Court File No. CV-10-411159

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

and

HUDBAY MINERALS INC. and HMI NICKEL INC.

Defendants

and

AMNESTY INTERNATIONAL CANADA

Intervenor

Court File No. CV-11-423077

BETWEEN:

MARGARITA CAAL CAAL, ROSA ELBIRA COC ICH, OLIVIA ASIG XOL, AMALIA CAC TIUL, LUCIA CAAL CHUN, LUISA CAAL CHUN, 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

and

AMNESTY INTERNATIONAL CANADA

Intervenor

Court File No. CV-11-435841

BETWEEN:

GERMAN CHUB CHOC

Plaintiff

and

HUDBAY MINERALS INC.,and
COMPANIA GUATEMALTECA DE NIQUEL S.A.

Defendants

and

AMNESTY INTERNATIONAL CANADA

Intervenor

FACTUM OF THE INTERVENOR,
AMNESTY INTERNATIONAL CANADA

"It is the basic expectation of society as a whole that companies should respect human rights throughout their operations and in their business relationships." [1]

OVERVIEW

1. Amnesty International Canada was granted leave to intervene in these three related actions arising from allegations of serious human rights abuses committed in Guatemala by security personnel working for the subsidiary of the Defendant

[1] United Nations Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/20/29 (April 10, 2012), at para. 60

Canadian mining companies. The Plaintiffs are all Mayan peoples from Guatemala. The Defendant Canadian companies want the actions dismissed, contending that a parent corporation can never owe a duty of care to those who may be murdered, shot or raped by security personnel employed by a subsidiary operating in a foreign country.

2. Three claims – *Choc v. HudBay Minerals et al* (CV-10-411159), *Chub v. HudBay Minerals et al* (CV-11-435841) and *Caal et al v. HudBay Minerals et al* (CV-11-423077) - have been joined for the purposes of the Defendants' motions to dismiss. All three involve allegations of serious human rights abuses committed near the Defendants' Fenix Mining Project in El Estor, Guatemala.

3. Amnesty International Canada submits that international norms, authorities and standards support the view that a duty of care may exist in circumstances where a parent company's subsidiary is alleged to be involved in gross human rights abuses. The transnational character of the dispute should not exempt the Defendants from the application of established principles of tort law.

PART I - FACTS

4. In 2009, the Defendants owned a mining interest in Guatemala. The Fenix Project was a proposed open pit nickel mining operation located in the municipality of El Estor, in the Republic of Guatemala. According to the statements of claim, HudBay Minerals controlled the mining project, but it was formally owned by Compañía Guatemalteca de Níquel S.A. ("CGN"), a Guatemalan company. CGN was, in turn, 98.2% owned by HMI Nickel, a Canadian holding company that was completely owned by HudBay Minerals.[2]

[2] Choc Claim (CV-10-411159), paras. 12-14

5. The statements of claim describe HudBay, HMI Nickel and CGN as carrying on a "combined and integrated economic enterprise" – the Fenix Mining Project. The claims assert that the Fenix Project was "directed, controlled, managed and financed" by HudBay Minerals from its head office in Toronto, Ontario. The claims note that HudBay Minerals' Country Manager for Guatemala was simultaneously employed as President of CGN.[3]

6. The mining project is opposed by local Mayan Q'eqchi' indigenous peoples, who claim that they were not consulted by the Guatemalan government in the transfer of the land to private interests. Many live on or near the disputed territory. [4]

7. CGN directly employed its own security personnel for the Fenix Project. The Head of Security, Mynor Padilla, was said to have criminal allegations against him and he openly carried an unlicensed pistol. The Plaintiffs assert that the Fenix Project security personnel had used unreasonable levels of violence in the past when dealing with Mayan peoples, and this fact was known by the Defendants. The Plaintiffs claim that HudBay directly or indirectly controlled these security forces. [5]

8. CGN also hired a private security firm, Integracíon Total S.A. The Plaintiffs claim that it was well known that Integracíon Total also had a history of involvement in human rights abuses and its personnel were not licensed to carry firearms. [6]

9. The claims all assert that, given these and other factors, the Defendants ought to have known that there was a high risk of violence at the Fenix site. The claims assert that the Defendants were negligent in continuing to engage under-trained and unlicensed security personnel, and failed to implement or enforce standards of conduct that would adequately govern or control the actions of the security personnel. The Plaintiffs claim that the Defendants owed them a duty of care in the

[3] Choc Claim (CV-10-411159), paras. 15, 19 and 36
[4] Choc Claim (CV-10-411159), paras. 38-39
[5] Choc Claim (CV-10-411159), paras. 3, 21, and 31-33
[6] Choc Claim (CV-10-411159), paras. 22 and 29

circumstances and that this negligent management led directly to the extreme violence that followed. [7]

10. In action CV-10-411159, the Plaintiff Angelica Choc claims that her husband, Adolfo Ich Chamán, was murdered with a pistol shot to the head delivered by Mynor Padilla, a CGN employee and the Fenix Head of Security. Adolfo Ich was a community leader, a strong advocate for land rights, and prominent critic of the Canadian mining operations. He organized and spoke at a community meeting on September 11, 2009 where he invited locals and government officials to air the community's grievances. He was murdered just over two weeks later on September 27, 2009.[8] The statement of claim contends that the Defendants are directly liable for negligence and/or indirectly liable on the grounds of vicarious liability.

11. In action CV-11-435841, the Plaintiff German Chub Choc claims that he was shot by Padilla on September 27, 2009, the same date that Adolfo Ich was murdered. Chub survived but is a paraplegic as a result of the attack. [9] The statement of claim contends that the Defendants are directly liable for negligence and/or indirectly liable on the grounds of vicarious liability.

12. In action CV-11-423077, the Plaintiffs are all Mayan women who claim they were forcibly evicted from disputed land at the Fenix Project and then gang-raped by Fenix security personnel as well as members of the police and military who assisted in the eviction. [10] The statement of claim contends that the Defendants are directly liable for negligence and/or indirectly liable on the grounds of vicarious liability.

Motions to Dismiss the Actions

[7] Choc Claim (CV-10-411159), paras. 80, 82 and 97-104; Caal Claim(CV-11-423077), paras 99, 100-105; and Chub Claim(CV-11-435841), paras 83-89
[88] Choc Claim (CV-10-411159), paras. 8, 47, 57 and 64
[9] Chub Claim(CV-11-435841), paras. 2-3, 52 and 54-55
[10] Caal Claim(CV-11-423077), paras. 1-2 and 62-75

13. The Defendants HudBay Minerals and HMI Nickel have brought essentially identical motions in each of the cases at bar, seeking to dismiss the claims as disclosing no reasonable cause of action. The Defendants contend in the motions that "there is no legally recognized duty of care owed by a parent company to ensure that the commercial activities carried on by a subsidiary in a foreign country are conducted in a manner designed to protect those people with whom the subsidiary interacts." Alternatively, the Defendants contend that "serious policy considerations" militate against recognizing any such duty of care.[11]

14. Justice Archibald of this Court issued an order directing the motions to be heard together.[12] On February 14, 2013, Justice C.J. Brown granted Amnesty International Canada leave to intervene in these motions to make legal arguments regarding international law, standards and norms concerning the existence and scope of the duty of care.

[11] Defendants' Notice of Motion in Choc (CV-10-411159), Grounds paras. (f) and (g); Defendants' Notice of Motion in Caal(CV-11-423077), Grounds paras. (i) and (j); Defendants' Notice of Motion in Chub(CV-11-435841), Grounds paras. (f) and (g)
[12] Order of Archibald, J., dated May 14, 2012

PART II - ARGUMENTS

Transnational Corporations, International Standards of Conduct and the Corporate Responsibility to Protect Human Rights

15. The Defendants contend that, as parent corporations, it is plain and obvious as a matter of law that they can never be held liable for murders and rapes allegedly committed by security personnel employed by their Guatemalan subsidiary, CGN. Amnesty submits that international authorities, norms and standards support the view that transnational corporations can owe a duty of care to those who may be harmed by the activities of subsidiaries, particularly where the business is operating in conflict-affected or high risk areas.[13]

16. The human rights implications of transnational corporate activity has been a subject of global concern for the past few decades,[14] and a range of voluntary codes of conduct have been developed over the years with the full participation of corporations to address this risk. They include the *Voluntary Principles on Security and Human Rights*,[15] the *OECD Guidelines for Multinational Enterprises*,[16] the *United*

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[13] There is no single definition for "conflict-affected" or "high risk" areas. Some international instruments also use related terms such as "post-conflict zones" or "weak governance zones". For the purposes of this Factum, Amnesty International Canada relies upon the definition proposed by the United Nations Global Compact in its report, *Guidance on Responsible Business in Conflict-Affected and High Risk Areas* (New York: 2010) at p. 8, where the UN Global Compact says the following factors inform the meaning of these terms:

- Areas not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely.
- There are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently present.
- Areas that are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organized violence
- Areas that are currently in transition from violent conflict to peace (these are sometimes referred to as 'post-conflict'; however transition contexts remain highly volatile and at risk of falling back into violent conflict).

[14] John G. Ruggie, "Business and Human Rights: The Evolving International Agenda", 101 Am. J. Int'l L. 819 (2007) at 819-820

[15] *The Voluntary Principles on Security and Human Rights* <http://www.voluntaryprinciples.org> The Voluntary Principles were first adopted in December 2000.

[16] The Organization for Economic Development and Co-operation (OECD) responded to early concerns in 1976 by developing the first version of its *Guidelines for Multinational Enterprises*, an international

Nations Global Compact, the United Nations' *Protect, Respect and Remedy: Framework for Business and Human Rights*[17] and the *United Nations Guiding Principles on Business and Human Rights*.[18] Even the International Standards Organization (ISO) now has a chapter aligned with corporate responsibility to respect human rights.[19]

17. Since their introduction in 2011, the *UN Guiding Principles* have swiftly become the authoritative global standard for business and human rights.[20] The Principles were prepared by Professor John G. Ruggie, the Special Representative on the issue of human rights and transnational corporations and other business enterprises, appointed by the UN Secretary General to study the issue in 2005. Importantly, the Special Representative's mandate was not to create or set new norms or standards, but rather to elaborate and clarify widely accepted *existing* standards. The Special Representative relied heavily on consultations, surveys and submissions with and from states, corporations, business associations, and civil society organizations.[21]

18. The *UN Guiding Principles* emphasize that businesses operating in some environments and contexts are at a heightened risk of becoming complicit in

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corporate code of conduct that referred to the *Universal Declaration of Human Rights* and other international human rights standards. The most recent iteration was issued in May 2011 and contains a chapter on human rights due diligence: OECD 2011, *OECD Guidelines for Multinational Enterprises*, Part I, Chapter IV, pp. 31-34

[17] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other Business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (April 7, 2008)

[18] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31 (March 21, 2011)

[19] See discussion at para. 24 of the United Nations Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/20/29 (April 10, 2012)

[20] *Report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/20/29 (April 10, 2012) at paras. 10, 24-26. Also, the *OECD Guidelines on Multinational Enterprises* were revised in 2011 and now reiterate the principles set out in the *UN Guiding Principles*. All OECD countries are required to promote the Guidelines to their corporate nationals.

[21] See Ruggie, Am.J. Int'l L, *supra*, at 821, 827 on "restating" standards, and 835-836; and Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31 (March 21, 2011) at para. 14

egregious violations of human rights.[22] In the Commentary for Principle 23, the Guidelines say,

> Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims….[23]

19. One of the main risks in conflict-affected or high risk areas relates to security forces at business sites.[24] These risks are particularly acute in the extractive sector. The *Voluntary Principles on Security and Human Rights*, a standard established in 2000, elaborate norms for corporate conduct in the extractive industry when engaging public and private security forces to protect business interests in areas with a potential for violence or conflict. These Principles call for a risk assessment of the human rights impacts of security forces, as well as requiring corporations to take action to screen and train security personnel and establish clear parameters on the use of force by security forces.[25]

Tort Law and the Duty of Care of Parent Corporations

20. Under Canadian law, individuals and corporations have a legal duty to "take reasonable care to avoid conduct that entails an unreasonable risk of harm to others".[26] In light of the foregoing standards and norms of corporate behaviour and conduct, Amnesty International Canada submits that a reasonable parent corporation would apprise itself of the human rights risks associated with operating in conflict-affected or high risk areas and conduct itself in accordance with these norms.

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[22] *UN Guiding Principles on Business and Human Rights* (A/HRC/17/31) 21 March 2011, Commentaries on Principles 7 and 23, at pp. 10 and 21
[23] *UN Guiding Principles on Business and Human Rights*, Principle 23, Commentary on Principle 23 at p. 21
[24] *UN Guiding Principles on Business and Human Rights*, Commentary on Principle 23, at p. 21
[25] *The Voluntary Principles on Security and Human Rights* <http://www.voluntaryprinciples.org>.
[26] *Odhavji Estate v Woodhouse,* [2003] 2 SCR 263 at para 45.

21. Canadian courts should have no difficulty drawing upon international norms and standards of conduct in determining whether a Canadian corporation owes a duty of care to individuals who are at risk of harm from security forces engaged to protect the corporation's assets and installations. These standards certainly reflect industry custom, particularly in the extractive sectors. The very existence of the *Voluntary Principles on Security and Human Rights* demonstrate that transnational corporations in the extractive industries have long recognized the risks of security forces (public or private) violating human rights or otherwise causing injury to members of the local community in high risk areas. Notably, the Defendants have publicized the fact that they adhere to the *Voluntary Principles* as a guide to their own corporate conduct.[27]

22. The Canadian government has also endorsed the main relevant standards, including the *UN Guiding Principles on Business and Human Rights*,[28] the *OECD Guidelines for Multinational Enterprises*,[29] and the *Voluntary Principles on Security and Human Rights*.[30] Canadian courts should follow and recognize Canada's commitment to these principles of business conduct.

23. Professor Ruggie has observed that codes of conduct such as the *Voluntary Principles* "enhance the responsibility and accountability of states and corporations alike".[31]

24. The key issue raised by the Defendants is whether a *parent* corporation can be held liable in the circumstances. The international norms of conduct address the question of parent company responsibility. The *UN Guiding Principles*, for example, usually refer to "business enterprises" rather than corporations, and state that they apply "to all business enterprises, both transnational and others, regardless of their

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[27] Choc Claim(CV-10-411159), para. 37; Caal Claim(CV-11-423077), para. 33; Chub Claim, para. 35
[28] Canada was one of the countries that co-sponsored the UN Human Rights Commission resolution giving the UN Special Representative his mandate: See Ruggie, Am. J. Int'l Law, *supra*, at 821, fn 15.
[29] All OECD countries are required to promote the *Guidelines* to their corporate nationals.
[30] Canada is one of only seven governments to adopt the *Voluntary Principles on Security and Human Rights*. See "Who's Involved: Participants". <http://voluntaryprinciples.org/participants/>.
[31] Ruggie, Am.J. Int'l Law, *supra*, at 835

size, sector, location, ownership and structure." The *OECD Guidelines* use similar language of "ownership and structure" to describe the scope of corporate responsibility for human rights.[32]

25. In any event, and contrary to the Defendants' submissions, the concept of parent company liability is not new to tort law. Canadian courts have recognized that a parent company may be directly liable for its own negligent conduct with respect to managing or failing to properly manage the actions of its subsidiaries.[33] In the context of transnational litigation, the UK courts have held that a parent corporation may owe a duty of care with respect to the acts of their subsidiaries operating in other countries regarding the health and safety of employees, where the parent corporation "exercises de facto control over the operation of a (foreign) subsidiary" and the directors of the parent company know that the operation of such subsidiary involves "risks to the health and safety of workers employed by the subsidiary and/or other persons in the vicinity of its factory or other business premises".[34]

26. The UK courts have also held that a parent company owes a duty of care to plaintiffs who may be harmed by foreseeable risks arising directly or indirectly from a subsidiary's business operations in a known a high risk area. In *Guerrero and Others v. Monterrico Metals PLC*, there were allegations that local police had brutally abused and mistreated protesters near the mine site of the British company's subsidiary in Peru. The High Court ruled that where the management of a parent mining corporation overlapped with that of the Peruvian subsidiary, and the parent's CEO was in frequent contact with the local mine manager, "there was a good arguable

[32] *OECD Guidelines*, pp. 31-32, para. 37
[33] See, e.g., *United Canadian Malt Ltd. v Outboard Marine Corp.* (2000), 48 O.R. (3d) 352 at para 24; and *Dreco Energy Services Ltd v. Wenzel Downhole Tools Ltd.*, ABQB 419 at paras 39-40.
[34] See *Lubbe v Cape plc,* [2000] UKHL 41, at paras 6 and 26. Also see, e.g., *Connelly v RTZ Corporation Plc* (unreported December 1998); *Ngcobo v Thor Chemicals Holdings Ltd* (unreported 1996) (Maurice Kay J); and, most recently, *Chandler v. Cape plc*, [2012] EWCA Civ 525.

case" that the parent corporation had a duty to take reasonable care to avoid foreseeable harm to the protesters.[35]

27. Notably, the Claimants in *Guerrero* relied upon the *Voluntary Principles on Security and Human Rights* as evidence that the Defendant mining companies would have been aware of the risk of ill-treatment and human rights abuses.[36]

28. In 2008, an Expert Panel of the International Commission of Jurists – a body of eminent jurists from around the world – carried out a major study of corporate complicity in human rights abuses and problems with legal accountability. Drawing upon cases from many different jurisdictions, the International Commission discussed emerging principles and contexts of corporate liability. The Panel concluded that parent companies may be directly liable for the actions of a subsidiary in certain circumstances:

> If the parent company knew or should have known about the risk of its subsidiary causing harm to third parties, then it will be required to take sufficient precautionary measures. The level of precautionary measures the law will expect depends on the level of formal and de facto control the parent exercises over its subsidiary and whether it was able, on the facts, to intervene in its subsidiary's activities. [37]

29. The Expert Panel of the International Commission of Jurists emphasized that there are often considerable legal risks associated with contracting security providers. The Panel concluded that a risk assessment should always be conducted in circumstances where direct physical contact is likely to take place between security providers and other persons. According to the Panel, "The risk may be considered to be high when the context is volatile, or one in which serious human rights are

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[35] *Guerrero and others v Monterrico Metals plc and another*, [2009] EWHC 2475 (QB), at para 26. This case involved an application by the plaintiffs for the continuation of a worldwide freezing injunction and other injunctions against Monterrico Metals plc.
[36] *Guerrero, supra, at para.8*
[37] International Commission of Jurists, *Corporate Complicity and Legal Accountability,* Report of the Expert Legal Panel on Corporate Complicity in International Crimes, Volume 3, Civil Remedies (2008), pp. 48-49.

regularly perpetrated, or where the actor hired has a history of human rights abuses."[38] These factors sound similar to those pleaded by the Plaintiffs in the cases at bar.

30. One frequently-quoted legal scholar who studied legal issues surrounding corporate social responsibility further elaborates on the parent corporation as 'primary tortfeasor'. Zerk finds that foreseeability and proximity are met where the parent corporation is aware of the risk and has some degree of control or influence over the subsidiary's response. Zerk writes,

> There would, in principle, be a duty of care between the parent company of a multinational and those affected by the activities of its affiliates where the possibility of injury or harm is (or ought to have been) foreseeable by the parent company and the plaintiffs are sufficiently 'proximate' to the parent company to justify the imposition of liability. This ought to be the case where the parent company is familiar with the activities of the affiliate and the health and environmental risks they may pose *and* that parent exercises a degree of control over the activities of the affiliate sufficient to influence the way in which (and the standards to which) those activities are carried out.[39]

31. Amnesty International Canada submits that the above authorities sufficiently establish that a reasonable cause of action exists where a parent company is alleged to have knowledge of risks to others posed by a subsidiary and has a degree of control over its response to that risk. The transnational character of the dispute – i.e., where both the subsidiary and those at risk of harm are located in another country - should have no bearing on the application of these principles of law.

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[38] *Corporate Complicity and Legal Accountability,* Report of the International Commission of Jurists, Expert Legal Panel on Corporate Complicity in International Crimes, Volume 3, Civil Remedies (2008), p. 40.

[39] Jennifer A. Zerk. Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge University Press, 2006) at pp. 216-217

Policy Reasons for Recognizing Legal Duty of Care

32. Even where the tests of foreseeability and proximity have been met, courts may refuse to find liability where policy considerations militate against imposing a duty of care.[40] The Defendants' argument, in essence, is that the Plaintiffs are proposing a "radical departure" in the common law, and the issue of accountability for corporate human rights abuses abroad should be left to legislative reform.

33. Amnesty International submits that cases involving parent corporation liability may not be common, but they are certainly not radical. As noted earlier, Canadian courts have upheld such a duty in certain cases, as have the UK courts, including the House of Lords.

34. More importantly, all policy considerations should certainly weigh in favour of vulnerable groups who allege egregious human rights abuses and ill-treatment and who reside in conflict-affected or high risk areas. Tort law plays an important role in regulating the conduct of Canadian corporations, and there is no principled reason why activities in conflict-affected or high risk areas should somehow be exempt.

35. Tort law also plays a key role in providing access to justice. There are no alternative legal mechanisms to formally enforce the international standards and codes of conduct discussed earlier, and there are no other reasonably accessible legal avenues for victims of human rights violations to seek compensation and redress for the injuries and damage they have suffered at the hands of parent corporations, their subsidiaries and their security personnel. The UN's *Protect, Respect and Remedy Framework* rests on three pillars, the third of which is access to an effective remedy, including judicial remedies.

36. Finally, Canadian society has a strong interest in ensuring that Canadian corporations respect human rights, wherever they may operate and whatever

[40] *Cooper v. Hobart,* [2001] 3 SCR 537 at paras 30-37

ownership and other business structure they may put in place to advance their operations. This is important for preserving Canada's own reputation, and it reflects the interest all Canadians share in ensuring that victims of gross human rights abuses have an effective and meaningful avenue to seek justice and accountability. This is particularly the case where the victims belong to vulnerable groups, such as Indigenous peoples, women, children or the disabled, and live in conflict-affected areas or weak governance zones where access to justice is difficult or impossible.

37. Amnesty International Canada submits that the Defendants' motions should be dismissed and the Plaintiffs' claims of gross human rights abuses be allowed to proceed to trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 20, 2013

Penelope Simons
Associate Professor
Faculty of Law
Common Law Section
University of Ottawa

Paul Champ
CHAMP & ASSOCIATES
Barristers and Solicitors
43 Florence Street
Ottawa, ON K2P 0W6
Telephone: 613-237-4740
Facsimile: 613-232-2680
Solicitors for the Intervenor