

ECUADORIAN MOUNTAIN VILLAGERS SUE A CANADIAN MINING COMPANY AND THE TORONTO STOCK EXCHANGE TO DEMAND SOCIAL AND ENVIRONMENTAL ACCOUNTABILITY

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High in Ecuador's Andean mountains, where the roads come to an end in the cloud forests of the Intag region far from the capital city of Quito or other towns, lies an area of great natural beauty. It is dotted with small villages, family farms and small coffee-growing plots, and located next to the pristine Cotacachi-Cayapas national ecological reserve.

But a Canadian junior mineral exploration company says a significant copper deposit lies buried underneath this lush ecosystem and peaceful community. Copper Mesa Mining Corporation, financed largely on the Toronto Stock Exchange and associated with global mining giant Rio Tinto, says a gigantic open pit mine should be excavated in the cloud forest mountains to extract the copper.

Most local Ecuadorian villagers, farmers, and political leaders believe a large open pit mine will bring far more social, ecological and economic destruction than could ever be justified.

The local community members and leaders have repeatedly protested and voted to block the proposed mine. They have said the company's attempts to begin mining exploration activities have broken Ecuadorean laws relating to land rights and ecological protection, and sparked harsh community conflicts. They also say that the company's agents have resorted to physical assaults, death threats and various human rights violations.

Attacks on the communities

On December 2, 2006, local community members received a tip that a large private armed security brigade hired by Copper Mesa (then known as Ascendant Copper) was travelling up the forest road to force its way past the communities to the site of the alleged mineral deposit. Community members quickly mobilized and a group of men, women and children gathered on the road to defend their homes, land and environment. A student from Europe visiting to study the controversy caught what happened next on video camera.

A number of company-hired trucks came to a stop in the forest, and dozens of uniformed men wearing bullet-proof vests and carrying shotguns and revolvers climbed out and approached the group that was peacefully blocking the road.

The paramilitary men came to a stop a few feet from the assembled local community members. The community members pleaded with them to leave and insisted the police should be called in. Suddenly and without provocation the leader of the paramilitaries levelled a canister of antipersonnel spray and blasted the faces of the women and men a mere metre away. He then drew his revolver and began shooting. Others in the paramilitary brigade followed suit. In all, scores of shots were fired by the company's forces.

Despite the unprovoked violent attack and ensuing chaos, community members did not disperse or back down. Surprised and confused by the community members' bravery, the mining company's forces retreated, regrouped, and then left in the company trucks.

One of the women sprayed in the face at point blank range was Marcia Ramírez. One of the men injured in the shooting and chaos was Israel Pérez.

The December 2, 2006 company-sponsored attack was only one part of an extended campaign to break the principled local opposition to the Copper Mesa open pit mine. Throughout 2005, 2006 and 2007, Polivio Pérez, a local community representative, and his family, received several death threats because of his role as a leader of the opposition to mining in Intag – threats believed by community members to be perpetrated by individuals connected to Copper Mesa. On July 31, 2007, Polivio Pérez was physically assaulted by a group connected to the mining company.

These threats and assaults are part of a wider campaign of intimidation, harassment and violence carried out by allies of, and sometimes apparently direct agents of, the Copper Mesa company of Canada, aimed at silencing the widespread and sustained local opposition to a gigantic open-pit copper mine in the Intag region.

What is happening in Intag is illustrative of a wider problem – the corporate and financial unaccountability of the Canadian mining industry. These events in Ecuador are being replayed in numerous other countries from the Democratic Republic of Congo, to Peru, to the Philippines, to Indonesia, and they are symptomatic of the fact that under current Canadian law, Canadian mining companies are not being held responsible for the harms that they create abroad.

But against enormous odds Ms. Marcia Ramírez, Mr. Israel Pérez and Mr. Polivio Pérez eventually were able to find a way to begin a lawsuit in Canada, on behalf of their communities, to defend their homes, lands and ecosystem against the corporate and financial institutions located thousands of kilometres away whose local agents and allies were causing such violence and harm, with impunity and apparently without accountability.

The Legal Claim Against the TSX

The Toronto Stock Exchange enables more money to be raised for international mining companies – especially junior exploration companies – than any other stock exchange in the world. It does so while turning a blind eye to the potential and actual harms that this financing can cause and often does cause.

In the Intag case, the TSX's stock market listing of Copper Mesa (at that time under the name of Ascendant Copper) allowed the company to obtain over \$25 million in capital funds – some of which paid for the armed attackers who injured Marcia and Israel on December 2, 2006. The TSX listing committee had previously agreed to list Copper Mesa (Ascendant Copper) on its stock exchange despite having been specifically alerted in a letter from the local Ecuadorean mayor to the company's involvement in local conflict, and despite a warning by the Canadian financial agency, hired by Ascendant, which prepared Ascendant's listing prospectus. That

prospectus warned that there was a “potential of further escalating violence” if the mineral exploration operations continued. The TSX ignored these specific red flag alerts, listed the company on its exchange, and soon the funds flowed to pay for the armed and violent men acting illegally on the cloud forest road in the Intag.

According to Canadian law, anyone who undertakes an activity, including a corporation such as the TSX, must “take reasonable care to avoid conduct that entails an unreasonable risk of harm to others”.¹ If someone does not take such care, and their conduct causes harm, they must pay compensation for the injuries that they cause.

Marcia, Israel and Polivio claim in their lawsuit that the TSX was bound by a legal duty under Canadian law to not provide financing assistance to a company such as Copper Mesa when there was a foreseeable and unreasonable risk that funds raised on the Exchange would be used to harm individuals in places such as Ecuador. In other words, the TSX was under a legal duty not to provide access to financing assistance without taking precautionary “due diligence” measures to reduce the risk that funds raised through the Exchange would be used to harm individuals such as Marcia, Israel and Polivio. In this lawsuit, the Plaintiffs point to a number of clear indicators known to the TSX which signalled that there was a real risk of such harm occurring.

Currently, the TSX does not take any steps whatsoever to help avoid the possibility that the funds raised on its exchanges will cause real harm to individuals abroad. The TSX presently has no policies in place that would inhibit the exchange from listing a company that was likely – or even certain – to use the funds so raised to instigate violence and human rights abuses in local communities abroad.

In the case of Copper Mesa, the TSX provided a means for the corporation to access millions of dollars in new financial capital, with which the company could continue and extend its remote-control campaign of fear and intimidation, and with which it could, and did, hire the violent security forces that harmed Marcia, Israel and Polivio.

The Plaintiffs are not saying that the Toronto Stock Exchange should be held responsible for each and every action of the companies which the TSX decides to list for trading. But the Plaintiffs are saying that the TSX should take reasonable steps to prevent the large amounts of capital raised with its assistance from being used to seriously harm individuals and communities in places like the Intag Valley in Ecuador, when the high risk of such harm is known or clear.

The Legal Claim Against Members of Copper Mesa’s Board of Directors

The lawsuit also claims that members of Copper Mesa’s board of directors are 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. It is the directors who ultimately have control over a corporation, and they are responsible in law for their own actions and omissions taken in the course of their duties as directors.

¹ This longstanding legal principle is restated in the 2003 Supreme Court of Canada case of *Odhavji Estate v. Woodhouse*, [2003] 2 S.C.R. 263 at paragraph 45.

In this case, at least some of the company's directors personally knew about the harmful use of private armed security forces in Intag. In particular, they had been shown photographic evidence of violent attacks against peaceful assemblies, perpetrated by forces hired by the company, and the directors were specifically warned about the high risk of further future violence.

Despite this knowledge, members of the board of directors of the company continued to operate the company in a manner that created a high risk of future violence. They approved further funding which was used for dangerous security forces. They failed to take any meaningful steps to reduce the risk that threats of physical harm and violent tactics would be used by the corporation's agents in the future. The result of the acts and omissions of the directors was that threats and violence continued.

The Plaintiffs are not saying that corporate directors are personally responsible and liable for any and every act of the corporation. Rather, they are saying that in cases where directors in fact have personal knowledge of a real and unreasonable risk of harm to individuals, or the risk is plain to see, they are under a duty to not act in a way that perpetuates or increases this risk, and they should take steps to reduce the risk.

The Legal Claim against Copper Mesa Mining Corporation

One serious shortcoming in the existing legal controls on Canadian mining companies operating abroad is that companies can spread their operations into many legal jurisdictions in a way that avoids laws of accountability in any one jurisdiction. This can happen through the use of subsidiary companies, and by incorporating in one jurisdiction while having the main company offices in another and its actual operations in yet another. For example, Copper Mesa, despite being a "junior" company, has connections to some nine different legal jurisdictions, making it difficult to identify which jurisdiction is the proper one in which to hold the corporation accountable.

In this lawsuit, the Plaintiffs have focused on decisions, actions and omissions of some of the final decision-makers of the company, that is, the directors, which have occurred in a specific provincial jurisdiction in Canada (the province of Ontario). By using existing laws and principles in this focused way, the Plaintiffs believe that both the directors and the company can be held accountable, since the corporation is legally responsible for the wrongs of its directors.

The Need for Law Reform

While the Plaintiffs are pursuing justice under existing legal rules and principles, they also strongly believe that legislative reform of the existing laws in Canada is critically necessary, to make accountability of corporations in these situations clearer, more effective, and more consistent with our common human and ecological values.

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