Chevron Canada Tattooed in US $9.51 Billion Environmental Damages Action

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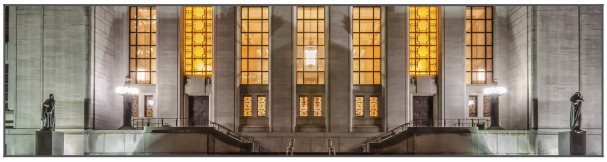

On September 4, 2015, the Supreme Court of Canada released its long-awaited decision in the case of *Chevron Corporation v. Yaiguaje*. The ruling settles the law in Canada in terms of the threshold issue of when Canadian courts can assert jurisdiction to deal with actions brought in Canada to enforce foreign judgments. It leaves a number of other very important issues unanswered, for the time being.

The case involves a law suit against Texaco commenced over twenty years ago in Ecuador by a group of plaintiffs on behalf of some 30,000 Ecuadorian villagers. The Ecuadorian courts awarded the plaintiffs US $17.2 Billion in damages as a result of extensive environmental pollution in their region arising out of oil development activities. This amount was later reduced to US $9.51 Billion.

Texaco since merged with Chevron. The battle between the parties took several twists and turns in the U.S. courts. They are full of allegations of fraud on the part of the plaintiff's lawyer and corruption on the part of the Ecuadorian judge. None of this was brought before the Supreme Court.

What the Supreme Court did have to decide is whether the Ontario courts had the jurisdiction to determine whether the Ecuadorian judgment for environmental damages should be enforced against Chevron Corporation and Chevron Canada Limited (a seventh-tier, indirect subsidiary of Chevron Corporation). The Court decided that the plaintiffs should be allowed to continue their financial claims against both Chevron and Chevron Canada. In the case of Chevron, it had been served with a statement of claim and had recognized the jurisdiction of the Ecuadorian courts and was therefore a proper subject of an enforcement suit in Canada. As for Chevron Canada, it was enough that it has a physical office in Ontario, where it was served, and that it carries on business in the province.

So the lesson from the decision is that corporations with a presence in Canada face the prospect that Canadian courts will entertain court actions brought by judgment creditors from other countries. This is not particularly surprising. What is more interesting are the issues

that the Court found to be unnecessary to address at the time.

Foremost among these issues are the questions of whether the judgment can be enforced against Chevron Canada, a subsidiary of Chevron with no involvement in the wrongdoings alleged by the plaintiffs to have occurred, and whether the plaintiffs can realize on their judgment by taking the shares of or any of the assets of Chevron Canada as payment on the judgment.

In order to assign liability for payment of the judgment to Chevron Canada, the courts would have to find that Chevron Canada somehow participated in or was responsible for the environmental pollution that is the subject of the claim, or, in the alternative, determine that the assets of Chevron Canada are available to the creditors of Chevron Corporation, at least in relation to this judgment.

Since the 1896 House of Lords decision in the case of *Salomon v. A. Salomon & Co. Ltd.*, the courts in common law jurisdictions around the world have recognized the separateness of a corporation and its shareholders. Mr. Salomon had a business that made leather boots. He took in his wife and five children as shareholders, but he held 20,001 of the company's shares with the other shareholders owning one share apiece. He loaned £10,000 to the company and took back security. Business took a turn for the worse and it was put into liquidation by its creditors. Mr. Salomon claimed that he had priority over the remaining cash by virtue of his debenture, leaving nothing for the unsecured creditors. When the liquidator disagreed and said that Mr. Salomon should be personally responsible for the remaining debt, Mr. Salomon sued. The court recognized Mr. Salomon and the corporation as separate legal persons and allowed him to be paid in preference to the unsecured creditors. It held that the creditors had no claim against Mr. Salomon personally because they had dealt with the corporation and not with Mr. Salomon in his personal capacity.

Since that time there have been many attempts to "pierce the corporate veil" in the courts to attempt to make a shareholder responsible for the actions of a corporation. Those attempts have met with very limited success and usually only where the evidence shows that the corporate structure was set up with fraudulent intent or where the corporation/subsidiary relationship is a "sham". This is not something that is easily proved. The circumstances of Chevron Canada are a bit different; here the plaintiffs are looking to make a subsidiary with assets responsible for the obligations of its parent.

In the Chevron case, the plaintiffs will argue that the principles of piercing the corporate veil only apply one way, protecting the shareholder (i.e. parent) from the liabilities of the corporation (i.e. subsidiary). They will say that it is not necessary to prove that the parent/subsidiary relationship is merely a "sham" and that there should be "enterprise liability". They will also claim that the principles of corporate separateness should only be applied to contracts. In a contract, the parties assume liability and take on risk voluntarily. Where claims are based in tort, such as negligence or nuisance, as is the case here, the

plaintiffs suffer from the wrongful act of a third party and do not “come to the party” voluntarily.

Well, for now, the Court has said that establishing the jurisdiction of the Ontario court does not decide whether the plaintiffs will be successful in enforcing their foreign judgment. It only gives them the opportunity to make all of these arguments before the Ontario courts. Chevron and Chevron Canada will be provided with the opportunity to argue against enforcement.

What this means is that the liability of Canadian corporations (or those with a presence in Canada) for the environmental and other liabilities of their parent corporations remains a live issue.

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