of documents relating to physical security policies at other of the defendants' major mining projects.

[4] There was also an issue with respect to the arrangements for interpreters for the plaintiffs, many of whom require a Q'eqchi' speaking interpreter. The defendants had originally agreed to pay for the costs of the interpreter. The plaintiffs are prepared to share the cost of the interpreter provided that they can participate in the choice of interpreter. Counsel agreed that they can resolve this issue without a ruling from the court.

[5] The parties also stated that they could agree on the scope of production of maps and satellite images without a ruling from the court.

[6] Counsel also agreed that the list of custodians whose documents must be produced shall include Len Babin, and that the defendants will do limited electronic searches for the balance of the proposed custodians, in accordance with the proposal in paragraph 32 of their factum.

[7] The parties argued the motion with respect to the following issues:

1. Whether the discovery plans must include documents with respect to security provided at the defendants' other major mining projects.

2. Whether the discovery plans must include documents relating to community relations between the Defendants and Mayan Q'eqchi' populations on contested land at the Fenix Project between September 2006 and the end of September 2009 (re: Choc and Chub Choc actions).

3. Whether the discovery plans must include documents relating to community relations between Skye Resources, CGN and Mayan Q'eqchi' populations on contested land at the Fenix Project between December 2004 and the end of January 2007 (re: Caal action).

4. Whether the discovery plans must include documents that indicate the level and degree of control and management exerted by HudBay Minerals over CGN and the Fenix Project in 2007 (re: Caal action) and in 2009 (re: Choc and Chub Choc actions).

5. Whether the plaintiffs in the Caal action should be ordered to be excluded from each others' examinations for discovery.

Issue 1: Production of documents relating to security at the defendants' other major mining projects

[8] The plaintiffs submit that these documents are relevant to the determination of the standard of care applicable to the defendants' supervision of the security personnel at the Fenix property. The security policies and codes of conduct at HudBay's other mining projects will help determine what HudBay itself considered to be reasonable. The defendants submit that the documents sought in this category are too remote and that the request contemplates an inquiry into the operation of other facilities where the circumstances are inherently different than in Guatemala, such as Manitoba.

[9] The court's determination of the standard of care applicable to the defendants' management of their security personnel mining operations in Guatemala could plausibly be based on the defendants' own policies governing security personnel at their other mining operations. Any differences between such policies would be the basis for legitimate enquiries as to the reason for such differences, for example, why there might be differences between security policies in Guatemala and Manitoba. The productions in the discovery plan shall include documents in this category.

Issues 2 and 3: Production of documents with respect to community relations

[10] The plaintiffs' cases are based on allegations that the defendants failed to take reasonable measures to control their security personnel in the context of a land dispute between the defendants' mining operations in Guatemala and the local indigenous communities. In addition, the plaintiffs in the Caal action allege that the forced evictions during which the alleged assaults and rapes occurred were requested or authorized by Skye Resources Inc., the predecessor to the defendant HudBay Minerals.

[11] On the defendants' rule 21 motion to strike the statements of claim, Brown J. considered the issue of proximity at paragraphs 66-70 of her decision, and concluded at paragraph 70:

> [70] It is possible that, based on the [plaintiffs' pleadings], the defendants have brought themselves into proximity with the plaintiffs. The pleadings disclose a sufficient basis to suggest that a relationship of proximity between the plaintiffs and defendants exists, such that it would not be unjust or unfair to impose a duty of care on the defendants. Based on the foregoing, I find that it is not plain and obvious that no duty of care can be recognized. A *prima facie* duty of care may be found to exist for the purposes of this motion.

[12] The pleadings relating to the defendants' involvement with the plaintiffs' community, combined with Brown J.'s ruling that those pleadings could give rise to a finding of a relationship of sufficient proximity to establish a duty of care on the part of the defendants, make this category of documents relevant and producible. Specifically, the documents relating to the defendants' community relations with the Q'eqchi' populations will help to provide the context for the defendants' conduct in relation to their security forces. The court's ultimate finding as to what, if anything, the defendants should or should not have done in relation to their security personnel could very well turn on the state of their relations with the populations affected.

[13] Accordingly the documents in category 3 in both of the plaintiffs' proposed discovery plans shall be included in the discovery plans for these actions.

Issue 4: Production of documents with respect to corporate control exercised by the defendant Hudbay

[14] The plaintiffs submit that documents relating to the corporate control exercised by the defendant Hudbay are relevant to the allegations in their various pleadings, as follows:

- That HudBay and its subsidiary 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, with operations directed, controlled, managed and financed by HudBay both directly through its executives, managers and employees and indirectly through its total control of the management and operation of CGN.

- That all of Sky Resources' activities were focussed on the Fenix Project, which was its sole business interest.

- That all aspects of the operation of the Fenix Project were directed, controlled, managed and financed by Skye Resources, both directly through its executives, managers and employees and indirectly through Skye's total control of the management and operation of CGN.

[15] The position advanced by the defendants in their pleadings is essentially that CGN was a corporate entity separate from Skye and HudBay, that it was not an agent of either of those corporations and that its corporate veil should not be violated.

[16] The issue of whether the plaintiffs' pleadings contain allegations sufficient to support the piercing of the corporate veil between Skye and HudBay as parent corporations and CGN as subsidiary was addressed by Brown J. in her decision on the defendants' rule 21 motion. After considering the circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced, Brown J. held, at paragraph 48, as follows:

> 48 The fact that Hudbay allegedly engaged in wrongdoing through its subsidiary is not enough to pierce the corporate veil. The plaintiffs would have to allege that Hudbay had used CGN "as a shield for fraudulent or improper conduct", that the very use of CGN was to avoid liability for wrongful conduct that it carried out through CGN. The plaintiffs do not plead this.

[17] Brown J. does go on to find that the plaintiffs' pleadings would allow for the piercing of the corporate veil based on Skye and Hudbay's subsidiary acting as their agent (at paragraph 49):

> 49 However, the plaintiffs do plead in the Choc action that CGN "is an agent of Hudbay Minerals". By doing so, the plaintiffs have pleaded the second exception to the rule of separate legal personality. Whether or not this agency relationship is ultimately found to have existed at the relevant time, the allegation is not patently ridiculous or incapable of proof, and therefore must be taken to be true for the purposes of this motion. If the plaintiffs can prove at trial that CGN was Hudbay's agent at the relevant time, they may be able to lift the corporate veil and hold Hudbay liable. Therefore, the claim based on piercing the corporate veil in the Choc action should be allowed to proceed to trial..

[18] The defendants submit that Brown J.'s finding that any claims based on piercing the corporate veil can only flow from the subsidiary corporations acting as HudBay's (or Skye's) agent eliminates the relevance of any production based on corporate control. I disagree.

[19] I accept the submission of the plaintiffs that most of the proposed categories of documents with respect to the corporate control exercised by HudBay are relevant to either the "direct negligence" theory of liability or to the issue of whether the corporate veil of its subsidiary corporations should be pierced based on an agency relationship. The direct negligence of HudBay, in failing to prevent the harms allegedly committed by security personnel in Guatemala, could result from acts or omissions in management functions exercised by HudBay through its subsidiary CGN. Similarly, the nature of the control exercised by HudBay over CGN could inform the trial court's decision as to whether CGN was acting as its agent.

[20] This ruling, however, does not mean that all of the documents listed under item 4.5 in the two discovery plans in the plaintiffs' motion record are relevant. The following subcategories of documents listed at 4.5.01 to 4.5.18 in the plaintiffs' proposed discovery plans shall be ***removed*** from those discovery plans (using the numbers in the plaintiffs' proposed discovery plans):

> 4.5.05 and 4.5.07(including 4.5.07.1-4.5.07.6): Appropriation requests and documents identifying sources of financing are too remote from the crucial issue of who was making which operational decisions regarding the security personnel at the Fenix Project to be relevant.
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> 4.5.16: The scope of production sought in this category is far too broad and will inevitably include documents that are not relevant to the issues of either HudBay's direct negligence or its subsidiaries' liability as its agent.

Issue 5: Exclusion of the plaintiffs in the Caal action from each others' examinations

[21] The defendants seek an order that the plaintiffs in the Caal action be excluded from each others' examinations for discovery on the basis that absent such an order there is a significant risk that the plaintiffs would tailor their evidence. Further, the effectiveness of cross-examination at examinations for discovery would be significantly diminished if each of the plaintiffs had already seen the examinations of the other plaintiffs.

[22] The plaintiffs in the Caal action submit that they have a right to be present throughout each step in the litigation and that an order depriving them of this right should be made only in exceptional cases and must be based on a real and substantial probability of harm. They rely on *Heasely v. Labelle*, 2013 ONSC 2601 in which the court stated:

> 20 . . . A co-party will only be excluded if the moving party shows there is sufficient evidence to demonstrate a real risk of tailoring, parroting, intimidation, disturbance of the proceeding, or where the ends of justice require exclusion. The onus on the moving party is to present sufficient evidence of the above factors to overcome a co-party's fundamental right to be present at all parts of the litigation process. The nature of the relationship between the co-parties by itself is not enough to constitute cause for exclusion.

[23] I disagree that the statement of the law in *Heasely* is correct. The two conflicting lines of authorities with respect to the exclusion of parties from examinations for discovery are reviewed by the court in *Heasely* and in my decision in *Ambrose v. Anderson*, [2011] O.J. No. 3496. The court in *Heasely*, in making the ruling set out above, stated that it was bound by *Liu Estate v. Chau* (2004), 69 O.R. (3d) 756 (C.A.). As I stated in *Ambrose*, *Liu Estate* is distinguishable because it was an appeal from the decision of a trial judge who ordered that a party be excluded from the courtroom ***during a trial*** while her co-defendant husband was testifying, contrary to rule 52.06(2) which specifically precludes the exclusion of a party from the trial courtroom. In addition, the court in *Baywood Paper Products Ltd. v. Paymaster Cheque-Writers (Canada) Ltd.* (1986), 57 O.R.(2d) 229, cited with approval in *Liu Estate*, considered the exclusion of one party from the examination of an opposing party, not a co-party.

[24] I continue to be of the view that the approach taken in *Sissons v. Olson* (1951), 1 W.W.R. (N.S.) 507 (B.C.C.A.) and followed in Ontario in *Karamanokian v. Assad*, [1992] O.J. No. 2284 (Gen. Div.) is the correct one. Based on these authorities, I reiterate my statements from *Ambrose v. Anderson, supra*:

1. This court, in deciding whether or not to exclude a party from a co-party's examination, must balance the *prima facie* right of those parties to be present at all stages of their action against the opposing parties' right to examination for discovery that is uncompromised by possible collusion between parties similar or identical in interest that may lead to "tailoring or "parroting" of evidence.

2. Any notional injustice to the parties excluded arising out of their exclusion can be redressed following the completion of their examinations by their review of each others' transcripts. However, any prejudice to the opposing parties arising from any tailoring of evidence by the parties sought to be excluded can never be remedied.

3. One of the functions of examinations for discovery is to enable the parties to test each others' evidence before trial. This cannot be properly done if the plaintiffs hear each others' discovery evidence before they are examined individually. As was the case in *Sissons, Visram* [*Visram v. Chandarana*, [2010] O.J. No. 3145] and *Solutions with Impact*, [*Solutions with Impact Inc. v. Domino's Pizza of Canada Ltd.*, 2010 ONSC 630] *supra*, there would be minimal actual prejudice to the plaintiffs arising from their exclusion from each others' examinations but there would be considerable prejudice to the defendants arising from the tailoring of evidence that could result if the plaintiffs were to hear each others' evidence.

[25] Each of the plaintiffs in the Caal action individually alleges that she was physically assaulted and raped by groups of men including uniformed members of Fenix Security Personnel and has her own claim for damages. However, paragraphs 62, 63 and 64 of the statement of claim are as follows:

> 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.
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> 63. When the Security personnel, police and military arrived in the village, the men of the village were not present. The intruding security forces 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.
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> 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.

[26] It is common ground in all parties' pleadings that an earlier eviction occurred at Lote Ocho on January 9, 2007. In their statement of defence, the defendants allege that on January 17, 2007, huts began to reappear at Lot 8 (Lote Ocho) and that a second eviction was carried out by a Guatemalan prosecutor assisted by officers from the National Civil Police and soldiers from the National Army. The defendants deny that the rapes occurred and also deny the allegations of the assaults and rapes by groups of men including Fenix Security Personnel. The defendants further deny that any uniformed Fenix Security Personnel attended at, or participated in, the January 17, 2007 eviction and that any women were present during the evictions.

[27] Based on the pleadings, there will be significant issues of credibility between the plaintiffs and defendants in the Caal action. It is precisely these issues that give rise to the defendants' concern regarding the tailoring of discovery evidence.

[28] Similar to *Ambrose*, the outcome of this action will turn to a significant extent on the credibility of the plaintiffs, who will be examined, not just about the assaults commited against each of them individually, but also about the general circumstances of the evictions on both dates including who was present. The possibility that allowing the plaintiffs to be present at each others' examinations would compromise the discovery process is sufficiently great that the order sought should be granted. In contrast, there would be no real prejudice to the defendants arising from an order for exclusion. Accordingly, I make the same order as in *Ambrose*:

1. The examinations for discovery of each of the plaintiffs shall take place in the absence of any and all of the other plaintiffs.

2. Every plaintiff and plaintiffs' counsel, and any other person having knowledge of what transpires at the examinations for discovery of each of the plaintiffs are hereby prohibited from communicating with any of the other plaintiffs with respect to any aspect of the content of the examinations for discovery of the plaintiffs that have been completed, including the questions asked and the evidence given, until the examinations for discovery of all of the plaintiffs are concluded.

3. No transcripts of the examinations for discovery of any of the plaintiffs shall be ordered until the examinations for discovery of all of the plaintiffs have been concluded.

Costs

[29] The parties provided costs outlines at the conclusion of the hearing. If the parties cannot agree to the disposition of the costs of the motion, they shall provide written submissions, the plaintiffs within 30 days and the defendants within 20 days thereafter. Submissions shall not exceed three pages.

MASTER A. GRAHAM

DATE: June 29, 2015.