KEY CASES

Chevron: High threshold for piercing corporate veil affirmed

The Ontario Court of Appeal's decision in *Chevron Corporation v Yaiguaje et al* confirmed the very high test under Canadian law for disregarding the separate legal personality of a parent corporation and its direct or indirect subsidiaries, rejecting attempts to introduce into Canadian law either a general equitable test for piercing the corporate veil or a form of group enterprise liability. The Supreme Court of Canada's determination not to hear an appeal from this decision effectively brought an end to a lengthy Canadian proceeding seeking to seize the assets of an indirect subsidiary to satisfy a judgment obtained (fraudulently) against its parent. This may be welcome news for defendants in other cases pending before the Canadian courts that seek to pierce the corporate veil to render one member of a corporate family accountable for acts of another. At a minimum, the plaintiffs in those cases may be driven to place greater reliance on alternative theories of liability.

Chevron Corp. v Yaiguaje et al

An almost seven-year long saga in the Canadian courts seeking recognition and enforcement of a US$9.5 billion judgment fraudulently obtained in the Ecuadorian Courts against Chevron Corporation came to an end in 2019. The plaintiffs – 47 residents of Ecuador – commenced an action in 2012 in the Ontario Superior Court of Justice, seeking an order that the assets and/or shares of Chevron Canada Limited, a seventh-level indirect subsidiary of Chevron Corporation, were exigible to satisfy the Ecuadorian judgment. In the face of several key losses in the Canadian courts – as well as overwhelming findings in international tribunals that the Ecuadorian judgment was obtained as a result of a massive fraud perpetrated by the plaintiffs' own lawyers – the plaintiffs consented to the dismissal of their Ontario action with costs in June of this year, thereby abandoning their quest to satisfy the judgment from Canadian assets.

The only judgment debtor, Chevron Corporation, had no assets in Canada, did not carry on business in Canada, and had an avowed intention never to do so in future. However, the plaintiffs were precluded from enforcing the fraudulent judgment in the United States, where Chevron Corporation is headquartered and has assets. In 2014, after a lengthy trial, the Southern District of New York (SDNY) held (as subsequently affirmed on appeal to United States Court of Appeals for the Second Circuit, *certiorari* denied by the United States Supreme Court) that the Ecuadorian judgment had been obtained by fraud, corruption, bribery, *Foreign Corrupt Practices Act* violations, and more, and enjoined the plaintiffs from seeking to enforce or profit from the fraudulent judgment in the United States. Among other findings, the SDNY held that the plaintiffs' lawyers had ghostwritten the judgment and promised a US$500,000 bribe to the Ecuadorian judge to sign it. The plaintiffs therefore came to Canada, seeking to seize the assets and/or shares of Chevron Canada Limited.

The plaintiffs' Ontario action sought to challenge well-established principles of separate corporate personality under Canadian law. Chevron Canada is an operating business that carries on an oil and gas exploration and extraction business in Canada, and has Canadian assets. However, the shares of Chevron Canada were only indirectly owned by Chevron Corporation through multiple other subsidiaries. And Chevron Canada had no connection to the Ecuadorian judgment: it had never carried on business in Ecuador, it was not involved in any Ecuadorian activities leading up to the judgment, and it was not a defendant in the Ecuadorian proceeding.

The Supreme Court of Canada held in 2015 that the Ontario court could take jurisdiction over the plaintiffs' action, even in the absence of assets against which to enforce it. (The Supreme Court of Canada did not consider the merits of the case in determining the issue of jurisdiction). However, the plaintiffs were unsuccessful in their subsequent motion for summary judgment seeking a determination that the assets or shares of Chevron Canada were exigible to satisfy the judgment debt of Chevron Corporation.

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the separate legal personality of parent and subsidiary. Leading judicial authority, including Supreme Court of Canada case law, has affirmed this principle on countless occasions, and has recognized only narrow circumstances that could justify piercing the corporate veil between a corporation and its subsidiary. Under the "*alter ego*" doctrine, expressed most notably in the Ontario *Transamerica* decision, it is necessary to demonstrate: (1) complete domination and control by the parent of the subsidiary such that the subsidiary has effectively no independent existence; and (2) conduct akin to fraud in the establishment or use of the corporation.

A major difficulty for the plaintiffs was that the voluminous evidence produced by both Chevron Corporation and Chevron Canada did not and could not establish complete domination and control of Chevron Canada by Chevron Corporation. To the contrary, as Justice Hainey of the Ontario Superior Court of Justice held at first instance, the evidence demonstrated the ordinary indicia of oversight, control and financial accountability expected from a public company in relation to its direct and indirect subsidiaries.

Moreover, there was no evidence whatsoever that the Chevron corporate structure was designed or used as an instrument of fraud. The structure had been in place for decades and predated the Ecuadorian judgment. The plaintiffs also expressly disavowed any allegation of wrongdoing against Chevron Canada. This was fatal to their attempt to rely on the *alter ego* doctrine, as Justice Hainey concluded. As a result, the assets and shares of Chevron Canada were not exigible to satisfy the judgment.

On appeal, both Hourigan J.A. and Huscroft J.A., for the majority of the Ontario Court of Appeal, upheld Justice Hainey's determination. They rejected the argument that separate corporate personality is a "legal fiction", stating instead that it is a "bedrock principle" of corporate law. These judges further confirmed that strong policy reasons underlie this principle, including the reasonable expectation that stakeholders doing business with a corporation need only consider the liabilities of that corporation, and not every other related corporation.

The majority judges affirmed that the *Transamerica* test for piercing the corporate veil will be rigorously applied. They rejected the plaintiffs' argument that the corporate veil can be pierced where it would be just or equitable to do so, that a different test should apply in enforcing a judgment debt, or that a form of group enterprise liability should be recognized in Canada. Although the majority recognized that the corporate law can evolve, the plaintiffs had put forward no principled basis for this to occur. Their action was essentially an attempted "end run" around the findings of the SDNY.

Nordheimer J.A. concurred in the result, but he would have entertained the possibility that, in rare circumstances, the principles of separate corporate personality could be disregarded where it is necessary on equitable grounds to permit a judgment creditor to realize on a judgment that would otherwise go unsatisfied. In such circumstances, he would be prepared to depart from the Transamerica test. However, in light of the SDNY findings that the judgment was obtained by fraud, he concurred in the majority's conclusion that this was not an appropriate case to develop or apply such an exception.

The plaintiffs invoked various policy reasons in order to tempt the Ontario courts to revisit principles of separate corporate personality. However, a key obstacle to the plaintiffs' argument was the mounting evidence and determinations in other forums that the Ecuadorian judgment was the product of a corrupt scheme and was thus incapable of recognition in Canada, in any event.

The findings of the SDNY, as affirmed by the Second Circuit, formed the backdrop to the conclusion by all of the judges of the Ontario Court of Appeal that the separate corporate personality between Chevron Corporation and Chevron Canada could not be disregarded in this case. The Court of Appeal appropriately recognized that "What we are really being invited to do is to assist the appellants in doing an end-run around the United States court order by breaking with well-established jurisprudence and creating an exception to the principle of corporate separateness."

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Moreover, just after the plaintiffs sought leave to appeal to the Supreme Court of Canada from the decision of the Ontario Court of Appeal, a unanimous international arbitral tribunal hearing Chevron Corporation's complaint against Ecuador under the United Stated-Ecuador Bilateral Investment Treaty, released its award in Track II of the arbitral proceeding. The tribunal included a nominee of Ecuador, as well as a nominee of Chevron Corporation. Based on its independent review of the evidence, the tribunal came to the same conclusion as the courts of the United States, finding that the Ecuadorian plaintiffs' team had engaged in "prolonged, malign conduct" that "almost beggars belief in its arrogant contempt for elemental principles of truth and justice". In a telling summary of its findings, the tribunal stated: "[s]hort of a signed confession," the evidence "'must be the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal'".

All of these findings were before the Supreme Court of Canada when it subsequently denied the plaintiffs' application for leave to appeal from the decision of the Ontario Court of Appeal on April 4, 2019. As a result, the plaintiffs could no longer pursue their action against Chevron Canada and they were left with the prospect of pursuing their action to recognize the Ecuadorian judgment in the absence of Canadian assets against which to enforce it.

Chevron Corporation then brought a motion seeking final dismissal of the plaintiffs' action on the basis that it would be an abuse of process for their action to consume Canadian judicial resources in the absence of exigible assets and in light of the overwhelming findings that the judgment was the product of a fraudulent and corrupt scheme. The plaintiffs consented to the dismissal of the action shortly thereafter. (Osler acted for Chevron Corporation.)

It remains to be seen whether Canadian courts will be more receptive to eroding the principle of separate corporate personality on different facts, in the interests of enhanced corporate responsibility and accountability. The Ontario Court of Appeal's reasons in the *Chevron* decision, and the Court's affirmation of the rigorous *Transamerica* test, could make such evolution unlikely, at least in the absence of legislative amendment.

Several other cases before the Canadian courts may provide opportunities to consider these or similar issues in the near term, although one such notable case settled in 2019.

Litigation against *Hudbay Mining* still pending

Hudbay Mining and certain of its subsidiaries continue to be subject to three civil lawsuits arising out of wrongdoing alleged to have been perpetrated on the plaintiffs by Guatemalan security personnel. The Guatemalan plaintiffs allege that personnel working for Hudbay's subsidiaries, allegedly under the control and supervision of Hudbay, committed human rights abuses, including murder and gang-rape.

This litigation relates to incidents allegedly occurring in 2007 and 2009 and has been ongoing for a number of years. It is notable as the first in a series of lawsuits seeking to hold a Canadian parent company accountable for acts of a subsidiary in a foreign jurisdiction.

In 2013, the Ontario Superior Court of Justice dismissed Hudbay's motion to strike the claims of the plaintiffs as having no reasonable chance of success and permitted all three cases to proceed to trial. The plaintiffs advanced certain direct claims against Hudbay, including a claim based on negligent oversight of its subsidiary by Hudbay. This claim, while novel under Canadian law, would not require the separate legal personalities of Hudbay and its subsidiaries to be disregarded.

The plaintiffs' claim that the Guatemalan subsidiary acted as Hudbay's agent was also not struck. As a theoretical matter, a number of authorities have recognized that a finding of agency does not require the separate personalities of parent and subsidiary to be disregarded. Nonetheless, agency is frequently described – including in this case – as a basis for piercing the corporate veil. The 'agency' concept may essentially be a legal fiction in these circumstances. In the motion to strike, the Ontario court held that a finding of agency did not depend on the rigorous *Transamerica* test. The claim was not "patently ridiculous" and could be a basis for liability, if proven at trial.

According to its public disclosure, Hudbay disposed of its Guatemalan interests in 2011, but as of the time of writing, the litigation remains pending in the Ontario court. It will be interesting to see, if it does come to trial and if the Court does find that Hudbay should be liable on the facts, whether the Court will base its findings on the direct claim for negligent oversight, or whether the Court will pierce the corporate veil. While the *Chevron* decision could have an impact on the corporate veil argument, the trial court could agree with the motions judge that the agency theory for piercing the corporate veil (which was not raised in *Chevron*) raises different considerations.

Imposing liability on either of the two bases raised by the plaintiffs could have significant future implications for corporate accountability in Canada.

Nevsun Resources Ltd v. Gize Yebeyo Araya, et al.

The Supreme Court of Canada recently heard an appeal in the *Nevsun* matter. The appeal seeks to resolve several specific issues in an ongoing lawsuit brought by three refugees from Eritrea, who claim they were subjected to forced labour at a mine in Eritrea owned jointly by the state of Eritrea and an indirect subsidiary of Nevsun. The plaintiffs say that Nevsun, through its subsidiary,

was complicit in their cruel, inhumane or degrading treatment as conscripts in Eritrea's National Service Program. They claim Nevsun is liable for private law torts, as well as new causes of action: breach of customary international law prohibitions on slavery, forced labour, torture, and crimes against humanity. Nevsun unsuccessfully moved in the B.C. courts to strike the plaintiffs' customary international law claims.

The only issues raised in the appeal to the Supreme Court were (a) whether the plaintiffs' claims for breach of customary international law should go to trial, and (b) whether the "acts of state" doctrine applies in Canada and if so, whether the plaintiffs' action improperly seeks to penalize Nevsun for the actions of the Eritrean government, i.e., the National Service Program.

At the time of writing, the Supreme Court had not released its reasons in the appeal. The Supreme Court will not address all of the pleaded bases for Nevsun's ultimate liability (including whether to pierce the corporate veil between Nevsun and its indirect Eritrean subsidiary). However, if the plaintiffs' case proceeds to trial, the court will likely have to consider the basis on which a Canadian corporate parent can (or cannot) be held legally accountable for wrongful acts occurring at the level of an indirect subsidiary. The *Chevron* case could be persuasive to a BC court both in its affirmation of the strict *Transamerica* test and in its rejection of group enterprise liability.

Tahoe proceeding

In 2014, seven Guatemalan men commenced a lawsuit against Tahoe Resources Inc., claiming battery and negligence as a result of an incident in which Guatemalan security guards opened fire at a mine site during a peaceful protest. The mine was owned by Tahoe's indirect subsidiary, and the allegations against Tahoe, as indirect parent, were based on its express or implicit authorization of the conduct of the Guatemalan security forces.

In a 2017 decision, the British Columbia Court of Appeal held that the B.C. Courts had jurisdiction over the lawsuit because it would be difficult for the plaintiffs to obtain a fair trial in Guatemala. Leave to appeal to the Supreme Court of Canada from this decision was denied.

Tahoe was acquired by Pan American Silver Corp in early 2019. Four of the plaintiffs had already settled with Tahoe. It was announced in July 2019 that Pan American had settled with the remaining plaintiffs, that the lawsuit had been resolved and that Pan American had apologized, on behalf of Tahoe, to the victims and the community. The terms of such resolution are not publicly available.

As a result of this settlement, the B.C. courts will not have the opportunity to rule on the extent to which a Canadian parent company should be liable in relation to its oversight of foreign subsidiaries. The settlement may, however, demonstrate how such proceedings can create leverage and compel Canadian businesses – or acquirors of those businesses – to propose resolutions that may benefit the foreign claimants.

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As 2020 unfolds, we will be watching these and other cases that seek to challenge principles of separate corporate personality or to advance other novel theories of corporate accountability.

AUTHOR

Jacqueline Code
Partner, Research

jcode@osler.com
416.862.6462