

findings on the truth of the allegations, but instead held that the TSX and corporate defendants did not owe a duty of care to the community despite being forewarned of the consequences of listing the corporation. The judgments suggest that the TSX is under no legal obligation to take into account the human rights records of companies they choose to list. This is particularly worrisome for the state of corporate accountability in Canada as the TSX lists many mining corporations.<sup>98</sup> The judgments of the Ontario Court of Appeal, the Ontario Superior Court of Justice and the Quebec Superior Court, indicate both the potential and the limits of the Canadian courts in holding corporations accountable for violations of human rights.

## V. Conclusion

In his decision in *Ramirez v. Copper Mesa*, the motions judge stated that there needs to be a political solution to the problems faced by the *campesinos* in Ecuador.<sup>99</sup> However, political solutions seem to be in short supply. Neither Bill C-300 nor any other private member's bills have been passed. Rather, in the spring of 2009, in response to the 2006 roundtables the Conservative government announced its CSR strategy, creating the CSR Counsellor office and essentially maintaining status quo in Canada, in other words relying on voluntary guidelines for the operation of Canadian extractive companies operating overseas. This back and forth between the judiciary and the legislature only results in the absence of corporate accountability. One of these bodies needs to take the lead, but it cannot allow only one avenue of redress for corporate human rights abuses. A legislative body that investigates claims, as envisioned by Bill C-300, might not be able to provide the complainants with adequate compensation. The ability of litigation to promote a just and equitable resolution to corporate human rights abuses is limited by the ability of the plaintiffs to fund an action in Canada. Given that the great majority of individuals in mine-affected communities have limited access to resources, litigation cannot be the only solution. Any potential remedy must exist alongside a myriad of options, such as the enactment of legislation or corporate law mechanisms, which create alternative, more accessible forums for those that have been negatively impacted by the operations of Canadian extractive industry. In this way, those in mine-affected communities in Guatemala and around the world can be afforded every opportunity to hold Canadian corporations accountable for violations of their human rights.

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<sup>98</sup> See for example the S&P/TSX Global Mining Index, online: [http://www.tmx.com/en/data/products\\_services/indices/global\\_mining\\_index.html](http://www.tmx.com/en/data/products_services/indices/global_mining_index.html)

<sup>99</sup> *Piedra v. Copper Mesa Mining Corporation*, *supra*, note 98 at paragraph 53

Ambassador further claimed that the photos of houses being burnt to the ground were in fact taken years before, in the context of the Guatemalan civil war.<sup>88</sup> An Ontario judge found that former Ambassador Cook had slandered Schnoor by making false statements about his documentary video.<sup>89</sup> The Honourable Justice Thomson stated that “the Ambassador was reckless”, and that “he should have known better”.<sup>90</sup>

Success in litigation to gain redress for the human rights abuses against mine affected communities continues to be mixed. The Quebec Superior Court has accepted a class action filed on November 8th 2010 by the Canadian Association Against Impunity (CAAI), against Anvil Mining Ltd., a corporation listed in Toronto and Australia, which alleges that Anvil provided material support to a military attack in 2004 against a group of rebels in the town of Kilwa in the Democratic Republic of Congo (DRC).<sup>91</sup> The attack led to the massacre of close to 70 people. The court held that if “if the court were to refuse to accept the application [for a class action]... there would be no other possibility for the victims’ civil claim to be heard,” rejecting the argument that the case should be heard in the DRC or Australia.<sup>92</sup> The perpetrators were acquitted of their crimes during a military trial held in the DRC in 2007. Leave to appeal the decision of the Superior Court has since been granted.<sup>93</sup>

In contrast, the suit commenced in 2008 against Copper Mesa and two of its directors as well as the Toronto Stock Exchange (TSX) has been struck out. Ecuadorian *campesinos* purported that security forces hired on behalf of Copper Mesa, a Canadian mining company in Ecuador had assaulted them. The allegations against the TSX and two company directors centered on raising funds in Canada that were then to be used to pay for the private security forces.<sup>94</sup> Prior to the listing of the corporation, the mayor of the town where the mine was located informed the TSX of the opposition to the mine in the community and the likelihood for violence.<sup>95</sup> The Ontario motions judge struck out the claim, finding that there was no relationship between the plaintiffs and the TSX defendants or the directors to “have imposed an obligation on the TSX Defendants to be mindful of the Plaintiffs’ interests when conducting their affairs.”<sup>96</sup> The Court of Appeal affirmed the motions judges’ reasoning.<sup>97</sup>

It seems strange that the Court would find that the corporation and the TSX have no relationship to the plaintiffs when the mining activities of the corporation have such a large impact on their lives and their community. The Court did not get so far as to make

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> “Congolese victims file class action against Canadian mining company”, *CCJI*, November 2010, online: [http://www.cci.ca/media/news-releases/2010/index.php?WEBYEP\\_DI=6](http://www.cci.ca/media/news-releases/2010/index.php?WEBYEP_DI=6)

<sup>92</sup> *Association canadienne contre l'impunité (ACCI) c. Anvil Mining Ltd.* (2011), 2011 QCCS 1966 (CanLII), online: <http://www.canlii.org/fr/qc/qccs/doc/2011/2011qccs1966/2011qccs1966.html>

<sup>93</sup> *Anvil Mining Ltd. c. Association canadienne contre l'impunité*, 2011 QCCA 1035 (CanLII), online: <http://www.canlii.org/fr/qc/qcca/doc/2011/2011qcca1035/2011qcca1035.html>.

<sup>94</sup> *Ramirez v. Copper Mesa*, online: <http://www.ramirezversuscoppermesa.com/>

<sup>95</sup> *Ibid.*

<sup>96</sup> *Piedra v. Copper Mesa Mining Corporation* (2010), 2010 ONSC 2421 at paragraph 38.

<sup>97</sup> *Piedra v. Copper Mesa Mining Corporation* (2011), 2011 ONCA 191.

in Guyana, resulting in spillage of mineral waste and heavy metals. The action was dismissed on the basis of *forum non conveniens*, as discussed above.<sup>77</sup>

More recently, two suits against Toronto-based HudBay Minerals have been launched in Ontario courts.<sup>78</sup> The chief conflict between the community and the corporation arises from the purportedly forcible eviction of the Mayan Q'eqchi communities from their historically communally owned lands near the town of El Estor, Guatemala in 2007.<sup>79</sup> In the course of the evictions, homes were alleged to have been looted and there is a charge that several women were gang raped in the community of Lote Ocho by mining company security personnel, police and military.<sup>80</sup> These evicted communities have since sought to reclaim these lands and protest against the mining project. In February 2011, the Constitutional Court of Guatemala issued a decision recognizing the community's collective property rights to its lands, and ordered the government to take the necessary measures for issuing land title to the community.<sup>81</sup>

On September 27, 2009, respected indigenous Mayan Q'eqchi' community leader, Adolfo Ich Chamán, was allegedly hacked with a machete and shot by security forces employed by HMI Nickel, a subsidiary of Canadian mining corporation, HudBay Minerals.<sup>82</sup> HMI Nickel was known as Skye Resources at the time of the forcible evictions and was purchased by HudBay Minerals in 2008.<sup>83</sup> Adolfo Ich Chamán's family has brought a lawsuit in Ontario courts to seek accountability for his death.<sup>84</sup> Further, eleven women from the community of Lote Ocho have also brought a suit against the corporation for the sexual assaults allegedly perpetrated against them. These claimants are seeking \$11 million in general damages and \$44 million in punitive damages.<sup>85</sup> Hudbay Minerals announced on August 5, 2011 that it would be selling its interest in the mining project near El Estor to another corporation. Murray Klippenstein, lawyer for Adolfo Ich Chamán's family, attributes the sale to the complications stemming from the severe human rights violations at the mine. He further stated that the lawsuit would continue in spite of the sale.<sup>86</sup>

There have been attempts to silence those who have reported on the incidents of violence. Former Canadian Ambassador to Guatemala, Kenneth Cook, alleged that Steven Schnoor, a Canadian videographer and Ph. D. student, used actors in his documentary about the forced evictions of the Mayan Q'eqchi from the El Estor region.<sup>87</sup> The Former

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<sup>77</sup> *Recherches Internationales Québec v. Cambior inc.* [1998] Q.J. No. 2554 (S.C.).

<sup>78</sup> See *Choc v. HudBay Minerals Inc.*, online: <http://www.chocversushudbay.com/>

<sup>79</sup> *Ibid.*

<sup>80</sup> "HudBay to investigate gang rape allegations", *Canadian Press*, March 29, 2010, online <http://www.cbc.ca/news/business/story/2011/03/29/hudbay-guatemala-gang-rape-allegations.html>

<sup>81</sup> "Guatemala Court makes Landmark Ruling in Indigenous Rights Case", *Indian Law*, online: <http://www.indianlaw.org/content/guatemala-court-makes-landmark-ruling-indigenous-rights-case>

<sup>82</sup> *Choc v. HudBay Minerals Inc.*, *supra* note 80.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> "HudBay announces sale of troubled Fenix mining project in Guatemala : Lawsuits in Ontario against HudBay and HMI Nickel regarding murder and gang-rapes will continue", August 9, 2011, online: [http://www.rightsaction.org/articles/HudBay\\_sells\\_mine\\_081111.html](http://www.rightsaction.org/articles/HudBay_sells_mine_081111.html)

<sup>87</sup> *Schnoor v. Canada*, online: <http://www.schnoorversuscanada.ca/>

Responsibility Counsellor.<sup>70</sup> However, its effect is limited as it only acts on complaints, participation is voluntary, it does not offer determinations as to whether harm has occurred, it cannot investigate the complaints and it cannot issue binding recommendations on the corporations.<sup>71</sup> In effect, corporate accountability in Canada relies on corporations to police themselves.

A member of the New Democratic Party, Peter Julian, proposed Bill C-354, a private members' bill to amend the *Federal Courts Act*<sup>72</sup> to ensure corporate accountability for all Canadian firms operating abroad. The effect of the Bill would be to expand the jurisdiction of the Federal Court to allow foreign citizens to sue Canadian corporations for human rights abuses, specifically violations of international law or a treaty to which Canada is a party, committed outside of Canada

Further, the Bill would forestall any limitations defence, allowing plaintiffs to bring suit for acts that occurred past the typical two-year limitation period.<sup>73</sup> The defence may be able to claim that there is a more convenient and appropriate forum that is fair and effective and that would provide a final and binding decision in a timely and efficient manner.<sup>74</sup> In effect, the bill would narrow the *forum non conveniens* defence whereby courts may refuse jurisdiction over matters where there is merely a more appropriate forum available, without considering whether a fair and timely resolution is possible in that forum.<sup>75</sup> The Bill would be valuable in cases where the country in which the abuses take place is not equipped or will not take action. For example, in Guatemala, there is a systemic problem with impunity. Human Rights Watch noted in January 2011 that as of 2009, 99.75 percent of violent crime went unpunished.<sup>76</sup> This Bill has not come up for debate in Canada and given the current political environment, as evidenced by the chilly reception given to Bill C-300 by the current leadership, it is unlikely that it will come forward again soon.

#### **IV. Court Actions against the Extractive Industry**

Even without Bill C-354 and its broadening of the jurisdiction of the Canadian courts, several cases have been launched in Ontario and Quebec courts that relate to human rights abuses by the Canadian mining corporations. In 1998, the Quebec Superior Court dismissed a class action against Cambior Inc. for a tailings dam failure at the Omai Mine

<sup>70</sup> "About us", *Office of the Extractive Sector Corporate Social Responsibility Counsellor*, online: [http://www.international.gc.ca/csr\\_counsellor-conseiller\\_rse/About\\_us-A\\_propos\\_du\\_bureau.aspx](http://www.international.gc.ca/csr_counsellor-conseiller_rse/About_us-A_propos_du_bureau.aspx)

<sup>71</sup> *Ibid.* For a further analysis, see: "Concerns with regard to the mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada", *Miningwatch*, March 2011, online: <http://www.miningwatch.ca/article/concerns-regard-mandate-and-review-procedure-office-corporate-social-responsibility>

<sup>72</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7

<sup>73</sup> *Ibid.* at section 2

<sup>74</sup> *Ibid.* at section 3

<sup>75</sup> *Amchem Products Inc. v. British Columbia Worker's Compensation Board*, [1993] 1 S.C.R. 897

<sup>76</sup> "World Report: Guatemala", *Human Rights Watch*, online: <http://www.hrw.org/en/world-report-2011/guatemala>

to seek advice from relevant authorities, and/or representatives of the business community, worker organizations, other non-governmental organizations, and relevant experts.<sup>62</sup> Further, the NCP is to make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement.<sup>63</sup> The Guidelines envision a fulsome inquiry and analysis of the implementation of the Guidelines, which was not afforded to FREDEMI in the Canadian NCP's response to their complaint.

#### IV. Canadian Legislation on Corporate Accountability

On October 28, 2010, the Parliament of Canada narrowly voted down Bill C-300: *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*. A private member's bill tabled by Liberal MP John McKay, the Bill sought to hold corporations accountable for their human rights abuses abroad by giving the government authority to investigate complaints against resources companies operating abroad, and to withhold public funding from corporate offenders, through divestment by the Canada Pension Plan or ineligibility for funding or guarantees of loans by Export Development Canada.<sup>64</sup> Several NGOs, community leaders, tens of thousands of Canadian citizens, academics and international civil society leaders lobbied for the passage of the Bill to no avail.<sup>65</sup> Bill C-300 failed to pass by a mere six votes, with a significant number of absentees. 24 opposition Members of Parliament were conspicuously absent from the final vote: five members of the Bloc Quebecois, 14 Liberal Party members (including former Liberal Party Leader Michael Ignatieff), four members of the New Democratic Party and one independent.<sup>66</sup>

The mining industry lobbied heavily against the Bill, arguing that it would reduce Canada's competitiveness in the global mining industry.<sup>67</sup> Nevertheless, the failure of the Bill still leaves a gap in the corporate accountability framework, which other countries have sought to fill with legislation<sup>68</sup> or with international mechanisms.<sup>69</sup> The Canadian government has created an Office of the Extractive Sector Corporate Social

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<sup>62</sup> OECD Guidelines for Multinational Enterprises, OECD Ministerial Meeting 25May 2011, Part II: Implementation Procedures of the OECD Guidelines, section 1:C:2(a), online:[http://www.oecd.org/document/33/0,3746,en\\_2649\\_34889\\_44086753\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html)

<sup>63</sup> *Ibid.* at section 1:C:3(c)

<sup>64</sup> *Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, Second Session, Fortieth Parliament, 57-58 Elizabeth II, 2009, online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4>

<sup>65</sup> John McKay, "Supporters of C 300", October 26, 2009, online: [http://www.johnmckaymp.on.ca/newsshow.asp?int\\_id=80590](http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80590)

<sup>66</sup> Journals, No. 88, October 27, 2010, House of Commons of Canada, 40<sup>th</sup> Parliament, 3<sup>rd</sup> session, online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4723496>

<sup>67</sup> "Vote on Bill C-300 Signals Strong Momentum Towards Regulation of Canadian Mining Industry Overseas", *Mining Watch Canada*, October 27, 2010, online: <http://www.miningwatch.ca/en/vote-bill-c-300-signals-strong-momentum-towards-regulation-canadian-mining-industry-overseas>

<sup>68</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub.L. 111-203, H.R. 4173

<sup>69</sup> *OECD Guidelines for Multinational Enterprises*, online: [http://www.oecd.org/document/28/0,3343,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html)

fastest growing senior gold producer in the world.<sup>56</sup> In 2010, Goldcorp reported revenues of approximately \$3.8 billion and assets of approximately \$28.8 billion.<sup>57</sup>

### III. International Mechanisms for Corporate Accountability

Under the OECD Guidelines for Multinational Enterprises, referenced in an earlier update, Canada has a National Contact Point who can receive official complaints from communities affected by the activities of multinational corporations.<sup>58</sup> In December 2009, two representatives of FREDEMI, presented a specific instance complaint to the Canadian NCP respecting the operations of the Marlin Mine, requesting an investigation, including a site visit, and seeking a final statement with recommendations. However, the NCP declined to make a site visit and stated that would not be producing a Spanish language translation of its final statement. In a letter to members of the cabinet dated January 11, 2011, Kris Genovese of Centre for International Environmental Law and Jamie Keen of Miningwatch Canada, criticized the NCP for faulting on its obligation to be transparent and accountable by not translating its final statement, thus ignoring its own terms of reference.<sup>59</sup> The letter provided that the NCP's offers of dialogue were made repeatedly despite the community not wishing to undertake dialogue with the corporation. Further, the letter questioned whether any fact-finding activities had been undertaken as the site visit was refused.

The Honourable Peter Van Loan, Minister of International Trade, responded to Kris Genovese on February 17, 2011, stating that because the NCP's repeated offers to mediate were rejected, investigation of the complaint became moot. The letter also stated that the Minister did not consider the NCP an investigative agency.<sup>60</sup> Ultimately, the NCP decided to close the complaint without providing an analysis of the implementation of the Guidelines. Further, instead of using the findings of the ILO or the IACHR to inform its decisions, the NCP stated that these finding did not influence its decisions.<sup>61</sup>

The present updates to the OECD Guidelines for Multinational Enterprises detail the NCP's role in a specific instance complaint. Although the function of the NCP is not investigative, where the issues raised merited further examination, the NCP is called upon

<sup>56</sup> "Goldcorp increases dividend", *Goldcorp*, February 24, 2011, online: [http://www.goldcorp.com/news/goldcorp/index.php?&content\\_id=839](http://www.goldcorp.com/news/goldcorp/index.php?&content_id=839)

<sup>57</sup> "Factsheet, March 2011", *Goldcorp*, March 2011 online: <http://www.goldcorp.com/investors/factsheets/>

<sup>58</sup> "Canada's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (MNEs)", *Foreign Affairs and International Trade Canada*, online: [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu\\_id=1&menu=R&view=d](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R&view=d)

<sup>59</sup> Letter to members of cabinet from Kris Genovese (CIEL) and Jamie Keen (Mining Watch), January 11, 2011, online: [http://www.oecdwatch.org/cases/Case\\_172/945/at\\_download/file](http://www.oecdwatch.org/cases/Case_172/945/at_download/file). The NCP terms of reference are available online at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/terms\\_of\\_ref-mandat.aspx?menu\\_id=29&view=d](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/terms_of_ref-mandat.aspx?menu_id=29&view=d).

<sup>60</sup> Letter to Kris Genovese (CIEL) from Minister Peter Van Loan, February 17, 2011.

<sup>61</sup> "Canadian Government Abdicates Responsibility to Ensure Respect for Human Rights" *Miningwatch*, May 16, 2011, online: <http://www.miningwatch.ca/news/canadian-government-abdicates-responsibility-ensure-respect-human-rights>

her in the head. She has since recovered, but has lost her right eye.<sup>47</sup> Carmen Mejía, another grassroots activist known for speaking out against the human rights abuses occurring at the Marlin mine, has received death threats by phone and was the target of an attempted kidnapping in June 2010 spurring Amnesty International to broadcast an urgent action seeking to halt these threats.<sup>48</sup>

On February 28, 2011, 200 members of communities in San Miguel Ixtahuacán protested against the Guatemalan states' failure to suspend mining activities in response to the IACHR's precautionary measures.<sup>49</sup> The Defence Front of San Miguel Ixtahuacán (FREDEMI) organized the protest, which consisted of protestors blocking the main routes that Montana Exploradora uses to access the mine. Violence erupted shortly following the protest when mine supporters purportedly assaulted over a dozen protestors by taking off them the bus they were returning home in and beating and robbing several of them.<sup>50</sup>

One protestor, Aniseto López, was singled out and, with 45 others, was detained in the office of the local mayor. He has been seen by the local government as spearheading the protests and was allegedly beaten and threatened with death.<sup>51</sup> Another protestor, Miguel Bamacá, who the Guatemalan government had already been ordered to protect, was taken from the scene and beaten. Both men returned home later that evening seriously injured.<sup>52</sup> On March 3, 2011, Amnesty International released an urgent action condemning the events and calling for the Government of Guatemala to ensure the safety of these individuals and their families, citing the Declaration on Human Rights Defenders adopted by the Organization of the United Nations in 1998.<sup>53</sup> Montana Exploradora denied any involvement of its employees, further stating that Aniseto López presumably instigated the demonstrations.<sup>54</sup>

Despite the recorded instances of violence and the recommendations of international and local actors, Goldcorp has indicated it will not shut down the Marlin mine. Goldcorp justifies this decision in part by pointing to the resulting costs to the employees and communities. The company reports that it employs around 2000 people in the area, such that closure would result in loss of wages for these employees if they were not compensated during any mine suspension.<sup>55</sup> Although this is undoubtedly true, Goldcorp, as the parent corporation of Montana Exploradora, is certainly capable of sustaining such costs. Goldcorp has posted an 11% increase in the annual dividend in February 2011, following its doubling in October 2010 and maintains its status as the

<sup>47</sup>“Carmen Mejía: Threatened with death for defending her community” *Amnesty International*, online: <http://www.amnesty.ca/atrisk/index.php/carmen-mejia/>

<sup>48</sup> *Ibid.*

<sup>49</sup>“Urgent Action: Mine activists beaten and threatened”, *Amnesty International*, UA 57/11, online:

<http://www.amnesty.org/en/library/asset/AMR34/002/2011/en/e99a7253-74fb-48fd-9448-a82c1bcb9805/amr340022011.en.html>

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup>Stakeholder update, March 4, 2011, *Goldcorp*, online:

[http://www.goldcorp.com/\\_resources/Stakeholder\\_Update\\_Supplement\\_for\\_Guatemala\\_03\\_04\\_11.pdf](http://www.goldcorp.com/_resources/Stakeholder_Update_Supplement_for_Guatemala_03_04_11.pdf).

<sup>55</sup> Guatemalan Government Responds To Marlin Mine Suspension Request, *supra*, note 11

institutions, as well as from the company's own HRA, were leading to a loss of credibility in the eyes of investors and the public.<sup>40</sup> The resolution sought the suspension of Goldcorp's operations at the Marlin mine in line with recommendations by the ILO and the IACHR. It also sought a moratorium on expansion, as recommended by Goldcorp's own HRA.<sup>41</sup> In a press release to announce submission of the resolution, the Public Service Alliance of Canada stated that the proposal warranted serious consideration based upon harmful repercussions of ignoring the dissatisfaction of the communities.<sup>42</sup> The corporation accepted the resolution for circulation to shareholders in advance of its Annual General Meeting held on May 18, 2011 with a lengthy rebuttal urging shareholders to reject the recommendations. In response to the shareholder proposal, Goldcorp president, Chuck Jeannes, stated that the dispute over land ownership and environmental impacts of the mine boiled down to a difference in vision between those who feel that mining should not be a part of the economic development of Guatemala and those who do, but did not respond to the specific allegations against the corporation.<sup>43</sup>

The shareholder resolution to suspend operations was defeated at the AGM. One ethical investment fund, Northwest & Ethical Investments (NEI Investments), did not support the resolution, stating that Goldcorp is moving forward on the recommendations in the HRA and has published formal updates on how it is implementing the recommendations.<sup>44</sup> Further, Jennifer Coulson, Manager of Corporate Engagement, stated "It seems to us, as shareholders that care about human rights issues, that we should all support a strategy that is based on dialogue, mutual respect, meaningful action, and that includes the voice of governmental authorities nationally and locally. Shutting down the Marlin Mine does not support this strategy and has the potential to cause even more conflict."<sup>45</sup>

Nevertheless, local pressure for closure of the Marlin mine continues as violence and human rights violations around the mine persist. One vocal activist, Diodora Hernández, was shot in the eye at close range purportedly for refusing to sell her land and speaking out about the impact of the mine on the water supply of her community of Ágel.<sup>46</sup> On July 13, 2010, two men, one allegedly a past employee of Montana Exploradora and another allegedly employed by a contractor for the company, entered her home and shot

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<sup>40</sup> "Goldcorp shareholder resolution asks for suspension of Marlin mine in Guatemala", *Mining Watch Canada*, online: <http://www.miningwatch.ca/en/goldcorp-shareholder-resolution-asks-suspension-marlin-mine-guatemala>

<sup>41</sup> *Ibid.*

<sup>42</sup> "Shareholders announce resolution to suspend controversial Goldcorp mine in Guatemala", *supra*, note 39. The Alliance's position was remarkable given the Alliance's involvement and subsequent withdrawal from the HRA process.

<sup>43</sup> Gordon Hamilton, "Goldcorp President Defends Mining Practices", *Vancouver Sun*, May 18, 2011, online:<http://www.vancouver.sun.com/life/Goldcorp+president+defends+mining+practices/4805887/story.html#ixzz1N6w3J32U>

<sup>44</sup> Statement by Jennifer Coulson, NEI Investments.

<sup>45</sup> *Ibid.*

<sup>46</sup> Grahame Russell, "Diodora Hernandez: No Tenga Pena", *Rights Action*, July 12, 2011, online: [http://www.rightsaction.org/articles/Diodora\\_Hernandez\\_071411.html](http://www.rightsaction.org/articles/Diodora_Hernandez_071411.html)



San Miguel and for their residents resulting from construction and operation of the Marlin mine.<sup>30</sup>

The human rights policy that Goldcorp released on February 9, 2011 made a number of commitments: that it would uphold the human rights in Universal Declaration of Human Rights,<sup>31</sup> that it would obey the rights and traditions of indigenous peoples in ILO 169,<sup>32</sup> and that any contractors would be required to comply with local and international law.<sup>32</sup> Nevertheless, the human rights policy does not envision the closure of the mine, only stating that Goldcorp would seek to minimize involuntary resettlement wherever possible.<sup>33</sup> Further, the policies do not require Goldcorp to obtain independent human rights or environmental impact assessments, nor do they detail mechanisms for accountability or potential remedial measures.<sup>34</sup>

Certain Goldcorp shareholders have not been satisfied by the corporation's efforts to address the situation in Guatemala. In addition to the shareholder resolution which led Goldcorp to conduct the HRA, Kathryn Anderson of the Maritimes-Guatemala Breaking the Silence (BTS) Network and Brenda Cooper brought forward a shareholder resolution on June 8, 2010, calling on Goldcorp to adopt a corporate policy on free, prior and informed consent by September 1, 2010.<sup>35</sup> The resolution provided that Goldcorp would implement the proposed policy retroactively and cease all operations that did not comply with this policy.<sup>36</sup> At the Annual General Meeting, Javier de Leon of Guatemala tried to explain the environmental, health and social devastation that a Goldcorp mine had brought to his municipality of San Miguel Ixtahuacán.<sup>37</sup> Management discouraged shareholders from accepting the proposal, which was voted down by 90 percent of shareholders. Nevertheless, that 10 percent of shareholders voted in favour of the resolution was surprising. As Kathryn Anderson commented, shareholders rarely vote against the company line.<sup>38</sup>

On March 16, 2011, the same two Goldcorp shareholders announced a resolution to suspend the operation of the Marlin mine.<sup>39</sup> The resolution stated that the effect of ignoring media scrutiny and the recommendations of international human rights

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<sup>30</sup> *Ibid.*

<sup>31</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), online: <http://www.un.org/en/documents/udhr/index.shtml>

<sup>32</sup> "Human Rights Policy", *Goldcorp*, online: [www.goldcorp.com/\\_resources/HR\\_Policy.pdf](http://www.goldcorp.com/_resources/HR_Policy.pdf)

<sup>33</sup> *Ibid.*

<sup>34</sup> Renu Mandhane, "Actions Speak Louder than Words: A Critical Analysis of Goldcorp's Human Rights and Corporate Social Responsibility Policies" *University of Toronto, Faculty of Law: International Human Rights Program*, May 11, 2011.

<sup>35</sup> Valerie Croft, "Goldcorp Drilled by Shareholders for Mining Projects in Central America", *The Dominion*, June 8, 2010, online: <http://www.commercialpressuresonland.org/press/goldcorp-drilled-shareholders-mining-projects-central-america>

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> "Shareholders announce resolution to suspend controversial Goldcorp mine in Guatemala", *Mining Watch Canada*, online: <http://www.miningwatch.ca/en/shareholders-announce-resolution-suspend-controversial-goldcorp-mine-guatemala>

productive or even appropriate.<sup>20</sup> The shareholder proposal ignored the rights of the mine-affected communities to consent to being assessed.<sup>21</sup> On Common Ground recognized that the study itself had caused heightened social tensions and increased polarization in the community.<sup>22</sup> As the assessment was conducted while the mine operations continued, a balanced investigation of the human rights abuses and environmental impacts proved difficult.

Despite initial fears that the HRA would be biased in favour of the corporation, the report was highly critical of Goldcorp's role in the mine. It stated that Montana Exploradora, the corporation's subsidiary, had failed to respect the right to life and security of the person as it lacked the policies and procedures to govern its interaction with public security forces.<sup>23</sup> The report criticized the consultation process and acquisition of land stating that "there is a pattern of allegations about coercion and pressure in the land sales that would undermine the voluntary nature of the transactions and would infringe upon the right to own property"<sup>24</sup> and that "there is no indication that Montana undertook prior consultation with land sellers in Sipacapa... these land acquisition procedures failed to respect indigenous peoples' land rights."<sup>25</sup> The HRA recommended that there be a moratorium on land acquisition and even called for a halt of all exploration activities and mine expansion projects pending state involvement in consultation.<sup>26</sup> However, the HRA did not recommend that all existing mining activities be shutdown, nor was this option explored. This is unsurprising as the HRA was designed to improve company operations rather than contemplate whether the operations should even continue. The report ultimately called for the corporation to create a proactive human rights strategy.<sup>27</sup>

In response to the report, Goldcorp stated that consultation as envisioned by ILO 169 only applies to government entities and is distinct from what the company seeks to undertake around the Marlin mine, which the corporation calls stakeholder dialogue.<sup>28</sup> Goldcorp stated that it would develop a formal, comprehensive human rights policy for Goldcorp and implement it at the Marlin Mine, although its reservations about international instruments such as ILO 169 indicate that these would be limited in scope from the outset.<sup>29</sup> The corporation did not indicate that land acquisitions would stop or that exploration would be halted, as per its own HRA, prior to these dialogues. Goldcorp reiterated its contribution to economic and social development for the Municipalities of

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<sup>20</sup> Aaron Dhir, "Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights and TWAIL Discourse", *Comparative Research in Law & Political Economy*, Research Paper No. #12/2009 at 10, online: <http://ssrn.com/abstract=1416198>

<sup>21</sup> *Ibid.*

<sup>22</sup> *Human Rights Impact Assessment*, *supra* note 18 at 13

<sup>23</sup> *Ibid.* at 169 to 171

<sup>24</sup> *Ibid.* at 124

<sup>25</sup> *Ibid.* at 133

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* at 216

<sup>28</sup> "Goldcorp's response to recommendations (English)", *Goldcorp*, online: [http://www.goldcorp.com/\\_resources/Goldcorps\\_Response\\_to\\_Marlin\\_Mine\\_HRA\\_report\\_final\\_06\\_29\\_10.pdf](http://www.goldcorp.com/_resources/Goldcorps_Response_to_Marlin_Mine_HRA_report_final_06_29_10.pdf)

<sup>29</sup> *Ibid.*

contamination of water supplies owing to mining activities.<sup>11</sup> Goldcorp's press release indicated certainty that the mine would continue to operate as normal.<sup>12</sup> After stalling on the suspension for over a year, on August 4, 2011, the Ministry of Energy and Mines refused to suspend the Marlin mine, arguing that it lacked evidence of water contamination. The Guatemalan government has requested that the IACHR modify or lift the precautionary measures.<sup>13</sup>

Despite Guatemala's refusal to implement the precautionary measures, the IACHR recommendations have been highly influential, garnering the attention of other governments. On March 30, 2011, fifteen members of the US Congress asked the Government of Guatemala to comply with the orders of the IACHR.<sup>14</sup> Thirty-six representatives of the European Parliament similarly urged the Guatemalan administration to shutdown the mine until investigations are complete.<sup>15</sup>

From June 14 to 18, 2010, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People, James Anaya, visited the communities in San Miguel Ixtahuacán and Sipacapa,<sup>16</sup> receiving complaints from the communities regarding general lack of consultation prior to Montana Exploradora's mining activity and attacks against community leaders by private security.<sup>17</sup>

In May 2010, On Common Ground, which was hired by Goldcorp to conduct a HRA in response to a shareholder proposal circulated by a consortium of investors, published its report.<sup>18</sup> The HRA, as noted in the earlier update, received little support from the community it was expected to assess.<sup>19</sup> There was no community representation on the steering committee and no efforts were made to consult whether the study would be

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<sup>11</sup> "Guatemalan Government Responds To Marlin Mine Suspension Request", *Goldcorp*, June 24, 2010, online: [http://www.goldcorp.com/news/goldcorp/2010/index.php?&content\\_id=787](http://www.goldcorp.com/news/goldcorp/2010/index.php?&content_id=787)

<sup>12</sup> Fiona Anderson, "Guatemala says it will suspend Goldcorp min, the mine will keep operating", *Vancouver Sun*, June 24, 2010, online: <http://www.vancouversun.com/news/Guatemala+says+will+suspend+Goldcorp+mine/3198018/story.html#ixzz1JMUKU8Hl> e: Company denies the allegations against it and says that for now

<sup>13</sup> "Guatemala defies human rights body, refuses to suspend Marlin mine", *Mining Watch*, 4 August 2011, online: <http://www.miningwatch.ca/news/guatemala-defies-human-rights-body-refuses-suspend-marlin-mine>.

<sup>14</sup> "Letter to the President of Guatemala", *US Congress*, online: [http://www.nisgua.org/get\\_involved/action\\_alerts/goldcorp/Dear\\_Colleague\\_Guatemala\\_03302011.pdf](http://www.nisgua.org/get_involved/action_alerts/goldcorp/Dear_Colleague_Guatemala_03302011.pdf)

<sup>15</sup> "Letter to the Government of Guatemala", *European Parliament*, October 2010, online: <http://goldcorpoutofguatemala.files.wordpress.com/2010/09/parlamento-europeo-carta-sobre-mina-marlin.pdf>

<sup>16</sup> "Observaciones preliminares del Relator Especial de Naciones Unidas sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, S. James Anaya, sobre su visita a Guatemala", *Office of the High Commissioner for Human Rights*, online:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10173&LangID=S>

<sup>17</sup> *Ibid.*

<sup>18</sup> On Common Ground, *Human Rights Impact Assessment*, online: <http://hria-guatemala.com/en/default.htm>

<sup>19</sup> Bill Law, "Canadian mine accused of causing skin infections", *BBC News World*, March 11, 2009, online: <http://news.bbc.co.uk/2/hi/americas/7934513.stm>

indigenous communities affected by the mines and to adopt measures to encourage communication between the corporation and the community in order to uphold the right of the communities to free, prior and informed consent.<sup>4</sup>

On May 20, 2010, IACHR issued precautionary measures in respect of 18 communities neighboring the Marlin mine and ordered that the Guatemalan government suspend operations at the Marlin mine until the IACHR reached a decision on the petition submitted in 2007 alleging human rights violations and lack of consent from affected communities – rights protected under international law.<sup>5</sup> The IACHR called on the government to take necessary measures to prevent environmental contamination and protect the communities that surround the mine from any adverse health effects resulting from the mine’s operations.<sup>6</sup> It was further requested that the government decontaminate the water sources of the mine-affected communities.<sup>7</sup> Earlier that week, Physicians for Human Rights, in conjunction with the University of Michigan, had released its findings with respect to contamination of water in the communities adjacent to or downstream from the mine. Although the study called for more research to be conducted, the researchers found that individuals residing closest to the mine had higher levels of mercury, copper, arsenic and zinc in their urine.<sup>8</sup> Further, metals such as aluminum, manganese and cobalt were found in elevated levels in the river water and sediment sites directly below the mine when compared to other sites.<sup>9</sup>

In response to mounting international pressure, particularly from the IACHR, on 23 June 2010, the Guatemalan government announced that it would suspend the operations at the Marlin mine and initiate an administrative process to investigate the allegations on which the IACHR’s request was based.<sup>10</sup> Goldcorp responded on June 24, 2010, citing the studies conducted by the Guatemalan Ministry of Health, Ministry of Environment and Natural Resources, and Ministry of Energy and Mines demonstrating no evidence of

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<sup>4</sup> *Ibid.*

<sup>5</sup> “PM 260-07 – Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala”, Precautionary Measures Granted by the Commission during 2010, *Interamerican Commission on Human Rights*; online: <http://www.cidh.oas.org/medidas/2010.eng.htm> see also “OAS Human Rights Commission Urges Suspension of Mining Activity at Goldcorp’s Marlin Mine in Guatemala”, *Mining Watch Canada*, May 24, 2010, online:

<http://www.miningwatch.ca/en/oas-human-rights-commission-urges-suspension-mining-activity-goldcorps-marlin-mine-guatemala>

<sup>6</sup> “Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala”, *Interamerican Commission on Human Rights*, Precautionary Measure 260-07, online: <http://www.cidh.oas.org/medidas/2010.eng.htm>

<sup>7</sup> *Ibid.*

<sup>8</sup> “Toxic Metals and Indigenous Peoples Near the Marlin Mine in Western Guatemala”, *Physicians for Human Rights*, online: <http://physiciansforhumanrights.org/site-search/search.jsp?query=guatemala>

<sup>9</sup> *Ibid.*

<sup>10</sup> “Guatemala Suspends Marlin mine - Human rights and environmental organizations applaud the decision, urge President Colom’s government to protect communities against retaliation”, *Mining Watch Canada*, June 24, 2010 online: <http://www.miningwatch.ca/en/guatemala-suspends-marlin-mine-human-rights-and-environmental-organizations-applaud-decision-urge-pr>

## **Goldcorp and Hudbay in Guatemala (August 2011 Update)**

**Bernadette Maheandiran**

### **I. Introduction**

In an attempt to shed light on the human rights abuses committed by Canadian mining corporations in Guatemala, “Breaching Indigenous Law: Canadian Mining in Guatemala” discussed the violence associated with mining operations in Guatemala, focusing on the Marlin mine in the San Marcos district of Guatemala.<sup>1</sup> An update of this article was published in 2010 detailing further incidents of violence as well as outlining mechanisms to hold Canadian mining corporations accountable for human rights violations.<sup>2</sup> The following pages chronicle events that have occurred in 2010 and early 2011.

The past year has seen increased attention paid to the Marlin mine, owned by Goldcorp subsidiary Montana Exploradora de Guatemala, from bodies such as the International Labour Organization (ILO) and the Organization of American States’ Interamerican Commission on Human Rights (IACHR).

Goldcorp itself conducted a Human Rights Impact Assessment (HRA) in response to a shareholder resolution. Further, a new shareholder resolution was put forward to address the situation relating to the Marlin mine. Tragically, the enhanced scrutiny has not caused a corresponding decrease in violence. Threats and attacks against community activists continue. Legislative options for accountability, such as Bill C-300 and Bill C-354, have not been passed by Parliament of Canada, consequently the Canadian courts remain the main forum for redress for mining affected communities overseas. However, as evidenced by recent litigation, it is yet to be seen whether the courts will take a role in enforcing corporate accountability.

### **II. Goldcorp in Guatemala: 2010 - 2011**

In the wake of the allegations of human rights abuses discussed in the previous update, in February 2010, the Committee of Experts on the Application of Conventions and Recommendations of the ILO urged the government of Guatemala to suspend operations of the Marlin Mine.<sup>3</sup> The Committee advised the government to fulfill its duty under ILO 169: the Indigenous and Tribal Peoples Convention by consulting with the

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

<sup>2</sup> Bernadette Maheandiran, Jessica DiFederico, Rolando Aguilera and Shin Imai, “Goldcorp and HudBay Minerals in Guatemala”, *Comparative Research in Law & Political Economy*: Research Paper No. 09/2010, online: <http://ssrn.com/abstract=1595157>

<sup>3</sup> International Labour Conference, Report of the Committee of Experts on the Application of Conventions and Recommendations (International Labour Office: Geneva, 2010) at 758 online: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_123424.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf)