

Indigenous plaintiffs come to Toronto, Nov.6-25, to be deposed by Hudbay Minerals lawyers

UpsideDownWorld article

Is Justice Possible in Canada or Guatemala for Hudbay Minerals/CGN Mining Repression?

By Grahame Russell, October 28, 2017, UpsideDownWorld

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Every now and then, there is a community, environmental, human rights defense struggle that is able to break through the complex, fortified barriers of global corporate impunity and corruption, criminality and deceit. The Hudbay Minerals/CGN lawsuits in Canada, and the parallel but separate criminal trial in Guatemala, are one such struggle.

The issues at hand – mining caused repression (including an assassination, shooting-paralyzing and rapes); illegal community evictions and destruction; corruption and collusion with governments, private security guards, police and military - are identical or similar to so many cases of corporate criminality, impunity, corruption and deceit occurring around the world, past and present.

For a number of general and particular factors – including the courage, dignity and strength of the Mayan Q'eqchi' victim-plaintiffs, and the legal brilliance, passion and commitment of the lawyers in Canada and Guatemala, these legal cases (Canada and Guatemala) are painstakingly overcoming numerous political, legal and tactical obstacles, and are proceeding.

While an eventual trial in Canada, and eventual re-trial in Guatemala - if it comes to that - might be years off, these lawsuits are already changing the legal and political reality of long-standing corporate impunity and immunity from legal accountability.

The legal proceedings

Thirteen Q'eqchi' plaintiffs, suing Hudbay Minerals and CGN (Guatemalan subsidiary company, formerly owned by Hudbay) for mining related repression, are coming to Toronto, Canada (11 of them in November 2017; 2 more in early 2018) to be deposed by Hudbay lawyers as part of the precedent setting Hudbay/CGN lawsuits.

Two of these mining repression victims are also pursuing a parallel but separate criminal trial in Guatemala against Mynor Padilla, former head of security of Hudbay/CGN.

Given the history of impunity and immunity from accountability that Canadian-based mining companies have enjoyed in Canada, forever, and given Guatemala's endemic impunity, corruption and repression (that global companies know about and benefit from), the question remains whether justice will be possible in Canada and/or Guatemala for Hudbay/CGN mining repression?

Going back to the 1970s, the Q'eqchi' people of the remote region of El Estor, in eastern Guatemala, have suffered repeated repression linked to a series of (until recently) Canadian owned nickel mining companies: INCO (International Mining Company), Skye Resources and Hudbay. This repeated repression includes: violent, illegal evictions and community destruction; shootings and maimings; targeted killings of community leaders; rapes; criminalizations of community defenders; etc.

[Corporate clarification: INCO (and its subsidiary EXMIBAL built the processing plant and got the mining operation going in the 70s and early 80s; Skye was incorporated in 2004 by former INCO company officers, and INCO transferred to Skye its existing subsidiary company EXMIBAL (whose name was changed to CGN), and it's mining concession that INCO had improperly received in the 1960s from the military-backed government of the day. In 2008, Hudbay bought Skye, including all of its assets (CGN) and liabilities (the lawsuits, etc.). In 2011, Hudbay sold CGN to the Solway Group, but remained responsible for its liabilities, such as the legal proceedings.]

The lawsuits in Canada are unique in Canadian legal history. It is the first time a court has ruled that a Canadian company can be tried and held liable in Canadian courts for harms and violations in other countries. These trail-blazing lawsuits are pitting impoverished indigenous plaintiffs, and their Toronto lawyers (Klippensteins Barristers and Solicitors, receiving donations into a client trust fund, to help defer a small part of the costs associated with the lawsuits), against a wealthy mining company that has hired a team of lawyers from the politically well-connected law firm of Faskens Martineau in Toronto.

While the criminal trial in Guatemala is not legally precedent setting, in the same way, it is politically more risky and courageous. Mynor Padilla, Hudbay's former head of security, is also a former Lieutenant-Colonel in the Guatemalan army. He joined the U.S.-backed military regime in 1981 during some of the worst years of State-sponsored disappearances, torture and rape, assassinations, massacres and genocide.

It is no small thing for impoverished Mayan people to stand up to and take on in court an army officer, one who is represented by a team of well-connected Guatemalan lawyers who are, in all likelihood, paid by Hudbay from Canada.

Below, I set out a somewhat detailed summary of the timeline and key aspects of the lawsuits in Canada and criminal trial in Guatemala. Note: These legal proceedings are independent. Neither proceeding has legal bearing on the other, though both deal with some of the same facts related to the targeted killing of Adolfo Ich and the shooting-paralyzing of German Chub.

Hudbay/CGN lawsuits in Canada: Timeline & issues

Lawsuits filed - 2010

The lawsuits were initiated in Toronto in 2010 and have, since then, established legal precedents in Canada, making it possible for the first time to hold corporations accountable in Canadian courts for repression, harms and violations committed abroad. Represented by Klippensteins lawyers, the three over-lapping cases were filed by 13 Q'eqchi' individuals:

- Angelica Choc, widow of Adolfo Ich, a father of five, community leader and teacher who was singled out, hacked with machetes, shot and killed by Hudbay security personnel on September 27, 2009;
- German Chub, a young father who was shot and left paralyzed by Hudbay security personnel on the same day Adolfo Ich was killed;

- Margarita Caal Caal, Rosa Elbira Ich Coc and 9 other women from the village of Lote 8 who were raped by Skye Resources security personnel, police and soldiers in January 2007 during an illegal, violent eviction and destruction of their village.

Co-defendants

It is legally noteworthy that the Guatemalan company CGN is included in the Canadian lawsuits not only as the former subsidiary of Hudbay, but also – in the Angelica Choc case – as a co-defendant.

Precedent setting decision – July 2013

After three years of legal battles over Hudbay's pre-trial motions to dismiss the lawsuits outright before trial, an Ontario court ruled in July 2013 that the lawsuits can go to trial in Canada. This was a significant legal leap forward in these cases, let alone in Canadian corporate accountability history. This decision was a long overdue victory for human rights and work to begin to hold global corporations legally accountable. The Hudbay lawsuits have paved the way for similar lawsuits to be filed in Canada, since then, against Canadian companies that committed human rights abuses abroad:

- Nevsun Resources case, regarding forced labour and slavery at a mine in Eritrea;
- Tahoe Resources case, regarding shootings-maimings by mine security personnel in Guatemala;
- Loblaws/Joe Fresh case, regarding the Rana Plaza garment factory collapse in Bangladesh, resulting in over 1000 deaths.

Corporate reactions

A lawyer with the Canadian firm Gowling WLG warns the mining industry that if the Hudbay litigation is successful "then we've got major new law and it's explosive." (<http://business.financialpost.com/legal-post/canadian-mining-companies-face-lawsuits-over-foreign-activities>) Other law firms note that "Hudbay serves as a significant warning for Canadian corporations operating in foreign countries that they could potentially face civil liability in Canada for wrongs committed in foreign countries," (https://www.bennettjones.com/Publications/Updates/A_Warning_for_Canadian_Corporations_with_Foreign_Subsiaries/) and "Choc v. Hudbay may usher in potential expanded exposure to risks and liabilities for Canadian corporations doing business abroad, not only in the natural resources sector but also in various other sectors, including banking, manufacturing, retailing and telecommunications." (<https://www.osler.com/en/resources/cross-border/2013/ontario-court-gives-green-light-to-international-h>)

Evidence disclosure

Since 2013, the lawsuits have dragged through a slow process of evidence disclosure. By law, both sides are required to disclose all documents and information relating to any aspect of the lawsuits. Because of Hudbay foot-dragging and what appear to be well-funded delays, Klippensteins lawyers were obliged to go to court again in 2015 to obtain a court order forcing Hudbay to do what it is supposed to do by law – ie, disclose extensive internal and normally confidential company documents and communications. At this point, Hudbay has handed over thousands of internal documents and other information.

Examinations for discovery

As the evidence disclosure process winds down, the thirteen plaintiffs will travel to Toronto to be deposed (questioned) by Hudbay lawyers. Similarly, Klippensteins lawyers have been deposing Hudbay and Skye company executives. Klippensteins may be forced to again go to court to obtain a court order if Hudbay fails to provide all the documents and information to which the plaintiffs are entitled, or if Hudbay and Skye executives refuse to answer valid questions during examinations for discovery.

Trial date?

After the disclosure and discovery phases are completed, hopefully in 2018, Klippensteins and the plaintiffs prepare for the actual trial which will take place in front of a jury, and will be lengthy. Any trial could well be two or more years away.

November 2017 depositions

Lawyers Murray Klippenstein and Cory Wanless, of Klippensteins Barristers and Solicitors, and Grahame Russell, of Rights Action, travelled to Guatemala City, October 18-20, 2017, to meet with the 13 plaintiffs and prepare them for their upcoming trip to Toronto. The 11 women from the community of Lote 8 will be questioned in November 2017; German Chub and Angelica Choc will return in early 2018 to be similarly deposed.



Here: 9 of 11 women plaintiffs from the remote community of Lote 8, victims of rapes committed during the burning and destruction of their home village in 2007, as part of an illegal eviction; Angelica Choc, widow of assassinated community leader Adolfo Ich. (Missing: German Chub, the man shot and left paralyzed the same day Adolfo was singled out and killed). Here: lawyers Murray Klippenstein and Cory Wanless; Grahame Russell (Rights Action) and Lisa Rankin (Breaking the Silence), assisting with the upcoming trip to Toronto and long-time supporters of the mining-harmed Q'eqchi' communities. Last and certainly not least: here, the newborn children of Lote 8 women Rosa and Amalia.

Since 2004, Rights Action has supported and worked with mining harmed Q'eqchi' communities in the El Estor region to document and denounce the mining related harms and violations. Since 2010, Rights Action has been supporting the victims of mining repression as they seek justice in Guatemalan and Canadian courts.

Currently, Rights Action is organizing the logistics (travel documents, travel, room and board, extra clothing, food, family stipends, etc.) of this trip. The 11 women from Lote 8 are unilingual Q'eqchi' speakers who have rarely left the remote El Estor region of Guatemala, let alone travelled in a plane.

Murray Klippenstein and Cory Wanless met with their clients on October 19 in Guatemala City, to update them on progress of the lawsuit and to talk of what to expect during the pending depositions in Toronto by Hudbay's lawyers.



Here: Winston Scott translates English to Q'eqchi' for the discussion between the Toronto lawyers and their Q'eqchi'. Photo: Murray Klippenstein.

These extraordinary women are very much ready to come to Toronto and tell the truth about the harms and violations done to them, their families and community, by police and military in coordination with mining company security guards.



Mynor Padilla criminal trial in Guatemala: Timeline & issues

(Reminder: The criminal trials in Guatemala address the targeted killing of Adolfo Ich and shooting of German Chub, but not the gang-rapes suffered by the women of Lote.)

On April 6, 2017, Mynor Padilla (Hudbay's ex head of security and former Lieutenant-Colonel in the Guatemalan army) was acquitted of mining-related murder and aggravated assault charges. The Judge ordered Padilla's immediate release from detention. She apologized on behalf of the justice system for

his detention. Then, to top it all off, the Judge ordered, as part of the sentence, that criminal investigations for obstruction of justice, perjury and coercion of witnesses be initiated against: Angelica Choc, widow of the murdered Adolfo Ich; Angelica's children and sister (witnesses to Adolfo's murder); other victims of Hudbay security guard violence; expert witnesses called to give testimony; and the prosecuting lawyers from the Attorney General's office.

Yes, you read this correctly! While freeing the hired killer, the Judge aimed to turn the victims of Hudbay's mining repression into the accused. Don't worry, the Judge's horrific decision was overturned on appeal, in September 2017 (see below).

Deadly mining repression – September 27, 2009

On this day, Hudbay/CGN security guards, under the command of Padilla, illegally entered the community of La Union, in the municipality of El Estor. They shot bullets at and over the heads of community members. At one point, Padilla looked to his side, saw German Chub standing there, and shot him with his handgun; German had been watching the regular Sunday game of soccer at the La Union field. The bullet left German paralyzed from the waist down; he also lost the use of one lung.

After shooting German, Padilla and his guards singled out and grabbed Adolfo Ich, a father of five, respected community leader and teacher. They machete hacked his body, shot and killed him. They dragged Adolfo through a hole they had made in the fence onto Hudbay/CGN property, where he was later found dead.

Fugitive from justice - on the Hudbay/CGN payroll

Though there was a capture order issued against Padilla after September 27, 2009, he continued his work, openly, as head of security for Hudbay/CGN for at least a year.

Pending questions: It is not known how long Padilla remained on the Hudbay/CGN payroll after the shooting of Adolfo and German? Or if Hudbay/CGN have an on-going financial commitment to him today?

Padilla captured – September 2012

Under increased international activist attention, in part due to the recently filed Hudbay lawsuits in Canada, Padilla was finally captured and held without bail as he had been a fugitive from justice for three years.

Regular intimidations, threats and attacks

Since 2013, Rights Action and, separately, the Klippensteins law firm have written letters to Hudbay, CGN and government officials in Canada and Guatemala, denouncing threats and attacks that Angelica, German, the 11 women and their family members have received from people working for, or linked to the mining company, and/or the family of Padilla. These threats and attacks are obviously illegal. In the context of Guatemala's historic and on-going repression and impunity, they are always a threatening message.

“Concocted stories”

When threatening and intimidating Angelica, German and the 11 women, the people doing so (mining company employees and/or people linked to Padilla's family) regularly make statements similar to those made by Padilla's lawyers in Guatemala and by Hudbay in Canada - that German, the 11 women and Angelica have “concocted” their stories of mining repression so as to win financial settlements in the lawsuits in Canada.

Trial begins - April 2015

Three and a half years after Padilla was finally detained (six and a half years after the mining repression occurred), the criminal trial began in a Puerto Barrios courtroom presided by Judge Ana Leticia Peña Ayala.

Who pays Padilla lawyers? Who sets their legal strategy?

It is widely suspected that Hudbay is paying for Padilla's team of well-connected defense lawyers, though Hudbay refuses to clearly clarify this publicly. When asked by the Toronto Star, Hudbay waffled: "We are not going to say anything that might be distorted on the internet or otherwise used to interfere with Mr. Padilla's presumption of innocence or right to a fair trial." (Scott Brubacher, Hudbay corporate communications, <https://www.thestar.com/news/world/2016/06/20/how-a-guatemalan-murder-trial-could-forever-change-canadian-overseas-mining.html>)

Pending questions: Is Hudbay paying for Padilla's legal defense? Why? Is Hudbay directing Padilla's legal defense strategy from Canada? Why is Hudbay intervening in the criminal trial in Guatemala, when the result has no legal implications for Hudbay?

Padilla lawyer killed by hit squad – June 3, 2015

On this day, one of Padilla's lawyers, Francisco Jose Palomo Tejada, was assassinated by a hit squad, shot 12 times, midday, in Guatemala City. Besides representing Padilla, Palomo was a lawyer for general Rios Montt, found guilty of genocide against the Mayan Ixil people during the worst years of U.S.-backed repression and genocide, 1978-1983. Palomo's assassination was allegedly linked to his work with a Guatemalan drug trafficker (Marllory Chacón, the "Queen of the south", now in jail in the U.S. on drug trafficking related charges) who laundered money for the Mexican Sinaloa drug cartel.

Hudbay intervenes in Padilla criminal trial - September 1, 2015

On this day, John Terry - a senior partner at the "Torys" law firm (<http://www.torys.com/people/terry-john-a>) – arrived in Puerto Barrios, where the trial was taking place, to give "expert testimony" about the Hudbay lawsuits in Canada, on behalf of Hudbay and Padilla. Terry was paid by Hudbay for "many hours of work" (as Terry said in the Puerto Barrios courtroom, Sept. 1, 2015), to appear in the trial. Terry's testimony turned out to be, according to people involved in the legal proceedings in Guatemala and Canada, misleading and selective.

Pending questions: Why was Hudbay intervening directly, and in this manner, in the criminal trial in Guatemala?

Motion to remove Judge for discrimination and partiality - January 20, 2016

Angelica's lawyers filed a motion that Judge Ana Leticia Peña be removed on grounds of racial discrimination and partiality against the Q'eqchi' victims/ witnesses/ accusers.

Motion dismissed on technicality - January 27, 2016

Citing a procedural technicality in the filing of the motion to remove, and not on the merits of the charges, an appeals court ruled against Angelica's motion.

Trial closed to public - February 8, 2016

Judge Peña ruled to continue the trial behind closed doors due to alleged "security threats" against herself and the prosecution. Astounding! Angelica and German, who have actually received many threats, did not request this measure and do not agree with the Judge's "justification". The trial continued behind closed doors until the end, in April 2017.

Padilla lawyer charged with crimes linked to organized crime - February 12, 2016

A second defense lawyer, Frank Manuel Trujillo Aldana, was charged with illicit association, bribery, influence-trafficking, obstruction of justice and collusion linked to the “la linea” organized crime network headed by former President Otto Perez Molina and Vice-President Roxana Baldetti, that stole \$120,000,000 in public funds. Perez Molina and Baldetti were forced to resign from office in 2015 and are now in jail.

Angelica Choc’s home shot up - September 17, 2016

Just after midnight, unidentified men opened fire on Angelica’s small, cinder block home in El Estor as she slept inside with two young children. Bullet marks were found the next morning on the walls of her house, and 12-gauge shotgun and 22-calibre bullet casings were found nearby. No one was hurt physically. But again, as part of over three years of threats and intimidations, a clear message was sent. Though initially investigated by the police, there was no follow-up.

After this most recent attack, Angelica Choc’s Canadian lawyer Murray Klippenstein commented:

“The fact that Angelica’s house was shot at just before the Guatemalan criminal court is to decide whether the former head of mine security is criminally responsible for the brutal killing of her husband is no coincidence. It is meant as a signal to all involved, including the judge who must decide whether Mr. Padilla is guilty.

“I am very concerned that Hudbay’s continued irresponsible defence of both the civil lawsuits in Canada and the criminal prosecution in Guatemala have done nothing to dissuade this kind of attack in Guatemala against our clients, and in fact their failure to own up to what happened in the past and take steps to punish those responsible make it more likely this will happen again, but maybe much worse.”

Hudbay collaboration with military “Kaibil” special forces? - December 2016

During the Padilla trial, a new criminal investigation was initiated into whether the military's “Kaibil” special forces worked with Hudbay/CGN guards and company officials to plan and mount a military intelligence and population control operation, before, during and after the day (September 27, 2009) of repression that resulted in the assassination of Adolfo Ich, shooting-maiming of German Chub, and wounding of other community members.

Like many of the happenings related to Hudbay’s actions and operations in Guatemala, this is a potentially explosive case of illegal collusion, if the appropriate political and media pressure is brought to bear on ensuring a proper investigation.

Threats and intimidations - March 7-8, 2017

Angélica and German’s closing statements to the court were an ordeal in and of themselves. They had to leave the Puerto Barrios court house under police escort after suspicious characters had been following them. Angélica and German were accompanied by friends, lawyers and human rights observers. At their hotel, the group spotted a man observing them. This man spent the night at the hotel, in a room adjacent to rooms occupied by members of Angélica and German’s party, and continued to observe them the next morning. Two other men were spotted observing the group in front of the courthouse, while a white Toyota Hilux - model used by the mining company security - drove around the block where Angelica and German’s driver was waiting.

The police were provided with photos of the men and of the car driven by the man in the hotel, with its license plate, etc. The police said they would follow-up. As before, there has been no follow-up to any attacks or acts of intimidation and threats.

Padilla's real name

In June 2017, Luis Solano published an extensive article about the Padilla trial, revealing that Mynor Ronaldo Padilla González (from the 102nd graduation class of the Guatemalan army) had changed his name. In 1981, he registered in the army as Jaime Rolando Padilla Gonzalez, and changed his name in 1982. (<https://cmiguate.org/mp-y-cicig-accionan-contra-libertad-de-militar-vinculado-a-minera-en-el-estor/>)

No crime in that, but what might he be covering up or hiding from?

Appeals court overrule – September 2017

In a correct, but surprising decision (given Guatemala's entrenched corruption, racism and impunity), a Guatemalan appeal court, on September 14, 2017, completely overturned the April 6, 2017 trial court acquittal of Padilla, including – though not directly or specifically John Terry's "expert witness" testimony - and ordered that the matter be re-tried by a new court with three judges. Padilla will now face a second prosecution for the murder of Adolfo Ich and shooting of German Chub. It is believed this might begin in early 2018.

Furthermore, it is possible that a criminal investigation will be initiated into the trial court judge, Ana Leticia Peña, due to the suspicions surrounding her completely compromised ruling in favour of Padilla.

Stay tuned.

Justice?

When these courageous Q'eqchi' victims of mining repression decided to seek justice in Guatemala and Canada, they were clear that their main aspiration was that their struggles for justice help create fundamental political and legal changes in Guatemala and Canada so that other communities would not have to suffer the same harms and violence, corruption and impunity.

Even as the plaintiffs have made stunning advances over the past 7 years in Guatemala and Canada, the fact is 10 years have gone by since the rapes and 8 years since the killing and shooting, and no justice has been achieved, neither in Guatemala, nor in Canada. Either or both trials could take years more to resolve and there remains the serious risk of further repression against them.

Yet, with clear heart, mind and determination, the plaintiffs go forward, exposing, challenging and trying to break through the barriers of corporate criminality, impunity, corruption and deceit that Hudbay – and companies operating around the world – enjoy and profit from.

(Grahame Russell is a non-practicing Canadian lawyer, author, adjunct professor at the University of Northern British Columbia and, since 1995, director of Rights Action. For more information about the Q'eqchi' struggles of justice, or to support them: info@rightsaction.org, www.rightsaction.org.)

Overview articles

- Guatemalan Women's Claims Put Focus on Canadian Firms' Conduct Abroad, April 2, 2016, http://www.nytimes.com/2016/04/03/world/americas/guatemalan-womens-claims-put-focus-on-canadian-firms-conduct-abroad.html?_r=2

- Mayan Families' Quest For Justice Against Canadian Mining Company Hudbay, June 20, 2016, <https://www.thestar.com/news/world/2016/06/20/the-mayans-vs-the-mine.html>
- How A Guatemalan Murder Trial Could Forever Change Canadian Overseas Mining, June 20, 2016, <https://www.thestar.com/news/world/2016/06/20/how-a-guatemalan-murder-trial-could-forever-change-canadian-overseas-mining.html>

Documentary film

- Defensora – This award-winning 40 minute film (by Rachel Schmidt, 2013) documents the Q'eqchi' peoples' struggle in Guatemala to reclaim ancestral lands and to seek justice in Canadian and Guatemalan courts for murder, shootings and rapes committed by police, soldiers and private security guards working for Canadian mining company Hudbay Minerals and its Guatemalan subsidiary CGN. View: <https://vimeo.com/75725049>

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