CITATION: Choc v. Hudbay Minerals Inc., 2013 ONSC 1414
COURT FILE NO.: CV-10-411159
CV-11-423077 & CV-11-435841
DATE: 2013/07/22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Angelica Choc, individually and as personal representative of the estate of Adolfo Ich Chamàn, deceased, Plaintiffs

AND:

Hudbay Minerals Inc., HMI Nickel Inc. and Compañía Guatemalteca de Níquel S.A., Defendants

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

AND:

Hudbay Minerals Inc. and HMI Nickel Inc., Defendants

German Chub Choc, Plaintiff

AND:

Hudbay Minerals Inc., and Compañía Guatemalteca de Níquel S.A., Defendants

BEFORE: Carole J. Brown J.

COUNSEL: *Murray Klippenstein and Cory Wanless*, for the Plaintiffs

Robert S. Harrison, Tracy A. Pratt and Christopher Rae, for the Defendants

Paul Champ and Penelope Simons, for the Intervenor

HEARD: **March 4, 5, 2013**

ENDORSEMENT

[1] The defendants, Hudbay Minerals Inc. ("Hudbay"), HMI Nickel Inc. ("HMI") and Compañía Guatemalteca De Níquel ("CGN"), bring three preliminary motions regarding three related actions, including a motion to strike all three actions pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure* on the ground that it is plain and obvious that they disclose no reasonable cause of action; a motion to strike the amended Statement of Claim in the Caal action on the ground that it is statute-barred; and a motion brought by CGN with respect to the Angelica Choc action, to have the action stayed or dismissed on the ground that this Court does not have jurisdiction *simpliciter vis-à-vis* CGN, a Guatemalan corporation. The defendants are only advancing this last motion in the event that Hudbay and HMI prevail on the motion to strike and only CGN is left as the defendant in the Choc action.

[2] Pursuant to the Order of Archibald J. dated May 14, 2012, these three actions were consolidated for the purposes of these preliminary motions.

[3] Pursuant to my Order dated February 14, 2013, Amnesty International Canada ("Amnesty") was granted intervenor status for the purpose of making submissions in these motions with respect to issues of law, and particularly international law and standards and norms concerning the existence or scope of the duty of care.

Background

The Plaintiffs and the Actions

[4] The plaintiffs are indigenous Mayan Q'eqchi' from El Estor, Guatemala. They bring three related actions against Canadian mining company, Hudbay Minerals, and its wholly-controlled subsidiaries. They allege that security personnel working for Hudbay's subsidiaries, who were allegedly under the control and supervision of Hudbay, the parent company, committed human rights abuses. The allegations of abuse include a shooting, a killing and gang-rapes committed in the vicinity of the former Fenix mining project, a proposed open-pit nickel mining operation located in eastern Guatemala.

[5] The case of *Margarita Caal Caal v. Hudbay Minerals Inc.* (the "Caal action") is brought by 11 women against Hudbay Minerals and HMI. The plaintiffs assert that on January 17, 2007, they were each gang-raped by mining company security personnel, police and the military during their forced removal from their village of Lote Ocho, requested by Canadian mining company Skye Resources (subsequently acquired by Hudbay) in relation to its Fenix mining project.

[6] In the case of *Angelica Choc v. Hudbay Minerals Inc.* (the "Choc action"), the plaintiffs bring an action against Hudbay Minerals and its subsidiaries, HMI Nickel and CGN, alleging that Angelica Choc's husband, Adolfo Ich, a respected indigenous leader and outspoken critic of mining practices, was beaten and shot in the head by CGN's security personnel. In particular, the pleadings allege that the Chief of Security for the Fenix mining project, Mynor Padilla, shot and killed Adolfo Ich on September 27, 2009 at close range, in the context of a land dispute.

[7] In *German Chub Choc v. Hudbay Minerals Inc.* (the Chub action"), the plaintiff brings this action against Hudbay Minerals and CGN regarding a gunshot wound sustained on

September 27, 2009 that left him paralyzed from the chest down. The pleadings assert that German Chub was shot in an unprovoked attack by security personnel employed at Hudbay's Fenix mining project, in the context of a land dispute.

The Defendants

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

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

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

The Contested Lands

[11] The factual context from which these actions arise, as set forth in the pleadings, is as follows. Several indigenous Mayan Q'eqchi' farming communities were located on a portion of the Fenix property. At all material times, the defendants maintained that they had a valid legal right to this land, while the Mayan communities claimed that the Mayan Q'eqchi' were the rightful owners of the lands, which they considered to be their ancestral homeland. The plaintiffs allege in their pleadings that any claim to ownership by the defendants is illegitimate, as rights to those lands were first granted to the defendants by a dictatorial military government during the Guatemalan Civil War, during the time when the Mayan Q'eqchi' were being massacred and driven off their lands.

[12] On February 8, 2011, the Constitutional Court of Guatemala, the highest court in the country, ruled that Mayan Q'eqchi' communities had valid legal rights to the contested lands and ordered the government of Guatemala to formally recognize the community's collective property rights.

[13] In or about September 2006, the Mayan Q'eqchi' who had been expelled from the area around El Estor reclaimed a small part of the lands which comprise the Fenix property and occupied it. From 2006 onward, the Mayan Q'eqchi', who had been expelled from those lands they claimed as ancestral homeland, attempted to reclaim and farm those lands, which included the communities from which the plaintiffs originate. There allegedly ensued numerous forced evictions, the burning of hundreds of homes, gunshots and alleged human rights atrocities, including those giving rise to these actions.

The Three Motions

[14] I will deal with each of the three motions separately, beginning with the motion to strike on the grounds that the actions disclose no reasonable cause of action; secondly, with the *Limitations Act* motion; and thirdly, with the motion regarding jurisdiction.

The Issues

[15] The issues to be determined on these motions are as follows:

1. With respect to all three actions, whether, pursuant to Rule 21.01, it is plain and obvious that the plaintiffs' claims fail for disclosing no reasonable cause of action in negligence.

2. With respect to the Caal action, whether the action is statute-barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B ("the *Limitations Act*"), s. 4.

3. In the event that the defendants' motion to strike is successful, whether, with respect to the Choc action, this Court has jurisdiction over CGN, a Guatemalan corporation.

The Rule 21.01 Motion to Strike

[16] The defendants' motion to strike the pleadings pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure* is brought with respect to all three actions.

The Position of the Defendants/Moving Parties

[17] The defendants make several overarching arguments. Firstly, they argue that the plaintiffs are implicitly asking the Court to ignore the separate corporate personalities of Hudbay, HMI and CGN. Secondly, they argue that the negligence claim is an attempt to use the common law to impose absolute supervisory liability on parent and grandparent companies regarding the operations of their subsidiaries in foreign countries. Thirdly, they argue that even if there is a duty of care owed, the alleged conduct was not foreseeable based on the facts as pleaded in the Statement of Claim.

[18] On the issue of negligence, the defendants submit that there is no recognized duty of care owed by a parent company to ensure that the commercial activities carried on by its subsidiary in a foreign country are conducted in a manner designed to protect those people with whom the subsidiary interacts. The defendants further submit that there is no foreseeability or proximity to establish a novel duty of care, and that policy considerations militate against recognizing any such duty.

[19] On the issue of separate legal personality, the defendants argue that the law is clear that one corporation cannot be responsible for the actions of another and, particularly, that a parent corporation cannot be responsible for the actions of its subsidiary. They submit that the narrow exceptions under which the corporate veil may be pierced have not been met. They argue that the plaintiffs are implicitly requesting that the Court ignore the separate corporate identity of Hudbay's subsidiary, CGN, and impose absolute supervisory liability on the parent company. They argue that permitting these actions to proceed would result in the overturn of one hundred years of corporate law, dating to the case of *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.).

[20] The defendants also argue that the plaintiffs' claims are deficient and that they plead facts based on assumptions, speculation and bald statements of law, without the requisite material facts. They argue that there is no valid cause of action pleaded and that it is plain and obvious that the claims as pleaded cannot succeed.

[21] With respect to the Choc case, the defendants submit that the claims, as alleged, are an attempt to pierce the corporate veil between Hudbay, HMI and CGN in order to make Hudbay directly liable for the alleged wrongs. Secondly, they submit that the plaintiffs seek to hold Hudbay vicariously liable for the wrongs allegedly committed by employees of its former Guatemalan subsidiary. Thirdly, they argue that the plaintiffs' allegations framed in direct negligence as against Hudbay seek to establish that Hudbay owes an overarching and novel supervisory duty of care 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 comes into contact. They argue that this proposition is untenable at law.

[22] The allegations in the Chub action, and the defendants' arguments, are largely the same as the allegations and arguments in the Choc action. Again, the defendants submit that neither the plaintiffs' propositions of direct or vicarious liability on the part of Hudbay are tenable at law.

[23] In the Caal action, the defendants argue that the plaintiffs' cause of action framed in negligence against Hudbay/Skye must fail. Again, as in the Choc and Chub actions, the defendants submit that the plaintiffs' allegation that a parent corporation owes an overarching and novel supervisory duty of care 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 is untenable at law.

The Position of the Plaintiffs/Responding Parties

[24] The plaintiffs argue that the pleadings are not based primarily on the theories of piercing the corporate veil or vicarious liability, although those are also pled in the Choc action. Rather, the pleadings rely predominantly on Hudbay's direct liability for actions leading to the human rights abuses, shootings, killing and gang rapes alleged in the Statements of Claim.

[25] The plaintiffs submit that the primary cause of action in all three cases is negligence based on the direct actions and omissions of Hudbay, and not on share ownership or vicarious liability of the parent corporation for the actions of its subsidiary, as argued by the defendants. This direct negligence includes Hudbay/Skye's wrongdoing in its on-the-ground management of the Fenix project, and in particular, its negligent management of the Fenix security personnel who allegedly shot the plaintiffs in the Choc and Chub actions and raped the plaintiffs in the Caal action.

[26] The Statements of Claim in the three cases include detailed allegations regarding the alleged direct negligence of Hudbay. In all three actions, the plaintiffs plead that:

- Hudbay/Skye voluntarily retained considerable direct responsibility and control over key aspects of on-the-ground operations at the Fenix mining project, including control and responsibility over security policy and security personnel, as well as the corporate response to ongoing land conflicts with local Mayan communities;

- Hudbay/Skye retained ultimate control over the forced removal of Mayan subsistence farming villages, including those in which the plaintiffs resided;

- Hudbay/Skye continually acknowledged direct responsibility for security practices at the Fenix project with public statements committing to the implementation of detailed standards of conduct applicable to security personnel. These statements included a commitment to adhere to Guatemalan and international law and to the *Voluntary Principles on Security and Human Rights*. It further committed to extensive training of security personnel on the Fenix site; and

- Hudbay/Skye created a high risk of violence by retaining undertrained and inadequately supervised security personnel. It failed to implement and enforce standards of conduct with respect to those security personnel. Hudbay/Skye knew that the Fenix security personnel were armed with unlicensed and illegal weapons, and were providing security services without authorization from the Guatemalan state.

[27] The plaintiffs plead that Hudbay/Skye's detailed on-the-ground management and control was achieved through managers employed by Hudbay/Skye. These managers were responsible for the day-to-day operation and management of the Fenix project in Guatemala.

[28] In the Caal action, the plaintiffs allege that William Enrico, Skye's VP Operations, was responsible for "all operational activities at the Fenix project". Rick Killam, Skye's VP Environment, Health, Safety and Community Affairs, was responsible for managing Skye's relationship with local Mayan communities. Hugh Duncan, Skye's Project Director, was

responsible for leading and managing the development of the Fenix project. Mr. Enrico and Sergio Gabriel Monzon Ordonez, Skye's Country Manager, oversaw the hiring, training, equipping and monitoring of security personnel.

[29] In the Choc and Chub actions, the plaintiffs allege that Hudbay conducted its operations at the Fenix project largely through John Bracale, Hudbay's Country Manager for Guatemala, who was directly employed by Hudbay. Mr. Bracale was responsible, *inter alia*, for community relations, supervising and directing the Fenix security personnel, and implementing and enforcing standards of conduct for security personnel. Also, a senior Hudbay executive, Tom Goodman, was responsible for corporate social responsibility policies at all of Hudbay's operations, including at the Fenix project in Guatemala.

[30] In the Caal action, the pleadings assert that Hudbay/Skye requested and authorized the forced removal of the village of Lote Ocho on January 17, 2007, despite knowing that violence had been used in two previous evictions also requested and authorized by Hudbay/Skye. In the Choc and Chub actions, the pleadings assert that Hudbay authorized the reckless and provocative deployment of heavily armed security personnel into Mayan Q'eqchi' communities on September 27, 2009.

[31] Only in the Choc action have the plaintiffs additionally pleaded a vicarious liability claim against Hudbay—for CGN's alleged torts of battery, wrongful imprisonment and wrongful death—based on the doctrine of piercing the corporate veil. The pleadings indicate that the claim based on piercing the corporate veil is "separate from and in addition to the pleading that Hudbay Minerals is directly liable in negligence".

The Submissions of Amnesty International Canada

[32] Pursuant to my Order of February 14, 2013, Amnesty made submissions with respect to international norms, authorities and standards which, it argued, 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. Amnesty submits 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, such as Guatemala. Amnesty also argued that the transnational character of the dispute should not exempt the defendants from the application of established principles of tort law.

[33] The human rights implications of transnational corporate activity have received the attention of numerous international and intergovernmental organizations over the past few decades and have resulted in a range of voluntary codes of conduct developed in conjunction with multinational corporations. Such codes of conduct include the *Voluntary Principles on Security and Human Rights*, which were established in 2000 and 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. The *Voluntary Principles* call for a risk assessment of the human rights impacts of security forces and require corporations to

screen and train security personnel and establish clear parameters for their use of force. Hudbay stated that this code guided their corporate conduct.

[34] As well, Amnesty referred to the OECD *Guidelines for Multinational Enterprises*, the *United Nations Global Compact*, the United Nations' *Protect, Respect and Remedy: Framework for Business and Human Rights*, the *United Nations Guiding Principles on Business and Human Rights*, and the International Standards Organization's involvement in corporate responsibility. These documents have emphasized the heightened risk of becoming complicit in human rights violations in certain environments, such as conflict-affected areas.

[35] Amnesty submits that the existence of these international norms and standards of conduct demonstrate the recognition by corporations in the extractive industries of the risks of security forces, both public and private, violating human rights and otherwise causing injury to members of local communities in high risk areas.

[36] Amnesty submits that the Canadian government has endorsed the main relevant standards, including the *UN Guiding Principles on Business and Human Rights*, the *OECD Guidelines for Multinational Enterprises* and the *Voluntary Principles on Security and Human Rights*. As such, Canadian courts should have no difficulty in recognizing these principles and drawing upon international norms and standards of conduct in considering whether a Canadian corporation owes a duty of care in the circumstances of this case.

[37] Amnesty further argues, as do the plaintiffs, that the concept of direct parent liability is not new to tort law, and 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. It relies on *United Canadian Malt Ltd. v. Outboard Marine Corp. of Canada* (2000), 48 O.R. (3d) 352 (Sup. Ct.) and *Dreco Energy Services Ltd. v. Wenzel Downhole Tools Ltd.*, 2008 ABQB 419, [2008] A.J. No. 758. Amnesty further refers to the U.K. decision of *Guerrero and others v. Monterrico Metals PLC.* [2009] EWHC 2475 (Q.B.), which held that a parent company could owe 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 high-risk area.

[38] Amnesty argues, based on the international norms and standards and on the foregoing authorities, that a reasonable cause of action may be found to exist 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 those risks. It submits that the transnational character of the dispute should have no bearing on the application of these well-established principles of law.

[39] Finally, Amnesty makes submissions with respect to policy reasons for recognizing a duty of care in these circumstances. It states that the essence of the defendants' argument on this issue is that the plaintiffs are proposing a radical departure in the common law and that the issue of accountability for corporate human rights abuses abroad should be left to legislative reform. Amnesty submits that cases involving parent corporation liability have been upheld in the U.K. courts, including the House of Lords; that issues of access to justice must be considered; and that, in order to preserve Canada's reputation, Canadian society has a strong interest in ensuring

that Canadian corporations respect human rights, wherever they may operate and whatever ownership and business structure they may put in place to advance their operations in foreign countries.

Rule 21.01(1)(b): Law and Analysis

[40] Pursuant to Rule 21.01(1)(b), a party may move to strike a pleading on the ground that it discloses no reasonable cause of action or defence. The test for determining whether a pleading should be struck is whether, assuming the facts set forth in the Statement of Claim can be proven, it is plain and obvious that no reasonable cause of action is disclosed.

[41] The pleadings should not be struck if there is a chance that the plaintiff may succeed. Neither the length nor the complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect should the pleading be struck out.

[42] The test for striking the Statement of Claim at the pleadings stage is stringent, with a difficult burden for the defendant to meet. Only in the clearest of cases should a party be deprived of the opportunity of persuading a trial judge that the evidence and the law entitle it to a remedy or defence. The fact that allegations in an action might be novel is not justification for striking the Statement of Claim. In this regard, Molloy J. observed in *McLean v. Toronto (City) Police Service*, [2001] O.J. No. 2882 (Sup. Ct.) at para. 2, with respect to the novelty or complexity of a cause of action:

> For purposes of the motion, the allegations of fact in the statement of claim must be taken as proven (unless patently ridiculous or incapable of proof). The pleading must be read generously, with allowances for inadequacies due to drafting deficiencies. The novelty or complexity of a cause of action does not require that the claim be struck on a summary basis. On the contrary, it is preferable that difficult and important points of law be examined within a full factual context, which can only take place at trial.

Piercing the Corporate Veil

[43] The defendants characterize the plaintiffs' claims as an attempt to pierce the corporate veil, and argue that the plaintiffs have failed to establish that this is an appropriate case in which to do so. However, the plaintiffs' claims are based primarily on the direct liability of the defendants. Only in the Choc action do the plaintiffs plead, in addition to direct liability, that the corporate veil should be pierced to impose liability on Hudbay for the torts of battery, wrongful imprisonment, and wrongful death committed by CGN's employees or agents. Both the defendants and the plaintiffs also made passing references to vicarious liability, but this line of argument is, in essence, the same as the attempt to pierce the corporate veil. In each situation, the defendants argue that the plaintiffs seek to ignore the separate legal personalities of Hudbay and CGN.

[44] Since *Salomon v. Salomon & Co.*, *supra*, Anglo-Canadian law has recognized that a corporation is a legal entity distinct from its shareholders. A parent corporation is also a legal entity distinct from a wholly-owned subsidiary. In *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.) at para. 24, the Court of Appeal stated with respect to the separate legal personality of a parent and subsidiary:

> Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

[45] Ontario courts have recognized three circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced: (a) where the corporation is "completely dominated and controlled and being used as a shield for fraudulent or improper conduct" (*642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) at para. 68); (b) where the corporation has acted as the authorized agent of its controllers, corporate or human (*Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, [2009] O.J. No. 1195 at para. 51); and (c) where a statute or contract requires it (*Parkland Plumbing*, *supra*, at para. 51).

[46] Only the first and second exceptions are applicable in this case. Sharpe J. discussed the first exception in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.) at paras. 22-23:

> [T]he courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently…
>
> The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights"?

[47] Concerning the first exception, the plaintiffs in the Choc action plead that "CGN is completely controlled by, subservient to and dependent upon Hudbay Minerals." However, the plaintiffs have not pleaded the second element of this exception. As stated recently by Morgan J. in *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2012 ONSC 5167, [2012] O.J. No. 4320 at paras. 72-73:

> The separate identity concept is foundational to Anglo-Canadian law, and applies even where the evidence demonstrates that the corporation has been involved in impropriety. As the English courts put it in a recent confirmation of the *Salomon* principle, "it is not permissible to lift the veil simply because a company has been involved in wrong-doing, in particular simply because it is in breach of contract."

> *Dadourian Group International Inc. v. Simms*, [2006] EWHC 2973, at para. 683 (Ch D), aff'd [2009] EWCA Civ 169 (CA).
>
> To put it another way, the corporate veil should be pierced not where a corporation has misappropriated funds, but where the very use of the corporation is to hide that misappropriation. "[I]t would make undue inroads into the principle of Salomon's case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough." *Trustor AB v. Smallbone and others (No. 2)*, [2001] 3 All E.R. 987, at 996 (HC).

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

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

Direct Negligence

[50] The plaintiffs argue that a parent corporation can be liable in negligence for its own actions and omissions in another country. They argue that the actions involve a straightforward application of established and well-recognized tort law. Further, they argue that a parent corporation can be found jointly and severally liable with the subsidiary where the direct actions of each result in damage.

[51] The plaintiffs rely on *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, where one of the striking employees who had been fired, planted a bomb in a mine and killed nine miners. As in this case, *Fullowka* involved allegations of direct liability against a corporation (Pinkerton's, a security company), as well as against the government. The plaintiffs in *Fullowka* did not claim that Pinkerton's was responsible for the striker's tort, but that it was negligent in failing to prevent the harm that the third party committed. As in an ordinary negligence case, the Supreme Court of Canada considered whether the corporation owed a duty of care to the plaintiff. The Court found, at para. 19, that "the relationship between the murdered miners and Pinkerton's and the government meets the requirements of foreseeability and proximity such that a *prima facie* duty of care existed", and that "these *prima facie* duties are not negated by policy considerations."

[52] Similarly, in this case, the plaintiffs are not claiming that Hudbay is responsible for the torts of the security personnel, but that Hudbay was, itself, negligent in failing to prevent the

harms that they committed. As in any ordinary direct negligence action, it must be considered whether the pleadings disclose a claim that Hudbay owed a duty of care to the plaintiffs.

[53] A situation very similar to the present one arose in *United Canadian Malt, supra*. In that case, a motion to strike the claim against an American parent corporation was dismissed because the plaintiff pleaded allegations which:

> could well form the basis of a claim directly against the American parent corporation independent of any issue as to whether there should be a piercing of the corporate veil. For example, if it can be established that the American parent corporation voluntarily assumed responsibility for the contamination problem, that could give the plaintiff the basis for a direct claim against it for damages suffered by the plaintiff through the failure of the American parent corporation to properly remedy the problem.

The Anns Test: Novel Duty of Care

[54] For the reasons given below, based on the Statements of Claim in these three actions, I find the plaintiffs have pled all material facts required to establish the constituent elements of their claim of direct negligence as against Hudbay, separate and distinct from any claims framed in vicarious liability as against it.

[55] In order for the plaintiffs' negligence claim against Hudbay to pass the Rule 21.01(1)(b) hurdle, it must not be "plain and obvious" that the claim discloses no reasonable cause of action and will fail. The primary issue for the negligence claim on this motion is whether Hudbay owes a duty of care to the plaintiffs. Unless it is plain and obvious that Hudbay cannot owe such a duty, the negligence claim must be allowed to proceed to trial.

[56] In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, the Supreme Court of Canada held that once a duty of care is recognized for a category of cases, it becomes an established duty of care. The plaintiffs do not argue that there is an established duty of care that applies to this situation. It is therefore necessary to apply the test for establishing a novel duty of care, as originally set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728 and adopted by the Supreme Court of Canada in *Kamloops (City of) v. Nielson*, [1984] 2 S.C.R. 2.

[57] This test was affirmed by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. The Court held at para. 52 that the following must be proven:

1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;

2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and,

3. that there exist no policy reasons to negative or otherwise restrict that duty.

[58] The first two steps are part of stage one of the *Anns* test and, if proven, establish a *prima facie* duty of care. The third step, stage two of the *Anns* test, asks whether residual policy concerns should negate the *prima facie* duty. It is important to stress that the plaintiffs' pleadings are to be taken as proven for the purposes of this motion. The plaintiffs merely need to plead facts that, if proven, would establish a duty of care. It will be up to the trial judge to determine whether a novel duty of care should be recognized in the circumstances of this case, based on the evidence adduced at trial. As the Court of Appeal stated in *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 at para. 24:

> On a Rule 21 motion, the court applies [the *Anns* test] to the facts as pleaded in the Statement of Claim in order to determine not whether a duty of care will be recognized, but whether it is plain and obvious that no duty of care can be recognized. If it is not plain and obvious then the action can proceed and the issue will be determined at a trial.

Foreseeability

[59] The first requirement to establish a *prima facie* duty of care is foreseeability. At this stage, the court asks whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act: *Cooper*, *supra*, at para. 30. The Court of Appeal has stated that "the proper reasonable foreseeability analysis…requires only that the general harm, not 'its manner of incidence', be reasonably foreseeable": *Bingley v. Morrison Fuels, a Division of 503373 Ontario Ltd.*, 2009 ONCA 319, 95 O.R. (3d) 191 at para. 24. For the purposes of the foreseeability analysis, it is enough if one could "foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable": *Bingley* at para. 21, citing *Assiniboine School Division No. 3 v. Hoffer*, [1971] M.J. No. 39 (C.A.), aff'd [1973] S.C.J. No. 48.

[60] In the Caal action, the defendants' alleged act was to control and direct the security personnel deployed at the Fenix mining project, who forcibly evicted members of the local community and allegedly raped the plaintiffs. The plaintiffs have pleaded that the harms were a reasonably foreseeable consequence of the defendants' act because:

- Hudbay/Skye knew or should have known that in Guatemala, violence is frequently used by security personnel during the forced evictions of Mayan Q'eqchi' communities;
- Hudbay/Skye executives specifically knew that violence had been used at the previous forced evictions of Mayan Q'eqchi' communities requested by Hudbay/Skye;
- Hudbay/Skye knew that there was a higher risk that more extreme forms of violence would be used during the eviction of remote communities;
- Hudbay/Skye knew that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms;

- Hudbay/Skye knew or should have known that the level of violence and rape against women in Guatemala is very high; and

- Hudbay/Skye knew that Guatemala's justice system suffers from serious problems and the vast majority of violent crime goes unpunished.

[61] In the Choc and Chub actions, the defendants' alleged act was to authorize the use of force in response to peaceful opposition from the local community and to control and direct security personnel, including Mynor Padilla who allegedly shot and killed Adolfo Ich, and other security personnel who allegedly shot and paralyzed German Chub. The plaintiffs have pleaded that the harms were a reasonably foreseeable consequence of the defendants' act because:

- Hudbay's managers and executives were advised of rising tensions regarding the land conflict between the company and Mayan communities;

- Hudbay executives specifically knew that violence had been used at the previous forced evictions of Mayan Q'eqchi' communities requested by Hudbay/Skye;

- Hudbay knew that its Chief of Security, Mynor Padilla, had been credibly accused of committing previous serious and similar criminal acts, including issuing death threats against Mayan Q'eqchi' community members and shooting his gun recklessly;

- Hudbay knew that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms;

- Hudbay knew or should have known that Guatemala has one of the highest murder rates in the world, and in particular, indigenous leaders such as Adolfo Ich are frequently assassinated; and

- Hudbay knew that Guatemala's justice system suffers from serious problems and the vast majority of violent crime goes unpunished.

[62] The defendants argue that some of the allegations made will be proven false, such as the alleged background of Mynor Padilla. However, it is not the role of this Court to consider or evaluate the evidence relating to these or any other allegations. This Court must, based on the pleadings as framed, and accepted as being able to be proven, determine whether the allegations could found a claim of negligence on the part of Hudbay.

[63] The Caal pleadings state that Hudbay/Skye knew: that violence was frequently used by security personnel during forced evictions; that violence had been used at previous forced evictions that it requested; that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms; and that, in general, there was a risk that violence and rape could occur. These pleadings make it reasonably foreseeable that requesting the forced eviction of a community using hundreds of security personnel, as Hudbay/Skye is

alleged to have done, could lead to security personnel using violence, including raping the plaintiffs.

[64] The Choc and Chub pleadings state that Hudbay knew: that tensions were high regarding the land conflict; that violence had been used at previous forced evictions that it requested; that the Chief of Security may have committed serious criminal acts in the past; that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms; and that, in general, there was a risk that violence could occur. Again, it would have been reasonably foreseeable to Hudbay, if these pleadings are accepted as able to be proven, that authorizing the use of force in response to peaceful opposition from the local community could lead to the security personnel committing violent acts, including killing Adolfo Ich and seriously injuring German Chub.

[65] The plaintiffs have pleaded facts which, if proven at trial, could establish that the harm complained of was the reasonably foreseeable consequence of the defendants' conduct. I find that the first requirement is met.

Proximity

[66] The second issue in the *Anns* analysis is whether there is a proximate relationship between the plaintiffs and the defendants in each action. Proximity means that "the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs": *Cooper*, *supra*, at para. 33, citing *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. In *Cooper*, *supra*, at para. 34, the Supreme Court went on to state that:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[67] The plaintiffs submit that the following pleadings are factors indicating a proximate relationship between Hudbay/Skye and the plaintiffs.

- In the Caal action, Hudbay/Skye repeatedly made representations that showed it had turned its mind to the issue of how to deal with the ongoing land conflict between it and Mayan villages (*e.g.* the plaintiffs refer to numerous statements made by Skye's CEO that Hudbay/Skye was holding discussions with local representatives, that it wanted to work with local stakeholders to seek solutions, and that it was building trusting relationships with them).

- In the Caal Action, on the day the alleged harm occurred, Skye's CEO stated that Hudbay/Skye "did everything in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights".

- In the Choc and Chub actions, Hudbay repeatedly made public statements recognizing its relationship with Mayan subsistence farming villages located on land that formed part of the Fenix mining project (*e.g.* "We remain committed to working with local residents to reach a fair and equitable solution to land claims and resettlement"; "In Guatemala, we continued investments in the region of El Estor…aimed at cementing our relationship with the broader community").

- In the Choc and Chub actions, Hudbay made public statements that it had adopted the *Voluntary Principles on Security and Human Rights*, a detailed set of standards applicable to the use of private security forces at resource extractive projects, and it made public statements that it had extensively trained the security personnel (*e.g.* "Hudbay is dedicated to promoting and respecting human rights, and implemented the internationally recognized *Voluntary Principles on Security and Human Rights* for our personnel and contractors in Guatemala. This included extensive training of security personnel.").

- In all of the actions, Hudbay/Skye's own executives and employees were directly in charge of on-the-ground operations at the Fenix Project, including both community relations and security.

- In all of the actions, Hudbay/Skye assumed direct responsibility and control over land issues (including forced evictions), formulated corporate responses to land claims, and controlled community relations with farming villages on contested land.

- In all of the actions, Hudbay/Skye assumed direct responsibility and control over Fenix security personnel, which included implementing and enforcing standards of conduct for security personnel, determining rules of engagement, determining procedures for protecting human rights, and determining the involvement of security forces in evictions.

[68] I would note that the fact that the defendants made public statements that "Hudbay" or "Skye" or "the company" was doing something does not necessarily mean that the parent company was actually doing it. The spokesperson may have been speaking in general terms and it may have, in fact, been the subsidiary taking the action. Nevertheless, these public statements alleged to have been made by the parent company are one factor among others to be considered and are indicative of a relationship of proximity between the defendants and plaintiffs.

[69] Proximity is determined by examining various factors, rather than a single unifying characteristic or test. Factors considered in defining the proximity of a relationship include, as set forth above, the "expectations, representations, reliance, and the property or other interests involved": *Cooper*, *supra*, at para. 34. In *Odhavji*, *supra*, at para. 55, Iacobucci J. outlined factors that could give rise to proximity as including (a) a close causal connection, (b) the parties' expectations and (c) any assumed or imposed obligations. Based on the plaintiffs' pleadings, there were numerous expectations and representations on the part of Hudbay/Skye and the plaintiffs. In particular, Hudbay/Skye made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs. There were also a number of interests engaged, such as

Hudbay/Skye's interest in developing the Fenix project, which required a "relationship with the broader community, whose efficient functioning and support are critical to the long-term success of the company in Guatemala", according to Hudbay's President and CEO. The plaintiffs' interests were clearly engaged when, according to the pleadings, the defendants initiated a mining project near the plaintiffs and requested that they be forcibly evicted.

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

Policy Considerations

[71] The second stage of the *Anns* analysis involves determining whether there are policy reasons to negative or otherwise restrict the *prima facie* duty of care.

[72] Both parties set out policy reasons to support their respective positions. The defendants submit that if a duty of care exists, it is negated because:

- a private member's bill was introduced in federal Parliament to ensure that Canadian extractive corporations met environmental and human rights standards—it was defeated;
- a private member's bill was introduced in federal Parliament to permit foreign plaintiffs to sue in Canada for claims based on violations of international law or treaties to which Canada is a party—it was also defeated (and has since been reintroduced but has not gone past first reading);
- recognizing a duty risks exposing any Canadian company with a foreign subsidiary to a myriad of claims, many of which will likely be meritless; this, in turn, would burden an already overtaxed judicial system;
- recognizing a duty would pre-empt the efforts of the federal government over the past seven years to work with Canada's mining sector to implement corporate social responsibility principles; and
- recognizing a duty would likely impinge upon the fundamental principle of separate corporate personality entrenched in the common law and in corporate statutes.

[73] The plaintiffs seek to refute the defendants' arguments and submit that there are sound policy reasons for recognizing a duty of care between a Canadian mining company and individuals harmed by security personnel at its foreign operations when there is direct control by the Canadian parent corporation, as follows:

- recognizing a duty would support efforts taken by the federal government by encouraging Canadian companies to meet the "high standards of corporate social responsibility" that are currently expected by the Canadian government;

- recognizing a duty would support the government's stated goal of reducing risks of excessive force or human rights abuse related to the deployment of private security at Canadian enterprises abroad; and

- tort law should be evolving to accord with globalization, and local communities should not have to suffer without redress when adversely impacted by the business activity of a Canadian corporation operating in their country. In the words of former Justice Ian Binnie, "Ordinary tort doctrine would call for the losses to be allocated to the ultimate cost of the products and borne by the consumers who benefit from them, not disproportionately by the farmers and peasants of the Third World".

[74] There are clearly competing policy considerations in recognizing a duty of care in the circumstances of this case. This alone would prevent it from being plain and obvious that this step of the *Anns* test will fail. In addition, "[a] court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments": *Haskett* at para. 52. Based on the foregoing, I find that it is not plain and obvious that policy reasons would negative or otherwise restrict a *prima facie* duty of care.

[75] In the circumstances of this case and based on the foregoing analysis and caselaw, it cannot be said that the Statements of Claim plainly and obviously disclose no cause of action. A novel claim of negligence should only be struck at the pleadings stage where it is clearly unsustainable. In this case, it cannot be said that it is clearly unsustainable or untenable. The plaintiffs have properly pleaded the elements necessary to recognize a novel duty of care. The plaintiffs have also pleaded that the defendants breached the duty of care and that the breach caused the plaintiffs' losses. Accordingly, I find that it is not plain and obvious that the three Statements of Claim disclose no reasonable cause of action in negligence. The defendants' motion to strike the plaintiffs' actions is dismissed.

The Limitation Period Motion

[76] The defendants seek to have the Caal action dismissed pursuant to Rule 21.01(1)(a) on the basis that it is statute-barred. The defendants argue that the basic limitation period of two years after the day on which the claim is discovered, as set forth in section 4 of the *Limitations Act*, is applicable given the allegations in the Caal Statement of Claim. The Caal action was commenced on March 28, 2011. The defendants have brought the limitation period motion only in respect of the Caal action (which stems from events occurring on January 17, 2007), and not the Choc or Chub actions (which both stem from events occurring on September 27, 2009).

[77] Section 10 of the *Limitations Act* provides an exception to the two year limitation period for claims based on an assault or sexual assault. The provision reads as follows:

> (1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition….
>
> (3) Unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.

[78] The plaintiffs are claiming that they were raped as the result of the negligent management of Hudbay/Skye. If their claim falls within the scope of s. 10, the limitation period will not have started running until the proceeding was commenced because the plaintiffs will be presumed to have been incapable of commencing the proceeding, unless the contrary is proven.

[79] The defendants argue that the claims as framed against Hudbay/Skye are not "based on assault or sexual assault", but rather are claims based on the alleged failure of Hudbay/Skye to supervise the employees and agents of its subsidiary, including the security personnel who allegedly committed the sexual assaults. Accordingly, they argue that sections 4 and 5 of the *Limitations Act* apply and that there is no presumption of incapability of commencing the proceedings. Therefore, they argue, there is no issue of discoverability of the alleged claims, and the plaintiffs knew of the claims on the date that the alleged rapes occurred, January 17, 2007.

[80] The plaintiffs argue that the language used in the *Limitations Act* of "claims based on sexual assault" is not intended to be limited to claims against the actual perpetrator, but is broad enough to include claims of vicarious liability and negligence against all persons whose acts or omissions contributed to the damage suffered as a result of misconduct. They rely, in this regard, on *J.P. v. Sinclair*, [1997] B.C.J. No. 1327 (C.A.) at para. 17 and *John Doe v. Bennett*, 2002 NFCA 47, [2002] N.J. No. 218 at para. 209. They note that the *Limitations Act* specifically defines "claim" to mean "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". Therefore, they argue, a "claim based on sexual assault" must necessarily include a claim to remedy injuries from a sexual assault caused by negligent acts or omissions. The plaintiffs also rely on the principle of interpretation that legislative provisions are to be given a large and liberal interpretation and are to be interpreted in line with their objectives. They submit that the purpose of s. 10 of the *Act* is to make it easier for victims of sexual assault to bring their claims, and that the narrow interpretation suggested by the defendants would subvert the legislative intent of the *Limitations Act*.

[81] Finally, the plaintiffs argue that it is inappropriate to strike a pleading on a Rule 21 motion on the basis of a limitation period before the defendant has served a Statement of Defence. They rely on *Beardsley v. Ontario Provincial Police* (2001), 57 O.R. (3d) 1 (C.A.) to argue that they should not be denied the opportunity to respond to the defendants' limitation defence with additional facts that may change the conclusion that the claim is statute-barred.

[82] Based on the persuasive appellate authority from other provinces and the broad wording of the legislation, I find that s. 10 is applicable in the circumstances of this case. I find that this is

a claim which is based on alleged sexual assaults. While the allegations are that the sexual assaults occurred due to Hudbay's failure to properly supervise and train the security forces it deployed, the actions arise from and are based on sexual assault. Without the sexual assault, there would be no claim. Like in *Sinclair*, *supra*, at para. 17, the sexual assaults are the "main ingredient of the cause of action in negligence". To fall within the scope of s. 10, a claim need not be made against the actual perpetrator, but may also be commenced against those persons whose acts or omissions may have contributed to the alleged assaults. This conclusion is consistent with the remedial purpose of s. 10 for those who are the alleged victims of sexual assault.

[83] As the plaintiffs in the Caal action are alleging that the defendants' negligence caused them to be sexually assaulted, the claim is "based on assault or sexual assault" under s. 10(1) of the *Limitations Act*. Therefore, under s. 10(3), the plaintiffs were "presumed to have been incapable of commencing the proceeding earlier than it was commenced", unless the contrary is proven. The defendants have not presented evidence nor made submissions to refute the presumption that the plaintiffs were "incapable of commencing the proceeding earlier than it was commenced". The defendants argue that the claim was discovered because the plaintiffs knew who sexually assaulted them, but they do not argue that the plaintiffs' "physical, mental or psychological condition" (s. 10(1)) did not prevent them from commencing the action. Accordingly, I find that the presumption is not rebutted, the limitation period did not begin to run until the proceeding was commenced, and the action is not statute-barred on that basis.

[84] In conclusion, the defendants' Rule 21.01(1)(a) motion to dismiss the Caal action on the basis that it is statute-barred is dismissed.

The Jurisdiction Motion

[85] In the event that a motion to strike were successful and the claims against Hudbay and HMI were struck, CGN sought an order permanently staying the Choc action on the ground that this Court has no jurisdiction over CGN, a Guatemalan company. CGN submitted that it has no real and substantial connection to Ontario. It submitted that the plaintiffs' jurisdictional argument rests on CGN's connection to Hudbay and, if Hudbay's motion to strike is successful, the claims against CGN alone must fail, as CGN has no real and substantial connection to Ontario. However, if the motion to strike fails, CGN accepts that it will be a necessary and proper party to the Choc action. CGN submitted that it is only advancing this last motion in the event that Hudbay prevails on the motion to strike and only CGN is left as the defendant in the Choc action.

[86] As set forth above, I have concluded that the actions as against Hudbay and HMI should not be dismissed. Given the foregoing determinations in this regard, the issue of jurisdiction *simpliciter* as raised by CGN is not in issue. CGN has conceded that if the motion to strike fails, it will be a necessary and proper party to the Choc action. Accordingly, is not necessary to make a determination in that regard, and I have declined to do so. CGN's jurisdiction motion is dismissed.

Conclusion

[87] Based on all of the foregoing, I find that:

1. The motion to strike the three actions pursuant to Rule 21.01(1)(b) is dismissed.

2. The motion to strike the Caal action as statute-barred pursuant to Rule 21.01(1)(a) is dismissed.

3. CGN's jurisdiction motion is dismissed.

Costs

[88] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to five pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Carole J. Brown J.

Date: July 22, 2013