

2014

# Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala


Shin Imai

*Osgoode Hall Law School of York University, simai@osgoode.yorku.ca*

Bernadette Maheandiran

Valerie Crystal

Follow this and additional works at: [http://digitalcommons.osgoode.yorku.ca/scholarly\\_works](http://digitalcommons.osgoode.yorku.ca/scholarly_works)

 Part of the [Business Organizations Law Commons](#), [International Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

## Recommended Citation

Imai, Shin, Bernadette Maheandiran, and Valerie Crystal. "Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala." *Canadian Journal of Development Studies* 35.2 (2014).

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

# Access to justice and corporate accountability: a legal case study of HudBay in Guatemala

Shin Imai<sup>a</sup>, Bernadette Maheandiran<sup>b</sup> and Valerie Crystal<sup>a</sup>

<sup>a</sup>*Osgoode Hall Law School, York University, Toronto, ON, Canada;* <sup>b</sup>*Swadron Associates, Toronto, ON, Canada*

**ABSTRACT** This case study looks at the avenues open for addressing serious allegations of murder, rape and assault brought by indigenous Guatemalans against a Canadian mining company, HudBay Minerals. While first-generation legal and development policy reforms have facilitated foreign mining in Guatemala, second-generation reforms have failed to address effectively conflicts arising from the development projects. The judicial mechanisms available in Guatemala are difficult to access and suffer from problems of corruption and intimidation. Relevant corporate social responsibility policies and mechanisms lack the necessary enforcement powers. Canadian courts have been reluctant to permit lawsuits against Canadian parent companies; however, in *Choc v. HudBay* and *Yaiguaje v. Chevron Corporation*, Ontario judges have allowed cases to proceed on the merits of the case, providing an important, if limited, avenue toward corporate accountability.

**RÉSUMÉ** Cette étude de cas examine les stratégies qui s'offrent pour traiter les allégations de meurtre, de viol et d'agression formulées par des autochtones guatémaltèques contre une compagnie minière canadienne, la HudBay Minerals. Alors que les réformes légales et institutionnelles de « première génération » ont facilité l'extraction minière par des compagnies étrangères, les réformes de « deuxième génération », qui s'intéressent aux droits sociaux et aux droits de la personne, n'offrent pas encore de mécanismes fiables pour résoudre les conflits résultant des actions des entreprises. En effet, les règles qui définissent la responsabilité sociale des entreprises et les jugements des mécanismes internationaux qui interviennent lors de plaintes ne sont pas contraignants pour les états. Or, il est très difficile d'accéder aux mécanismes judiciaires du Guatemala, sans compter qu'ils sont affligés par des problèmes de corruption et d'intimidation. En outre, les cours canadiennes ont jusqu'ici été réticentes à autoriser des actions légales contre les compagnies mères canadiennes. Cependant, dans *Choc v. HudBay* et *Yaiguaje v. Chevron Corporation*, la Cour supérieure ontarienne a permis ces cas à procéder, s'il pourraient s'avérer une voie intéressante pour bien établir la responsabilité sociale des entreprises.

Keywords: mining; Latin America; Chevron; HudBay; corporate social responsibility

## Introduction

In this paper, we will examine the history of one particularly troubled nickel mine in Guatemala, located near the town of El Estor in the region of Izabal. The mine was born into violence, as indigenous people living on the site were removed to make room

---

\* Corresponding author. Email: [simai@yorku.ca](mailto:simai@yorku.ca)

for the mine and the town in the 1960s and 1970s. Numerous murders, assaults, and other human rights violations have occurred as a result of the conflict between local indigenous people who have lived in the area since the late nineteenth century and the successive Canadian corporate entities INCO, Skye Resources, and HudBay Minerals, as well as their Guatemalan subsidiaries.

We will study the practical dimensions of this case in the context of “second-generation” reforms in the law and development field that have introduced social and human rights issues as a component of the rule of law. While first-generation reforms focused on judicial and institutional reforms to encourage an appropriate climate for commercial relations, second-generation reforms introduced a number of voluntary, soft law mechanisms to address social, environmental, and human rights aspects of development (Trubek 2006). However, they have been criticised for being more show than substance (Eslava 2008). Legal scholar Kerry Rittich suggests the need for specific case studies to determine how these social aspects are faring on the ground (Rittich 2006). We are not engaged in evaluating whether corporate social responsibility mechanisms or judicial reforms in Guatemala have improved the conduct of individual corporations, or judges, as the case may be; rather, we are making a more specific point, that the current mechanisms do not provide meaningful access to justice for those who are most in need of the protection of the law.<sup>1</sup> Taking up Rittich’s suggestion, we describe a dispute, centred around allegations of murder and rape, between indigenous people in the El Estor region of Guatemala and the Canadian mining company HudBay Minerals. We first look at the history and context of the dispute, including a decades-long struggle over land and resources. We believe that an understanding of the history of the conflict reveals the contextual factors driving the actions of specific individuals. We take the approach that second-generation reforms must take into account history and context in a way that recognises the interests and rights of indigenous communities.

We then review three avenues for addressing that dispute: seeking resolution in the

Guatemalan judicial system, relying on voluntary corporate social responsibility mechanisms, and suing in Canada. We argue that both the Guatemalan courts and corporate social responsibility mechanisms present serious limitations with respect to resolving claims of human rights abuses by Canadian mining companies. We are concerned that, while Canadian companies are permitted to profit from extractive activities in foreign jurisdictions, the Canadian court system has typically not stepped in to fill this gap with respect to the effects of those activities, finding either that the cases should be heard in foreign jurisdictions or that Canadian mining companies do not owe a duty of care to people in foreign countries directly affected by Canadian mining.

Decisions rendered in 2013 by the Ontario Superior Court of Justice and in 2014 by the Ontario Court of Appeal may be an indication that Canadian courts are prepared to narrow this accountability gap. In the first decision, the judge ruled that three lawsuits filed by indigenous people of El Estor against HudBay may proceed to trial, as it is not “plain and obvious” that HudBay is not liable to the plaintiffs in negligence. In the second decision, the Ontario Court of Appeal provided that the Ontario courts had the jurisdiction to decide whether an Ecuadorian judgment could be enforced in Ontario. Regardless of whether these plaintiffs succeed in proving their case in either proceeding, the openness of the court to decide on the issues based on their merits provides an important precedent for those attempting to seek a remedy against Canadian mining corporations’ alleged wrongs committed abroad.

We wish to point out two limitations to our methodology. First, we are only studying the interests of the individuals who are plaintiffs in the lawsuit. While there are different views about mining and the events in the region within the indigenous communities, we do not purport to generalise about interests in the indigenous community as a whole. We feel that this is a valid approach, as we are studying the availability of legal remedies to complainants, not the dynamics of community relations. Second, we are limited by the evidence that we have available, from court documents, newspaper reports and our own

personal knowledge of Guatemala. Consequently, while we present divergent versions of events, we do not attempt to draw conclusions about which version is correct or whether we have all the information; rather, we show that there are serious issues raised that need to be resolved in a process that can make determinations of fact and, if appropriate, provide redress.

The establishment of INCO in Guatemala<sup>2</sup>

The Canadian mining company INCO<sup>3</sup> first became involved in the Izabal region of Guatemala in 1960 through Exmibal, a subsidiary established with the US-based Hanna Mining Company (McFarlane 1989). The history of INCO in Guatemala shows that Canadian mining interests were promoted by the Canadian government, and yet that the Canadian government did not take the initiative to address corporate accountability for the violence associated with these mining operations.

INCO planned to build an open pit nickel mine near the town of El Estor, located north of Lake Izabal in the area of Izabal in eastern Guatemala. However, there were two immediate obstacles to the realisation of INCO's objective. First, open pit mining was prohibited under Guatemalan law. Second, in 1960, civil war began in Guatemala and the area around El Estor became the base of operations for guerrilla rebels (McFarlane 1989).

INCO was able to surmount these difficulties through negotiations with Guatemala's military government. INCO hired an engineer to rewrite the mining code, and this revised version was accepted by Guatemala's Congress (McFarlane 1989). The resulting mining code of April 1965 specifically allowed for "open sky mining" (Driever 1985, 34). The company also received a 40-year lease to mine an area of 385 km<sup>2</sup> near El Estor as well as "generous tax concessions". Finally, the military government provided INCO with the understanding that it would guarantee "stability" in the region (McFarlane 1989, 127).

Colonel Carlos Arana Osorio<sup>4</sup> was responsible for clearing the indigenous people out of the INCO region in Zacapa-Lake Izabal in the late 1960s and 1970s (McFarlane 1989; Bradbury 1985). The indigenous people of Izabal were largely Mayan Q'eqchi', who had migrated to the area from the highlands of Verapaz in the late nineteenth century (Grandia 2006). During this "reign of terror", the number of people killed is estimated to be between 3,000 and 6,000 (McFarlane 1989, 127). At the same time, Canada showed ongoing support for the El Estor project, as the Canadian ambassador to Guatemala, S. F. Rae, went on a well-publicised tour of the mine site in 1968 (McFarlane 1989).

There was strong opposition to the Exmibal project from indigenous people and other concerned Guatemalans. A group of professors from the School of Economic Sciences at the University of San Carlos, Guatemala City, took up the cause and established a commission in 1969 (McFarlane 1989). The commission concluded that the Guatemalan government had not negotiated sufficient benefits from the project and that Exmibal would simply strip Guatemala of its riches (Driever 1985, 36). Public protests against the mine followed. Carlos Arana, who had become President of Guatemala, responded by suspending the constitutional right to assembly and arresting large numbers of people. The army occupied the university in an attempt to silence the opposition from the nation's intellectual community. State death squads assassinated two law professors and members of the commission, Julio Camey Herrera and Adolfo Mijangos López. One other member of the commission was wounded in an assassination attempt and another was forced to flee the country due to death threats (Ball, Kobrak, and Spiner 1999; Bradbury 1985). The UN Commission on Historical Clarification (the Truth Commission) later found that these crimes were committed by state authorities in retaliation for opposition to the government's policies (Guatemalan Commission for Historical Clarification 1999).

In February 1971, an exploitation agreement was signed between INCO and the Guatemalan government. Major construction began on the El Estor mine in 1974

(Driever 1985), aided by a CAD20 million loan from the Canadian Export Development Corporation (*Toronto Star*, April 15, 1979). The UN Commission documented violence associated with the mine during this period. In 1978, two people in El Estor were shot and wounded by men riding in an Exmibal truck (Guatemalan Commission for Historical Clarification 1999, 679). The next month, employees of Exmibal were involved in the execution of four people in the municipality of Panzós, near El Estor (Guatemalan Commission for Historical Clarification 1999, 105). In 1981, police officers riding in an Exmibal truck killed community leader Pablo Bac Caal (Guatemalan Commission for Historical Clarification 1999, 674).

In 1982, the market value of nickel was declining while the cost of oil was rising. As a result, INCO shut down the El Estor mine. While the mine lay dormant, violence in Guatemala continued. The most serious human rights violations were perpetrated under the dictator Rios Montt. There were 192 massacres in 1982 alone.<sup>5</sup> Despite condemning these human rights violations in Guatemala in 1983, the Canadian government participated in negotiations to sell military planes to the Guatemalan air force. The Guatemalan military had been known to use their planes to shoot at indigenous villages (Lemco 1986).

In 1996, the Guatemalan government signed a peace accord with the guerrillas, ending the 36-year civil war. According to a 1998 report by Monsignor Juan Gerardi, which evaluated evidence and testimony of 600 people collected from across Guatemala over three years, 150,000 people were murdered, 50,000 disappeared and 1 million were displaced during the civil war (Gerardi 1998). In a 1999 report, *Guatemala: Memories of Silence*, the UN Commission found that the state, in some capacity, was responsible for 93 per cent of the human rights violations that occurred during the war and that the state had “committed acts of genocide against groups of the Maya people” (United Nations 2002, 2).

## The Fenix project

In 2004, a Canadian company called Skye Resources purchased the mine at El Estor. At that time, the mine came to be known as “Fenix” and was to be operated by Skye’s Guatemalan subsidiary, Compañía Guatemalteca de Níquel (CGN). As INCO’s original mining concession from the 1960s was set to expire, the Guatemalan government granted a licence for mining exploration at El Estor on 13 December 2004 (International Labour Organization 2007, 40). According to a committee of the International Labour Organization (ILO), despite the fact that indigenous people had not yet formalised their rights of ownership and possession with respect to the land in question, the Guatemalan government had an obligation under ILO Convention No. 169 to consult with the affected indigenous people prior to granting the licence, which it had failed to do (International Labour Organization 2007, paragraphs 48–51).

The Mayan Q’eqchi’ farmers in the Izabal region gradually began to occupy or reoccupy lands in El Estor that had been cleared of indigenous people for the mine in the 1960s and 1970s. New settlements were formed on these lands, including the community of Barrio Revolución, and other communities, such as La Unión, were reoccupied (Paley 2007).

Skye Resources referred to the reoccupation of the El Estor region as “land invasions” (Skye Resources 2007). Because of Skye Resources’ belief that it had the exclusive right to occupy the area, court orders were obtained to remove the “squatters”.<sup>6</sup> On 8 and 9 January 2007, hundreds of armed police officers and members of the military conducted forced evictions of five communities in the El Estor region, including Barrio Unión, La Pista, Barrio Revolución, Barrio La Paz and Lote Ocho (Paley 2007; *Caal v. HudBay* 2011). During the evictions, people’s homes were destroyed and some were burned (Paley 2007).

According to Skye Resources, “a peaceful atmosphere” was maintained during the evictions (Skye Resources 2007). President and CEO Ian Austin admitted that homes were burned, but claimed that the burning of homes was not caused by company people



(Canadian Broadcasting Corporation 2011). He stated that the company remained committed to “continue [its] discussions on matters of concern with the local communities in the El Estor region” (Skye Resources 2007). According to allegations in court documents, another set of evictions occurred on 17 January 2007. During these evictions, 11 Mayan women of Lote Ocho were allegedly gang raped by police, military and Fenix security personnel. The women say that they were trapped by security personnel as they were attempting to leave their homes, and then raped by groups of men, including members of the Fenix security team, who were wearing uniforms bearing the initials CGN. Two of the women were pregnant at the time of the alleged rapes, and subsequently miscarried their unborn children (*Caal v. HudBay* 2011). CGN denies that these rapes occurred; according to the company, police reports show that no “illegal occupiers” were even present at the evictions on the date of the alleged rapes (HudBay Minerals, n.d.).

The Fenix mine changed ownership again in 2008, when HudBay Minerals purchased Skye Resources, changing the name to HMI Nickel (HudBay Minerals 2008a, 2008b). HudBay announced that it did not plan to begin construction at the Fenix site until market conditions became more favourable (HudBay Minerals 2008b). During this time, some of the Mayan Q’eqchi’ people returned once again to the disputed land.

In 2009, nickel was rising in price, and the company began considering spending the CAD1 billion necessary to open the mine (Grainger 2009).<sup>7</sup> On 27 September 2009, there were protests against mining activities in several communities located near the Fenix mine, including the communities of La Unión and Las Nubes. In the violence that day seven people were shot, resulting in the death of community leader and school teacher Adolfo Ich Chamón, and serious injury to another community member, German Chub Choc. Five security guards were also injured.

The events that led up to the violence are in dispute. According to one version of

events, the governor of Izabal, along with 50 CGN security guards, entered the community of Las Nubes to discuss resettlement of the community (Behrens 2009). These discussions lasted for a few hours, but did not lead to an agreement. In response to CGN's presence, community members organised protests to assert their right to remain on the land. Adolfo Ich's family claims that protests were sparked by the "intrusion of Fenix security personnel into Mayan Q'eqchi' communities" and "fears of renewed forced and violent evictions" (*Choc v. HudBay* 2010, paragraph 51). Residents of La Unión joined those of Las Nubes in a march toward the town of El Estor to denounce "illegal evictions" and to gather support for their cause (Rodriguez 2009). At around three in the afternoon, security guards reportedly opened fire on community members, wounding eight people (Behrens 2009). According to the Ich family's statement of claim, Adolfo Ich was in his home in La Unión when he heard gunshots being fired. He left his home to see what was going on and if he could help restore the calm (*Choc v. HudBay* 2010). As he was a respected community leader, he was apparently recognised by security personnel. The claim states that he was unarmed when he was surrounded by a dozen armed CGN security guards who beat him, dragged him away and severed his arm with a machete. The head of CGN security, Mynor Padilla, is alleged to have shot him in the head. Padilla is a former high-ranking officer in the Guatemalan military.

An alternative version of events is provided by HudBay. According to the company, authorities were attempting to "peacefully resolv[e] illegal occupations through dialogue" when "organised protestors" attacked departing government vehicles (HudBay Minerals 2009). HudBay claims that the protestors stole automatic firearms and other weapons from the police station and attacked a community hospital that had been sponsored by CGN. HudBay acknowledges that a protestor died that day; however, it claims that "CGN personnel were not involved with his death" (HudBay Minerals, n.d.). HudBay suggested that Adolfo Ich died as a result of a "confrontation among the

protestors” (HudBay Minerals 2009). The company expressed its commitment to working with residents to arrive at a “fair and equitable solution to the land claims and resettlement”. Regardless of which version of events is believed, the incident highlights the ongoing tensions occurring in the area as a result of unsettled land claims.

The three cases from El Estor

Members of the Mayan Q’eqchi’ communities around the Fenix mine are bringing three related lawsuits in the Ontario Superior Court of Justice against the Canadian mining company HudBay Minerals. The first lawsuit was commenced on 24 September 2010 by the widow of Adolfo Ich Chamán, who was killed during the protests around El Estor in September 2009. As discussed above, the claim alleges that Adolfo Ich was “hacked and shot to death by private security forces employed by [CGN] near his home in El Estor, Guatemala” (*Choc v. HudBay* 2010, paragraph 1).

The claim made by Adolfo Ich’s widow is that HudBay, both in Canada and Guatemala, was negligent in deploying security forces into the community of La Unión and in authorising the use of excessive force in response to the peaceful opposition, despite the corporation’s knowledge that the security personnel were unlicensed, using illegal weapons and had in the past used unreasonable violence against local Mayan populations. Furthermore, the allegation is that HudBay continued to employ under-trained and inadequately supervised security personnel and, regardless of public commitments to the contrary, failed to implement or enforce adequate standards of conduct and oversight, which would have prevented the murder of Adolfo Ich.

On the same day that Adolfo Ich was shot, German Chub was shot, allegedly by the same mine company security personnel (*Chub v. HudBay* 2011). The then 21-year-old single father has been left a paraplegic by the shooting and has lost the use of his right lung. He had not been involved in any protests on that day but was watching a football game at a community football field and was shot without provocation. On 26

October 2011, Chub commenced a lawsuit against HudBay Minerals and CGN, similarly alleging that the violence against him was caused by negligent authorisation of the deployment of heavily armed security personnel into Mayan Q'eqchi' communities on 27 September 2009.

The final lawsuit against the corporation relates to the forcible evictions of the community of Lote Ocho that took place in January 2007, as discussed above. Eleven women – Luisa Caal Chun, Margarita Caal Caal, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Carmelina Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib and Irma Yolanda Choc Quib – have commenced an action against HudBay Minerals and HMI Nickel for the alleged gang rapes by uniformed mining company security personnel, police, and military during the forceful expulsion of Mayan Q'eqchi' families (*Caal v. HudBay* 2011).

The claim alleges that the security forces who committed the rapes were under the control and direction of Canadian mining company Skye Resources, which sought the forced eviction in order to clear the land of the indigenous communities for its Fenix mining project. The claim asserts that HudBay's 2008 purchase of and merger with Skye Resources (renamed HMI Nickel) makes HudBay responsible for the past legal wrongs and liabilities of Skye Resources. The lawsuit alleges that the harm suffered by the plaintiffs was caused by the negligence of Skye Resources in failing to direct and supervise its security personnel, knowing that they lacked the licence required under Guatemalan law, and authorising the forced evictions without taking reasonable steps to control violence against the community, although it made public representations to the contrary.

In September 2011, HudBay sold the Fenix mine and all of its Guatemalan assets to Solway Investment Group, a private company with a head office in Cyprus (HudBay Minerals 2011). While HudBay had purchased the mine for CAD446 million, it was sold for only CAD76 million (Canadian Broadcasting Corporation 2011). The lawsuits against

HudBay are proceeding despite the sale (Klippensteins, n.d.).

On 22 July 2013, Justice Carole J. Brown of the Ontario Superior Court of Justice rejected three preliminary motions filed by HudBay and allowed the three cases to proceed to trial. We will come back to the discussion of this case below, in the section “The courts in Canada”.

The context for judicial decision making in Guatemala

The plaintiffs in the three El Estor cases have decided to pursue their claims against HudBay in Canadian courts rather than in Guatemala. There is good reason for Canadian courts to hear cases like these on their merits, given the context for judicial decision making in Guatemala. This section will outline the state of impunity in Guatemala, as expressed by international bodies, and will then provide an example of a case that made its way through the Guatemalan courts, to illustrate the difficulties faced by plaintiffs who wish to receive a fair trial in a claim against the interests of foreign mining companies.

According to a 2009 report of the UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, the Guatemalan justice system is afflicted by a general climate of impunity for violent crimes and human rights abuses:

the prevalence of impunity in Guatemala has a number of causes, the main ones being a variety of structural factors and the violence to which justice professionals are subjected [ ... ]. The existing system is open to external interference and is highly politicised, and this has a negative impact on the independence of the judiciary. (United Nations 2009a, 1)

Similarly, the 2012 Human Rights Report on Guatemala prepared by the US Department of State asserts that the Guatemalan judicial system has failed to “ensure full and timely

investigations and fair trials” and to “protect judicial sector officials, witnesses, and civil society representatives from intimidation” (US Department of State 2012, 1). It notes that judges, prosecutors, plaintiffs and witnesses “continued to report threats, intimidation, and surveillance” (US Department of State 2012, 7).

This situation has improved to some degree since the establishment of the UN-backed International Commission Against Impunity in Guatemala (CICIG); however, the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions cautions that “neither Guatemala nor the international community should fall into the trap of seeing CICIG as ‘the’ solution to Guatemala’s failing criminal justice system” (United Nations 2009b, 12) and the US Department of State report observes that “impunity continue[d] to be widespread” despite the efforts of the CICIG (US Department of State 2012, 1).<sup>8</sup>

As an illustration, we describe a case from Guatemala’s Constitutional Court in which the claimants were required to pursue an excessive number of judicial proceedings in order to obtain a remedy for a relatively simple problem involving formal title to communal property. The community of Agua Caliente Lote Nueve located near the Fenix project in El Estor complained that CGN was illegally exploring on its land and said that mining personnel moved boundary stones and made exploration holes, which affected the community’s water (Constitutional Court 2011).<sup>9</sup> The community asked Fontierras<sup>10</sup> to confirm that the community of Lote Nueve had title to its land. There was a problem with this request, and the resolution to this problem reveals much about the judicial system and its potential influences.

Under a land reform statute, communities were able to purchase land to hold under communal title. The community in this case began paying for the land in 1985 and was awarded provisional title, conditional on completing the scheduled payments. They made the final payment on 18 July 2002. In 2004 the mine was being transferred from INCO to Skye Resources. On 2 July 2004, Fontierras informed the community that the registry book had been damaged in 1998 and that the pages of the registry that

contained their title were missing. Fontierras told the community that they would have to go to court to obtain an order to replace the pages.

The same year, the community went to the Ninth Judge of the Civil Trial Court.<sup>11</sup> Their case was rejected because the judge held that the community had begun the wrong process for the remedy that they were seeking. The community then went to the Tenth Judge of the Civil Trial Court, but were rejected because the document certifying the legal status of the representative was illegible. The community returned to the Tenth Judge, who then found that there was no certification that the land claimed was the land that was referred to in the missing pages. In 2007, the community again appealed to Fontierras for assistance. They were rebuffed a second time, and told that they needed to obtain a judicial order. When the community returned to court, this time the Sixth Judge of the Civil Trial Court, their case was dismissed because the community had failed to provide proof that the missing pages referred to the land that they were claiming. The community returned to Fontierras to ask them to replace the pages, and they were told a third time that a court order was necessary. Finally, the community began a constitutional proceeding, arguing that their constitutional rights had been violated through the refusal of Fontierras to confirm their title.

The constitutional application was heard at the first level by the Court of Appeals on 15 February 2010. This was a year after HudBay started considering reactivating the mine and had been trying to remove indigenous occupants from lands needed for the mine. The judge found that the community already had title confirmed on 17 February 2004 and that Fontierras had replaced the missing pages, pursuant to an order from the Fifth Judge of the Civil Trial Court on 20 December 2004. Consequently, there was no basis for the proceeding. The judge ordered costs against the community and fined the lawyer 1,000 quetzales (approximately CAD143) for bringing the proceeding. The history of Lote Nueve, as recounted by the judge of the Court of Appeals, is completely different from the story we have recounted above, in which Lote Nueve did not have the missing pages

replaced and were being shunted back and forth between the courts and Fontierras. This is because the judge of the Court of Appeals based his decision on the documents from another community, Agua Caliente Sexan Lote Once.

The community of Lote Nueve appealed this decision, and was able to present its case to the Constitutional Court in 2010. Lawyers for Fontierras and for CGN intervened to ask the Constitutional Court to uphold a decision that was clearly based on mistaken documents. Fortunately for the community, the Constitutional Court found in their favour, and confirmed that the Court of Appeals had relied on mistaken documents. The Constitutional Court reviewed documents that confirmed that the provisional title had been awarded in 1985 and documents that confirmed that the final payment had been made in 2002. The judges of the Constitutional Court came to the conclusion that the only step remaining was the administrative act of confirming title. The Court then ordered that the missing pages be replaced, confirming community title to the land. It was unnecessary, then, for land title to be thrown into limbo for seven years when the evidence that fulfilled the conditions for title was readily available. It is interesting that the missing pages were noticed at around the same time as exploration was taking place on the land in question and as the mine was being sold by INCO to Skye Resources. Without more facts, we do not know whether CGN played an active role in the circumstances surrounding Lote Nueve's title, but we do know that HudBay had an interest in the outcome of the hearing at the Constitutional Court, as lawyers for CGN intervened and argued that the community of Lote Nueve should not have their title confirmed. As of May 2013, two years after the Constitutional Court decision, the missing pages in the registry have not been replaced.

We do not argue that it is impossible to obtain a fair trial for a claim against the interests of a mining company within the Guatemalan justice system. Nevertheless, the barriers faced by plaintiffs who wish to sue mining companies in Guatemala are



significant, and they are compounded by the difficulty in retaining a lawyer for cases such as these. The Lote Nueve case, for example, was supported by Leo Crippa, a lawyer for the Washington-based Indian Law Resource Centre.

A further problem exists in respect to the availability of remedies. A decision of a court in Guatemala against CGN alone will not reach the conduct of executives in Canada, or the assets of the Canadian parent. Even if a Guatemalan court were to make an order against the parent company, HudBay Minerals, enforcement would have to be transferred to a court in Canada, where further litigation could take place, challenging the original decision in Guatemala. This would further lengthen an already arduous process and render it prohibitively expensive.

#### Corporate social responsibility

If claimants such as those from El Estor are unable to obtain a fair trial in the Guatemalan courts, it might be suggested that corporate social responsibility (CSR) mechanisms adopted by mining companies can provide appropriate redress. We argue in this section that the voluntary nature of CSR and the lack of enforcement mechanisms make it an inadequate forum for resolving cases in which there are allegations of serious human rights abuses and significant factual discrepancies between the positions of the claimants and those of the company.

In recent years there has been an increasing interest in, and adoption of, CSR policies by the mining industry (Dashwood 2012; Sagebien and Lindsay 2011). The establishment of the United Nations' "Guiding Principles on Business and Human Rights" framework ("Ruggie Principles") has provided further impetus to develop standards of behaviour that address a company's impact on the environment and local communities (United Nations 2011).

HudBay heavily promotes its commitment to CSR. Its website shows that it has internal policies on human rights, the environment, and business ethics. It has also adopted

a number of external instruments, including the Voluntary Principles on Security and Human Rights (Voluntary Principles on Security and Human Rights, n.d.), the Global Reporting Initiative (Global Reporting Initiative, n.d.), and the “Toward Sustainable Mining” framework of the Mining Association of Canada (Mining Association of Canada 2011). Each year, HudBay publishes an attractive 50page Corporate Social Responsibility Report, setting out its accomplishments (HudBay Minerals 2012).

We do not propose to describe and analyse each of these CSR policies, nor do we wish to suggest that HudBay is being disingenuous in adopting these standards. Rather, we wish to show that the policies will not serve as an adequate mechanism for addressing the issues raised by the Guatemalan plaintiffs.

The 2012 Corporate Social Responsibility Report lists four “avenues available to people who wish to register concern about HudBay’s activities” (HudBay Minerals 2012, 13). The first two avenues provide phone numbers and a website to the Board or a Committee of the Board to register a concern. In the case of the Guatemalan plaintiffs, this avenue would not have been fruitful for serious criminal charges, as HudBay released a press release saying that its own investigations had shown that “a protestor died” but that company personnel were not involved; and that rapes did not take place (HudBay Minerals, n.d.). HudBay maintains this position despite the arrest of their head of security, Mynor Padilla, in 2012 for the murder of Adolfo Ich Chamán (Prensa Libre 2012). Given that HudBay had already publicly declared its own findings of fact, the plaintiffs would not expect to have a fair hearing from HudBay.

The third avenue of redress suggested by HudBay is the federal government’s Corporate Social Responsibility Counsellor. In 2009, Canada’s federal government released a policy called “Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector”, which established the Office of the Extractive Sector Corporate Social Responsibility Counsellor. The CSR Counsellor does not have any significant powers. She can only act when there has been a complaint; a process can be

instituted only with the agreement of the corporation; she cannot offer determinations as to whether harm has occurred; she cannot investigate the complaints; and she cannot issue binding recommendations to the corporations (Department of Foreign Affairs, n.d.). The limitations of the process are clearly illustrated in a complaint about labour practices that was lodged against a Canadian mining company, Excellon Resources Inc., in Mexico. The CSR Counsellor found that the Mexican workers were “eager to engage in a good faith dialogue”, but Excellon unilaterally withdrew from the process after six months. This brought the process to an abrupt end (CSR Counsellor 2011). In fact, in all three of the cases in which the CSR Counsellor was ready to begin mediation, the process ended when the mining company decided to withdraw from the process. For the Guatemalan plaintiffs, the most that the CSR Counsellor could do would be to try to convene a meeting, but she would be powerless to require HudBay to participate. Even if HudBay agreed to participate, she would not be able to investigate what happened or provide compensation if there was wrongdoing.

The final mechanism suggested by HudBay is the National Contact Point of the Organisation for Economic Development and Cooperation (OECD). The OECD has developed Guidelines for Multinational Enterprises, which state that corporations should “respect the internationally recognised human rights of those affected by their activities” (OECD 2011, 19). In order to implement the Guidelines, the OECD Council created a system of National Contact Points (NCPs) in 2000; these are typically government officials in each of the member states. The role of the NCP is to facilitate inquiries and discussions between corporations and affected communities on all matters covered by the Guidelines. The NCP has some capacity to investigate complaints directly by seeking information from parties to the dispute and can attempt to mediate between the parties to come to a resolution. Neither the resolution nor the statement is binding on the corporation or enforceable by state governments. The NCP does have fact-finding powers, but these are not commonly used. The NCP does not have the power to award

compensation. If there is no resolution, the NCP can review the evidence, consult experts, make a determination and issue a statement on the case (OECD 2011).

None of these mechanisms suggested by HudBay provide an effective method for investigating whether the allegations are true, for ascertaining responsibility, or for awarding penalties or redress. For this reason, we turn in the next section to the Canadian courts as the remaining potential avenue to fairly resolve the dispute between the plaintiffs from El Estor and HudBay.

### The courts in Canada

Having a case decided in a Canadian court has the advantage of producing an enforceable decision. A judgment against the parent company, HudBay, could result in payments to the plaintiffs and could shed light on the conduct of the executives.

Judges in Canada have had several opportunities to address concerns about the activities of mining companies with operations abroad. They have articulated three principles that create barriers to bringing a case in Canada: lack of jurisdiction, *forum non conveniens* and lack of duty of care.<sup>12</sup>

We will discuss each of these principles in the context of a case against a transnational mining company and then explain how these principles play out in the lawsuits from El Estor.

### *Jurisdiction*

On 8 November 2010, the Canadian Association Against Impunity brought a class action against Anvil Mining Ltd. in Quebec for the corporation's actions relating to a massacre in the Democratic Republic of Congo (DRC) (Mining Watch 2010). Anvil Mining was headquartered in Perth, Australia, but opened a small office in Montreal in 2005. Its primary activity was the exploration of a mine located 55 kilometres from Kilwa in the DRC (*Association Canadienne Contre L'impunité (ACCI) c Anvil Mining Ltd.* 2011).

On 13 October 2004, a small group of approximately 10 armed individuals from neighbouring Zambia, claiming to act on behalf of the Revolutionary Movement for the Liberation of Katanga, entered Kilwa. The government of the DRC ordered army officers to remove the men and to regain control of Kilwa. A UN mission in the DRC subsequently documented the army's human rights violations against the people of Kilwa perpetrated during the counterattack (Mission in the Democratic Republic of Congo 2005). According to the mission's report, 73 civilians were killed and a large percentage of the population was displaced as they fled the counterattack. Twenty-eight people were reported to have been summarily executed based on suspicions that they supported the insurgents.

The mission's report stated that Anvil provided support to the military during the events by providing its planes to transport troops to Kilwa and providing trucks, drivers, fuel and food rations to the army. It also stated that the managing director of Anvil Mining admitted in an interview with an Australian television station that the corporation provided logistics to the army.

The Quebec Court of Appeal dismissed the action on the basis that the Court had no jurisdiction. It found that at the time of the massacre there was no Anvil activity or office in Quebec and that, in any event, the dispute was not substantially connected to Anvil's work in Quebec. The Court did not apply the forum of necessity exception, which permits the Court to assume jurisdiction where there is a sufficient connection to the jurisdiction and proceedings could not possibly or reasonably be instituted outside Quebec (Civil Code of Quebec, article 3136). The Court found that the claim against Anvil could be heard in Australia, the corporate headquarters, and that victims could bring their case before the courts in the DRC, although attempts to try the cases in those jurisdictions before had been unsuccessful.

Anvil's overall revenue for the DRC rose from USD29 million in 2004 to almost USD69 million in 2005 (Anvil 2005).

Although in *ACCI c. Anvil Mining Ltd* the courts declined to exercise jurisdiction to adjudicate a tort that had been committed outside of Canada, in *Yaiguaje v. Chevron Corporation* Ontario courts considered the related issue of whether they should exercise jurisdiction to enforce a judgment that had been obtained outside Canada (*Yaiguaje v. Chevron Corporation* 2013).

The underlying dispute was between 47 plaintiffs – representing approximately 30,000 residents of Sucumbíos province in Ecuador – and Chevron, an American corporation incorporated in Delaware. The plaintiffs alleged that Texaco, which subsequently merged with Chevron, severely polluted the Lago Agrio region of Ecuador during its activities between 1972 and 1990. The plaintiffs brought an action before the United States District Court for the Southern District of New York in 1993, which was eventually dismissed. As a condition of dismissal, Texaco committed to submit to the jurisdiction of the Ecuadorian court when a claim was brought in that jurisdiction.

On 11 February 2011, the trial court in Ecuador found that Chevron was liable for approximately USD18 billion. In 2013, the highest appellate court in Ecuador, the Court of Cassation, reduced the damages on appeal to USD9.51 billion.

Nevertheless, the plaintiffs have not been able to enforce the judgment. Chevron continues to contend that the trial judgment was obtained by fraud and corruption by the plaintiffs' counsel. In 2011, a New York District Court granted Chevron a global anti-enforcement injunction, barring the enforcement of the judgment. This injunction was overturned on appeal (*Yaiguaje v. Chevron Corporation* 2013, C.A., paragraphs 5–13).

In 2012, the plaintiffs brought an action in Ontario, seeking recognition and enforcement of the judgment against the assets of Chevron and its Canadian subsidiary, Chevron Canada Limited (*Yaiguaje v. Chevron Corporation* 2013, Ont. Sup. Ct., paragraph 3). The defendants, Chevron and Chevron Canada, did not file statements of defence but instead challenged the jurisdiction of the court to enforce the judgment. In other words, Chevron argued that the Ecuadorians should be barred from the Ontario

justice system. The Ontario Court of Appeal was clearly irritated by the position taken by Chevron. Mr Justice MacPherson pointed out the shifting positions taken by Chevron in various court proceedings:

For 20 years, Chevron has contested the legal proceedings of every court involved in this litigation – in the United States, Ecuador and Canada [ ... ]. In these circumstances, the Ecuadorian plaintiffs should have an opportunity to attempt to enforce the Ecuadorian judgment in a court where Chevron will have to respond on the merits. (*Yaiquaje v. Chevron Corporation* 2013, C.A., paragraphs 69 and 70)

The Court of Appeal found that Ontario courts could hear the case and hear arguments from both sides about whether or not the Ecuadorian judgment could be enforced in Canada.

Chevron has since sought leave to appeal to the Supreme Court of Canada (Supreme Court of Canada 2014) and has continued fighting the case in the USA. In March 2014, a US District Court Judge found that the plaintiffs' counsel had engaged in fraud and corruption in order to obtain the Ecuadorian judgment. Although the US decision does not bar the enforcement of the Ecuadorian judgment in Canada, or in Brazil and Argentina (where the plaintiffs have also sought enforcement), it may cause the Ontario courts "to take a second look at the enforceability of the Ecuador judgment" if there was fraud (Krauss 2014). However, the finding of fraud could only be made if Chevron agrees to bring itself under the jurisdiction of the Ontario court to argue on the merits that the judgment should not be enforced against it. Thus Chevron appears to be in a difficult position. If it continues to argue that Ontario courts do not have jurisdiction to hear the case by the Ecuadorians, then it will not be able to argue in a Canadian court that the Ecuadorian judgment was fraudulent. If Chevron wishes to argue that the Ecuadorian judgment was fraudulent in a Canadian court, it will have to agree that the

Ecuadorians also have the right to have their case heard in Canada.

### *Forum non conveniens*

As noted above, even when a court accepts jurisdiction, the defendant company can assert that there is a more appropriate forum for the claim can be heard. In 1998, a class action was brought in Quebec against Canadian mining corporation Cambior Inc. by a group of 23,000 victims represented by a public interest group, Recherches Internationales Québec. The claim alleged that a failed tailings dam leaked 2.3 billion litres of liquid containing cyanide and heavy metals into the Esequibo River in Guyana on 19 August 1995. Justice Maughan, who was hearing the case, described the leak as one of the worst environmental disasters in gold mining history (*Recherches Internationales Québec v. Cambior Inc* 1998).

The action was dismissed without being heard on the merits. The Quebec Superior Court ruled that it had jurisdiction but applied the legal doctrine of *forum non conveniens* codified in Quebec's civil code. The Court based its decision on the fact that Guyana was the location of the spill, the location of many of the witnesses and victims, the location in which the damage was suffered and that Guyanese law would apply to the incident. Furthermore, the Court noted that its decision not to hear the case did not deny the victims justice, since "Guyana's judicial system would provide the victims with a fair and impartial hearing". It rejected the claim that "the administration of justice is in such a state of disarray that it would constitute an injustice to the victims to have their case litigated in Guyana" (*Recherches Internationales Québec v. Cambior Inc.* 1998, paragraph 12). The victims did pursue their claim in Guyana's courts, but due to failure to file an affidavit, in 2006 the action was struck by the High Court of the Supreme Court of Judicature of Guyana and the plaintiffs were ordered to pay the company's legal costs (CNN Money 2006). Cambior continued to operate profitably until 2005, when



the mine was exhausted (Ramraj, n.d.; Cambior 2004).

### *Duty of care*

A component of establishing that a mining company is responsible for human rights abuses is the existence of a legal obligation to take reasonable care in the conduct of mining operations that could foreseeably harm the interests of the claimants. In Canada and in many other common law jurisdictions, duty of care is established when the court determines that: the harm suffered is “reasonably foreseeable” as a result of the defendant’s conduct; and there is a relationship of “proximity” between the defendant and the claimant, such that the defendant should be required to contemplate the claimant’s legitimate interests when acting (*Donoghue v. Stevenson* 1932).

In the context of transnational corporations, there are several obstacles to finding such a relationship. Owing to legal requirements of the country in which the mining is taking place or in order to avoid financial liability, a subsidiary of the parent corporation is often incorporated in the country of operations to conduct the extraction or production of the mineral resource. The subsidiary is in charge of day-to-day operations on the ground, which often include hiring and training employees, conducting exploration and maintaining the mine. Where third parties, such as private security companies hired by subsidiary corporations, commit violence, it may be difficult to impute their wrongdoing to the parent corporation. The difficulty in establishing duty of care was evidenced by the suit commenced in 2008 against two of the directors of Copper Mesa, a Canadian mining company in Ecuador, as well as the Toronto Stock Exchange (TSX). The claimants, Ecuadorian *campesinos* from areas adjacent to Junin, where Copper Mesa attempted to carry out exploration activities, opposed the proposed mine (Klippensteins 2009, paragraphs 13–15). Prior to Copper Mesa being listed on the TSX, the mayor of the county informed the TSX of the opposition to the mine in the community and the likelihood of violence.

On 2 December 2006, a large group of armed security forces confronted members of the Junin community and sprayed pepper spray directly into the eyes of one of the claimants. The security forces then shot into the crowd, injuring another of the claimants. A representative of the community met with the Copper Mesa directors on 27 April 2007 to advise them of the confrontation and risk of violence. However, the violence continued. One of the plaintiffs was alleged to have received death threats in June 2007 and one month later was allegedly attacked by a mob led by affiliates of the corporation, who assaulted him with sticks and rocks before the police intervened (Klippensteins 2009).<sup>13</sup>

The Ontario Court of Appeal found insufficient evidence to hold the Copper Mesa directors personally liable, upholding the determination of the lower court that the directors did not owe a duty of care to the plaintiffs as there was no direct connection between acts or omissions of the directors and the harm caused to the plaintiffs. The Court held that the circumstances in which directors could be held personally liable for negligence for the acts of the corporation were limited and were not met in this case. The Court found that the defendants had only recently become directors when the representative of the community advised them of the potential violence, and it was not claimed that the directors directly operated the Copper Mesa entities or authorised the violence, nor was it specified how the policies and practices of the corporation led to violence. The Court was not sympathetic to the argument that the directors had been informed and that silence from the directors in the face of the violence amounted to tacit approval of the violence against the plaintiffs (*Piedra v. Copper Mesa Mining Corporation* 2011).

In the HudBay case, the company did not contest the fact that Ontario courts had jurisdiction to hear the case. However, HudBay initially argued that the case should be heard in Guatemala based on *forum non conveniens*. They abruptly dropped this ground of objection shortly before a hearing on the matter (Klippensteins, n.d.). In the end, HudBay relied on the third ground: the lack of duty of care. In other words, even if the

allegations of murder and rape by their security forces were true, HudBay would not be responsible because the parent did not have a duty of care to community members in Guatemala. Therefore, HudBay argued, there would be no purpose in having a trial.

The Ontario Superior Court rejected this argument, finding that it was not “plain and obvious” that the actions would not succeed. In doing so, the Court has acknowledged that parent companies may owe a duty of care to individuals in foreign countries to prevent harm caused by “security personnel at its foreign operations when there is direct control by the Canadian parent corporation” (*Choc v. HudBay* 2013, paragraph 73). The Court found that the plaintiffs have alleged facts which, if proven at trial, could establish the elements of foreseeability and proximity necessary to establish a duty of care. The Court stated that acts such as “requesting a forced eviction of a community using hundreds of security personnel” and “authorising the use of force in response to peaceful opposition from the local community” would make it reasonably foreseeable to HudBay/Skye that violence would result, including “raping the plaintiffs” and “killing Adolfo Ich and seriously injuring German Chub” (*Choc v. HudBay* 2013, paragraphs 63–64). The Court found that HudBay’s public commitment to maintaining a relationship with local communities is a factor in finding that a relationship of proximity may be established at trial.

Because this decision is the result of a preliminary proceeding only, the existence of a duty of care will have to be established at trial. However, it is important to note that HudBay has decided not to appeal this preliminary decision and the case will proceed to be tried on its merits.

#### Access to justice

A resolution of conflict between mining corporations and communities does not automatically require a judicial determination in the Canadian courts. In fact, some aspects of the El Estor cases make judicial resolution impractical. For example, threats of

violence to potential plaintiffs and witnesses can prevent evidence from being brought forward, regardless of whether a case is heard in Canada or in the jurisdiction in which the alleged incidents occurred. There is also a significant difficulty when the plaintiffs have limited access to funds to retain counsel. Additionally, the present cases against HudBay will not resolve underlying political issues such as the decadeslong dispute over land rights. Nevertheless, due to significant shortcomings of other dispute resolution mechanisms, a Canadian judicial determination on the merits may be the only practical way, at the present time, to resolve issues raised in the El Estor cases. The court system in Guatemala would likely not be reliable, as the judicial system in Guatemala appears “open to external interference and is highly politicised” (United Nations 2009a, 2), and the outcome of a judicial process could be influenced by mining interests. The Lote Nueve case, plagued by troubling administrative delays, indicates the significant barriers faced by mine-affected plaintiffs. In any event, a decision against a Guatemalan subsidiary may not effect the necessary change in the parent company’s practices, or be sufficient to impose the rule of law on Canadian executives.

CSR mechanisms are not adequate for resolving serious allegations of human rights abuses against Canadian mining companies. Mechanisms coordinated by the mining company are ineffective when the company disputes the basic facts alleged by the complainants. Mechanisms coordinated by a third party, such as the Corporate Social Responsibility Counsellor or the National Contact Points of the OECD, are voluntary and not enforceable. Given the limitations of alternative mechanisms for resolving these disputes, there is a lack of adequate accountability measures with respect to Canadian mining companies with operations in other jurisdictions. We find it contradictory that profits can travel freely from Guatemala to Canada, while the Canadian beneficiaries are not held responsible for how that money is raised or for activities undertaken to produce the profits. Canadian courts do have the ability to fill the void. As demonstrated by the cases of Anvil Mining, Cambior, and Copper Mesa, legal obstacles such as jurisdiction,

*forum non conveniens* and duty of care can prevent cases like these from being tried on their merits in Canada. However, *Choc v. HudBay* may represent an important change in course, at least with respect to duty of care.

As discussed above, the Ontario Superior Court has now acknowledged that parent companies may owe a duty of care to individuals in foreign countries to prevent harm caused by “security personnel at its foreign operations when there is direct control by the Canadian parent corporation” (*Choc v. HudBay* 2013, paragraph 73). If the trial court confirms this finding, individuals alleging injury caused by Canadian mining operations will have access to an enforceable mechanism of accountability. While the legal barriers mentioned above and other barriers such as the cost of litigation and availability of evidence will still exist, we may be at the beginning of a shift in judicial thinking on the relationship between Canadian transnational corporations and the individuals at the location of operations. Until such time as Guatemala’s judiciary is strengthened and is able to act, the Canadian courts may be the most viable forum.<sup>14</sup>

In a globalised world, encouraging ethical behaviour cannot be left to a single jurisdiction or a single institution. We hope that the time has come for Canadian courts to begin to participate in creating the mechanisms necessary to close the gap in corporate accountability.

A spokesperson for Chevron, referring to the Ecuadorian case, stated that “We’re going to fight this until hell freezes over. And then we’ll fight it out on the ice”, to which the Ontario Court of Appeal replied:

Chevron’s wish is granted. After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction. (*Yaiguaje v. Chevron Corporation* 2013, C.A., paragraphs 74 and 75)

In the words of retired Supreme Court of Canada judge Ian Binnie, “[a]pplying our law to situations outside of our territory is contrary to our custom; but there are acts that are so repugnant that they must force us to rethink our law” (Boisvert 2012).<sup>15</sup>

### Acknowledgments

The authors would like to thank the following students for research assistance: Justin Dharamdial, Sarah Molyneaux, Sara Rohani and James Roundell. This article is an initiative of the Justice and Corporate Accountability Project at Osgoode Hall Law School.

### Biographical notes

Shin Imai is counsel to the Justice and Corporate Accountability Project, which attempts to make Canadian mining companies accountable for human rights abuses in Latin America. He practised at Keewaytinok Native Legal Services in Moosonee, and with the Ontario Ministry of the Attorney General in Toronto before joining the faculty of Osgoode Hall Law School in 1996.

Bernadette Maheandiran is a board member of the Justice and Corporate Accountability Project. She is presently an associate with Swadron Associates, a social justice firm located in Toronto.

Valerie Crystal is a third-year law student at Osgoode Hall Law School. She works as a research assistant with the Justice and Corporate Accountability Project. In August 2014, she will begin a clerkship at the Ontario Court of Appeal.

### Notes

1. See also North and Young (2013) and Keenan (2013).
2. This section is based in part on Imai, Mehranvar, and Sander (2007), section II.
3. At the time it was called International Nickel Company. It officially changed its name to INCO in 1976 (see McFarlane 1989).
4. Carlos Arana Osorio was elected as president in 1970, in what was referred to by McFarlane as a “fraudulent election”. Upon his election, Arana stated that he would, if necessary, “turn the country into a cemetery in order to pacify it” (McFarlane 1989, 130).
5. For example, Oliverio Castañeda de León, a member of the University Student Association, was machine-gunned to death in broad daylight in front of hundreds of witnesses, including police. The police did not attempt to chase or arrest the shooters (Gerardi 1998).
6. Note that the first evictions in November took place without a court order, which is required by Guatemalan law (Paley 2007).
7. HudBay Minerals has indicated that the Canadian dollar is the company’s functional currency. See Audited annual financial statements – English, HudBay Minerals, dated 19 February 2014. All references to dollar amounts in relation to HudBay Minerals, unless otherwise specified, refer to Canadian dollars.
8. The recent conviction at first instance of Ríos Montt, Guatemala’s former military leader, in Guatemalan Courts for genocide and crimes against humanity during the civil war represents an important step in Guatemala’s fight against impunity (UN News Center 2013a). However, the verdict was annulled by the Constitutional Court a few days later (UN News Center 2013b).
9. For photos of Lote 9 see University of Northern British Columbia (2008).
10. Fontierras or “Fondo de Tierras” is a state entity responsible for keeping a registry of land titles.
11. The courts of first instance, or trial courts, are referred to this way, so that the Ninth Judge of the Civil Trial Court refers to a judge at the Civil Trial level.
12. For a description of litigation in Canada and the Interamerican system, see North and Young (2013).
13. Much of the conflict in and around Junin between farmers, the security forces, and the mining community has been filmed by Malcolm Rogge in his documentary film, *Under Rich Earth* (see the website at [http://underrichearth.ryecinema.com/?page\\_id=114](http://underrichearth.ryecinema.com/?page_id=114)).
14. There is significant support for legislation in Canada that would provide accountability for the

activities of extractive industries in other countries, but attempts at a legislative solution have not been successful. For a full discussion, see Kamphuis (2012).

15. Author's translation. Original: "Appliquer notre droit à des situations à l'extérieur de notre territoire est contraire à nos conceptions; mais il y a des actes tellement répugnants qu'ils doivent nous forcer à revoir nos conceptions du droit. Au XVIIIe siècle, la piraterie posait une telle menace qu'on pouvait juger les pirates sans égard au lieu de leurs crimes".

## References

- Anvil. 2005. "Anvil Annual Report 2005." MMG Limited. <http://webcache.googleusercontent.com/search?q=cache:BeBnt9djtYJ:www.anvilmining.com/files/2005-anvilannualreport.pdf+&cd=3&hl=en&ct=clnk&gl=au>
- Association Canadienne Contre L'impunité (ACCI) c Anvil Mining Ltd. 2011. 2011 QCCS 1966. Quebec Court of Appeal. <http://canlii.ca/t/fl6jl>
- Ball, Patrick, Paul Kobrak, and Herbert Spierer. 1999. *State Violence in Guatemala, 1960–1996: A Quantitative Reflection*. Washington, DC: American Association for the Advancement of Science, Scientific Responsibility, Human Rights & Law Program. [http://shr.aaas.org/projects/human\\_rights/guatemala/report/Guatemala\\_en.pdf](http://shr.aaas.org/projects/human_rights/guatemala/report/Guatemala_en.pdf)
- Behrens, Susan Fitzpatrick. 2009. "Nickel for Your Life: Q'eqchi' Communities Take On Mining Companies in Guatemala." North American Congress on Latin America (NACLA) blog, 25 October 2009. <https://nacla.org/node/6177>.
- Boisvert, Yves. 2012. "L'impunité de nos société minières." *La Presse*, November 5. <http://www.lapresse.ca/debats/chroniques/yves-boisvert/201211/04/01-4590272-limpunite-denos-societes-minieres.php>
- Bradbury, J. H. 1985. "International Movements and Crises in Resource Oriented Companies: The Case of Inco in the Nickel Sector." *Economic Geography* 61 (2): 129–143.
- Caal v. HudBay. 2011. *Caal v. HudBay* Amended Statement of Claim. <http://www.chocversushudbay.com/legal-documents>
- Cambior. 2004. "Omai 2003/2004." [http://web.archive.org/web/20050315144101/www.cambior.com/site/english/operations/operations/fr\\_omai.htm](http://web.archive.org/web/20050315144101/www.cambior.com/site/english/operations/operations/fr_omai.htm)
- Canadian Broadcasting Corporation. 2011. "Unfinished Business." *Sunday Edition*. <http://www.cbc.ca/video/player.html?clipid=2141604355&position=990702&site=cbc.news.ca>
- Choc v. HudBay. 2010. *Choc v HudBay*, Second Amended Fresh as Amended Statement of Claim. <http://www.chocversushudbay.com/legal-documents>
- Choc v. HudBay. 2013. 2013 ONSC 1414. Ontario Superior Court of Justice. [www.chocversushudbay.com/wp-content/uploads/2010/10/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf](http://www.chocversushudbay.com/wp-content/uploads/2010/10/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf)
- CNN Money. 2006. "Cambior Inc: Omai Lawsuit Struck and Dismissed." *CNN Money*. <http://money.cnn.com/news/newsfeeds/articles/marketwire/06178759.htm>
- Constitutional Court. 2011. *Expediente 934-2010*. Constitutional Court of Guatemala. <http://www.cc.gob.gt/sjc/>
- CSR Counsellor. 2011. "Closing Report Request for Review File #2011-01-MEX." Foreign Affairs, Trade, and Development Canada. [http://www.international.gc.ca/csr\\_counsellor-conseiller\\_rse/publications/2011-01-MEX\\_closing\\_rep-rap\\_final.aspx](http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-01-MEX_closing_rep-rap_final.aspx)
- Chub v. HudBay. 2011. *Chub v. HudBay*; Amended Statement of Claim Filed October 26, 2011. <http://www.chocversushudbay.com/legal-documents>
- Civil Code of Quebec*. Statutes of Quebec, 1991, c. 64. <http://www.justice.gouv.qc.ca/english/sujets/glossaire/code-civil-a.htm>
- Dashwood, Hevina S. 2012. *The Rise of Global Corporate Social Responsibility: Mining and the Spread of Global Norms*. Cambridge: Cambridge University Press.
- Department of Foreign Affairs. n.d. *Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor*. Ottawa: Department of Foreign Affairs and International Trade. [http://www.international.gc.ca/csr\\_counsellor-conseiller\\_rse/index.aspx?view=d](http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?view=d)
- Donoghue v. Stevenson. 1932. 1932 UKHL 100. House of Lords. <http://www.bailii.org/uk/cases/UKHL/1932/100.html>
- Driever, Steven. 1985. "The Role of Lateritic Nickel Mining in Latin American Countries with Special Reference to Exmibal in Guatemala." *GeoJournal* 11: 29–42.
- Eslava, Luis. 2008. "Corporate Social Responsibility and Development: A Knot of

Disempowerment.”

*Sortuz: Oñati Journal of Emergent Socio-legal Studies* 2 (2): 43–71.

Gerardi, Monisgnor Juan. 1998. “Informe para la Recuperación de la Memoria Histórica: Nunca Más” [Report for the Recovery of Historical Memory: Never Again]. Oficina de Derechos Humanos del Arzobispado de Guatemala. <http://www.odhag.org.gt/03publicns.htm>

Global Reporting Initiative. n.d. Global Reporting Initiative. <https://www.globalreporting.org/Pages/default.aspx>

Grainger, Sarah. 2009. “Land Dispute Threatens Major Guatemala Nickel Project.” *Reuters*, October 12. <http://www.reuters.com/article/idUSN1254892220091012>

Grandia, Liza. 2006. “Unsettling: Land Dispossession and Enduring Inequity for the Q’eqchi’ Maya in the Guatemalan and Belizean Frontier Colonization Process.” PhD diss., University of California Berkeley.

Guatemalan Commission for Historical Clarification. 1999. “Guatemala: Memory of Silence.” AAAS. [http://www.aaas.org/sites/default/files/migrate/uploads/mos\\_en.pdf](http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf)

HudBay Minerals. n.d. “The Facts: Hudbay’s Former Operations in Guatemala.” HudBay. <http://www.hudbayminerals.com/English/Responsibility/CSR-Issues/The-facts-Hudbays-former-operations-in-Guatemala/default.aspx>

HudBay Minerals. 2008a. “Hudbay Minerals Completes Business Combination with Skye Resources; Announces New Director and Chief Financial Officer.” HudBay. <http://www.hudbayminerals.com/default.aspx?SectionId=5cc5ecae-6c48-4521-a1ad-480e593e4835&LanguageId=1&PressReleaseId=c0e9ae5e-c314-4898-8008-137ec8d9c764>

HudBay Minerals. 2008b. “Hudbay Reports Third Quarter Results.” HudBay. <http://www.hudbayminerals.com/English/Media-Centre/News-Releases/News-Release-Details/2008/HudBay-Reports-Third-Quarter-Results/default.aspx>

HudBay Minerals. 2009. “HudBay Minerals Provides Update on CGN.” HudBay. <http://www.hudbayminerals.com/English/Media-Centre/News-Releases/News-Release-Details/2009/HudBay-Minerals-Provides-Update-on-CGN/default.aspx>

HudBay Minerals. 2011. “HudBay Minerals Announces Completion of Sale of Fenix Project and Key Management Appointments.” HudBay. <http://www.hudbayminerals.com/default.aspx?SectionId=5cc5ecae-6c48-4521-a1ad-480e593e4835&LanguageId=1&PressReleaseId=c4c56f9d-8be7-4600-898f-3b07f7aa8eac>

HudBay Minerals. 2012. *2012 Corporate Social Responsibility Report*. [http://www.hudbayminerals.com/files/doc\\_downloads/csr/5961\\_Hudbay\\_CSR\\_2012\\_ENG.pdf](http://www.hudbayminerals.com/files/doc_downloads/csr/5961_Hudbay_CSR_2012_ENG.pdf)

Imai, Shin, Ladan Mehranvar, and Jennifer Sander. 2007. “Breaching Indigenous Law: Canadian Mining in Guatemala.” *Indigenous Law Journal* 6: 101–139.

International Labour Organization. 2007. “Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).” International Labour Organization. [http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2507321,en:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507321,en:NO)

Kamphuis, Charis. 2012. “Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account.” *German Law Journal* 13 (9): 1456–1486.

Keenan, Karyn. 2013. “Commentary. Desperately Seeking Sanction: Canadian Extractive Companies and their Public Partners.” *Canadian Journal of Development Studies* 34 (1): 111–121.

Klippensteins. n.d. *Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc.* <http://www.chocversushudbay.com>

Klippensteins. 2009. *Piedra v. Copper Mesa Mining Corporation*. Statement of Claim. <http://www.ramirezversuscoppermesa.com>

Krauss, Clifford. 2014. “Big Victory for Chevron Over Claims in Ecuador.” *New York Times*, March 4. [http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?\\_r=0](http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?_r=0)

Lemco, Jonathan. 1986. “Canadian Foreign Policy Interests in Central America: Some Current Issues.” *Journal of Interamerican Studies and World Affairs* 28 (2): 119–146.

McFarlane, Peter. 1989. *Northern Shadows: Canadians and Central America*. Toronto, ON: Between the Lines.

Mining Association of Canada. 2011. “Toward Sustainable Mining”. Mining Association of Canada. <http://www.mining.ca/towards-sustainable-mining>

Mining Watch. 2010. “Class Action Filed Against Anvil Mining by Congolese Victims.” Mining Watch Canada. <http://www.miningwatch.ca/article/class-action-filed-against-anvil-mining-congolese-victims>



- Mission in the Democratic Republic of Congo. 2005. *Report on the Conclusions of the Special Investigation into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004*. Kinshasa: United Nations. [http://www.abc.net.au/4corners/content/2005/MONUC\\_report\\_oct05.pdf](http://www.abc.net.au/4corners/content/2005/MONUC_report_oct05.pdf)
- North, Liisa, and Laura Young. 2013. "Generating Rights for Communities Harmed by Mining: Legal and Other Action." *Canadian Journal of Development Studies* 34 (1): 96–110.
- OECD. 2011. *OECD Guidelines for Multinational Enterprises*. Paris: Organization for Economic Cooperation and Development. <http://www.oecd.org/daf/inv/mne/48004323.pdf>
- Paley, Dawn. 2007. "This Is What Development Looks Like." *The Dominion*. <http://www.dominionpaper.ca/articles/900>
- Piedra v. Copper Mesa Mining Corporation*. 2011. 2011 Ontario Court of Appeal 191. <http://canlii.ca/t/fkg76>
- Prensa Libre. 2012. "Militar Queda en Prisión por Asesinato de Adolfo Ich Chamán" [Soldier in Prison for Murder of Adolfo Ich Chamán]. *Prensa Libre*, October 2. [http://www.prensalibre.com/noticias/justicia/Militar-asesinato-Adolfo-Ich-Chaman\\_0\\_784124821.html](http://www.prensalibre.com/noticias/justicia/Militar-asesinato-Adolfo-Ich-Chaman_0_784124821.html)
- Ramraj, Robert. n.d. "The Omai Disaster in Guyana." Winston-Salem State University. <http://www.gammathetaupsilon.org/the-geographical-bulletin/2000s/volume43-2/article3.pdf>
- Recherches Internationales Québec v. Cambior Inc.* 1998. Q.J.No. 2554. Quebec Superior Court. Available on Quicklaw.
- Rittich, Kerry. 2006. "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social." In *The New Law and Economic Development: A Critical Appraisal*, edited by David Trubek and Alvaro Santos, 203–252. Cambridge: Cambridge University Press.
- Rodriguez, James. 2009. "Barrio La Union Leader Killed by CGN's Security Agents in El Estor." MiMundo. <http://www.mimundo.org/2009/09/29/barrio-la-union-leader-killed-by-cgn%E2%80%99s-security-agents-in-el-estor/>
- Sagebien, J., and N. Lindsay. 2011. *Governance Ecosystems: CSR in the Latin American Mining Sector*. Basingstoke: Palgrave MacMillan.
- Skye Resources. 2007. "Land Occupations End at Fenix Project." Schnoor v. Canada. <http://www.schnoorversuscanada.ca/docs/skye-pr.pdf>
- Supreme Court of Canada. 2014. *Chevron Corporation, et al. v. Daniel Carlos Lusitande Yaiguaje, et al.*, Docket number: 35682, Application for leave to appeal. <http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35682>
- Trubek, David M. 2006. *The New Law and Economic Development: A Critical Appraisal*. Cambridge: Cambridge University Press.
- United Nations. 2002. "Report of the United Nations Verification Mission in Guatemala (MINUGUA) for the Consultative Group Meeting for Guatemala." United Nations Verification Mission in Guatemala (MINUGUA). [http://www.iadb.org/regions/re2/consultative\\_group/gu/minugua\\_eng.pdf](http://www.iadb.org/regions/re2/consultative_group/gu/minugua_eng.pdf)
- United Nations. 2009a. "Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy." A/HRC/11/41/Add.3. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/125/63/PDF/G0912563.pdf?OpenElement>
- United Nations. 2009b. "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Follow-up to Country Recommendations Guatemala." A/HRC/11/2/Add.7. [http://www.geneva-academy.ch/RULAC/pdf\\_state/G0913064.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/G0913064.pdf)
- United Nations. 2011. "Guiding Principles on Business and Human Rights." A/HRC/17/31. <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>
- University of Northern British Columbia. 2008. "El Estor." Field Schools. <http://blogs.unbc.ca/fieldschools/2008/05/07/el-estor/>
- UN News Center. 2013a. "Justice in Guatemala Vital for Preventing Recurrence of Heinous Crimes, Say UN Experts." UN News Center. <http://www.un.org/apps/news/story.asp?NewsID=44918&Cr=guatemala&Cr1=#.UZutDLWmiAg>
- UN News Center. 2013b. "UN Human Rights Office Urges Trial to Be Decided on Merits after Guatemalan Court Overturns Ríos Montt Conviction." UN News Center.

[http://www.un.org/apps/news/story.asp? NewsID=44993#.UaQI85zNkv0](http://www.un.org/apps/news/story.asp?NewsID=44993#.UaQI85zNkv0)  
US Department of State. 2012. "Guatemala 2012 Human Rights Report". US Department of State.  
[http:// www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204454](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204454)  
Voluntary Principles on Security and Human Rights. n.d. "The Voluntary Principles are the Only  
Human Rights Guidelines Designed Specifically for Extractive Sector Companies."  
Voluntary Principles on Security and Human Rights. <http://www.voluntaryprinciples.org>  
Yaiguaje v. Chevron Corporation, 2013 ONCA 758 (CanLII). <http://canlii.ca/t/g2dbp>  
Yaiguaje v. Chevron Corporation, 2013 ONSC 2527 (CanLII). <http://canlii.ca/t/fxczj>