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GOLDCORP AND HUSBAY MINERALS IN GUATEMALA

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Goldcorp and HudBay Minerals in Guatemala

Abstract: *Canadian mining in Guatemala has been associated with violence and death. Opposition to an INCO mine in the El Estor region in the 1960's resulted in the assassination of two law professors, and another activist has been killed in 2009. In the San Marcos region of Guatemala, two deaths are associated with the opening of a mine now owned by Goldcorp. Indigenous opposition to the mines continues in both regions. This article updates an article originally published in 2007 which ties the events in Guatemala to efforts in Canada to hold Canadian mining companies accountable.*

Key words: Aboriginal rights, Indigenous rights, Indigenous law, Goldcorp, HudBay Minerals, mining, Guatemala, Bill C-300, National Roundtables on Corporate Social Responsibility, consulta

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GOLDCORP AND HUSBAY MINERALS IN GUATEMALA

Bernadette Maheandiran, Jessica DiFederico, Rolando Aguilera and Shin Imai*

A series of events in 2005 and 2006 involving a Canadian mine in Guatemala led to the publication of “Breaching Indigenous Law: Canadian Mining in Guatemala” in the *Indigenous Law Journal* in 2007.¹ That article chronicled the history of Canadian mining and its association with violence in Guatemala and death of Guatemalans. It ended with a review of attempts to hold Canadian mining companies accountable in Canada for their actions abroad. The pages which follow provide an update of developments up to the beginning of 2010.

Three years after the original article was published, the situation in San Marcos has not improved - conflicts with the mining company, Montana Exploradora,² have increased and opposition is spreading in the region. Death threats, shootings and killing of environmentalists, *campesinos* and their supporters continue in Guatemala. However, there has been greater international attention paid to the dispute,³ and at a more generalized level, there has been some progress. The Constitutional Court in Guatemala, which made the original decision on the validity of the community referendum or *consulta*, declared certain sections of the Guatemalan *Mining Act*, unconstitutional for breaching environmental standards. In Canada, Goldcorp’s actions have come under increased scrutiny and in 2009, shareholder pressure forced the company to undertake a Human Rights Impact Assessment. The affected communities in Guatemala have also filed a complaint under the OECD Guidelines. Concern about Canadian mining company activities in Latin America became the subject of hearings before a Canadian Parliamentary Committee and a community in Ecuador has begun ground breaking litigation against the Toronto Stock Exchange.

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¹ Shin Imai, Ladan Mehranvar and Jennifer Sander, “Breaching Indigenous Law: Canadian Mining in Guatemala”, (2007) 6 *Indigenous Law Journal* 101. Available at <http://ssrn.com/author=1019085>.

² Herein referred to simply as Montana.

³ For example, the BBC and Reuters have been covering developments in the region. For an in depth radio report from the BBC see “Unease Over Canadian Gold Rush”, September, 2008 available at http://news.bbc.co.uk/2/hi/programmes/crossing_continents/7606571.stm. The CTV investigative show, W5, aired a one hour program in April, 2010. There are also two independently produced documentaries: “Sipkapa Si” available from Rights Action and “The Business of Gold: Tale of a Foretold Conflict” available from Amnesty International. Our original article, published in the *Indigenous Law Journal*, is now available on a number of websites, has been republished in India and will be available in a collection of essays from the United Nations University in Tokyo. For other articles, see Brant McGee, “The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development”, (2009) 27 *Berkeley Journal Of International Law* 570; and Comisión Pastoral Paz y Ecología – COPAE, Diócesis de San Marcos, “La consulta comunitaria: Estrategia de lucha contra el atropello y la imposición” in *América Latina: Riqueza privada, pobreza pública* (2009, Quito, Ecuador) pp.19-34, available at <http://alainet.org/publica/riqueza/>.

I. ALLEGATIONS AGAINST GOLDCORP RELATING TO THE MARLIN MINE

Complaints about the Marlin mine have not abated. The communities say that they have been affected by the contamination of the Cuilco River and the Tzala River, used for bathing, washing clothes, irrigation, and, in some cases, for drinking water.⁴ They brought their claims to the *Tribunal Latinoamericano del Agua* (Latin American Water Tribunal) which released its decision on September 12, 2008. The Tribunal found that Montana's operations would generate 170 barrels of waste every month.⁵ Further, it found that acid rock drainage would overflow into surrounding land and rivers during the rainy season creating a human health risk.⁶ The Tribunal ultimately held that Montana should be responsible for indemnifying the community for damage already caused and that an independent study should be conducted to prevent further damage.

The community also alleges that the water contamination has resulted in several *campesinos* being inflicted with rashes.⁷ Of particular note, one of the members of the community, Emeterio Perez, has experienced swelling and pain throughout his body, followed by skin rashes. His stomach has swollen immensely and distended, and he now finds it difficult to move.⁸ Other community members have allegedly experienced similar symptoms owing to the contamination of their water supply.⁹

The blasting associated with the open pit mine has damaged homes in the communities. From 2007 to 2009, the *Comisión Pastoral Paz y Ecología* (COPAE) and the Unitarian Universalist Service Committee (UUSC) conducted an investigation of the building damage resulting from the mining activities. They found that buildings located in the villages near the mine were more prone to cracks than buildings in the control villages.¹⁰ The study eliminated land instability,

⁴ Alberto Ramírez, "Temen daños a ríos por desechos mineros" *La prensa libre* (18 March 2008) online: *La prensa libre* <<http://www.prensalibre.com/pl/2008/marzo/18/226955.html>>.

⁵ "Case: Open pit mining in the Cuilco and Tzala river basins. Sipacapa and San Miguel Ixtahuacan Districts, San Marcos Department", *Latin American Water Tribunal*, online: <http://www.tragua.com/english/hearing/2008/sc_guatemala_2008.html> on Jan 31, 2010.

⁶ *Ibid.*; See also, Alberto Ramírez Espada, "Tribunal de Agua condena contaminación minera" *La prensa libre* (13 September, 2008), online: *La prensa libre* <<http://www.prensalibre.com/pl/2008/septiembre/13/263443.html>>.

⁷ Bill Law, "Canadian mine accused of causing skin infections", *BBC News World*, Mar 11, 2009, online: <<http://news.bbc.co.uk/2/hi/americas/7934513.stm>> on Jan 31, 2010.

⁸ Grahame Russel, "Who is Emeterio Perez? And Why Goldcorp Shareholders and Investors Ought to Know" *Upside Down World* (12 February 2009), online: *Upside Down World* <<http://bit.ly/a7189n>>.

⁹ *Ibid.*

¹⁰ Comisión Pastoral Paz y Ecología (COPAE) and the Unitarian Universalist Service Committee (UUSC), *Damaged Buildings near the Marlin Mine: Preliminary Investigation and Analysis of Building Damage in the Villages of Agel, El Salitre, San José Ixcániche, and San José Nueva Esperanza, San Miguel Ixtahuacán and Sipacapa Municipalities, San*

seismic activity, damage due to underlying soil types, and faulty construction as causes of structural cracking.¹¹ The engineering team, composed of mining, structural, civil and geotechnical engineers, determined that the type and pattern of cracks - more or less vertical, usually located within the middle third of the wall length and cracked walls with ends pointing toward the adjacent road and/or the mine - were caused by ground vibrations.¹² The team concluded that the most likely cause of these vibrations was mine blasting and increased heavy vehicle traffic. The team suggested that continued monitoring would be needed to provide information on the impact of mining activities at the Marlin mine.¹³

Protests by members of the local indigenous communities has resulted in criminal charges and in death threats from individuals and groups in support of the mine.¹⁴ In 2009, Rights Action, an NGO based in the US and Canada which funds community-controlled projects in Guatemala, reported that the Guatemalan government filed criminal charges against *campesinos*, from the community of Sacmuj, in the village of Agel, who were resisting Goldcorp's purchase of property on in their territory.¹⁵ In 2008, warrants were issued for eight women for interrupting the electrical lines to the processing plant.¹⁶ The women were objecting to the location of the power lines close to their homes. In other proceedings, charges laid against five people in 2007 were dropped and charges are pending against two individuals for protesting against the mine.¹⁷

Álvaro Ramazzini, a Bishop in the San Marcos diocese,¹⁸ has received death threats from unknown individuals asserting that he will be killed unless he withdraws his support for the

Marcos Department, Guatemala, online: <<http://www.resistance-mining.org/english/?q=node/147>> on Jan 31, 2010.

¹¹ *Ibid.* at 4.

¹² *Ibid.* at 22.

¹³ *Ibid.* at 56.

¹⁴ See Valerie Corft, "Disputed Property Sale in Guatemala Results in Death Threats, Charges: Canada's Goldcorp Agrees to Negotiate; Police, Military Arrive Instead" *The Dominion: News From the Grassroots* (5 July 2009), online: *The Dominion* <<http://www.dominionpaper.ca/articles/2744>>; See also, "More Illegal Land Occupations, More Soldiers and Police, More Threats of Violence" (12 June 2009), online: Rights Action <http://www.rightsaction.org/articles/goldcorp_guatemala_061509.html>.

¹⁵ "Goldcorp", *Rights Action*, online: <http://www.rightsaction.org/articles/goldcorp_guatemala_061509.html> on Jan 31, 2010.

¹⁶ For Goldcorp's coverage on the event, see "Goldcorp Provides Information on Marlin Power Supply Interruptions", *Goldcorp*, online: <http://www.goldcorp.com/news/goldcorp/index.php?&content_id=615> on Feb 2, 2010.

¹⁷ "Goldcorp", *Rights Action*, online: <http://www.rightsaction.org/articles/goldcorp_suit_061909.html> on Jan 31, 2010.

¹⁸ See "Bishop speaks against Canadian mining firm", *Western Catholic Reporter*, Apr 21, 2008, online: <<http://www.wcr.ab.ca/news/2008/0421/bishop042108.shtml>> on Jan 31, 2010; and "Guatemala: Bishop receives death threats", *Mines and Communities*, Apr 14, 2008, online: <<http://www.minesandcommunities.org/article.php?a=8565>> on Jan 31, 2010. See also, Irmalicia Velásquez

campesinos. The Bishop has been active in organizing the investigation into the structural damage to the village houses and in drawing attention to the *campesinos*' conditions.

II. REPERCUSSIONS FROM THE COMMUNITY REFERENDUM

A central part of the original article was the decision of the *Corte de Constitucionalidad* (Constitutional Court) on the validity of the community referendum (the *consulta*). Montana and the government of Guatemala attempted to stop the referendum from taking place, arguing that the very act of voting was unconstitutional. The Court held that the result of the vote, which was overwhelmingly against mining, did not bind the government. Montana claimed that the decision vindicated the Marlin mining operations. As noted in the main article, however, the decision was more nuanced. While the Court found that the state had the authority to authorize mining, the Court also was sharply critical of both the state and Montana for attempting to shut down the community referendum and for failing to consult properly. In 2009, the Court went a step further. Responding to a challenge brought by Dr. Yuri Melini, the head of the Centre for Environmental Law And Social Action (CALAS),¹⁹ the Court found held that several sections of the *Mining Act* were unconstitutional as they contravened the environmental protection sections of the Guatemalan Constitution.²⁰ This was a courageous decision on the part of the Court. The decision, however, was accompanied by reprisals and violence aimed at Dr. Melini. Shortly after the release of the decision, he was shot seven times in his stomach and legs on a Guatemala City street.²¹ Although the Guatemalan police have not yet found those who perpetrated the crime nor have they established a conclusive motive, Dr. Melini commented that “(t)he most obvious, logical position is that the attack had something to do with my stand against the rampant mining in my country, given the timing of the attack.”²²

Nimatuj, “Ixtahuacan y Montana” El periodico (11 November, 2007), online: El peridico <<http://www.elperiodico.com.gt/es/20071112/opinion/45602/?tpl=54>>.

¹⁹ CALAS has highlighted the role of mining in environmental degradation and in the displacement of the *campesinos* from their villages and lands. See their website at <http://www.calas.org.gt/>.

²⁰ The decision (in Spanish) can be found at <http://blog.reportero.org/?p=139>. See Alberto Ramírez Espada, “CC resuelve contra ley de minería” La prensa libre (17 June, 2008), online: La prensa libre <<http://www.prensalibre.com/pl/2008/junio/17/244930.html>>.

²¹ See Shawn Pogatchnik, “Guatemalan Anti-Mining Activist Wins Rights Prize”, *ABC News*, May 8, 2009, online: <<http://abcnews.go.com/International/wireStory?id=7535268>> on Jan 31, 2010; See “Business and Human Rights”, *Amnesty International*, online: <http://www.amnesty.ca/blog.php?blog=bhr_blog&month=9&year=2008> on Jan 31, 2010; “Guatemala’s Government and civil society condemn attack on environmentalist Yuri Melini”, *Guatemala Times*, Sep 5, 2008, online: <<http://www.guatemala-times.com/news/guatemala/343-guatemalas-government-and-civil-society-condemn-attack-on-environmentalist-yuri-melini.html>> on Jan 31, 2010. see Paola Hurtado, “Algún sentido tiene que estar aquí” El periodico (12 January 2010), online: El periodico <<http://www.elperiodico.com.gt/es/20090125/domingo/88024/?t>>.

²² *Ibid.*

The attempted assassination of Dr. Melini was only the latest occurrence in a pattern of intimidation against environmentalists. In 2008, the Procuraduría de los Derechos Humanos (Human Rights Ombudsman) had to investigate death threats against nine environmentalists, including the Minister of Environment.²³

III. DEVELOPMENTS IN THE EL ESTOR REGION

The distressing pattern of violence associated with Canadian mining operations also continued in the El Estor region – the area that was originally opened by INCO in the 1960's. The main article described the 2007 removal of hundreds of local *campesinos* and the burning of their homes on land that was claimed by Skye Resources.²⁴ HudBay Minerals purchased Skye Resources in August 2008, but the mine did not recommence operations immediately, due to low nickel prices.²⁵ As nickel rose in price, the company began considering spending the \$1 billion necessary to open the mine. Meanwhile local indigenous people continued their opposition. On September 27, 2009 a local teacher was killed and several other indigenous people were shot. Five security guards were reportedly injured.²⁶ Reports of the occurrence are widely divergent.

According to the members of the community, mining company officials and private security forces arrived at the occupied area to discuss resettlement; however, hours later the guards opened fire on protestors.²⁷ Community members allege that Adolfo Ich Xaman, a community leader known for his resistance to the mining operations, was not killed at this point, but was

²³ "Investigan amenazas en contra de nueve ambientalistas, incluido ministro" (23 September 2008), online: and.es <http://www.adn.es/printVersion/ADNNWS20080923_2475/4>.

²⁴ At footnote 161 of the main article, the text describes accusations made by Canadian ambassador Kenneth Clark against a Canadian film maker. The accusations have yet to be substantiated and the ambassador is being sued by the filmmaker.

²⁵ Liezel Hill, "HudBay reports protests near Guatemala project" Mining Weekly, 30 September 2009, online: Mining Weekly <<http://www.miningweekly.com/article/hudbay-reports-protests-near-guatamala-project-2009-09-30>> on Feb 1, 2010.

²⁶ "Land dispute threatens major Guatemala nickel projec", Reuters, <http://www.reuters.com/article/idUSN1254892220091012>

²⁷ Susan Fitzpatrick Behrens, "Nickel for Your Life: Q'eqchi' Communities Take On Mining Companies in Guatemala" North American Congress on Latin America, 25 October 2009, online: North American Congress on Latin America <<https://nacla.org/node/6177>> ["Behrens"] on Feb 1, 2010. See also Dawn Paley, "Recent killings linked to Canadian-owned nickel mine in Guatemala" The Dominion, 30 September 2009, online: The Dominion <<http://www.dominionpaper.ca/weblogs/dawn/2947>> on Feb 1, 2010.

deliberately kidnapped and killed by the mine's security forces.²⁸ The protestors deny²⁹ allegations made by the police that they were armed.³⁰

HudBay commented on the incident in a news release on their website.³¹ In their version, the conflict arose as a result of discussions which were occurring between authorities and “illegal occupiers” of company land. The discussions began as “an effort to persuade the occupiers to comply with their commitments under an agreement to relocate”.³² When negotiations ended without resolution, a group of “organized protestors” attacked government vehicles, which were leaving the area.³³ The company claims that protesters were armed with weapons stolen from a local police station, and asserted that private security personnel “showed great restraint and acted only in self defence”.³⁴ HudBay acknowledged the death of one of the protestors, stating that they “deeply regret” the loss of life that occurred and reaffirming that their number one priority is the “safety and security of all residents and employees in El Estor”.³⁵ HudBay also stated that they are committed to working with residents to arrive at a “fair and equitable solution to the land claim and resettlement issues”.³⁶ Regardless of which version of events is believed, the incident highlights the ongoing tensions occurring in the area as a result of unsettled land claims.

Despite the ongoing conflict occurring in the El Estor and San Marcos regions, the government of Guatemala has yet to implement a scheme for consultation. In 2006 both the Constitutional Court and the Committee of Experts of the International Labour Organization³⁷ criticised the lack of government for failing to act. In 2010, the Committee of Experts again noted this failure and expressed exasperation with Guatemala's lack of answers regarding the mine in El Estor as well

²⁸ *Ibid.*, Behrens.

²⁹ Annie Bird and Grahame Russell, “Mining & the death of a Mayan teacher” Rights Action, 18 October 2009, online: Rights Action <http://www.rightsaction.org/articles/Guatemala_mining_death_101809.html> on Feb 1, 2010.

³⁰ Sarah Grainger, “Protest at HudBay Guatemalan mine leaves one dead” Reuters, 28 September 2009, online: Reuters <<http://www.reuters.com/article/idUSN2810703620090929>> on Feb 1, 2010.

³¹ HudBay Minerals Inc., “HudBay Minerals Provides Update on CGN”, 29 September 2009, online: HudBay Minerals Inc. <<http://investor.shareholder.com/hbm/releasedetail.cfm?ReleaseID=412384>> on Feb 1, 2010.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ ILO Committee of Experts on the Application of Conventions and Recommendations, (2006) at para. 7, online: ILO <<http://webfusion.ilo.org/public/db/standards/normes/appl/>

[appl-displayAllComments.cfm?hdroff=1&ctry=0270&conv=C169&Lang=EN](http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displayAllComments.cfm?hdroff=1&ctry=0270&conv=C169&Lang=EN)>.

as in San Marcos. The Committee goes a step further than its 2006 report, calling for the government to suspend the exploitation in the San Marcos region until there has been proper consultation.³⁸

IV. COMPLAINT UNDER THE OECD GUIDELINES

The communities around the Marlin mine have continued to press for recognition of their struggle. The Front in Defense of San Miguel Ixtahuacán (FREDEMI) a coalition composed of the Association for Integrated Mayan Development (ADIM), the Association for the Integral Development of San Miguel (ADISMI), the local Catholic parish, and Strengthening Bilingual Education in San Miguel (FEBIMI), has filed a complaint with the Canadian government regarding the Marlin mine.³⁹ The complaint was filed under the Guidelines for Multinational Enterprises of the Organization of Economic Co-operation and Development (OECD),⁴⁰ of which Canada is a member. The General Policies of the Guidelines state that corporations should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments,”⁴¹ thereby placing an obligation on the corporation to respect, protect and fulfill human rights.

In order to implement the Guidelines, the OECD Council in 2000 created a system of National Contact Points (NCP), government representatives in each of the member states. The role of the NCP is to facilitate inquiries and discussions between corporations and affected communities on all matters covered by the Guidelines. The NCP has some capacity to investigate complaints directly by seeking information from parties to the dispute and can attempt to mediate between the parties in order to come to a resolution.⁴² Neither the resolution nor the statement is binding on the corporation and is not enforceable by state governments. The NCP does not have the power to award compensation. If there is no resolution, the NCP can review the evidence, consult experts, make a determination and issue a statement on the case.⁴³ However, there is a backlog of older cases which have not been dealt with effectively; for example, a complaint to the UK NCP against an Anglo American corporation has taken six years to conclude. Under the

³⁸ ILO Committee of Experts on the Application of Conventions and Recommendations, (2010) at p. 771, online: www.ilo.org/ilolex/gbe/ceacr2010.htm.

³⁹ Cameron French, “Guatemalan groups file complaint on Goldcorp mine”, *Reuters*, Dec 9, 2009, online: <http://www.reuters.com/article/idUSN0923516520091209> on Jan 31, 2010.

⁴⁰ OECD Guidelines for Multinational Enterprises, online: http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html on Jan 31, 2010.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

new procedures, introduced a year ago, the NCP is committed to conclude cases within 12 months.⁴⁴

In making their specific instance complaint to the Canadian NCP, FREDEMI states that Goldcorp violated the right to free, prior and informed consent of the indigenous community, has structurally damaged houses in the village, thereby violating the right to property of the home owners, and contaminating the water, violating the right to health of the *campesinos*. The complainants do not ask that the NCP facilitate access to alternative dispute resolution but instead are requesting that NCP undertake an investigation into Goldcorp's activities at the Marlin mine and make a statement, including recommendations, as appropriate, to ensure the company's compliance with the Guidelines. Specifically, the complainants seek Goldcorp's commitment to: "suspend all mining operations and close the mine; terminate its plans to expand the mine; cease its intimidation and persecution of community members; submit to ongoing, third-party monitoring of water contamination; establish an escrow account with sufficient funds to finance the environmental restoration and continuous water treatment needed after the closure of the Marlin Mine; and adopt a corporate policy to respect the right of indigenous peoples to free prior and informed consent".⁴⁵ This complaint is currently in its nascent stages and therefore it remains to be seen if the community can actually gain redress through the OECD mechanism.

V. THE GOLDCORP SHAREHOLDER PROPOSAL

Typically, the directors of a corporation set the agenda for shareholder meetings. However, there is a mechanism through which shareholders can add an issue to the agenda for discussion and consideration at shareholders' meetings.⁴⁶ Once the corporation receives notice of the proposal, it must include the proposal on the management proxy circular along with a supporting statement from the shareholder.⁴⁷ The *Canadian Business Corporations Act* (CBCA)⁴⁸ sets out a number of requirements which must be met in order for the proposal to be circulated – for example,

⁴⁴ "Fit for Purpose? A Review of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises 2008", *CORE*,

online: <<http://www.corporate-responsibility.org/C2B/PressOffice/display.asp?ID=94&Type=2>> on Jan 31, 2010.

⁴⁵ Frente de Defensa San Miguelense (FREDEMI, The Front in Defense of San Miguel Ixtahuacán) and The Center for International Environmental Law, "Specific Instance Complaint to the Canadian National Contact Point – Goldcorp Inc.: Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises", December 9, 2009, online: <http://www.ciel.org/Hre/Guatemala_Canada_9Dec09.html> on Feb 1. 2010.

⁴⁶ J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 2nd ed. (Toronto, Irwin Law: 2003) at 216.

⁴⁷ *Ibid.* at 222.

⁴⁸ Canadian Business Corporations Act, R.S.C. 1985, c. C-44.

pertaining to who may submit a proposal,⁴⁹ or the timeline for submission⁵⁰ – and if any of those requirements are not met, the corporation can refuse to circulate the proposal. Section 137(5)(b.1) of the CBCA provides that the corporation may refuse to circulate a proposal if it “clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation”.⁵¹ The shareholder proposal has been used by activists to try to influence the behaviour of corporations. In 2008, Goldcorp refused to circulate a proposal relating to the Marlin mine pursuant to section 137(5)(b.1).⁵² However, when a consortium of investors circulated a second proposal, which addressed human rights abuses at the mine, Goldcorp agreed to conduct a Human Rights Impact Assessment (the Assessment) and the second proposal was withdrawn.

The Assessment was to be headed by a three-person steering committee, including Bill Brassington who is the chair of the Public Service Alliance of Canada’s socially responsible investment sub-committee.⁵³ The contract to undertake the Assessment was awarded to Canadian consulting company, On Common Ground.⁵⁴ The Assessment, however, has garnered its own controversy. Some community organizations state that it is increasing tension and further damaging the already fractured relationship between the *campesinos* and the corporation. Several civil society organizations have refused to participate.⁵⁵ Professor Douglas Cassel of the University of Notre Dame’s Centre for Civil and Human Rights turned down Goldcorp’s offer to tender a bid for the Assessment stating that he was not confident that the terms set by Goldcorp would yield a full and independent analysis.⁵⁶ At the request of the Archbishop of Guatemala, Professor Cassel and the Center for Civil and Human Rights have formed an independent international panel to conduct a separate human rights impact assessment of the situation at the Marlin mine.⁵⁷ The Public Service Alliance of Canada then pulled out of the Assessment, citing

⁴⁹ *Ibid.* at s. 137(1.1)

⁵⁰ *Ibid.* at s. 137(5).

⁵¹ *Ibid.* at s. 137(5)(b.1).

⁵² Fredericton Peace Coalition, “Maritime Human Rights Group Seeks Answers from Goldcorp” (16 May 2008), online: <<http://frederictonpeace.org/?p=1218>> on Feb 1, 2010.. See also Shareholder Association for Research and Education, “Shareholder Resolution Database”, online: <<http://www.share.ca/en/node/1432>> on Feb 1, 2010.

⁵³ Bill Law, “Canadian mine accused of causing skin infections”, *supra*, note 7.

⁵⁴ *On Common Ground*, online: <<http://www.oncommonground.ca/>> on Jan 31, 2010.

⁵⁵ Bill Law, “Canadian mine accused of causing skin infections”, *supra*, note 7.

⁵⁶ *Ibid.*

⁵⁷ “Independent International Panel”, *University of Notre Dame, Law School*, online: <<http://law.nd.edu/center-for-civil-and-human-rights/independent-international-panel>> on Jan 31, 2010.

For the terms of reference of the HRIA see: “Terms of Engagement”, *University of Notre Dame, Law School*, online: <<http://law.nd.edu/center-for-civil-and-human-rights/independent-international-panel/terms-of-engagement>> on Jan 31, 2010.

their concerns that the interests of Goldcorp were “being put before the interests of the local people”.⁵⁸

Professor Aaron Dhir of Osgoode Hall Law School has discussed the criticisms of the Assessment.⁵⁹ While the steering committee will be comprised of at least three people with representation from the company as well as the shareholder group, it does not mandate any representation from a Guatemalan. Rather, the Memorandum of Understanding states that it is only preferable that the third party representative is Guatemalan. The Assessment begins from the assumption that Goldcorp will remain in the area. In fact the Memorandum of Understanding states that its primary objective of the Assessment is:

To improve the opportunities for the company to continue to operate profitably in Guatemala by ensuring that the company has in place and is implementing effectively policies and procedures designed to mitigate the risks of potential conflicts with internationally recognized human rights standards and norms given in the context in Guatemala.

Dhir notes that the investors have been dismissive of the communities’ desire to end Goldcorps’ operations entirely and have favoured their own interest in risk mitigation. Mining Watch Canada pointed out that the shareholder proposal itself did not have the input from the communities. The proposal:

reveals a lack understanding of the ethical responsibility to assure that shareholder resolutions that directly impact on locally affected communities do not undermine the efforts these communities are engaged in to protect their own rights. In short, shareholder resolutions put forward in Canada that will directly impact on local communities should have the free prior and informed consent of locally affected communities.⁶⁰

One of the members of the Steering Committee for the Assessment is a representative of Ethical Funds, a mutual fund that promotes the “concept of sustainable investing — to create long-term change and make a difference in the world”.⁶¹ In spite of the withdrawal of the Public Service Alliance of Canada, Ethical Funds has decided to continue working with Goldcorp. . Ethical Funds has refused to follow the recommendation of investment research firm Jantzi Sustainalytics, that Goldcorp be ineligible for socially responsible investing portfolios.⁶²

⁵⁸ Bill Law, “Canada goldmine worries grow”, *BBC News*, 30 March 2009, online: BBC News <<http://news.bbc.co.uk/2/hi/americas/7968888.stm%3E>> on Feb 1, 2010.

⁵⁹ Shareholder Engagement, *supra*, note. 46

⁶⁰ *ibid* at 10.

⁶¹ www.ethicalfunds.com

⁶² Jantzi Sustainalytics, “Jantzi Research Recommends Goldcorp as Ineligible for SRI Portfolios”, 30 April 2008, online: <<http://www.jantziresearch.com/jantzi-research-recommends-goldcorp-ineligible-sri-portfolios>> on Feb 1, 2010.

VI. FOLLOW UP TO THE NATIONAL ROUNDTABLES IN CANADA

In 2006, the Government of Canada held four National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Sector in Developing Countries (the National Roundtables) in response to a Parliamentary report which called for the implementation of a multi-stakeholder process dedicated to creation and strengthening of programs and policies with regard to mining and corporate social responsibilities in developing countries.⁶³ The Advisory Group to the Roundtables released a comprehensive report (the Advisory Report),⁶⁴ which made a series of recommendations for the federal government to adopt, as well as a series of recommendations for the consideration of various interested parties as a way to improve, from a corporate social responsibility perspective, the practices of Canadian extractive companies operating in developing nations.⁶⁵ One of the main recommendations made to the Government of Canada was for the development of a Canadian corporate social responsibility framework, including the creation of an ombudsman which would act in an advisory and fact finding capacity in relation to complaints about the operations of Canadian extractive companies in developing countries.⁶⁶ The federal government responded with a policy called “*Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector*”.⁶⁷ Through this new policy, the Government provided vague support for enhancing corporate social responsibility guidelines and created an Office of the Extractive Sector CSR Counsellor.⁶⁸ The government response fell well short of the recommendations of the Advisory Committee.

In order to counter the government initiative, Liberal M.P. John McKay introduced Private Members’ Bill, Bill C-300.⁶⁹ The Bill provides that the Minister shall establish corporate

⁶³ See Standing Committee on Foreign Affairs and International Trade (SCFAIT), Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility, 38th Parliament, 1st Session, June 2005, 2, online: <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=8979&Lang=1&SourceId=178650>> on Feb 1, 2010.

⁶⁴ National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, “Advisory Group Report”, 29 March 2007, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr.aspx>> on Feb 1, 2010.

⁶⁵ *Ibid.* The Advisory Group “included representatives from industry associations; individuals currently or formerly employed by extractive-sector companies active overseas; civil society organisations; labour; academics; and the responsible investment sector”.

⁶⁶ *Ibid.* at 23.

⁶⁷ Foreign Affairs and International Trade Canada, “Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector”, March 2009, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx>> on Feb 1, 2010.

⁶⁸ *Ibid.* at 10.

⁶⁹ Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess., 40th Parl., 2009. At the time of writing this article, the Bill had passed a second reading and was referred to the Standing Committee on Foreign Affairs and International Development.

accountability standards for Canadian extractive companies.⁷⁰ The Bill also creates a mechanism through which complaints about a Canadian extractive corporation can be reported to the Minister.⁷¹ A finding by the Minister that a company's operations are not in accordance with the guidelines established under the Act can result in divestment from the corporation by the Canada Pension Plan.⁷² Furthermore, Export Development Canada (EDC) may not enter into, continue, or renew transactions relating to the extractive industry unless the activities are consistent with the established guidelines.⁷³

Bill C-300 was supported by many NGOs, including Amnesty International, Mining Watch Canada, Ecojustice Canada, and World Vision.⁷⁴ Irene Khan, the outgoing chief of Amnesty International, called Bill C-300 "very relevant" in light of the "egregious human rights violations related to the extracting industry".⁷⁵ Further, Graham Allen, of the same organization praised the Bill, stating that Canada "would be well-served" if it became law.⁷⁶ He argued that the voluntary nature of the of Canada's CSR Strategy made it problematic.⁷⁷ Mining Watch Canada echoed those sentiments, characterizing the Government's CSR Strategy for Canada as "woefully inadequate" and calling on members of the public to write to their MPs in support of the Bill.⁷⁸ Rights Action, however, does not support the Bill, arguing that it would provide neither accountability nor protection of the rights of communities affected by mining operations.⁷⁹

Mining industry representatives spoke out against what they see as the fundamental flaws of the Bill. Goldcorp's vice-president of corporate social responsibility, Dina Aloï, has stated that false

⁷⁰ *Ibid.* s. 5.

⁷¹ *Ibid.* s. 4.

⁷² *Ibid.* ss. 4(8) and 10.

⁷³ *Ibid.*s. 8.

⁷⁴ John McKay, "Supporters of C-300", 26 October 2009, online: <http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80590> on Feb 3, 2010.

⁷⁵ Louisa Taylor, "Outgoing Amnesty chief tackles world poverty" *The Ottawa Citizen*, 3 November 2009, online: <<http://www.ottawacitizen.com/business/Outgoing+Amnesty+chief+tackles+world+poverty/2180361/story.html>> on Feb 3, 2010.

⁷⁶ Graham Allen, "Amnesty International's Graham Allen on Bill C-300", 13 November 2009, online: <http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80600> on Feb 3, 2010.

⁷⁷ *Ibid.*

⁷⁸ Mining Watch Canada, "Bill C-300 – Corporate Accountability for the Activities of Mining, Oil or Gas Corporations in Developing Countries", 18 August 2009, online: <<http://www.miningwatch.ca/en/bill-c-300-corporate-accountability-activities-mining-oil-or-gas-corporations-developing-countries>> on Feb 3, 2010.

⁷⁹ Rights Action, "Bill C-300 will Perpetuate Effective Immunity from Legal Recourse in Canada", 20 October 2009, online: <http://www.rightsaction.org/articles/Analysis_Bill_C-300.htm> on Feb 3, 2010.

allegations would make a lasting impact on the reputation of the industry.⁸⁰ Similarly, Barrick Gold Corp. spokesman Vince Borg cited the hearings as an example of how the Bill could become “a magnet for false and unsubstantiated allegations.”⁸¹ The mining industry asserts that vast resources would be needed to conduct impartial investigations in order to substantiate the claims against the corporations.

Professor Richard Janda of the Faculty of Law at McGill University prepared a report on the Bill for the Canadian Network on Corporate Accountability.⁸² The report addresses many criticisms put forward by opponents to the Bill. For example, he argues that Bill C-300 does not “represent a marked and unwarranted departure from the recommendations of the Advisory Group”.⁸³ In response to claims that the Bill is not informed by input from the extractive industry, Janda points to the fact that Bill C-300 emerged from the recommendations of the Advisory Group’s Report, which adopted a multi-stakeholder approach.⁸⁴ In fact, the Advisory Group itself “included representatives from industry associations; individuals currently or formerly employed by extractive-sector companies active overseas; civil society organisations; labour; academics; and the responsible investment sector”.⁸⁵ Professor Janda also addresses concerns that Bill C-300 would put Canadian extractive corporations at a competitive disadvantage as compared to their counterparts from nations that do not have similar legislation. According to his report, there is no evidence that Bill C-300 would unfairly disadvantage Canadian extractive corporations. On the contrary, he believes that the Bill’s requirements would give Canadian companies which are operating internationally a competitive advantage.⁸⁶ He relies on research showing that socially responsible companies gain advantages over companies that do not have CSR policies in place.⁸⁷

Prime Minister Stephen Harper suspended sittings of Parliament at the end of 2009, so it is not clear what will happen to Bill C-300. While it may not become legislation in its present form, it

⁸⁰ “Mining companies deny abuses”, *Toronto Star*, Nov 27, 2009, online: <http://www.thestar.com/news/canada/article/731559--mining-companies-deny-abuses> on Feb 3, 2010.

⁸¹ *Ibid.*

⁸² Richard Janda, “Bill C-300: Sound and Measured Reinforcement for CSR”, September 2009, online: <http://www.johnmckaymp.on.ca/images/newsmanager/newsfiles/bill%20c-300%20report%20-%20final.pdf> on Feb 3, 2010.

⁸³ *Ibid.* at 6.

⁸⁴ *Ibid.* at 7.

⁸⁵ Advisory Group Report, *Supra*, note 65 at iii.

⁸⁶ Janda, *supra*, note 83 at 8.

⁸⁷ *Ibid.* Examples of competitive advantages listed by Janda include: cost savings; improved productivity and operational efficiencies; improved risk management; Benefits in employee recruitment, retention, and motivation; attracting customers and investors; improved relations with local communities; and improved access to lenders and insurers.

has provided a positive step toward addressing the accountability deficit that exists for Canadian mining companies operating in Latin America.

VI. CANADIAN COURTS AND CORPORATE ACCOUNTABILITY

The main article ended with a reflection on the role that Canadian courts could play in corporate accountability. Since then, lawyer Murray Klippenstein has filed a lawsuit on behalf of three Ecuadoreans who were threatened and assaulted for their opposition to mining exploration.⁸⁸ They have compelling video footage of community members being pepper sprayed and shot at by security forces working for Copper Mesa (at the time known as Ascendent Copper) on December 2, 2006.⁸⁹ They are suing the Toronto Stock Exchange (TSX), Vancouver based Copper Mesa and an individual member of the Board of Directors in relation to alleged human rights abuses that took place around the copper mines in Junin, Ecuador.

The plaintiffs assert that the mayor of their local county wrote a letter to the Finance and Audit Committee of the TSX on March 8, 2005, warning the TSX about the company's activities and requested that the company not be listed.⁹⁰ The TSX listed Copper Mesa despite the warnings and allowed the company to obtain over \$25 million in capital funds, some of which paid for the alleged armed attacks. The plaintiffs allege that the TSX is under a legal duty to "take reasonable care to avoid conduct that entails an unreasonable risk of harm to others".⁹¹ The plaintiffs further claim that members of Copper Mesa's board of directors were under a duty to avoid conduct that creates a foreseeable risk of harm to individuals and communities located in the company's areas of exploration and that the directors made decisions, omissions and took actions that caused the injury of the plaintiffs.⁹²

It remains to be seen if litigation can provide redress for the plaintiffs. The TSX has stated that they intend to bring motions to strike the statements of claim, as they disclose no reasonable cause of action against them.⁹³ However, the argument posed by the plaintiffs may give the courts the opportunity to allow overseas plaintiffs to hold Canadian corporations accountable.

⁸⁸ Marcia Luzmila Ramirez Piedra, Jaime Pollvio Perez Lucero, And, Israel Perez Lucero v. Copper Mesa Mining Corporation, TSX Inc., TSX Group Inc., William Stearns Vaughan and John Gammon, Plaintiff's Statement of Claim. See also Brett Popplewell, "Canadian mining firms face abuse allegations", *Toronto Star*, Nov 22, 2009, online: <<http://www.thestar.com/news/canada/article/729147>> on Feb 3, 2010.

⁸⁹ See "Under Rich Earth", <<http://underrichearth.ryecinema.com/>>.

⁹⁰ *Ibid.* at para. 32.

⁹¹ *Ibid.* at para. 74.

⁹² *Ibid.* at para. 63.

⁹³ Brett Popplewell, "Copper Mesa sued for alleged assault", *Toronto Star*, Nov 22, 2009, online: <<http://www.thestar.com/news/canada/article/729148>> on Feb 3 2010.

The courage being shown by the Constitutional Court in Guatemala should not be ignored. Canadian mining companies wield enormous economic and political power. Guatemalan courts need the support of their Canadian counterparts in order to level the playing field.