WeirFoulds LLP

An end to the enforcement saga? *Yaiguaje v. Chevron Corporation* and the Preservation of the Corporate Veil

May 30, 2018

By Megan Mah

In its recent decision in *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, the Court of Appeal clarifies the interpretation of the *Execution Act*, R.S.O., 1990, c. E.24, and reiterates the test for piercing the corporate veil in the context of the enforcement of a judgment. While the decision reinforces the long-standing principle of corporate separateness, it also raises certain questions regarding the role of equity in piercing the corporate veil to enforce a valid judgment.

Background

The decision of the Court of Appeal is the most recent in a long line of decisions surrounding oil operations undertaken in the Oriente region of Ecuador from 1964 to 1992. The appellants are indigenous peoples of Ecuador who were affected by extensive environmental pollution caused by oil exploration and extraction in the region during this time period.

One of the corporations involved in the oil operations was an indirect subsidiary of Texaco Inc., which is now part of Chevron Corporation, a public company with its head office in California. Chevron Corporation's principal business is holding shares in its subsidiary corporations and managing those investments. Chevron Corporation holds 100% of the shares of its direct subsidiary, Chevron Investments Inc.; Chevron Investments Inc., in turn, owns 100% of the shares of its own direct subsidiary; and this ownership structure continues down the corporate line. The Respondent, Chevron Canada Limited ("Chevron Canada"), is a seventh-level subsidiary of Chevron Corporation, and has its head office in Calgary.

The appellants first sought compensation for the environmental pollution by commencing a class action in the United States. Texaco was successful in opposing the class action on jurisdictional grounds. Following an eight-year trial and two appeals in Ecuador, the appellants eventually obtained a $9.5 billion USD judgment against Chevron Corporation in the Ecuadorian courts.

As Chevron Corporation had no assets in Ecuador, the appellants sought to enforce the judgment in the United States. Chevron Corporation successfully opposed the enforcement action on the ground that the Ecuadorian judgment had been obtained by fraud.

The appellants subsequently commenced an action in Ontario, attempting to enforce the Ecuadorian judgment against Chevron Canada.

After Chevron Corporation and Chevron Canada were unsuccessful at challenging enforcement on jurisdictional grounds, the parties agreed to determine by means of a summary judgment motion the issue of whether Chevron Canada's shares and assets were exigible to satisfy the judgment debt of Chevron Corporation. At first instance, Chevron Corporation and Chevron Canada successfully argued that Chevron Canada's assets were not exigible to satisfy the judgment against the parent company. Specifically, Hainey J. rejected the appellants' submission that Chevron Canada's assets were exigible, as Chevron Corporation had an indirect beneficial interest in Chevron Canada through the 100 percent ownership of cascading intermediary subsidiaries.

On appeal, the Court of Appeal addressed several issues raised by the appellants, including the addition of an intermediary subsidiary as a party to the action, the introduction of fresh evidence, and the appropriate measure of a costs award in the context of public interest litigation. However, the decision is most notable for the Court of Appeal's discussion of the Execution Act and the test for piercing the corporate veil.

Interpretation of the *Execution Act*, R.S.O., 1990, c. E.24

The appellants did not allege any wrongdoing against Chevron Canada, but pleaded that because Chevron Corporation wholly owned and controlled Chevron Canada, it beneficially owned Chevron Canada's assets. Therefore, it argued that Chevron Canada's assets were exigible pursuant to s. 18(1) of the *Execution Act*, as they constituted "any legal, equitable or other right… whether direct or indirect" of Chevron Corporation.

C.W. Hourigan J.A., writing for the majority, considered how the *Execution Act* operates, basic principles of corporate law, and the policy implications of the appellants' submissions, and ultimately rejected the appellants' interpretation. Specifically, the Court found that the *Execution Act* is purely a procedural statute, designed to permit only the enforcement of existing rights, and not future contingent rights, such as a right upon wind-up of a corporation. The Court clarified that the only function of the *Execution Act* is to facilitate the collection of judgments, and that it does not purport to grant substantive rights to judgment creditors.

In its analysis of the purpose of the *Execution Act*, the Court reaffirmed the principle of corporate separateness, which holds that corporations are separate entities from their shareholders, capable of carrying on business and incurring debts on their own behalf. The Court also clarified that a corporation's assets are its own and do not belong to related corporations, such as subsidiaries.
The Court specifically addressed the policy implications of granting the relief sought by the appellants, stating that various stakeholders rely on the corporate separateness doctrine. Such stakeholders should have a reasonable expectation that when they do business with a Canadian corporation, they need only consider the liabilities of that corporation, and not the liabilities of a related corporation.
Therefore, the Court held that the appellants' interpretation was not supported by the wording of the *Execution Act* and would violate fundamental principles of corporate law.

Piercing the corporate veil

With respect to the test for piercing the corporate veil, the appellants submitted that the courts have an equitable ability to pierce the corporate veil whenever it appears just. The Court rejected this argument, stating that this submission "ignores more than twenty years of jurisprudence."

Citing the test established by *Sharpe J. in Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.*, (1996), 28 OR (3d) 423 (Gen Div), aff'd (1997) 74 ACWS (3d) 207 (Ont CA), the Court reaffirmed that corporate separateness is the rule, and stated that there are only three circumstances where a court will pierce the corporate veil:

1. When the court is construing a statute, contract or other document;
2. When the court is satisfied that a company is a "mere façade" concealing the true facts; and

3. When it can be established that the company is an authorized agent of its controllers or its members, corporate or human.

With respect to the second set of circumstances, a party must satisfy a court that: (i) there is complete control of the subsidiary, such that the subsidiary is the "mere puppet" of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity.

In applying this test to the circumstances of the case, the Court of Appeal held that the appellants could not bring themselves within the existing two-part test for piercing the corporate veil, as they did not even attempt to address the second part of the test. There was no allegation of wrongdoing on the part of Chevron Canada and no suggestion that it was established or used for fraudulent or improper purposes. To the contrary, the appellants had specifically pleaded that Chevron Canada had not engaged in any inappropriate conduct. Therefore, the Court found that this was a complete bar to the appellants' request to pierce the corporate veil.

Is there still a role for equity to play in piercing the corporate veil?

In his concurring opinion, Nordheimer J.A. agreed with the majority's analysis in respect of the interpretation of the *Execution Act*, but disagreed with respect to the test for piercing the corporate veil. Specifically, Nordheimer J.A. did not agree that it would never be appropriate to lift the corporate veil to permit the enforcement of a judgment, unless the requirements of the *Transamerica* test are met.

While the majority held that there was no conceptual difference between enforcement of a judgment debt and a case of first instance where the issue is establishing liability, Nordheimer J.A. suggested that there may be circumstances where the *Transamerica* test need not be applied in the debt enforcement context. Specifically, Nordheimer J.A. stated that were it not for the findings of the U.S. courts with respect to the fraudulent manner in which the Ecuadorian judgment was alleged to have been obtained, the appellants could fall into a situation where it would be in the interests of third parties to lift the corporate veil.

Although Nordheimer J.A. agreed that in the circumstances of this case, Chevron Canada's assets should not be exigible to satisfy the judgment against Chevron Corporation, his concurring opinion suggests that there still may be a role for equity to play with respect to piercing the corporate veil. While recognizing that the situations where a remedy would be appropriate are likely to be rare and exceptional, Nordheimer J.A. stated that "it would take much stronger language in the jurisprudence, or a clear statutory amendment, to displace or limit the courts' equitable power to pierce the corporate veil in those extraordinary situations where liability has been established but the judgment creditor is nevertheless left without any remedy because of the judgment debtor's internal corporate structure."[1]

The Court's decision to uphold the principle of corporate separateness in this case was likely impacted by the judgment obtained by Chevron Corporation in the United States and the findings that that the Ecuadorian judgment had been obtained by fraud. The Court of Appeal was clearly cognizant of the appellants' litigation strategy and the context in which the request to pierce the corporate veil was being made. As C.W. Hourigan J.A. stated, it was clear that the difficulties the appellants were encountering in collecting the judgment were not related to Chevron Corporation's structuring of its subsidiaries. Rather, he stated that what the Court was "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 that is both ill-defined and will be unnecessary for similarly situated judgment creditors."[2]

Going forward, it is clear that courts must now be rigorous in their application of the *Transamerica* test. However, in light of Nordheimer J.A.'s concurring opinion, and the majority's emphasis on the context of the appellants' request and the findings of fraud by the United States courts, it is unclear whether equity could have a larger role to play in piercing the corporate veil in circumstances where the validity of the judgment is uncontested.

[1] See para 115.
[2] See para 82.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:

Megan Mah

Toronto
416.947.5098

Email:
mmah@weirfoulds.com

Megan Mah has a diverse practice that focuses on human rights, employment, civil litigation, administrative and constitutional law.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035