

Rights Action
HudBay Minerals Impunity Watch

CHOC versus HUSBAY update – February 18, 2011

GUATEMALAN WIDOW'S LAWSUIT AGAINST HUSBAY COULD BE PRECEDENT SETTING

By Matthew Hill, 18th February 2011 <http://www.miningweekly.com/article/guatemalan-widows-lawsuit-against-hudbay-could-be-precedent-setting-2011-02-18>

TORONTO (miningweekly.com) - The trial of a Guatemalan woman who is suing Canadian miner HudBay Minerals for C\$12-million in the Ontario Superior Court of Justice for the death of her husband in 2009 is "probably years away", Angelica Choc's lawyer said on Thursday.

Choc, represented by Toronto law firm Klippensteins, claimed in court papers (court file number CV-10411159) that security forces under a HudBay Guatemalan subsidiary's employ "hacked and shot to death" her husband Adolfo Ich Chamán, who she said was an outspoken critic of the company in El Estor, located in the east of the Central American country.

TSX-listed HudBay bought a nickel project there in 2008, but slowed work on the mine in November that year because of market conditions at the time.

Ich Chamán died in the wake of a spate of community protests around the mine, called the Fenix project, in 2009. Choc alleged that CGN's then head of security CGN Mynor Ronaldo Padilla Gonzáles shot an unarmed Ich Chamán in the head at close range, citing eyewitnesses. She claimed the parent company, HudBay, failed in its duties.

HudBay, represented by Fasken Martineau Dumoulin, disputes this, saying it is confident CGN and its employees were not involved in Ich Chamán's death, based on its own investigations and eye witness reports.

Guatemala has since issued an arrest warrant for Padilla, though Choc's lawyers claimed he is still at large.

HudBay investor relations and corporate communications VP John Vincic said in reply to emailed questions that Padilla is on paid leave from CGN as there is "the presumption of innocence". "He is not operating in any capacity for the company at this time," he said.

An obstacle Choc has to overcome for the trial to be heard in Canada is convincing a judge that an Ontario courtroom is the suitable location the litigation to take place.

FORUM NON CONVENIENS

For the case to proceed in Ontario, Choc would have to prove that it is the most suitable jurisdiction. University of Western Ontario Faculty of Law assistant professor Sara Seck said on Friday Canadian courts have been reluctant to hear cases in which the defendant is a Canadian parent company and the alleged harm took place in another country, but that the legal landscape is changing on forum non conveniens.

"A case like this has never been heard in a Canadian court... It will be a very interesting case to follow," she said.

Forum non conveniens is a legal doctrine that states a court can dismiss a case if it finds it is not the most suitable jurisdiction for it to be tried. Cases have been brought by foreign citizens against Canadian companies in Canada for their actions elsewhere, but none have made it to trial yet. "It seems increasingly likely that such a case will be heard here," Seck said, adding that it was not guaranteed.

University of Ottawa faculty of law associate professor Penelope Simons agreed. She said there were a number of cases that foreigners had brought against Canadian companies over the past few years, and that "one of these cases will definitely get through" to trial. "The landscape is changing – there is a lot of awareness and a lot of concern around these issues. The courts are more knowledgeable now of them now," said Simons.

HudBay's Vincic said a case regarding Ich Chamán's death was currently before the court in Guatemala, and that "CGN has cooperated fully with the Guatemalan authorities and we intend to continue doing so until the investigations conclude".

PIERCING THE CORPORATE VEIL

Choc also argued that, through HMI Nickel, HudBay indirectly owns 98,2% of the shares of CGN, with the Guatemalan government holding the remainder, and that the Toronto-based parent company financed and supervised the Fenix security forces at all material times.

Piercing the corporate veil is a legal term, where a court can in exceptional circumstances hold the directors or shareholders of a company accountable for the corporation's actions.

"It is in the interests of justice to pierce the corporate veil and to impose liability for battery, wrongful imprisonment and wrongful death directly against the parent corporation, HudBay Minerals," Choc said in her statement of claim.

Klippensteins lawyer Murray Klippenstein said there was "no chance" of Choc getting a fair trial in Guatemala, citing a United Nations Special Rapporteur that said in February 2009 there is "a general climate of impunity" in the country, with only four out of every 100 crimes ending up before the courts.

Asked to comment on this Vincic said: "Our experience in this case is different from the perspective expressed in your quote. This case is currently before the courts in Guatemala and investigations are ongoing. From the outset, CGN has cooperated fully with the Guatemalan authorities and we intend to continue doing so until the investigations conclude."

"To say that Angelica can participate in the Guatemala case is offering a flimflam excuse, because the Guatemala justice system is so dysfunctional," said Klippenstein, who made headlines last year as one of the lawyers leading a C\$45-million class action against the Toronto Police Services Board and the Attorney-General of Canada for the arrest of protestors at the G20 summit in Toronto.

Vincic said: "It should also be noted that Angelica Choc has been participating actively in these court proceedings and investigations in Guatemala."

"The Canadian legal system allows for the creation of artificial foreign-based subsidiaries and traditionally doesn't hold the parent accountable for their actions. That all too easily becomes a strategy for avoiding accountability where the actual control resides with the parent," said Klippenstein.

CANADIAN ACCOUNTABILITY

Human rights group Rights Action claimed earlier this month that Canadian mining companies are not held accountable for their actions in other countries.

Last year, Canadian lawmakers voted against proposed legislation that would block access to government funds for companies found guilty of human rights abuses.

Industry organisations such as the Prospectors and Developers Association of Canada and the Mining Association of Canada fiercely opposed Bill C-300, which they argued would open the way for parties to make "vexatious" claims against resource companies. The proposed legislation was defeated in a vote of 140 to 134 in the Canadian House of Commons in October.

National Democratic Party Member of Parliament Peter Julian has been trying to muster support for his Bill C-354, based on the US Alien Tort Claims Statute, which would allow foreign citizens to sue Canadian companies for human rights or environmental violations.

FENIX

The Fenix operation, on care and maintenance since 1980, is the subject of a feasibility study, which HudBay said last year it aimed to publish along with its financial results, scheduled for March 10. HudBay had estimated Fenix, which it acquired with Skye resources in 2008, would cost \$1-billion to build. The operation has been on care and maintenance since 2008.

"The updated feasibility study for the Fenix project is substantially complete, and we have not made a decision on when the study will be released publicly," Vincic said on Friday.

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FUNDS NEEDED

Rights Action asks for financial support to ensure that this case advances in the Canadian courts and that justice is done for the brutal and targeted killing of Adolfo Ich. As this case may take years, both short and long term funding are needed for the family of Adolfo Ich and a local community-based human rights group, for the Klippensteins law firm and for Rights Action. Funding needs for the family and their local Mayan-Qeqchi community development committee are:

- TOTAL: \$16,400
- Communication (phones, internet): \$1,800
- 2 laptop computers: \$1,400
- Digital and video cameras: \$600
- Transportation, in the region, and to and from capital city, for legal case related meetings: \$1,200
- Local meetings, to keep local Mayan Qeqchi communities informed: \$2,400
- On-going investigations into the killing of Adolfo Ich and other human rights violations: \$2,400
- Local publications: \$1,800
- Stipend for 2 local community leaders to carry on with this case: \$4,800

TAX-DEDUCTIBLE DONATIONS - Make check payable to "Rights Action" and mail to:

CANADA: 552 - 351 Queen St. E, Toronto ON, M5A-1T8
UNITED STATES: Box 50887, Washington DC, 20091-0887

CREDIT-CARD DONATIONS: Go to www.rightsaction.org, or directly to:
<http://rightsaction.org/contributions.htm>

DONATION OF STOCK?: Contact Grahame Russell, info@rightsaction.org

ANGELICA CHOC'S LEGAL FUND

Donations to Angelica Choc for use in her lawsuit can be made online at:
www.chocversushudbay.com; or, by sending a cheque, made out to "Klippensteins in Trust for Angelica Choc", to Klippensteins Barristers & Solicitors, Suite 300, 160 John Street, Toronto ON, M5V 2E5.

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EDUCATIONAL DELEGATION TO MINING AFFECTED COMMUNITIES IN GUATEMALA, APRIL 17-23: INDIGENOUS COMMUNITY DEVELOPMENT, ENVIRONMENTAL JUSTICE & HUMAN RIGHTS

* versus *

MINING COMPANIES & IMPUNITY

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