NO EASY WAY AROUND SEPARATE CORPORATE PERSONALITY: ONTARIO COURT RELEASES ITS DECISION IN *YAIGUAJE V. CHEVRON*

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The Ontario Superior Court of Justice released its decision last week on a motion for summary judgment in the epic legal battle in *Yaiguaje v. Chevron*.[1] The plaintiffs hold a judgment of an Ecuadorean court against Chevron Corporation for US$9.5 billion for alleged environmental liabilities in Ecuador. The Ecuadorean judgment has been mired in allegations of fraud and bribery, which have so far prevented the plaintiffs from enforcing it in the United States. As a result, the plaintiffs sought to enforce their judgment against the shares and assets of Chevron Canada Limited, which is a seventh level subsidiary of Chevron Corporation and has no connection to the action in Ecuador.

Although the Canadian proceedings are only the most recent installment of Chevron's Ecuadorian saga, they already have a long procedural history. Chevron's jurisdictional objections led to a decision of the Supreme Court of Canada in 2015, which confirmed that parties holding foreign judgments do not need to establish a connection to Ontario in order to have their judgments recognized and enforced in the province.

In its latest decision, the Ontario Superior Court granted summary judgment in favour of Chevron Canada Limited. The Court upheld the separate legal personality of parent and subsidiary corporations and declined to 'pierce the corporate veil' to allow the plaintiffs to seize the Canadian subsidiary's assets in order to satisfy their judgment against the parent company.

The Court rejected the plaintiffs' argument that a corporate relationship gives the parent company a beneficial interest in the assets of its subsidiary that can be seized under the *Execution Act*. The Court held that this is only a procedural statute and does not convey property rights that do not otherwise exist. The judge concluded that "a parent corporation does not beneficially own the property of its wholly-owned direct subsidiary, let alone an indirect subsidiary such as Chevron Canada." He observed that subsidiaries, both domestic and foreign, would always and automatically be subject to execution to satisfy judgments against their parents if that were the case.

The plaintiffs also asked that the Court 'pierce the corporate' veil, which would allow the Court to disregard the

separate legal personality of the parent and subsidiary. They led evidence that the parent exercised 'complete control' over the subsidiary, including the fact that the parent made consolidated tax filings in the United States for all of its subsidiaries, the parent company and the intermediary corporations did not carry on business, and that the subsidiary did not have a separate board of directors. In doing so, the plaintiffs relied on previous cases for the proposition that the corporate veil can be pierced where corporate separateness would yield a result that is flagrantly opposed to justice, as well as cases where the veil was pierced because the "true relationship" between parent and subsidiary was "in the nature of an enterprise."

The judge rejected these arguments, noting that the principle of corporate separateness applies equally to members of a group of companies. He also confirmed that the test for piercing the corporate veil involves two distinct and necessary elements: the parent must exercise 'complete control' over the subsidiary, and, there must be conduct akin to fraud that would unjustly deprive the claimants of their rights if separate corporate personalities were upheld. He rejected the suggestion that the veil can be pierced when it is "just and equitable" to do so, as an independent exception to corporate separateness. The plaintiffs had not alleged conduct akin to fraud. The judge also found that the relationship between Chevron Corporation and Chevron Canada was not one of 'complete control', as the subsidiary exercised a great deal of operational independence. Accordingly, the judge declined to pierce the corporate veil.

The *Yaiguaje* decision can be contrasted with the same Court's recent decision in *Belokon v. the Kyrgyz Republic*.[2] In *Belokon*, four separate applicants sought to enforce foreign arbitral awards against the Kyrgyz Republic in Ontario and seize assets in the province that were registered in the name of a company wholly owned by the Republic. The state owned company was the registered owner of shares of an Ontario based mining company. The applicants in *Belokon* did not simply rely on the *Execution Act* or seek to pierce the corporate veil. Rather, they led evidence that the beneficial interest in the shares was transferred to the Republic despite the legal ownership by the state owned company. This included evidence regarding the terms of the transaction by which the shares were transferred to the state owned company and statements by the Republic declaring that it was the direct owner and the company simply held the shares on its behalf. The applicants also argued that some of the shares were subject to a purchase money resulting trust in favour of the Republic, since it paid for the shares without receiving any value in return.

These arguments had prevailed in the Superior Court in an earlier case on similar facts, *Sistem v. Kyrgyz Republic*.[3] However, the *Sistem* decision was set aside on a service issue and re-submitted to be decided jointly with the other applicants in *Belokon*. A second applications judge came to the opposite conclusion and her decision was upheld by the Ontario Court of Appeal. Despite the evidence of the circumstances surrounding the transaction, the courts held that the intention of the parties was to transfer the shares to the state owned company only, such that no beneficial interest would be passed along to the Republic.

While they involved different issues and legal arguments, both the *Yaiguaje* and *Belokon* decisions demonstrate the difficulty of circumventing the doctrine of separate legal personality, which is a cornerstone of corporate law in Canada and elsewhere.

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[1] 2017 ONSC 135
[2] 2016 ONSC 4506; 2016 ONCA 981.
[3] 2014 ONSC 2407, overturned on appeal at 2015 ONCA 447.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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