Human Rights and Mining Corporations: Canadian New Perspectives Regarding Corporation Social Responsibility*

Resumen

Por muchos años, extranjeros víctimas de exacciones cometidas por las empresas multinacionales canadienses se han enfrentado a una laguna jurídica en tiempo de exigir la responsabilidad de esas compañías. Aunque Canadá fue considerado como un paraíso judicial para las empresas mineras, esta época de impunidad ahora parece pasada. Dos decisiones judiciales recientes, una del Tribunal Superior de Ontario (Choc v. Hudbay Minerals Inc.) y otra del Tribunal Supremo de Canadá (Chevron Corp. c. Yaiguaje) han cambiado la perspectiva de la legislación canadiense. Este artículo presenta una visión completa de estas decisiones y las pone en perspectiva con el movimiento inevitable de la responsabilidad corporativa. El encuentro del derecho y de la responsabilidad social de las empresas establece una base solida para el fortalecimiento de las responsabilidad corporativa. En efecto, los tribunales pueden atribuir la responsabilidad a las empresas por las violaciones de derechos humanos cometidas por sus subsidiarias. Aunque quedan preguntas y obstáculos judiciales, este nuevo riesgo de responsabilidad y sus consecuencias pueden convencer las empresas que tienen que adoptar actitudes proactivas para encontrar una responsabilidad social.

Abstract

Foreign victims of exactions committed by Canadian multinational companies have long been confronted to a legal vacuum in liability actions against those companies. Although Canada was considered as a judicial paradise for mining corporations, this impunity era seems now over. Two recent court decisions of the Ontario Superior Court of justice (*Choc* v. *Hudbay Minerals Inc.*) and the Supreme Court of Canada (*Chevron Corp.* c. *Yaiguaje*) have changed Canadian law's perspective. This article provides a complete overview of these decisions and puts them in perspective with the unavoidable

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movement of corporate accountability. The meeting of law and corporate social responsibility brings real basis for corporations' responsibility reinforcement. Indeed, it allows courts to held parent corporations liable for their subsidiary's human rights violations. Despite the remaining interrogations and judicial obstacles, this new risk of liability and its consequences may convince corporations to adopt proactive attitudes towards social responsibility.

Key Words

Canada, Extractives multinational corporations, Corporate social responsibility, Human rights violations, Liability

1. Introduction

As major actors from the extractive industry, Canadian and Quebec governments are directly concerned by economic, environmental and social impacts of mining activities (Sharma & Bhatnagar, 2015; Gakwaya, 2014; Chaire en éco-conseil, 2012; Bridge, 2004; J. Sagebien *et al*., 2008). Most of the biggest Canadian mining corporations pursue activities in multiple countries (recently: Brüls (Ed.), 2013). This strategic form of expansion allows them to benefit from soft regulation. Without a real international legal personality, these multinational corporations are not truly subject to either international or national law, since the latter does not apply to their extraneous activities (Amnesty International, 2014; Clapham, 2006; Delmas-Marty, 2004; Muchlinski, 1999). Regarding that issue, Canada and Quebec governments have been criticized many times for their insufficient efforts, leading to unpunished Human rights abuses committed in foreign countries. Several actors are urging for a serious integration of corporate social responsibility principles ("CSR")[1] in Canadian law, while the complexity of that issue is increasing due to the international expansion of those corporations' activities:

> On several occasions, beginning in 2002, [The United Nations treaty bodies] have urged Canada, specifically, to assume its responsibility to protect against human right abuse outside its territory and to provide effective oversight regarding its companies' overseas operations including through extraterritorial regulation. (Canadian Network on Corporate Accountability, 2014, p. 11).

In addition to the abuses suffered, victims have to deal with real obstacles when they want to access justice (Above Ground, 2015). As a matter of fact, Canadian business law strongly promotes both corporate veil (*Adams* v. *Cape Industries plc*, [1990] Ch. 433; *Salomon* v. *Salomon & Co. Ltd*, [1897] AC 22 51) and territorially limited jurisdiction. At the moment, "Canada (...) does not have comparable legislation to the [Alien Tort Statues]" (Fairhurst & Thoms, 2014, p. 390). Thus, only few foreign victims are tempted

[1] "Corporate social responsibility" not only refers to labour law but also concerns fundamental human rights.

and able to submit proceedings to Canadian courts (Fairhurst & Thoms, 2014, p. 390 and 392) [2]. Meanwhile, the situation is totally different in our neighbour country (Horlick, Cyr, Reynolds & Behrman, 2008) since the 1979 case *Filágerta* (*Filágerta* v. *Peña-Irala*, 630 F 2d 876 (2d Circ. 1980). See: Jospeh, 2004; White, 2004). This alarming truth prompted retired Supreme Court Justice Ian Binnie to vigorously denounce corporate veil's effects on impunity:

> This concept, deeply rooted in corporate law, is used regularly to deny liability of the head office, with its deep pockets, for acts of its subsidiaries in the far flung regions of the world where, it is alleged, the wrongful acts occurred. In a corporate pyramid the profits flow up the chain to the top (or are taken at whatever corporate level seems most advantageous) but legal liability remains stuck at the bottom where there may be liability but shallow pockets (Binnie, 2013, p. 18 quoted in Fairhurst & Thoms, 2014).

Despite this pessimistic context, it appears that some judges have heard former J. Binnie's call for boldness[3]. The two cases *Hudbay Minerals Inc.* (2013 ONSC 1414, « Choc ») (**2**) and *Chevron Corp.* v. *Yaiguaje* (2015 CSC 42, « Chevron ») (**3**) decided respectively by the Ontario Superior Court of Justice and the Supreme Court demonstrate a new desire for a real and effective justice of global scope. While some would call this age the era of multinational companies, these two judgements, based on new legal foundations, attest of a great movement of CSR judiciarisation (**4**).

2. *Choc* v. *Hudbay Minerals Inc.*: a new "duty of care" for a parent company with regard to the victims of its subsidiary?

In a case involving Toronto mining company Hudbay Minerals Inc. ("Hudbay"), Justice Carole Brown of the Ontario Superior Court of Justice had to rule a motion to

[2] Canada is not the sole country which does not have any specific legislation regarding that issue. Australia and United Kingdom did not reproduced the American system as well (Stephens, 2002, p. 32).

[3] In Britsh Columbia, two lawsuits were recently fulfilled by plaintiffs asking the court to hold parent corporations liable for torts committed by their subsidiaries. In the first case, British Columbia Supreme Court declined jurisdiction and suspended the action without pronouncing itself on the liability issue (*Garcia* v. *Tahoe Resources Inc*., 2015 BCSC 2045). The second case have been introduced on November 20, 2014 but no ruling was made so far (*Araya* v. *Nevsun Resources Ltd*.).

dismiss the liability lawsuit filed by Guatemalan villagers (**2.1**). Thereby the Court had to determine if Hudbay's liability could possibly be retained if the facts alleged by the plaintiffs were proven at trial (**2.2**). By its conclusions, the Court opened the way for a new ruling permitting tribunals to held a parent company responsible for torts committed by its extra territorial subsidiary (Bryant & Romano, 2015) (**2.3**).

2.1 Facts and Background

In 2013, the Court rejected Hudbay's motion to dismiss against Guatemalan plaintiffs Margarita Caal Coal, Angelica Choc and German Chub. The three plaintiffs asked the Court to hold Hudbay responsible for Human rights abuses committed by security agents employed by Hudbay's subsidiary, CGN, during the Fenix mining project in EL Estor, Guatemala, between 2007 and 2009 (*Choc*, para. 4 et s.). Even though, the Fenix project was directed by HMI Nickels Inc. at the time of the alleged facts, Hudbay still had to be held liable because of its merger with HMI Nickels Inc. (*Choc*, para. 9).

To sustain its motion to dismiss, Hudbay pleaded that the plaintiff's request had no foundation in law and should be dismiss, pursuing to article 21.01(1)b) of the Ontario *Rules of civil procedure* (R.R.O. 1990, Règl. 194). In accordance with the *Rules*, the Court assumed the facts set forth in the plaintiffs' statement can be proven and decided that plaintiffs' pleadings disclosed a reasonable cause of action.

2.2 Parent Corporation's Liability

According to Hudbay, plaintiffs' claim discloses no reasonable cause of action because it goes against corporation separate legal entity (also known as *corporate veil*), a judicial theory applicable since the *Salomon's* case (*Choc*, para. 19). On the other side, plaintiffs argue that no lift of the corporate veil is at stake. The question is rather whether Hudbay could be held liable because it did not prevent Human rights violations[4].

[4] *Choc*, para. 52. Only the complainant Angelica Choc alleged that Hudbay's corporate veil should be lifted so it can be held liable for torts committed solely by its subsidiary CGN. Ontario law permits corporate veil

Therefore, they plead that a novel duty of care should be recognized and imposed to Hudbay. In common law jurisdictions, liability requests that the defendant owes a duty of care to the plaintiff:

> Even if a person negligently causes loss to another, there may be no liability to that person if the actor owed no duty to avoid that harm. (...) The concept of duty is a control device that enables courts, as a matter of law, to deny liability where reasons of policy make it appear desirable to do so (Beaudoin & Liden, 2010, p. 112, n° 304).

According to the Supreme Court, "once a duty of care is recognized for a category of cases, it becomes an established duty of care" (*Choc*, para. 56; *Edwards* v. *Law Society of Upper Canada*, 2001 SCC 77; *Cooper* v. *Hobart*, 2011 SCC 76, as quoted in Beaudoin & Liden, 2010, p. 113, n° 304).

In the present case, plaintiffs agree their demand does not fit in an existing category of duty of care (*Choc*, para. 52). They rather submit that the particularities of their relation with the mining society could give rise to the recognition of a new duty. The establishment of a new duty of care requires the application of the analysis developed by the House of Lords in *Anns* (*Anns* v. *Merton London Borough Council*, [1978] A.C. 728) and adopted by the Supreme Court of Canada in *Kamloops* (*Kamloops (City of)* v. *Nielson*, [1984] 2 S.C.R. 2). First, the petitioner needs to establish a *prima facie* duty of care by demonstrating "that the harm complained of is a reasonably foreseeable consequence of the alleged breach" (**2.2.1**) and "that there is sufficient proximity between the parties that it would not be unjust of unfair to impose a duty of care on the defendants" (*Odhavji Estate* v. *Woodhouse*, 2013 SCC 69, para. 52) (**2.2.2**). Second, the petitioner has to prove "that there exist no policy reasons to negative or otherwise restrict that duty" (*Odhavji Estate* v. *Woodhouse*, 2013 SCC 69, para. 52. See also: *Cooper* v. *Hobart*, 2001 SCC 79, [2001] 3 SCR 537) (**2.2.3**).

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lifting when a corporation acts as the "authorized agent" of its corporate (*Choc*, para. 45). According to Angelica Choc, CGN acted as an authorized agent for Hudbay. Considering that allegation is not patently incapable of proof, the Court decided that its demand "should be allowed to proceed to trial" (*Choc*, para. 49).

2.2.1 Foreseeability

According to the first step of the test, the harm has to be a reasonably foreseeable consequence of the defendant's wrong (*Choc*, para. 59). As such, this criterion requires that the harm is not "a manner of incidence" (*Choc*, para. 59, referring to *Bingley* v. *Morrison Fuels*, 2009 ONCA 319, 95 O.R. (3d) 191, para. 24). In support of their claims, the complainants argue "that Hudbay knew or should have known that in Guatemala, violence is frequently used by personnel during the forced evictions of Mayan Q'eqchi communities" (*Choc*, para. 60). Moreover, they allege that "Hudbay executives specifically knew that violence had been used at the previous forced evictions of Mayan Q'eqchi' communities requested by Hudbay" (*Choc*, para. 60). They also claim that Hudbay knew that the security agents employed by CGN had no license, were poorly trained and in possession of illegal weapons. Finally, the complainants allege that Hudbay directly authorized the agents to use force to respond to local communities' opposition, even if the opposition was peaceful. On the opposite, Hudbay submits that the alleged prejudices were totally unforeseeable. Hudbay also argues that "some of the allegations made will be proven false" (*Choc*, para. 62).

For the Court, plaintiffs' pleadings "make it reasonably foreseeable that requesting the forced eviction of a community using hundreds of security personnel (...) could lead to security personnel using violence, including raping the plaintiffs" (*Choc*, para. 63). According to the Court, Hudbay's alleged knowledge was sufficient to meet the first requirement of the *Anns* test.

2.2.2 Proximity

To meet the second requirement of the Anns analysis, the relationship between the plaintiffs and Hudbay has to be sufficiently proximate so no injustice would be caused if Hudbay was bound by a novel duty of care (*Choc*, para. 66). For the Court, "the expectations, representations, reliance, and the property or other interests involved" have

to be considered in defining the proximity of a relationship (*Cooper* v. *Hobart*, 2001 SCC 79, para. 34, as cited in *Choc*, para. 69). In this respect, the Court finds plaintiffs' allegations sufficiently indicate a relation of proximity between them and Hudbay (*Choc*, para. 70).

As a part of the analysis, the Court takes in account the public declaration of Hudbay's representatives and directors that Hudbay "(…) did evertyhing in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights" (*Choc*, para. 67). Nevertheless, the Court specifies that those public statements constitute an indication, among others, that local communities might have had expectations towards Hudbay. For the Court, "the spokesperson may have been speaking in general terms and it may have, in fact, been the subsidiary taking the action. Nevertheless, (...) public statements alleged to have been made by the parent company (...) are indicative of a relationship of promixity between the defendants and the plaintiffs" (*Choc*, para. 68).

The Court underscores plaintiffs' allegations pointing out that Hudbay's employees and executives were directly in charge of local community relations and security operations during the Fenix project (*Choc*, para. 67).

2.2.3 Policy Considerations

The third and last step of the analysis "involves determining whether there are policy reasons to negative or otherwise restrict the prima facie duty of care" (*Choc*, para. 71). In the case, both parties submit favourable arguments to support their position. On one hand, Hubday pretends that the recognition of such a duty could undermine the efforts made by the Parliament to improve social responsibility in the mining sector. Hudbay also argues that it would go against the legislator's intentions and would expose mining societies to number of unfounded lawsuits (*Choc*, para. 72). On the other hand, plaintiffs submit that the novel duty of care they are looking forward would foster Federal

Parliament objectives by encouraging Canadian mining societies to respect high standards on social responsibility (*Choc*, para. 73).

For the Court, it is not "plain and obvious" that plaintiffs' position has no legal foundation and would fail further examination. Therefore, the Court rules that both positions must be decided at trial (*Choc*, para. 74).

2.3 A New Basis for Multinational Corporations' Liability?

Applying the *Anns* analysis, the Ontario Superior Court found that it was not plain and obvious that Hudbay could not have the duty to supervise its security personnel and make sure that no harm is done to local community during extractive projects (*Choc*, para. 54). Instead of focussing on corporate veil piercing (Khimji & Nicholls, 2015; Gallez, 2013), the conclusions in *Choc* v. *Hudbay* were based on innovative arguments regarding the possibility that a parent corporation be held directly liable for acts committed by its extraneous subsidiaries (Commission consultative nationale des droits de l'homme, 2009, p. 135).

The fundamental impact of this decision relies on the possibility for defendant to vindicate their liability effectively with a low cost (Fairhurst & Thoms, 2014, p. 400). From now on, [TRANSLATION] "Canadian society conducting their activities through extraterritorial subsidiaries should revise their social responsibility engagement and make sure they assume commitments they make through public statements" (Bottomer & Williams, 2015). Once a new duty of care will have been recognized, parent companies will risk to be held responsible, with their subsidiary, if their negligence causes damages abroad. Even though no Canadian courts has granted this type of request so far, there is no definitive judgement dismissing one. The threat of a ruling against a mining society in a context similar to *Choc* will certainly impel other companies to be more careful and improve their oversight mechanisms[5].

[5] Civil liability is a risk that has to be taken seriously by corporations because of its financial cost (Collard, Delhaye, Loosdregt et Roquilly, 2011, p. 41; M. Lipton *et al.*, 2011, p. 794; Verdun, 2013, p. 10). Recent

3. *Chevron Corp.* v. *Yaiguaje* : Canadian Courts' Jurisdiction in Recognition and Enforcement Actions

In this action to recognize and enforce a foreign judgement (**3.1**), the appeal raised two issues. First, must there be a real and substantial link between the defendant or the dispute and Ontario for jurisdiction to be established (**3.2**)? Second, do the Ontario courts have jurisdiction over Chevron Canada, a third party to the judgment for which recognition and enforcement is sought (**3.3**)? This Supreme Court decision shows an certain evolution in the matter of recognition and enforcement of foreign judgments against a company for the actions of its subsidiary (**3.4**).

3.1 Background and Facts

For over 20 years, the indigenous communities of the Lago Agrio region, in Ecuador, have been seeking legal accountability and financial reparation for harms allegedly caused by *Texaco*'s operations, which has since then merged with the american corporation *Chevron* (*Chevron*, para. 4). These communities have put forward the environmental pollution suffered from the exploitation of their lands. In 2013, the Ecuador's Court of Cassation ruled that *Chevron* had to pay US$9.51 billion for environmental damages to the plaintiffs (*Chevron*, para. 6). Since then, *Chevron* has refused to acknowledge or pay the debt (*Chevron*, para. 8). The plaintiffs therefore commenced an action for recognition and enforcement of the Ecuadorian judgment in the Ontario Superior Court of Justice (*Chevron*, para. 8) by serving *Chevron Canada* at its place of business located in this province (*Chevron*, para. 9)[6]. The corporations *Chevron*

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studies underscore some augmentation of those lawsuits targeting multinational corporations: "What stands out from this study is risk managers' perception of heightened cross-border liability risk. No fewer than four of their top six 'multinational risks' relate directly to liability issues" (Longitude Research, 2014, p. 4). In this sens, Vigeo, a french agency of extra-financial rating, recently found that lawsuits based on social responsibility represent a serious risk for companies. In fact, 19,2 % of the 484 societies studied have been the target of a lawsuit between 2012 and 2013. Around 7% of the sanctions were imposed for human rights violations and totalize 7,6 billions of euros (Vigeo, 2015).

[6] *Chevron Canada* is *Chevron Corporation*'s seventh degree subsidiary. It owns gas stations and financially participates to *Duvernay Shale* and *Kitimat LNG*'s projects in British Columbia and has shares in *Athabasca Oil Sands* in Alberta and in *Hibernia* et *Hibernia South Extension* in Newfounland as well.

and *Chevron Canada* each sought orders setting aside service ex juris of the amended statement of claim, declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying the action (*Chevron*, para. 11). Both the Ontario Superior Court and the Court of Appeal rejected the arguments of *Chevron* and the plaintiffs' action was allowed (*Chevron*, para. 12-22). The Supreme Court of Canada dismissed the appeal in 2015 (*Chevron*, para. 42), affirming the that a Canadian court has jurisdiction to adjudicate a recognition and enforcement action against a subsidiary operating outside of Canada.

3.2 The Real and Substantial Connection Test

Jurisdiction to recognize and enforce a foreign judgment against a defendant for its operations in another country does not require a real and substantial connection between the defendant or the dispute and the province where the action is commenced (*Chevron*, para. 27)[7]. The Supreme Court arrives at this conclusion notably because it has never imposed the proof of such a connection (*Chevron*, para. 28). As soon as service is effected on a defendant against whom a foreign judgment debt is alleged to exist, jurisdiction in a recognition and enforcement action is established (*Chevron*, para. 36). The Supreme refers to the statement of Deschamps J. in *Pro Swing*:

> The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms. (*Pro Swing Inc*. c. *Elta Golf Inc*., [2006] 2 RCS 612, para. 11, in *Chevron*, para. 37).

Moreover, two considerations of principle justify the conclusion that the real and substantial connection test should not apply in an action for recognition and enforcement

[7] If the litigious facts happened outside Canada and the jurisdiction of the provincial court is disputed, a proof of a real and substantial connection between the province where the action is commenced and the parties is required. See: *Anvil Mining Ltd.* c. *Association canadienne contre l'impunité*, 2012 QCCA 117, permission to appeal rejected *Association canadienne contre l'impunité* c. *Anvil Mining Limited*, 2012 CanLII 66221 (CSC); Afarian, Black, Hubbard & Piovesan, 2012.

(*Chevron*, para. 42). First, the purpose of the recognition and enforcement action is to allow the fulfillment of a pre-existing obligation (*Chevron*, para. 43). Second, the notion of comity militates in favour of generous enforcement rules (*Chevron*, para. 42).

3.2.1 The Purpose of Recognition and Enforcement Proceedings

According to the Supreme Court, the purpose of a recognition and enforcement action, being different than the purpose of an action at first instance, does not require an evaluation of the underlying claim, but should rather focus on the already-adjudicated obligation (*Chevron*, para. 43). Three consequences flow from this observation. First, the original dispute is not re-examined (*Chevron*, para. 44) and it is therefore irrelevant that the parties are elsewhere or that the facts giving rise to the dispute are addressed in another court (*Chevron*, para. 45). The only important element is the legal obligation created by the foreign judgment (*Chevron*, para. 45). Second, enforcement is limited to measures that be taken within the territorial jurisdiction and concerns only local assets (*Chevron*, para. 46). Third, there is no constitutional concerns that might arise in recognition and enforcement proceedings. Since the real and substantial connection test is intrinsically linked to the legitimacy of the exercise of state power, such a test is not necessary in an action limited to the recognition and enforcement of a foreign judgment (*Chevron*, para. 47). The Canadian enforcing court does not require a similar legitimacy towards the parties (*Chevron*, para. 48). There is no problem concerning a territorial overreach, because the obligation created by a foreign judgement is universal and has an equal interest for each jurisdiction (*Chevron*, para. 50). In the end, the only consideration that can help the creditor make his choice about a jurisdiction in particular is the access to potential assets within its territory (*Chevron*, para. 49).

3.2.2 The Notion of Comity in Recognition and Enforcement Proceedings

In Canadian law, the notion of comity has always underlied action for recognition and enforcement. According to the Supreme Court, this notion refers to “the deference and respect due by other states to the actions of a state legitimately taken within its

territory" [as well as] "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (*Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C. 1077, p. 1095-1096, in *Chevron*, para. 51). The rejection of Chevron's pretention regarding the real and substantial test does not counteract the foundation of the principle of comity – namely order and fairness, for three main reasons(*Chevron*, para. 53). First, order and fairness are already protected by the real and substantial connection test needed between the foreign first instance tribunal and the litigation (*Chevron*, para. 54). If this connection was missing, if the parties were outside of this first tribunal's territorial jurisdiction or if they had not recognized its authority, the recognition and enforcement action would be dismissed (*Chevron*, para. 54). Second, the debtor of an obligation resulting from a foreign judgement would not be treated unjustly by having to defend himself against its recognition and enforcement (*Chevron*, para. 55). Third, presence of assets in the jurisdiction can not constitute a real requirement nowadays, considering the growing asset mobility and the globalization (*Chevron*, para. 56-68). In conclusion, the Supreme Court states that facilitation and comity – two pilars of private international law - militate in favour of a liberal approach to recognition and enforcement proceedings (*Chevron*, para. 70-74). The Supreme Court therefore dismisses Chevron's argument regarding the proof of a real and substantial connection between the initial trial and the enforcement tribunal in order to recognize its jursidiction (*Chevron*, para. 69).

3.3 Jurisdiction

The Superior Court of Ontario has presence-base jurisdiction, made out on the basis of Chevron Canada's office in the province (*Chevron*, para. 81-85, in application of *Club Resorts Ltd.* v. *Van Breda*, [2012] 1 S.C.R. 572). The presence of a subsidiary is indeed sufficient to establish the court's jurisdiction towards the company (*Chevron*, para. 86). It should be noted that constitutional conflict of laws principles do not impact such a conclusion: a recognition and enforcement judgement is not illegitimate in this

case (*Chevron*, para. 89). The confusion between presence-based jurisdiction and assumed jurisdiction is therefore rejected by the Supreme Court (*Chevron*, para. 89). Presence-based jurisdiction does not require that the assets present within the jurisdiction of the enforcement tribunal have any link with the initial trial (*Chevron*, para. 90-92). Even though *Chevron Canada* is a third-party towards the obligation contracted by Chevron, it can be forced to pay its parent corporation's debt insofar as it has assets in the enforcement jurisdiction (*Chevron*, para. 93).

3.4 Consequences for a Subsidiary

The *Chevron Corp*. v. *Yaiguaje* case is fundamental in the area of recognition and enforcement actions against a corporation. First, this action does not require a real and substantial connection between the initial foreign trial and the enforcement jurisdiction. Second, presence-based jurisdiction should not be confused with assumed jurisdiction. This case is particularly important regarding two factual elements: *Chevron* did not have any asset in Canada and *Chevron Canada* was never a party of the initial judgement.

4. Conclusion

Lawsuits may not be the more effective way to protect Human rights, although "(…) well-publicized cases influence the many corporations that learn about them and fear becoming targets, the cases can have an impact on corporate culture and business practices" (Stephens, 2007, p. 22). Given the two decisions examined, the idea that "[s]uing transnational corporations in the home state (…) remains problematic" (Simons, 2015, p. 31) seems now questionable. *Choc* v. *Hudbay Minerals Inc.* and *Chevron Corp*. v. *Yaiguaje* counterbalance the lack of will that the Canadian government has shown with its new CSR strategy (Tchotourian, 2016; Gouvernement du Canada, 2015; Torrance, 2014; Lin, 2014). Plus, these rulings reflect the new judicial tendency to look over corporate separate personality (Cabinet Davies, 2015, p. 111). They are also consistent with recommendations made by professor Olivier De Schutter, arguing that more efforts should be dedicated to improve the efficiency of already existing mechanisms allowing

plaintiffs to hold parent corporations liable (De Schutter, 2008, p. 39). Moreover, they contribute to the unavoidable movement of the industry's social responsibilization (Broduzic, 2015; Gouvernement du Canada, 1998; Gouvernement du Canada, 1996), a movement even promoted by extractive corporations (Association minière du Canada, 2015; International Council on Mining and Metals; Miller, 2007; Heledd, 2004; Hilson, 2000).

As it was underscored by Lambert "(…) mining is viewed both as an essential part of, and a threat to, sustainable development" (2001, p. 275). Thus, corporations and governments are currently encouraged to face the challenges posed by extractive activities. A report submitted to the French *Ministère de l'Écologie, du Développement durable, des Transports et du Logement* in 2011 stated in that there is a growing consensus that mining law is now outdated. This finding would be mostly due to the fact that mining law does not take into account society environmental and social preoccupations (Ministère de l'Écologie, du Développement durable, des Transports et du Logement, 2011, p. 21. See: Carbon, 1997; Epps, 1997; Cordes, 1997). According to the 2007, *Rapport sur l'investissement dans le monde*, [TRANSLATION] "the society expects [mining corporations] to preserve populations' essential needs and to do the maximum they can for their development" (Conférence des Nations unies sur le commerce et le développement, 2007, p. 103).

Multinationals are more and more sensitive to CSR norms, in compliance with the principles put forward in law: "[t]he perspective of a direct corporate responsibility to secure international human rights (…) is already underway" (Francioni, 2007, p. 167). These companies are thus encouraged to take in account the impact of their activities on individuals and on the environment (Pestre, 2013; Renouard, 2007; Zerk, 2006). Numerous texts have been written in the last years in order to help and accompany them (Heidenreich, 2012. See : Conseil des droits de l'Homme des Nations Unies, 2011; OCDE, 2011; OIT, 2006. For a recent summary, see: C. Brüls, 2013). As the Canadian Strategy does it as well, these texts remind the multinationals of the importance of Human rights (ISO 26000, 2012, principles 4.8 and 6.3.1.2; OCDE, 2011, Principle II, A-

2 ; OIT, 2006, §8 – General Politic). The impact of these non-binding initiatives should not be neglected (Belem, Champion & Gendron, 2008). The Canadian jurisprudence presented in this article is directly in line with this new trend, by considering a possible new basis to liability and by facilitating the recognition and enforcement action of foreign judgements.

If it is clear that CSR is now meeting law, law (procedural and substantial: hard and soft) is in turn meeting CSR (Javillier 2007; McInerney, 2005). This meeting should not be neglected, since CSR is a relevant tool (Herbel, 2013; Mathey, 2011) to face the challenges of Human rights issues in the economic area (Salah, 2012) and the law efficiency issues they rise (Kessedjian, 2015; Decaux (Ed.), 2010 ; Sherpa, 2010; Collingsworth, 2010; Sontag, 2009; Maurel, 2008; Muchlinski, 2003; Weissbrodt & Kruger, 2003; Jospeh, 2000). Moreover, CSR offers an alternative way based on softer normativity and on volontary participation, which garantees a better efficiency and a stronger protection of Human rights (Deumier, 2013). On the legal side, there is a better equilibrium between the extended protection in favour of multinationals and the non-binding system regulating Human rights. Many multinationals "(…) outgrown the ability of individual states to regulate them effectively" (O'Sullivan, 2000, p. 9. See also: R. Oberoi, 2013; Lowe, 2004, p. 23). [TRANSLATION] "[The] study of CSR normativity shows an improvement of the rules applicable to transnational companies and a potential strengthening of their legal liability" (Caillet, 2014, p. iii). Some legislative reforms in Europe[8], along with Canadian[9] and French[10] draft laws, as well as

[8] In France, Bill No 2010-788 (July 12th 2010) on national commitment towards environment has reviewed some provisions of the codes on commerce and environment (e.g. Muka-Tshibende, Queinnec & Tchotourian, 2012; Martin, 2011; Teller, 2010). The bill has recognized a basis for liability of a parent corporation for a subsidiary's misbehavior regarding its environmental obligations. Recently, the bill has limited corporate veil in the subcontracting chain. The Bill No 2014-790 (July 10th 2014) on unfair social competition has enforced an obligation for the deciding authority to command the respect of Human rights.

[9] Adopted by the House of Commons on April 22nd 2009, the draft law C-300 was applicable to Canadian mining companies. It aimed at enforcing internationally recognized practices in environment and Human rights areas. The proposed system was original since any citizen (Canadian or foreign) could lodge a complaint with a minister. In case of a company's misbehavior, it would have lost the support of Export Development Canada, of CPP investment Board and of Canadian embassies. This draft law was rejected at the report step in 2010 by 135 in favour and 140 against. Recently, two other draft laws have been presented to the House of Commons. First, the draft C-492 aimed at modifying the Federal Courts Act to expressively allow non-citizens to commence liability action based on international law violations, even if the acts were committed outside of Canada. The draft established the proceedings for the Federal Court and

jurisprudential solutions[11] (also American[12] and Australian[13]) are innovating in the governance and social interest areas (Tchotourian, 2014; Rousseau & Tchotourian, 2009; Lizée, 1989). These innovative solutions show a strong will to improve CSR within multinationals. The legal problem (Lizée, 1985) that constitute multinationals in the extractive area is not fully resolved[14], but their liability is certainly growing. It should be noted that [TRANSLATION] "Human rights or environmental concerns are logical concerns, and not anti-economy, even if they are first and foremost external to economic calculus" (Gollier, 2009, p. 310).

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the Federal Court of Appeal to have jurisdiction in this matter. So far, the House of Commons have not adopted this draft. Second, the draft C-584 presented on March 31st 2014 focused on social liability of Canadian extractive companies working in developing countries. The draft aimed at ensuring Canada's commitment to international law and International Bill of Human Rights regarding extractive activities of Canadian companies in developing countries. It created the Office of the Ombudsman and forced companies to report their extractive activities. The Office of the Ombudsman was responsible for elaborating the guidelines regarding extractive activities. It also had to report to each member of Parliament on the bill and its application. Once again, this draft was rejected by 23 votes at the second-reading step on October 1st 2014.

[10] In France, a draft law (February 11th 2015) on duty of care is currently discussed (Assemblée nationale, *Proposition de loi nº 2578 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*). This draft presents two provisions on company's liability. The first provision suggests a preventive duty of care for some companies. The second provision allows civil liability where the damages could reasonably be prevented.

[11] In 2004, the Supreme Court of Canada has extended the duty of directors in *Peoples Department Stores Inc. (Trustee of)* v. *Wise*, ([2004] 3 SCR 461). The Supreme Court has stated that: "it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". Moreover, the Court added that "(...) in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment". This judgement was confirmed in 2008: *BCE Inc.* v. *1976 Debentureholders*, [2008] 3 SCR 560; 2008 SCC 69. See also: Rousseau, 2006; Lee, 2005.

[12] *Credit Lyonnais Bank Nederland, N.V.* v. *Pathe Communications Corp*., 1991 WL 277613 (Del Ch, 1991); *Schlensky* v. *Wrigley*, 237 NE2d 776 (III App Ct 1968); *Smith Manufacturing* v. *Barlow* (1953,) in Arnold, Beauchamp & Bowie, 2003, p. 85. See: Tchotourian, 2012.

[13] *The Bell Group Ltd. (in liq)* v. *Westpac Banking Corporation*, [2008] WASC 239, conf par [2012] WASCA 157; *Walker* v. *Wimborne*, (1976) 137 CL.R 1 (HCA) p. 6 and ff.

[14] In 2009, a study showed that mining companies were involved in 33% of the 171 serious incidents (conflict with communities, Human rights violations, non-ethical practices, environmental issues...) that happened between 1999 and 2009 in the extractive area (Canadian Centre for the Study of Resource Conflict, 2009, p. 6).

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