

W-11-423077

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

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

Plaintiffs

and

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

Defendants

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.

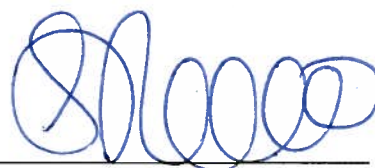
Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

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: HUBBAY 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 Canadian mining company HMI Nickel 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. The mine security personnel who committed the rapes were deployed at HMI Nickel's Fenix mining project, and were under the control and direction of HMI Nickel.
2. The Plaintiffs allege that these rapes were caused by the negligence of HMI Nickel. In particular, the Plaintiffs allege that HMI Nickel was negligent in its direction and supervision of the security personnel who committed the rapes. The Plaintiffs further allege that HMI Nickel 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 company security personnel during this eviction. As a result of the Defendants' negligence, the Plaintiffs suffered serious physical and psychological harm.
3. The Plaintiffs further allege that HudBay Minerals is vicariously liable for the negligence of HMI Nickel owing to HudBay Minerals' current total control of all aspects of the operations of its subsidiary, HMI Nickel.

II. RELIEF CLAIMED

4. The Plaintiff Margarita Caal 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 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 Carmelina 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 Elbira Coc Ich, Margarita Caal Caal, Olivia Asig Xol, Amalía Cac Tuil, Lucia Caal Chún, Luisa Caal Chún, Carmelina 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 HMI Nickel Inc., (“HMI Nickel”) is currently headquartered in Toronto, Ontario and incorporated under the laws of British Columbia. At the time of the rapes described in this Statement of Claim (January, 2007), HMI Nickel was an independent Canadian mining corporation named Skye Resources Inc. (“Skye Resources”), headquartered in Vancouver, British Columbia. In August 2008, HudBay Minerals acquired all of HMI Nickel’s shares, thereby converting HMI Nickel into a wholly-owned and wholly-controlled subsidiary of HudBay Minerals. As part of the acquisition, Skye Resources Inc. was amalgamated with numbered company 0828275 B.C. Ltd on August 26, 2008. Under s. 282 of the *Business Corporation Act (British Columbia)*, S.B.C. 2002, c.57, the amalgamated company, HMI Nickel, continues to be liable for the obligations of each amalgamating corporation, and any existing cause of action against either amalgamating corporation continues unaffected with the amalgamated company. Throughout this Statement of Claim this corporation or any of its amalgamating corporations will be referred to as “HMI/Skye”, “HMI Nickel”, or “Skye Resources”.
17. At the time of the rapes described in this Statement of Claim, HMI Nickel indirectly owned 94.2% of the shares of a Guatemalan company called Compañía Guatemalteca de Níquel S.A. (“CGN”) through two subsidiary holding companies incorporated in the British Virgin Islands. After the shares of HMI/Skye were purchased by HudBay Minerals in 2008, all shares of CGN held by the British Virgin Islands holding companies were transferred to HMI Nickel. HMI Nickel therefore currently directly holds 98.2% of CGN’s shares. At the time of the rapes described herein, despite the existence of the above subsidiaries, HMI/Skye legally and in fact directed, controlled, managed and financed all aspects of CGN’s operations.
18. 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 four mining projects in Canada and one mining project in Guatemala. Shares of HudBay Minerals are listed on the

Toronto Stock Exchange. HMI Nickel is currently a wholly-owned and wholly-controlled subsidiary of HudBay Minerals.

IV. MATERIAL FACTS

The Fenix Mining Project

19. During the time period relevant to the events in this action, all of HMI/Skye's activities were focused on HMI/Skye's sole business interest – a mining property located in Guatemala known as the Fenix nickel mining project (the "Fenix Project"). HMI/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."
20. The Fenix Project is a proposed large open pit nickel mining operation located on the northern shores of Lake Izabal in eastern Guatemala. The project consists of a mine whose operations have been suspended since 1982, a processing plant and a massive exploration concession claimed by HMI/Skye which covers almost 250 square kilometers (the "Fenix Property").

Fenix Security Personnel

21. At all material times, on behalf of and for the benefit of HMI/Skye, CGN hired, deployed and controlled security personnel at the Fenix mining project. The security personnel were directly or indirectly controlled by HMI/Skye from its head-offices in Canada and were engaged under instructions from and subject to continuing supervision by HMI/Skye.
22. 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 HMI/Skye. Mynor Padilla was hired and supervised by employees and executives of HMI/Skye.

23. In January 2007, HMI/Skye instructed CGN to retain a third party company called Integración Total S.A. (“Integración Total”) to provide further security personnel at the Fenix Project on behalf of and for the benefit of HMI/Skye. HMI/Skye 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. HMI/Skye had knowledge of and power over the terms of the contract between CGN and Integración Total, and in fact approved the terms of the contract. This contract failed to include rules of conduct for security personnel, failed to impose standards regarding the use of force and failed to require adequate training of security personnel. Further, HMI/Skye failed to review the background of Integración Total prior to contracting with it to determine whether its members had been implicated in human rights abuses in the past. CGN retained Integración Total on January 7, 2007.
24. CGN’s internal security personnel and the security personnel provided through Integración Total will be hereinafter collectively referred to as “Fenix Security Personnel” or “Security Personnel”.
25. HMI/Skye 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.
26. At and around the time of the evictions and rapes described herein, HMI/Skye had publically 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 Human Rights and Security. Despite publically representing that HMI/Skye would abide by these commitments, HMI/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 HMI/Skye and Mayan Q'eqchi' communities

27. There are currently several indigenous Mayan Q'eqchi' farming communities located on a small portion of the Fenix Property (the "Contested Land"). HudBay and its subsidiaries claim that they have valid legal right to the Contested Land, while Mayan Q'eqchi' communities claim that they are the rightful owners of the lands which they consider to be their ancestral homeland. The Mayan Q'eqchi' further claim that any apparent rights to the Contested Land claimed by HudBay, HMI Nickel 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.
28. 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."
29. 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 HMI/Skye without adequately consulting with local Mayan Q'eqchi' communities. The Guatemalan government and HMI/Skye have ignored this ruling.
30. In or around September 16, 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.

31. 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 have lived and farmed on this land for decades. HMI/Skye claims that it has legal rights to exclusive possession of the land occupied by the community of Lote Ocho.
32. HMI/Skye described the land dispute in a press release issued in Canada dated September 19, 2006:

Skye Resources Inc (TSX:SKR) --- (“Skye”) 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 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 pursuing legal avenues.

HMI/Skye’s control and management of the Fenix Mining Project

33. During the time period relevant to this action, all aspects of the operation of the Fenix Project were directed, controlled, managed and financed by HMI/Skye, both directly through HMI/Skye’s executives, managers and employees, and indirectly through HMI/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, HMI/Skye had 20 employees, including 13 corporate officers, all focused on the development of the Fenix mining project.
34. Many of HMI/Skye’s 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 HMI/Skye:
 - (a) William Anthony Enrico, Vice President Operations of HMI/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 HMI/Skye, was responsible for managing environmental sustainability, corporate social responsibility and HMI/Skye's relationships with local communities;
 - (c) Hugh S. Duncan, Project Director at HMI/Skye, was responsible for leading and managing the development of the Fenix Project;
 - (d) Sergio Gabriel Monzon Ordonez, Country Manager for HMI/Skye, was responsible for the day-to-day operations of CGN, as well as managing aspects of HMI/Skye's administration, corporate social responsibility strategy and relations with indigenous communities and government institutions in Guatemala;
 - (e) Geoffrey Bach, Vice President Finance of HMI/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 HMI/Skye, was responsible for all exploration activities related to the Fenix Project; and
 - (g) David Neudorf, Vice President Technology and Development for HMI/Skye, was responsible for technology development and project development activities, including the design and engineering of the Fenix Project's processing plant.
35. HMI/Skye, 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, HMI/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;

- (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 HMI/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 HMI/Skye's claimed right to exclusive possession of the Contested Land, including the land occupied by the community of Lote Ocho.
36. HMI/Skye appointed specific managers and executives to oversee the Security Personnel engaged at the Fenix Project. Sergio Monzon, in his role as HMI/Skye's Country Manager; Rick Killam, in his role as HMI/Skye's Vice President Environment, Health, Safety and Community Affairs; and William Anthony Enrico, HMI/Skye Vice President Operations, were responsible for, and did in fact, supervise and direct activities of the Security Personnel deployed at the Fenix Project.
37. 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.
38. Further, HMI/Skye controlled its subsidiary CGN through key HMI/Skye executives, who were also at the same time key executives and directors of CGN. For example, David Anthony Huggins served as HMI/Skye's Chief Operating Officer at the same time

that he served as CGN's President and Legal Representative. William Keith Service served as HMI/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 HMI/Skye at the same time that he served as CGN's Secretary. William Anthony Enrico served as Vice President, Operations, for HMI/Skye at the same time that he served as President and Legal Representative of CGN.

39. Many of the decisions taken by these executives were taken jointly on behalf of both HMI/Skye and CGN.
40. HMI/Skye 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 HMI/Skye and to advise HMI/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.

Representations made by HMI/Skye regarding the land dispute

41. In the four months leading up to the evictions, HMI/Skye made numerous public representations regarding its corporate social responsibility policies, the standards it imposed on Fenix Security Personnel, and the company's relationship with neighbouring communities, including Lote Ocho. The Plaintiffs plead that these representations are relevant to assessing the duty of care and the standard of care owed by HMI/Skye to the

Plaintiffs, as well as the legal proximity between HMI/Skye and the Plaintiffs. The Plaintiffs further plead that these representations indicate that HMI/Skye assumed responsibility for the relationship between the Fenix Project and local communities, including Lote Ocho.

42. In a news release issued on September 19, 2006 entitled "Skye's Project Unaffected by Land Occupation" HMI/Skye stated "[t]he 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."
43. On September 22, 2006, Mr. Austin, the President and Chief Executive Officer of HMI/Skye, stated in a newspaper article that HMI/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."
44. On December 19, 2006, Mr. Austin released a public letter regarding HMI/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.
45. During this time, however, HMI/Skye, through its executives, made clear that HMI/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.
46. At the same time, according to HMI/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 HMI/Skye's activities. In corporate documents dated September 30, 2006, HMI 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.

Evictions of Mayan Q'eqchi' Communities

47. Despite HMI/Skye's publically claimed desire to resolve the land dispute through dialogue, and despite there being no pressing need to rush the resolution of the conflict, HMI/Skye vigorously sought immediate forced evictions. These efforts included high-level meetings conducted by HMI/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 HMI/Skye.
48. In November 2006, Guatemalan police conducted forced evictions of some communities located on the Fenix Property without a court order. After these evictions, HMI Nickel 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.
49. On January 8, 2007, HMI/Skye 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, HMI/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."
50. On January 8 and 9, 2007, at the request of HMI Nickel, 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. HMI Nickel took no steps to determine whether any of the individuals who participated in these evictions were “specially trained”.

51. On January 10, 2007, HMI/Skye published a press release confirming the first round of evictions, again emphasizing that “specially trained” individuals carried out the evictions. Skye/HMI’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.

52. After this first round of evictions, HMI/Skye, 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 HMI Nickel, 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.
53. HMI/Skye took no steps after the evictions of January 8 and 9 to investigate alleged uses of violence during these evictions. HMI/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.
54. In the week that followed, the community of Lote Ocho returned to the land and began to rebuild their homes.

Assaults suffered by the Plaintiffs

55. 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 HMI/Skye.
56. When the Security Personnel, police and military arrived in the village, the men of the village were not present. The intruding men 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.
57. 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.
58. The Plaintiff Rosa Elbira 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.
59. 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.
60. 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.

61. The Plaintiff Elena Choc Quib was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
62. The Plaintiff Olivia Asig Xol was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
63. The Plaintiff Amalía Cac Tiul was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
64. The Plaintiff Lucia Caal Chún was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
65. The Plaintiff Luisa Caal Chún was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
66. The Plaintiff Carmelina Caal Ical was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
67. The Plaintiff Elvira Choc Chub was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
68. The Plaintiff Irma Yolanda Choc Quib was physically assaulted and raped by several police, military and uniformed Fenix Security Personnel.
69. On January 17, 2007, the same day the Plaintiffs were raped during the forced eviction requested and authorized by HMI/Skye, HMI/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 [HMI/Skye] did everything in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights.** (emphasis added)

HMI/Skye's public commitments and representations

70. The Defendant HMI/Skye has made various representations regarding standards that it claims to have agreed to apply to operations at the Fenix Project. The Plaintiffs plead that HMI/Skye's representations are relevant in assessing the duty of care and the standard of care that HMI/Skye owed to individuals who reside in communities near the Fenix Project in relation to community safety and the conduct of Fenix Security Personnel.
71. For example, HMI/Skye publically 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, HMI/Skye's President and CEO publically 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".
72. As part of HMI/Skye's publically claimed commitment to IFC Performance Standards at the Fenix Project, HMI/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 HMI/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).**

73. Similarly, through HMI/Skye’s public claimed commitment to the Voluntary Principles on Security and Human Rights, HMI/Skye agreed to be guided by the following principles regarding the use of private Security Personnel at its Fenix Mining Project:

- (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).

74. Despite public representations from the highest levels in HMI/Skye’s management regarding the company’s claimed commitment to specific and identifiable security standards, HMI/Skye did not take reasonable, appropriate or necessary steps, or the steps described above by the applicable standards, to implement or enforce those standards regarding the use of Security Personnel at HMI Nickel’s operations in Guatemala.

75. Further, the Defendant HMI/Skye made frequent public representations about the direct relationship between HMI/Skye and neighbouring communities, especially communities that faced evictions, including Lote Ocho. The Plaintiffs plead that these representations are relevant to assessing the duty of care owed by HMI Nickel to the Plaintiffs as well as the legal proximity between HMI Nickel and individuals, including the Plaintiffs, located on the Contested Land. The Plaintiffs further plead that these representations indicate that HMI Nickel assumed responsibility for the relationship between the Fenix Project and communities located near the Fenix Project, including Lote Ocho.

76. 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) HMI/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.”

77. Many such public representations were made by HMI/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."

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

The Defendants’ knowledge

79. Prior to the violent eviction on January 17, 2007, executives of HMI/Skye knew that violence had been used during previous evictions that HMI/Skye had requested and that had occurred on January 8 and 9, 2007. In particular, these executives had seen photographic and video evidence of homes being burnt down. Further, HMI/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.
80. The Defendants 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.
81. The Defendant HMI/Skye 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 Defendant HMI/Skye knew, or should have known, that 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.

82. The Defendants 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”.
83. The Defendants knew, or should have known, that individuals who were former members of the Guatemalan military and paramilitary groups during the Guatemalan Civil War were employed as part of HMI/Skye’s Fenix Security Personnel.
84. The Defendants knew, or should have known, that private security personnel in Guatemala continue to employ the violent tactics that were used during the Guatemalan Civil War.
85. HMI/Skye and CGN 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.”
86. HMI/Skye knew or should have known that its subsidiary CGN, which was called EXMIBAL prior to its acquisition by HMI/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.

87. The Plaintiffs plead that CGN's historical involvement in acts of serious human rights violations is relevant in assessing legal foreseeability, as well as the Defendants' duty of care and standard of care. Based on the known historical involvement of CGN in acts of serious human rights abuse, including arbitrary executions, the Defendant HMI/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 HMI/Skye for Negligence

- 88. The Plaintiffs claim against HMI/Skye directly for negligence causing physical and psychological harm.
- 89. HMI/Skye, 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.

90. HMI/Skye, 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. HMI/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.
91. In making decisions and taking actions regarding the Fenix Project, HMI/Skye owed the Plaintiffs a duty to act with reasonable care. HMI/Skye breached that duty by (with the knowledge particularized above):
- (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 during the evictions of January 8 and 9;
 - (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;
 - (d) Failing to investigate credible allegations that violence had been used by Fenix Security Personnel, police and military during previous forced evictions requested by HMI Nickel;
 - (e) 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;
 - (f) Negligently instructing CGN to retain Integración Total to provide security at the Fenix Project without taking adequate steps to guard against the use of violence

- by these security personnel, including by failing to require the inclusion of terms related to standards of conduct, appropriate use of force, adequate training in its contract;
- (g) Negligently directing, controlling, monitoring and supervising Fenix Security Personnel;
 - (h) Failing to establish, implement or enforce appropriate standards of conduct for its Security Personnel;
 - (i) Failing to ensure that its Security Personnel were adequately trained;
 - (j) Failing to ensure that its Security Personnel had reasonable levels of technical and professional proficiency;
 - (k) Failing to take reasonable steps to ensure that its Security Personnel did not include individuals who had previously committed serious human rights violations;
 - (l) Failing to establish and implement adequate disciplinary mechanisms designed to prevent and deter unreasonable uses of violence by its Security Personnel;
 - (m) Failing to implement, monitor or enforce the International Finance Corporation Performance Standards, or the Voluntary Principles on Security and Human Rights as HMI/Skye publically had committed to do;
 - (n) Failing to adequately supervise the operation of CGN, a company entirely controlled and directed by HMI/Skye.
92. As a result of HMI/Skye's 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.

Piercing the corporate veil between HMI Nickel and HudBay Minerals

93. Since 2008, HudBay Minerals and its subsidiaries HMI Nickel and CGN have 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. HMI Nickel and CGN are directed, managed and financed by HudBay Minerals from its corporate headquarters in Toronto, Ontario.

94. The Plaintiffs claim that HMI Nickel is completely controlled by, subservient to and dependant upon HudBay Minerals, and is an agent of HudBay Minerals. The Plaintiffs plead that it is in the interests of justice to pierce the corporate veil and to impose the liabilities of HMI Nickel vicariously on HudBay Minerals.
95. HMI Nickel is now solely a holding corporation. HudBay Minerals directly owns 100% of the shares of HMI Nickel; HMI Nickel in turn directly owns 98.2% of CGN. HMI Nickel conducts no business of its own, exercises no independent discretion and has no independent functioning.
96. All four directors, and four officers, of HMI Nickel are also directors and officers of HudBay Minerals; all directors and officers of HMI Nickel operate from HudBay's headquarters in Toronto, Ontario:
 - (a) David A. Garofalo, Chief Executive Officer ("CEO"), President and a director of HudBay Minerals, is also President, CEO and a director of HMI Nickel;
 - (b) David S. Bryson, Senior Vice President and Chief Financial Officer ("CFO") of HudBay Minerals, is also CFO, an officer, and a director of HMI Nickel.
 - (c) Alan T.C. Hair, Senior Vice President, Business Development and Technical Services for HudBay Minerals, is also an officer and a director of HMI Nickel; and
 - (d) H. Maura Lendon, Senior Vice President, General Counsel and Corporate Secretary for Hudbay Minerals, is also Senior Vice President, General Counsel, Corporate Secretary, and a director of HMI Nickel.
97. HMI Nickel has no other employees.

98. HMI Nickel does not in fact observe all the necessary corporate formalities required of an independent corporation. The directors and executives of HMI Nickel do not act for HMI Nickel independently of their duties for HudBay Minerals.
99. HudBay Minerals and HMI Nickel's head offices share the same address in Toronto, Ontario.

Punitive damages

100. 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

101. The Plaintiffs contend that Ontario law is applicable in relation to the Defendants' liability and damages for all claims in this action.
102. 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.
103. 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.
104. 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

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

Date: March 28, 2011

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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.

MARCH 28, 2011

W-11-423077

MARGARITA CAAL CAAL et al.
Plaintiffs

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

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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