RESOURCE EXTRACTION IN THE COURTROOM: THE SIGNIFICANCE OF *CHOC V HUDBAY MINERALS INC* FOR TRANSNATIONAL JUSTICE IN CANADA

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I. INTRODUCTION

Canada has not seen much transnational litigation along the lines of the US *Alien's action for tort*,[1] under which individuals and corporations are sued in US courts by non-US nationals over environmental and human rights abuses committed outside US territory. Only a handful of such cases have found their way to the dockets of Canadian courts. The first major case appeared in 1998 in Quebec and did not reach

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[1] *Alien's action for tort*, 28 USC §1350 (1988). The statute grants Federal District Courts original jurisdiction to hear and determine "any civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

the appellate courts.[2] The second major case appeared twelve years later in 2010 with an appellate decision, also in Quebec.[3] The third was decided by the Ontario Court of Appeal in 2011.[4] The fourth was decided by the Quebec Court of Appeal in January 2012.[5] The latest was the subject of a preliminary ruling by the Ontario Superior Court of Justice in July 2013 rejecting the defendants' motion to dismiss, paving the way for a merits-based trial.[6] None of the earlier cases was litigated on the merits. The first four were dismissed either for want of jurisdiction[7] or for *forum non conveniens*[8] or for failure to disclose a reasonable cause of action.[9] Only the last case – *Hudbay* – survived pre-trial challenges. This case will be the focus of this essay.

My purpose is to explore the significance of the *Hudbay* decision to see what necessitated the different result the court reached. The ultimate goal is to cast a shadow on the future of transnational corporate wrongs litigation in Canada. It is argued that *Hudbay* is significant for its attempt to recognize a novel duty of care between Canadian parent corporations and local communities harmed overseas by the activities of foreign subsidiaries of Canadian corporations. It is also significant for the plaintiffs' successful use of the direct liability theory. From a plaintiff-lawyer's perspective, the decision underscored the need to place sufficient particulars of all allegations on the pleadings, a lesson that must have been learned from the failure of the previous cases, particularly the *Copper Mesa* decision.

Before going into the *Hudbay* decision, however, it is essential to understand the climate triggering the efforts by foreign local communities to seek transnational justice in Canadian courts against Canadian extractive companies operating in their communities. This climate is created by the deleterious impacts of the operations of Canadian extractive companies on local communities in developing countries of Africa, Asia and Latin America where Canadian extractive companies are operating, absence or inadequacy of accountability mechanisms in those countries, and the hesitancy of the Canadian government to regulate the environmental and human rights

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[2] *Recherches Internationales Québec v Cambior inc*, 1998 CarswellQue 4511 (WL Can) (Qc Sup Ct) [*Cambior*].
[3] *Yassin v Green Park International Inc*, 2010 QCCA 1455 (CanLII), leave to appeal to SCC refused, 33898 (3 March 2011) [*Green Park*].
[4] *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191 (CanLII) [*Copper Mesa*].
[5] *Anvil Mining Ltd v Association canadienne contre l'impunité*, 2012 QCCA 117 (CanLII), leave to appeal to SCC refused, 441 NR 396 [*Anvil*].
[6] *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414, 116 OR (3d) 674 [*Hudbay*].
[7] *Anvil*, *supra* note 5 at para 104.
[8] *Cambior*, *supra* note 2 at paras 88-89; *Green Park*, *supra* note 3 at paras 4, 97, 99.
[9] *Copper Mesa*, *supra* note 4 at paras 99-100.

impacts of its corporations abroad. Following this discussion, the remaining part of this essay is devoted to an analysis of the *Hudbay* decision and its significance.

II. CANADIAN EXTRACTIVE COMPANIES ABROAD AND THE SEARCH FOR REGULATION

Canada is a giant in global mining, being home to about 75 per cent of the world's mining companies.[10] It hosts 16 per cent of global mining investment.[11] About 70 per cent of the equity capital raised globally for mining in 2012 was raised on the Toronto Stock Exchange (TSX) and the Venture Exchange (TSXV),[12] making Canada the leading source of mining financing in the world. The contribution of mining to the Canadian economy is equally massive. The industry has about 320,000 workers in its employ. Its contribution to Canada's gross domestic product was $35.6 billion in 2011.[13] In the same year, it accounted for 22.8 per cent of Canadian exports, which included a huge assortment of minerals, such as aluminum, zinc, coal, gold, copper, iron, iron ore, steel, nickel, silver, uranium, diamonds and potash.[14] Canadian mining companies operate in over 100 countries in the world, resulting in Canadian companies accounting for the largest share of exploration spending in the US, Central and South America, Europe and Africa.[15]

While the majority of Canadian mining corporations operate responsibly abroad, an increasing number of these companies are being implicated in egregious environmental and human rights abuses in their

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[10] Canada, Foreign Affairs, Trade and Development Canada, "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector", (March 2009), online: Government of Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx>. According to the Canadian government, Canada is the largest source of equity financing for global mining and is home to more mining companies than any other country in the world.

[11] Brendan Marshall, "Facts & Figures of the Canadian Mining Industry 2013" (2013) at 6, online: Report from The Mining Association of Canada<www.mining.ca/sites/default/files/documents/FactsandFigures2013.pdf>.

[12] *Ibid.*

[13]"The Mining Association of Canada – Facts & Figures" (2012), online: Contact Financial <www.contactfinancial.com/news/397-the-mining-association-of-canada-facts-figures.html>.

[14] *Ibid.*

[15] Paul Stothart, "F&F 2011 Fact$ & Figure$ of the Canadian Mining Industry" (2011) at 40, online: Report from The Mining Association of Canada < www.miningnorth.com/wp-content/uploads/2012/04/MAC-FactsFigures-2011-English-small.pdf>.

operations in developing countries where accountability mechanisms are weak.[16] For instance, disasters at Canadian corporations-owned mines resulted in huge spills of toxic sludge in Guyana in 1995, in the Philippines in 1996, and in Spain and Kyrgyzstan in 1998.[17] Those incidents resulted in massive destruction of aquatic life and hectares of farmland, as well as the hospitalization of thousands of people.[18]

In Sudan, it is believed that Canadian oil company Talisman Energy Incorporated might have contributed to the Sudanese government's capacity to commit "ethnic cleansing" against non-Muslim civilian populations surrounding oil concessions located in southern Sudan, during the over 40-year civil war in that country, in order to facilitate oil exploration and extraction in the region.[19] The main thrust of the allegations was that Talisman collaborated with the Sudanese military to map out a security strategy for its oil fields. It allowed its facilities to be used by government soldiers who, to its knowledge (actual or constructive), were engaged in ethnic cleansing.[20] Although Talisman denied that it ever knew that ethnic cleansing was going on and with the aid of its facilities, the Harker Commission set up by the Canadian government to investigate the human security situation in Sudan found reason to believe that if Talisman had "look[ed] over the fences of their compounds", it would have found that the abuses were being committed.[21] Instead, Talisman relied greatly on information from the Sudanese military staff.[22]

In 2009, the Prospectors and Developers Association of Canada commissioned a research to provide a statistical report of incidents involving

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[16] Madelaine Drohan, "Regulating Canadian mining companies abroad" (January 2010) at 1, online: Centre for International Policy Studies <www.sciencessociales.uottawa.ca/cepi-cips/eng/documents/CIPS_PolicyBrief_Drohan_Jan2010.pdf>.

[17] Sara L Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can YB Intl Law 139 at 139-140.

[18] *Ibid.*

[19] Canada, Department of Foreign Affairs and International Trade, *Human Security in Sudan: The Report of a Canadian Assessment Mission*, by John Harker for the Department of Foreign Affairs and International Trade (Ottawa: January 2000) at 1-2.

[20] *Ibid* at 14-15.

[21] *Ibid* at 14.

[22] *Ibid.* For comprehensive studies of Talisman's operations in Sudan and Government of Canada's response, see Georgette Gagnon, Audrey Macklin & Penelope Simons, "Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy" (January 2003), online: University of Toronto Faculty of Law <www.law.utoronto.ca/documents/Mackin/DeconstructingEngagement.pdf>; Craig Forcese, "'Militarized Commerce' in Sudan's Oilfields: Lessons for Canadian Foreign Policy" (2001) 8:3 Can Foreign Policy J 37.

Canadian mining and exploration companies in developing countries for the previous ten years, and to review the evolution and progress of corporate social responsibility in Canada in connection with the mining and exploration industry.[23] The study, conducted by the Canadian Centre for the Study of Resource Conflict, found 171 "infractions", one-third of which implicated Canadian companies.[24] It classified the infractions into environmental crimes, human rights abuses, violations of the local law of host countries, community conflicts, occupational hazards, and "unethical" operations.[25] When compared to other mining superpowers Australia and the United Kingdom, Canadian companies were implicated in more than four times as many incidents.[26] For every three incidents that occurred in developing countries, Canadian companies were implicated in more than one.[27] The regions that were most commonly affected included Latin America (32 per cent), Sub-Saharan Africa (24 per cent), South East Asia (19 per cent) and South Central Asia (12 per cent).[28]

More recently, in March 2013 to be more precise, thousands of Columbians flooded the streets of Bucaramanga to protest the environmental impacts of the activities of Canadian mining company Eco Oro Minerals Corp.[29] In the same month, Catholic priests marched with thousands of locals in Matagalpa, Nicaragua against a mining project owned by another Canadian miner B2Gold Corp.[30] There have also been allegations of gang-rape implicating Toronto-based gold miner Barrick Gold in Tanzania and Papua New Guinea.[31] Canadian companies have also been targeted in several other countries around the world, including Bolivia, the Dominican

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[23] "Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World" (October 2009) at 3, online: The Canadian Centre for the Study of Resource Conflict <indigenouspeoplesissues.com/attachments/article/7184/CSR_Movements_and_Footprints.pdf>.

[24] *Ibid* at 7.

[25] *Ibid* at 5.

[26] *Ibid* at 10.

[27] *Ibid.*

[28] *Ibid* at 9.

[29] Santiago Ortega Arango, "Canadian mining companies subject of worldwide protests", *CBC News* (3 April 2013), online: <www.cbc.ca/news/world/canadian-mining-companies-subject-of-worldwide-protests-1.1368155>.

[30] *Ibid.*

[31] Geoffrey York, "Claims of sexual abuses in Tanzania blow to Barrick Gold", *The Globe and Mail* (30 May 2011), online: <www.theglobeandmail.com/news/world/claims-of-sexual-abuses-in-tanzania-blow-to-barrick-gold/article598557/>.

Republic, Ecuador, Guatemala, Israel, Kyrgyzstan, Mexico, Peru, Romania and Slovakia.[32]

Incidents similar to the above were occurring in Canada in the early 20th century until the Canadian government imposed stringent rules on mining operations in Canada.[33] These rules, however, do not apply to the overseas operations of Canadian mining companies. Those are typically regulated by the laws of their host countries. But the incidents have put Canadian extractive companies on a global human rights and environmental watch list; perhaps more importantly, they raise the question of whether Canada, home to most of the mining corporations and to which the corporations repatriate their profits, should assist in addressing the challenges posed by the activities of its corporations abroad, and if so, how?

To be clear, it is not due to a mental preference for foreign courts that the victims of the corporate abuses do not seek accountability and justice in their local courts. Rather, as the editors of *Liability of Multinational Corporations Under International Law* observe:

> With foreign direct investment replacing intergovernmental aid as the most important means of transferring capital and technical know-how from the developed to the developing world, governments in developing countries are tempted to – and in some cases feel compelled to – attract investors by minimizing the potential costs facing investing MNCs [multinational corporations]. This desire, compounded in many instances by the relative weakness of host States compared to the larger and more experienced MNCs, means that injured citizens of these host States are left without any legal recourse [in their country] [...].[34]

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[32] Arango, *supra* note 29; Catherine Solyom, "Conflicts surrounding Canadian mines 'a serious problem'", *The Gazette* (18 December 2012), online: <www.montrealgazette.com/news/Conflicts+surrounding+Canadian+mines+serious+problem/7711072/story.html>; Christopher Siess, "Canadian-Owned Mines Under Siege By Protesters", *Business in Canada* (6 June 2013), online: <https://businessincanada.com/2013/06/06/canadian-owned-mines-protest-kumtor-escobal-eldorad/>;"'On the Road for Justice': Speaking Tour to Bring Attention to Guatemala Mining Conflict, Need for Remedy in Canada", *MiningWatch Canada* (12 March 2014), online: <www.miningwatch.ca/news/road-justice-speaking-tour-bring-attention-guatemala-mining-conflict-need-remedy-canada>.

[33] Seck, *supra* note 17 at 141.

[34] Menno T Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law: An Introduction* (The Hague, The Netherlands: Kluwer Law International, 2000) at 2. See also Chika B Onwuekwe, "Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence: A Developing Country's Nightmare" (2006) 7:1 The J of World Investment & Trade 113 at 115.

Canadian responses to these challenges have not produced any accountability regime that will address issues of human and environmental rights abuses incriminating Canadian corporations in developing countries. They have instead consisted largely of public statements describing Canada's commitment to corporate social responsibility and international human rights standards. A statement issued by Canada's Foreign Minister in 1997 articulating Canada's trade policy as one of respect for human rights is still typical:

> Trade on its own does not promote democratization or greater respect for human rights. But it does open doors. It creates a relationship, within which we can begin to speak about human rights. In addition, as countries open up to foreign trade and investment, they come under increasing pressure to respect the rule of law – and they see more and more reasons why it is in their own interests to do so. The key issue here is not a crude choice between trade or human rights, but rather a need for responsible trade.[35]

Between 2004 and 2005, following allegations of human and environmental rights abuses implicating Canadian mining corporations operating overseas, the House of Commons Sub-Committee on Human Rights and International Development held numerous hearings to ascertain the veracity of the allegations. The hearings revealed that the activities of Canadian miners overseas had had serious adverse effects on local communities. The Sub-Committee made a number of recommendations to the Canadian Government, including the creation of incentives to encourage Canadian mining firms to act responsibly, the development of mechanisms for monitoring their activities, and the creation of legal norms in Canada to ensure that erring corporations were held accountable in Canada.[36] In its response, the Canadian government acknowledged the importance of the

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[35] Notes for An Address by the Honourable Lloyd Axworthy to the International Conference on Universal Rights and Human Values "A Blueprint for Peace, Justice and Freedom," (27 November 1998) cited in Craig Forcese et al, "Backgrounder: Options Available to the Government of Canada in Responding to Canadian Corporate Complicity with Human Rights Abuses" (2 January 2000) at 6, online: Canadian Lawyers Association for International Human Rights, University of Ottawa's Faculty of Law <aix1.uottawa.ca/~cforcese/other/complicity.pdf>.

[36] House of Commons, Standing Committee on Foreign Affairs and International Trade, Mining in Developing Countries – Corporate Social Responsibility (Presented to the House as Report 14 of the Standing Committee) (June 2005) (Chair: Bernard Patry), online: Parliament of Canada <www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1961949&Language=E&Mode=1&Parl=38&Ses=1>.

recommendations in enhancing governmental capacity to ensure that Canadian corporations operate responsibly abroad, but declined to accept those recommendations because of what it called "practical policy challenges in translating ... [them] into practice."[37] These policy challenges were outlined as: the under-developed nature of the international architecture of corporate social responsibility, the lack of consensus about what constitutes corporate social responsibility, the conflict between international accountability mechanisms and the primary responsibility of host countries to regulate corporations operating within their territory, and the fact that Canada has "few mechanisms" with which to influence its corporations operating overseas.[38] The government expressed preference for working with "stakeholders" and "like-minded countries" to develop corporate social responsibility best practices.[39] Even that has not yet been pursued vigorously by the government. However, it must be noted that in 2009, the government published "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector"[40] as a roadmap for the implementation of CSR in the Canadian extractive sector. Among other things, the Strategy called for the creation of the Office of the Extractive Sector Corporate Social Responsibility Counsellor as a mechanism to help investors resolve CSR disputes in a timely and transparent manner to avoid project delays and manage conflicts.[41] The Office, which was established in Toronto in 2009, began work in March 2010 and has since developed a Review Process and undertaken initiatives to provide advice on CSR implementation to stakeholders.[42] The implementation of the CSR Strategy is a continuing process.

More recently, Canada has changed its foreign aid policy, placing great emphasis on partnerships with Canadian extractive companies in

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[37] Canada, Department of Foreign Affairs and International Trade, Mining in Developing Countries – Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade (Government of Canada: Department of Foreign Affairs and International Trade, October 2005) at 2, online: Mining Watch Canada <www.miningwatch.ca/sites/www.miningwatch.ca/files/SCFAIT_Response_en_0.pdf>.

[38] *Ibid* at 2-3.

[39] *Ibid* at 3.

[40] *Supra* note 10.

[41] *Ibid.*

[42] Lloyd Lipsett, Michelle Hohn & Ian Thomson, "Recommendation of the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries: Current Actions, Stakeholder Opinions and Emerging Issues" (January 2012), at 2, 19, online: On Common Ground <oncommonground.ca/wp-content/uploads/2012/07/Final-MAC-Roundtables-Report-_December-21-2011_-_3_5.pdf>.

developing countries, with the goal of enhancing the development impact of the operations of Canadian companies in those countries.[43] Before the Canadian International Development Agency (CIDA) was merged with the Foreign Affairs, Trade and Development Canada, CIDA created the Canadian International Institute for Extractive Industries and Development. The aim of the institute is to "help resource-rich developing countries make better use of and derive more benefit from their extractive sectors in order to reduce poverty and stimulate sustainable economic growth".[44] The institute, located at the University of British Columbia and managed collaboratively by the University, Simon Fraser University and Ecole Polytechnique de Montreal, works in three areas: natural resource governance, environmental protection, and economic development and diversification.[45] In May 2013, CIDA contributed $24.6 million to the project.[46] The project is still at its takeoff stage and relevant experts to run the institute are being recruited.

An attempt to enact CSR legislation was defeated in the federal Parliament in 2010 following intense industry lobbying. The bill – Bill C-300: *An Act Respecting Corporate Accountability for Mining, Oil or Gas Corporations in Developing Countries*[47] – introduced by Liberal Parliamentarian John McKay on 9 February 2009, was intended to ensure that Canadian corporations operating overseas in the mining, oil and gas sectors and receiving Canadian governmental assistance operate according to "international environmental best practices" and "international human rights standards" to which Canada has committed.[48] The bill proposed standards for Canadian extractive firms operating in developing countries, provided a complaints mechanism for alleged violation of the standards, and proposed that Canadian government

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[43] Canada, Foreign Affairs, Trade and Development Canada, *Canada promotes private-sector-led development to help the world's most vulnerable people* (Government of Canada: Foreign Affairs, Trade and Development, 11 June 2013), online: Government of Canada <www.international.gc.ca/media/dev/news-communiques/2013/06/11a.aspx?lang=eng>.

[44] Canada, Foreign Affairs, Trade and Development Canada, *Project profile: Creating the Canadian International Institute for Extractive Industries and Development* (Government of Canada: Foreign Affairs, Trade and Development Canada), online: Government of Canada <www.acdi-cida.gc.ca/cidaweb%5Ccpo.nsf/projEn/S065811001>.

[45] *Ibid.*

[46] Canadian International Institute for Extractive Industries and Development, "Funding Structure", online: Canadian International Institute for Extractive Industries and Development <www.ciieid.org/about/funding-structure/>.

[47] Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Sess, 40th Parl, 2009, online: Parliament of Canada <www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4/t_blank> (last accessed 24 January 2011).

[48] *Ibid*, s 3.

financing and diplomatic support shall be contingent on the firms' compliance with the proposed standards. Unfortunately, following fierce and relentless industry lobbying, this private member's bill, which gained widespread civil society support,[49] was defeated on 27 October 2010. In March 2014, a similar bill, titled Bill C-584, was introduced by New Democrat Ève Péclet.[50] The major difference between this bill, which is currently undergoing Second Reading, and Bill C-300 is that it seeks to create the Office of the Ombudsman with responsibility for developing guidelines on best practices for extractive companies[51] and requires Canadian corporations to report to it on their extractive activities.[52] Under Bill C-300, this responsibility was placed on the Ministers of Foreign Affairs and International Trade and the duty of corporations to report their activities was not provided under Bill C-300.

On 1 April 2009 another attempt was made to enact accountability legislation through the introduction of Bill C-354 – *An Act to Amend the Federal Courts Act* (international promotion and protection of human rights)[53] – by long-standing Parliamentarian Peter Julian. This bill would give Canadian federal courts international jurisdiction similar to what is given by the US *Alien Tort Statute*. The bill's aim is to amend the *Federal Courts Act* to "expressly permit persons who are not Canadian citizens to initiate tort claims based on violations of international law or treaties to which Canada is a party

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[49] See e.g. Canadian Network on Corporate Accountability (CNCA), "Canada Must Guarantee Ethical Mining Practices with Bill C-300, says Panel of Experts" (19 October 2010), online: Canadian Network on Corporate Accountability (CNCA) <cnca-rcrce.ca/canada-must-guarantee-ethical-mining-practices-with-bill-c-300-says-panel-of-experts/>. The CNCA consists of a coalition of 21 civil society groups interested in the impact of the operations of Canadian extractive companies abroad, *Ibid.* During the pendency of the Bill, it encouraged Members of the Canadian Parliament "to vote in favour of the Bill C-300", *Ibid.* See also MiningWatch Canada, "Urgent Action: Support Legislation to Impose Standards on Canadian Government Support for Mining Companies Operating Internationally" (1 July 2010), online: MiningWatch Canada <www.miningwatch.ca/en/urgent-action-support-legislation-hold-canadian-mining-companies-account-abuses-overseas>.

[50] Bill C-584, An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries, 2nd Sess, 41st Parl, 2013-2014, online: Parliament of Canada <www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6497386&File=4&Col=1>.

[51] *Ibid*, ss 4-7.

[52] *Ibid*, s 9.

[53] Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 40th Parl, 2009, online: Parliament of Canada <www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3796994>. Records show that this bill had first been introduced in 2007, but appears not to have garnered wide publicity.

if the acts alleged occur outside Canada."[54] The claims to which the bill applies include genocide, slavery, extrajudicial killing, torture, war crimes and crimes against humanity, sexual violations, transboundary pollution, and violations "of any of the fundamental conventions of the International Labour Organization".[55] During the introduction of the bill, Mr Peter Julian stressed the following:

> The bill would ensure corporate accountability for Canadian firms operating abroad. It would broaden the mandate of the federal court so that it protects foreign citizens against rights violations committed by corporations operating outside of Canada. This bill would hold violators accountable for gross human rights abuses, regardless of where they take place, and it would allow lawsuits in Canada for a host of universal human rights violations.[56]

Despite its age, this bill has not gone past First Reading. Given this lack of progress and the defeat of Bill C-300, victims of human rights abuses by Canadian corporations continue to turn to Canadian courts for redress, relying on existing common law causes of action. As noted in the introduction, only the latest of those cases has survived pre-trial challenges. It is to that case that the rest of this essay now turns.

III. *HUDBAY*

a. Factual Background

The plaintiffs were members of an indigenous Mayans Qe'qchi' group in Guatemala.[57] They brought three related actions against Hudbay Minerals Inc – a Canadian mining company with its headquarters in Toronto – and two of its subsidiaries: HMI Nickel Inc (HMI) and Compañia Guatemalteca De Níquel (CGN).[58] The three actions concerned the Fenix mining project in eastern Guatemala, which featured a nickel mine and smelting operation and occupied a large swath of land in Guatemala. The first

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[54] *Ibid*, see bill's "Summary".
[55] *Ibid*, s 25(2).
[56] *House of Commons Debates*, 40th Parl, 2nd Sess, Vol 144, No 038 (1 April 2009) at 2269 (Peter Julian), online: Parliament of Canada <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3795918&Language=E&Mode=1>.
[57] *Hudbay*, *supra* note 6 at para 4.
[58] *Ibid* at paras 4, 8-10.

action – *Margarita Caal Caal v Hudbay* (the *Caal* action) – was brought by 11 women against Hudbay Minerals and HMI.[59] These women claimed that on 17 January, 2007, they women were victims of gang-rape by security personnel, police and the military when they were forcefully removed from their village at the request of Skye Resources (a company subsequently acquired by Hudbay) to pave way for the Fenix project.[60] The second action – *Angelica Choc v Hudbay Minerals Inc.* (the *Choc* action) – was brought against HMI Nickel and CGN for the beating and shooting death of Adolfo Ich, a respected community leader and critic of the practices of mining companies.[61] The plaintiffs allege that he was "beaten and shot" by CGN's security personnel on 27 September 2009.[62] The last action – *German Chub Choc v Hudbay Minerals Inc.* (the *Chub* action) – was brought against Hudbay and CGN.[63] The plaintiff alleged that he was paralyzed as a result of a gunshot fired at his chest by security personnel employed by Hudbay at the Fenix project during a disagreement over his land.[64]

Hudbay owned the Fenix mining project through its wholly-controlled and 98.2 per cent-owned subsidiary CGN.[65] HMI was a former Canadian mining company previously named Skye Resources Inc. During the period material to the *Caal* action, Skye owned and operated the Fenix project. However, since the actions were filed, HMI merged with Hudbay and became known as Hudbay.[66] As a result, Hudbay became legally responsible for the liabilities of Skye Resources.[67] Although in 2011 Hudbay sold CGN and the Fenix project, the purchase agreement showed that it agreed to remain responsible for any litigation against CGN in connection with the September 27, 2009 incidents, regardless of where the litigation takes place. CGN on the other hand agreed to cooperate with Hudbay in the conduct of any such litigation, including making records and employees available to Hudbay to enable Hudbay conduct the litigation.[68] The plaintiffs sought damages against the defendants.

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[59] *Ibid* at para 5.
[60] *Ibid.*
[61] *Ibid* at para 6.
[62] *Ibid.*
[63] *Ibid* at para 7.
[64] *Ibid.*
[65] *Ibid* at para 10.
[66] *Ibid* at para 9.
[67] *Ibid.*
[68] *Ibid* at para 10.

The defendants filed three preliminary motions in relation to the three actions: (1) a motion to strike out the three actions pursuant to Rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*[69] for failure to disclose a reasonable cause of action; (2) "a motion to strike the amended Statement of Claim in the *Caal* action" on grounds of statute-bar; and (3) in the event that the motion to strike is upheld in favour of Hudbay and HMT, a motion challenging the jurisdiction of the court over CGN (because CGN believed that jurisdiction on matters relating to them was predicated on jurisdiction over Hudbay; therefore, if the case against Hudbay was dismissed, there would be no jurisdictional basis to proceed against CGN).[70]

b. The Decision

1. Failure to Disclose a Reasonable Cause of Action

As noted, the defendants' motion to strike the plaintiffs' pleading for failure to disclose a reasonable cause of action was predicated on Rule 21.01(1)(b) of the Ontario *Rules*. If it is "plain and obvious" that the plaintiff's version of the story discloses no reasonable cause of action, the common law interpretation of the rule dictates that the plaintiffs' version of the story as stated in the Statement of Claim should be struck out.[71] A claim discloses no reasonable cause of action if it has no chance of success, i.e., if the facts, even if ultimately proven or admitted by the defendant, are not sufficient to grant the plaintiff the relief sought. But the mere fact that the cause of action is "novel" is not a ground for striking it out.[72] Neither is the mere fact that the cause of action presents difficult questions or issues of great complexity.[73] Nor is the fact that it would result in a protracted trial.[74] Before the court can strike, the action must be demonstrated to be "certain to fail" because it contains a fundamental and incurable defect.[75] Otherwise, the plaintiff must

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[69] RRO 1990, Reg 194, r 21.01(1)(b).

[70] Hudbay, *supra* note 6 at para 1.

[71] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 979-980, 49 BCLR(2d) 273. See also *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 15, [2003] 3 SCR 263 (noting that "[t]he test is a stringent one" at para 15); *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paras 4, 20, [2011] 2 SCR 261; *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at para 31, [2013] 3 SCR 545.

[72] *Ibid* at 980.

[73] *Ibid.*

[74] *Ibid.*

[75] *Hudbay*, *supra* note 6 at 41.

be given an opportunity to prove their case and the defendant to establish their defence. The test for striking out is thus applied stringently.

The defendants canvassed two arguments to establish that the statements of claim disclosed no reasonable cause of action, the first based on the doctrine of piercing the corporate veil and the second based on the non-existence of a duty of care.

a) Piercing the Corporate Veil

The doctrine of piercing corporate legal personality has been recognized since the English decision of *Salomon v Salomon*, where the court established that a corporation is distinct from its shareholders and cannot be held accountable for their conduct.[76] Although the principle extends to the relationship between parent corporations and their subsidiaries, there are circumstances when it may be disregarded, permitting the court to "pierce the corporate veil" and view a corporation as "a mere 'agent' or 'puppet' of its controlling shareholder or parent corporation".[77] In *Gregorio v Intrans-Corp*,[78] the Ontario Court of Appeal stated that:

> Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights [...].[79]

It follows that there are circumstances in which the corporate veil of a corporation may be disregarded. The Court in *Kosmopoulos* confirmed this, as it stated that the law as to when the corporate veil may be disregarded "follows no consistent principle".[80] However, in Ontario, there are at least three circumstances where the corporate veil may be lifted. They include: (a) where the corporation is "completely dominated and controlled" by another entity and is merely being used as a "shield" or "façade" to conceal the true facts; (b) where the corporation has acted as "an authorized agent of its

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[76] *Salomon v Salomon & Co, Ltd*, [1897] AC 22, 13 TLR 46.

[77] *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2 at 10, 1987 CanLII 75 [*Kosmopoulos*].

[78] *Gregorio v Intrans-Corp*, 18 OR (3d) 527, 1994 CanLII 2241 (Ont CA).

[79] *Ibid* at 536. See also *Aluminum Company of Canada Ltd v City of Toronto*, [1944] SCR 267, 1944 CanLII 6.

[80] *Kosmopoulos supra* note 77 at 10. See also *Sun Sudan Oil Co v Methanex Corp*, [1993] 2 WWR 154 at para 31, 1992 CanLII 6194 (Alta QB).

controllers or its members", whether corporate or human; and (c) where a "statute, contract or other document" is being construed.[81] The plaintiff does not need to show the existence of these three circumstances; one will suffice. The element of complete domination or control "requires more than ownership",[82] meaning that that the subsidiary is a wholly-owned subsidiary is not enough. It must be shown that the subsidiary "does not, in fact, function independently".[83]

Accordingly, the mere fact that Hudbay used its subsidiaries to commit the alleged acts is not enough to justify lifting the veil. It must be shown that Hudbay used its subsidiaries to commit the acts in order to hide the commission of the acts.

To the defendants, the plaintiffs' claim was an attempt to impermissibly pierce the corporate veil of Hudbay and its subsidiaries. However, in the *Choc* action, the court found that the plaintiffs pleaded the complete domination and control of CGN by Hudbay, but did not plead that that complete domination and control was intended to shield Hudbay from liability.[84] It follows that the plaintiffs did not make out this exception. But the court also found that the plaintiff pleaded that CGN acted as an agent of Hudbay, which satisfied the second exception to the piercing the veil doctrine.[85] At this stage, it was not permissible for the court to inquire into the plaintiffs' ability to prove the agency relationship, as long as the claim was not "patently ridiculous or incapable of proof".[86] The court consequently dismissed the defendants' challenge in the *Choc* case. In all three actions (*i.e.*, the *Caal*, *Chub*, and *Choc* actions), the court found that the plaintiffs relied on the direct liability theory rather than vicarious liability based on parent-subsidiary relationship, making it impossible for the defendants' piercing the veil challenge to succeed.[87] Again, whether or not the plaintiffs would be able to make out a direct liability case does not matter, provided it was not plain and obvious that the claim was incapable of proof.

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[81] *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423 at 433-434, 1996 CanLII 7979 (Ont Gen Div) [*Transamerica*]; *Parkland Plumbing & Heating Ltd v Minaki Lodge Resort* 2002 Inc, 2009 ONCA 256 (CanLII) at para 51. See also *642947 Ontario Ltd v Fleischer*, 56 OR (3d) 417 at para 68, 2001 CanLII 8623.

[82] *Transamerica*, *supra* note 81 at 434.

[83] *Ibid.*

[84] *Hudbay*, *supra* note 6 at paras 47-48.

[85] *Ibid* at para 49.

[86] *Ibid.*

[87] *Ibid* at paras 50-75.

A parallel may be drawn with *United Canadian Malt Ltd v Outboard Marine Corp*,[88] an action arising from contamination that migrated from property belonging to a Canadian subsidiary of a US corporation onto the plaintiff's property.[89] The Ontario Superior Court of Justice held that the plaintiff established an arguable case sufficient to dismiss a no-reasonable-cause-of-action challenge.[90] This holding was based on the following pleadings: the US parent corporation effectively controlled its Canadian subsidiary; it "'managed, directed and controlled' the closure and clean-up of the property"; it had in other contexts claimed responsibility for the contamination; "the Canadian subsidiary had no authority to deal with the problem"; "all decisions regarding... the [contamination were] made by the ...[US] parent alone"; and the US parent had, after the discovery of the contamination, taken all assets "out of the Canadian subsidiary" such that the plaintiff would be deprived of any real remedy from the Canadian subsidiary.[91] The court held that it was not plain and obvious from these facts that the plaintiff's action would ultimately fail.[92]

b) Duty of Care

The question the court addressed here is: Was it plain and obvious that Hudbay did not owe any duty of care to the plaintiffs with regard to the activities of its foreign subsidiaries? The plaintiffs' case was not that Hudbay was directly responsible for the actions of its subsidiaries' security personnel, but that Hudbay was liable in negligence for failing to prevent the commission of the acts. In other words, that it was Hudbay's negligent failure to supervise the actions of its foreign subsidiaries that led to the commission of the acts against the plaintiffs by its subsidiaries' security personnel.

For the plaintiffs to overcome the no-reasonable-cause-of-action challenge on this issue, they needed to show that they had pleaded all the constituent elements of a duty of care against Hudbay, independent of any vicarious liability claims against it based on the negligence of its subsidiaries. And unless the defendants showed that it was not possible for Hudbay to owe the plaintiffs a duty of care in the overall context of the case, the no-

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[88] *United Canadian malt Ltd v Outboard Marine Corp* (2000), 48 OR (3d) 352, 2000 CanLII 22365 (Ont Sup Ct J).
[89] *Ibid* at para 2.
[90] *Ibid* at para 24.
[91] *Ibid* at paras 22-23.
[92] *Ibid* at para 24.

reasonable-cause-of-action challenge must fail and the case would proceed. Thus in *Haskett v Equifax Canada Inc*,[93] the Ontario Court of Appeal stated as follows:

> On a Rule 21 motion, the court applies ... [the test for duty of care] to the facts as pleaded in the Statement of Claim in order to determine not whether a duty of care will be recognized, but whether it is plain and obvious that no duty of care can be recognized. If it is not plain and obvious then the action can proceed and the issue will be determined at a trial.[94]

The duty of care principle in England was once governed by the *Anns* test developed by the English House of Lords in 1978[95,] but this was later abandoned by that court.[96] However, this test is still good law in Canada.[97] Lord Wilberforce stated the test as follows:

> Through the trilogy of cases in this House –*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and Dorset Yacht Co. Ltd. v. *Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the

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[93] *Haskett v Equifax Canada Inc* (2003), 63 OR (3d) 577, 2003 CanLII 32896 (Ont CA) [*Haskett* cited to OR].

[94] *Ibid* at para 24.

[95] *Anns v Merton London Borough Council* (1977), [1978] AC 728 at 751-752, [1977] 2 All ER 492 (HL Eng) [*Anns*].

[96] See *Murphy v Brentwood District Council* (1990), [1991] 1 AC 398, [1990] 2 All ER 908 (HL Eng) (Adopting a more category-based reasoning).

[97] See *Kamloops (City of) v Nielsen* (1984), [1984] 2 SCR 2, 10 DLR (4th) 641; *Cooper v Hobart*, 2001 SCC 79 at para 30, [2001] 3 SCR 537 [*Cooper*]; *Edwards v Law Society of Upper Canada*, 2001 SCC 80 at paras 8-10, [2001] 3 SCR 562; *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 46, [2003] 3 SCR 263.

> scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise [citation omitted].[98]

The *Anns* test thus has two parts. In the first part, a *prima facie* duty of care arises where the plaintiff establishes foreseeability and proximity between the defendant's conduct and the plaintiff's harm. The court determines foreseeability and proximity separately. The second stage of the test considers "whether there are residual policy considerations outside the relationship of the Parties that may negative the imposition of a duty of care."[99]

The Supreme Court of Canada has held that once a duty of care is recognized for a category of cases, it becomes an established duty of care. Where a case does not fall into a category of cases where a duty of care has been previously recognized, the court considers whether the case before it presents a situation in which the boundaries of negligence liability should be extended by recognition of a new duty of care.[100] This exercise is also done applying the *Anns* test.[101] The *Hudbay* plaintiffs did not argue that there was an established duty of care that applied to the situation. The court therefore had to look for the existence of a novel duty of care.

(i) Foreseeability

In ascertaining whether the resulting harm was a reasonably foreseeable outcome of the defendant's conduct, the court "focuses on factors arising from the relationship between the plaintiff and the defendant."[102] The defendant's negligence is therefore considered only in relation to the plaintiff and the type of harm complained of. However, what is required is that "the general harm, not 'its manner of incidence', be reasonably foreseeable."[103] It suffices if one could "foresee in a general way the sort of thing that happened."[104] The "extent" and "manner of incidence" do not need to be foreseeable, as long as the "kind" of resulting damage was foreseeable.[105]

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[98] *Anns*, *supra* note 95.
[99] *Cooper*, *supra* note 97 at para 30.
[100] *Ibid* at paras 39-42; See also *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 25, [2007] 3 SCR 129.
[101] *Ibid* at para 39.
[102] *Ibid* at para 30.
[103] *Bingley v Morrison Fuels*, 2009 ONCA 319 at para 24, 95 OR (3d) 191.
[104] *Assiniboine South School Division No 3 v Greater Winnipeg Gas Co* (1971), 21 DLR (3d) 608 at 614, 1 NR 34.
[105] *Ibid.*

Applying the above analysis to the *Hudbay* situation, the court found that the defendants in the *Caal* action were alleged to have controlled and directed the security personnel at the mine site.[106] The security personnel were alleged to have committed the acts of forcible eviction and rape.[107] The plaintiffs' pleadings showed that Hudbay/Skye knew:

> That violence was frequently used by security personnel during forced evictions; that violence had been used at previous forced evictions that ... [Hudbay/Skye] requested; that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms; and that, in general, there was a risk that violence and rape could occur.[108]

These pleadings, according to the court, made it "reasonably foreseeable that requesting the forced eviction of a community using hundreds of security personnel ... could lead to security personnel using violence, including raping the plaintiffs."[109]

With regard to the *Choc* and *Chub* actions, the court found that the defendants were alleged to have authorized "the use of force" in response to the community's peaceful opposition to their operations, and to have controlled and directed the security personnel who committed the alleged murder and paralyzed German Chub.[110] The particulars of foreseeability pleaded by the plaintiffs were similar to those pleaded in the *Caal* action, and include Hudbay's knowledge that:

> Tensions were high regarding the land conflict; that violence had been used at previous forced evictions that ... [Hudbay had] requested; that the Chief of Security may have committed serious criminal acts in the past; that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms; and that, in general, there was a risk that violence could occur.[111]

As in the *Caal* action, the court agreed that these pleadings made it "reasonably foreseeable to Hudbay ... that authorizing the use of force in response to peaceful opposition from the local community could lead to the

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[106] *Hudbay*, *supra* note 6 at para 60.
[107] *Ibid.*
[108] *Ibid* at para 63.
[109] *Ibid.*
[110] *Ibid* at para 61.
[111] *Ibid* at para 64.

security personnel committing [the alleged acts]".[112] Accordingly, the court ruled that the first requirement of the first part of the *Anns* test was met.[113]

(ii) Proximity

In addition to foreseeability, the relationship between the plaintiff and the defendant must be so proximate as to justify the imposition of a duty of care on the defendant. As La Forest J defined it in *Hercules Managements Ltd v Ernst & Young*[114], proximity "connote[s] that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs".[115] In defining this relationship, the court may consider the "expectations, representations, reliance, and the property or other interests involved" – factors which would enable the court to assess "the closeness of the relationship between the plaintiff and the defendant" and to ascertain whether in view of that relationship a duty of care ought to be imposed on the defendant.[116] The defendant's negligence is thus considered only in relation to the plaintiff and the type of harm complained of. Only persons within the range of risk of the harm complained of are owed a duty of care.

To establish proximity in *Hudbay*, the plaintiffs relied on the following pleadings. With respect to the *Caal* action: (a) Hudbay/Skye made numerous statements indicating that it wanted to engage local stakeholders to seek solutions to the "ongoing land conflict" between it and the local community that resulted in the alleged atrocities that were the subject of the action, and (b) Skye's CEO stated, on the day of the alleged harm, that Hudbay/Skye "did everything in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights".[117] With respect to the *Choc* and *Chub* actions: (a) Hudbay made numerous statements in which it recognized its relationship with local farmers located on land forming part of the mining project, and (b) Hudbay also issued numerous public declarations adopting the Voluntary Principles on Security and Human Rights "applicable to the use of private security forces" to protect

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[112] *Ibid.*

[113] *Ibid* at para 65.

[114] *Hercules Managements Ltd v Ernst & Young* (1997), [1997] 2 SCR 165, 1997 CanLII 345 [cited to SCR].

[115] *Ibid* at para 24.

[116] *Cooper*, *supra* note 97 at para 34.

[117] *Hudbay*, *supra* note 6 at para 67.

extractive resource projects, and that it had "extensively trained" its security personnel.[118] Further, in all the three actions: (a) Hudbay/Skye, through its executives and employees, were "directly in charge" of the day-to-day operations of the mining project, including relations with villagers and security matters, (b) Hudbay/Skye was directly in charge of land matters (which included eviction decisions), prepared corporate responses to land claims, and coordinated the company's relations with local farmers on the contested land, and (c) Hudbay/Skye had "direct responsibility and control" over the security personnel securing the mining project, and this included responsibility over the implementation and enforcement of "standards of conduct for security personnel, determining rules of engagement, determining procedures for protecting human rights, and determining the involvement of security forces in evictions".[119]

The court began by noting that the fact that the defendants made certain representations did not necessarily mean that they were actually doing them.[120] However, those representations created "expectations" on the part of the plaintiffs.[121] In addition, the defendants' interest in developing the mining project created a relationship between them and the local community located on the contested land.[122] The court concluded that a *prima facie* relationship of proximity could be founded on these, such that "it is not plain and obvious that no duty of care ... [could] be recognized".[123]

(iii) Policy Considerations

Canadian courts had recognized that the extension of the categories of negligence liability would implicate policy considerations well before *Anns* was decided.[124] But it was in *Anns* that policy considerations were for the first time explicitly recognized as a basis for extending the categories of negligence liability.[125] In *Haskett*, the Ontario Court of Appeal stated that "[a] court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage before there is a record on

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[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid* at para 68.
[121] *Ibid* at para 69.
[122] *Ibid.*
[123] *Ibid* at para 70.
[124] *Cooper*, *supra* note 97 at para 25.
[125] *Anns*, *supra* note 95 at 743.

which a court can analyze the strengths and weaknesses of the policy arguments".[126]

The *Hudbay* plaintiffs must convince the court that negligence law should be extended to recognize a duty of care on the part of a Canadian parent corporation towards persons harmed by security personnel of the company's foreign subsidiaries when the parent company directly controls the operations of the subsidiaries, because the relationship between the parent company and the persons harmed in such a case justifies the imposition of a duty of care.

To the plaintiffs, recognizing a duty of care in the present circumstances would be consistent with Canada's efforts to encourage Canadian corporations to meet "high standards of corporate social responsibility".[127] It would also support Canada's stated goal of reducing the risk of the use of force by private security personnel protecting Canadian businesses abroad that has often resulted in human rights abuses of local populations.[128] Lastly, it would bring tort law in step with the ever-evolving process of globalization and would reduce the incidence of corporate impunity by providing a forum where local communities harmed by Canadian corporate actors abroad can seek redress so that the costs of those harms can be borne by those who cause them or benefit from them.[129]

On the contrary, the defendants believed that policy considerations militated against recognizing a duty of care. Those policy considerations included the defeat of Bill C-300[130] (intended to promote the corporate social responsibility of Canadian extractive companies abroad) and the lack of progress that has bedeviled Bill C-354[131] which was, as mentioned, intended to grant jurisdiction to the Federal Court of Canada to hear claims of environmental and human rights abuses committed outside Canada.

The defendants also argued that recognizing a duty of care would expose Canadian corporations with foreign subsidiaries to an avalanche of litigation in Canadian courts, some of which would likely lack any merit,

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[126] *Haskett*, *supra* note 93 at para 52.
[127] *Hudbay*, *supra* note 6 at para 73.
[128] *Ibid.*
[129] *Ibid.* The plaintiffs cited an opinion of Ian Binnie, former Justice of the Supreme Court of Canada, famous for his support of international justice: "Ordinary tort doctrine would call for the losses to be allocated to the ultimate cost of the products and borne by the consumers who benefit from them, not disproportionately by the farmers and peasants of the Third World", *Ibid.*
[130] *Ibid* at para 72.
[131] *Ibid.*

which would thereby overburden Canada's justice system.[132] They also pointed to Canada's efforts to engage Canadian mining companies to implement corporate social responsibility principles.[133] Lastly, they argued that recognizing a duty of care would offend the age-long principle of the "separate corporate personality".[134]

The court dexterously observed that the existence of competing policy considerations rendered it un-plain and un-obvious that this second stage of the *Anns* test would fail at trial.[135] Citing the Ontario Court of Appeal's admonition in *Haskett* enjoining courts to be reluctant in relying on policy considerations to dismiss claims for disclosing no reasonable cause of action "at the motion stage",[136] the court ruled that it was "not plain and obvious that policy reasons would negative or otherwise restrict a *prima facie* duty of care" under the circumstances in question.[137] Accordingly, it struck out the defendants' motion to dismiss for failure to disclose a reasonable cause of action.

While the court was not permitted at this stage to go into a merits consideration of the policy issues raised by the defendants, a consideration of the potential viability of those issues is in order. The defendant's reference to the defeat of Bill C-300 and the lack of progress of Bill C-354 may be suggestive of Parliament's preferred method of dealing with the problem. However, Bill C-300 was defeated by a mere six votes (specifically, the tally was 140-134).[138] This demonstrates a clear division within Parliamentary ranks regarding what kind of corporate accountability measures Canada should adopt. Such a division cannot be taken as a rejection of judicial approaches to corporate responsibility in the extractive sector. In addition, Bill C-354's lack of progress alone cannot be construed as an indication of government's opposition to the use of judicial action. The Bill is a private member's bill sponsored by a member of the Opposition. From a political perspective, it cannot be expected that it would be eagerly embraced by the majority given the divide in political ideology between the majority Party and the Opposition. But it is informative that the majority has not tabled any

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[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid* at para 74.
[136] *Haskett*, *supra* note 93 at para 52; *Hudbay*, *supra* note 6 at para 74.
[137] *Hudbay*, *supra* note 6 at para 74.
[138] Richard Janda, "Note: An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries (Bill C-300): Anatomy of a Failed Initiative" (2010) 6:2 JSDLP 97 at 97.

alternative bill despite its unequivocal acknowledgment of the danger that Canadian extractive companies pose to local communities in developing countries. A better view is to regard the lack of progress of the bill as a symbol of the Parliamentary dilemma regarding the best approach to ensure that Canadian corporations operate responsibly abroad. This is reflected in the government's refusal to adopt the recommendations of the Parliamentary Sub-Committee on Human Rights and International Development.[139] Such a dilemma cannot be regarded as a bar to judicial intervention.

The defendants might argue that the determination of how best Canada should respond to the impacts of the activities of its corporations abroad lies with Parliament and not the courts, especially in light of the potential economic and international relations impacts of any proposed response. However, it cannot be correctly said that such a determination is the *sole* responsibility of Parliament. Canadian courts would be abdicating their duty of maintenance of order and the rule of law if they sit idly by waiting endlessly for Parliament to act on a problem whose egregiousness has been acknowledged by all Canadians, including the very parliamentary institution that is expected to take the lead in addressing. In *BCGEU v British Columbia (Attorney General)*, the Supreme Court of Canada emphasized, albeit in a different context, that "[t]here cannot be a rule of law without access [to the courts], otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice".[140] Although this statement relates to access to courts, which in a technical sense is different from the provision of legal remedies, the manner and context in which the defendants canvassed the duty of care transmutes it to an access to court issue. Canadian courts must continue to apply existing legal doctrines to, as far as possible within the confines of existing law, grant reliefs to persons harmed by the activities of Canadian corporations abroad.

In fact, the need for Canada to open its courts to foreign victims of human and environmental rights abuses committed by Canadian corporations abroad has been openly advocated by a number of distinguished Canadians in the judicial echelon. Speaking extra-judicially, former Justice of the Supreme Court of Canada Ian Binnie has repeatedly called for the replication of the US *Alien Tort Statute*[141] in Canada.[142] The eminent jurist

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[139] See *supra* note 36.

[140] *B.C.G.E.U. v British Columbia (Attorney General)* (1988), [1988] 2 SCR 214 at 230, 1988 CanLII 3.

[141] *Alien's action for tort*, *supra* note 1.

believed that this would be consistent with Canada's international human rights treaty obligations.[143] He regarded the US statute as "a very effective mechanism" and opined that "if that legislation were replicated in more countries, there would be more avenues whereby companies could clear their names of allegations made against them, or complainants could obtain redress, depending on what the evidence shows."[144] He warned that he does not suggest that the charges against corporations are "in fact well-founded," but that they point to the need for a forum in which they can be addressed, and should not be viewed as a "dissatisfied local population squared off against a foreign company with no means of introducing a legal structure to look after the fall-out."[145] A member of the International Commission of Jurists (ICJ), Binnie stated that the ICJ would like to see "a network of domestic courts where these disputes can be resolved."[146] In addition, while dismissing the plaintiff's claims in *Anvil*, the Quebec Court of Appeal found that Quebec lacked jurisdiction over the case and noted with regret that "citizens face such difficulties in obtaining justice."[147]

The defendant also raised the issue that recognizing a duty of care in a case like this would result in an avalanche of lawsuits against Canadian corporations in Canadian courts, which would in turn lead to congestion of the Canadian judicial system.[148] This argument, with respect, does not hold water. In the US where hundreds of US corporations have been the subject of similar litigation, there is no evidence that such lawsuits have posed any severe burden on US courts warranting dismissal of such cases.

The *Hudbay* defendant's further argument that recognizing a duty of care would go against the principle of the corporate separate legal personality disregarded the fact that there are recognized exceptions to that principle which are open-ended in nature.[149] On the whole, Canada's apparent

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[142] Cristin Schmitz, "Binnie calls for corporate accountability", *The Lawyers Weekly* (29 August 2008), online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=745>.

[143] *Ibid.*

[144] *Ibid.*

[145] *Ibid.*

[146] *Ibid.*

[147] *Anvil*, *supra* note 5 at para 104.

[148] *Hudbay*, *supra* note 6 at para 72.

[149] However, it must be pointed out that the courts have refused to lift the veil where the individual plaintiff had an insurable interest in the assets of the company he had chosen to incorporate, see *Kosmopoulos*, *supra* note 77 at 11-12. In *BG Preeco I (Pacific Coast) Ltd v Bon Street Developments Ltd* (1989), 37 BCLR (2d) 258 at 269, 1989 CanLII 230 (BC CA), the British Columbia Court of Appeal stated that "[t]he use of a company as a means of avoiding bearing business losses ... [was not] a basis for lifting the veil." And in *Sun Sudan Oil Co v Methanex Corp* (1992), [1993] 2 WWR 154 at para 52, 1992 CanLII 6194,

orientation towards the use of soft law to address the problem may well be motivated by the unsettled state of the legal norms for corporate accountability rather than any opposition to the use of the courts to promote corporate accountability.[150]

2. Statute of Limitation

The defendants sought to have one of the actions – the *Caal* action – dismissed "on the basis that it is statute-barred"[151], having been brought after the two-year limitation period established under section 4 of the *Limitations Act* of Ontario.[152] The events that gave rise to the *Caal* action occurred on 17 January 2007 whereas the plaintiff commenced the action on 28 March 2011[153] – more than two years after the two-year limitation period expired.

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the Alberta Court of Queen's Bench stated that where "the parties to this agreement used subsidiary companies for legitimate business reasons, which could include shielding of the parent from liability for the debts of the subsidiary", this would not justify lifting the veil. These cases, however, raise different policy considerations than those confronting the court in *Hudbay*, a case dealing with egregious human rights violations at a time when the developed countries' corporations are being universally urged to do more to protect poor citizens of developing countries from the activities of their subsidiaries in developing countries where regulatory standards are weak.

[150] Before the trial judge began her analysis of the duty of care principle, she referred to the Supreme Court of Canada decision in *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5, [2010] 1 SCR 132 [*Fullowka*], relied upon by the plaintiffs, which represented a case similar to *Hudbay*, *Hudbay*, *supra* note 6 at paras 51-52. But a reading of the two cases shows this representation to be erroneous in a way that cannot be considered insignificant. In *Fullowka*, following violence by a group of striking miners in Yellowknife, the owner of the mine hired a security outfit to protect its mine site. One of the striking employees planted an explosive device near the mine site operated by their employer, which killed nine miners, *Fullowka* at para 1. The surviving miners and another person "who came upon the carnage after the explosion" brought action against the mining company, the security outfit and the territorial government of Yellowknife, *Fullowka* at para 1. The suit was predicated on the negligent failure of the defendants to prevent the murders, *Fullowka* at para 1. The plaintiffs also claimed against the strikers' national union, "some union officials and members" of the employees' bargaining agent for failure to control the striking employee that planted the explosive "and for inciting him", *Fullowka* at para 1. The claims against the mining company, its chief executive officer and one of its directors were settled out of court, *Fullowka* at para 1. The issue before the Supreme Court was whether the security outfit and the territorial government of Yellowknife should be held liable in negligence "for failing to prevent the murders and whether the unions should be responsible, directly or vicariously, for the miners' deaths", *Fullowka* at para 1. The Court held that although the security firm and the territorial government owed a duty of care to the murdered miners, they did not breach that duty, *Fullowka* at para 2. The case is thus clearly distinguishable from *Hudbay*, in that even though both cases claimed negligent liability for failure to prevent wrongs committed by third parties, *Hudbay* concerned the negligence liability of a parent corporation for failure to prevent wrongs committed by employees of its subsidiaries. Had the claims against the mining company in *Fullowka* not been settled out of court, *Fullowka* would have provided a more apt analogy to *Hudbay*.

[151] *Hudbay*, *supra* note 6 at para 76.

[152] *Limitations Act, 2002*, SO 2002, c 24, Schedule B, s 4 [*Limitations Act*].

[153] *Hudbay*, *supra* note 6 at para 76.

However, the events that gave rise to the other two actions – the *Choc* and *Chub* actions – took place on 27 September 2009.[154] Therefore, these two actions were commenced eighteen months after the alleged incidents (*i.e.*, within time). However, section 10 of the *Limitations Act* provides an exception to the limitation period when claims are based on an assault or a sexual assault (which was pointed out in *Hudbay*[155]). The section provides:

> (1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.
>
> ...
>
> (3) Unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.[156]

The issue was whether the plaintiffs' claim against Hudbay in the Caal action was a claim based on sexual assault or not. The claim against Hudbay was that the security personnel employed by Hudbay committed acts of rape against the plaintiffs. The defendants argued that since the plaintiffs' claim was based on its alleged failure to supervise the employees and agents of its Guatemalan subsidiary, it was not a claim based on sexual assault (which would make section 10 inapplicable).[157] On the other hand, the plaintiffs argued that section 10 was "not intended to be limited to claims against the actual perpetrator" of the sexual assault, but encompassed claims against all those who participated, directly or indirectly, in the sexual assault.[158] They argued further that a Rule 21-based motion could not be used to dismiss a statement of claim on the basis of a statute of limitation without the defendant filing a Statement of Defence, since this would deny the plaintiffs an opportunity to furnish further facts to show that the claim is not statute-barred.[159]

The court resolved the issue based on the plaintiffs' first ground of defence (*i.e.*, that section 10 should be construed liberally to encompass claims against all participants, direct and indirect, in the sexual assault).[160]

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[154] *Ibid.*
[155] *Ibid* at para 77.
[156] *Limitations Act*, *supra* note 152, s 10.
[157] *Hubday*, *supra* note 6 at para 79.
[158] *Ibid* at 80.
[159] *Ibid* at para 81.
[160] *Ibid* at para 82.

This view is consistent with the definition of "claim" in the *Limitations Act*, as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".[161] This definition does not limit the application of the Act to the actual perpetrators of the harm that gave rise to the claim.

In *JP v Sinclair* – referred to by the court in *Hudbay*[162] – the plaintiff brought action for sexual assault against her teacher and the School District Board, alleging that the Board was vicariously liable for the teacher's action.[163] The Board raised the limitation of action defence. The British Columbia limitation statute had been amended in 1994 to remove the application of limitation periods to actions based on "misconduct of a sexual nature, ... where the misconduct occurred while the person was a minor, and ... whether or not the person's right to bring the action was at any time governed by a limitation period".[164] The plaintiff was born in 1964 and the alleged sexual assault occurred in 1978[165] when she was 14. Under the original provisions of the limitation statute, any cause of action she had would have expired in 1985 upon her attaining the age of 21.[166] On the expiration of the cause of action, her right would have been extinguished. However, the limitation statute was amended in 1994 to eliminate the limitation barrier for sexual assaults through the afore-cited provision. The plaintiff brought her action after this amendment.

The relevant issue for our consideration was whether the elimination of the limitation period applied only to the actual perpetrator of the sexual offence, or to all individuals whose actions contributed (directly or indirectly) to the commission of the offence. The District Board argued that the elimination of the limitation period should be construed narrowly to apply only to claims against the assaulter who committed the sexual misconduct "rather than broadly so as to include others", such as his employer, whose "acts or omissions" may have inadvertently played into his hands and contributed to the harm.[167] The Court affirmed the holding of the Chambers Judge[168] that the amendment "must be necessarily broad enough to allow a

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[161] *Supra* note 152 at s 1.

[162] *Hudbay*, *supra* note 6 at paras 80, 82.

[163] *JP v Sinclair* (1997), 37 BCLR (3d) 366 at para 2, 1997 CanLII 12500 (BC CA) [*Sinclair*].

[164] Bill 9, *Limitation Amendment Act, 1994*, 3rd Sess, 35th Parl, British Columbia, 1994, s 3, online: Legislative Assembly of British Columbia <leg.bc.ca/35th3rd/3rd_read/gov09-3.htm> [*Limitation Amendment Act*]; amendment is discussed in *Sinclair*, *supra* note 163 at paras 4, 6.

[165] *Sinclair*, *supra* note 163 at para 3.

[166] *Ibid.*

[167] *Ibid* at para 7.

[168] *Ibid* at para 9.

victim to seek compensation from all persons whose acts or omissions contributed directly or indirectly to the ... [sexual assault]."[169] Accordingly, the question was whether the plaintiff's claim against the defendants was based on sexual assault. The plaintiff alleged that the School Board negligently hired and failed to supervise an employee.[170] The School Board argued that these could not be regarded as sexual misconduct.[171] However, the court referred to the wording of the amendment which applies to "a cause of action based on misconduct of a sexual nature",[172] emphasizing that "the phrase 'based on' connotes something that serves as a foundation 'or starting point and a main or important ingredient'."[173] The court further stated that "[t]he sexual misconduct here is a main ingredient of the cause of action in negligence, in that no action would lie for negligent hiring or supervision without that component."[174]

The first part of this statement is somewhat inelegantly written when juxtaposed with the wording of the amendment, although the court's conclusion in the second part of the statement remains accurate. The amendment speaks of causes of action "based on sexual misconduct", i.e., actions that have "a main ingredient" of sexual misconduct – that is to say that no action would lie if sexual misconduct is not a main component thereof – and not actions of which sexual misconduct is a main ingredient, e.g., rape. The School Board's negligent hiring and supervision of its employer (the sexual assaulter) would thus be regarded as the foundation, and therefore a main ingredient, of the sexual misconduct – the circumstance that made the sexual misconduct possible.

Applying this to *Hudbay*, the provisions of section 10 of the Ontario *Limitations Act* (which eliminate the application of limitation statutes to claims "based on assault or sexual assault"[175]) are wide enough to include all participants in the act or omission that gave rise to the claim, including those who procured, counseled, aided or abetted the commission of the act or omission.

3. Jurisdiction

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[169] *Ibid* at para 7.
[170] *Ibid* at para 15.
[171] *Ibid* at paras 15-16.
[172] *Limitation Amendment Act*, *supra* note 164, s 3.
[173] *Sinclair*, *supra* note 163 at para 17 (per Newbury, JA, referring to the judgment of the trial judge).
[174] *Ibid.*
[175] *Limitations Act*, *supra* note 152, s 10.

Only CGN raised the jurisdictional issue. However, it predicated the issue on the success of the motion to strike the claims against Hudbay. It argued that its jurisdictional links with Ontario was based on its ties to Hudbay; therefore if the claims against Hudbay are dismissed, Ontario would lack jurisdiction over it since it has no real and substantial connection with Ontario. But if the motion to strike the claims against Hudbay failed, Ontario would have jurisdiction over it since it would be regarded as a necessary and proper party to the suit. Having dismissed the motion to strike, the court rightly regarded the jurisdictional question as moot.[176]

IV. THE POTENTIAL SIGIFICANCE OF *HUDBAY*

Hudbay is significant in at least three respects: (1) its jurisdictional use of the direct liability theory; (2) its attempt to enunciate a novel duty of care; and (3) good lawyering.

A. The Direct Liability Theory and its Jurisdictional Significance

Hudbay is significant for its reliance on the direct liability theory rather than on vicarious liability. The plaintiffs' pleading was unequivocal about Hudbay's direct participation in the abuses in Guatemala and supplied material facts that strongly, even if only *prima facie*, substantiated that allegation. Compared to *Hudbay's* predecessors, this is perhaps *Hudbay's* most distinguishing feature, for the second significance of the decision (its attempt to enunciate a novel duty of care) discussed later was dependent on this factor. Whether or not the plaintiffs will be able to provide evidence to prove Hudbay's direct liability is not relevant at the pleadings stage. Moreover, had the plaintiffs not advanced the direct liability theory in their pleadings – and done so in a manner that raised a *prima facie* case – the claims against Hudbay would have been struck out for failure to disclose a reasonable cause of action and Ontario would have lacked a real and substantial connection with CGN.

The jurisdictional significance of the direct liability theory was also borne out in *Cambior*[177] – the test case for transnational human rights litigation in Canada – although the case was dismissed on grounds of *forum non conveniens*. The case related to a mining disaster that occurred in Guyana,

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[176] *Hudbay*, *supra* note 6 at paras 85-86.
[177] *Cambior*, *supra* note 2.

South America in 1995.[178] Two rivers were polluted, including the Essequibo (Guyana's main waterway).[179] Some 23,000 Guyanese whose existence depended substantially on the integrity of the river instituted a class action in Quebec against Cambior.[180] Cambior is a Quebec corporation that owned 65% of Omai Gold Mines Ltd.[181] This latter Guyanese corporation owned the mine that caused the disaster.[182] The other shareholders were Golden Star Resources and the Government of Guyana.[183] The action was initiated through Recherches Internationales Quebec (RIQ), a company formed in Quebec for the purpose of initiating the action in Quebec. Cambior contested the jurisdiction of Quebec courts to hear the case.[184] In the alternative, it argued that even if Quebec courts had jurisdiction, Guyana was a more suitable forum for the action.[185]

Cambior contended that it and Omai were not one and the same person and that even though it held majority shares in Omai, this did not make it responsible for Omai's actions in Guyana[186] due to the doctrine of separate corporate personality. It denied RIQ's allegation that it had any responsibility in the "construction, maintenance, operation and management of the mine".[187] It also denied RIQ's claim that it took part in "the principal decisions effecting the daily operation of the mine."[188] Before the construction of the mine, Cambior and the other co-shareholders of Omai entered into a mineral agreement, under which Omai "would be responsible for the design, maintenance and operation of the mine."[189] The agreement stated that Omai would "operate as a distinct corporate entity."[190] However, Cambior had extensive powers as "managing member".[191] Those included assisting Omai in the day-to-day running of the mine, preparation of work programs relating to the development and operation of the mine, preparation of Omai's budgets, and directing Omai in the implementation of Board

[178] *Ibid* at para 1.
[179] *Ibid.*
[180] *Ibid* at para 2.
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid* at para 16.
[184] *Ibid* at para 6.
[185] *Ibid.*
[186] *Ibid* at paras 15-16.
[187] *Ibid* at para 16.
[188] *Ibid.*
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*

decisions.[192] Cambior was responsible for appointing four of the six members of Omai's Board.[193] However, it was not a party to the various contracts entered into between Omai and various consultants for the construction of the mine or the tailings dam.[194] Although Cambior offered services to Omai, these services were described by Cambior as "minimal" and were billed to Omai.[195] Lastly, out of the approximate one thousand employees of Omai, Cambior stated that only ten were its former employees.[196] On these facts, Cambior argued that Quebec lacked jurisdiction in the case as the facts did not establish that it was Omai's directing mind and could not be held responsible for any negligent acts of Omai.[197] On the other hand, RIQ relied on their claim that Cambior financed the study establishing the mining project as economically viable and that this study included the construction of the tailings dam.[198] It also pointed out that the Chairman of both Cambior's and Omai's Boards was one and the same person.[199]

In determining Quebec jurisdiction, Maughan J considered Articles 3134 and 3148 of the *Civil Code of Quebec*.[200] Article 3134 reads as follows:

> "In the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec." [201]

Article 3148 reads as follows:

In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:

> (1) the defendant has his domicile or his residence in Quebec; ... [and]
> (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec [...].[202]

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[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid* at para 17.
[198] *Ibid* at para 19.
[199] *Ibid* at para 19.
[200] *Ibid* at para 18.
[201] art 3134 CCQ.
[202] *Ibid*, art 3148.

The court found that it was clear in the record that Cambior was domiciled in Quebec.[203] Maughan J held that this fact alone conferred jurisdiction on the Quebec Superior Court over Cambior.[204] Maughan J went further to state that "if it is the case that Cambior made certain decisions relating to the construction and operation of the mine which resulted in the failure of the tailings dam, those decisions would have been made in Quebec".[205] As Seck has noted, this reasoning not only served to "bolster the 'domicile' link" between Cambior and Quebec, but also spoke to the "real and substantial connection" test applicable throughout Canada.[206] Regarding Cambior's claim that it was not the directing mind of Omai and had not committed any acts that could give rise to liability, Maughan J pointed out that determining these issues would amount to going into the merits of the suit, an impermissible exercise in jurisdictional inquiries.[207] Jurisdictional inquiries are certainly not merits-based. Provided the plaintiff's pleadings that Cambior was the directing mind of Omai were not patently ridiculous, the court must accept them as true for the purposes of the motion to dismiss. As noted earlier, however, the case was dismissed on the doctrine of *forum non conveniens* in favour of Guyana – an issue that was not dealt with in *Hudbay*.

B. Enunciation of a Novel Duty of Care

Hudbay is even more significant for its attempt to enunciate a novel duty of care between Canadian parent corporations and persons harmed overseas by security personnel engaged by subsidiaries of the Canadian corporations where the subsidiaries are under the direct responsibility and control of their Canadian parents. What the court did was "an attempt to enunciate" this duty of care, and not an actual enunciation, since the court did not definitively rule – nor could it do so at the pleadings stage – that a duty of care existed. Rather, the court decided to sustain the claim at the pre-trial stage because the facts as stated by the plaintiffs would, if proven at trial, likely justify the creation of a new duty of care.

An attempt to create a similar duty of care was earlier made by the plaintiffs in *Copper Mesa* but failed due to the plaintiffs' failure to supply

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[203] *Cambior*, *supra* note 2 at para 18.
[204] *Ibid* at para 18.
[205] *Ibid.*
[206] Seck, *supra* note 17 at 156-157. In the author's opinion, Seck's article provides the most detailed analysis of the *Cambior* decision available in the English language.
[207] *Cambior*, *supra* note 2 at paras 18.

sufficient particulars of the existence of such a duty of care in their pleadings.[208] The issue was whether a stock exchange which listed the shares of a mining corporation through which the corporation raised funds for a mining project that allegedly caused harm to local communities could be held liable for the harm. For a clear understanding of the issue, the relationship among the parties (particularly the defendants) would need to be explained to some detail.

The plaintiffs were Ecuadorian residents.[209] One of the corporate defendants (Copper Mesa) was a mining corporation "incorporated under the laws of British Columbia".[210] It carried on business through a series of subsidiaries, one of which was a Barbadian corporation.[211] This Barbadian corporation wholly owned another company performing mining operations in Ecuador.[212] The other corporate defendants were the TSX Inc and TSX Group Inc.[213] TSX Group Inc. is a Canadian stock exchange which wholly owns TSX Inc., its subsidiary.[214] TSX Inc. owned and operated the Toronto Stock Exchange (TSE).[215] The individual defendants were directors of Copper Mesa, and resided in Toronto.[216]

The plaintiffs had opposed a proposed mining project in Ecuador to be carried out by Copper Mesa's Ecuadorian subsidiary, on the basis that they would be "severely impacted" by the project.[217] They claimed that they were subjected to a "campaign of intimidation, harassment, threats and violence carried out by security forces under the control of Copper Mesa and some of its agents.[218] Their claims against TSX Inc. and TSX Group Inc. were that these defendants listed the shares of Copper Mesa on the TSE and that this listing enabled Copper Mesa to raise funds for the mining project in Ecuador.[219] The claims stated that but for this listing and the consequent funds raised therefrom, Copper Mesa would not have been able to carry out

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[208] *Copper Mesa*, *supra* note 4 at para 81.
[209] *Ibid* at para 1.
[210] *Ibid* at para 2.
[211] *Ibid.*
[212] *Ibid.*
[213] *Ibid* at para 1.
[214] *Ibid* at para 4.
[215] *Ibid.*
[216] *Ibid* at para 3.
[217] *Ibid* at para 9.
[218] *Ibid* at para 11.
[219] *Ibid* at paras 13.

the alleged acts of assault and intimidation.[220] As such, TSX "caused or materially contributed" to those acts.[221] The plaintiffs asserted that TSX Inc. was "under a legal duty not to list a corporation when there is a reasonably foreseeable and serious risk that funds raised on the [TSE] will be used in such a way as to harm individuals such as the Plaintiffs".[222] Alternatively, they asserted that TSX Inc. was "under a legal duty not to list a corporation on the [TSE] without instituting precautionary measures to prevent a serious risk that funds raised through the [TSE] will be used to harm individuals such as the Plaintiffs".[223] According to the plaintiffs, this duty arose from the fact that TSX Inc. "knew or ought to have known", before the listing of the shares, that the listing posed a "serious risk of harm" to the plaintiffs.[224] The plaintiffs claim that TSX Inc. knew or ought to have known because they were warned twice against the listing and the potential for violent conflicts in connection with the project.[225] The plaintiffs believed that TSX Inc. breached the above duty by failing to take any steps to reduce the risk of harm created by the provision of access to funds to Copper Mesa and by enabling Copper Mesa to access millions of dollars through equity financing.[226] They allege that this caused or "materially contributed to the harm suffered by the plaintiffs [citation omitted]."[227] There was no direct claim against Copper Mesa itself, but only claims of vicarious liability for the alleged wrongs of its directors who had knowledge of the risk of harm to the local communities.[228] The plaintiffs claim that a duty was breached – among other things –by the directors' failure "to avoid acts or omissions that caused or materially contributed to"[229] the harm, including approving funding for the security forces that directly inflicted the harm.[230]

The defendants framed their arguments in terms of whether they owed a duty of care to the plaintiffs. In determining the existence of a duty of care, the Ontario Court of Appeal applied the reasonable foreseeability test.[231]

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[220] *Ibid* at para 14.
[221] *Ibid.*
[222] *Ibid* at para 15.
[223] *Ibid.*
[224] *Ibid* at para 16.
[225] *Ibid* at para 17.
[226] *Ibid* at para 18.
[227] *Ibid.*
[228] *Ibid* at paras 20, 22.
[229] *Ibid* at para 21.
[230] *Ibid* at paras 21-26.
[231] *Ibid* at paras 40-56.

Applying this test, Cronk JA found that the facts pleaded by the plaintiffs did not establish that the plaintiffs were in such a close relationship with the TSX defendants that, at the time of listing Copper Mesa's shares on the TSE, the TSX defendants could reasonably have foreseen that the listing would occasion harm to the plaintiffs.[232] First, the court pointed out that none of the plaintiffs held shares or were otherwise investors in Copper Mesa.[233] Moreover, none of them were involved in the Canadian capital market, and none had any dealings of any nature with any of the TSX defendants.[234] Secondly, Cronk JA examined the letters that allegedly informed the TSX defendants of the risk of harm to the plaintiffs.[235] After pointing out that both letters were written by strangers to the suit, she concluded that none of them warned of the risk of the alleged harm.[236] She concluded that in fact "there was simply no relationship at all between the plaintiffs and the TSX defendants, let alone one which might be characterized as 'proximate'."[237] While holding that no duty of care existed, however, she was careful to add that this holding did not preclude the possibility of a future finding that a risk of harm to "third parties by a company whose shares are proposed to be listed on the TSE might be found to be reasonably foreseeable to entities like the TSX defendants where it is alleged, on the basis of sufficient material facts, that such entities received specific advance notice of the risk of specific harm attendant on a public securities offering."[238]

The vicarious liability claims against Copper Mesa were also dismissed for disclosing no reasonable cause of action. Copper Mesa was claimed to be vicariously liable for the actions of its directors. But the court found that the claims against the directors, which if proven might have vicariously attached to Copper Mesa, consisted of "conclusory" statements and general allegations of wrongdoing without supporting particulars.[239]

The plaintiffs' claims against the TSX defendants might have been made more difficult by the fact that the TSX defendants are body corporates whose obligations are owed to the public at large, and not to private

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[232] *Ibid* at para 43.
[233] *Ibid* at para 44.
[234] *Ibid.*
[235] *Ibid* at paras 45-49.
[236] *Ibid* at paras 45-47.
[237] *Ibid* at para 70.
[238] *Ibid* at para 55.
[239] *Ibid* at para 89.

individuals.[240] Even then, those obligations are related to the capital market. To found a duty of care towards individuals in connection with matters unrelated to capital markets would be onerous without a direct relationship between those individuals and the TSX defendants. However, as Cronk JA noted, it would be possible to establish a duty of care where the entity can be fixed with "specific advance notice of the risk of specific harm".[241] Although Cronk JA did point out in the course of her decision that the plaintiffs relied on two letters to establish that the TSX defendants had advance notice of the risk of harm if Copper Mesa's shares were listed, she found that neither letter warned the TSX defendants, explicitly or impliedly, of the alleged risk.[242] All this shows that Copper Mesa's failure can be attributed to the lack of particulars in the pleadings of the plaintiffs' allegations, as well as the plaintiffs' lack of adequate appreciation of the relationship between companies and the public in the capital market. The latter has an influence on the existence of a duty of care between the company and the public.

Indeed, *Hudbay's* attempt to create a new duty of care in the circumstances of the case is consistent with the trend in the UK. In *Guerrero v Moterrico Metals Plc*, for instance, the UK High Court of Justice (Queens Bench Division) was faced with a similar case of human rights abuse involving detention, torture, sexual abuse, and homicide committed by police officers[243] protecting the mine site of the defendants in Peru. The defendants were a UK mining company and its Peruvian subsidiary.[244] The claimants alleged the direct participation of the UK parent in the abuses through its personnel that ran the mine owned by the Peruvian subsidiary.[245] They also alleged that risk management policies for the "operation and management" of the Peruvian subsidiary were reserved for the UK parent's Board of Directors, as disclosed in this UK parent's 2003, 2004 and 2005 Annual Reports.[246] It is further alleged that the UK parent exercised effective control over the Peruvian subsidiary.[247] The claimants pleaded that the UK parent owed them a duty "to take reasonable care to avoid foreseeable harm to them" and that it was negligent in failing to ensure "adequate risk management" of the operation of

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[240] *Ibid* at para 69.
[241] *Ibid* at para 55.
[242] *Ibid* at para 49.
[243] *Guerrero v Moterrico Metals Plc*, [2009] EWHC 2475 (QB) at para 7 (available on BAILII).
[244] *Ibid* at paras 1-2.
[245] *Ibid* at para 8.
[246] *Ibid.*
[247] *Ibid.*

the mine.[248] The court ruled that these pleadings created an arguable case against the UK parent:

> Despite ... [the defendant's] persuasive arguments to the contrary, the evidence in relation to the participation, or part played, by ... [the UK parent's] employees or officers, whether actually at the mining site or behind the scenes, is not so clear cut in my judgment as to exonerate the company conclusively from any legal responsibility for the brutality which it appears occurred as a result of the conduct of the police.[249]

C. Good Lawyering

It is likely that *Copper Mesa* suffered from over-ambitious claims. In addition, the judgment showed that the plaintiffs' failure to disclose particulars of their allegations against Copper Mesa's directors was fatal to their vicarious liability claims against Copper Mesa. This is not a problem unique to extraterritorial corporate wrongs litigation, but one that is constant in civil litigation generally. A plaintiff that alleges a wrongdoing must supply the particulars thereof. It is even curious that there was no direct liability claim against Copper Mesa itself when the claims against TSX and TSE were based solely (or principally) on the listing of Copper Mesa's shares.[250] It is also in these respects that one must understand the success of the plaintiffs in *Hudbay*.

V. CONCLUSION

On 30 August 2013, *The Globe and Mail* reported that Hudbay would not be appealing the decision.[251] This means that the case would proceed to trial on the merits, unless the parties reach a settlement. Given the potential impact of the US Supreme Court decision in *Kiobel v Royal Dutch Petroleum*,[252]

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[248] *Ibid* at para 11.

[249] *Ibid* at para 27.

[250] I am not arguing that a direct liability claim against Copper Mesa would necessarily have succeeded. It might still have failed, perhaps as a result of an absence of particulars to support it. However, using the listing of a company's shares as the basis for making claims against the entity that carried out the listing for harm caused by the project funded with money raised through the listing provokes the thought that the company itself could have been directly liable for the alleged harm.

[251] Alexandra Posadzki, "HudBay won't appeal ruling bringing Guatemala case to Canada", *The Globe and Mail* (30 August 2013), online: <www.theglobeandmail.com/news/national/hudbay-wont-appeal-ruling-bringing-guatemala-case-to-canada/article14060058/>.

[252] *Kiobel v Royal Dutch Petroleum Co* (2013), 569 US 1 (2013), 133 S Ct 1659 (2013).

the *Hudbay* decision makes Canada a scene to observe in the years to come as a likely forum for transnational human rights litigation.

Being the first of such a decision in Canada, *Hudbay* will be a constant reference case for future transnational human rights litigation in Canada. Its potential impact will lie not so much in the precedential value of the actual ruling – bearing in mind however that not being an appellate decision, it is not binding on other courts, whether in Ontario or in other provinces – as in the lessons it contains for plaintiff lawyers in preparing their pleadings. Reliance on vicarious liability may prove onerous given the doctrine of corporate separate personality and its narrow exceptions that place a heavy burden on the plaintiff. It is essential if the plaintiff can demonstrate that the Canadian parent corporation had a direct hand in the alleged conduct. This can be achieved by pleading either the direct participation of the Canadian parent in the alleged abuses (if this is true in the particular case) or by pleading the direct control of the Canadian parent over its subsidiary in relation to the activity that gave rise to the abuses and then seeking to persuade the court to follow the ruling in *Hudbay*. But direct control of the subsidiary corporation that does not relate to the activity that gave rise to the abuses may not suffice because such control does not establish the type of relationship between the parent corporation and the plaintiffs requisite for recognition of a duty of care. And since not all future cases will fit into the factual matrix of *Hudbay*, one must be careful to not overstate the potential impact of *Hudbay* on future cases, particularly since the degree of control the Canadian parent corporation has over its foreign subsidiary in relation to the activity that resulted in the alleged wrong – a critical factor in *Hudbay* – will vary case by case.

Yet, to achieve real success in these cases, plaintiffs must think beyond the pleading stage. Given the pre-trial hurdles faced by transnational human rights cases, plaintiffs' lawyers may be tempted to engage in elaborate pleadings in order to overcome pre-trial challenges. Such an approach may have dire consequences if they are found at trial to have been made without any foundation as it may be a basis to award substantial costs against plaintiffs.

In any event, this initial success of the plaintiffs in *Hudbay* will bolster the impetus for transnational justice in Canada. Canadian extractive companies should already begin to assess the risk such litigation will pose to their businesses and begin to take due diligence initiatives, with regard to

their subsidiaries operating in developing countries, to avoid conduct that may give rise to legal action in Canada.