CANADIAN HISPANIC
BAR ASSOCIATION

October 14, 2014

Michele H. Hollins, Q.C.
President
Canadian Bar Association
500-865 Carling Avenue
Ottawa ON,
K1S 5S8

VIA EMAIL

Dear President Hollins,

RE: Opposition to the Canadian Bar Association's decision to intervene in Chevron Corporation, et al. v. Daniel Carlos Lusitande Yaiguaje, et al.

On behalf of the Canadian Hispanic Bar Association (formerly the Hispanic Ontario Lawyers Association), whose members are also part of the Canadian Bar Association ("CBA"), we are writing to express our disagreement with the CBA's decision to intervene in *Chevron Corporation, et al*. v. *Daniel Carlos Lusitande Yaiguaje, et al*. (*Chevron* v *Yaiguaje)* before the Supreme Court of Canada.

For the reasons outlined below, we request that the CBA decline to file submissions with the court on October 17, 2014 and that it withdraw its intervention in this case immediately.

The CBA's Policies Regarding Interventions

The CBA has enjoyed a special position in the courts when seeking intervener status due to its national membership of approximately 37,000 legal professionals and law students. Historically, this privilege has been safeguarded by various policies of the CBA governing public interest interventions, many of which were largely ignored in the present case on both procedural and substantive grounds.

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The CBA's intervention policies require that the CBA intervene only when it would make a significant contribution to the consideration of the issue(s) involved and only when the position sought to be advanced is:

> (i) consistent with previously adopted policy of the CBA;
>
> (ii) a matter of compelling public interest which the Board of Directors then adopts as policy of the Association; or
>
> (iii) a matter of special significance to the legal profession.

These policies also require that the section seeking approval for intervening status consult with interested member sections. The seeking section must also have its proposal reviewed by the Legislation and Law Reform Committee ("L&LRC") of the CBA.

The L&LRC is accorded a special privilege in reviewing intervention requests due to its expertise in law reform and familiarity with the application of the CBA's Intervention Policy. It is the L&LRC that can best ensure that the Intervention Policy is interpreted and applied with consistency. Indeed, the CBA's Intervention Policy states that an intervention factum may only be filed after the L&LRC has certified that it is of "high quality and a fair representation of the policy of the Association."

The importance of the above substantive and procedural requirements cannot be overstated, to ensure that a national organization like the CBA can make the best judgment as to whether it should intervene, on behalf of <u>all</u> of its members. Where such requirements were not met, as in the present case, the CBA should not intervene.

The CBA's Decision to Intervene

On July 8, 2014 Blakes Cassels Grayon LLP ("Blakes"), which represents Chevron in other matters, submitted a proposal for intervention on behalf of the Canadian Corporate Counsel Association ("CCCA").

The CCCA then consulted the Civil Litigation and Business Law sections, giving them only two days to respond. The CCCA did not consult the National Aboriginal Law Section ("NAWLS") nor the National Environment, Energy and Resources Law Section ("NEERLS"). Both the Civil Litigation and Business Law sections raised concerns that the proposed intervention did not meet intervention criteria. The CCCA nevertheless forwarded its proposal to the L&LRC and the Executive Committee.

The L&LRC reviewed the proposal and advised the CBA's Executive Officers on July 15, 2014 that the CBA should not intervene because the proposed arguments did not meet the criteria for intervention (no unique perspective). The L&LRC also expressed concern that Blakes acts for Chevron in Alberta.

Upon receiving this recommendation, the Executive Committee decided that the CBA would not intervene in the case on July 18, 2014 and advised the CCCA of same. On July 20, 2014, the CCCA requested that the Executive Committee reconsider this decision. On July 22, 2014, the Executive Committee decided, over email discussion, that the distinctiveness of argument criterion could be met and reversed its decision.

The L&LRC was never consulted as to whether the CCCA's reconsideration request satisfied the concerns that it had raised. Indeed, the Executive Committee reversed its decision solely on the basis of the CCCA's arguments, and failed to consult any other CBA section.

Procedural Concerns with the CBA's Decision to Intervene

The CCCA appears to have violated the CBA's policy to seek consultation from interested groups by failing to seek input from NAWLS and NEERLS. This is a striking oversight given that the case regards the ability of Indigenous peoples of the Ecuadorian Amazon to collect on a judgment for Chevron's decades-long dumping of 18.5 billion gallons of toxic wastewater and 16.8 million gallons of crude oil, onto their territory.

The issues engaged on appeal affect indigenous communities in Canada and globally, as well as the ability to collect on environmental-based claims.

That the CCCA consulted only the Civil Litigation and Business Law sections should have been viewed by the Executive Committee as a *prima facie* failure to adhere with the CBA's policies. It should have remitted the proposal for further consultation before the CCCA could forward it to the L&LRC and Executive Committee.

The unfortunate consequence of CCCA's failure to obtain the view of interested groups from the outset is that the proposal received by the Executive Committee and the L&LRC was incomplete from inception. The Executive Committee's eventual decision to intervene on the basis of such an incomplete proposal should be viewed as a procedural failure that cannot be cured.

The CBA's handling of the L&LRC's recommendation is most troubling. Despite this body's expertise in interventions, the CBA ultimately decided not to accept its recommendation to not intervene. This was done solely on the basis of the CCCA's further submissions, which were not shared with the L&LRC. And now, in the face

of strong and widespread criticism from its members, the CBA has chosen to publicly undermine the L&LRC by stressing the non-binding nature of its recommendation, rather than to acknowledge the L&LRC's essential role in these matters.

Lastly, we are concerned with the CBA's decision to hire Blakes on a pro bono basis. The CBA's Conflict of Interest policy recognizes the challenge "...to balance the expertise with the need to be (and appear to be) independent of client biases."

Blakes acts for Chevron in other matters. This means that its client would be the direct beneficiary of the CBA's intervention, should the court agree with its arguments. Such an arrangement raises concerns of real or perceived bias among CBA members, and the general public.

Substantive Concerns with the CBA's Decision to Intervene

One of the CBA's most important activities is to promote access to justice in Canada, and abroad through its "International Initiatives" program. Yet, the position to be espoused by the CBA in this intervention would constrain access to justice to one of the most vulnerable groups in our global society: Indigenous peoples living on resource-rich land.

The CBA's proposed intervention is not balanced and neutral, as stated in its communiqué of October 1, 2014. Its submissions on the piercing of the corporate veil would further the interests of multinational corporations such as Chevron. It is completely silent on the importance of developing the law in such a manner to promote the ability of Indigenous peoples to collect on judgments against multinational corporations that can simply flee the country when found to be liable, as Chevron's predecessor Texaco did in Ecuador.

The CBA's proposed intervention advocates for the Ontario Court of Appeal's ("OCA") decision in this matter to be overturned; yet the OCA's decision promotes access to justice. For the CBA to present an argument that would aid Chevron in its global campaign to avoid paying damages for an environmental disaster that caused irreparable harm to one of the most bio diverse places in the world, and caused suffering to the already marginalized Indigenous peoples of the Ecuadorian Amazon, flies in the face of the very principles of access to justice that the CBA espouses. This is inconsistent with the CBA's Intervention Policy, referenced above, that an intervention be consistent with a previously stated goal of the CBA. To remain consistent with its goal to promote access to justice on both the domestic and international stage, the CBA must withdraw the intervention.

Concerns with the Issues Raised in the CBA's Intervention

Lastly, we question the CBA's case that there is a compelling need for it to intervene. The CBA has stated that it is intervening because the corporate veil issue is important to corporate organizations in Canada, and because forum shopping would set a bad precedent in Canada.

The CBA's language in the proposed intervention implying that the Plaintiffs are forum shopping, and that the decisions below represent "a dramatic extension of the jurisdiction of the Ontario courts" and will "negatively impact investment in the province", is loaded with support for the Appellants. The optics of this is concerning, to say nothing of the fact that it is questionable. Both the motions judge and the judges of the Ontario Court of Appeal have found jurisdiction *simpliciter* on the basis of the existing law applicable to recognition and enforcement proceedings and presence-based (as opposed to assumed) jurisdiction.

The CBA proposes to argue this matter as if the Plaintiffs are attempting to obtain a judgment *de novo* in Canada against Chevron and Chevron Canada, or as if the Plaintiffs want to make Chevron pay for the acts of Chevron Canada. That is not so. Chevron's liability has already been determined. What the Plaintiffs seek is to have a final Ecuadorian Judgment recognized by the Superior Court of Ontario and enforced against Chevron by executing against Chevron Canada's shares and assets. That request is made because Chevron Canada has a presence in Ontario and it is 100% beneficially owned by the judgment debtor, Chevron.

If this recognition and enforcement matter is allowed to proceed, Chevron and Chevron Canada are free to raise any issues they wish in their statements of defence, except jurisdiction *simpliciter*. There is therefore no need for the CBA to intervene at this juncture in defence of the corporate veil or against forum shopping. The Defendants are well able to mount their defences in due course and argue that: (i) the Ecuadorian Judgment has been procured by fraud; (ii) Chevron Canada's shares and assets are not exigible to satisfy the Ecuadorian Judgment because of its separate legal personality; (iii) the Superior Court of Ontario should decline to exercise its jurisdiction because there is a more convenient forum to try this matter (e.g., Alberta) or for any other reason, including that the Plaintiffs are forum shopping and Chevron has no assets in Ontario; and (iv) any other defence the Defendants wish to raise, except that the Superior Court of Ontario does not have jurisdiction *simpliciter*.

Conclusion

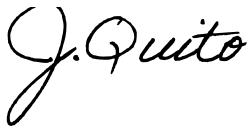
As the CBA is no doubt aware, there has been a large outcry from many of its members about its decision to intervene in this case and the way that this decision was made.

CBA sections including NAWLS, NEERLS and the National Sections Council Executive, have written to the CBA opposing the intervention. As well, individual lawyers and professional organizations have written to the CBA expressing their concerns and requesting that the CBA withdraw its motion to intervene. Some have renounced their CBA memberships. Law students have held a protest. Clearly, the CBA does not enjoy the general support of its members in proceeding with this intervention. This should trouble you immensely as the CBA purports to represent all of us before Canada's highest court.

On the basis of the procedural and substantive issues noted above, in addition to the documented disagreement of its members to the CBA's actions, we strongly request that the CBA decline to file submissions with the Supreme Court of Canada on October 17, 2014 and that it withdraw its motion to intervene in *Chevron* v *Yaiguaje*.

Yours truly,

W. Xavier Navarrete
President of the Canadian Hispanic Bar Association



Jennifer Quito
Board Member of the Canadian Hispanic Bar Association