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CANADA[1]

Cases – Criminal Prosecution for Genocide and Crimes Against Humanity

☛ *R c Mungwarere* [2013] ONCS 4594

The 2012 report from Canada's Correspondent highlighted numerous pre-trial applications argued prior to the judgment detailed below. As mentioned in the 2012 report, Mr Jacques Mungwarere was prosecuted in Ottawa before Ontario's Superior Court of Justice ('SCJ'). The indictment was issued pursuant to Canada's *Crimes Against Humanity and War Crimes Act* ('*CAHWCA*').[2] Owing to Mungwarere's presence in Canada, the SCJ had jurisdiction over his alleged international crimes committed abroad.

On 28 May 2012, the prosecution opened its case alleging that Mungwarere committed genocide and crimes against humanity in the Kibuye prefecture of Rwanda from April to July 1994. After filing a number of formal admissions made by the accused, the prosecution led evidence from 12 witnesses over 33 court days alleging that Mungwarere actively participated in the 1994 genocide. An expert witness and three police investigators testified in person. A Tutsi survivor then testified in person – and in public – following the Court's rejection of the prosecution's application for protective measures (eg pseudonym, closed session). As a result of this rejection, another Tutsi survivor refused to testify. The subsequent seven prosecution witnesses (three Tutsi and four Hutu) testified that they had either survived the genocide or participated in it. They each detailed Mungwarere's active participation in the Hutu's attacks on the Tutsi at the Mugonero Hospital Complex and subsequently throughout the hills of Bisesero. They were each cross-examined on inconsistencies with their previous statements to various investigators or their previous testimony to foreign courts.

In response to these allegations, Mungwarere and his team of defence counsel led evidence from 31 witnesses over 54 court days categorically denying any implication in the genocide. In addition to an expert witness and two private investigators, Mungwarere led evidence from nine Tutsi and 19 Hutu. Unlike the prosecution's request, the Court granted Mungwarere's applications for protective measures for eight defence witnesses (eg pseudonyms, closed sessions, obscured video image). Three of these witnesses were Tutsi survivors who testified that they falsely accused Mungwarere in their pre-trial statements to Canadian investigators. At trial, they detailed their reasons for such false accusations (eg vengeance, fear, travel, money, hate) and their reasons for eventual truth-telling (eg

[1] The author of this Correspondent's Report is counsel with the Public Prosecution Service of Canada and a contract instructor at the University of Ottawa teaching 'International Criminal Law.' The information and summaries presented below do not necessarily reflect the position(s) of either the Public Prosecution Service of Canada or the Government of Canada.

[2] *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

reconciliation, conscience, justice). After the testimony of 27 defence witnesses, Mungwarere testified on his own behalf. He denied any involvement in the genocide but acknowledged that he lied to Canadian immigration officials during his refugee determination process regarding his employment history and his passage from Rwanda to Canada.

In reply, the prosecution led evidence from one Hutu witness, filed further admissions, and finalized the 125 exhibits.

The majority of the witness testimony was conducted via video-conference between Ottawa and central Africa (overcoming technical and time-zone complexities and respecting religious commitments). Questioning was usually conducted in French, and the witnesses' Kinyarwanda responses were translated accordingly by a team of Court-appointed interpreters.

On 5 July 2013, after 94 court days of evidence and argument, Mungwarere was acquitted of all charges.[3] The Court drew upon conventional and customary international criminal law to define the elements of genocide and crimes against humanity. To do so, it relied on domestic jurisprudence and decisions of the ad hoc international criminal tribunals. The Court also decided that section 21(1) of the *Criminal Code* regarding modes of liability applies to prosecutions conducted pursuant to the *CAHWCA* – including co-perpetration and aiding.

The Court concluded that Mungwarere was not a credible witness and rejected the essential aspects of his testimony. Similarly, the Court rejected the accused's alibi and applied little weight to evidence of his absence in Bisesero and in Gacaca proceedings.

Equally, however, the Court found a lack of credibility in many of the prosecution's witnesses and a lack of reliability in much of the prosecution's evidence. The Court concluded that Mungwarere was probably guilty, but nonetheless acquitted him because the prosecution had not discharged its burden to prove his guilt beyond a reasonable doubt.

The 2014 report from Canada's Correspondent will survey the Immigration and Refugee Board's decision to vacate Mungwarere's refugee protection largely on the basis of the SCJ's reasons for judgment summarized above.

Cases – Exclusion from Refugee Protection and Inadmissibility due to Complicity in International Crimes

☛ *Ezokola v Canada (Citizenship and Immigration)* (2013) SCC 40

The 2012 report from Canada's Correspondent highlighted various cases decided prior to the judgment detailed below. In January 2008, Mr Rachidi Ekanza Ezokola arrived in Canada and claimed asylum. On 23 September 2009, the Refugee Protection Division ('RPD') of the Immigration and Refugee Board ('IRB') excluded him from the definition of 'refugee' on the basis of his complicity in the crimes against humanity committed by the government of the Democratic Republic of Congo during his public service from 1999 to 2008 in Kinshasa and New York.[4] Based on his official rank and voluntary service, the RPD concluded that

[3] *R c Mungwarere* (2013) ONCS 4594. As stated in the 2012 report, the author of this Correspondent's Report was a member of the three-person prosecution team.

[4] The appellant, Rachidi Ekanza Ezokola, began his career with the government of the Democratic Republic of Congo in January 1999. He was hired as a financial attaché at the Ministry of Finance and was assigned to the Ministry of Labour, Employment and Social Welfare in Kinshasa. He later worked as a financial adviser to the Ministry of Human Rights and the Ministry of Foreign Affairs and International Cooperation. In 2004, the appellant was assigned to the Permanent Mission of the Democratic Republic of Congo to the United Nations in New York. In his role as second counsellor of embassy, the appellant represented the Democratic Republic of Congo at international meetings and UN entities including the UN Economic and Social Council. He also acted

Ezokola had 'personal and knowing awareness' of the atrocities committed by the DRCgovernment.[5]

On 17 June 2010, the Federal Court ('FC') allowed Ezokola's application for judicial review of the RPD's decision on the basis that complicity requires a nexus between the refugee claimant and the crimes committed by a group (eg a senior position in the public service making possible commission, incitement, concealment, participation, or collaboration in the crimes).[6] According to the FC, a refugee claimant is not complicit in international crimes committed by a government through mere employment in the government or knowledge of the atrocities.

On 15 July 2011, pursuant to the Minister's appeal, the Federal Court of Appeal ('FCA') rejected the FC's approach to complicity as too narrow and ordered a *de novo* hearing on the basis that the RPD applied an incorrect test when determining complicity – 'personal and knowing awareness' instead of 'personal and knowing participation.'[7]

On 19 July 2013, the Supreme Court of Canada ('SCC') clarified the FCA's decision and re-articulated the test for complicity in the context of article 1F(a) of the *Refugee Convention*[8] and section 98 of Canada's *Immigration and Refugee Protection Act*.[9] The SCC highlighted that 'complicity is a defining characteristic of crimes in the international context, where some of the world's worst crimes are committed often at a distance, by a multitude of actors.'[10] The extraordinary nature of international crimes was observed to be 'collective and large-scale criminality, where crimes are often committed indirectly and at a distance.'[11] The SCC's modified test distinguished mere association from culpable complicity. It replaced the FCA's 'personal and knowing participation' test established in 1992[12] that had been overextended in some cases to exclude refugee claimants on the basis of complicity by association.

The SCC unanimously adopted a contribution-based test for complicity in order to exclude a claimant from the definition of 'refugee'. The SCC stated that

> an individual will be excluded from refugee protection under art. 1F(a) for complicity in international crimes if there are serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime. The evidentiary burden falls on the Minister as the party seeking the applicant's exclusion.[13]

The SCC rejected any broad approach to complicity based on mere membership, mere awareness, passive acquiescence, complicity-by-association, or tangential contribution.

Before remitting Ezokola's matter back to the RPD for re-determination in accordance with the re-articulated and contribution-based test for complicity, the SCC made the

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as a liaison between the Permanent Mission of the Democratic Republic of Congo and UN development agencies. In 2007, the appellant served as acting *chargé d'affaires*. In this capacity, he led the Permanent Mission and spoke before the Security Council regarding natural resources and conflicts in the Democratic Republic of Congo. The appellant worked at the Permanent Mission until January 2008 when he resigned and fled to Canada.

[5] *Ezokola v Canada (Citizenship and Immigration)* (2009) CanLII 89027, [71].

[6] *Ezokola v Canada (Citizenship and Immigration)* (2010) FC 662, [2011] 3 FCR 377, [4].

[7] *Ezokola v Canada (Citizenship and Immigration)* (2011) FCA 224, [2011] 3 FCR 417, [75].

[8] *Convention Relating to the Status of* Refugees, opened for signature 28 July 1951, 189 UNTS 189 (entered into force 22 April 1954).

[9] *Immigration and Refugee Protection Act,* SC 2001, c 27.

[10] *Ezokola v Canada (Citizenship and Immigration)* (2013) SCC 40, [1].

[11] Ibid [44-45].

[12] *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306.

[13] Ibid [29]. Also, see [8], [36], [84], and [92].

following observations. The purpose of the *Refugee Convention* and article 1F(a) is to deny international criminals any refugee protection. The role of the RPD is to exclude refugee claimants from this protection according to the unique standard of 'serious reasons for considering' – not to establish guilt or innocence. Refugee claimants must knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or the criminal purpose of a group in order to be complicit under international criminal law. Decisions of the domestic courts of other state parties to the *Refugee Convention* require a similar standard for complicity under article 1F(a).

For the benefit of decision makers, the SCC also updated the non-exhaustive list of factors to consider when determining whether a refugee claimant's conduct satisfies the *actus reus* and *mens rea* for complicity. The original pre-*Ezokola* list identified six factors, but the SCC enhanced one factor, added two, and merged two such that the updated list still only identifies six factors.[14] According to the SCC, the following factors may be relevant:

- the size and nature of the organization;
- the part of the organization with which the refugee claimant was most directly concerned;
- the refugee claimant's duties and activities within the organization;
- the refugee claimant's position or rank in the organization;
- the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose;
- and the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

☛ *Marie Nikuze v The Minister of Citizenship and Immigration* (2013) FC 33

On 30 June 2009, Ms Marie Nikuze applied for asylum in Canada on the basis of her fear of persecution by Tutsi extremists in the Rwandan government. On 20 March 2012, the RPD of the IRB found serious grounds to consider that she was complicit in crimes against humanity committed during the 1994 genocide in Rwanda and therefore excluded her from protection as a Convention refugee pursuant to the *Immigration and Refugee Protection Act.* On 15 January 2013, the FC allowed her application for judicial review of the RPD's decision. The FC's judgment was issued prior to the SCC's decision in *Ezokola* and therefore employed the FCA's test established in 1992.

Nikuze's mother was a Tutsi, and her father was a Hutu. Following the outbreak of conflict in 1990, Nikuze was threatened, harassed, and raped by Hutu extremists for her alleged Tutsi sympathies. From 1992 to April 1994, she was a law student at the National University of Rwanda in Kigali. Upon the outbreak of ethnic massacres in Kigali on 7 April 1994, all law students were evacuated to Butare where they remained until late-May 1994 amid local atrocities. In July 1994, Nikuze was accused by the Rwandan prosecution service of participating in the genocide and detained accordingly. In December 1998, she was conditionally released after spending four-and-a-half years in preventive detention without trial. Following her release, she was mistreated by Tutsi extremists and was alleged to have been close to the Interahamwe. In June 2009, she fled from Rwanda after being accused of participating in the killings in Kabgayi during the genocide.

Nikuze challenged the RPD's decision on numerous grounds, including the following: failing to identify the crimes that she was allegedly complicit in; and failing to properly

[14] The six pre-*Ezokola* factors are set out below.

assess her alleged complicity. The FC concluded that the RPD arrived at 'largely speculative and unreasonable findings of fact' in concluding that every law student, law professor, and law faculty official evacuated to Butare personally participated in or was complicit in the local atrocities. Regarding Nikuze, the FC highlighted the absence of inculpatory evidence (other than the accusations by Rwandan government) and the failure of the RPD to identify her inculpatory acts and corresponding intention. A person's mere presence at the scene of a crime is insufficient to conclude 'personal and knowing participation' required for complicity. Moreover, in the FC's opinion, the RPD made various unreasonable findings of fact instead of assessing the following six pre-*Ezokola* factors to properly establish complicity in the massacres in Butare:

- nature of the organization;
- method of recruitment;
- position/rank in the organization;
- knowledge of atrocities;
- length of time in the organization;
- and opportunity to leave the organization.

For all these reasons, the matter was remitted back to the RPD for re-determination by another member.

☛ *Tewolde Gebremedhin v The Minister of Citizenship and Immigration* (2013) FC 380

Mr Tewolde Gebremedhin applied from Kenya for permanent residence in Canada. On 3 April 2012, an Immigration Program Manager ('the Officer') with Citizenship and Immigration Canada decided that there were reasonable grounds to believe that Gebremedhin was complicit in crimes against humanity committed by the Ethiopian government (forcible transfer of civilians and extermination by deliberately starving civilians) and therefore inadmissible to Canada pursuant to section 35(1) of the *Immigration and Refugee Protection Act*. On 16 April 2013, the FC concluded that the Officer's decision was reasonable and therefore dismissed Gebremedhin's application for judicial review of the Officer's decision. The FC's judgment was issued prior to the SCC's decision in *Ezokola*.

From 1978 to 1991, Gebremedhin worked for an important organization in the Ethiopian government which distributed food and relief supplies to civilians in the Eritrea region of Ethiopia – the Relief and Rehabilitation Commission ('RRC'). During that time, thousands of Eritrean civilians suffered from starvation or forcible resettlement under the regime of Mengistu Haile Mariam. Gebremedhin's responsibilities at the RRC included the transportation of food aid to all seven districts in the Eritrean region. He rose through the RRC's organizational hierarchy and eventually was a senior director administering food distribution and coordinating cargo transport to areas hardest hit by the famine. Instead of assisting civilians, the RRC is believed to have diverted some of its resources to assist government forces and militias. Moreover, some of its transportation systems are believed to have been used to forcibly resettle civilians and transport weapons. The RRC is also believed, however, to have conducted some legitimate aid work.

Gebremedhin challenged the Officer's finding of complicity as unreasonable owing to the fact that 'the issue of active participation was not considered.' In its reasons for judgment, however, the FC noted that 'active participation is not necessary for a finding of complicity.' Personal and knowing participation is sufficient. The FC stated:

> If a senior official remains in his or her position, defends the interests of the government for whom he or she works and is aware of the relevant atrocities, this is sufficient to demonstrate complicity.

The FC concluded that the Officer reasonably evaluated Gebremedhin's participation using the then-correct analytical framework including the six pre-*Ezokola* factors. Notwithstanding the complete absence of evidence related to Gebremedhin's personal contribution to the atrocities, his supervisory responsibilities regarding food transportation at the RRC were sufficient for the FC to conclude that he participated in, or condoned, the regime's crimes against humanity.

Additionally, Gebremedhin challenged the Officer's finding of complicity as unreasonable owing to the fact that his senior position within the RRC was insufficient to permit the inference that he was part of the regime of Mengistu Haile Mariam. Again, the FC concluded that the Officer reasonably evaluated Gebremedhin's seniority to support the finding of complicity in the regime's crimes against humanity. At the time of the judgment (ie pre-*Ezokola*), no evidence of Gebremedhin's personal contribution to the atrocities was necessary – his mere association with the perpetrators was sufficient.

☛ *Suman Raj Sapkota v The Minister of Citizenship and Immigration* (2013) FC 790

Mr Suman Raj Sapkota arrived in Canada in March 2009 and applied for asylum. On 28 June 2012, the RPD of the IRB concluded that there existed serious reasons for considering Sapkota was complicit in crimes against humanity in Nepal and therefore neither a Convention refugee nor a person in need of protection pursuant to the *Immigration and Refugee Protection Act*. On 15 July 2013, the FC concluded that the RPD's decision was reasonable and therefore dismissed Sapkota's application for judicial review of it. The FC's judgment was issued prior to the SCC's decision in *Ezokola*.

From 1991 to 2009, Sapkota was a police officer with the Nepali Police Force ('NPF') – an organization known for its involvement in crimes against humanity of murder, forced disappearances, torture and other inhuman acts. For ten years of his career, Sapkota was a senior officer in areas with a strong and active Maoist insurgency, and he supervised between twenty and forty officers. Following these ten years, he was posted to the Central Jail in Kathmandu where his responsibilities included ensuring no detainees escaped and transporting detainees. He was eventually promoted to the rank of Inspector and his responsibilities became supervisory in nature.

Sapkota challenged two of the RPD's fundamental findings: that the NPF committed crimes against humanity; and that he was complicit in those crimes. In response, the Minister of Citizenship and Immigration relied on significant documentary evidence of the NPF's widespread abuses and argued that they constituted crimes against humanity. Additionally, it was noted that only 'personal and knowing participation' is required for complicity – active membership is not.

In its reasons for judgment, the FC confirmed that the standard of review is 'correctness' for the enunciation of the test for complicity and 'reasonableness' for the application of the test. It also confirmed that the standard of proof underlying the expression 'serious reasons for considering' is lower than 'on a balance of probabilities'.

According to the FC, the RPD reasonably concluded that the NPF committed crimes against humanity during the Maoist revolution. Moreover, the RPD reasonably concluded that Sapkota was complicit in these atrocities on the basis of his contribution to the organization 'while being aware that it is committing crimes against humanity'. Sapkota's

complicity was assessed on the basis of the six pre-*Ezokola* factors – notably his leadership positions within the NPF in areas of violent Maoist insurgency and his responsibility for detainees.

Additionally, the FC noted that 'it was not necessary for the RPD to have evidence showing the Applicant's personal implication in the crimes specifically, in order to determine that he committed a crime against humanity.' Finally, according to the FC, the RPD reasonably found Sapkota to lack credibility when evasively denying any knowledge or inquiry into the NPF's serious and well-documented abuses of human rights.

☛ *James Mobwano Kamanzi v The Minister of Citizenship and Immigration* (2013) FC 1261

Mr James Mobwano Kamanzi arrived in Canada in June 2008 on a false passport and applied for asylum in August 2008. On 25 October 2012, the RPD of the IRB concluded that there existed serious reasons for considering Kamanzi was complicit in war crimes of recruiting child soldiers in the DRC, and was therefore neither a Convention refugee nor a person in need of protection pursuant to the *Immigration and Refugee Protection Act*. On 18 December 2013, the FC applied the modified test for complicity and dismissed Kamanzi's application for judicial review of the RPD's decision. The FC's judgment was issued after the SCC's decision in *Ezokola*.

Kamanzi is a Tutsi from the DRC. In November 1996, he was recruited to be an intelligence agent by Anselme Masasu Nindaga. Prior to his assassination in 2000, Masasu was a leader of the *Alliance des forces démocratiques pour la liberation du Congo* ('AFDL') and widely known for recruiting and training thousands of child soldiers. From 1997 to 1999, Kamanzi worked for Masasu and, notably, provided information to him regarding the families in Bukavu which opposed their children joining the AFDL's liberation army. As a result, Masasu intervened on this issue – including making radio broadcasts encouraging parents to permit their children to fight against Mobutu's regime. Kamanzi described himself as Masasu's 'right hand man' and denied that he or Masasu were implicated in the recruitment of child soldiers.

In its reasons for judgement, the FC confirmed that the standard of review is 'correctness' for the enunciation of the test for complicity and 'reasonableness' for the application of the test. Kamanzi sought that the matter be re-determined by the RPD because the SCC had extinguished the test for complicity as a matter of law in *Ezokola*. In response, the Minister of Citizenship and Immigration relied upon the 'futility doctrine' to oppose re-determination by the RPD which would result in the same outcome.

The FC concluded that it would be inappropriate to review the record and make findings of fact but that, pursuant to the 'futility doctrine', it could uphold the RPD's decision if no properly-instructed tribunal could have come to a different conclusion. The FC reviewed the *actus reus* of the war crime of 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.' It then concluded that there were serious reasons to consider that Kamanzi voluntarily and knowingly participated in the conscription of child soldiers. Kamazni was directly involved in providing Masasu with important intelligence regarding those who opposed the recruitment of child soldiers. The Court held that Kamanzi's 'personal work thus facilitated the terrible crime' and was satisfied that it would be futile to return this matter to the RPD for a re-determination.

Cases — State Immunity and Torture
☛ Various orders by the SCC in *Kazemi v Iran*

The 2012 report from Canada's Correspondent highlighted that Québec's Court of Appeal recently dismissed the appeal of Ms Kazemi's estate and allowed the defendants' appeal. On 7 March 2013, the SCC granted Kazemi's application for leave to appeal from this dismissal.[15] On 23 September 2013, the SCC dismissed Mr Houshang Bouzari's application for leave to intervene in this appeal (see Bouzari's case below) but granted similar applications from numerous other parties.[16] On 26 April 2013, the SCC granted an application for an order stating constitutional questions.[17] On 18 March 2014, the SCC heard the appeal and reserved judgment. The 2014 report from Canada's Correspondent will survey the judgment rendered in this appeal on 10 October 2014.

☛ *Bouzari v Bahremani* (2013) ONSC 6007

The 2012 report from Canada's Correspondent highlighted that Ontario's Superior Court of Justice recently issued a default judgment against the primary defendant in this matter, Mr Mehdi Hashemi Bahremani**.** On 25 June 2013, this defendant obtained an order from the Court, on the plaintiff's consent, setting aside this default judgment because the statement of claim was never brought to the attention of the defendant.[18] On 26 September 2013, the Court issued its reasons for declining to award costs to either party for the defendant's successful motion to set aside the default judgment.[19] The Court refused to award costs to the plaintiff because of both the irregularity in obtaining the default judgment and the delay in consenting to the defendant's amply-supported motion to set it aside. The Court noted that the motion ought not to have been opposed. Additionally, the Court refused to award costs to the moving-party defendant because his motion to set aside the default judgment was brought simultaneously (and in one motion record) with his motion for a stay on the grounds of *forum non-conveniens*. The Court was unable to readily distinguish the costs associated with each motion but anticipated that the costs issue will be addressed at the conclusion of the defendant's motion for *forum non-conveniens* which remains to be heard.

Cases — Lawsuit against Corporation
☛ *Choc v Hudbay Minerals Inc* (2013) ONSC 1414

During Guatemala's Civil War, indigenous Mayan Q'eqchi' communities were massacred and driven off their ancestral homelands in eastern Guatemala. Starting in 2006, the surviving Mayan Q'eqchi' attempted to reclaim the lands from those whom had been granted ownership. Numerous human rights atrocities allegedly were committed during the course of

[15] *Kazemi (Estate of) v Islamic Republic of Iran* (2013) CanLII 11303 (SCC).
[16] See SCC online: http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35034 (last accessed 30 June 2015).
[17] Ibid.
[18] *Bouzari v Bahremani* (2013) ONSC 6007, [7-8].
[19] Note that this was only three days after the plaintiff's application for leave to intervene in the *Kazemi* appeal was dismissed by the SCC (see *Kazemi* above).

these land disputes – three of which are now the subject of individual civil actions before Ontario's Superior Court of Justice ('SCJ'). In each action, the plaintiffs are indigenous Mayan Q'eqchi' and allege that security personnel working for the defendants – and negligently managed by the defendants – committed human rights abuses against them. The defendants are a Canadian mining company, Hudbay Minerals, and its subsidiaries. They claim legitimate ownership of the both land and the nearby 'Fenix' nickel mining operation and dispute any wrongdoing.

In the Caal action,[20] eleven indigenous women allege that they were gang raped on January 17, 2007 by the defendants' 'Fenix' security personnel during the forced removal from their village. In the Choc action,[21] the widow of a respected indigenous community leader alleges that her husband, Adolfo Ich Chaman, was beaten and murdered on September 27, 2009 by the defendants' 'Fenix' security personnel during a land dispute. In the Chub action,[22] the indigenous plaintiff alleges that he was shot (resulting in his paralysis from the chest down) on September 27, 2009 by the defendants' 'Fenix' security personnel during a land dispute.

On 22 July 2013, the SCJ dismissed the following three preliminary motions brought by the defendants: a motion to strike all three of the aforementioned actions on the grounds that no reasonable cause of action was disclosed; a motion to strike the Caal action on the basis that it is statute barred; and a motion to strike the Choc action on the basis that the SCJ has no jurisdiction over the defendant, a Guatemalan corporation.[23]

The SCJ dismissed the defendants' first aforementioned motion on the basis that, assuming the facts alleged in the Statements of Claim are true, 'it cannot be said that the Statements of Claim plainly and obviously disclose no cause of action.'[24] The Court concluded that the plaintiffs' pleadings disclosed the necessary elements from which the SCJ could do the following: recognize a novel duty of care owed by the defendants to the plaintiffs; conclude that the defendants breached that duty of care; and conclude that the defendants caused the plaintiffs' losses. Canada's Correspondent will follow the eventual trial(s) before the SCJ and highlight in future reports whether the defendants are held liable – directly or vicariously.

TIM RADCLIFFE

[20] Margarita Caal Caal, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Luisa Caal Chun, Carmelina Caal leal, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib and Inna Yolanda Choc Quib, Plaintiffs and Hudbay Minerals Inc and HMI Nickel Inc, Defendants.
[21] Angelica Choc, individually and as personal representative of the estate of Adolfo Ich Chaman, deceased, Plaintiffs and Hudbay Minerals Inc, HMI Nickel Inc, and Campania Guatemalteca de Niquel SA, Defendants.
[22] German Chub Choc, Plaintiff and Hudbay Minerals Inc and Campania Guatemalteca de Niquel SA, Defendants.
[23] *Choc v Hudbay Minerals Inc* (2013) ONSC 1414, [87].
[24] Ibid [75].