

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiff

- and -

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

Defendants

**AMENDED STATEMENT OF DEFENCE**

AMENDED THIS June 1/15 PURSUANT TO  
MODIFIÉ CE CONFORMÉMENT A  
 RULE/LA RÉGLE 26.02 ( )  
 THE ORDER OF Master Glustein  
L'ORDONNANCE DU Oct. 9/14  
DATED / FAIT LE  
.....  
REGISTRAR GREFFIER  
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

1. The defendants, HudBay Minerals Inc. (“**HudBay**”), HMI Nickel Inc. (“**HMI**”) and Compañía Guatemalteca De Níquel S.A. (“**CGN**”) admit the allegations contained in paragraphs numbered 9 (to the extent that Angelica Choc is the widow of Adolfo Ich Chamán and resided in La Union), 10 (to the extent of the first and last sentence), 12 (except that the Fenix Project operates under an exploitation license), 13 (to the extent that in August 2008 HudBay purchased all of the shares of Skye Resources Inc. (“**Skye**”) and that as a result of a subsequent amalgamation Skye became HudBay in August 2011), 14 (only to the extent of the first sentence), 18 (to the extent that HudBay has made certain general statements to its shareholders and others about the Fenix Project), 31 (to the extent that Mynor Ronaldo Padilla González (“**Padilla**”) was employed by CGN as chief of security for the Fenix Project) and 84 to 87 (only to the extent that the statements quoted therein are accurate) of the Third Amended Fresh as Amended Statement of Claim (“**Statement of Claim**”).

2. The defendants deny the allegations contained in paragraphs numbered 1 through 5, 8 (although the defendants admit that Adolfo Ich Chamàn (“**Ich**”) was a teacher in the community of La Union and one of the community’s appointed representatives), 11 (although the defendants admit that CGN at all material times was a wholly owned subsidiary of HudBay), 15 to 17, 19, 20 to 29, the balance of 31, 32 to 36 (except that John Bracale as the President of CGN was the direct supervisor of Padilla), 37 to 41 (except that individuals self-identifying as Mayan Q’eqchi’, including Ich and the plaintiff, invaded and occupied several parcels of land owned by CGN and its subsidiaries or affiliates), 42 to 46 (except that Mr. Bracale as the President of CGN interacted with Padilla in the course of CGN’s operations), 48 (except that they have no knowledge about Ich’s speech pleaded in the first sentence), 49 to 51 (except that the so-called protests involved the violent blockading of a public road on September 27, 2009 and subsequent riot which included the destruction of CGN property and a life-threatening attack on the Fenix Project security forces), 52, 53 to 83, the balance of paragraphs 84 to 87, and 88 to 119 of the Statement of Claim.

3. The defendants have no knowledge of the allegations contained in paragraphs numbered 30 and 47 of the Statement of Claim.

### **The Defendants**

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

5. CGN is a mining company incorporated in 1960 under the laws of Guatemala. In December 15, 2004, INCO Limited (now VALE INCO) transferred a majority interest in CGN

(then named Exploraciones y Explotaciones Mineras Izabal, S.A. d/b/a/ EXMIBAL) to Skye. Over time, Skye's ownership interest increased to 98%, the remainder being owned by the Government of Guatemala.

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

7. In September 2011, HudBay sold its ownership interest in CGN and its related affiliates to the Solway Group, a private equity group based in Russia. HudBay remains responsible for the defence of this action on behalf of CGN.

### **The Fenix Project**

8. At all material times, CGN's head office was located in Guatemala City, Guatemala. In or about September 2009, CGN employed approximately 84 individuals. CGN, as well as a subsidiary and an affiliate, owned property located in the Departments of Izabal and Alta Verapaz in eastern Guatemala (the "**CGN Property**") where CGN carried on business. The government of Guatemala granted title to what is now the CGN Property by Presidential Decree over 100 years ago.

9. CGN's principal project was the development of a ferro-nickel mine on the CGN Property (the "**Fenix Project**"). The Fenix Project plant and administrative offices were located on CGN Property in and around El Estor in eastern Guatemala.

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

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

11. Security for the Fenix Project was provided by several CGN employees ("**CGN Security**") and a third party independent contractor retained by CGN, Integración Total S.A., carrying on business as Delta Elite ("**Delta**"). Delta was a security company in good standing, licensed by the Guatemalan government. Contrary to the allegations in paragraph 23 of the Statement of Claim, Delta was neither retained in response to the land occupations nor with the intention that it would participate in the eviction of the occupiers. Contrary to the allegations contained in the Statement of Claim, Delta was not CGN's agent.

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

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

14. To the extent that any CGN Security or Delta Security personnel carried firearms, they did so in compliance with the registration and licensing requirements of the Guatemalan government contrary to the allegations in paragraphs 28 and 32 of the Statement of Claim.

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

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

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

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

17. Contrary to the allegations in paragraph 42 of the Statement of Claim, in January 2007, these evictions were carried out peacefully by a Guatemalan prosecutor with the assistance of the National Civil Police and the National Army. Neither the CGN Security, nor the Delta Security, carried out the evictions or engaged in any of the acts or criminal conduct alleged in paragraph 42 of the Statement of Claim. These court-ordered and state-implemented evictions were widely publicized and monitored by Governmental observers, representatives of a local non-governmental organization (La Defensoria Q'eqchi') and international activists and NGOs, and members of the local and international press.

18. In September 2009, there were 16 separate groups who had invaded CGN Property. Each had created a "community" by, among other things, erecting rudimentary

dwellings and other structures on the CGN Property. The occupation sites closest to El Estor on the CGN Property were named "La Union" and "El Chupon". The "Las Nubes" occupation site was located in an area of the CGN Property known as Area 217.

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

**(ii) Agreement with Las Nubes**

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

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

**(iii) Road Blockade**

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

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

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

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

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

26. The Hospital had been previously attacked and damaged significantly in November 2006 by illegal occupiers or their supporters. With funding from CGN, the Hospital had been rebuilt, and had only recently re-opened. Because there was costly medical equipment

inside, on September 27, 2009 the Hospital was guarded by two members of Delta Security. Two Delta Security members also were posted at a guardhouse at the housing project within La Colonia.

27. Although there were police in the area of La Colonia, they did nothing to stop or curb the initial attack by the mob or to escort the Delta Security to safety. CGN was forced to respond and sent a Delta Security contingent to rescue the [removed] guards stationed at La Colonia. When the size of the mob increased and the violence escalated, two contingents comprised of CGN Security and Delta Security (the last one of which included Padilla) were dispatched to the area to bring the security personnel to safety.

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

29. The mob ultimately occupied positions to the north and south of the Hospital from where they fired guns, including the AK-47s stolen from the barracks. They fired at the CGN Security and Delta Security personnel who were using the Hospital as protective cover. The CGN Security and Delta Security personnel were significantly outnumbered and surrounded. They could not match the fire power of their attackers. They were unaided by the police who were nearby but did not intervene. They feared for their lives.

30. Contrary to the allegations in the Statement of Claim, Padilla, and CGN Security and Delta Security personnel acted with restraint in fending off the mob's attack. Their conduct was entirely defensive in nature. They complied with CGN Security Protocols using only the



force that was appropriate and proportionate in the circumstances. They ultimately managed to escape to safety, although several of them were injured.

31. Thereafter, a contingent of Guatemalan National Civil Police officers, including officers dispatched from Guatemala City, arrived and restored order.

### **The Death of Ich**

32. The defendants are not aware of how Ich came to his unfortunate death. Ich was not grabbed by Padilla, or CGN Security or Delta Security personnel, forcibly taken from La Union, dragged through the fence separating La Colonia from La Union and executed in cold blood, as alleged in the Statement of Claim or at all.

33. The plaintiff has concocted a story about how Ich died and who killed him. The plaintiff's initial fabricated story was that Padilla shot Ich at close range in the head with a pistol/handgun. Ich's fatal wound came from a shotgun. Padilla was not carrying a shotgun on September 27, 2009.

34. The plaintiff, alone or with the assistance of others, coerced or intimidated witnesses into lying about what happened on September 27, 2009 by threatening to take away their land in La Union if they did not provide false testimony.

35. The plaintiff, alone or with the assistance of others, asked, demanded or persuaded her son José Ich to provide false testimony about what happened on September 27, 2009.

36. [intentionally left blank]

37. The current version of the plaintiff's fabricated story is that Ich was executed by Padilla with a "firearm" or, in the alternative, that Ich was executed in Padilla's presence by a member of CGN Security or Delta Security who was under Padilla's direction and control. These [removed] allegations [removed] are false.

### **No Corporate Responsibility**

38. In the alternative, and in any event, the defendants deny legal liability for the alleged conduct of Padilla, or members of CGN Security or Delta Security.

#### **A. CGN**

##### **(a) No Vicarious Liability**

39. To the extent the plaintiff alleges that Padilla or a member of the CGN Security following Padilla's order murdered Ich in cold blood, such conduct would not have been an authorized mode of providing security but rather an entirely unforeseeable event, with the result that the imposition of vicarious liability would not be justified as a matter of law.

##### **(b) No Liability for the Conduct of Delta Security**

40. To the extent it is alleged that a member of the Delta Security murdered Ich, such conduct was entirely unforeseeable, and in any event, Delta was an independent contractor for whose acts CGN was not in law liable.

##### **(c) No Negligence**

41. To the extent it is alleged that CGN and John Bracale were negligent in the hiring, training, and supervision of Padilla, CGN pleads as follows:

- (i) CGN and John Bracale owed no duty of care to Ich in the context of the aforesaid circumstances of the mob attack on September 27, 2009;
- (ii) CGN and John Bracale took all reasonable steps to ensure that Padilla would conduct himself as head of security with the appropriate restraint, and in accordance with CGN Security Protocols, which included a commitment to the Voluntary Principles on Human Rights and Security; and
- (iii) Padilla's alleged murder of Ich would have been entirely unforeseeable. Padilla had an exemplary record as CGN's chief of security. On prior occasions, he had exercised great restraint and not used, or directed other security personnel to use, physical force when he and other security personnel were under threat or attack. For example, on May 25, 2009, when Padilla was attacked with a machete and his thumb almost severed, Padilla did not counter-attack, but maintained a defensive posture and retreated. Similarly, Padilla used defensive tactics in an attempt to defuse a volatile situation on September 25, 2009. There is also no substance to the plaintiff's allegation in paragraph 33 of the Statement of Claim that Padilla had engaged in prior material "criminal incidents" of which CGN was or should have been aware.

42. To the extent it is alleged that CGN and John Bracale were negligent in the hiring of CGN Security or the retention of Delta Security and the training and supervision of such Security personnel, CGN pleads as follows:

- (i) CGN and John Bracale owed no duty of care to Ich in the context of the aforesaid circumstances of the mob attack on September 27, 2009; and
- (ii) CGN and John Bracale took all reasonable care in training CGN Security and Delta Security personnel. All such personnel received training regarding CGN Security Protocols and were specifically trained in the use of minimum and proportionate use of force when confronted with potentially violent situations, including those involving individuals armed with machetes, firearms and other weapons. One such training session, led by Padilla, took place on September 25, 2009.

43. To the extent it is alleged that CGN or John Bracale was negligent in connection with the deployment of CGN Security or Delta Security personnel on September 27, 2009, CGN pleads as follows:

- (i) CGN and John Bracale owed no duty of care to Ich in the context of the aforesaid circumstances of the mob attack on September 27, 2009; and
- (ii) CGN's and John Bracale's deployment decisions were reasonable in the circumstances of the mob attack on September 27, 2009 and not reckless as alleged in paragraph 2 of the Statement of Claim.

**B. HudBay**

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

45. HudBay has no legal liability to the plaintiff arising from the alleged murder of Ich for the following reasons:

- (i) CGN was a separate corporate entity, independent from HudBay. CGN was not controlled by, and subservient to, contrary to the allegations, *inter alia*, in paragraphs 13, 15 and 19 of the Statement of Claim. All of the allegations in the Statement of Claim notwithstanding, no tenable basis has been pleaded to pierce the corporate veil;
- (ii) CGN was not an agent of HudBay. As a matter of fact and law, in carrying out its operations in Guatemala, CGN neither had the authority, nor held itself out as having the authority, to conduct business on HudBay's behalf;
- (iii) HudBay, as the ultimate parent of CGN, owed no duty of care to the plaintiff sounding in negligence. Contrary to the allegations contained, *inter alia*, in paragraphs 37, 82, 83 and 88 of the Statement of Claim, HudBay's public statements regarding, for example, its commitment to the Voluntary Principles on Human Rights and Security and other corporate social responsibility principles including its support for building relationships with local stakeholders as a matter of general corporate policy, did not create a duty of care as the plaintiff alleges;
- (iv) nothing in any of the multitude of allegations in the Statement of Claim as a matter of fact or law constituted HudBay's acknowledgment, or acceptance, of control over the hiring, retention, training or supervision of Padilla and other security personnel, or over CGN's interaction with Ich or other members of the La Union community generally or on September 27,

2009. This includes by way of example, allegations regarding HudBay's public statements with respect to its commitment to the Voluntary Principles on Human Rights and Security and other corporate social responsibility principles including its support for building relationships with local stakeholders, as a matter of general corporate policy;

- (v) even though it may have been the fact that (a) the Fenix Project was financed by HudBay, (b) HudBay provided oversight or input into the general operations or policies relating to the Fenix Project, or (c) Bracale held a position at CGN and HudBay, as a matter of law, none of those facts either separately or together could form a basis to pierce the corporate veil or to constitute the acknowledgement or acceptance of control by HudBay as the plaintiff alleges;
- (vi) neither HudBay nor Tom Goodman owed the duty of care to the plaintiff or was negligent as alleged in paragraph 105 of the Statement of Claim. In any event, CGN acted appropriately and reasonably in the context of the mob attack on September 27, 2009; and
- (vii) in the alternative, HudBay adopts the defences in law pleaded on behalf of CGN.

### **C. No Proximity**

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

**D. No Foreseeability**

47. Even if a duty of care theoretically might have been owed by the defendants as the plaintiff alleges, contrary to the allegations contained in the Statement of Claim, the criminal conduct alleged by the plaintiff, if it occurred (which is not admitted but denied), would have been wholly unforeseeable, for all the reasons hereinbefore set out.

48. There is also no substance to the allegations in paragraphs 42, 63 and 102(i) that the Fenix Project Security personnel had engaged in criminal conduct, including gang rapes of several women in the 2006 and 2007 evictions of occupiers of CGN Property or that CGN had a strategy of addressing unlawful occupations through the use of force and violence or, in the alternative, that HudBay had any knowledge of this alleged conduct.

**E. Policy Considerations**

49. There are compelling policy considerations that militate against adopting the doctrine of acceptance of control into the common law, and expanding the tort of negligence, in the manner pleaded by the plaintiff including the following:

- (i) the plaintiff's proposed legal liability for parent corporations in respect of the operations of their foreign subsidiaries would undermine the bedrock principle of separate corporate personality entrenched in both the common law and federal and provincial corporate statutes and would extend far beyond the narrow exceptions carefully crafted over the past 115 years;
- (ii) any proposed radical departure from longstanding corporate law principles should be left to the legislature to consider. It would be particularly

inappropriate for the courts to impose the proposed duty of care in light of the fact that attempts to pass legislation to achieve a similar outcome have failed [removed]; and

- (iii) the proposed duty of care would expose Canadian companies with foreign subsidiaries to myriad claims [removed].

#### **F. Other Issues**

50. The allegations in paragraphs 39 and 40 of the Statement of Claim have no relevance to the claims pleaded against the defendants.

51. To the extent any of the allegations in paragraphs 70 through 80 of the Statement of Claim may be factual, material, not too remote and not vexatious, it is not true that CGN had a “historical involvement in serious human rights abuses” at all or, in the alternative, that HudBay knew about it.

#### **Damages**

52. In the further alternative, the defendants deny that the plaintiff, either on her own behalf, or as the personal representative of the estate of Ich, is entitled to the damages claimed, either in terms of the categories of damages pleaded or the amount sought, and the defendants put the plaintiff to the strict proof thereof.

53. Furthermore, even if Ich was murdered as the plaintiff alleges, nothing in the conduct of the defendants, as pleaded in the Statement of Claim or otherwise, would warrant the imposition of any award of punitive or exemplary damages.



54. The defendants therefore request that this action be dismissed with costs on a full indemnity basis.

February 18, 2014  
Amended May 27, 2015

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Court File No. CV-10-411159

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**AMENDED STATEMENT OF DEFENCE**

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