

Ecuadorians' Efforts to Enforce Their Foreign Judgment in Canada against Chevron Corporation Is Brought to an End by Canada's Highest Court

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On April 4, 2019, the Supreme Court of Canada denied the Ecuadorian plaintiffs leave to appeal from an Ontario Court of Appeal decision. By denying leave, the Supreme Court ended the Ecuadorians' pursuit to enforce, through Chevron Canada Limited, a \$9.5 billion Ecuadorian judgment against Chevron Corporation.¹

The Ontario Court of Appeal held that the Ecuadorians cannot enforce their Ecuadorian foreign judgment against Chevron Canada Limited by:

- 1 relying on Ontario's *Execution Act* to permit execution on Chevron Canada Limited's shares and assets, or
- 2 piercing the corporate veil between Chevron Corporation (a U.S. parent corporation) and Chevron Canada Limited (a seventh level indirect Canadian subsidiary of Chevron Corporation) to make Chevron Canada Limited's shares and assets exigible.²

The *Execution Act* Does Not Create Substantive Rights

The Ecuadorians sought a declaration that Ontario's *Execution Act* allows execution on Chevron Canada Limited's shares and assets to satisfy the Ecuadorian judgment against Chevron Corporation.

The Ontario Court of Appeal held that judgment creditors cannot rely on the *Execution Act* to obtain such a declaration. The Court of Appeal affirmed that the Act is a procedural statute that does not create substantive rights. The Act sets out a framework for the collection of debt through several methods prescribed in the Act.

The Ecuadorians argued that Chevron Corporation has an indirect interest in Chevron Canada Limited. Specifically, the Ecuadorians pointed to instances where Chevron Canada Limited sought approval from Chevron Corporation to undertake certain corporate actions.³

The Court of Appeal rejected this argument.

Relying on *BCE Inc. v. Debentureholders*,⁴ the Court of Appeal held that as shareholders do not have a right to claim a proportionate share of the corporation's assets while the corporation is

¹ 2019 CarswellOnt 5162.

² 2018 ONCA 472 [OCA Decision], released on May 23, 2018.

³ Ibid at para 53.

⁴ 2008 SCC 69.

ongoing, a creditor likewise cannot be entitled to a corporation's assets before the corporation is wound up.

The Ontario Court of Appeal concluded that because Chevron Corporation does not have an existing legal right to Chevron Canada Limited's assets, Chevron Canada Limited's assets are not exigible and available to satisfy a foreign judgment against Chevron Corporation under Ontario's *Execution Act*.

No Independent “Just and Equitable Ground” For Piercing The Corporate Veil

The Ecuadorians argued in the alternative that the Ontario Court of Appeal should pierce the corporate veil between Chevron Canada Limited and Chevron Corporation.⁵ They argued that Courts can pierce the corporate veil where the interests of justice demand or justify piercing.⁶

Citing Ontario Court of Appeal jurisprudence dating back 10 years, the Court rejected the “just and equitable ground” argument. The majority reaffirmed the two-part test for piercing the corporate veil enunciated in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (Transamerica)*:

- (i) the parent corporation had complete control of the subsidiary; and
- (ii) the subsidiary was incorporated for a fraudulent or improper purpose.⁷

The Ecuadorians argued that Chevron Corporation has an indirect beneficial interest in Chevron Canada Limited because Chevron Corporation had complete ownership of shares via intermediary subsidiaries.⁸ However, the Ecuadorians did not address the second part of the test that the Canadian subsidiary was incorporated for a fraudulent or improper purpose.

Two of three Court of Appeal judges did not consider the Ecuadorians' arguments on the first part of the *Transamerica* test because the Ecuadorians had not addressed the second part of the test. The majority also rejected the Ecuadorians' argument that *Transamerica* did not apply in situations where a court is addressing enforcement of a judgment debt.⁹

One of three Ontario Court of Appeal judges dissented about whether the test in *Transamerica* applied at all. Nonetheless, the minority judge agreed with the majority that it would be inappropriate to pierce the corporate veil as between Chevron Canada Limited and Chevron Corporation, relying on the U.S. Courts' finding that the Ecuadorian judgment was obtained by fraud.

⁵ OCA Decision at para 64.

⁶ Ibid at para 64.

⁷ 28 OR (3d) 423 (Gen Div) at pp 433-434.

⁸ OCA Decision at para 33.

⁹ Ibid at para 74.

Long, Winding and Tortured Litigation

The Ecuadorians' litigation originated in the United States in 1993 and was successfully opposed on jurisdictional grounds by Texaco Inc. in 2002. Texaco Inc. agreed that Ecuadorian courts should have jurisdiction over the litigation.

Texaco Inc. was acquired by Chevron Corporation in 2001.

After the corporate merger of Texaco Inc. and Chevron Corporation, the Ecuadorians launched a new lawsuit in Ecuador in 2003. This second lawsuit also asserted claims about contamination from Texaco Inc.'s oil project that ceased in 1992 in the Lago Agrio oil field, located near the City of [Nueva Loja](#) in the Province of [Sucumbíos](#), Ecuador.

In 2013, after an eight-year trial and two appeals, Ecuador's highest court (National Court of Justice) confirmed the lower Ecuadorian court's verdict against Chevron Corporation. The National Court of Justice reduced the damages award from \$18 billion to \$9.5 billion.

International attempts to enforce the Ecuadorian judgment against Chevron Corporation have been unsuccessful beginning with failed enforcement proceedings in the United States. U.S. Courts held that the judgment in Ecuador was obtained through corrupt means and the Ecuadorians were enjoined from subsequently seeking enforcement anywhere in the U.S.

Days after the Supreme Court of Canada refused to hear the Ecuadorians' appeal on April 4, 2019 the Supreme Court of the Netherlands issued yet another enforcement denial against the Ecuadorians.

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