

1-1-2017

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## Citation Information

Bromwich, Rebecca Jaremko. "Networking the Rule of Law: The Canadian Bar Association's Abandoned Intervention in *Chevron v Yaiguaje*." *Journal of Law and Social Policy* 26. (2017): 159-180.  
<http://digitalcommons.osgoode.yorku.ca/jlsp/vol26/iss1/8>

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## Networking the Rule of Law: The Canadian Bar Association's Abandoned Intervention in *Chevron v Yaiguaje*

REBECCA JAREMKO BROMWICH\*

Cet article examine les débats publics sur la façon dont un réseau d'avocates et d'avocats canadiens ont réussi à déstabiliser une intervention à titre d'*amicus curiae* dans la décision récente de la Cour suprême du Canada *Chevron Corp. c Yaiguaje*. Cette étude de cas permet de remettre en question nos idées sur la façon de créer le droit et les lieux où cela est fait. Elle permet aussi d'envisager différemment le succès d'un engagement militant. En travaillant ensemble sur une gamme de questions différentes, en tant que défenseurs des droits, conseillers, intervenants et militants, les avocats ont utilisé leur pouvoir professionnel pour influencer, par le type d'arguments présentés au tribunal, et gouverner une société multinationale. J'ai analysé le débat public autour de l'intervention dans l'affaire *Yaiguaje* à titre d'événement gouvernemental. Cet article examine en profondeur comment le pouvoir d'agir sur le plan politique des avocates et des avocats canadiens, à l'extérieur d'une salle d'audience, dans le contexte de leurs manifestations contre la proposition de l'Association du Barreau canadien d'intervenir à l'instance, a créé une variante axée sur la justice sociale et réelle au concept de la primauté du droit. Cet article avance que cette mobilisation a eu un impact sur ce que Rosenau et Cziempiel, ainsi que Sørensen, Torfing et d'autres appellent la « gouvernance de réseau ». Cet article suggère également que la décision *Yaiguaje*, qui est importante en soi, est aussi importante pour illustrer le fait que les batailles juridiques ne se déroulent pas seulement ou principalement dans les salles d'audience ou à travers les débats législatifs, soit des lieux de justice formels. L'efficacité déstabilisante de la gouvernance de réseau et le rôle des organisations de la société civile dans les interventions peuvent inspirer le public et les avocates et avocats canadiens à développer des stratégies pour influencer les multinationales, notamment dans le cas des sables bitumineux.

This article looks at public debates surrounding how a network of Canadian lawyers disrupted an *amicus curiae* intervention in the recent Supreme Court of Canada case of *Chevron Corp. v Yaiguaje*. Analysis of this case study troubles assumptions about where and how law is made and suggests possibilities for successful activist engagement. Working together on a variety of points on a spectrum as advocates, counsel, interveners, and activists, lawyers leveraged their professional networks to influence and govern a multinational corporation by affecting what arguments were raised inside the court. I analyze the public debate about intervention in the *Yaiguaje* case as a governmental

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\*: PhD, LL.M., LL.B., Carleton University Department of Law and Legal Studies. I would like to thank Professor R Lynn Campbell for his time and gracious mentorship, without which I would not have been able to write this article. I would also like to acknowledge a debt to the thoughtful, careful, and comprehensive policy research and thought leadership of Alberta journalist Deborah Jaremko and historian Gordon Jaremko, from both of whose expertise about the Oil Sands I have learned a great deal, and from whom there is a great deal more I can learn. All errors are, of course, my own. A further note: while I was a Staff Lawyer for the Canadian Bar Association in 2014 when the events described took place, I confirm that all information relied upon in this study is in the public record and no confidential information is relied upon in this research or otherwise disclosed.

event. This article specifically scrutinizes how political agencies exercised by Canadian lawyers outside of the courtroom in the context of their protests against the Canadian Bar Association's proposal to intervene in the proceedings mobilized a substantive and social justice oriented variant on the construct of the rule of law. The article argues that this mobilization affected what Rosenau and Czempiel, as well as Sørensen, Torfing and others call "network governance." The article further suggests that the *Yaiguaje* decision, important in its own right, is also significant as an illustrative instance of how legal struggles happen not just, or even primarily, in the formal venues of courtrooms or legislative debates. The disruptive efficacy of network governance and the role of civil society organizations in interventions provide inspiration for how Canada's public and lawyers may strategize to influence activity by multinationals, such as in the development of the oil sands.

THE RECENT DECISION OF THE SUPREME COURT OF CANADA in *Chevron Corp. v Yaiguaje*<sup>1</sup> represents one small victory in a long battle undertaken by a group of Indigenous people from the Lago Agrio region of Ecuador. The decision signals a willingness on the part of Canadian courts to preclude multinational corporations from prematurely foreclosing collection on judgment debts from other jurisdictions. More broadly, it is being hailed as a victory by advocates seeking to ensure corporations are held accountable for environmental harms.

This article considers possibilities afforded by network governance as a check on the power of multinational corporations. The article explores how a professional network of lawyers, working transnationally across jurisdictional boundaries and utilizing social media, disrupted plans by the Canadian Bar Association (CBA) to intervene in the Supreme Court of Canada proceeding in the *Yaiguaje* case. It argues that the CBA's abandoned intervention gives reason for hope that lawyers' agencies, and the deployment of widely accepted, but vaguely defined and flexible concepts like the rule of law, can offer constructive, democratic possibilities for governing multinational corporations that are difficult to otherwise legally control.

The central argument of this article is that the actions of protesting lawyers and law students were governmental and productive of legality in and of themselves. The protests can be understood as an effective instance of transnational network governmentality. When the theoretical framework of network governance is considered, arguably CBA members and other protesters performed a transgressive act of resistance in protesting the decision of the CBA, for example by picketing the association's offices and by burning their membership cards. This protest prevented the CBA from intervening in support of Chevron's position, leaving counsel for Chevron on their own against not just the plaintiffs, but also several interveners whose legal arguments aligned with those of the plaintiffs. It cannot be conclusively demonstrated that this protest changed the outcome of the proceeding, but, at a minimum, it changed the game afoot within the courtroom: the protests of lawyers against the CBA's intervention in the *Yaiguaje* case can be understood as constituting a governmental event demonstrating the appropriateness of Rosenau and Czempiel's theorization of global governance as being about power.<sup>2</sup>

This article presents an analysis of how a network of lawyers incited and engaged in a public debate surrounding who should and should not participate in the case before the Supreme Court of Canada. More specifically, I look at public documents surrounding a controversy about

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<sup>1</sup> 2015 SCC 42 [*Yaiguaje*].

<sup>2</sup> James N Rosenau & Ernst-Otto Czempiel, *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992).

the use (and non-use) of *amicus curiae* intervention in the Supreme Court of Canada proceeding in the *Yaiguaje* case. The study discussed in this article is an analysis of texts produced in relation to an unprecedented series of public protests undertaken by Canadian lawyers and law students in an activist attempt to prevent the CBA from intervening in the case. My case study focuses narrowly on the public controversy surrounding the CBA intervention proposal, and more precisely on how the construct of the rule of law was mobilized and deployed as a governmental technology in order to compel certain conduct. In this context, this deployment was striking and even ironic, because no single legal order unambiguously applied, and the conduct sought could not technically be compelled.

Critical discourse analysis of the public debates surrounding the CBA's proposed intervention, in which many called for the withdrawal of the intervention application, makes visible empowering, resistant, and surprising ways in which an art of network governance is imaginable and possible. Where there was in fact no clear and unambiguous "rule of law," in the sense understood by the CBA,<sup>3</sup> political and legal resistances exercised by individual actors including the Ecuadorean villagers, Ecuadorian and Canadian courts, and Canadian lawyers have contributed to the reification of the construct of the rule of law through their agencies. It was as a direct result of these protests that the CBA did not appear as an intervener before the Supreme Court of Canada to articulate positions sympathetic to counsel for Chevron on points of law.

It is unknowable how a CBA intervention in the Supreme Court proceeding would have influenced the judges hearing the case, but it is clear that the conversation in the courtroom would have been different as a result. The content of the discourse of the rule of law in the Canadian *Yaiguaje* case may well have been materially affected by the CBA's absence.

## I. THIS CASE STUDY

This analysis defines the "case" studied much as Michel Foucault defined the case of Pierre Riviere.<sup>4</sup> The article argues that the mobilization of a network of lawyers affected what Cziempiel, Sørensen, Torfing and others call "network governance."<sup>5</sup> The case being studied here is constituted by the events in the public square between the launch of the appeal in the *Yaiguaje* case and the decision rendered by the Supreme Court of Canada in the matter. When I say I define the "case" much as Foucault defined the "case" of Pierre Rivière, I mean I am applying the method of his attempt to reconstruct discursive confrontations and battles, and rediscover the operation of those discourses in the relations of power and knowledge. Foucault understood the Pierre Rivière matter as a "dossier":

a case, an affair, an event that provided the intersection of discourses that differed in origin. ... All of them speak, or appear to be speaking, of one and the same thing; at any rate, the burden of all these discourses is the occurrence on June 3. But in their

<sup>3</sup> Referred to as formal, "black letter" law, are well-established and formally enacted legal rules that are not vague or in dispute.

<sup>4</sup> Michel Foucault, "Foreword" in *I, Pierre Riviere, Having Slaughtered My Mother, My Sister and My Brother: A Case of Parricide in the 19th Century*, translated by Frank Jellinek (Lincoln: University of Nebraska Press, 1975) vii at x [Foucault, *Pierre Riviere*].

<sup>5</sup> See e.g. Eva Sørensen & Jacob Torfing, "Theoretical Approaches to Governance Network Dynamics" in Eva Sørensen & Jacob Torfing, eds, *Theories of Democratic Network Governance* (New York: Palgrave MacMillan, 2007) 25 [Sørensen].

totality and their variety they form neither a composite work nor an exemplary text, but rather a strange contest, a confrontation, a power relation, a battle among discourses and through discourses. And yet, it cannot simply be described as a single battle; for several separate combats were being fought out at the same time and intersected each other... .<sup>6</sup>

As noted, in this case study, through critical discourse analysis, I looked at publicly available documents produced in relation to the proposed intervention by the Canadian Bar Association in the *Yaiguaje* case. These included public statements made by the CBA, print media texts, blogs, calls to action by student groups, a petition, and several open letters. I specifically focused on the terms “rule of law” and “accountability” to ascertain how understandings of the rule of law were mobilized in the intersection of public, political, and legal discourses that constituted the protests against the CBA’s intervention in the *Yaiguaje* case.

There are many reasons why attention should be paid to the *Yaiguaje* case in Canada. Foremost, and this should not be overlooked, it matters because the Lago Agrio villagers matter. Ethics demand that their value as human beings not be lost in discussion of the case. Their rights should not be disregarded under international law. The case is also significant in Canada because we live in a global economy and an environmentally interconnected world. The harms done to the Ecuadorean environment by Texaco’s work in the region are not local alone: there is material interdependence and transnational relevance to these harms. Further, the case is significant from a doctrinal legal perspective because it clarifies jurisdictional questions.

Finally, the case matters because of the way it demonstrates effective mobilization of a network to contribute to governance of a multinational corporation. Questions of how to govern the behaviour of multinationals are of great significance in general. Where, as was the case in the *Yaiguaje* matter, multinational corporations operate in Canada and are headquartered elsewhere, local people have an interest in influencing their conduct. The case study on intervention presented in this article fits into the larger picture of governance of multinationals by means of networks.

## II. THEORETICAL FRAMEWORK

In undertaking this analysis, I am relying upon prior social constructivist writing and thinking about power and governance. Below, I provide some discussion of background material about governmentality, lawyers’ creative agencies, and what is meant by a governmental event. When I refer to “discourses” of the rule of law in this analysis, I am talking about different existences of the concept as “world-changing fictions.”<sup>7</sup> This understanding in turn relies upon theorization about structures of power and knowledge organized in language.

Discourses, as understood in this theoretical framework, are regularized ways of speaking and thinking about the world.<sup>8</sup> These systems are the social procedures that organize power and knowledge, thereby creating social facts. It is through discourse so defined that power relations shape and define the subjects who speak. Put another way, discourse is a set of social conditions

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<sup>6</sup> Foucault, *Pierre Riviere*, *supra* note 4 at x.

<sup>7</sup> Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York: Routledge, 1991) at 149-181 [Haraway]; see generally Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 2006).

<sup>8</sup> Sara Mills, *Discourse* (London: Routledge, 1997) [Mills].

of possibility.<sup>9</sup> These are the social, cultural, and historical conditions, rules, and structures which produce particular utterances and texts.<sup>10</sup> The way we describe and define reality, both makes possible, and at the same time narrows, our understanding of reality. In describing and defining phenomena, discourses contain constructed representations of those phenomena. Representations are powerful, socially constructed images formed using implicit pre-existing, widely-accepted cultural truths. Thus, my inquiry focuses on the content given to the phrase the “rule of law” as it is variously used by different stakeholders in the *Yaiguaje* case.

I am relying upon a constructionist theory of representation set forth by Stuart Hall that relies in turn upon Michel Foucault’s study of discourse not primarily as language but as a system of representation.<sup>11</sup> I accept Hall’s formulation that the process of representation itself constitutes the world it represents. The discourses that are dominant in a culture provide a map that gives meaning to the real; these representations do not simply reflect the real. They constitute a world-changing fiction.<sup>12</sup> Representations do not derive their value or power from being realistic, but rather from being persuasive.<sup>13</sup> Representations are powerful for their ability to define phenomena and to have those definitions accepted, not for being verifiable in some objectively empirical sense.

A generative, bottom-up understanding of power is foundational to this research. I accept the Foucauldian understanding, further developed by Pechuex, that power is multiple, relational, heterogeneous and pervasive, and that discourses are the “site for the constant contestation of meaning.”<sup>14</sup> I rely on Foucault’s formulation of discursive power as generative and diffuse. In this understanding, power relations can be likened to a strategic game.<sup>15</sup> Rather than being dictated by a sovereign from the top down, power is dispersed in society, related to knowledge, and productive rather than repressive. As such, in his understanding of discourse, Foucault makes a direct link between knowledge and power. Power produces knowledge.<sup>16</sup> Power produces what is socially understood to be reality, objects, and rituals of truth. It is “mundanely productive ... not spectacularly conspiratorial.”<sup>17</sup> Power relations involve struggles between discourses for pre-eminence in defining the real.

When I am talking about lawyers’ creative agencies, I am talking about “the temporally constructed engagement by actors of different structural environments ... which, through the interplay of habit, imagination, and judgement, both reproduces and transforms those structures in interactive response to the problems posed by changing historical situations.”<sup>18</sup> Put more simply, agency is the capacity of the entity (in this case a lawyer) to act within the constraints of

<sup>9</sup> Michel Foucault, “Truth, Power, Self: An Interview with Michel Foucault” in Luther H Martin, Huck Gutman & Patrick H Hutton, eds, *Technologies of the Self: A Seminar with Michel Foucault* (Amhurst: University of Massachusetts Press, 1988) [Foucault, *Truth, Power, Self*].

<sup>10</sup> Mills, *supra* note 8 at 6.

<sup>11</sup> Stuart Hall, *Stuart Hall: Critical Dialogues in Cultural Studies*, David Morley & Kuan-Hsing Chen, eds, (London: Routledge, 1996).

<sup>12</sup> Haraway, *supra* note 7.

<sup>13</sup> See generally Stuart Hall, “The West and the Rest: Discourse and Power” in Stuart Hall et al, eds, *Modernity: An Introduction to Modern Societies* (Malden: Blackwell Publishers, 1996).

<sup>14</sup> Mills, *supra* note 8 at 14.

<sup>15</sup> Graham Burchell, Colin Gordon & Peter Miller, *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) at 5 [Burchell].

<sup>16</sup> Alan Hunt and Gary Wickham, *Foucault and the Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994) at 12.

<sup>17</sup> *Ibid* at 81.

<sup>18</sup> Mustafa Emirbayer & Ann Mische, “What is Agency?” (1998) 103 *American Journal of Sociology* 962 at 970.

the conditions of possibility the entity occupies. Speaking more specifically about creative agencies, I am thinking about the potential of lawyers' actions outside of formal legal processes to intentionally reshape the structural conditions sought to be changed through the production of new and different world-changing fictions.

Also relied on is Mitchell Dean's understanding that the concept of governmentality provides "a language and a framework for linking questions of government, authority and politics and questions of identity, self and person."<sup>19</sup> Regimes and practices of governmentality are reinforced and shaped by various forms of knowledge. The concern of governmentality studies is with the government of human conduct in all contexts. The concept of governmentality in this sense relies on Foucault's analysis of modern government grounded in his theories of discursive power.<sup>20</sup> However, Foucault's governmentality studies were an unfinished project of his later career. It is later theorists who developed the theorization of governmentality that underpins this analysis.

As Burchell, Gordon, and Miller write, governmentality studies look at a "dimension of historical existence which Foucault did most to try to describe."<sup>21</sup> Government can be thought of broadly as the "conduct of conduct."<sup>22</sup> Thus governmentality involves particular mentalities, arts, and regimes of government that have emerged since early modern Europe.<sup>23</sup> When government is discussed, it is not just a conversation about war and struggle, or about the dictates of a sovereign, but also in terms of the arts and techniques used to deliberately shape subjects' behaviour according to particular sets of norms.<sup>24</sup>

As an aspect of governmentality, law is not separate from, but enmeshed within, broader social discourses and processes. Law and society are mutually constitutive: law is not an external force to which society is subject, but represents a dynamic set of codes, practices, categories, and deliberations that both shape and are shaped by broader social, political, and economic contexts. Government that takes place in mundane sites in opaque ways can be at least as significant as the practices of government in a grander, formal, or legislative sense. Law is socially and culturally embedded. Studies about governmentality such as the one undertaken here look at the cultural force of the power embedded in discourse and how that power applies to people and corporations in general, whose actions and identities are constrained by reference to the power of law.

While multinationals are able to evade the jurisdiction of traditionally constituted states and elude some processes of the law, theorists have shown how, in some contexts, they can be subjected successfully to the "pluricentric forms of governance"<sup>25</sup> often called "network governance."<sup>26</sup> Where formal legal mechanisms may not be doing so adequately alone, and where individuals with a stake in an outcome fear legal mechanisms for corporate accountability are not going to be effective, the exercise of political agencies could be employed to intervene in the government of corporations and arguably influence the conduct of multinationals. A growing

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<sup>19</sup> Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Thousand Oaks: SAGE Publications, 1999) at 20 [Dean].

<sup>20</sup> Foucault, *Truth, Power, Self*, *supra* note 9.

<sup>21</sup> Burchell, *supra* note 15 at ix.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at 2.

<sup>24</sup> Dean, *supra* note 19.

<sup>25</sup> Kees Van Kersbergen & Frans Van Waarden, "Governance as a Bridge between Disciplines: Cross-disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy" (2004) 43:2 *European Journal of Political Research* 143 at 148.

<sup>26</sup> *Ibid* at 150.

body of literature tracks how civil society, in the form of professional and other associations, can be involved in transnational governance processes through their networks. Network governance is government in the Foucauldian sense affected by the engagement of individual actors who have no special authority to compel certain results. Governance networks have been defined by Sørensen and Torfing as:

1. a relatively stable horizontal articulation of interdependent, but operationally autonomous actors; 2. who interact through negotiations; 3. which take place within a regulative, normative, cognitive and imaginary framework; 4. that is self-regulating within limits set by external agencies; and 5. which contributes to the production of public purpose.<sup>27</sup>

Thus, one other form of accountability for corporations is through network governance. Czempiel, in a chapter called “governance and democratization,” addresses the theme of government in a globalized world by referring to the concept of power: “I understand governance to mean the capacity to get things done without the legal competence to command that they be done.”<sup>28</sup> Network governance offers potential as a way for actors to achieve things they technically do not have the power to achieve through the operation of formal mechanisms of the law.

### III. THE CASE IN CANADA

The legal case in *Chevron Corp. v Yaiguaje*<sup>29</sup> was a civil action brought by Indigenous people from the Lago Agrio region of Ecuador, and was initially pursued in that country. The Supreme Court of Canada decision in the case is the latest in a twenty-year saga of legal decisions in the process of efforts of the forty-seven plaintiffs, who on behalf of thousands of local people from the Lago Agrio region of Ecuador, seek legal accountability for the corporation that they allege severely damaged the environment in their area. The plaintiffs are seeking financial and environmental reparation for harms they allegedly suffered as a result of operations in the region undertaken previously by Texaco. Texaco later merged with Chevron, a US corporation. Chevron left Ecuador. It does not currently hold any assets in that country. It does not acknowledge the debt, and has made abundantly clear that it has no intention of paying it.

The plaintiffs in the Canadian procedural matter had previously secured massive judgments in damages from the courts in Ecuador. After eight years of litigation, in which Chevron actively participated, the Ecuadorian trial judge awarded US\$8.6 billion in environmental damages and US\$8.6 billion in punitive damages against Chevron. This judgment was upheld in the Appellate Division of the Provincial Court of Justice of Sucumbíos. On further appeal, Ecuador’s Court of Cassation upheld the judgment, but overturned the award for punitive damages, reducing the total award to US\$9.51 billion.<sup>30</sup> Chevron has not paid.

The plaintiffs in *Yaiguaje* are trying to enforce their judgment against Chevron in the jurisdictions where it now operates. Two high profile decisions in Canada and the US have been

<sup>27</sup> Sørensen, *supra* note 5 at 9.

<sup>28</sup> Ernst-Otto Czempiel, “Governance and Democratization” in Rosenau & Czempiel, eds, *Governance Without Government: Order and Change in World Politics* (London: Cambridge University Press, 1992) at 89.

<sup>29</sup> *Yaiguaje*, *supra* note 1.

<sup>30</sup> *Ibid* at para 6.



rendered in relation to the plaintiffs' efforts to collect on the Ecuadorean Court's Order. In 2014, in *Chevron Corporation v. Steven Donziger et al.*,<sup>31</sup> the United States District Court of the Southern District of New York declined to permit collection on the debt against Chevron's US corporate entity. The Canadian legal proceeding is an attempt to enforce the judgment against Chevron's Canadian subsidiary, Chevron Canada, which has its head office in Alberta. Chevron Canada was served in Mississauga, Ontario, which is how the matter ended up in an Ontario court. Chevron Canada retained Norton Rose Fullbright, LLP, one of the world's largest law firms, itself a multinational organization, to defend against collection. Chevron challenged the jurisdiction of the Ontario court to hear the case, arguing that there was no real and substantial connection between Ontario and the defendants, or the subject matter of the dispute. Chevron Canada also argued that it was a distinct legal personality and not a judgment debtor to the Ecuadorean judgment. At first instance, the Ontario Superior Court granted Chevron a stay of proceedings.<sup>32</sup> On appeal of that decision, the Ontario Court of Appeal authorized the Ecuadorians to proceed with an action for collection on their judgment.<sup>33</sup>

Chevron further appealed this judgment to the Supreme Court of Canada. At the Supreme Court of Canada, counsel for Chevron raised a series of complex jurisdictional and procedural issues. The Supreme Court of Canada upheld the decision of the Ontario Court of Appeal, which means that the plaintiffs, the Ecuadorean villagers, can now bring an action in a Canadian court to seek recognition of their judgment. It does not mean they will necessarily be able to collect. At the time of writing, of course, Chevron still has not paid the damages awarded to the Ecuadorians.

The Supreme Court of Canada, in dismissing Chevron's complex and highly technical appeal, rejected its counsel's suggested legal analysis, including its contention that there must be a real and substantial connection between Ontario and the defendants to the action or to the dispute. In the context of an action for recognition and enforcement, this connection, Chevron argued, required the presence of assets in the jurisdiction. Instead, the Supreme Court confirmed the ability of judgment creditors to enforce judgments against judgment debtors in other jurisdictions. Paragraphs 57-58 of the decision are particularly significant. The Court held:

In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality...

... other common law jurisdictions — presumably equally concerned about order and fairness as our own — have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment.<sup>34</sup>

The Supreme Court of Canada dismissed Chevron's appeal and ordered costs against it as appellant. In adopting a generous and liberal approach to the recognition and enforcement of foreign judgments, the Court characterized its role as "facilitative"<sup>35</sup> and stressed that "order and

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<sup>31</sup> *Chevron Corp v Donziger, No 14-0826* (2d Cir 2016) [Donziger].

<sup>32</sup> *Chevron Corp v Yaiguaje*, 2013 ONSC 2527.

<sup>33</sup> *Chevron Corp v Yaiguaje*, 2013 ONCA 758.

<sup>34</sup> *Yaiguaje, supra* note 1 at para 57-58, citing *BNP Paribas (Canada) v Mécs* (2002), 60 OR (3d) 205 (SCJ).

<sup>35</sup> *Ibid* at para 44.

fairness”<sup>36</sup> require that Chevron’s contention that a real and substantial connection<sup>37</sup> must be demonstrated should be rejected.<sup>38</sup>

While the *Yaiguaje* decision was favourable to the Ecuadorean villagers’ position, it must be made clear that the case deals with a very narrow issue: whether there has to be a real and substantial connection between the corporate defendant (Chevron) or dispute and the Canadian enforcing court. In short, the legal answer was “no.”

Because of the decision of the Supreme Court in *Yaiguaje*, the plaintiffs now have only the opportunity to bring an action for recognition and enforcement of the Ecuadorian judgment in Ontario. The recognition of the Ontario court’s jurisdiction does not mean that the plaintiffs will ultimately succeed in the action, nor necessarily in collecting any of the judgment.

## IV. INTERVENTIONS

Interventions are appearances in court proceedings, usually at the appellate level, and particularly in Canada most commonly at the Supreme Court of Canada, by third parties who appear as friends of the court to render assistance by way of argument.<sup>39</sup> Interventions are a departure from the traditional framing of the adversarial legal tradition of common law jurisdictions.<sup>40</sup> At the Supreme Court of Canada, in accordance with Rules 55-57 of the *Rules of the Supreme Court of Canada*,<sup>41</sup> the permitted role of interveners is not to take a position on one side or the other of a dispute but rather to assist the court by providing a different perspective on the legal issues than what is offered by the parties.<sup>42</sup> Critical scholarship has also suggested that the presence of interveners in Canada’s appellate courts may also serve to legitimate the decisions rendered, by affording interveners an impression that they have had a voice in the outcome of the litigation. Thus, it may not just be accuracy with which interventions assist the Court, but also acceptance.<sup>43</sup> Non-governmental organizations will often participate as interveners in appellate proceedings. Their participation is an important but understudied way in which civil society organizations act including, in some instances, across jurisdictional boundaries.

The CBA is a voluntary member association comprised of lawyers, law students, legal academics and notaries. It brands itself as “the leaders and the voice of the legal profession” and has approximately 36,000 members across Canada.<sup>44</sup> The CBA has historically operated under a rigid and complex governance structure. At the Federal level, the CBA is comprised of an elected Executive, a Board, a governing Council, Sections,<sup>45</sup> a Sections Council,<sup>46</sup> Conferences (in 2015 renamed as Forums),<sup>47</sup> as well as Committees composed of members appointed by the

<sup>36</sup> *Ibid* at para 75.

<sup>37</sup> *Ibid* at para 27.

<sup>38</sup> *Ibid* at para 27.

<sup>39</sup> See generally Benjamin R D Alarie & Andrew J Green, “Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance” (2010) 48:3/4 *Osgoode Hall LJ* 381 [Alarie].

<sup>40</sup> *Ibid* at 384.

<sup>41</sup> SOR/2002-156, s 55-57.

<sup>42</sup> *Ibid*, s 57(2)(b).

<sup>43</sup> Alarie, *supra* note 39 at 383-84.

<sup>44</sup> For CBA marketing materials and governance documents, see generally cba.org.

<sup>45</sup> Which are groups of lawyers who have similar subject matter of practice.

<sup>46</sup> An umbrella group governing all Sections, with its own elected Chair.

<sup>47</sup> Which are groups of lawyers who affiliate around some dimension of their identity not directly related to their area of practice, such as their gender or age in the cases of the Woman Lawyers Forum and Young Lawyers conference, respectively.

Executive and ratified by the Council. Further, duplicative structures of Boards, Sections, and Committees, as well as equivalents to Forums, are often constructed in different ways across thirteen jurisdictions at the Provincial or Territorial Branch level. In turn, Branches contribute their presidents to the governing Board of the CBA. All of these bodies have formalized leadership ladders, with elected chairs, and vice chairs, usually holding in-person meetings annually. The CBA is currently undergoing a “re-think” process of governance restructuring,<sup>48</sup> precipitated at least in part by what transpired concerning the Chevron intervention.

Decisions of whether to intervene in cases are taken by the CBA in accordance with its interventions policy,<sup>49</sup> which provides that any CBA body<sup>50</sup> can submit an application to the CBA President and Legislation and Law Reform Committee jointly. Under the policy in existence at the time of the Chevron intervention, it was the Board of the CBA who approved interventions, with the final decision resting with the Executive of the organization. The Legislation and Law Reform Committee was tasked with providing the Board with an opinion as to whether it should accede to the CBA body’s request to intervene.

## A. THIS INTERVENTION: CBA IN YAIGUAJE

On 31 July 2014, The Canadian Bar Association completed its filing of a motion for leave to intervene in the Supreme Court proceeding in *Yaiguaje*. The motion made clear that the CBA sought to make arguments in support of the strong protection of the corporate veil,<sup>51</sup> which would support Chevron Canada’s position that its assets were not available to satisfy the Ecuadorian judgment. Notably, while protection of the corporate veil through respecting the corporate structure of the various entities related to Chevron was at issue in the case, and would have been the focus of the CBA’s intervention, issues relating to the corporate veil were ultimately not addressed in the Supreme Court decision. That decision focused on jurisdiction, and expressly noted that at the “early stage of assessing jurisdiction” the Court is not called on to alter the fundamental principle of corporate separateness.<sup>52</sup>

Lawyers from across Canada protested against the CBA’s participation in the *Yaiguaje* proceedings. These protests were ultimately successful; the CBA did not proceed with this intervention, and never filed a factum. On 16 October 2014, it filed a notice to withdraw as an intervener in the case. This is highly unusual in the context of public interest intervention, and unprecedented for the CBA. Although there were several interveners that were heard at the appeal, none spoke in support of Chevron’s legal position with respect to the corporate veil. Intervenors who participated in the *Yaiguaje* appeal included the International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada, Canadian Centre

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<sup>48</sup> See Canadian Bar Association, “CBA Re-Think” (2014) online: <[www.cba.org/CBA-Re-Think/Home](http://www.cba.org/CBA-Re-Think/Home)> [[perma.cc/BVB5-QT2Q](https://perma.cc/BVB5-QT2Q)].

<sup>49</sup> This policy was revised in September 2015, after the Chevron case and the outcry surrounding it. The new version of the policy provides for a wider range of consultation within the CBA before an intervention request is approved. See Canadian Bar Association, “CBA Intervention Policy,” online: <[www.cba.org/Who-We-Are/Governance/Policies/Public-Interest-Intervention-Policy](http://www.cba.org/Who-We-Are/Governance/Policies/Public-Interest-Intervention-Policy)> [<https://perma.cc/F8F8-NH2Q>] [Intervention Policy].

<sup>50</sup> Including a Branch, Conference (Forum), Committee, or Section.

<sup>51</sup> The corporate veil refers to the legal fiction of corporate personality. For a recent appellate discussion of when it is appropriate to lift or pierce the corporate veil and hold individuals accountable for the actions or inaction of a corporation, see *e.g. Shoppers Drug Mart Inc v 6470360 Canada Inc (Energyshop Consulting Inc/Powerhouse Energy Management Inc)*, 2014 ONCA 85.

<sup>52</sup> *Yaiguaje*, *supra* note 1 at para 95.

for International Justice, and the Justice and Corporate Accountability Project. The protest against the CBA's proposed intervention clearly affected what was and was not said in the courtroom, and may well have affected the judgment in the case.

There is an important caveat to note here with respect to the abandoned intervention. It is not safe to simply assume that the impact of the CBA's intervention, had it continued, would have altered the outcome of the proceeding. While the CBA's abandonment of the intervention left Chevron without allies in the court case on its position in law, it is not required that a party have allies. There are many cases in which the Supreme Court has decided in favour of a party and disregarded views held commonly amongst several interveners presenting that the victorious party was wrong in law.<sup>53</sup> It would be highly speculative, and unprovable, to suggest what impact a CBA intervention would have had on the outcome of the case.

Notwithstanding this caveat, it is clear from the strong resistance encountered by those seeking to have the CBA intervene, that many amongst Canada's legal community felt it mattered a great deal whether the intervention proceeded. Further, it is not speculative but clear from available evidence of other CBA interventions<sup>54</sup> that the Association would have been represented by well-resourced, experienced counsel who would have worked hard to persuade the Court of the veracity and correctness of its position on the legal question of how to address the corporate veil in relation to Chevron's Canadian subsidiary in the case.

It is also significant that the CBA's elected leadership ultimately reversed their decision upon receipt of significant pressure from their membership. They were effectively forced to cede control over the decision made to the popular views of the membership, a transaction that evidences power operating diffusely within the association as a network of professional colleagues, and without deference to traditional lines of authority.

## V. IN CONTEXT: GOVERNING MULTINATIONAL CORPORATIONS

A multinational corporation is a corporate entity legally constituted in one jurisdiction which has operations in multiple jurisdictions and more specifically, operates fixed facilities and employs workers in multiple jurisdictions.<sup>55</sup> Multinational corporations are problematic subjects for legal regulation mechanisms because they are able to operate independent of the state and can pursue profits and other interests in opportunistic ways that allow them to avoid and evade the authority of local laws.

The global reach and accumulated power of multinational corporations is difficult to overstate, and it is growing. In 2006, there were over 70,000 multinational corporations with approximately 700,000 subsidiaries and millions of suppliers around the world.<sup>56</sup> Multinationals

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<sup>53</sup> Success rates of interveners are discussed in detail by Alarie and Green. Their study on intervention at the Supreme Court of Canada found that the discernable positions of interveners were successful 61% of the time. See Alarie, *supra* note 39 at 399.

<sup>54</sup> Recent, high-profile examples where well-funded, expert pro bono counsel acted for CBA in interventions include *The Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59 (CanLII) and *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7.

<sup>55</sup> Mira Wilkins, *The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914* (Cambridge, Harvard University Press, 1970).

<sup>56</sup> Allison Snyder, "Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer?" (2007) 2 Colum Bus L Rev 565 at 565, citing John Ruggie, *Interim Report of the Special Representative of the*

control vast amounts of capital. According to UNCTC (United Nations Centre on Transnational Corporations) statistics, as of 2010, the total global value of foreign direct investment accounted for “\$21,288.5 billion and the number of transnational corporations was estimated at over 100,000.”<sup>57</sup> The largest oil and gas companies, often known collectively as “big oil” or the “seven sisters” are among these large multinationals and are major players in the world economy.<sup>58</sup> For instance, the Chevron corporation reported earnings of US \$1.3 billion for the third quarter of 2016 alone.<sup>59</sup> While these earnings are down slightly as multinational oil and gas companies in general are experiencing a market contraction, these companies, including Chevron, remain profitable, and control billions of dollars in assets<sup>60</sup>.

Multinational corporations are tremendously powerful entities in the contemporary globalized economy. Governments seeking to enforce existing laws related to corporate criminal liability, as well as private parties seeking to ensure careful stewardship of local resources through existing domestic civil legal regimes, face a difficult conundrum when attempting to regulate the conduct of multinationals concerning human rights, labour laws, and environmental protections. Exacerbating the jurisdictional challenges of regulating companies operating transnationally is the fact that corporate persons cannot be disciplined or governed in the same ways as natural persons. Underlying this research are general thematic questions: how can the power accumulated in multinationals be governed in the Foucauldian sense, and how can law be invoked and deployed, and lawyers act, to ensure such governance is effective? How can corporations’ conduct be steered, and, if they cause harm, how can they be held to account for it?

The extraction of oil is an integral part of Canada’s economy, and how it is undertaken should be of importance to all Canadians. Oil is a non-renewable resource and this economic activity will not go on indefinitely. The *Yaiguaje* case sheds light on the potential effectiveness of network action in Canada, for example in the context of the oil sands region of Alberta. Canadians face the conundrum of how to influence the conduct of multinationals both in their ongoing operations and when those operations conclude. The *Yaiguaje* case is significant as an instance of political and legal agencies exercised by local people in an attempt to hold a multinational accountable for environmental harm.

## A. ROADBLOCKS AND CONUNDRUMS

The ability of multinational corporations to operate in ways that transcend national jurisdictions comes together with the vast sums of money at stake for local economies to present roadblocks that can impede effective regulation. This is exemplified by the significance of the oil industry to Canada’s national economy of resource development. Regulatory frameworks have been

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*Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN4/2006/97 (2006).

<sup>57</sup> Malgorzata Jaworek & Marcin Kuzel, “Transnational Corporations in the World Economy: Formation, Development and Present Position” (2015) 4:1 Copernican Journal of Finance & Accounting 55, online: <<http://dx.doi.org/10.12775/CJFA.2015.004>> [perma.cc/AE9G-XQSU] at 58.

<sup>58</sup> Brian Black, *Crude Reality: Petroleum in World History* (New York: Rowman & Littlefield, 2012).

<sup>59</sup> Chevron News Release (28 October 2016) online: <[www.chevron.com/stories/-/media/77CC9C07C3B647EC98B76EFBA1A8837A.ashx](http://www.chevron.com/stories/-/media/77CC9C07C3B647EC98B76EFBA1A8837A.ashx)> [perma.cc/BSE8-ZDAG].

<sup>60</sup> Chevron Corporation (NYSE: CVX) in January 2017 reported earnings of \$415 million (\$0.22 per share – diluted) for fourth quarter 2016, compared with a loss of \$588 million (\$0.31 per share – diluted) in the 2015 fourth quarter.

effective in a variety of ways at various times in constraining the activities of multinational oil and gas companies, particularly where those companies are operating domestically. Conduct for which corporate accountability on the part of multinationals may be sought includes labour abuses, human rights violations, and environmental harms. Labour, human rights, and environmental legislative regimes are relevant when considering regulatory liability for multinationals operating domestically.

It is difficult indeed for those individuals or organizations seeking to deploy the power of law against corporations to ensure their accountability. Criminal liability on the part of corporations has long been contemplated under Canadian criminal law. The *Criminal Code of Canada*, in section 2, defines the term “every one,” to include “an organization” as well as a natural person.<sup>61</sup> However, reaching a verdict that a corporation has committed the *actus reus* (prohibited act) and had the *mens rea* (guilty mental state) is a more complicated process than making the same findings about a natural person. Indeed, punishment of corporations, even after a guilty verdict is obtained, is an even more challenging task.

Corporate identity becomes an issue in the context of criminal liability of multinational corporations. In the *Yaiguaje* case, the original corporate entity which allegedly perpetrated the environmental harm in Guatemala was a subsidiary of Texaco, a corporation only subsequently purchased by Chevron, which in turn is comprised of several subsidiaries including Chevron Canada and Chevron's American entity. Of these possible entities, it is not clear which could be held criminally responsible for the environmental harm in Guatemala for which the plaintiff villagers seek redress.

## 1. CIVIL LIABILITY AND CORPORATE PERSONHOOD

The central issue arising in the *Yaiguaje* case is one of civil liability in tort, sought by private individuals affected by environmental harms. It is an example of an attempt to assign financial liability and recover damages, instead of seeking punishment through criminal law. Civil causes of action in tort under the common law, and in conjunction with statutory torts, are available as remedies for plaintiffs who suffer injury, loss, or damage arising from environmental harms caused by corporate resource development. In Canada, as elsewhere, tort law affords wide-ranging theories of liability to plead against corporate actors responsible for environmental harm, such as nuisance,<sup>62</sup> trespass, negligence, and strict liability. Tort law, however, presents prospective plaintiffs with challenges illustrated well by the process of the *Yaiguaje* case: civil litigation entails lengthy processes that must be driven and funded by the plaintiffs themselves. Further, where the defendant is a multinational corporation, it has the ability to leave the jurisdiction in which the action is brought and to shield assets with subsidiaries in other jurisdictions.

Of course, although corporations are not natural persons, they are composed of them. It is possible for the purposes of both criminal and civil liability to find the acts of an individual person within the corporate structure to be liable. In limited circumstances, courts can disregard corporate personality and find individuals culpable or liable for corporate acts. While not impossible, it is difficult to pierce the corporate veil and assign liability to natural persons for corporate torts. A recent decision of the Ontario Court of Appeal illustrates the continually

<sup>61</sup> *Criminal Code*, RSC 1985, c C-46, s 2. For further discussion of corporate personhood as extending to freedom of expression see *e.g. Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927.

<sup>62</sup> See *e.g. Kerr v Revelstoke Building Materials Ltd*, (1976), 71 DLR (3d) 134 (Alta SC).

evolving circumstances under which the corporate veil may be pierced, and confirms the longstanding legal test applied by Canadian courts. There, the Court confirmed that individuals who are “directing minds” of corporations can be held liable for corporate acts only in exceptional cases:

Only exceptional cases that result in flagrant injustice warrant going behind the corporate veil. It can be pierced if those in control expressly direct a wrongful act to be done. ... Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated those in control expressly direct a wrongful thing to be done.<sup>63</sup>

While there may be some sense of satisfaction in holding an individual to account for corporate actions, it is also an expedient and financially inexpensive tactic for corporations to allow the scapegoating of individuals within their structures. The concern is that, after the individual is held to account, the corporation can go on with its work, and evade responsibility for any harms it may have previously been involved in causing.

Just as corporate organizations are more than the sum of their individual parts, other forms of social organization have properties that are powerful and significant. One such organizational form is a social network. Networks of affiliated professionals can play a unique role in global network governance. Professional associations, like the CBA, are non-state actors with potential to affect outcomes in disputes about resource development and the operation of multinational corporations. Professional networks in particular can work to “establish bridges between domestic and international, recognizing the distinct nature of ... actors”<sup>64</sup> through the use of social media, enabling social organization that is not dependent upon “fixed, place-based activities.”<sup>65</sup> The CBA’s withdrawn intervention in the *Yaiguaje* case presents an example of network governance through a coalition of professionals within and external to the Association. Drawing on common elements of their identities, individual actors involved in the *Yaiguaje* case were able to contact and persuade other activists and lawyers to become involved in protesting the proposed CBA intervention. Working together on a variety of points on a spectrum as advocates, counsel, interveners, and activists, lawyers mobilized their networks to govern a multinational by altering the configuration of speakers and scripts present in the courtroom.

## VI. DISPUTES ABOUT THE INTERVENTION: THE PUBLIC DEBATE

Upon receipt of an application from CBA members in accordance with its stated intervention policy in effect at the time, the CBA initially decided to intervene in the case before the Supreme Court. Unusually, while the Legislation and Law Reform Committee of the CBA had

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<sup>63</sup> *Shoppers Drug Mart Inc v 6470360 Canada Inc (Energyshop Consulting Inc./Powerhouse Energy Management Inc)*, 2014 ONCA 85 at 43, citing *642947 Ontario Ltd v Fleischer* (2001), 56 OR (3d) 417 (CA) at para 68.

<sup>64</sup> Mariana de Freitas Montebugnoli, “Changing World and the Growing Importance of the Transnational Advocacy Network on Global Governance,” (date unknown; accessed 4 July 2016) online: <web.isanet.org/Web/Conferences/FLACSO-ISA%20BuenosAires%202014/Archive/6228ae78-1118-469e-ba56-a7fae26fce66.pdf> [perma.cc/UA5D-FQZ5] at 2.

<sup>65</sup> *Ibid* at 9, citing Sidney Tarrow, *The new transnational activism* (New York: Cambridge University Press, 2005) at 210.

recommended against the intervention, the Executive of the CBA chose to act against their recommendation and proceed.<sup>66</sup> Blake, Cassells and Graydon LLP, the firm retained to undertake the intervention on a pro bono basis by the CBA had represented Chevron on other matters. At the time the decision was taken, the President of the CBA, Michele Hollins, was a Calgary corporate lawyer, working in the heart of oil-rich Alberta. When announcing the decision to intervene, the CBA referenced the rule of law in a public statement citing the need to protect the sanctity of “foundational principles of business law.”<sup>67</sup>

A public debate about whether the CBA should intervene in the *Yaiguaje* case ensued only after the Association took its original decision to intervene in the case. Evidently, CBA members outside of its formal leadership only became aware of the decision after it was made. The ensuing debate that took place in Canada about the proposed CBA intervention constituted an intersectional event involving the collision of discourses and constellations of power; it was an enactment of political agency and governmental discourses contesting for meaning. Critical discourse analysis reveals conflicting constructions of the meaning of “rule of law” contesting for dominance in the intersection of arguments around whether the CBA should intervene in the case. Review of publicly available documents, such as statements and press releases issued by the CBA; news articles authored by journalists; and Op-Ed pieces, websites, and social media pages written by CBA members about the CBA’s prospective intervention in the case reveal that the debate focused on thematic notions of due process, articulated either explicitly in terms of the “rule of law,” or with reference to related concepts about “adherence to policy.” When the decision was taken to withdraw its application to intervene, the CBA also publicly cited a need to “respect [the Legislation and Law Reform] Committee’s opinion,” gesturing towards the legitimacy of, and need to follow, its stated process, a notion linked to the rule of law.<sup>68</sup>

The construct of the rule of law is not defined within, but appears repeatedly in the founding documents of the Canadian Bar Association. The Mission and Vision of the CBA characterizes the organization as: “the essential ally and advocate of the legal profession and guardian of the rule of law in Canada.”<sup>69</sup> In its intervention policy, as discussed above, the CBA refers to the following “core principles” of the legal profession, which are repeatedly referential to the goal of the rule of law:

- An impartial and independent judiciary, without which there is no *rule of law*;
- An independent legal profession, without which there is no *rule of law* or freedom for the people;

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<sup>66</sup> Shawn McCarthy, “Canadian Bar Association Feels Backlash Over Chevron Intervention,” *The Globe and Mail* (30 September 2014), online: <[www.theglobeandmail.com/report-on-business/industry-news/the-law-page/canadian-bar-association-feels-backlash-over-chevron-intervention/article20869596](http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/canadian-bar-association-feels-backlash-over-chevron-intervention/article20869596)> [perma.cc/4MKH-3C7E] [McCarthy].

<sup>67</sup> *Ibid.*

<sup>68</sup> The public statement made by the CBA to announce the withdrawal of its intervention was posted on its website on 16 October 2014. It has since been taken down, but is quoted by several media sources. See, e.g. Yamri Taddese, “CBA Drops Chevron Intervention” *Legal Feeds* (16 October 2014) online: <[www.canadianlawyermag.com/legalfeeds/2332/cba-drops-chevron-intervention.html](http://www.canadianlawyermag.com/legalfeeds/2332/cba-drops-chevron-intervention.html)> [perma.cc/573X-NRWM] [Taddese].

<sup>69</sup> Canadian Bar Association, “Mission & Vision”, online: <[www.cba.org/Who-We-Are/About-us/Mission-and-Vision](http://www.cba.org/Who-We-Are/About-us/Mission-and-Vision)> [perma.cc/AN5F-WFD7].



- Access to justice for all people, which is only possible with an independent legal profession and an impartial and independent judiciary.<sup>70</sup> [emphasis added]

In the controversy around the *Yaiguaje* case, the concept of the rule of law was mobilized by lawyers seeking for the CBA to intervene in the case in support of the notion of protecting the corporate veil. It was also deployed by others seeking to prevent the CBA from entering into the fray as an intervener. Lawyers seeking to prevent the CBA from intervening mobilized around the foundational idea of the rule of law with reference to access to justice for Indigenous peoples, and a need to curb the power of corporations, while using language explicitly referential to the Association's policies.<sup>71</sup>

Analysis of the sites in which particular articulations of the “rule of law” were produced reveals networks of lawyers connecting across the CBA, without particular regard for the Association's institutional hierarchy. News of the CBA's application to intervene in the *Yaiguaje* case travelled through official channels, like the Association's electronic newsletter. Once CBA members, including members of the Aboriginal Law Section, heard of the proposed intervention, a group of lawyers and law students set up a public Facebook page called “CBA Chevron,” without any particular institutional authority to act on behalf of the CBA. The Facebook page remains open at the time of writing.<sup>72</sup> Draft letters opposing the CBA's intervention were posted online via this Facebook page and circulated via email. A petition was initiated online, and a protest was organized by University of Toronto, Osgoode, and McGill law students. Protests were set up as Facebook “events,” the largest taking place on 9 October 2014. The National Aboriginal Law; Environmental, Energy, and Resource Law; and Civil Litigation Sections, as well as several other legal organizations, firms, and professionals wrote letters criticizing the CBA's decision.<sup>73</sup> The disruptive network that successfully opposed the CBA's intervention in the *Yaiguaje* case functioned—at least in part—through social media, and benefited from the capacities of that electronic medium to work rapidly across jurisdictional boundaries, and with a flat, as opposed to hierarchical, organizational structure. In the summer of 2014, over one hundred CBA members signed an open letter to its leadership asking it to reconsider intervening in the *Yaiguaje* case. By September, objections had taken the form of a Petition to the CBA,<sup>74</sup> a series of letters,<sup>75</sup> and several motions.<sup>76</sup>

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<sup>70</sup> Intervention Policy, *supra* note 49.

<sup>71</sup> “Oct. 10: An Open Letter to the CBA – and Other Letters to the ROB Editor”, The Globe and Mail (14 October 2014), online: <[www.theglobeandmail.com/report-on-business/rob-commentary/rob-letters/oct-10-an-open-letter-to-the-cba--and-other-letters-to-the-rob-editor/article21067533](http://www.theglobeandmail.com/report-on-business/rob-commentary/rob-letters/oct-10-an-open-letter-to-the-cba--and-other-letters-to-the-rob-editor/article21067533)> [perma.cc/L7NV-ZRRD] [Open Letter].

<sup>72</sup> “CBA Chevron” (05 February 2017), online: <[www.facebook.com/CBAChevron](http://www.facebook.com/CBAChevron)> [perma.cc/AMU9-7C9C].

<sup>73</sup> These included a letter to the CBA's executive from the CBA's National Aboriginal Law Section; a letter from the CBA's National Civil Litigation Section Chair (24 September 2014); a letter from the CBA's National Environmental, Energy, and Resources Law Section (25 September 2014); a joint letter from Aboriginal Law Student Association McGill, Environmental Law McGill, Feminist Collective of McGill Law, McGill Radical Law Student Community, Osgoode Hall Law Union, and University of Toronto Law Union (8 October 2014); an open letter from former and current CBA members (10 October 2014); and a letter from the Canadian Hispanic Bar Association (14 October 2014) [Letters].

<sup>74</sup> “Withdraw from the Supreme Court of Canada or Don't File an Argument” petition, online: <[www.change.org/p/canadian-bar-association-withdraw-from-the-supreme-court-of-canada-or-don-t-file-an-argument](http://www.change.org/p/canadian-bar-association-withdraw-from-the-supreme-court-of-canada-or-don-t-file-an-argument)> [perma.cc/A53Y-72T5].

<sup>75</sup> Letters, *supra* note 73.

The open letter to the CBA and the protests surrounding it were enactments of a form of power that undermined the claims on the part of the leadership of the organization to authority over the association itself, as well as to authority to speak for the legal profession as a whole. The letter sets out that the CBA “purports to speak for all of us [in the Canadian legal profession]; it does not.”<sup>77</sup> It is signed by 109 individually named signatories who are connected to one another by their professional identity and CBA membership, but not under the power of a particular authority. The signatories of the letter are acting as a headless body: they are acting as a network.

In addition, the National Environmental, Energy and Resource Law Section (NEERLS) of the CBA publicly objected to the decision to intervene by letter from its chair dated 2 April 2015.<sup>78</sup> The Section contended that the CBA had not followed its own policies in deciding to proceed with the intervention without consulting with NEERLS. Their objection centres on the process by which it was determined that the CBA should intervene, and its (in)consistency with set policies, thus implicitly referencing the rule of law from a procedural perspective.<sup>79</sup>

The protests surrounding the Chevron intervention reveal the productive power of network governance in a variety of ways. They show the potential of network connections to disrupt existing power hierarchies while demonstrating the reliance of both sides on the concept of the rule of law. The battle that ensued between factions within the CBA revealed a tension between a longstanding quasi-governmental, or quasi-corporate, authority structure entrenched in the Association's objects and a different, more egalitarian series of connections spreading network-based influence within the Association. Ultimately, the protesters prevailed. While purporting to act within its scope of authority, the executive of the Association had not complied with its own policies. It was held to account by, and could not assert control over, the network it claimed to speak for. Ultimately, it not only reversed its decision but undertook to review its intervention practices and policies.<sup>80</sup>

While protesters objecting to the CBA's proposed intervention in *Yaiguaje* mobilized a substantive notion of the rule of law, they also on occasion used it to refer to processes of the Association's own advocacy work. These process-based references to the rule of law were common in the legal community's public protests against the CBA's decision to intervene in *Yaiguaje*, as exemplified by this statement articulated in an open letter: “this is not a legitimate way for the CBA to approve an intervention. This intervention is also contrary to the CBA's own intervention regulation.”<sup>81</sup> Protests were organized in October 2014 by the University of Toronto Law Union, the “Anti-Chevron Committee,” the Osgoode Indigenous Students Association, and the Osgoode Hall Law Union. The Law Union of Ontario, on 12 October 2014, issued a general call for CBA members to resign their memberships. Students and lawyers publicly picketed the CBA's Toronto office, and burned their membership cards. To quote an article from the *Globe and Mail*:

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<sup>76</sup> These included a motion by the Ontario Bar Association Constitutional, Civil Liberties and Human Rights Section (14 October 2014), and a motion by the CBA Vancouver Island Aboriginal Law Section (15 October 2014).

<sup>77</sup> Open Letter, *supra* note 71.

<sup>78</sup> This letter was reported on publicly and in detail at the August 2015 Council Meeting of the CBA, the written materials for which can be found online at: <[www.cba.org/getattachment/Publications-Resources/Resources/2014/2014-Reports-to-Council/reportsToCouncil.pdf](http://www.cba.org/getattachment/Publications-Resources/Resources/2014/2014-Reports-to-Council/reportsToCouncil.pdf)> [perma.cc/23ZC-37WC].

<sup>79</sup> McCarthy, *supra* note 66.

<sup>80</sup> Canadian Bar Association, “Pardon the Intervention” (October 15, 2015) *CBA News & Media*, online: <[www.cba.org/News-Media/News/2015/October/Pardon-the-intervention](http://www.cba.org/News-Media/News/2015/October/Pardon-the-intervention)> [perma.cc/AQ9Q-M897].

<sup>81</sup> Open Letter, *supra* note 71.

Victoria lawyer Kathryn Deo, managing partner at Arbutus Law Group LLP, said she and many of her colleagues from the aboriginal law practice were tendering their resignations in protest. “The CBA didn’t follow its own processes at all for when and how it should intervene in a case like this.”<sup>82</sup>

When protesters marched in front of the CBA’s Toronto (Ontario Bar Association Branch) office, they carried signs that said “Chevron is not above the law,” as documented in the *Globe and Mail*,<sup>83</sup> again referencing the rule of law. The rule of law was invoked by protesters to refer to a sense of natural or fundamental justice, to the equities of a situation, and to the need to protect the vulnerable. The “core values of the bar” linked to the rule of law by protesters are substantive issues about justice and access to it. To quote from the open letter published in the *Globe and Mail*:

Vulnerable people face tremendous odds in their effort to seek redress for the harm caused to their lands and interests by environmental pollution. If it wants to be broadly representative of the profession in Canada, it has not only to limit its interventions to cases where there is a deep consensus. It also has to ensure that its position does not clash so jarringly with the *core values of the bar, including our commitments to access to justice and to the public interest.*<sup>84</sup> [emphasis added]

CBA President Michele Hollins’ promised in an October 2014 statement to review its policy, though she did not accede to the contention made by the varied protesters that the problem was not the policy itself, but that the policy had not been followed.<sup>85</sup>

The debate in which lawyers engaged in contesting whether the CBA should intervene in the *Yaiguaje* case was thematically centred around the content of the rule of law, and whether that rule referred specifically to the formalistic processes of the law, or adherence to the CBA’s own policies and practices. The same discourse was invoked in arguments related to the legal concept of corporate personality, as well as whether the rule of law had a more substantive meaning relating to CBA members having full ability to participate in their own association’s work.

In the United States, a formalistic and process-oriented understanding of the rule of law was mobilized by the Court in the *Donziger* judgment. The Court held that the lead counsel, American lawyer Steven Donziger, and his associate plaintiff counsel in the Ecuadorean case, had committed fraud, and therefore declined to enforce the judgment:

As the Court wrote at the outset, “[t]he issue in this case is not what happened in the Orienté more than twenty years ago and who, if anyone, now is responsible for any wrongs then done. The issue here, instead, is whether a court decision was procured by corrupt means, regardless of whether the cause was just.”<sup>86</sup>

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<sup>82</sup> McCarthy, *supra* note 66.

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

<sup>84</sup> Open Letter, *supra* note 71.

<sup>85</sup> Taddese, *supra* note 68.

<sup>86</sup> *Donziger*, *supra* note 31 at 485.

In contrast, the attempt on the part of the plaintiffs in the Canadian courts to collect against the Canadian subsidiary of Chevron in Ontario, had a different legal result. The Court explicitly declined to inquire into the substantive equities and questions of justice in the case, although it did centrally consider fairness when determining jurisdiction. However, it was a substantive construction of the rule of law that was deployed through a network of professional colleagues who became protesters to successfully disrupt, and affect the withdrawal of, the proposed CBA intervention in the case.

The public debate about who should intervene in the Canadian case constituted an intersection or collision between divergent concepts of the rule of law. More specifically, the protests about whether the Canadian Bar Association should intervene in the *Yaiguaje* case can be seen as a conflict about the content of the phrase “rule of law.” The rule of law as articulated in the Supreme Court of Canada’s judgment, and that of the New York Court in the related *Donziger* case, is referential to formal processes. A network of lawyers protesting the CBA intervention mobilized a more substantive conception of the rule of law outside the Canadian courtroom. The deployment of this discursive technology was undertaken by means of a network of activists collaborating together.

Protesters against the CBA’s intervention in the *Yaiguaje* case used rule of law to mean substantive justice, the championing and serving of causes that are just. They also mobilized the concept of the rule of law to hold the CBA to account for fairness and transparency in its own decision-making, even though the CBA is not a formal lawmaker, and its processes are not technically laws. At the same time, advocates speaking in support of Chevron took a more technical approach, referencing the formal discourses of written laws as giving content to the rule of law.

When articulated by protesters in the case, the concept of the rule of law was overwhelmingly used to articulate a substantive sense of natural justice, both in reference to the CBA’s policies and the duties of the corporation to the Ecuadorean people. On the other side, the corporate defendants and their counsel use the phrase “rule of law” to refer to procedural compliance with existing rules. Thus, the negotiations of power in the case of the CBA’s intervention in *Yaiguaje* were articulated through deployment of discourses of the rule of law.

## **A. THEORIZING THE DISPUTED INTERVENTION: NETWORK GOVERNANCE**

Setting aside the particularities of the *Yaiguaje* case, it is clear that interventions should receive more attention and study in legal and socio-legal scholarship. When considering the struggle of who should be present in the courtroom, particularly when interventions are considered, the case reveals a muddy complexity of microprocesses affecting and influencing litigation that are not made visible when traditional legal scholarship considers the doctrinal arguments made by parties. Not just the mechanism of intervention itself but the way interventions are conducted, and how this type of engagement influences court cases, belie law’s mythology of being a dispute between two parties neatly resolved in a courtroom. Looking at the contested question of who might intervene in the *Yaiguaje* case reveals dimensions to governmentality that are obfuscated by “black letter” legal analysis. This analysis troubles commonly held assumptions that processes of law happen under the bright lights of a dusty courtroom. The ultimate decision of the Supreme Court of Canada makes no reference to the conclusion ultimately arrived at by the Canadian Bar Association in its decision to withdraw its intervention application. The case

makes no mention of arguments that corporate personality should not be interfered with in this circumstance. This silence may be a coincidence; it might just be the correct doctrinal focus, or, plausibly, this may also reflect the absence of the CBA's intervention on the outcome of proceedings before the Court.

## VII. CONCLUSION

This article has presented a case study of how a network of lawyers disrupted the trajectory of a legal dispute towards a hearing before the Supreme Court of Canada. I have argued that what protesters affected through social networking and deployment of the construct of the “rule of law” can be understood as network governance by members of a professional association. I have critically unpacked how different discourses of the “rule of law” were deployed as a governmental technology in contestations of power and knowledge within civil society about whether the Canadian Bar Association should intervene in the *Yaiguaje* case. This article focuses on the grappling in the public sphere about what constituted the rule of law in the case. It looks at the connections forged, and debates in the public square amongst lawyers, which may have influenced what arguments were and were not made within the courtroom. Critical discourse analysis suggests that the concept of the “rule of law” was deployed by a network of lawyers as a means to resist action by multinational corporations. Further, this article has looked at how professional networks, as well as the political, and other creative, agencies of lawyers were important in shaping governance not just as they are deployed in court processes but also as they are exercised *around* them, in the public square in affecting through agentic actions and resistances outside the formal litigation process. Disruptive network activity affected what outcomes were made possible within those formal mechanisms. More specifically, the arguments those in favour of the CBA intervention sought to make were ultimately not made in court, at least not by any intervener.

Analysis of the CBA's cancelled Chevron intervention as a case study suggests new ways of understanding how cases before the Supreme Court of Canada function as governmental events and troubles commonly accepted understandings of who has a voice in court. It also demonstrates the efficacy of network governance transnationally where professional affiliations are involved. The *Yaiguaje* case is a victory: an interim, limited victory for networks, for civil society, for political agencies, for villagers, for the Global South, and against the forces of capitalism, globalization and global economic systems. It is also a victory for Canadian lawyers' sense of their own capacity to serve justice. It suggests that interventions are important, and foreshadows ways in which activists within Canada and elsewhere may productively seek to govern corporate conduct.

The CBA institutionally claims to be the guardian of the rule of law in Canada and this claim gave its constituent members a language in which to argue both that substantive justice for Ecuadorean villagers mattered to Canadian lawyers, and that the CBA itself had to be more open, transparent, and fair in its own procedures. The flexible concept of the rule of law was deployed as a discursive technology with which to influence government of the Association, and of multinational corporations, even where the factual contention that either is ruled by formal laws is at best debatable. The notion of the rule of law deployed in the service of various interests was key to the decision of the CBA first to intervene in the *Yaiguaje* case, and then not to do so. Yet, ironically, this deployment of the concept of the rule of law had governmental effects in the absence of a concrete, unambiguous reality to the law actually ruling. Deployment of the

concept of the rule of law both explicitly and implicitly, was a useful technology to those seeking to alter the course of the CBA's action.

The optimism of the conclusion that network governance made possible by grassroots activism by lawyers and law students was successful must be tempered with awareness of the power collected in multinational corporations. Clearly, it has not been established that, as a corporate entity, Chevron has a conscience. If corporate social responsibility is central to their corporate structure, it is difficult to see why Chevron did not negotiate directly with the Ecuadorian government years ago. Further, this victory at the Supreme Court is one step in a series over many years. It is likely that other arguments will again be taken to the Supreme Court of Canada. Litigation is ongoing and will continue to take years. Exhaustion or "outrunning the plaintiff" by way of fostering extreme delays and expense are not foreclosed as defense tactics by this judgment. Further, in subsequent future proceedings, when the issues are heard on their merits, Chevron may argue that the Ecuadorian lawyers were engaged in fraud, as was found in the New York decision.

This article has not argued that the outcome of the *Yaiguaje* decision offers a solution to harms perpetrated by multinationals and a better world in which corporations act responsibly. Also, it has not taken a position on the issue of whether the Ecuadorian *Yaiguaje* decision was or was not the result of fraud. Rather, it has contended that the public case of the CBA's abandoned intervention provides evidence that there is hope in lawyers' agencies, and the deployment of widely accepted, but vaguely defined, and flexible, concepts like the rule of law can be involved in constructive ways towards governing multinationals. I have argued in this article that the instance in *Yaiguaje* of moving towards holding a multinational oil corporation to account for environmental harm is an encouraging example of how grassroots activists, working in networks, and by invoking the power of law, can sometimes achieve ends they do not technically have the formal legal power to effect. It is particularly salient in situations where multinational corporations owned and headquartered in other jurisdictions undertake massive projects in Canada, for example, in the context of the development of the Alberta oil sands. It is therefore a matter to which Canadians should pay close attention.