The Elephant in the Room:

How 'piercing the corporate veil' led the court astray in Yaiguaje v. Chevron Corporation

By Angela Swan, Aird & Berlis LLP.

The real issues in Yaiguaje v. Chevron Corporation, the claim of the Ecuadorian plaintiffs to enforce an Ecuadorian judgment in their favour now worth some US$12 billion with interest, are in danger of being lost or obscured by a great deal of unhelpful argument.

Notwithstanding what Hainey J. said in Yaiguaje v. Chevron Corporation, 2017 ONSC 135, the decision now on appeal to the Court of Appeal, and what many commentators have said, the case has absolutely nothing to do with "piercing the corporate veil." The corporate veil is only "pierced" when a shareholder is made liable for the debts of the corporation. As the House of Lords held in Salomon v. Salomon & Co. Ltd., [1896] UKHL 1, [1897] A.C. 22, and as all modern corporate law statutes state, a corporation is an entity separate from its shareholders, who are not ordinarily liable for its debts.

The argument of the plaintiffs is, or should be, simple. They have a judgment against Chevron Corporation. Chevron Canada Limited is a wholly-owned, indirect subsidiary of Chevron Corporation. (Another subsidiary, Chevron Canada Finance Limited, was also sued; it is irrelevant to the litigation.) The plaintiffs want to seize the shares of Chevron Canada as property of their judgment debtor. The claim is not more complicated in its essentials than the claim of any judgment creditor to seize the assets of its judgment debtor. No issues of corporate personality are engaged in this argument. Chevron Canada is not being made liable for the debts of its parent; it is simply an asset of its parent, an asset just like a building or a bank account. If the plaintiffs are successful, nothing will happen to Chevron Canada; there will be no judgment against it. It will not have a judgment creditor, it will simply have new shareholders.

The practical problem facing the plaintiffs is that Chevron Canada is a seventh-level indirect subsidiary of Chevron Corporation. The shares of Chevron Canada are not held by Chevron Corporation, but by the sixth-level subsidiary, the actual shareholder of Chevron

Canada. That shareholder does not appear to be subject to Canadian law and, of course, there is no judgment against it. To get at the shares of Chevron Canada, the plaintiffs have to be able to seize the property of its parent. An action against Chevron Corporation won't achieve this goal and I can see no way that an action in Ontario can help.

The argument of the plaintiffs, as reported in the Globe & Mail on Monday, April 16, 2018, that, because Chevron Corporation receives US$25 billion in dividends from its subsidiaries, they are then entitled to enforce the judgment against Chevron Canada, also misstates the issue. The source of Chevron Corporation's dividends is irrelevant, and I am sure that those dividends earned in Canada are not directly paid to it by Chevron Canada. The only question is whether, by an order of garnishment, the plaintiffs can intercept those dividends on their way up the corporate chain. I see no possibility of this remedy being effective from anything that an Ontario court can do. The Ontario courts have no jurisdiction over Chevron Corporation or, I assume, over any of its subsidiaries other than Chevron Canada.

It is obvious that Hainey J. simply misunderstood the nature of the plaintiffs' claim and the relation of Chevron Canada to Chevron Corporation. He said, for example:

[36] Chevron Canada is not an asset of Chevron. It is a separate legal person. It is not an asset of any other person including its own parent, CCCC. The Supreme Court of Canada confirmed this in BCE Inc. v. 1976 Debentureholders, where the court stated, "While the corporation is ongoing, shares confer no right to its underlying assets."

[37] The Execution Act, which is a procedural statute, does not create any rights in property but merely provides for the seizure and sale of property in which a judgment-debtor already has a right or interest. It does not establish a cause of action against Chevron Canada. Chevron Canada is not the judgment-debtor under the Ecuadorian judgment and, therefore, the Execution Act does not apply to it with respect to that judgment. The Execution Act does not give Chevron any right or interest, equitable or otherwise, in the shares or assets of Chevron Canada.

The plaintiffs cannot argue that Chevron Canada is a judgment debtor, only that its shares, not its assets, are an exigible asset of Chevron Corporation. It is this simple point that the judge did not understand. The first sentence of para. 36 is simply wrong; the separate legal personalities of Chevron Canada and Chevron Corporation can be admitted, but are irrelevant.

If the Court of Appeal does nothing else, we have to hope that it will state the law on corporations accurately; that law is too important to be so badly misstated as it has been. Chevron Canada is an asset of Chevron Corporation, just one that is beyond the reach of Ontario law.

The tragedy of the litigation is that it still faces huge difficulties. Even if a Canadian court says that the plaintiffs are entitled to claim the shares of Chevron Canada, the Ecuadorian judgment has to survive another attack. A foreign judgment will only be enforced in Canada if it was not given in violation of the rules of natural justice or as a result of fraud. These rules require the defendant to have had an opportunity to make an effective defence and that the judge not be corrupt. Actions in the United States Federal Court, Chevron Corporation v. Donziger, 768 F. Supp. 2d 581 (2011), and on appeal, 2016 WL 4173988 (2d Cir. Aug. 8, 2016), have held that the Ecuadorian judgment was obtained by fraud, both on the evidence put before the court and in the drafting of the original judgment. The story told in these reasons is extraordinary. (The United States Supreme Court on June 19, 2017, rejected Donziger's attempt to appeal.) The litigation and arguments are canvassed in a case comment in the Harvard Law Review[1]. The conclusion that the Ecuadorian judgment was tainted by fraud has been challenged, see here[2], here[3] and here[4], and on the basis that, inter alia, the evidence relied on by the district court was itself fraudulent. It is possible that these arguments will be successful in Canada, though the costs of the litigation necessary to get to this point will be enormous. Chevron Corporation has said, "We're going to fight this until hell freezes over. And then we'll fight it out on the ice." The tragedy is that the very real harm done to the Ecuadorian plaintiffs may in the end be uncompensated, in part at least because of the misdirected zeal of those who sought to help them.

1. December 9, 2016 130 Harv. L. Rev. 745.

2. Key Documents & Court Filings from Aguinda Legal Team, Amazon Defence Coalition, April – July 2011.

3. Chevron Hurting Again As Shareholders Show Renewed Anxiety Over $12B Ecuador Pollution Judgment, The Chevron Pit, Posted on Monday, March 26, 2018.

4. Fighting Chevron in Ecuador, Linda Ofrias, November 3, 2017, NACLA Report on the Americas.