

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**CHEVRON CORPORATION and CHEVRON CANADA LIMITED**

Appellants (Respondents/Appellants by cross-appeal)

-and-

**DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA,  
MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE  
PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE  
PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE  
PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO  
MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA  
VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA  
ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE  
RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ  
MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO  
WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO  
ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA  
GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA  
ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA,  
FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA,  
MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA  
IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO  
ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA  
NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO  
NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO  
PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO  
ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA,  
GUILLERMO VINCENTE PAYAGUAJE LUSITANDE, ALFREDO DONALDO  
PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE**

Respondents (Appellants/Respondents by cross-appeal)

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**INTERVENER MOTION RECORD TO A JUDGE  
(MOTION BY THE INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY  
OF TORONTO FACULTY OF LAW, MININGWATCH CANADA AND CANADIAN  
CENTRE FOR INTERNATIONAL JUSTICE FOR LEAVE TO INTERVENE)**

*(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)*

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**Murray Klippenstein**  
**W. Cory Wanless**  
 Klippensteins, Barristers & Solicitors  
 160 John Street, Suite 300  
 Toronto, ON M5V 2E5  
 Tel: 416.598.0288  
 Fax: 416.598.9520  
 murray.klippenstein@klippensteins.ca  
 cory.wanless@klippensteins.ca

**Renu Mandhane**  
 Director, International Human Rights Program  
 University of Toronto Faculty of Law  
 39 Queen's Park  
 Toronto, ON M5S 2C3  
 Tel: 416.946.8730  
 Fax: 416.978.8894  
 renu.mandhane@utoronto.ca

*Counsel for the Moving Parties, MiningWatch  
 Canada, the International Human Rights  
 Program, University of Toronto Faculty of Law,  
 and the Canadian Centre for International Justice*

**Jeffrey W. Beedell**  
 Gowling Lafleur Henderson LLP  
 160 Elgin St., Suite 2600  
 Ottawa, ON K1P 1C3  
 Tel: 613.786.0171  
 Fax: 613.563.9869  
 jeff.beedell@gowlings.com

*Agent for the Moving Parties, MiningWatch  
 Canada, the International Human Rights  
 Program, University of Toronto Faculty of Law,  
 and the Canadian Centre for International  
 Justice*

ORIGINAL TO: THE REGISTRAR OF THIS COURT

COPIES TO:

**Clarke Hunter, Q.C.**  
**Anne Kirker, Q.C.**  
**Jung Lee**  
**Robert Frank**  
 Norton Rose Fulbright Canada LLP  
 Suite 3700, Third Avenue S.W.  
 Calgary, Alberta T2P 4H2  
 Telephone: (403) 267-8292  
 FAX: (403) 264-5973  
 E-mail: clarke.hunter@nortonrosefulbright.com

**Sally Gomery**  
 Norton Rose Fulbright Canada LLP  
 1500-45 O'Connor Street  
 Ottawa, Ontario K1P 1A4  
 Telephone: (613) 780-8604  
 Fax: (613) 230-5459  
 sally.gomery@nortonrose.com

*Agent for the Appellant (Respondents/  
 Appellants by cross-appeal), Chevron Corporation*

*Counsel for the Appellant (Respondents/  
 Appellants by cross-appeal), Chevron  
 Corporation*

**Benjamin Zarnett**  
**Suzy Kauffman**  
**Peter Kolla**  
Goodmans LLP  
3400 - 333 Bay Street  
Toronto, Ontario M5H 2S7  
Telephone: (416) 597-4204  
FAX: (416) 979-1234  
E-mail: bzarnett@goodmans.ca

*Counsel for the Appellant (Respondents/  
Appellants by cross-appeal), Chevron Canada  
Limited*

**Alan J. Lenczner, Q.C.**  
**Brendan F. Morrison**  
Lenczner Slaght Royce Smith Griffin LLP  
2600 - 130 Adelaide St. W.  
Toronto, Ontario M5H 3P5  
Telephone: (416) 865-3090  
FAX: (416) 865-9010  
E-mail: alenczner@lsrsg.com

*Counsel for the Respondents  
(Appellants/Respondents by Cross-Appeal)*

**Sally Gomery**  
Norton Rose Fulbright Canada LLP  
1500-45 O'Connor Street  
Ottawa, Ontario K1P 1A4  
Telephone: (613) 780-8604  
FAX: (613) 230-5459  
E-mail: sally.gomery@nortonrose.com

*Agent for the Appellant (Respondents/ Appellants  
by cross-appeal), Chevron Canada Limited*

**Guy Régimbald**  
Gowling Lafleur Henderson LLP  
160 Elgin Street  
26th Floor  
Ottawa, Ontario K1P 1C3  
Telephone: (613) 786-0197  
FAX: (613) 563-9869  
E-mail: guy.regimbald@gowlings.com

*Agent for the Respondents  
(Appellants/Respondents by Cross-Appeal)*

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**IN THE SUPREME COURT OF CANADA  
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**CHEVRON CORPORATION and CHEVRON CANADA LIMITED**

Applicants (Respondents/Appellants by cross-appeal)

-and-

**DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANDE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE**

Respondents (Appellants/Respondents by cross-appeal)

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**NOTICE OF MOTION TO A JUDGE**

**(Motion by the International Human Rights Program, University of Toronto Faculty of Law, MiningWatch Canada and Canadian Centre For International Justice for leave to intervene)**

**(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)**

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**TAKE NOTICE** that the International Human Rights Program, University of Toronto Faculty of Law (“IHRP”), MiningWatch Canada (“MiningWatch”) and the Canadian Centre for International Justice (“CCIJ”) hereby apply to a Judge of this Honourable Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada* for an Order:

- a) granting the IHRP, MiningWatch and CCIJ (henceforth the “Proposed Joint Interveners”) leave to intervene jointly in this appeal;
- b) permitting the Proposed Joint Interveners to file a factum not exceeding 10 pages;
- c) permitting the Proposed Joint Interveners to make oral argument at the hearing of this appeal; and
- d) granting such further and other relief as counsel may advise and this Honourable Court may permit.

**AND FURTHER TAKE NOTICE** that the said motion shall be made on the following grounds:

**About the IHRP, MiningWatch and the CCIJ**

- a) The Proposed Joint Interveners have a direct and significant interest in the issues raised in this appeal;
- b) The IHRP was established in 1987 and is part of the Faculty of Law at the University of Toronto. Its mission is to advance the field of international human rights law by enhancing the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society. The issues raised are central to the IHRP’s mandate, as protection of international human rights is predicated on the availability of meaningful remedies and the willingness of the international community to hold violators of human rights, including transnational corporations, accountable. The IHRP has intervened in several cases before this Court on issues related to human rights accountability;
- c) MiningWatch is a federally registered non-profit organization established in 1999 by environmental, labour, Aboriginal and social justice groups to support mining-affected

communities in Canada and communities affected by Canadian mining companies abroad ("Impacted Communities"). Mining Watch facilitates linkages and exchanges between Impacted Communities and other organizations; provides advice and technical support to Impacted Communities; conducts research; and provides recommendations to government regarding regulations and legislation;

- d) CCIJ is a federally incorporated registered charity that works with survivors of torture and other abuses to seek redress and bring to justice those responsible for such abuses. CCIJ has a strong interest in assuring that Canadian and international law provide accountability for those implicated in human rights abuse, including individuals, governments and corporations, and ensuring access to remedies for those whose rights have been violated, including people of the global south<sup>1</sup> affected by the activities of transnational corporations. Of late, the CCIJ has taken an increased interest in the issue of corporate accountability for human rights abuses abroad;
- e) By seeking leave to intervene jointly, the Proposed Joint Interveners will present the Court with legal arguments drawn from their respective areas of expertise. The IHRP and CCIJ's expertise in international law and international human rights combined with MiningWatch's technical expertise and experiences with mining-affected communities around the world make the Proposed Joint Interveners uniquely situated to provide this Honourable Court with a distinct perspective and submissions that will be useful and different from those of the other parties.

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#### **The Proposed Joint Interveners' Proposed Submissions**

- f) The Court's ruling in this appeal will have an impact beyond the interests of the immediate parties to the appeal;
- g) The Proposed Joint Interveners propose to make submissions that will be independent, relevant, useful to the Court, and different from the submissions of the parties;

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<sup>1</sup> The term "global south" is used in the development and international relations fields to describe those countries with relatively low levels of economic growth and industrialization, per capita incomes, and standards of living. It is generally agreed to include Africa, South and Central America and the Caribbean, Asia (except Japan) and Oceania (except Australia and New Zealand). Many of these countries suffer from problems associated with weak governance.

- h) If permitted to intervene, the Proposed Joint Interveners will advance the arguments set out in the Memorandum of Argument filed in this motion including the following (as advised by counsel and subject to further consideration):
- i. Interpretation of Canadian common law principles regarding the jurisdiction of a court to hear an enforcement action should be informed by emerging international legal norms and principles, and in particular, the international human right to access to justice and to an effective remedy for individuals and communities whose human rights have been infringed by transnational corporations or other actors;
  - ii. In accordance with international legal norms and principles, the common law jurisdictional requirements for enforcement actions should not be interpreted in a manner that raises additional barriers for individuals and communities who are attempting to enforce judgments obtained against transnational corporations for violations of human rights; and
  - iii. This Honourable Court should not foreclose, at this juncture, the possibility that the assets of a wholly-owned subsidiary corporation are available to satisfy a judgment obtained against a transnational parent corporation by an Impacted Community for violations of human rights;
- i) Granting leave to intervene to the Proposed Joint Interveners will not prejudice any party;
- j) The Proposed Joint Interveners will take the record as they find it and will not seek to supplement the record;
- 
- k) The Proposed Joint Interveners will abide by any schedule set by this Honourable Court. The Proposed Joint Interveners will not seek costs in the intervention and will respectfully request that none be awarded against it;
- l) Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*; and
- m) Such further or other grounds as counsel may advise and this Honourable Court may permit.

**AND FURTHER TAKE NOTICE** that the following documents will be referred to in support of the motion:



- a) The Affidavit of Trudo Lemmens on behalf of the IHRP affirmed July 21, 2014;
- b) The Affidavit of Catherine Coumans on behalf of MiningWatch affirmed July 22, 2014;
- c) The Affidavit of Matthew Eisenbrant on behalf of the CCIJ affirmed July 17, 2014;
- d) The Memorandum of Argument filed herewith; and
- e) Such further and other material as counsel may advise and this Court may permit.

**DATED** at Toronto, Ontario, this 28<sup>th</sup> day of July, 2014.

SIGNED BY

**Counsel for the Moving Parties, the  
International Human Rights Program  
University of Toronto Faculty of Law,  
MiningWatch Canada and the Canadian  
Centre for International Justice**

  
as agent for

**Klippensteins Barristers & Solicitors**  
160 John Street, Suite 300  
Toronto, ON M5V 2E5  
Tel.: (416) 598-0288  
Fax: (416) 598-9520

**Murray Klippenstein**  
murray.klippenstein@klippensteins.ca

**W. Cory Wanless**  
cory.wanless@klippensteins.ca

  
as agent for

**International Human Rights Program  
University of Toronto, Faculty of Law  
Room 106, 39 Queen's Park  
Toronto, ON M5S 2C3  
Tel.: 416-946 8730  
Fax: 416-978 7899**

**Renu Mandhane**  
renu.mandhane@utoronto.ca

**Agent for the Moving Parties, the  
International Human Rights Program  
University of Toronto Faculty of Law,  
MiningWatch Canada and the Canadian  
Centre for International Justice**

**Gowling Lafleur Henderson LLP**  
160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3  
Tel.: 613-233-1781  
Fax: 613-563-9869

**Jeffrey W. Beedell**  
Tel.: 613-786-0171  
Fax: 613-788-3587  
jeff.beedell@gowlings.com

**ORIGINAL TO: THE REGISTRAR**

**COPIES TO:**

**Clarke Hunter, Q.C.**  
**Anne Kirker, Q.C.**  
**Jung Lee**  
**Robert Frank**  
Norton Rose Fulbright Canada LLP  
Suite 3700, Third Avenue S.W.  
Calgary, Alberta T2P 4H2  
Telephone: (403) 267-8292  
FAX: (403) 264-5973  
E-mail: [clarke.hunter@nortonrosefulbright.com](mailto:clarke.hunter@nortonrosefulbright.com)

*Counsel for the Appellant  
Chevron Corporation*

**Benjamin Zarnett**  
**Suzy Kauffman**  
**Peter Kolla**  
Goodmans LLP  
3400 - 333 Bay Street  
Toronto, Ontario M5H 2S7  
Telephone: (416) 597-4204  
FAX: (416) 979-1234  
E-mail: [bzarnett@goodmans.ca](mailto:bzarnett@goodmans.ca)

*Counsel for the Appellant  
Chevron Canada Limited*

**Alan J. Lenczner, Q.C.**  
**Brendan F. Morrison**  
Lenczner Slaght Royce Smith Griffin LLP  
2600 - 130 Adelaide St. W.  
Toronto, Ontario M5H 3P5  
Telephone: (416) 865-3090  
FAX: (416) 865-9010  
E-mail: [alenczner@lsrsg.com](mailto:alenczner@lsrsg.com)

*Counsel for the Respondents  
(Appellants/Respondents by Cross-Appeal)*

**Sally Gomery**  
Norton Rose Fulbright Canada LLP  
1500-45 O'Connor Street  
Ottawa, Ontario K1P 1A4  
Telephone: (613) 780-8604  
Fax: (613) 230-5459  
[sally.gomery@nortonrose.com](mailto:sally.gomery@nortonrose.com)

*Agent for the Appellant  
Chevron Corporation*

**Sally Gomery**  
Norton Rose Fulbright Canada LLP  
1500-45 O'Connor Street  
Ottawa, Ontario K1P 1A4  
Telephone: (613) 780-8604  
FAX: (613) 230-5459  
E-mail: [sally.gomery@nortonrose.com](mailto:sally.gomery@nortonrose.com)

*Agent for the Appellant  
Chevron Canada Limited*

**Guy Régimbald**  
Gowling Lafleur Henderson LLP  
160 Elgin Street, 26th Floor  
Ottawa, Ontario K1P 1C3  
Telephone: (613) 786-0197  
FAX: (613) 563-9869  
E-mail: [guy.regimbald@gowlings.com](mailto:guy.regimbald@gowlings.com)

*Agent for the Respondents  
(Appellants/Respondents by Cross-Appeal)*

**NOTICE TO THE RESPONDENT TO THE MOTION:** A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

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**B E T W E E N:**

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Respondents (Appellants/Respondents by Cross-Appeal)

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**AFFIDAVIT OF CATHERINE COUMANS**

Affirmed July 22, 2014

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I, Catherine Coumans, of the City of Ottawa, Ontario, MAKE OATH AND SAY:

1. I am the Research Co-ordinator at MiningWatch Canada (“MiningWatch”). I hold an M.Sc. (London School of Economics) and a Ph.D. (McMaster University) in Cultural Anthropology. I have taught at Cornell University and McMaster University.

**Nature of this Motion**

2. MiningWatch, together with the International Human Rights Program at the University of Toronto Faculty of Law (“IHRP”) and the Canadian Centre for International Justice (“CCIJ”), seek leave to intervene in this appeal. As such, I have knowledge of the matters to which I hereinafter depose. In cases where I obtained information from other sources, I state the sources of such information, and I declare that I verily believe all such information to be true.

3. I swear this affidavit in support of a motion brought by MiningWatch, the IHRP and CCIJ (the “Proposed Joint Interveners”) for leave to intervene in this appeal, and for no other or improper purpose. As such, this affidavit sets out my knowledge and information about matters relevant to the above motion.

4. MiningWatch seeks to jointly intervene with the IHRP and the CCIJ in order to make the most effective contribution possible to this appeal, while combining resources and reducing any potential overlap. We seek to file joint submissions focusing on emerging international legal norms and principles as they relate to access to justice and access to a remedy for people located in the global south who have been negatively impacted by the activities of transnational corporations. In particular, the Proposed Joint Interveners wish to make submissions regarding the impact of emerging international legal norms and principles on the consideration of the following issues: (a) in what circumstances should a Canadian court hear an enforcement action brought by a community from the global south against a transnational corporation or its subsidiaries in Canada; and, related, b) what role the doctrine of separate corporate personhood should play in determining whether to allow the enforcement action to proceed in Canada.

5. The joint submissions will be informed by MiningWatch’s experience with mining-affected communities around the world, and both the IHRP and the CCIJ’s established expertise

in international law and legal norms and principles related to corporate accountability and the right to a remedy.

**Description of MiningWatch Canada**

6. MiningWatch Canada is a federally registered non-profit organization established in 1999 by environmental, labour, aboriginal and social justice groups to support mining-affected communities in Canada and communities affected by Canadian mining companies abroad (“Impacted Communities”). MiningWatch facilitates linkages and exchanges between Impacted Communities and other organizations; provides advice and technical support to Impacted Communities; conducts research; and provides recommendations to government regarding regulations and legislation.

7. MiningWatch functions as a coalition of over 25 environmental, labour, international development and aboriginal member organizations from all parts of Canada. MiningWatch’s current members include:

<p>Alternatives North</p> <p>Bathurst Sustainable Development</p> <p>Bedford Mining Alert</p> <p>Canadian Auto Workers (CAW) Social Justice Fund,</p> <p>Canadian Environmental Law Association (CELA)</p> <p>Canadian Parks and Wilderness Society (CPAWS)</p> <p>Centre for Long-term Environmental Action Newfoundland/Labrador (CLEAN)</p> <p>Canadian Union of Public Employees (CUPE) Development and Peace</p> <p>Friends of the Earth</p> <p>Friends of the Stikine Society</p> <p>Innu Nation</p>	<p>Kairos - Canadian Ecumenical Justice Initiatives</p> <p>Mixedwood Forest Society</p> <p>Nature Canada</p> <p>Northwatch</p> <p>Ontario Public Service Employees Union (OPSEU) Social Justice Fund</p> <p>Polaris Institute</p> <p>Primate’s World Relief and Development Fund (PWRDF)</p> <p>Quebec Native Women</p> <p>Public Service Alliance of Canada (PSAC)</p> <p>Rivers Without Borders</p> <p>Sierra Club of Canada</p> <p>Steelworkers Humanity Fund</p> <p>United Church of Canada</p>
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Inter Pares International Institute of Concern for Public Health (IICPH)	Yukon Conservation Society (YCS)
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8. MiningWatch devotes a substantial portion of its attention toward supporting communities in the global south that have been or may in the future be negatively impacted by the actions of transnational corporations, in particular mining corporations. These negative impacts include environmental and social harms and human rights violations. As a result of this work, MiningWatch is in direct and regular contact with a wide range of communities in the global south located in over 15 countries, including Ecuador. MiningWatch also has extensive experience working with indigenous communities both in Canada and abroad.

9. MiningWatch has a substantial interest in the subject matter of this appeal. Because of its extensive work with Impacted Communities, and its demonstrated expertise in the area of corporate accountability and access to justice, MiningWatch has an interest in the development of the common law as it relates to the question of whether Canadian courts have jurisdiction to hear enforcement claims against transnational corporations that have been accused of causing significant environmental harms to a community located in the global south. In particular, MiningWatch has an interest in the evolution of Canadian common law principles in a manner that provide Impacted Communities with access to meaningful and enforceable remedies when their rights have been infringed, and hold transnational corporations accountable for the environmental harms and human rights violations caused by their activities.

10. MiningWatch is recognized by government, policy makers and the media as a trusted and credible source of research and analysis. MiningWatch has participated in various multi-stakeholder advisory initiatives regarding corporate accountability, the extractive sector and access to remedies for impacted communities. For example, in 2006, the Government of Canada convened the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries (the “National Roundtables”). On behalf of MiningWatch, I participated as a member of the multi-stakeholder Advisory Group to the National Roundtables. Between 2009 and 2012, I participated on the Steering Committee of the Canadian Center for Excellence in Corporate Social Responsibility in the Extractive Sector. In

2013, MiningWatch was invited to participate in a roundtable consultation hosted by the Department of Foreign Affairs, Trade and Development Canada (DFATD) as part of the Government of Canada's review of its CSR Strategy for the Extractive Sector. Also in 2013 MiningWatch was invited to participate in an in-depth interview with the Office of Audit, Evaluation and Inspection of DFATD on the same topic. In 2014 MiningWatch submitted a brief to DFATD regarding the Government of Canada's CSR Strategy for the Extractive Sector.<sup>1</sup>

11. MiningWatch regularly appears before various parliamentary committees including the Standing Committees on International Trade, Natural Resources, Finance, and the Environment, as well as Senate committees including the Standing Senate Committee on Foreign Affairs and International Trade.

12. MiningWatch provided input into the formation of the UN Guiding Principles on Business and Human Rights, and has attended and presented on the issue of remedy at the UN Forum on Business and Human Rights in 2012 and 2013. In 1999 and 2001, I provided expert testimony on mining in two congressional inquiries in the Philippines and before the Constitutional Court in Indonesia in 2005. In 2008, I participated as a mining expert in an Amici Brief for the Supreme Court of the United States.

13. In 2005, I co-authored *Framework for Responsible Mining: A Guide to Evolving Standards*.<sup>2</sup> I contribute chapters on mining to peer-reviewed books<sup>3</sup> and publish articles on mining in peer-reviewed journals.<sup>4</sup> In 2012, I authored an academic paper on the issue of the right to a remedy entitled "Mining and Access to Justice: From Sanction and Remedy to Weak Non-

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<sup>1</sup> Catherine Coumans, "Submission to the Government of Canada's Review of Corporate Social Responsibility Strategy for the Canadian Extractive Sector", (January 2014) online:

<[http://www.miningwatch.ca/sites/www.miningwatch.ca/files/submission\\_to\\_the\\_government\\_of\\_canada\\_on\\_csr\\_jan-2014.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/submission_to_the_government_of_canada_on_csr_jan-2014.pdf)>

<sup>2</sup> Co-authored with Marta Miranda and David Chambers, Centre for Science in Public Participation, online: <[www.frameworkforresponsiblemining.org](http://www.frameworkforresponsiblemining.org)>.

<sup>3</sup> I have chapters in: Ciaran O'Faircheallaigh and Saleem Ali, eds, *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* (UK: Greenleaf Publishing Limited, 2008); Julia Sagebien and Nicole Marie Lindsay, eds, *Governance Ecosystems: CSR in the Latin American Mining Sector* (UK: Palgrave Macmillan, 2011); Wesley Cragg, ed, *Business and Human Rights* (UK: Edward Elgar Publishing, 2012).

<sup>4</sup> For example, I have had articles published in *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* (2005); *Canadian Journal of Development Studies* (2010); *Current Anthropology* (2011); and *Journal of Sustainable Finance and Investing* (2012).

Judicial Grievance Mechanisms”, which was published in the University of British Columbia Law Review.<sup>5</sup>

14. MiningWatch has supported numerous impacted communities in the global south in attempts to promote corporate accountability through a number of judicial, quasi-judicial and non-judicial mechanisms. These efforts include filing requests for review with Canada's National Contact Point for the Organisation for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises; providing information to the RCMP regarding alleged offences under the *Corruption of Foreign Public Officials Act*; participating in complaints to the International Finance Corporation of the World Bank’s Compliance Advisor Ombudsman; initiating shareholder resolutions regarding the concerns of Impacted Communities; and providing support to communities seeking remedies through civil lawsuits against companies within Canada.

15. MiningWatch has a history of responsible participation in judicial proceedings. MiningWatch was granted public interest standing to bring judicial reviews in the cases of:

- a. *Great Lakes United v. Canada (Minister of the Environment)* 2009 FC 408 (standing granted together with Great Lakes United), regarding whether the Minister was required by the *Canadian Environmental Protection Act* to provide pollutant release information through the National Pollutants Release Inventory in relation to releases and transfers to tailings and waste rock disposal areas; and
- b. *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, regarding the decision by the federal government to conduct a screening of a proposed copper and gold open pit mining and milling operation in British Columbia rather than a comprehensive study as required by the *Canadian Environmental Assessment Act*.

16. An appeal of the case of *MiningWatch Canada v Canada (Fisheries and Oceans)*<sup>6</sup> was heard by this Court. MiningWatch was entirely successful in that appeal.

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<sup>5</sup> Catherine Coumans, “Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms” (2012) 45 UBC L Rev 651.

<sup>6</sup> 2010 SCC 2, [2010] 1 S.C.R. 6.



17. In granting standing in *MiningWatch Canada v Canada (Fisheries and Oceans)*, Justice Martineau of the Federal Court stated that MiningWatch:

[...] is a federally registered non-profit society that functions as a coalition of environmental, social justice, Aboriginal and labour organizations from across Canada. By focusing on federal aspects of mining development, the applicant enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems associated with mine development.”<sup>7</sup>

18. MiningWatch and Great Lakes United was successful at the Federal Court in this matter. The judgment in this case was not appealed.

19. MiningWatch has recently been granted intervener status in the judicial review case of *Taseko Mines Ltd. v. Canada (Canadian Environmental Assessment Agency)*, which is proceeding before the Federal Court.

### **Proposed Joint Intervention**

20. I can confirm that the Proposed Joint Interveners are working jointly and have complimentary views on the issues raised by this appeal. If granted leave to intervene, the Proposed Joint Interveners will file one factum representing their joint position. The submissions that the Proposed Joint Interveners intend to make are set out in the Memorandum of Argument.

21. If granted leave to intervene, the Proposed Joint Interveners will not take a position regarding the merits of the appeal. Rather, the Proposed Joint Interveners will limit their role to rendering assistance to the Court strictly on legal issues as they relate to international norms and standards relating to access to justice and access to a meaningful remedy.

22. If granted leave, the Proposed Joint Interveners will not raise any new issues or attempt to file new evidence. The Proposed Joint Interveners will endeavour to avoid overlap between their submissions and those of any other party or intervener.


23. Granting leave to intervene to the Proposed Joint Interveners will not prejudice any party. The Proposed Joint Interveners will take the record as they find it and will not supplement the

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<sup>7</sup> 2007 FC 955, at para 180.

record. The Proposed Joint Interveners will seek to avoid duplication of submissions, and will abide by any schedule set by the Court.

24. MiningWatch is a non-profit organization. The CCIJ is a registered charity. The IHRP is a registered charity and an educational program based at the University of Toronto Faculty of Law. If leave to intervene is granted, the Proposed Joint Interveners will not seek costs, and will request that no costs be awarded against them.

**AFFIRMED** before me at )  
the City of Ottawa, in )  
the Province of Ontario, on )  
this 22nd<sup>th</sup> day of July, 2014 )  
 )  
A Commissioner for taking affidavits, etc. )

  
\_\_\_\_\_  
**CATHERINE COUMANS**

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

**B E T W E E N:**

**CHEVRON CORPORATION and CHEVRON CANADA LIMITED**

Applicants (Respondents/Appellants by cross-appeal)

-and-

**DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA,  
MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE  
PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE  
PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE  
PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO  
MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA  
VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA  
ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE  
RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ  
MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO  
WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO  
ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA  
GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA  
ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA,  
FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA,  
MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA  
IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO  
ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA  
NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO  
NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO  
PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO  
ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA,  
GUILLERMO VINCENTE PAYAGUAJE LUSITANDE, ALFREDO DONALDO  
PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE**

Respondents (Appellants/Respondents by cross-appeal)

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**AFFIDAVIT OF TRUDO LEMMENS**

Pursuant to Rule 57(1) of the *Rules of the Supreme Court of Canada*

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**I, TRUDO LEMMENS, of the City of Toronto, in the Province of Ontario, AFFIRM AND SAY AS FOLLOWS:**

1. I am the Chair of the Faculty Advisory Committee of the International Human Rights Program (“IHRP”) at the University of Toronto Faculty of Law (the “Faculty”). As such, I have knowledge of the matter to which I depose, except where I have otherwise stated. Where facts are based on information obtained from others, I believe that information to be true.

**I. BACKGROUND**

**A. Nature of this Motion**

2. I make this affidavit in support of a motion by the IHRP for leave to intervene in this appeal. The IHRP seeks leave to intervene in this appeal jointly with MiningWatch Canada (“MiningWatch”) and the Canadian Center for International Justice (“CCIJ”).

3. This appeal raises issues of interest to the IHRP. The IHRP’s mission is to advance the field of international human rights law by enhancing the legal protection of existing and emerging international human rights. Protection of international human rights is predicated on the willingness of the international community to hold accountable those who violate human rights, including non-state actors, as well as on the availability of meaningful remedies for individuals whose rights have been infringed. The IHRP has a strong interest in ensuring that Canadian common law evolves in a manner that increases accountability for human rights abuses committed by transnational corporations, and ensures access to enforceable remedies for those whose rights have been violated, including and especially indigenous communities.

4. The IHRP seeks to jointly intervene with MiningWatch and CCIJ in order to make the most effective contribution possible to this appeal, while combining resources and reducing any potential overlap. We seek to file a joint submission that focuses on the proper interpretation and progression of Canadian common law in light of international and comparative law as it relates to corporate accountability for human rights and the right to an effective remedy. In particular our submissions will address a) the circumstances in which a Canadian court should hear an enforcement action brought by a community from the Global South against a transnational corporation or its subsidiaries in Canada; and, related, b) what role the doctrine of separate

corporate personhood should play in determining whether to allow the enforcement action to proceed in Canada. Our submissions will be grounded by MiningWatch's experience with mining-affected communities around the world, and both the CCIJ and IHRP's established expertise in international human rights law.

**B. Description of the IHRP**

5. The IHRP was established in 1987 and is part of the University of Toronto Faculty of Law. As set out above, the IHRP's mission is to advance the field of international human rights law by enhancing the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society. In keeping with its location within an academic institution, the IHRP values intellectual rigour, professionalism, independence, and collaboration with civil society as the foundation for all of its work.

6. I am the Chair of the Faculty Advisory Committee of the IHRP, and have sat on the Advisory Committee since it was created in 2008. I am Associate Professor and the Scholl Chair in Health Law and Policy at the Faculty, with cross-appointments in the Faculty of Medicine and the Joint Centre for Bioethics. I hold LL.M. and D.C.L. degrees from McGill University, and a Lic. Jur. from the Katholieke Universiteit Leuven in Belgium. My research sits at the interface of law, ethics, human rights, and professional governance, with a focus on the complex interaction between law, other governance tools, and ethical norms and values in the context of health care, biomedical research, health product development, and knowledge production.

7. Renu Mandhane is the Director of the IHRP and has held that role since June 2010. Ms. Mandhane has a J.D. from the Faculty and an LL.M. from New York University, and is a member of the Law Society of Upper Canada. She has acted as legal counsel in an intervention before this Honourable Court, and in a complaint to the United Nations Human Rights Committee. Ms. Mandhane teaches the IHRP's clinical seminar on international human rights advocacy, and has also trained judges on the domestic application of international law through the National Judicial Institute of Canada.

8. The IHRP has established lines of accountability through the Dean's Office, an internal Faculty Advisory Committee, as well as an external Advisory Board. The IHRP's external Advisory Board was established in 2003 and its members include the Hon. Louise Arbour, the Rt. Hon. Adrienne Clarkson, Prof. Ronald Daniels, Prof. Yash Ghai, the Hon. William Carver Graham, Michael Ignatieff, Prof. Harold Hongju Koh, the Hon. Roy McMurtry, Prof. Cecilia Medina, Dr. James Orbinski, John Ralston Saul, and the Hon. Bob Rae.

9. The internal Faculty Advisory Committee, of which I am the Chair, oversees all of the IHRP's work and takes an active role in its development. The IHRP draws on the extensive international law experience of the Faculty Advisory Committee, which includes myself (health law), Prof. Vincent Chiao (criminal law and criminal justice), Prof. Karen Knop (public and private international law), Prof. Patrick Macklem (public international law, international human rights and constitutional law), adjunct Prof. Jennifer Orange (international human rights law), Andrea Russell (international criminal law), and Assistant Dean Alexis Archbold (*ex officio*). The IHRP also draws on the expertise of the large number of other scholars who also research issues of international law at the Faculty.

10. The IHRP hosts international law conferences, supports international internships for law students, develops and supervises working groups on important international law issues, and houses the award-winning International Human Rights Clinic (the "Clinic"), which was Canada's first legal clinic focusing on international law. The Clinic provides law students with the opportunity to work with experienced lawyers and professors at the Faculty on innovative international human rights advocacy for academic credit. The Clinic was recipient of a Lexpert Zenith award for pro bono service in 2010.

### **C. The IHRP's Expertise**

11. Consistent with its mission to advance the field of international human rights law, the IHRP is a recognized expert in international human rights law, and has particular expertise in the domestic application of international law, and the law regarding corporate accountability for human rights.

**a. Previous interventions before this and other Courts**

12. This Honourable Court has granted the IHRP (or the Clinic), leave to intervene in six previous cases where international law was relevant to the interpretation and application of domestic Canadian law:

- a. *Estate of the Late Zahra Kazemi v. Islamic Republic of Iran et al*, 2014 (decision pending)
- b. *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40;
- c. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3;
- d. *Canada (Justice) v. Khadr*, 2008 SCC 28;
- e. *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9; and
- f. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39.

13. The Clinic has also been granted leave to intervene as *amicus curiae* in two international proceedings:

- a. In 2003, the Clinic was granted leave by the Special Court for Sierra Leone to submit an amicus brief on the international law regarding the recruitment of child soldiers and the scope of crimes against humanity and war crimes. In *Prosecutor v. Sam Hinga Norman*, the Special Court adopted the Clinic's position and cited the Clinic's submission (June 14, 2004, SCSL-2004-14-AR72(E) at 7383-7489).
- b. In 2006, the Clinic was granted leave to intervene by the State of Connecticut Supreme Court in *Kerrigan and Mock et al. v. Department of Public Health*. The Clinic made submissions on developments in international jurisprudence with respect to civil marriage and equal treatment of same-sex couples.

**b. Expertise related to corporate accountability for human rights**

14. The IHRP has longstanding expertise in relation to corporate accountability for human rights. In 2007, the IHRP submitted policy recommendations to support the work of the Canadian government's National Roundtables on Corporate Social Responsibility. The recommendations

were grounded in student field research related to Canadian mining companies operating in Zambia.

15. In 2008, the IHRP produced a report that analyzed the effectiveness of the Organisation for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises through a case study of alleged forced evictions of Zambian subsistence farmers by Mopani Copper Mines, a Canadian/Swiss company. The report made a number of recommendations directed at the OECD and the company.

16. In 2010, the IHRP released a report that analyzed the human rights and corporate social responsibility policies of GoldCorp, a Canadian mining company with global operations. The report was meant to educate management, shareholders, and the public on the extent to which the policies reflected “best practice” based on international human rights law, including in relation to the responsibility to remedy harm.

17. In 2011, the IHRP co-hosted a conference with Amnesty International Canada and the Canadian Centre for International Justice on “Corporate Accountability for Human Rights Committed Abroad.” The conference brought together academics, activists, and lawyers to discuss challenges in pursuing accountability in Canadian and US courts for human rights abuses linked to corporate activity.

18. That same year, the IHRP provided Member of Parliament the Rt. Hon. John McKay, with memoranda to assist with drafting of his private member’s bill related to revenue transparency for Canadian extractive-sector companies operating abroad. The bill would have required Canadian extractive companies to disclose payments to foreign governments. The IHRP also hosted an invitation-only roundtable that brought together leading academics, policy makers, industry groups, and civil society to discuss and provide feedback on the draft bill.

19. Late in 2011, the IHRP released a guide for non-governmental organizations (“NGOs”) and communities based in Canada and abroad on accessing the review process of Canada’s then-new Office of the Extractive Sector Corporate Social Responsibility Counsellor. The Guide addressed alternative accountability mechanisms, including civil claims, included a step-by-step guide to the review process, and summarized in plain language key obligations under the



International Finance Committee Performance Standards on Environmental and Social Sustainability, the Voluntary Principles on Security and Human Rights, and the Global Reporting Initiative.

20. In 2014, the IHRP partnered with the Centre for International Environmental Law (Washington, D.C.) to publish another guide aimed at NGOs, this time for those seeking amicus standing to raise human rights or environmental issues in international investment arbitration proceedings before the International Centre for Settlement of Investment Disputes (“ICSID”). This Guide includes extensive background on ICSID and its jurisdiction, and best practices drawn from a review of all disputes in which amicus standing has been sought.

21. Every year, the IHRP facilitates and supports international human rights internships for Faculty students at international organizations and NGOs. In addition to placements at the UN, International Criminal Court and countless other organizations, students have worked in the field on issues related to corporate accountability for human rights. For example, in 2013, a student interned at the Centre for Public Interest Law in Ghana where she conducted research on the human rights impacts and violations of national and international law associated with the onshore component of a new oil and gas project, in support of local litigation and advocacy. In 2012, another student traveled to Peru to research social conflict surrounding large-scale mining operations for a public policy research organization. In 2011, a student traveled to Colombia to intern with Gaia Amazonas to produce a report on impact-benefit agreements between extractive sector companies and indigenous communities.

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**c. Expertise related to the Right to an Effective Remedy**

22. The IHRP has also lent its expertise to the issue of the right to an effective remedy under international law. Earlier this year, the IHRP represented Suleyman Goven in filing a complaint with the United Nations Human Rights Committee against Canada wherein the IHRP argues that the right to an effective remedy under international law includes the right to access civil remedies.

23. Earlier this year, before this Honourable Court, the IHRP intervened with the Asper Centre in *Kazemi* to argue that, by denying victims of gross human rights violations access to a civil remedy in Canada against a foreign state, the *State Immunity Act* fails to recognize the

fundamental importance to rights claimants and to the legal order generally of being able to seek legal vindication for rights violations.

**d. On International Human Rights Law, more generally**

24. The IHRP also has demonstrated expertise in international human rights law more generally and has participated in a number of research and advocacy projects including:

- a. Preparing fact-finding reports on the state of freedom of expression in Mexico (2011) and Honduras (2014), in partnership with PEN Canada and PEN International. The report on Mexico and related advocacy resulted in key changes to Mexico's criminal law to better protect journalists. The report on Honduras was presented to the Inter-American Commission on Human Rights and the Parliamentary Standing Committee on international trade to inform Canada's trade negotiations with Honduras;
- b. Providing research assistance in the "160 Girls" litigation in Kenya (*C.K., et al. v. The Commissioner of Police/Inspector General of the National Police Service, et al.*, Petition No. 8 of 2012, High Court of Kenya), which was brought on behalf of women and girls seeking meaningful enforcement of Kenya's rape laws. In 2013, the High Court of Kenya ruled that police failure to investigate allegations of sexual violence violated international law;
- c. Preparing a report highlighting Canada's international human rights obligations vis-à-vis Canadian prisoners with mental health issues (2012). The report was provided to the Canadian Human Rights Commission, the United Nations Committee against Torture, and the United Nations Human Rights Council;
- d. Partnering with the International Commission of Jurists in developing the Sexual Orientation & Gender Identity Legislative Database, which features comprehensive research briefs on LGBT-friendly or neutral legislation in 24 countries from all regions of the world;
- e. Providing research assistance to the Office of the Prosecutor of the International Criminal Court on the recruitment of child soldiers in *Prosecutor v. Thomas Lubanga Dyilo* (ICC-CPI-20070129-196) in 2006-2007; and

- f. Representing applicants before the European Court of Human Rights in the case of *Tanase and Others v. Romania* regarding an anti-Roma pogrom in Romania in 2003-2009, and successfully negotiating a settlement that included key policy changes in Romania as well as financial compensation.

#### **D. MiningWatch and the Canadian Centre for International Justice**

25. I can confirm that the IHRP, MiningWatch and the CCIJ have complementary views on the issues raised by this appeal and, if granted leave to intervene, will seek to file one factum representing their joint position.

### **II. THIS MOTION FOR LEAVE TO INTERVENE**

26. The IHRP has an interest in the issues raised in this appeal. This appeal has potentially far-reaching implications for corporate accountability for human rights violations, including the right to an effective remedy for individuals and communities that have been negatively impacted by the actions of transnational corporations. More narrowly, it offers an opportunity to explore the key questions of a) in what circumstances should a Canadian court should hear an enforcement action brought by a community from the global south against a transnational corporation or its subsidiaries in Canada; and, related, b) what role the doctrine of separate corporate personhood should play in determining whether to allow the enforcement action to proceed in Canada. Given that Canada is a recognized global leader in overseas mining and natural resource extraction, these issues are centrally important to the IHRP's international law-focused mission, especially as a program housed in a Canadian law school.

27. The IHRP has expertise on the issues raised in this appeal, drawing on its extensive resources and research with respect to the domestic application of international law, and corporate accountability for human rights. Given the issues in this case, the IHRP and CCIJ's expertise in international human rights law is well complemented by MiningWatch's grassroots experience with mining-affected communities.

### **III. OUTLINE OF PROPOSED SUBMISSIONS**

28. I have reviewed the Memorandum of Argument and confirm that it is an accurate reflection of the proposed submissions that the Proposed Joint Interveners intend to make should

this Honourable Court grant them leave to intervene in this appeal. If granted leave to intervene, the Proposed Joint Interveners will take no position in respect of the ultimate merits of the lawsuit.

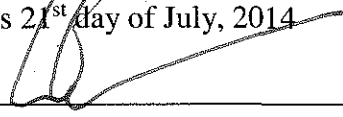
**IV. SUMMARY**

29. As a leading centre for international human rights advocacy in Canada, the IHRP can make a contribution to this appeal that will be useful to this Court in determining the questions before it, and will present arguments that are unique and distinct from those of the parties. For these and the reasons set out above, the IHRP respectfully requests that it be granted leave to intervene jointly with MiningWatch and the CCIJ. It further requests leave to file a joint factum of no more than 10 pages and to present oral argument at the hearing of this appeal.

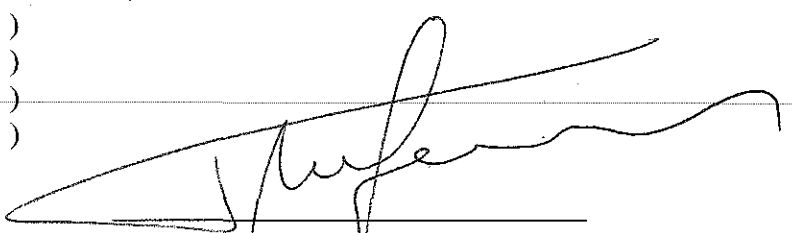
30. Granting leave to intervene to the Proposed Joint Interveners will not prejudice any party. The Proposed Joint Interveners will take the record as they finds it and will not supplement the record. The Proposed Joint Interveners will seek to avoid duplication of submissions, and will abide by any schedule set by the Court. The Proposed Joint Interveners seek no costs in the proposed intervention and asks that none be awarded against it.

I affirm this affidavit in support of the Proposed Joint Interveners' motion for leave to intervene, and for no other or improper purpose.

Affirmed before me at )  
the City of Toronto, in )  
the Province of Ontario, )  
this 21<sup>st</sup> day of July, 2014 )



Lawyer, Commissioner for Taking Affidavits  
U. Cory Wankess LSUC # 57288M

  
TRUDO LEMMENS

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

**B E T W E E N:**

**CHEVRON CORPORATION and CHEVRON CANADA LIMITED**

Applicants (Respondents/Appellants by cross-appeal)

-and-

**DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANDE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE**

Respondents (Appellants/Respondents by cross-appeal)

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**AFFIDAVIT OF MATTHEW EISENBRANDT**  
Pursuant to Rule 57(1) of the *Rules of the Supreme Court of Canada*

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**I, MATTHEW EISENBRANDT**, of the City of Vancouver, in the Province of British Columbia, **AFFIRM AND SAY AS FOLLOWS:**

1. I am the Legal Director for the Canadian Centre for International Justice (“CCIJ”), and as such have knowledge of the matters hereinafter deposed, except where I have otherwise stated.

Where facts are based on information obtained from others, I believe that information to be true.

**I. BACKGROUND**

**A. Nature of this Motion**

2. I make this affidavit in support of a motion by CCIJ for leave to intervene in this appeal. CCIJ seeks leave to intervene in this appeal jointly with the International Human Rights Program (“IHRP”) at the University of Toronto Faculty of Law and MiningWatch Canada (“MiningWatch”).

3. This appeal raises issues at the heart of CCIJ’s mandate and about which we have expertise that will assist the Court in determining the issues before it. CCIJ works with survivors of torture and other abuses to seek redress and bring to justice those responsible for such abuses. CCIJ has a strong interest in assuring that Canadian and international law provide accountability for those implicated in abuses, including individuals, governments and corporations, and ensure access to remedies for those whose rights have been violated, including people of the global south affected by the activities of transnational corporations. As such, we have played a direct role in Canadian legal cases involving the application of international norms to the operations of transnational corporations in the global south.

4. CCIJ seeks to jointly intervene with the IHRP and MiningWatch in order to make the most effective contribution possible to this appeal, while combining resources and reducing any potential overlap. We seek to file a joint submission that focuses on the proper interpretation and progression of Canadian common law in light of international and comparative law as it relates to corporate accountability for human rights and the right to an effective remedy. In particular, our submissions will address (a) the circumstances in which a Canadian court should hear an enforcement action brought by a community from the global south against a transnational corporation or its subsidiaries in Canada; and, related, (b) what role the doctrine of separate corporate personhood should play in determining whether to allow the enforcement action to proceed in Ontario. Our submissions will be grounded by CCIJ's and the IHRP's established expertise in international law and corporate accountability and MiningWatch's experience with mining-affected communities around the world.

**B. Description of CCIJ**

5. CCIJ, a federally-incorporated, registered charity, is a non-governmental organization that works with survivors of torture and other abuses to seek redress and bring to justice those responsible for such abuses.

6. CCIJ is the only Canadian organization primarily dedicated to (a) supporting survivors of torture and other abuses in their pursuit of justice and (b) seeking and promoting accountability for torturers, war criminals and others responsible for abuses. CCIJ assists survivors and families with connections to Canada and supports the criminal and civil prosecutions of those responsible for torture and other abuses, including corporations.

7. More specifically, CCIJ's mission consists of:

- (a) providing information, assistance and direction to survivors of abuses and families of victims, carrying out or facilitating research and investigations of such cases, and compiling cases to be brought to the attention of the Canadian Government or other authorities or to be filed in Canadian courts;
- (b) providing support to government initiatives leading to the prosecution in Canada of alleged torturers, war criminals and other abusers, and providing support for other appropriate remedies including civil lawsuits;
- (c) providing education and training for legal professionals, civil society groups and the general public in Canada about impunity as a critical human rights issue;
- (d) serving as a resource centre for anti-impunity initiatives launched across the country, including access to Canadian and international jurisprudence and information regarding Canadian law, policy and practice; and
- (e) providing support for law reform efforts aimed at strengthening the legal remedies available in Canada for survivors of abuses, including efforts to provide greater accountability when Canadian corporations are complicit in abuses overseas.

8. CCIJ receives and responds to requests for information and assistance from people in the global south and elsewhere about the application of Canadian and international law to the activities of transnational corporations. CCIJ has received such inquiries from North America, Australia, South America, Europe, Africa and Asia.



9. CCIJ has extensive knowledge of Canadian law and international norms applying to transnational corporations, including issues of corporate social responsibility, corporate structure and tort liability.

10. Individuals with a deep and longstanding commitment to international law and/or the defence of human rights have taken part in CCIJ's activities and have given their endorsement to CCIJ. The following persons are members of CCIJ's Honorary Council: the Honourable Madam Justice Louise Arbour, the Honourable Madam Justice Claire L'Heureux-Dube, the Honourable Flora MacDonald, the Honourable Raynell Andreychuck, Judge Philippe Kirsch, Mr. Maher Arar, Dr. Lloyd Axworthy, Dr. Ed Broadbent and Ms. Erna Paris.

11. CCIJ is also supported by an Advisory Committee and regional Working Groups composed of professors, lawyers and other experts on international law, human rights, accountability, civil litigation and corporate social responsibility.

12. In addition to more than six years of experience working on these issues in Canada with CCIJ, I previously served as Legal Director for a similar organization in the United States, the Center for Justice and Accountability ("CJA"). In that job, I litigated several cases on behalf of survivors against alleged human rights violators under the Alien Tort Statute ("ATS"). In addition, I was very familiar with litigation under the ATS involving transnational corporations, including the lawsuit that eventually led to the enforcement action now before this Court.

### **C. CCIJ's Expertise**

13. Consistent with its mission described above, CCIJ is a recognized expert in Canada on the domestic application of international law, particularly international criminal, humanitarian

and human rights law, as well as Canadian and international law regarding corporate accountability for human rights.

**1. Previous interventions before this and other Courts**

14. This Honourable Court has granted CCIJ leave to intervene in four previous cases:

- (a) *Kazemi v. Islamic Republic of Iran*, Court File No. 35034, still pending before this Court, on the issue of whether states and individual government officials sued for torture in Canadian courts are entitled to immunity under the *State Immunity Act*;
- (b) *Club Resorts Ltd. v. Van Breda et al.*, 2012 S.C.C. 17, on the issue of “forum of necessity,” an exception to the common law test for jurisdiction in cases where a plaintiff cannot reasonably bring suit elsewhere, as often occurs in cases of abuses that take place outside Canada;
- (c) *Ezokola v. Canada (Citizenship and Immigration)*, 2013 S.C.C. 40, a case concerning individual responsibility for crimes against humanity, in which the Court ruled that the determination of whether a refugee applicant can be denied refugee status for complicity in crimes against humanity must be made in accordance with international law;
- (d) *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, a case concerning individual responsibility for atrocity crimes, in which the Court upheld the deportation of a permanent resident for whom there were reasonable grounds to believe that he had committed a crime against humanity.

15. CCIJ has been granted intervener status in other cases concerning accountability for alleged abuses overseas:

- (a) *Munyaneza v R*, 2014 QCCA 906, in which the Quebec Court of Appeal, examining the application of international law in domestic courts, upheld the first conviction under Canada's *Crimes against Humanity and War Crimes Act*;
- (b) *Kunlun Zhang et al. v. Jiang Zemin et al.*, Court File No. 04-CV-278915CM2, a civil lawsuit in Ontario Superior Court against Chinese government officials for their role in the alleged torture of, *inter alia*, a Canadian citizen.

## 2. Expertise related to corporate accountability for human rights abuses

16. CCIJ has been directly involved in two cases in Canadian courts involving alleged abuses connected to the activities of transnational corporations overseas. In *Garcia v. Tahoe Resources Inc.*, Court File No. S-144726, CCIJ is on the legal team bringing a civil action in the Supreme Court of British Columbia on behalf of seven Guatemalan men allegedly shot by the security personnel of a Canadian mining company. In *Anvil Mining Ltd. v. Association canadienne contre l'impunité*, 2012 QCCA 117, I served as CCIJ's representative on the Board of Directors of an association that brought suit in Quebec on behalf of victims of a massacre in the Democratic Republic of Congo in which a transnational mining company was allegedly complicit.

17. CCIJ also joined amicus curiae briefs before the U.S. Supreme Court in the landmark case *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), in which the court ruled on the liability of corporations under international law and the territorial reach of the ATS, which has had profound impacts on the litigation of U.S. cases involving transnational corporations.

18. In 2011, CCIJ co-hosted a conference with the IHRP and Amnesty International Canada called “Corporate Accountability for Human Rights Committed Abroad” that brought together academics, activists, and lawyers to discuss issues relating to the pursuit of cases in Canadian and U.S. courts for alleged abuses connected to the operations of transnational corporations.

19. On behalf of CCIJ, I have given several presentations in law schools, universities and public events concerning corporate accountability issues in Canada, with a focus on legal issues raised in civil lawsuits in Canadian courts against transnational corporations and attempts to create a regulatory system in Canada to oversee the activities of Canadian corporations abroad.

**D. Other work by CCIJ concerning international law and human rights**

20. Since its inception in 2000, CCIJ has actively and consistently promoted the application of international law in Canadian courts. Some of CCIJ’s work in this regard includes:

- (a) Undertaking a major campaign to amend the *State Immunity Act* – and thereby allow greater opportunities for survivors of torture and other abuses to seek redress in Canadian courts – by testifying before committees in the House of Commons and the Senate, drafting proposed legislation, and meeting with MPs and other government officials;
- (b) Intervening in select cases, listed above, on issues including accountability for human rights abuses, international law and the ability of survivors to seek redress in Canadian courts;

- (c) Hosting a two-day workshop on civil remedies for torture survivors in Canada, with the participation of numerous experts on civil litigation, the *State Immunity Act*, international law and jurisdictional issues;
- (d) Presenting, in cities throughout Canada, continuing professional development courses on justice issues, including corporate accountability and the application of international law in Canadian courts;
- (e) Working directly with survivors of torture and other abuses on an ongoing basis to hear their stories, investigate their cases and assist them in seeking redress;
- (f) Working with private lawyers, government officials and others through civil litigation, criminal investigations or other mechanisms, to seek accountability against those responsible for torture or other abuses;
- (g) Serving as a leading resource centre in Canada for information on corporate accountability, international justice mechanisms and the application of international law in Canadian courts;

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- (h) Researching international, domestic and foreign law with regard to potential cases in Canadian courts and other national and international tribunals;
- (i) Participating in educational and outreach initiatives to raise awareness about legal issues related to redress and accountability.

**D. Joint Interveners**

21. I have read the affidavit of Trudo Lemmens of the IHRP. I can confirm that CCIJ, the IHRP and MiningWatch have complementary views on the issues raised by this appeal and, if granted leave to intervene, will seek to file one factum representing their joint position.

**II. THIS MOTION FOR LEAVE TO INTERVENE**

22. CCIJ has an interest in the issues raised in this appeal. This appeal has potentially far-reaching implications for corporate accountability for human rights violations, including the right to an effective remedy for individuals and communities that have been negatively impacted by the actions of transnational corporations. More narrowly, it offers an opportunity to explore the key questions of (a) in what circumstances should a Canadian court hear an enforcement action brought by a community from the global south against a transnational corporation or its subsidiaries in Canada; and (b) relatedly, what role the doctrine of separate corporate personhood should play in determining whether to allow the enforcement action to proceed in Ontario. As demonstrated above, these issues are central to CCIJ's mandate.

23. CCIJ has expertise on the issues raised in this appeal, particularly with regard to corporate structures, domestic application of international law, and corporate accountability for human rights abuses. Given the issues in this case, CCIJ's expertise complements that of the IHRP and MiningWatch.

**III. OUTLINE OF PROPOSED SUBMISSIONS**

24. I have reviewed the Memorandum of Argument and confirm that it is an accurate reflection of the proposed submissions that CCIJ intends to make should this Honourable Court

grant it leave to intervene in this appeal. If granted leave to intervene, CCIJ will take no position in respect of the ultimate merits of the lawsuit.


#### IV. SUMMARY

25. As a centre focused on helping survivors seek redress and hold accountable those responsible for human rights abuses, particularly through international law and its domestic application in Canada, CCIJ has a strong interest in this appeal and will present arguments that are different from or more extensive than those of the parties. CCIJ can therefore make a valuable contribution to this appeal that will be useful to this Court in determining the questions before it.

26. Granting leave to intervene to CCIJ will not prejudice any party. CCIJ will take the record as it finds it and will not supplement the record. CCIJ will seek to avoid duplication of submissions, and will abide by any schedule set by the Court. CCIJ seeks no costs in the proposed intervention and asks that none be awarded against it.

27. I affirm this affidavit in support of CCIJ's motion for leave to intervene, and for no other or improper purpose.

SWORN BEFORE ME at the City of  
Vancouver, on July 17, 2014.



\_\_\_\_\_  
Commissioner for Taking Affidavits in  
British Columbia



\_\_\_\_\_  
MATTHEW EISENBRANDT

**Brian M. Samuels**  
*Barrister and Solicitor*  
#1400 - 1125 Howe Street  
Vancouver, B.C. V6Z 2K8

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**CHEVRON CORPORATION and CHEVRON CANADA LIMITED**

Appellants (Respondents/Appellants by Cross-Appeal)

-and-

**DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANDE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE**

Respondents (Appellants/Respondents by Cross-Appeal)

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**MEMORANDUM OF ARGUMENT**

**(Motion by the International Human Rights Program, University of Toronto Faculty of Law, MiningWatch Canada and the Canadian Centre for International Justice for leave to intervene)**

**(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)**

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## PART I - OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. MiningWatch Canada (“MiningWatch”), the International Human Rights Program at the University of Toronto Faculty of Law (“IHRP”), and the Canadian Centre for International Justice (“CCIJ”) seek leave to jointly intervene in this appeal pursuant to Rule 55 of *Rules of the Supreme Court of Canada*, SOR/2002-156 (the “Rules”).
2. In this appeal, this Honourable Court is asked to decide whether Ontario has jurisdiction to hear an enforcement action brought by Ecuadorian indigenous villagers against Chevron Corporation and its wholly-owned subsidiary, Chevron Canada, to enforce a final judgment obtained by the plaintiffs in Ecuador.
3. The issues raised by this appeal are of significant interest to MiningWatch, IHRP, and CCIJ (the “Proposed Joint Interveners”). If granted leave, the Proposed Joint Interveners will bring a unique perspective to the appeal, and intend to make submissions that are distinct from the parties, and that will be useful to the Court. The Proposed Joint Interveners’ submissions will focus on emerging international law and norms regarding the right to an effective remedy and corporate accountability for social, environmental and human rights harms.

### Description of the Appeal

4. This appeal raises legal issues of significant public importance regarding the common law principles of jurisdiction *simpliciter*, and separate corporate personhood. The plaintiffs, a group of indigenous Ecuadorian villagers, wish to enforce in Ontario and against Chevron Corporation (“Chevron”) and Chevron Canada Limited (“Chevron Canada”), a final Ecuadorian judgment ordering Chevron to pay US \$9.51 billion in damages for remediation and costs related to extensive pollution of the Lago Agrio region of Ecuador.<sup>2</sup>
5. This Court is asked to determine a) the circumstances under which a Canadian court should hear an enforcement action brought by a community from the global south<sup>3</sup> against a

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<sup>2</sup> *Yaiguaje v Chevron Corporation*, 2013 ONCA 758 at paras 8 & 12 [“*Yaiguaje*”].

<sup>3</sup> The term “global south” is used in the development and international relations fields to describe those countries with relatively low levels of economic growth and industrialization, per capita incomes, and standards of living. It is generally agreed to include Africa, South and Central America and the Caribbean, Asia (except Japan) and Oceania

transnational corporation or its subsidiaries in Canada; and, related, b) the role that the doctrine of separate corporate personhood should play in determining whether to allow the enforcement action to proceed in Canada.

6. Chevron, like most major transnational corporations, conducts its business and holds its assets through a myriad of wholly owned subsidiaries incorporated in various jurisdictions worldwide. Chevron Canada is one of these wholly owned subsidiaries.<sup>4</sup>

7. In this appeal, the appellants argue that: a) Ontario does not have jurisdiction to entertain an enforcement action against Chevron because neither Chevron nor the underlying action has any connection to Ontario; and b) any enforcement action in Ontario is merely an “academic exercise” because i) Chevron does not have any assets in Ontario and ii) Chevron Canada’s Ontario assets are not available to satisfy a judgment obtained against its corporate parent Chevron.<sup>5</sup> Both arguments depend significantly on treating Chevron and Chevron Canada as if they are entirely separate and unrelated entities in law.

8. This appeal is set against a backdrop of a rapidly globalizing world where domestic courts are increasingly being called upon to ensure that corporations that chose to operate transnationally and organize themselves in complex corporate structures of subsidiaries to maximize profit and to shield themselves from liability are held accountable for environmental and social harms and human rights abuses caused by corporate actions. Failure to interpret the common law in a manner that ensures appropriate accountability will have a negative impact on access to justice and the right to an effective remedy for those harmed by corporate activity.

## **B. Description and Expertise of MiningWatch, IHRP, and CCIJ**

### ***MiningWatch Canada***

9. MiningWatch is a federally registered non-profit organization established in 1999 to support mining-affected communities in Canada and communities affected by Canadian mining

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(except Australia and New Zealand). Many of these countries suffer from problems associated with weak governance.

<sup>4</sup> Factum of the Appellant Chevron Corporation at paras 30-33; *Yaiguaje* at para 38.

<sup>5</sup> Factum of the Appellant Chevron Canada Ltd., filed July 2, 2014 at paras 1-10; Factum of the Appellant Chevron Corporation, filed July 2, 2014 at paras 1-10.

companies abroad (“Impacted Communities”). MiningWatch is comprised of a coalition of over 25 Canadian environmental, labour, international development and aboriginal organizations.<sup>6</sup>

10. MiningWatch facilitates linkages and exchanges between Impacted Communities and other organizations; provides advice and technical support to Impacted Communities; conducts research; and provides policy recommendations to government. MiningWatch has supported Impacted Communities in attempts to seek remedies and promote corporate accountability through a number of judicial, quasi-judicial and non-judicial mechanisms.<sup>7</sup>

11. MiningWatch is recognized as a trusted and credible source of research and analysis, and regularly appears before various parliamentary committees. MiningWatch has participated in various multi-stakeholder advisory initiatives convened by the Canadian government regarding corporate accountability and access to remedies for Impacted Communities. MiningWatch also provided input into the formation of the United Nations Guiding Principles on Business and Human Rights (“UN Guiding Principles”), and has presented on the issue of remedy at the UN Forum on Business and Human Rights.<sup>8</sup>

12. MiningWatch has been granted public interest standing to bring judicial reviews before the Federal Court in the cases of *Great Lakes United v Canada (Minister of the Environment)*, 2009 FC 408 and *MiningWatch Canada v Canada (Ministry of Fisheries and Oceans)*, 2007 FC 955. MiningWatch’s appeal in *MiningWatch v Canada (Minister of Fisheries and Oceans)*, 2010 SCC 2 was granted by this Honourable Court. MiningWatch was also recently granted intervener status in the judicial review case of *Taseko Mines Ltd v Canada (Canadian Environmental Assessment Agency)*, which is proceeding before the Federal Court.<sup>9</sup>

***International Human Rights Program, University of Toronto Faculty of Law***

13. IHRP was established in 1987 and is part of the University of Toronto Faculty of Law. IHRP’s mission is to advance the field of international human rights law by enhancing the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and education.

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<sup>6</sup> Affidavit of Catherine Coumans at para 7.

<sup>7</sup> Affidavit of Catherine Coumans at paras 6 & 14.

<sup>8</sup> Affidavit of Catherine Coumans at paras 10-12.

<sup>9</sup> Affidavit of Catherine Coumans at paras 15, 16 & 19.

14. IHRP is a recognized expert in international law. IHRP has particular expertise in the domestic application of international law, international human rights and the international legal norms and principles related to corporate accountability and the right to an effective remedy. IHRP's experience and expertise is extensive, and is set out in detail at paragraphs 11 to 24 of the affidavit of Professor Trudo Lemmens.

15. IHRP has been granted leave to intervene by this Honourable Court on six occasions in appeals where principles of international law and their application in Canada were at issue: *Estate of the Late Zahra Kazemi v. Islamic Republic of Iran et al*, 2014 (decision pending); *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3; *Canada (Justice) v. Khadr*, 2008 SCC 28; *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9; and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39.<sup>10</sup>

#### ***Canadian Centre for International Justice***

16. CCIJ is a federally incorporated and registered charity that works with survivors of torture and other abuses to seek redress and bring to justice those responsible for such abuses. CCIJ has a strong interest in assuring that Canadian and international law provide accountability for those implicated in abuses, including individuals, governments and corporations, and ensuring access to remedies for those whose rights have been violated. This includes people of the global south affected by the activities of transnational corporations. Of late, the CCIJ has taken an increased interest in the issue of corporate accountability for human rights abuses abroad.<sup>11</sup>

17. CCIJ is a recognized expert in Canada on the domestic application of international law, particularly international criminal, humanitarian, and human rights law. CCIJ has extensive knowledge of Canadian law and international norms applying to transnational corporations, including issues of corporate social responsibility, corporate structure, and tort liability.<sup>12</sup>

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<sup>10</sup> Affidavit of Trudo Lemmens at para 12.

<sup>11</sup> Affidavit of Matthew Eisenbrandt at paras 3, 5, 13 & 16-19.

<sup>12</sup> Affidavit of Matthew Eisenbrandt at paras 9 & 13.

18. This Honourable Court has granted CCIJ leave to intervene in four previous cases: *Kazemi v. Islamic Republic of Iran*, Court File No. 35034 (pending); *Club Resorts Ltd. V. Van Breda et al.*, 2012 S.C.C. 17; *Ezokola v. Canada (Citizenship and Immigration)*, 2013 S.C.C. 40; and *Mugasera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.R. 100. CCIJ has also been granted intervener status in other cases concerning accountability for alleged abuses overseas, including *Munyaneza v. R.*, 2014 QCCA 906 and *Kunlun Zhang et al. v. Jiang Zemin et al.*, Court File No. 04-CV-278915CM2, in the Ontario Superior Court.<sup>13</sup>

## PART II – QUESTION IN ISSUE

19. The sole question in issue on this motion is whether the Proposed Joint Intervenors should be granted leave to jointly intervene in this appeal.

## PART III – ARGUMENT

20. Proposed intervenors must demonstrate that they (1) have an interest in the appeal; and (2) will make submissions that are both useful and different from the submissions made by the parties to the appeal.<sup>14</sup>

### A. Interest in this appeal

21. The standard for an “interest” in an appeal sufficient to ground intervention is flexible. Subject to the discretion of the court, “any interest is sufficient” to support intervention.<sup>15</sup>

22. This appeal raises important legal issues that are of interest to the Proposed Joint Intervenors and the constituents they represent. As noted above, MiningWatch Canada’s interest stems from its work with Impacted Communities. As an advocate for and ally of such communities, MiningWatch Canada has an interest in ensuring that common law principles promote access to meaningful and enforceable remedies across borders for such communities.<sup>16</sup>

23. IHRP’s interest stems from its mission to advance the field of international human rights law. Protection of human rights is predicated on the willingness of the international community to hold those who violate human rights, including non-state actors, accountable, as well as on the

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<sup>13</sup> Affidavit of Matthew Eisenbrandt at paras 14 & 15.

<sup>14</sup> *Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene)*, [1989] 2 SCR 335 at 339, Sopinka J (“Reference”); *R v Finta*, [1993] 1 SCR 1138 at 1142, McLachlin J. (as she was then).

<sup>15</sup> *Norcan Limited v Lebrock*, [1969] SCR 665 at 666, Pigeon J; see also, *Reference* at 339.

<sup>16</sup> Affidavit of Catherine Coumans at para 9.

availability of effective remedies. IHRP has an interest in ensuring that Canadian common law evolves in a manner that ensures accountability for abuses committed by transnational corporations, and access to enforceable remedies for those whose rights have been violated.<sup>17</sup>

24. CCIJ's interest stems from its mandate to seek redress and bring to justice those responsible for torture and other abuses. CCIJ has a strong interest in assuring that Canadian law provides accountability for those implicated in abuses (including individuals, governments, and corporations), and ensuring access to remedies for those whose rights have been violated.<sup>18</sup>

**B. A useful and different perspective**

25. An intervention "is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue".<sup>19</sup>

26. MiningWatch, CCIJ and IHRP together bring a unique perspective and expertise to this appeal. MiningWatch's perspective is informed by its work with Impacted Communities, and by its efforts to support such communities to seek effective remedies.<sup>20</sup> IHRP and CCIJ's perspectives are informed by their expertise in the domestic application of international law (particularly the right to an effective remedy) and corporate accountability.<sup>21</sup>

27. The Proposed Joint Interveners intend to make submissions that focus on emerging international legal norms and principles related to corporate accountability, access to justice and the right to an effective remedy, and how these emerging international legal norms should inform the evolution of the common law. The Proposed Joint Interveners will not raise any new issues or new evidence on the appeal. The Proposed Joint Interveners will endeavour to avoid overlap between their submissions and those of any other party or intervener.

**C. Outline of proposed submissions**

28. As noted above, the Proposed Joint Interveners seek to make submissions regarding a) in what circumstances a Canadian court should hear an enforcement action brought by a community from the global south against a transnational corporation or its subsidiaries in

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<sup>17</sup> Affidavit of Trudo Lemmens at para 3.

<sup>18</sup> Affidavit of Matthew Eisenbrandt at para 3.

<sup>19</sup> *Reference* at 340, Sopinka J.

<sup>20</sup> Affidavit of Catherine Coumans at para 9.

<sup>21</sup> Affidavit of Trudo Lemmens at para 11; Affidavit of Matthew Eisenbrandt at para 13.

Canada; and, related, b) what role the doctrine of separate corporate personhood should play in determining whether to allow the enforcement action to proceed in Canada.

29. Over the past decade, the international community has become increasingly concerned with the expanding reach of transnational business and the concurrent failures of domestic and international legal systems to provide adequate remedies for human rights violations and environmental and social harms caused by transnational business. The problem is described by Harvard Professor John Ruggie, United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (“UN Special Representative”), as a “governance gap”:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.<sup>22</sup>

Professor Ruggie was appointed by the UN Secretary General to study the issue of human rights and transnational corporations in 2005.

30. In the face of this growing concern with the “governance gap”, the international community has focused on identifying and promoting existing international standards and principles that support access to justice and the right to an effective remedy for Impacted Communities. For example, since their endorsement by the UN Human Rights Council in 2011, the UN Guiding Principles have become the global standard for business and human rights.<sup>23</sup>

Importantly, the UN Special Representative’s mandate was not to create new norms or standards, but rather to elaborate and clarify widely accepted existing standards, norms and legal principles. The Special Representative relied heavily on consultations with and submissions from states

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<sup>22</sup> Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, UNHRC, 8<sup>th</sup> Sess, UN Doc A/HRC/8/5 (April 7, 2008) [“UN Framework for Business and Human Rights”] at para 3.

<sup>23</sup> Human rights and transnational corporations and other business enterprises, UNHRC Res, 17<sup>th</sup> Sess, UN Doc A/HRC/RES/17/4 (July 6, 2011).

(including Canada), corporations, business associations and civil society organizations.<sup>24</sup>

31. The UN Guiding Principles have three pillars: (a) the state duty to protect human rights; (b) the corporate responsibility to respect human rights; and, crucially, (c) access to remedy.<sup>25</sup>

32. The right to an effective remedy is the cornerstone of binding international human rights law. There is growing consensus that the right to an effective remedy for Impacted Communities requires that domestic law be interpreted and applied in a manner that removes legal barriers that effectively thwart access to a meaningful remedy. For example, the UN Protect, Respect and Remedy Framework, endorsed by the UN Human Rights Council in 2008, advises states to “strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territories”, and to “address obstacles to access to justice, including for foreign plaintiffs”.<sup>26</sup>

33. The rigid application of common law principles regarding jurisdiction and separate corporate personhood has been specifically cited as creating inappropriate barriers blocking access to justice and effective remedies. For example, the UN Guiding Principles state: “the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability”, and recommends that states take steps to reduce these legal barriers that can lead to a denial of access to remedy.<sup>27</sup> In a recent book, Amnesty International recommends “mak[ing] parent/controlling companies legally responsible for human rights abuses arising in their global operations” as a means of vindicating the international human right to an effective remedy in the context of the realities of transnational business operations.<sup>28</sup>

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<sup>24</sup> Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Guiding Principles on Business and Human Rights”, UNHRC, 17<sup>th</sup> Sess, UN Doc A/HRC/17/31 (March 21, 2011) at para 14 [“UN Guiding Principles”]; Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms”, UNHRC, 4<sup>th</sup> Sess, UN Doc A/HRC/4/35/Add.3 (February 28, 2007).

<sup>25</sup> UN Guiding Principles at p 1.

<sup>26</sup> UN Framework for Business and Human Rights at para 91.

<sup>27</sup> UN Guiding Principles at p 23.

<sup>28</sup> Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to a Remedy*, (London, 2013), pp 201-205.



34. Using the above emerging international norms and standards, the Proposed Joint Interveners intend to make two key submissions. First, the jurisdictional requirements for enforcement actions should not be interpreted in a manner that raises additional barriers for Impacted Communities who are attempting to enforce judgments obtained against transnational corporations for violations of their human rights. The law regarding when a Canadian court has jurisdiction to enforce a foreign judgment in Canada is clear and should not be changed – the court need only need to determine if the original jurisdiction, in this case Ecuador, had a real and substantial connection to the matter.<sup>29</sup> This is the sole test, and no further requirements are necessary on the facts before the Court in this appeal. The imposition of additional hurdles to enforce foreign judgments is inappropriate and would have the effect of making it more difficult for Impacted Communities to access effective remedies. The weight of international norms and standards accord with the general principle set out in *BNP Paribas (Canada)*:

As set out in *Morguard v De Savoye Investments Ltd* [1990] 3 SCR 1077, the purpose of comity is to secure the ends of justice and contemplates the recognition of judgments in multiple jurisdictions. The court should grant its assistance in enforcing an outstanding judgment, not raise barriers.<sup>30</sup>

In the alternative, the Court should adopt a broad and generous test when determining whether a Canadian court has jurisdiction to hear an enforcement action. Specifically, this test should be satisfied where either a wholly owned subsidiary of a judgment debtor is present in the jurisdiction, or a wholly owned subsidiary has assets in the enforcing jurisdiction.

35. Second, this Honourable Court should not foreclose, at this juncture, the possibility that Chevron Canada's assets are available to satisfy the judgment obtained against Chevron Canada's parent corporation. Within Canadian common law, there is no consistent principle governing when Canadian domestic law courts will ignore the separate corporate person and impose liability on a related corporation, or allow collection of judgments from an affiliated corporation, including a wholly owned subsidiary.<sup>31</sup> The doctrine of separate corporate

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<sup>29</sup> *Beals v Saldanha*, 2003 SCC 72 at paras 24-32.

<sup>30</sup> *BNP Paribas (Canada) v Mécis* [2002], 60 OR (3d) 205 at para 12.

<sup>31</sup> See, eg Gordon Phillips, *Personal Remedies for Corporate Injuries*, looseleaf (consulted in June 2014), (Toronto: Carswell, 1992) at 133.

personality does not act as a general exclusion of liability, and there are circumstances in which the imposition of liability on a parent or affiliated corporation is appropriate.

36. Increasingly commentators, including former Supreme Court Justice Ian Binnie, have highlighted the issue of the separation of corporate personhood as requiring the specific attention of this Honourable Court.<sup>32</sup> The Proposed Joint Interveners will suggest that recent developments in international norms and standards should be taken into account when determining whether the assets of a wholly owned subsidiary are available to satisfy a judgment against a parent corporation in circumstances where the transnational corporation in question has specifically organized its business and its assets through subsidiary corporations in a manner that renders Impacted Communities' right to an effective remedy illusory. These developments include (a) the increased identification of the strict separation of parent corporations from their wholly owned and controlled subsidiaries as an unjustified and unjustifiable barrier to justice and remedy that is outmoded in our current globalized world;<sup>33</sup> (b) the increasing adoption of the concept of "business enterprise" and "multinational enterprise" by organizations such as the United Nations and the OECD instead of simply accepting the formal and rigid legal separation between parent corporations and their wholly owned subsidiaries;<sup>34</sup> and (c) substantial state practice of extending national law to regulate the conduct of corporate nationals operating extraterritorially through foreign subsidiaries, such as in areas of competition law, shareholder and consumer protection, tax law, and bribery and corruption.

#### PART IV – ORDER SOUGHT

37. MiningWatch, IHRP, and CCIJ respectfully seek an order granting leave to (i) jointly intervene in this appeal and file a 10-page factum; and (ii) present oral submissions at the hearing of the appeal.

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<sup>32</sup> Ian Binnie, "Judging the Judges: May they boldly go where Ivan Rand went before", (Coxford Lecture, delivered at, January 2013), 26 Can JL & Juris 5 at pp. 20-21.

<sup>33</sup> UN Guiding Principles at p. 23; UN Framework for Business & Human Rights at paras 11-13 & 88-89; International Commission of Jurists, *Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (Geneva: International Commission of Jurists, 2008) at pp 43-49; Gwynne Skinner et al, *The Third Pillar* (International Corporate Accountability Roundtable, CORE & the European Coalition for Corporate Justice, 2013) at p 73; and Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive industries, human rights, and the home state advantage* (New York: Routledge, 2014) at pp 33-34.

<sup>34</sup> UN Guiding Principles at 6; OECD, *OECD Guidelines for Multinational Enterprises*, 2011 ed, (Paris: OECD Publishing, 2011) at pp 17-18.

All of which is respectfully submitted this 28<sup>th</sup> day of July, 2014.

  
as agent for

Murray Klippenstein

  
as agent for

Renu Mandhane

  
as agent for

W. Cory Wanless

Counsel for the Moving Parties, the International Human Rights Program University of Toronto  
Faculty of Law, MiningWatch Canada, and the Canadian Centre for International Justice

PART V – TABLE OF AUTHORITIES

Authority	Paragraph Reference in Argument
Amnesty International, <i>Injustice Incorporated: Corporate Abuses and the Human Right to a Remedy</i> , (London, 2013)	33
<i>Beals v Saldanha</i> , 2003 SCC 72	34
Binnie, Ian, “Judging the Judges: May they boldly go where Ivan Rand went before”, (Coxford Lecture, delivered at, January 2013), 26 Can JL & Juris 5	36
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Human rights and transnational corporations and other business enterprises, UNHRC Res, 17th Sess, UN Doc A/HRC/RES/17/4 (July 6, 2011)	30
International Commission of Jurists, <i>Corporate Complicity &amp; Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes</i> (Geneva: International Commission of Jurists, 2008)	36
<i>Norcan Limited v Lebrock</i> , [1969] SCR 665	21
OECD, <i>OECD Guidelines for Multinational Enterprises</i> , 2011 ed, (Paris: OECD Publishing, 2011)	36
Phillips, Gordon, <i>Personal Remedies for Corporate Injuries</i> , looseleaf (consulted in June 2014), (Toronto: Carswell, 1992)	35
<i>Reference re Workers' Compensation Act</i> , 1983 (Nfld.) (Application to intervene), [1989] 2 SCR 335	20, 21 & 25
Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Guiding Principles on Business and Human Rights”, UNHRC, 17 <sup>th</sup> Sess, UN Doc A/HRC/17/31 (March 21, 2011) at para 14 [“UN Guiding Principles”]	30, 31, 33 & 36
Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms”, UNHRC, 4 <sup>th</sup> Sess, UN Doc A/HRC/4/35/Add.3 (February 28, 2007)	30
Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises,	29, 32 & 36

John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights", UNHRC, 8<sup>th</sup> Sess, UN Doc A/HRC/8/5 (April 7, 2008)

*R v Finta*, [1993] 1 SCR 1138 20

Simons, Penelope and Macklin, Audrey, *The Governance Gap: Extractive industries, human rights, and the home state advantage* (New York: Routledge, 2014) 36

Skinner, Gwynne et al, *The Third Pillar* (International Corporate Accountability Roundtable, CORE & the European Coalition for Corporate Justice, 2013) 36

**PART VI – STATUTORY PROVISIONS**

*Rules of the Supreme Court of Canada,  
SOR/2002-156*

*Règles de la Cour suprême du Canada  
(DORS/2002-156)*

47. (1) Unless otherwise provided in these Rules, all motions shall be made before a judge or the Registrar and consist of the following documents, in the following order:

- (a) a notice of motion in accordance with Form 47;
- (b) any affidavit necessary to substantiate any fact that is not a matter of record in the Court;
- (c) if considered necessary by the applicant, a memorandum of argument in accordance with paragraph 25(1)(c), with any modifications that the circumstances require;
- (d) the documents that the applicant intends to rely on, in chronological order, in accordance with subrule 25(3); and
- (e) except in the case of a motion for intervention or a motion to state a constitutional question, a draft of the order sought, including costs, in print and electronic format.

(2) Parts I to V of the memorandum of argument shall not exceed 10 pages.

(3) There shall be no oral argument on the motion unless a judge or the Registrar otherwise orders.

47. (1) Sauf disposition contraire des présentes règles, toute requête est présentée à un juge ou au registraire et comporte dans l'ordre suivant :

- a) un avis de requête conforme au formulaire 47;
- b) tout affidavit nécessaire pour attester un fait dont la preuve n'est pas au dossier de la Cour;
- c) si le requérant le juge nécessaire, un mémoire conforme aux exigences prévues à l'alinéa 25(1)c), avec les adaptations nécessaires;
- d) les documents que compte invoquer le requérant, par ordre chronologique, compte tenu du paragraphe 25(3);
- e) sauf dans le cas d'une requête en intervention ou d'une requête en formulation d'une question constitutionnelle, une ébauche de l'ordonnance demandée, notamment quant aux dépens, en version imprimée et en version électronique.

(2) Les parties I à V du mémoire de la requête comptent au plus dix pages.

(3) Sauf ordonnance contraire d'un juge ou du registraire, aucune plaidoirie orale n'est présentée à l'égard de la requête