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Susana C. Mijares Peña

University of Western Ontario, Law Faculty, susanamijares@gmail.com

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Human Rights Violations by Canadian Companies Abroad: *Choc v Hudbay Minerals Inc*

Abstract

Canadian mining corporations operating abroad represent a challenge to the international legal system and Canadian legal system in the field of human rights. Currently, there are no legal mechanisms available to ensure that these corporations abide by international standards and voluntary codes. For this reason, some argue that Canadian courts should be more active in holding Canadian companies accountable for the human rights violations of their affiliates operating abroad. The recent Ontario Superior Court of Justice decision of *Choc v Hudbay Minerals* suggests that for the first time, a Canadian court is ready to play a regulatory role in preventing and remedying human rights violations committed abroad by Canadian corporations. The victims in this case are claiming direct negligence in tort by Hudbay Minerals for its subsidiary's actions in Guatemala, which resulted in human rights abuses against members of the Q'eqchi' Mayan Community. This paper argues in favour of direct negligence in tort as a remedy for victims of human rights violations by foreign subsidiaries of Canadian corporations.

Keywords

Choc v. Hudbay Minerals Inc, human rights abuses committed abroad, Canadian mining corporations, foreign subsidiaries, accountability, corporate criminal liability, mining, corporate, copyright, negligence, Latin America, UN, United Nations, international law, corporate veil, risk management

HUMAN RIGHTS VIOLATIONS BY CANADIAN COMPANIES ABROAD: *CHOC V HUDBAY MINERALS INC.*

SUSANA MIJARES PEÑA*

INTRODUCTION

Canadian mining corporations operating abroad represent a challenge to international and Canadian legal human rights protection. Over 1,000 Canadian mining companies operate in more than 100 countries, making it difficult to effectively regulate corporations without violating each country's sovereignty.¹ Unilateral home-state measures that prevent and remedy human rights violations are frequently proposed because most host states are developing countries lacking strong legal protections for communities affected by mining activities.² There have been efforts in Canada to encourage domestic courts to more actively hold Canadian companies and their subsidiaries accountable for human rights violations committed abroad. International standards or codes are currently voluntary and have no legal enforcement mechanisms.³

There is no provision under international law that negates the jurisdiction of national courts over crimes committed in other jurisdictions.⁴ Nevertheless, Canadian courts have frequently refused to hear human rights cases involving Canadian companies' foreign subsidiaries based on the *forum non conveniens* doctrine, which dictates the host state is a more appropriate venue than home state. *Bil'in (Village Council) v Green Park International Ltd* and *Association canadienne contre l'impunité c Anvil Mining Ltd* are recent examples of this approach.⁵ The 2013 Ontario Superior Court of Justice decision in *Choc v Hudbay Minerals Inc* signals a potential shift.⁶ *Hudbay* is about a Canadian corporation's alleged 2009 human rights abuses in Guatemala.⁷ This decision suggests, for the first time, that Canada is ready to play a regulatory role in preventing and remedying human rights violations by its corporations. The victims in this case are claiming direct negligence in tort by the Canadian parent company that authorized the subsidiary's security personnel in Guatemala. The

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* Susana Mijares Peña is a qualified lawyer in Venezuela, earning her undergraduate degree in law in 2008 at Universidad Católica Andrés Bello. She also completed her LLM degree at Osgoode Hall Law School in 2011. She is currently a third-year law student completing her J.D. degree at Western Law. Her area of concentration is international business transactions. Susana expresses her gratitude to Professors Valerie Oosterveld and Sara Seck for their guidance in developing this paper and providing expertise and knowledge.

¹ Shin Imai, Bernadette Maheandiran & Valerie Crystal, "Accountability Across Borders: Mining in Guatemala and the Canadian Justice System" (8 September 2012) 26 Osgoode CLPE Research Paper at 1 [Imai, Maheandiran & Crystal], online: SSRN: <<http://ssrn.com/abstract=2143679>>.

² Sara Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" (2008) 46 Osgoode Hall Law Journal 565 at 566-567.

³ Imai, Maheandiran & Crystal, *supra* note 1 at 2; *Choc v Hudbay*, 2013 ONSC 1414 (Factum of the Intervenor Amnesty International Canada at para 35) [Amnesty International Factum].

⁴ James Yap, "Corporate Civil Liability for War Crimes in Canadian Courts" (2010) 8 JICJ 631 at 632.

⁵ 2009 QCCS 4151 [*Green Park International*]; 2011 QCCS 1966 [*Anvil QCCS*], rev'd 2012 QCCA 117 [*Anvil QCCA*].

⁶ 2013 ONSC 1414 [*Hudbay*].

⁷ Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 83 [Zerk].

plaintiffs' claim that security personnel injured, killed, and sexually assaulted various members of Guatemala's Q'eqchi' Mayan Community.

Part I of this paper provides a brief overview of the current legal framework applicable to Canadian corporations in the area of human rights, including international treaties and standards. Part II describes previous Canadian court decisions regarding human rights violations by Canadian companies operating abroad. Part III examines the facts and decision in *Hudbay*. The final part of the paper analyzes the viability of using tort negligence as a remedy for human rights violations by Canadian companies and their subsidiaries working abroad.

I. HUMAN RIGHTS LEGISLATION IN CANADA AND THE PROBLEM OF JURISDICTION WHEN REGULATING MULTINATIONAL CORPORATIONS

States can regulate human rights by direct and indirect means.⁸ Direct regulation is done through international law. The United Nations' *Universal Declaration of Human Rights*, together with the *International Covenant on Civil and Political Rights* and its two Optional Protocols, and the *International Covenant on Economic, Social and Cultural Rights* form The International Bill of Human Rights.⁹ The *UDHR* and *ICCPR* both guarantee freedom from torture and from cruel, inhuman, or degrading punishment.¹⁰ Another international human rights instrument is the *Rome Statute of the International Criminal Court*, which has expanded the scope of corporate responsibility for international crimes.¹¹ According to the *Rome Statute*, murder, torture, rape, or any other form of sexual violence of comparable gravity constitute crimes against humanity when "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹² The statute defines torture in the following manner:

[T]he intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions....¹³

These treaties were reviewed, debated and ratified by the Parliament of Canada. As a party to these treaties, the Canadian government is legally bound to take positive action to protect individuals against human rights abuses.¹⁴

Furthermore, declarations, guidelines, and principles adopted internationally also contribute to the understanding, implementation, and development of international human rights law. Academics and scholars assert that because corporations enjoy considerable rights and benefits under international law, they are also subject to international human rights obligations.¹⁵ This idea is reflected in the *United Nations Guiding*

⁸ *Ibid.*

⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, ATS 5, 6 ILM 360 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

¹⁰ *UDHR*, *ibid*, art 7; *ICCPR*, *ibid*, art 7.

¹¹ *UDHR*, *ibid*, s 5; *ICCPR*, *ibid* *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, 37 ILM 1002 (entered into force 1 July 2002) [*Rome Statute*].

¹² *Ibid*, art 7.

¹³ *Rome Statute*, *supra* note 11, art 7.

¹⁴ "International Human Rights Law", online: United Nations Human Rights <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>>.

¹⁵ Zerk, *supra* note 7 at 77.

Principles on Business and Human Rights developed by John G. Ruggie, which addresses the issue of human rights and transnational corporations and other business enterprises.¹⁶ Amnesty International refers to the *UN Guiding Principles* “the authoritative global standard for business and human rights.”¹⁷

The *UN Guiding Principles* advocate that corporations and states be considered part of the human rights law framework.¹⁸ The document declares that “[s]tates should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”¹⁹ The *UN Guiding Principles* rests on three pillars, the third of which is victims’ access to effective remedies.²⁰ This is reflected in Principle 25, which stipulates that a state’s duty to protect against business-related human rights abuse includes sufficient judicial, administrative, and legislative measures to provide an effective remedy.²¹ According to Amnesty International Canada (AIC), the commentary for Principle 23 of the *UN Guiding Principles* is an important consideration for *Hudbay*. When extractive industry operations occur in conflict areas, there may be a higher risk of human rights abuse by the security personnel of the business or its subsidiaries.²²

The *Voluntary Principles on Security and Human Rights* established in 2000 are also relevant to the extractive and energy sectors.²³ These principles involve a risk assessment that evaluates “human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security.”²⁴ These risk assessments should be conducted where there is a high probability of direct physical contact between security personnel and citizens.²⁵

The 1976 Organization for Economic Co-operation and Development’s *Guidelines for Multinational Enterprise* offers non-binding recommendations for the behaviour of corporations operating among member countries.²⁶ In relation to *Hudbay*, the OECD’s *Guidelines* states that corporations shall avoid causing or contributing to “adverse human rights impacts” during business activities—whether by action or omission.²⁷ The document adds that corporations should give particular attention to specific groups whose human rights may be adversely impacted.²⁸ Canada’s National Contact Point (NCP) was created to promote awareness of the OECD *Guidelines*.²⁹ Host state communities in countries such as Guatemala, Mongolia, Papua New Guinea,

¹⁶ *Report of the Special Representative of the Secretary-General on the issues of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011) [*UN Guiding Principles*].

¹⁷ Amnesty International Factum, *supra* note 3 at para 17; *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UNGAOR, 20th Sess, UN Doc A/HRC/20/29, (2012) at para 10.

¹⁸ Sara Seck, “Collective Responsibility and Transnational Corporate Conduct” in Richard Vernon & Tracy Isaacs, eds, *Accountability for Collective Wrongdoing* (Cambridge: Cambridge University Press, 2011) 140 at 141 [Seck, “Collective Responsibility”].

¹⁹ *UN Guiding Principles*, *supra* note 16, principle 2.

²⁰ Sara Seck, “Corporate Law Tools and the Guiding Principles for Business and Human Rights” in Manoj Kumar Sinha, ed, submission to edited book collection *Business and Human Rights* (India: Sage Publishers, 2012) at 1, 22.

²¹ *UN Guiding Principles*, *supra* note 16, principle 25.

²² Amnesty International Factum, *supra* note 3 at paras 18-19, citing *UN Guiding Principle*.

²³ “What Are The Voluntary Principles?”, online: *The Voluntary Principles on Security and Human Rights* <<http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>>.

²⁴ *Ibid.*

²⁵ Amnesty International Factum, *supra* note 3 at para 29.

²⁶ OECD 2011, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) [OECD Guidelines], online: OECD <<http://dx.doi.org/10.1787/9789264115415-en>>.

²⁷ *Ibid.*, chapter IV:2, commentary 42 on human rights.

²⁸ *Ibid.*, commentary 40 on human rights.

²⁹ “Canada’s National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)”, online: Foreign Affairs, Trade and Development Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R>.

and Zambia had used Canada's NCP to raise concerns about the conduct of Canadian mining corporations operating in their jurisdictions.³⁰

The UN *Guiding Principles*, OECD *Guidelines*, and the *Voluntary Principles on Security and Human Rights* are classified as "soft" law because they are voluntary, not mandatory. Nevertheless, they have a significant impact on the development of hard law, both internationally and domestically, especially considering that these voluntary codes have been developed with the full participation of corporations in order to address further risks.³¹ Under these voluntary codes, countries are not directly required to regulate the extraterritorial activities of businesses domiciled in their jurisdiction; however, they are also not prohibited from doing so.

Failure to effectively regulate corporate activity may result in Canada being held liable for human rights violations committed by multinationals registered in its jurisdiction.³² Thus, Canada must adopt other indirect and domestic measures to efficiently achieve its international human rights obligations and duties, and to prevent human rights violations committed by private actors operating within their jurisdictions.

Canada has attempted to adopt universal rights principles as part of its domestic law. For example, to implement the *Rome Statute* and fully cooperate with the International Criminal Court procedures, Canada passed the *Crimes Against Humanity and War Crimes Act* on June 24, 2000.³³ Furthermore, to efficiently address complaints from individuals adversely affected by the activities of Canadian extractive sector companies operating overseas, the Government of Canada created the Office of the Extractive Sector Corporate Social Responsibility Counsellor (CSR Counsellor).³⁴ The idea behind this office—which welcomes complaints from anyone in the world regardless of citizenship—was to impose human rights standards on domestic companies. Critics argue the CSR Counsellor's Office "fell well short" of the federal government's objectives for the following reasons:

The Counsellor can only act when there has been a complaint; a process can be instituted only with the agreement of the corporation; it cannot offer determinations as to whether harm has occurred; it cannot investigate the complaints; and it cannot issue binding recommendations on the corporations.³⁵

Another domestic measure was attempted in February 2009. Liberal Member of Parliament John McKay introduced Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*.³⁶ C-300 required that companies in the extractive sector receiving support from the Canadian government "act in a manner consistent with international environmental best practices and with Canada's commitments to international human rights standards."³⁷ Bill C-300 was highly criticized by the Canadian mining sector, which argued that it would put Canadian companies at a competitive disadvantage

³⁰ Sara Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 *Canadian Yearbook of International Law* 51 at 65 [Seck, "Mining Internationally"].

³¹ Amnesty International Factum, *supra* note 3 at para 16.

³² Zerk, *supra* note 7 at 83.

³³ SC 2000, c 24 [CAHWCA]; "Canada's Crimes Against Humanity and War Crimes Act", online: Foreign Affairs Trade and Development Canada <<http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx>>.

³⁴ "Sources of Federal Government and Employee Information", online: Foreign Affairs, Trade <<http://www.international.gc.ca/departement-ministere/infosource.aspx>>.

³⁵ Imai, Maheandiran & Crystal, *supra* note 1 at 14.

³⁶ Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess, 40th Parl, 2009 [Bill C-300], online: <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4>>.

³⁷ *Ibid*, s 3.

when doing business in developing countries.³⁸ Bill C-300 was narrowly defeated in 2010 by a vote of 140 for to 134 against.

In instances such as the proposed Bill C-300 and the *Hudbay* case, two questions regularly arise regarding a potential duty to regulate multinational corporations: (i) the extent to which Canada owes international legal duties to individuals in other countries, and (ii) the extent to which a foreign subsidiary is subject to Canadian law.³⁹

The reasons set out previously in this paper effectively answer question (i). Canada must regulate corporate activity effectively or, possibly, be held liable for human rights violations committed by multinationals registered in its jurisdiction.

As for issue (ii), the nationality of a multinational corporation operating in more than one jurisdiction is determined according to the state where it was incorporated and the state where it has its head office.⁴⁰ Once it is incorporated, a corporation is a person in the eyes of the law.⁴¹ Thus, the state of incorporation has jurisdiction to prosecute criminal offences committed by a corporation registered within its borders.⁴² This territorial principle initially prohibits states from exercising jurisdiction beyond their borders.⁴³ Consequently, while a home state has control over a parent corporation incorporated in its jurisdiction, it does not necessarily have jurisdiction over its foreign affiliates.

In exceptional cases, permissive rules derived from international custom or convention permit states or international organizations to claim criminal jurisdiction over accused persons regardless of where the alleged crime was committed and of the accused's nationality or country of residence.⁴⁴ It has been said that because these crimes are of such concern to the international community, they allow the exercise of universal jurisdiction.⁴⁵ Therefore, only the presence of a transnational corporation within the territory of the prosecutor state is required to exercise jurisdiction.⁴⁶ However, there is still no customary international law that recognizes extraterritorial liability of transnational corporations for violations of international human rights laws.⁴⁷ For this reason, Canadian courts have been reluctant to hold Canadian companies responsible for human rights abuses in other jurisdictions. Invoking the doctrine of *forum non conveniens* or by finding a lack of jurisdiction, Canadian courts have declined to hear these types of cases. As a result, Canada has been criticized for failing to protect the human rights of minority groups by denying foreign plaintiffs access to home-state courts.⁴⁸

The decision by the Ontario Superior Court of Justice in the *Hudbay* case provides a unique opportunity to make transnational Canadian corporations liable for human rights violations committed in host states, giving victims access to remedies and supporting the development of extraterritorial corporate liability as customary international law.

³⁸ Seck, "Mining Internationally", *supra* note 30 at 72.

³⁹ Zerk, *supra* note 7 at 86.

⁴⁰ *Belgium v Spain*, [1970] ICJ Rep 3 at para 70.

⁴¹ *Salomon v Salomon*, [1897] AC 22, 66 LJ Ch 35.

⁴² *Ibid.*

⁴³ John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin Law, 2007) at 443 [Currie, Forcese & Oosterveld], referring to the decision in *SS Lotus France v Turkey* (1927), PCIJ Series A, No 10.

⁴⁴ *Ibid* at 434.

⁴⁵ Seck, "Collective Responsibility", *supra* note 18 at 150; Currie, Forcese & Oosterveld, *supra* note 43 at 463.

⁴⁶ Currie, Forcese & Oosterveld, *supra* note 43 at 464.

⁴⁷ See e.g. John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UNGAOR, 4th Sess, UN Doc A/4/35, (2007) at paras 33-34.

⁴⁸ Catherine Coumans, "Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms" (2012) 45:3 UBC L Rev 651 at paras 9, 14, 37 (QL).

II. CANADIAN COURTS' POSITION IN THE PAST

Canadian courts have historically been unwilling to decide cases involving grievances that occurred outside their territorial jurisdiction. They have relied on two main reasons: the lack of jurisdiction and the *forum non conveniens* doctrine. *Green Park International*, *Anvil Mining*, and *Club Resorts Ltd v Van Breda* collectively reflect the position that Canadian courts have recently adopted on issues similar to those in the *Hudbay* case.⁴⁹

In *Green Park International*, the Superior Court of Québec (QCCS) declined jurisdiction on the grounds of *forum non conveniens* in a case involving two Québec-registered corporations accused of aiding, abetting, assisting, and conspiring with the State of Israel in violation of the *Fourth Geneva Convention* (hereafter *Geneva Convention*).⁵⁰ The corporations, acting as agents of Israel, were building and selling condominiums on Bil'in lands, which are located in the West Bank Palestinian territory. Israel never annexed the West Bank. Therefore, according to article 49 (sixth paragraph) of the *Geneva Convention* and article 8(2)(b) of the *Rome Statute*, it was unlawful for Israel to re-assign land over which it only had military control for non-military or security uses.⁵¹ For this reason, the plaintiffs alleged that by transferring part of its civilian population to territory it occupies in the West Bank and by constructing and selling condominiums exclusively to Israeli civilians, Israel and the two Québec-registered corporations were violating international humanitarian law, as well as Section 6 of Canada's *Crimes Against Humanity and War Crimes Act (CAHWCA)* and article 1457 of the *Civil Code of Québec (CCQ)*.⁵²

The plaintiffs argued that the courts of Israel would refuse to find that Israel was in violation of the international instruments on which they relied because, in previous cases, the Israeli High Court of Justice (IHCJ) had refused to apply the *Geneva Convention*.⁵³ The plaintiff argued that Canada's failure to follow the *Geneva Convention* would allow the commission of a war crime recognized under Canadian domestic law and international law to go unpunished, and this would be "manifestly inconsistent with public order as understood in international relations."⁵⁴

In the decision, the QCCS abstained from determining whether the defendants had committed an offence. Despite the fact that the *Geneva Convention* and the CAHWCA conceded Canadian courts' criminal jurisdiction over war crimes committed anywhere, the Court declined jurisdiction in accordance with Article 3135 of the CCQ. This article states that a Québec authority may decline jurisdiction when it considers that the authorities of another country are in a better position to decide.⁵⁵ In the *Green Park International*, the court considered that the IHCJ was in a better and "[m]ore practical" position to decide the case.⁵⁶ In coming to this conclusion, the court considered the factors required to decline jurisdiction held in *Spar Aerospace Ltd v American Mobile Satellite Corp*, concluding that the forum selected by the plaintiff had little connection with the action.⁵⁷

⁴⁹ 2012 SCC 17 [*Van Breda*].

⁵⁰ *Green Park International*, *supra* note 5 at para 338.

⁵¹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, art 49 (sixth paragraph), (entered into force 21 October 1950) [*Geneva Convention*]; *Rome Statute*, *supra* note 10, art 8(2)(b)(viii); *Green Park International*, *supra* note 5 at para 14.

⁵² *Supra* note 36, s 6.

⁵³ *Green Park International*, *supra* note 5 at paras 8, 288.

⁵⁴ *Ibid* at para 295.

⁵⁵ This is called the *forum non conveniens* doctrine.

⁵⁶ *Green Park International*, *supra* note 5 at para 315.

⁵⁷ 2002 SCC 78; *Green Park International*, *supra* note 5 at paras 315, 335.

In *Anvil Mining*, André Forget JA, on behalf of the Québec Court of Appeal (QCCA), similarly held that Québec does not have jurisdiction to hear a class action brought by the Association canadienne contre l'impunité (Canadian Association Against Impunity, ACCI).⁵⁸ In this case, the defendant corporation was headquartered in Australia but incorporated in Canada in January 2004, under the *Business Corporation Act* of the North West Territories. The defendant had decided to open a two-employee office in Montreal in 2005 to maintain relationships with investors and the company's shareholders.⁵⁹ The defendant's "main, if not its sole activity" was the exploitation of a copper and silver mine located in the Democratic Republic of the Congo (DRC).⁶⁰ According to the plaintiffs, the defendant was liable for providing logistical support to military actions by the DRC Armed Forces in order to repress an insurrection in the town of Kilwa, located 55 kilometres from the defendant's mining operations.⁶¹ According to the United Nations' Organization Stabilization Mission in the DRC (MONUSCO), the DRC Armed Forces' military operation killed approximately 70 to 80 civilians.⁶² The defendant allegedly employed a company plane to transport DRC Armed Forces troops to Kilwa, and also provided trucks and drivers, and supplied the Forces with food rations and fuel.⁶³

The issue before the QCCA was whether Canadian courts had the jurisdiction to hear the ACCI's claims, since the actions under examination took place in the DRC and before the defendant incorporated its Montreal office.⁶⁴ Two provisions of the *CCQ* were of important consideration for the QCCA: articles 3148 and 3136. The former provision gives Québec jurisdiction where the defendant is a legal person that has an establishment in Québec and the dispute relates to its activities in Québec. The trial judge agreed that the Montreal office's activities were necessarily connected to the Congolese mining operation in October of 2004.⁶⁵ Furthermore, the "forum of necessity" doctrine in Article 3136 of the *CCQ* states the following:

[e]ven though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.⁶⁶

Interestingly, in 2007, a similar class action was initiated in Australia on behalf of the victims of the 2004 events. However, the action was later withdrawn due to impediments in transporting the victims to Australia after the Congolese government threatened the victims with death.⁶⁷ After these events, it was impossible for the victims to find any counsel willing to represent them in Australia.⁶⁸ Despite this, the QCCA negated the forum of necessity, deciding that the ACCI had not demonstrated that the victims had exhausted local remedies in the DRC.⁶⁹ Thus, the QCCA dismissed the action on the basis that it did not have jurisdiction

⁵⁸ *Anvil QCCA*, supra note 5 at para 104.

⁵⁹ *Ibid* at para 19.

⁶⁰ *Anvil QCCS*, supra note 5 at para 29 [translated by the author].

⁶¹ *Anvil QCCA*, supra note 5 at paras 16-17.

⁶² *Ibid* at para 25.

⁶³ *Ibid* at para 26.

⁶⁴ *Ibid* at paras 50-51.

⁶⁵ *Anvil QCCS*, supra note 5 at para 29 [translation by the author].

⁶⁶ Art 3136 *CCQ*.

⁶⁷ *Anvil QCCA*, supra note 5 at para 34.

⁶⁸ *Ibid* at para 37.

⁶⁹ *Ibid* at para 100.

to hear it.⁷⁰ The Court found that a sufficient connection had not been established between the events in Kilwa and Québec because of the lack of an establishment and activity in Québec at the time of the disputed events.⁷¹

A more recent Canadian decision on the international liability of transnational corporations is *Van Breda* by the Supreme Court of Canada (SCC). Even though this case does not involve crimes against humanity, Justice LeBel's majority decision provided clarity with respect to the "real and substantial connection" test frequently used in cases where Canadian mining companies operating abroad have unlawfully caused injuries. Therefore, this decision may impact the trial decision in the *Hudbay* case. Two Canadian citizens were injured during their trip to Cuba in two separate cases. One of the victims suffered catastrophic injuries while exercising in a hotel facility, and the other died while scuba diving, which was part of the hotel's all-inclusive package. In both cases, the appellant was Club Resorts Ltd., a company incorporated in the Cayman Islands that managed the two hotels where the incidents occurred.⁷²

The SCC held that Ontario courts had jurisdiction in each case on the basis of the real and substantial connection test, since it found a sufficient connection between Ontario and the subject matter of the litigation.⁷³ Specifically, it found that the company's business activities in Ontario were exclusively directed at attracting residents of the province.⁷⁴ In reaching this conclusion, the SCC stated that the substantial connection test is designed to avoid claims prosecuted in a jurisdiction that has "little or no connection with either the transactions or the parties."⁷⁵ Furthermore, the court examined *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, where it was established that the law applicable to tort "should be that of the place where the tort occurred" and from which some connecting factors could be identified that associate the court or the law to the subject matter and the parties.⁷⁶

Justice LeBel reviewed the jurisprudence concerning the doctrine of *forum non conveniens*.⁷⁷ This formulation relies on the doctrine of *forum non conveniens*. The plaintiff must first establish the existence of one or more of the presumptive connecting factors for tort cases. It is a non-exhaustive list of factors that link the subject matter of the action to the forum. Once the existence of one or more of these factors is established, the court is then presumed to act under its constitutional jurisdiction.⁷⁸ The defendant may rebut this presumption by proving that a given connection is inappropriate in the circumstances of the case.⁷⁹ In addition, the defendant's rebuttal requires identifying a more appropriate forum to hear and decide the subject matter.⁸⁰ If no connecting factor is found or if the presumption of jurisdiction is rebutted, the court will lack jurisdiction and it must dismiss the action.

According to the SCC, there will be a presumptive connecting factor if, among others:

- (a) *the defendant is domiciled or resident in the province;*
- (b) *the defendant carries on business in the province;*
- (c) the tort was committed in the province; and
- (d) a contract connected with the dispute was made in the province.⁸¹

⁷⁰ *Ibid* at para 104.

⁷¹ *Ibid* at para 93-94, 102-103.

⁷² *Van Breda*, *supra* note 49 at para 1.

⁷³ *Ibid* at para 117.

⁷⁴ *Ibid* at para 123.

⁷⁵ *Ibid* at para 26.

⁷⁶ [1994] 3 SCR 1022; *Van Breda*, *supra* note 49 at para 38.

⁷⁷ *Ibid* at paras 101-109.

⁷⁸ *Ibid* at para 80.

⁷⁹ *Ibid* at para 81.

⁸⁰ *Ibid* at para 108-109.

⁸¹ *Ibid* at para 90 [emphasis added].

With respect to factors (a) and (b), the court commented that a legal person may always be sued in a court of the jurisdiction where its head office is located and, in some cases, carrying on business in that jurisdiction may be sufficient to find an appropriate connecting factor. However, the definition of “carrying on business” requires actual presence in the selected forum through, for example, a permanent office within the jurisdiction or regular visits to that particular jurisdiction.⁸²

III. CHOC V HUDBAY MINERALS INC

The *Hudbay* case primarily turns on the application of private law. However, this case involves many aspects relevant to the field of public international law.⁸³ International norms on business and human rights are a substantial element in this case. Therefore, the final decision in *Hudbay* may have significant implications for the future liability of Canadian corporations operating abroad. As shown in the previous section of this paper, Canadian courts have not held Canadian companies accountable for unlawful acts committed during their business activities abroad. This part of the paper analyzes the unique opportunity that the *Hudbay* case provides for foreign citizens to access Canadian courts to seek justice against Canadian mining corporations operating in their territories.

Hudbay Minerals Inc. (HMI), a Canadian mining company headquartered in Toronto, and two of its subsidiaries, HMI Nickel Inc (HMI Niquel), and Compañía Guatemalteca de Níquel S.A. (CGN) are the defendants in the three separate actions brought by affected members of the Q’eqchi’ Mayan community of Lote Ocho. The three defendants owned, managed, and controlled the Fenix Mining Project, an open-pit nickel mining operation located in the municipality of El Estor in Guatemala.⁸⁴

AIC was permitted to act as an intervenor in the three actions to make legal arguments regarding “international law, standards and norms concerning the existence and scope of the duty of care.”⁸⁵

What Happened in Guatemala?

Canadian mining companies have operated in the El Estor region of Guatemala since 1965, when the Guatemalan government granted a 40-year lease to Inco Limited (INCO).⁸⁶ As a result, Q’eqchi’ Mayan farmers were removed from the land near INCO’s mine, since the company was planning the construction of a new town site to house the mine’s workforce.⁸⁷ The mine was closed in 1982 due to a decline in nickel’s market value. Consequently, members of the community slowly returned to their ancestral land in El Estor.⁸⁸ In 2004, Skye Resources (SR) purchased the El Estor Mine. SR was a small Canadian company whose sole business interest was the mine. The Mayan community was not consulted before the granting of the exploration licence to SR, nor was it aware of the sale transaction between INCO and SR.⁸⁹ However, SR referred to the

⁸² *Ibid* at paras 86-88.

⁸³ Craig Scott, “Brief Remarks on Intersocietal Responsibility and Canada’s Honour in the Case of Angelica Choc v. Hudbay Minerals Inc” (Remarks delivered at Klippensteins, Toronto press conference, 1 December 2010), online: Choc v Hudbay Minerals Inc & Caal v HudBay Minerals Inc. <<http://www.chocversushudbay.com/wp-content/uploads/2010/11/Craig-Scott-Brief-Remarks-Intersocietal-Responsibility-and-Honour-in-the-case-of-Choc-v-Hudbay.pdf>>.

⁸⁴ *Hudbay*, *supra* note 6 at paras 8-10.

⁸⁵ *Ibid* at para 3.

⁸⁶ “Lawsuits against Canadian Company HudBay Minerals Inc. over Human Rights Abuse in Guatemala: Canadian Mining in El Estor”, online: Choc v HudBay Minerals Inc & Caal v HudBay Minerals Inc <<http://www.chocversushudbay.com/history-of-the-mine>>.

⁸⁷ *Ibid*.

⁸⁸ Imai, Maheandiran & Crystal, *supra* note 1 at 8.

⁸⁹ *Ibid* at 8.

aforementioned reoccupation by the Q'eqchi' community as "land invasions."⁹⁰ In 2008, SR became HMI Niquel, which subsequently amalgamated with HMI. Consequently, HMI is now legally responsible for all the legal liabilities of SR.⁹¹ Even though HMI controlled the mining project, it was CGN who formally owned and operated the El Estor Mine, which was renamed the Fenix Mining Project. During the disputed events, CGN was a "wholly-controlled and 98.2% owned subsidiary" of HMI.⁹² The lands reoccupied by the Mayan community include land that was formally part of SR's mining concession and that the HMI now alleges was invaded by Q'eqchi' Mayan "squatters." As a result of these allegations, the Guatemalan police forcibly expelled Q'eqchi' Mayan farmers from the land.⁹³

On January 8th and 9th, 2007, the Guatemalan police and military evicted residents in the disputed land.⁹⁴ Gunfire, looting, vandalism, and arson allegedly accompanied these evictions.⁹⁵ In response, SR published a news release expressing its gratitude to the Guatemalan government and the National Police Force for carrying out the evictions.⁹⁶ In its press release, SR stressed that personnel were specially trained and that a peaceful atmosphere was maintained at all times during the evictions.⁹⁷ However, the plaintiff claimed that SR's CEO and President, and most executives and managers, were aware by the time of the news release that the evictions were not peaceful events.⁹⁸ Nevertheless, the company took no steps to modify its modus operandi during the subsequent evictions.

After the aforementioned evictions, the Mayan community moved to the mountains for a few days but soon returned to the land in order to rebuild their homes.⁹⁹ Consequently, a second round of evictions occurred on January 17th, 2007. In addition to the police and military, Fenix security personnel were involved this time. During these evictions, 11 women were allegedly gang raped by a group of uniformed mine security personnel while trying to leave their homes.¹⁰⁰ Among these women were Rosa Coc Ich, Margarita Caal, and Yolanda Choc Cac. The women claim nine men raped Ms. Coc Ich and, as a result of her injuries, she is no longer able to have children.¹⁰¹ Margarita Caal was six-months' pregnant at the time of the evictions.¹⁰² Caal's statement of claim outlines that ten men, including uniformed Fenix security personnel, raped and assaulted her.¹⁰³ Due to the complications from this incident, she gave birth to a stillborn baby.¹⁰⁴ Yolanda Choc was three months' pregnant when twelve men, including four uniformed Fenix security personnel, raped her. She claims her miscarriage was the result of the rape.¹⁰⁵ Regarding these evictions, the CEO and president of SR publicly declared that "the company did everything in its power to ensure that the evictions were carried out in the best

⁹⁰ *Ibid* at 9.

⁹¹ *Hudbay*, *supra* note 6 at para 76.

⁹² *Ibid* at para 10.

⁹³ *Ibid* at para 13.

⁹⁴ *Choc v Hudbay*, 2013 ONSC 998, (06 February 2012) at para 57 [Caal Statement of Claim].

⁹⁵ *Ibid*.

⁹⁶ *Ibid* at para 58.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* at para 59.

⁹⁹ Imai, Maheandiran & Crystal, *supra* note 1 at 10.

¹⁰⁰ Caal Statement of Claim, *supra* note 94 at para 1.

¹⁰¹ *Ibid* at para 65.

¹⁰² *Ibid* at para 66.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid* at para 67.

possible manner while respecting human rights.”¹⁰⁶ The company maintained that no CGN personnel were involved in these evictions.¹⁰⁷

Protests by the indigenous communities on the disputed land continued until September 27th, 2009, when Adolfo Ich, a community leader and mining critic, was killed by the company’s security personnel.¹⁰⁸ During the protest on that day, Fenix security personnel opened fire and, as a result, eight people were injured. According to witnesses, Adolfo was not participating in the protest when the gunfire took place. His family has declared that he made his way to the protest site after hearing gunfire to “restore the calm.”¹⁰⁹ Witnesses claim that Adolfo was unarmed when he approached the security personnel to speak in his capacity as community leader, at which point he was surrounded and taken to the other side of the fence.¹¹⁰ There, he was struck in the forearm with a machete, which almost severed his arm from his body, after which Mynor Padilla (“Padilla”), Chief of Security for the Fenix Mining Project, shot him in the head with a handgun.¹¹¹ Adolfo died from his wounds.¹¹²

The same day that Adolfo was killed, German Chub Choc, another community member, was also shot by Padilla. Although German survived the attack, he has lost function in his left lung.¹¹³ German did not participate in any of the protest activities that day. Instead, he was watching a soccer game at the community soccer field when he saw a CGN vehicle with approximately 14 uniformed men approaching the field.¹¹⁴ Among these men was Padilla, who approached German and shot him, allegedly, without any provocation. German spent three months in the hospital and more than 17 months in physiotherapy and rehabilitation centres.¹¹⁵

On February 8, 2011, the Constitutional Court of Guatemala decided that the Q’eqchi’ Mayan communities had valid legal rights over the disputed lands.

Plaintiffs’ Allegations

The first action, *Caal v HudBay* (*Caal* action), was brought by Rosa Elbira Coc Ich, Margarita Caal, and nine other Q’eqchi’ Mayan women who are suing HMI for the negligence of its predecessor corporation “in its direction and supervision of the security personnel who committed the rapes.”¹¹⁶ Adolfo Ich’s widow, Angelica Choc, is the plaintiff in the second action, *Angelica Choc v HudBay* (*Choc* action), against HMI and its subsidiaries. The plaintiff asserts that her husband’s death resulted from the wrongful actions and omissions of HMI and its subsidiaries.¹¹⁷ The third action against HMI and its subsidiaries, *German Chub v Hudbay* (*Chub* action), was brought by German Chub, who alleges that HMI and its subsidiaries unlawfully caused his injuries.

¹⁰⁶ *Ibid* at para 76.

¹⁰⁷ Imai, Maheandiran & Crystal, *supra* note 1, citing HudBay Minerals, “The facts: HudBay’s former operations in Guatemala”, online: HudBay <<http://www.hudbayminerals.com/English/Responsibility/CSR-Issues/The-facts-Hudbays-former-operations-in-Guatemala/default.aspx>> [HudBay, “The Facts”].

¹⁰⁸ “Lawsuits against Canadian Company HudBay Minerals Inc. over Human Rights Abuse in Guatemala: About”, online: Choc v. HudBay Minerals & Caal v. HudBay Minerals <<http://www.chocversushudbay.com/>>.

¹⁰⁹ Imai, Maheandiran & Crystal, *supra* note 1 at 12, citing *Choc v HudBay*, “Second Amended Fresh as Amended of Claim” (24 September 2010) at paras 53-54 [*Choc* Statement of Claim].

¹¹⁰ *Choc* Statement of Claim, *ibid* at para 56.

¹¹¹ *Ibid* at para 56.

¹¹² *Ibid* at para 59.

¹¹³ *Chub v Hudbay*, Amended Statement of Claim (06 February 2012) at para 2 [*Chub* Statement of Claim].

¹¹⁴ *Ibid* at para 49.

¹¹⁵ *Ibid* at para 54.

¹¹⁶ *Caal Statement of Claim*, *supra* note 94 at para 2.

¹¹⁷ *Choc Statement of Claim*, *supra* note 109 at para 2.

The plaintiffs claim that the company's security personnel were hired through an authorized informal oral agreement, which failed to include adequate standards regarding the appropriate use of force and the adequate training of security personnel.¹¹⁸ Furthermore, the plaintiff claims that the companies knew the security company was operating without the required authorization and licence for providing armed security services in Guatemala.¹¹⁹ Therefore, SR allegedly knew that the Fenix security personnel were operating illegally. The plaintiffs maintain that SR knew or should have known that the managers of the hired security company had a history of violence, since it was public knowledge that they were involved in arms and drug trafficking.¹²⁰ Specifically, they claim that that the company was aware that Padilla had been accused of committing several criminal acts while employed as its head of security.¹²¹ Nonetheless, the company continued to authorize him and the security personnel to act on its behalf, despite the significant risk of their using unjustified violence in the course of their duties.¹²²

The plaintiffs also claim that HMI's country manager for Guatemala did not implement the standards and principles of conduct applicable when "hiring, directing or supervising" Fenix security personnel, notwithstanding the company's public commitment in Ontario to apply the *UN Guiding Principles* and other international standards.¹²³ In fact, the plaintiff claims that the three defendants had access to pictures and videos of the violent events during the evictions and had not taken any measures to stop them.¹²⁴ Therefore, the plaintiff condemns the falsehood in the defendant's declaration that the defendants had taken accountable actions with respect to the situation in the Fenix Mining Project.¹²⁵ The plaintiff maintains that the defendants knew or should have known about the frequent serious human rights abuses reported in Guatemala, as well as about the lack of deterrence due to Guatemala's weak and corrupt justice system.¹²⁶ Consequently, the defendants should have known the great risks of permitting security personnel at the Fenix Mining Project to employ violent tactics without adopting adequate conduct and training standards. For all these reasons, the plaintiffs maintain that HMI is directly liable in negligence as it breached its duty and standard of care in undertaking the Fenix Mining Project.¹²⁷

Only in the *Choc* action does the plaintiff claim vicarious liability for CGN's alleged torts of battery, wrongful imprisonment, and wrongful death. These last allegations against HMI rely on the doctrine of "piercing the corporate veil" in addition to the accusation of a breach of duty of care.¹²⁸

Ontario Superior Court's Decision

HMI, HMN, and CGN brought three preliminary motions to the Ontario Superior Court of Justice (i) to strike the three actions against them, alleging that they disclose no reasonable cause of action in negligence according to Rule 21.01 of the *Rules of Civil Procedure*; (ii) to strike the amended statement of claim of the *Caal* action as it is statute-barred pursuant section 4 of the *Limitations Act*; and (iii) to dismiss the *Choc* action

¹¹⁸ *Ibid* at para 24, 88(g), 88(i).

¹¹⁹ *Ibid* at para 26, 28, 29.

¹²⁰ *Ibid* at para 67.

¹²¹ *Ibid* at para 31.

¹²² *Ibid* at para 65.

¹²³ *Ibid* at para 37.

¹²⁴ *Ibid* at para 63.

¹²⁵ *Ibid* at para 37.

¹²⁶ *Ibid* at paras 71 and 76.

¹²⁷ *Ibid* at para 103.

¹²⁸ *Hudbay*, *supra* note 6 at para 31.

on the grounds that the court lacks jurisdiction over the Guatemalan corporation CGN.¹²⁹ Justice Carole Brown for the Ontario Superior Court of Justice dismissed the three motions.

On the first issue, the court ruled that “only in the clearest of cases should a party be deprived of the opportunity to” persuade a trial judge when the law and evidence have entitled it to a remedy.¹³⁰ For the same reason, the novelty of the case was held not to be a sufficient reason for striking a statement of claim.¹³¹ As a result, the court decided that “it cannot be said that the statements of claims plainly and obviously disclose no cause of action”¹³² since the plaintiffs have provided sufficient evidence to plead the elements necessary to recognize a novel duty of care. The court indicated that it would be up to the trial judge to apply the test held in *Anns v Merton London Borough Council (Anns test)* and determine whether or not a new duty of care should be recognized under the circumstances of this case.¹³³

Furthermore, the court ruled that the plaintiff’s claim in the *Choc* action based on the doctrine of piercing the corporate veil should be allowed.¹³⁴ In deciding this, the court cited the decision in *Parkland Plumbing & Heating Ltd v Minaki Lodge Resort 2002 Inc.*, which held that when the subsidiary corporation “has acted as the authorized agent of its controllers, corporate or human,” the corporate veil can be pierced because the separate legal personality can be disregarded.¹³⁵ In *Parkland Plumbing*, the court held that a parent corporation can be held liable for the actions committed by the subsidiary corporation. The court applied this reasoning in *Hudbay* and held that it would be up to the plaintiff to prove at trial that such an agency relationship existed between HMI and CGN. The court concluded that such a relationship is not apparently ridiculous or incapable of proof and, consequently, the relationship was taken as true for the purpose of the motion.¹³⁶

With respect to the *Caal* action, the court concluded that the two-year limitation period for claims based on sexual assault stated in section 10 of the *Limitations Act* was applicable in *Hudbay*. However, it ruled that the defendants have not proved that the plaintiffs were capable of commencing the proceeding earlier than when it was initiated and, therefore, it should be presumed that the plaintiffs were incapable of doing so in accordance with section 10(3) of the *Limitations Act*.¹³⁷

IV. TORT LAW AS A REMEDY FOR HUMAN RIGHTS VIOLATIONS

The Ontario Superior Court of Justice’s decision in *Hudbay* is novel in that for the first time in Canada, a judge decided to look at the substance of the subject matter in a case of human rights violations by a foreign subsidiary of a Canadian corporation. As discussed in section III, Canadian courts have denied their jurisdiction to hear similar cases. But on this occasion, the primary cause of action alleged by the three plaintiffs is negligence based on direct actions and omissions.¹³⁸ The decision by the Ontario Superior Court of Justice suggests that, for the first time, Canadian courts are willing to address issues of international concern such as the violation of human rights by transnational corporations. To this aim, the *Hudbay* case proposes negligence as a viable civil action to offer a remedy for the victims.

¹²⁹ *Ibid* at para 15.

¹³⁰ *Ibid* at para 42.

¹³¹ *Ibid*.

¹³² *Ibid* at para 75.

¹³³ [1978] AC 728, [1977] 2 All ER 118, adopted by the SCC in *Kamloops (City of) v Nielson*, [1984] 2 SCR 2; *Hudbay*, *supra* note 6 at para 58.

¹³⁴ *Hudbay*, *ibid* at para 49.

¹³⁵ 2009 ONCA 256 [*Parkland Plumbing*]; *Hudbay*, *IBID* at para 49.

¹³⁶ *Hudbay*, *ibid* at paras 45-46, 49.

¹³⁷ *Ibid* at paras 82-83.

¹³⁸ *Ibid* at para 25.

As with any negligence action, the first fact to be established by the plaintiff is that the defendant owed him or her a duty of care.¹³⁹ Since the circumstances in these types of cases are not under an established category of duty of care, the court ruled that the three elements of the *Anns* test should be satisfied in order to establish a novel duty of care.¹⁴⁰ Therefore, according to the *HudBay* decision, victims of a crime against humanity by a Canadian company's foreign subsidiary would have to prove:

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 would not be unjust or unfair to impose a duty of care on the defendants; and
3. that there exist no policy reasons to negate or otherwise restrict that duty.¹⁴¹

To establish the requirement of foreseeability, the Ontario Superior Court of Justice cited the decision in *Bingley v Morrison Fuels, a Division of 503373 Ontario Ltd.*, which stated that it would be sufficient if the defendant could “[f]oresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need to be foreseeable if physical damage of the kind which in fact ensues is foreseeable.”¹⁴² In the mining context, a risk of abuse is automatically foreseeable when a parent corporation establishes a subsidiary in a weakly governed host country, and the mining operations are bound to bring potentially irresponsible actors, such as security personnel and corrupt officials, into contact with the local communities.¹⁴³ However, the factors to establish the requirement of foreseeability may vary on a case-by-case basis.

In the *Hudbay* case, the court accepted the factors presented by the plaintiff: HMI and SR knew that violence had been frequently used during the forced evictions and therefore, there was a high risk that it would be used again; serious criminal accusations had been made against Padilla; and the Fenix security personnel were unlicensed, inadequately trained, and in possession of illegal weapons.¹⁴⁴ Considering these factors, the court concluded that by authorizing the use of force during the protest, it could be proven at trial that it was reasonably foreseeable that somebody could be killed or assaulted as a result of HMI and SR's authorization of the use of force during the protest at the Fenix Mining Project.¹⁴⁵

In addition, the Ontario Superior Court of Justice ruled that to establish the proximity relationship between the plaintiff and the defendant, the court would look at various factors, including the parties' “expectations, representations, reliance, and the property or other interest involved.”¹⁴⁶ These factors would permit the court to determine whether it is just and fair to impose a duty of care. Consequently, the court considered the public declaration made by HMI and SR's authorities, in which they specifically expressed their concern about the indigenous communities around the Fenix Mining Project and their commitment to respect the human rights of these communities. The court concluded that it was reasonable for the plaintiffs to have some expectation regarding the defendant's conduct and to consider themselves in a proximate relationship with the defendants.¹⁴⁷

¹³⁹ *Ibid* at para 52.

¹⁴⁰ *Ibid* at para 56.

¹⁴¹ *Ibid* at para 57, citing *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 52.

¹⁴² 2009 ONCA 319, citing *Assiniboine School Division No. 3 v Hoffer*, [1971] M.J. No. 39 (C.A.), aff'd [1973] SCJ No 48.

¹⁴³ Radu Mares, *The UN Guiding Principles on Business and Human Rights-Foundation and Implementation* (Leiden, NL, Boston: Martinus Nijhoff Publishers, 2012) 169 at 181 [Mares].

¹⁴⁴ *Hudbay*, *supra* note 6 at para 64.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid* at para 69, citing *Bingley v Morrison Fuels, a Division of 503373 Ontario Ltd*, 95 OR (3d) 191 at para 24.

¹⁴⁷ *Ibid* at para 70.

The last requirement in the *Anns* test consists of determining whether or not there is a public policy reason for negating the duty of care.¹⁴⁸ Justice Carole Brown decided that, for the purpose of the motion, it was not plain and obvious that the *Anns* test would fail for policy reasons.¹⁴⁹ However, she expressly identified that “there are clearly competing policy considerations in recognizing a duty of care in the circumstances of this case.”¹⁵⁰ This part of the *Anns* test will be the more challenging requirement for the plaintiffs to satisfy at trial. As the defendant pointed out, policy reasons are a key factor used not only by Canadian courts but also by the federal government to discourage Canadian jurisdictions from regulating and adjudicating the conduct of Canadian corporations’ foreign subsidiaries.¹⁵¹

Public Policy Considerations in the Hudbay case:

In the *Hudbay* case, there are two complex considerations that will be crucial in determining the last step of the *Anns* test at trial. The first is the controversial issue of extraterritorial jurisdiction. Canadian courts have resisted exercising their jurisdiction beyond their borders in matters related to human rights violations. However, the law often recognizes that people live in an international world where cross-border transactions take place every day. Therefore, Canadian courts’ jurisdiction regarding events occurring in foreign countries has increasingly been recognized in other areas of law. This approach was clearly expressed by the SCC in *Van Breda*. For this reason, the presumptive connecting factors used to establish jurisdiction in tort cases and clearly stated in the *Hudbay* motion decision, as well as the new requirement established for the application of the *forum non conveniens* doctrine, will be fundamental for the trial decision in the *Hudbay* case.

First, the plaintiffs are suing HMI in direct negligence for its own wrongdoings. Per *Van Breda*, HMI can always be sued in the Canadian courts because it is incorporated in Canada and has a presence in this country. Therefore, there is sufficient connection between Ontario and the subject matter of the litigation. Secondly, although the *forum non conveniens* doctrine was not alleged by the parties, it is likely that the court will consider it. According to Human Rights Watch, impunity remains the norm in Guatemala; 98 per cent of crimes in Guatemala do not result in prosecutions, and those who seek justice from the state authorities have themselves often been killed.¹⁵² In particular, violent incidents against Guatemalan anti-mining activists have often been reported in Guatemala, and the police have not been found responsible for these crimes. For example, nine environmental activists were threatened with death in 2008; an individual who was trying to strike down part of the Guatemalan *Mining Act* in 2009 was shot seven times in the stomach and legs in a Guatemala City street; a Bishop who led a march against the Marlin Mine, owned by Goldcorp, another Canadian mining company, received death threats and had to be placed under government protection; and an individual who refused to sell property to Goldcorp and who participated in some protests against the Marlin Mine was shot in the head in 2010.¹⁵³ Indeed, there is strong evidence suggesting that Guatemala’s legal system is deeply broken and that no similar case has ever been prosecuted in the country.¹⁵⁴ For the reasons outlined above, it can be concluded that under the existing common law, there is room to assert that Canada has the

¹⁴⁸ *Ibid* at para 71.

¹⁴⁹ *Ibid* at para 75.

¹⁵⁰ *Ibid* at para 74.

¹⁵¹ *Choc v Hudbay*, 2013 ONSC 1414 (Factum of the Defendants: Hudbay Minerals and HMI Nickel at para 44) [Factum of the Defendants].

¹⁵² “World Report 2013: Guatemala”, online: Human Rights Watch <<http://www.hrw.org/world-report/2013/country-chapters/guatemala>>; Reed Brody, “Is Justice Gaining a Foothold?” CNN (8 April 2013), online: Human Rights Watch <<http://www.hrw.org/news/2013/04/08/justice-gaining-foothold>>.

¹⁵³ Imai, Maheandiran & Crystal, *supra* note 1 at 28-29.

¹⁵⁴ Cory Wanless (1 November 2013) in Canadian Centre for International Justices (CCIJ), “International Corporate Responsibility: The Implications of the Choc v. Hudbay Mineral Inc” (Toronto, Gowling Lafleur Henderson LLP, 2013) [CCIJ Conference].

jurisdiction to decide the allegations claimed in the *Hudbay* case and that doing otherwise would deny access to justice for the victims.

Another policy consideration is Bill C-354, *An Act to Amend the Federal Court Act (International Promotion and Protection of Human Rights)*, proposed by MP Peter Julian of the New Democratic Party.¹⁵⁵ The Bill was first introduced in April 2009, but it did not move past its first reading and was consequently re-introduced as Bill C-323 on October 5th, 2011. The bill is the Canadian version of the US *Alien Torts Claims Act (ATCA)*, which grants jurisdiction to American courts over civil claims brought by foreign citizens based on torts committed abroad.¹⁵⁶ Thus, the main objective of Bill C-354/C-323 is to provide an accessible remedy to non-Canadian plaintiffs for violations of international law committed outside Canada.¹⁵⁷ Considering this proposed bill and the absence of a statutory authority in Canada, the recent decision by the Supreme Court of the United States (SCOTUS) in *Kiobel v Royal Dutch Petroleum* will likely be considered at trial in *Hudbay* when analyzing the policy considerations with respect to Bill C-354/C-323.¹⁵⁸

The issue in *Kiobel* was whether an American federal court could hear a human rights claim under the *ATCA* when the alleged violations occurred in Nigeria.¹⁵⁹ Unlike in the *Hudbay* case, the defendant corporations were not incorporated in the US; rather, they were incorporated in the Netherlands, the United Kingdom, and Nigeria. The defendants were accused of aiding and abetting the Nigerian government to stop the Ogoni, an indigenous group, from protesting against the defendant's oil exploration in the region. The petitioners, representatives of the late Dr. Barinem Kiobel and the Ogoni people, alleged that Nigerian military forces committed gross human rights violations, including torture, extra-judicial executions, rape, and other crimes against humanity.¹⁶⁰ Therefore, the petitioners claimed that the defendants aided and abetted the Nigerian forces by providing transportation, food, compensation and staging areas for carrying out attacks against the Ogoni population.¹⁶¹

On April 2013, SCOTUS upheld the decision by the United States Court of Appeals for the Second Circuit, which ruled that customary international law does not recognize liability on the part of corporations and dismissed the claims regarding a lack of jurisdiction.¹⁶² SCOTUS affirmed that the "the presumption against extraterritoriality applies to claims under the AT[C]A" and that more than a corporate presence in the US would be necessary to reverse this presumption.¹⁶³

The SCOTUS decision appears to obstruct the fight to hold extractive and energy industries more accountable. SCOTUS left some room for suing US parent corporations for their overseas activities in cases of foreseeable risk because allegations of overseas human rights abuses as common law tort actions, like those claimed in the *Hudbay* case, were not covered in the decision.¹⁶⁴ Also, Justice Kennedy's comment in his concurring opinion provided some recourse for foreign victims of US companies' actions. Justice Kennedy made the following statement:

¹⁵⁵ Bill C-354, *An Act to Amend the Federal Court Act (International Promotion and Protection of Human Rights)*, 3rd Sess, 40th Parl, 2009 (first reading 1 April 2009) [Bill C-354/C-323].

¹⁵⁶ 28 USC § 1350 (1789) [*ATCA*]; Seck, "Mining Internationally", *supra* note 30 at 63.

¹⁵⁷ Seck, "Mining Internationally", *supra* note 30 at 63.

¹⁵⁸ The Honourable Ian Binnie, "The Oxford Lecture: Judging The Judges: May They Boldly Go Where Ivan Rand Went Before" (2013) 26 Can JL & Juris 5 at para 61 (QL) [Binnie]; 569 US ___ (2013) [*Kiobel*].

¹⁵⁹ *Kiobel*, *ibid* at 4.

¹⁶⁰ Binnie, *supra* note 158 at para 57.

¹⁶¹ *Kiobel*, *supra* note 158 at 2.

¹⁶² *Ibid* at 1.

¹⁶³ *Ibid* at 14.

¹⁶⁴ Rich Samp, "Supreme Court Observations: *Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*", online: FORBES <<http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>>.

Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.¹⁶⁵

In any case, this decision is likely to influence the final and substantive decision in the *Hudbay* case.

The second policy consideration under the third step of the *Anns* test is the principle of a separate corporate personality between the parent corporation and the subsidiary corporation, which has been well established in the common law and in corporate legislation.¹⁶⁶ Distinct from any other case involving human rights violations, the plaintiffs in the *Hudbay* case are not asking to pierce the corporate veil in order to hold HMI liable for the human rights abuses of its subsidiaries. Rather, they are suing in direct negligence for the parent corporation's own wrongdoing, not that of the foreign subsidiary. In support of their claim, the plaintiffs are arguing that the parent corporation managed and controlled key aspects of the subsidiary corporation's operations, including security policies and relations with the local community. The plaintiff argues that HMI was well aware of the situation in Guatemala and did nothing to prevent the human rights violations against the Mayan community. This claim is based on the doctrine of enterprise liability for corporate group, a new approach and viable alternative to regulate conduct that "views the corporate group as a singular unit, rather than viewing each subsidiary or affiliated corporation as a separate legal entity."¹⁶⁷ This tort doctrine aims to avoid the formalistic difficulties involved in piercing the corporate veil, focusing instead on the normative and economic realities of the relationship between parent corporations and their subsidiaries.¹⁶⁸¹⁷¹ The doctrine's ultimate objective is to make all members of a corporate group accountable for their actions.

This doctrine has not yet been recognized under Canadian law.¹⁶⁹ However, it has already been adopted in the US in the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which aims to ensure that corporations play an active role in respecting international human rights.¹⁷⁰ Germany is a pioneer in implementing this enterprise doctrine and treating a parent and a subsidiary as a single economic unit under certain circumstances per the *German Stock Corporation Act*.¹⁷¹ The *Act* regulates subsidiary and parent enterprises (where a subsidiary is a majority-owned enterprise), controlled and controlling enterprises, and members of a group of companies.¹⁷² Similar legislation has been adopted in other jurisdictions, including Brazil and Portugal.¹⁷³

Interestingly, the UN proposed to include the enterprise liability doctrine as part of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the predecessor of the UN Guiding Principles.¹⁷⁴ However, these later principles do not adopt the enterprise

¹⁶⁵ *Kiobel*, *supra* note 158, Kennedy J.

¹⁶⁶ Factum of the Defendants, *supra* note 151 at para 56.

¹⁶⁷ CCIJ Conference, *supra* note 154; MJC van der Heijden, "The Dodd-Frank Act's Interventionist Approach to Business and Human Rights: Transparency, Reporting and Due Diligence" (Paris Legal Publishers, 2012) at 210 [van der Heijden], online: Business and Human Rights Resources Center <http://www.business-humanrights.org/media/documents/mj_van_der_heijden_article_pdf.pdf>.

¹⁶⁸ Meredith Dearborn, "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups" (2009) 97 Cal L Rev 195 at 210 [Dearborn].

¹⁶⁹ CCIJ Conference, *supra* note 154.

¹⁷⁰ Pub L No 111-203; van der Heijden, *supra* note 167 at 134.

¹⁷¹ Dearborn, *supra* note 168 at 215.

¹⁷² *Ibid* at 217.

¹⁷³ *Ibid* at 220-221.

¹⁷⁴ Sub-Commission on the Promotion and Protection of Human Rights, 22nd meeting, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

liability doctrine or any other doctrine with respect to the issue of a separate corporate personality.¹⁷⁵ Instead, corporate personality is an issue of remedies within these principles, which means that its regulation is left to national authorities. For this reason, it has been argued that when remedies at a national level are ineffective, as is the case in the Guatemalan legal systems, the international responsibility of parent companies becomes essential.¹⁷⁶ Furthermore, cases of unremedied harm have been considered a special category of “peculiar-light” risk, which consequently requires parent corporations to take special precautions.¹⁷⁷ These arguments support the existence of HMI’s duty to respond reasonably to the events that occurred in the Fenix Mining Project in Guatemala.

Some of the AIC’s submissions may be of significant influence in this part of the analysis. The AIC strongly argued that international norms and standards establish a duty of care in circumstances where a parent company’s subsidiary is alleged to be involved in gross human rights abuses.¹⁷⁸ It asserted that by publicly implementing the Voluntary Principles as a guide for their own company, the defendants were corroborating that there are considerable risks associated with the use of security personnel in violating the human rights of local community members in areas of high risk, such as the El Estor sector.¹⁷⁹ More noticeably, AIC also provided examples of previous case law in Canada where it was suggested that a parent corporation could be responsible for its own negligent conduct in managing the conduct of its foreign subsidiary, independent of “any issue as to whether there should be a piercing of the corporate veil.”¹⁸⁰ AIC also referenced decisions from UK courts where a parent corporation was held to have a duty of care with respect to the acts of its foreign subsidiaries when the former had de facto control over the operations of the latter. Similarly, AIC noted that UK courts have held that a parent company may be liable when it was foreseeable that the business operation of the foreign subsidiary in a high-risk area would result in personal injury.¹⁸¹ AIC conceded that cases involving parent corporations are not common. Yet it found that there is room under both domestic common law and international law to conclude that a parent corporation has a duty of care to prevent its foreign subsidiary from impacting the human rights of local communities.¹⁸²

The case law collectively demonstrates that parent corporation liability is gradually being recognized in accordance with international norms and standards. The preceding discussion also supports that the plaintiffs’ claim of direct negligence against HMI, based on the enterprise liability doctrine, could effectively address the problem of human rights violations by foreign subsidiaries.

CONCLUSION

Canada has an obligation to promote, secure, respect, and protect human rights recognized under international and national law. However, it seems that the legislation and voluntary international guidelines implemented by Canada do not provide sufficient enforcement and remedial mechanisms to redress and prevent cases of human rights violations by the foreign subsidiaries of Canadian transnational corporations. More action is needed on the part of Canadian courts, despite the fact that Canada has gradually adopted legal measures that suggest that it supports the emergence of an international customary law that demands better accountability by

¹⁷⁵ Mares, *supra* note 143 at 169-173.

¹⁷⁶ *Ibid* at 180.

¹⁷⁷ *Ibid* at 183.

¹⁷⁸ *Hudbay*, *supra* note 6 at para 32.

¹⁷⁹ Amnesty International Factum, *supra* note 3 at para 21.

¹⁸⁰ *Ibid* at paras 25-27, citing *United Canadian Malt Ltd v Outboard Marine Corp.*, (2000), 48 OR (3d) 352 at para 24. Also see, e.g. *Dreco Energy Services Ltd. v Wenzel Downhole Tools Ltd*, 2010 ABQB 419 at paras 39-40.

¹⁸¹ *Ibid* citing *Lubbe v Cape plc*, [2000] UKHL 41 at para 6, 26. Also see, e.g. *Chandler v Cape plc*, [2012] EWCA Civ 525.

¹⁸² *Ibid* at para 33.

parent corporations. The need for action is especially notable considering that in other areas of the law, Canadian courts have not limited Canada's jurisdiction to regulate the conduct of parent corporations and its subsidiaries. For this reason, the *Hudbay* decision is a unique opportunity for the Canadian courts to resolve this issue and finally determine what role Canada should play as a home state in the protection of international human rights.¹⁸³

Claiming direct negligence in tort under the circumstances in the *Hudbay* case is a viable alternative for Canadian courts to make Canadian companies accountable for human rights violations committed while operating abroad. A decision confirming Canada's jurisdiction to hear and decide on the events that occurred in the El Estor region in Guatemala will be fundamental for the development of domestic legislation and customary international law. It will also reinforce Canada's reputation as a strong player in the global mining sector. Most importantly, this decision will finally provide a remedy to the Q'eqchi' Mayan community of Lote Ocho, which has repeatedly been the victim of gross human rights violations.

¹⁸³ Seck, "Mining Internationally", *supra* note 30 at 51.