COURT OF APPEAL FOR ONTARIO

CITATION: Yaiguaje v. Chevron Corporation, 2018 ONCA 472
DATE: 20180523
DOCKET: C63309 and C63310

Hourigan, Huscroft and Nordheimer JJ.A.

BETWEEN

Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje, Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje, Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje, Luis Agustin Payaguaje Piaguaje, Emilio Martin Lusitande Yaiguaje, Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar, Carlos Grefa Huatatoca, Catalina Antonia Aguinda Salazar, Lidia Alexandria Aguinda Aguinda, Clide Ramiro Aguinda Aguinda, Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila, Lucio Enrique Grefa Tanguila, Patricio Wilson Aguinda Aguinda, Patricio Alberto Chimbo Yumbo, Segundo Angel Amanta Milan, Francisco Matias Alvarado Yumbo, Olga Gloria Grefa Cerda, Narcisa Aida Tanguila Narvaez, Bertha Antonia Yumbo Tanguila, Gloria Lucrecia Tanguila Grefa, Francisco Victor Tanguila Grefa, Rosa Teresa Chimbo Tanguila, Maria Clelia Reascos Revelo, Heleodoro Pataron Guaraca, Celia Irene Viveros Cusangua, Lorenzo Jose Alvarado Yumbo, Francisco Alvarado Yumbo, Jose Gabriel Revelo Llore, Luisa Delia Tanguila Narvaez, Jose Miguel Ipiales Chicaiza, Hugo Gerardo Camacho Naranjo, Maria Magdalena Rodriguez Barcenes, Elias Roberto Piyahuaje Payahuaje, Lourdes Beatriz Chimbo Tanguila, Octavio Ismael Cordova Huanca, Maria Hortencia Viveros Cusangua, Guillermo Vincente Payaguaje Lusitande, Alfredo Donaldo Payaguaje Payaguaje and Delfin Leonidas Payaguaje Payaguaje

Plaintiffs (Appellants)

and

Chevron Corporation, Chevron Canada Limited and Chevron Canada Finance Limited

Defendants (Respondents)

Alan Lenczner, Brendan Morrison, Kirk Baert and Celeste Poltak, for the appellants (see Schedule I)

Peter Grant, for the appellants (see Schedule II)

Benjamin Zarnett, Suzy Kauffman and Peter Kolla, for the respondent Chevron Canada Limited

Larry P. Lowenstein, Laura K. Fric, Clarke Hunter and Robert Frank, for the respondent Chevron Corporation

Terrence O'Sullivan and Paul Michell, for Chevron Canada Capital Company

Heard: April 17 and 18, 2018

On appeal from the judgments of Justice Glenn A. Hainey of the Superior Court of Justice, dated January 20 and 25, 2017, with reasons reported at 2017 ONSC 135 and 2017 ONSC 604 respectively, and from the costs order dated May 26, 2015.

Hourigan J.A.:

A. OVERVIEW

[1] The appellants are indigenous peoples of the Orienté region of the Republic of Ecuador. During the period from 1964 to 1992, oil exploration and extraction were undertaken on their traditional lands. The result was extensive environmental pollution of the area.

[2] One of the corporations involved in the oil operations was an indirect subsidiary of Texaco Inc. ("Texaco"). The Texaco subsidiary left Ecuador when its oil project was completed, in 1992. Since 2001, Texaco has been part of the global conglomerate Chevron Corporation. Chevron Corporation is a public company with its head office in California. Its principal business is holding shares in its subsidiary corporations and managing those investments. It owns 100 percent of the shares

of its direct subsidiary, Chevron Investments Inc., which was also incorporated in the United States. Chevron Investments Inc. owns 100 percent of the shares of its own direct subsidiary, and so on down the corporate chain.

[3] The appellants first sought compensation for the environmental devastation through a class action in the United States. Texaco opposed that action, not on the merits, but on jurisdictional grounds. It was successful and ultimately the appellants commenced a new action in the Ecuadorian courts. There followed an eight-year trial and two appeals. The eventual result was a $9.5 billion USD judgment against Chevron Corporation.

[4] The difficulty was that Chevron Corporation had no assets in Ecuador. So the appellants took the next logical step of seeking enforcement of their judgment in the United States. In its home jurisdiction, Chevron Corporation opposed the enforcement of the judgment on the ground that it had been obtained by fraud.

[5] The United States District Court for the Southern District of New York (“S.D.N.Y.”) accepted Chevron Corporation’s submission. In a comprehensive judgment, the court detailed a litany of fraudulent behaviour, not by the appellants, but by their counsel in the Ecuadorian proceeding. The court made an order enjoining any enforcement proceedings of the Ecuadorian judgment in the United States. That decision was upheld on appeal.

[6] Having had no success in enforcing their judgment in the United States, the appellants commenced the present action in the Ontario Superior Court of Justice. The enforcement targets this time were the shares and assets of Chevron Canada Limited ("Chevron Canada"), a seventh-level subsidiary of Chevron Corporation, with its head office in Calgary. After a jurisdictional challenge by Chevron Corporation and Chevron Canada that was ultimately rejected by the Supreme Court of Canada, the parties agreed to determine by means of a summary judgment motion the issue of whether Chevron Canada's shares and assets are exigible to satisfy the judgment debt of Chevron Corporation. Chevron Corporation and Chevron Canada were successful on that motion.

[7] On appeal to this court, the appellants advance two primary submissions. First, they argue that the *Execution Act*, R.S.O., 1990, c. E.24 (the "*Act*"), permits execution on Chevron Canada's shares and assets to satisfy the Ecuadorian judgment. Second, and in the alternative, they submit that this court should pierce the corporate veil in order to render Chevron Canada's shares and assets exigible.

[8] This is a tragic case. There can be no denying that, through no fault of their own, the appellants have suffered lasting damages to their lands, their health, and their way of life. Their frustration in obtaining justice is understandable. Notwithstanding those legitimate concerns, our courts must decide cases in a manner that is consistent with the common law as developed in our jurisprudence and the statutes enacted by our democratically elected legislatures.

[9] The legal arguments advanced by the appellants cannot succeed. They urge upon us an interpretation of the *Act* that finds no support in the wording of the legislation or its jurisprudence. If this court endorsed this interpretation it would result in significant changes to fundamental principles of our corporate law and the law of execution. It would also create new substantive rights arising from what is supposed to be a purely procedural statute.

[10] Nor can the appellants' alternative argument, that this court should ignore the corporate separateness of Chevron Corporation and Chevron Canada, succeed. They submit that our courts have an equitable ability to pierce the corporate veil whenever it appears just. That is not the law in this province. Indeed, this submission ignores more than twenty years of jurisprudence. The appellants cannot bring themselves within the existing two-part test for piercing the corporate veil, as they do not even attempt to address the second part of the test. Moreover, they proffer no principled basis for piercing the corporate veil other than the assertion that we should do so in the interests of justice.

[11] What is really driving the appellants' appearance in our courts is their inability to enforce their judgment in the United States. This is not a case where a judgment debtor does not have sufficient assets available to pay the judgment debt. In the ordinary course, enforcement of a judgment against a parent corporation judgment debtor, including against its shares held in subsidiaries, is a routine matter. It is only because of the court order in the United States that

enforcement measures are not being pursued there, and that the appellants are asking us to radically alter our law.

[12] In the result, I would dismiss the appeals from the motion judge's orders, save for his costs award. I would grant leave to appeal the costs order and reduce the amounts awarded in accordance with these reasons.

B. HISTORY OF PROCEEDINGS

[13] The dispute among the parties has a long and complex history. The following summary provides sufficient context to consider the issues raised on these appeals. As numerous relevant events occurred in overlapping timeframes, my review of the proceedings will not be strictly chronological.

(1) TexPet drills in Ecuador and the plaintiffs bring the initial U.S. action

[14] In 1964, the Republic of Ecuador granted TexPet, an indirect subsidiary of Texaco, as well as another oil company, a concession to explore for and extract oil from the Orienté region of Ecuador. In 1973, Ecuador's state-owned oil company, PetroEcuador, joined the consortium and soon thereafter became its majority owner. In 1992, when TexPet's concession came to an end, TexPet began winding down its operations.

[15] In 1993, a group of Ecuadorian plaintiffs, the current appellants, brought a class action against Texaco in New York. Among the appellants' counsel was American lawyer Steven Donziger. The S.D.N.Y. eventually dismissed this action

on the basis of *forum non conveniens* and international comity: *Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534 (S.D.N.Y. 2001). The United States Court of Appeals for the Second Circuit ("2nd circ.") upheld the dismissal, in part because Texaco agreed to commit to the jurisdiction of the Ecuadorian courts: *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

(2) The appellants obtain judgment against Chevron Corporation in Ecuador

[16] In 2001, Texaco merged with Chevron Corporation. In 2003, the appellants brought an action against Chevron Corporation in Ecuador both in their names and on behalf of some 30,000 Ecuadorian indigenous villagers from the Orienté region. Mr. Donziger was again among the appellants' lawyers. The appellants sought damages and remediation for the environmental harm that TexPet's oil operations allegedly caused.

[17] After lengthy proceedings, Judge Zambrano of the Provincial Court of Justice of Sucumbíos entered a judgment against Chevron Corporation for approximately $17 billion. That amount included about $8.6 billion in punitive damages to be paid unless Chevron Corporation issued a public apology within 15 days of the judgment. Chevron Corporation did not apologize. The Appellate Division of the Provincial Court upheld the judgment. In 2013, the National Court of Justice, Ecuador's highest court, reduced the award to $9.5 billion, as

Ecuadorian law did not contemplate awarding punitive damages where a tortfeaser failed to publicly apologize.

(3) Chevron files an action in New York, contending that the Ecuadorian judgment was obtained by fraud

[18] On February 1, 2011, Chevron filed an action in New York against the appellants[1], Mr. Donziger, and other individuals and entities involved with his legal team, seeking damages and a global injunction against the enforcement of Ecuadorian judgment. Chevron Corporation alleged that Mr. Donziger and his legal team obtained the Ecuadorian judgment fraudulently by, among other things, submitting false evidence, ghostwriting the judgment, and bribing Judge Zambrano to sign it.

[19] In March of that year, Judge Kaplan of the S.D.N.Y. granted preliminary relief in the form of a global injunction with respect to the enforcement of the Ecuadorian judgment: *Chevron Corp. v. Donziger*, 768 F.Supp.2d 581 (S.D.N.Y. 2011). In 2012, however, the 2nd circ. overturned the injunction and held that the appellants could seek to enforce the Ecuadorian judgment in any country where Chevron Corporation had assets: *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

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[1] Two of the appellants answered and defended the action, Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje. A certificate of default was entered against the rest of the appellants.

(i) Judge Kaplan rules that the Ecuadorian judgment was obtained by fraud

[20] The action proceeded to a full bench trial in the S.D.N.Y. before Judge Kaplan. By that time, five causes of action remained, including the allegation that Mr. Donziger and his team engaged in fraud and civil conspiracy. In addition, Chevron had waived all claims for damages and sought only equitable relief. On March 4, 2014, Judge Kaplan released a lengthy decision with extensive and detailed factual findings: *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014). He ultimately found that Mr. Donziger and his team corrupted the Ecuadorian proceedings. He summarized his findings at the outset of his decision, at p. 384:

> They coerced one judge, first to use a court-appointed, supposedly impartial, "global expert" to make an overall damages assessment and, then, to appoint to that important role a man whom Donziger hand-picked and paid to "totally play ball" with the [appellants]. They then paid a Colorado consulting firm secretly to write all or most of the global expert's report, falsely presented the report as the work of the court-appointed and supposedly impartial expert, and told half-truths or worse to U.S. courts in attempts to prevent exposure of that and other wrongdoing. Ultimately, the [appellants'] team wrote the [Ecuadorian] court's Judgment themselves and promised $500,000 to the Ecuadorian judge to rule in their favor and sign their judgment.

[21] Judge Kaplan held that Chevron Corporation was entitled to equitable relief as the record established both corruption and coercion of judges: p. 558. Even

absent the bribery, ghostwriting the judgment and misrepresenting the nature of the expert report constituted fraud: pp. 560-66. Judge Kaplan imposed a constructive trust for Chevron Corporation's benefit on Mr. Donziger's contractual and other rights to fees and payments and issued injunctive relief to ensure that Mr. Donziger will never benefit in any material way from the Ecuadorian judgment. He also ordered Mr. Donziger and the other defendants in that action to pay over and assign to Chevron Corporation all fees and other payments and benefits that they had received or will receive as a result of the Ecuadorian judgment: pp. 639-41. Finally, Judge Kaplan enjoined the defendants in that action from initiating any enforcement proceedings of the Ecuadorian judgment in the United States: pp. 641-44.

(ii) Judge Kaplan's decision is upheld on appeal

[22] The 2nd circ. upheld Judge Kaplan's decision in 2016: *Chevron Corporation v. Donziger*, 833 F.3d 74 (2d Cir. 2016). In 2017, the Supreme Court of the United States denied the petition for writ of *certiorari*: *Donziger v. Chevron Corp.*, 137 S.Ct. 2268.

(4) The appellants commence proceedings in Ontario

[23] In 2012, the appellants commenced an action in the Ontario Superior Court of Justice for the recognition and enforcement of the Ecuadorian judgment. The action was originally commenced against Chevron Corporation, Chevron Canada,

and Chevron Canada Finance Limited. It was discontinued against the last corporation.

[24] In their Amended Statement of Claim, the appellants sought against Chevron Canada, *inter alia*, the Canadian equivalent of approximately $18.2 billion US resulting from the Ecuadorian judgment (later reduced to reflect the National Court of Justice's ruling); a declaration that Chevron Canada's shares and assets are exigible to satisfy the Ecuadorian judgment if enforced in Ontario; and the appointment of an equitable receiver over Chevron Canada's shares and assets.

(i) The proceedings involving jurisdiction

[25] In response to the Amended Statement of Claim, Chevron Corporation and Chevron Canada brought motions seeking a declaration that the Ontario court had no jurisdiction to hear the action. Brown J., then of the Superior Court of Justice, heard the motions: *Yaiguaje v. Chevron Corporation*, 2013 ONSC 2527, 361 D.L.R. (4th) 489. He concluded that the Ontario court had jurisdiction to recognize and enforce the Ecuadorian judgment. However, he also found that this was an appropriate case in which to exercise the court's power to stay the proceedings pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[26] Among his reasons for the stay was his finding that there was no basis for asserting that Chevron Canada's assets were Chevron Corporation's assets for the purposes of satisfying the Ecuadorian judgment. Nor was there a legal basis

for piercing Chevron Canada's corporate veil. He thus concluded that there was "nothing in Ontario to fight over", and no reason to allow the claim to proceed: para. 111.

[27] The appellants appealed the stay, and Chevron Corporation and Chevron Canada cross-appealed the jurisdictional ruling. This court affirmed that the Ontario court had jurisdiction, but reversed the imposition of the stay: *Yaiguaje v. Chevron Corporation*, 2013 ONCA 758, 118 O.R. (3d) 1. This court noted that the only issue at that juncture of the proceedings was jurisdiction; issues concerning Chevron Canada's corporate veil could be properly addressed in later proceedings: para. 39.

[28] The matter reached the Supreme Court of Canada, which confirmed that the Ontario court had jurisdiction: *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69. Gascon J., writing for the court, was careful to indicate that his reasons "should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron [Corporation] and Chevron Canada" and that the court took "no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment" (para. 95). As jurisdiction was the only issue in these proceedings, Gascon J. noted that Brown J.'s findings concerning the separate corporate personalities of Chevron Corporation and Chevron Canada were not entitled to deference.

(5) The judgments under appeal

[29] Following the Supreme Court of Canada's decision on jurisdiction, Chevron Corporation and Chevron Canada filed Statements of Defence in the action. Chevron Corporation's defences included that the Ecuadorian judgment could not be recognized or enforced in Ontario because, as Judge Kaplan found in 2014, it was obtained by fraudulent means. The appellants moved to strike Chevron Corporation's defences. Hainey J. granted that motion in part, striking certain paragraphs that he found contained impermissible defences. That portion of Hainey J.'s ruling is not at issue on this appeal.[2]

(i) Justice Hainey dismisses the appellants' claim against Chevron Canada

[30] The appellants did not allege any wrongdoing against Chevron Canada, nor did they allege that the corporate structure of which Chevron Canada is a part was designed or used as an instrument of fraud or wrongdoing. They pleaded that Chevron Corporation wholly owned and controlled Chevron Canada, and beneficially owned Chevron Canada's assets. As such, Chevron Canada's assets were exigible pursuant to s. 18(1) of the *Act*, since they represented "any legal, equitable or other right…whether direct or indirect" of Chevron Corporation.

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[2] Leave to appeal this part of Hainey J.'s ruling to the Divisional Court was denied: *Yaiguaje v. Chevron Corporation*, 2017 ONSC 2251, 278 A.C.W.S. (3d) 229.

[31] Chevron Corporation and Chevron Canada each moved for summary dismissal with respect to the appellants' claim against Chevron Canada. They submitted that Chevron Canada's shares and assets were not exigible pursuant to the *Act*, and that there was no basis to pierce the corporate veils between Chevron Canada and its indirect parent Chevron Corporation so that Chevron Canada's shares and assets could be available to satisfy the Ecuadorian judgment.

[32] Hainey J. heard the motions for summary judgment: *Yaiguaje v. Chevron Corporation*, 2017 ONSC 135, 136 O.R. (3d) 261. He articulated the issues to be decided upon the motions as follows, at para. 23:

> (1) Are the shares and assets of Chevron Canada exigible and available for execution and seizure pursuant to the *Execution Act* to satisfy the Ecuadorian judgment against Chevron?
>
> (2) If they are not, should Chevron Canada's corporate veil be pierced so that its shares and assets are available to satisfy the Ecuadorian judgment against its indirect parent, Chevron?

Hainey J. answered both questions in the negative and dismissed the appellants' claim against Chevron Canada.

[33] The appellants' principal submission before Hainey J., as it is on appeal, was that Chevron Canada is an asset of Chevron Corporation that is exigible and available for execution and seizure. They argued that the broad wording of the *Act* permits the sheriff to seize any property in which a judgment debtor has a direct or indirect legal or beneficial interest. According to the appellants, Chevron

Corporation has an indirect beneficial interest in Chevron Canada because Chevron Corporation is "the sole owner of the shares of Chevron Canada…through the 100 [percent] ownership of cascading intermediary subsidiaries which carry on no business."

[34] Hainey J. rejected this submission. He noted that Chevron Corporation does not own the shares of Chevron Canada. Rather, all of Chevron Canada's shares are owned by its direct parent, Chevron Canada Capital Company ("CCCC"). Hainey J. held that Chevron Canada was not an asset of Chevron Corporation, or indeed any other person or corporation, including CCCC. He further found that the *Act* is a procedural statute that "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". On a plain reading of the *Act*, nothing in it "override[s] or supplant[s] the long-established principle of corporate separateness." As such, the *Act* did not give Chevron Corporation any right or interest in the shares or assets of Chevron Canada: paras. 37, 47. Absent a finding that Chevron Canada's corporate veil should be pierced, Chevron Canada's shares and assets were not exigible to satisfy the Ecuadorian judgment.

[35] Hainey J. also rejected the appellants' submission that the principle of corporate separateness should not apply in this case. He held that the principle "has been recognized and respected since the 1896 decision of the House of Lords in *Salomon v. Salomon & Co*" (para. 58, citing [1897] A.C. 22 (H.L. (Eng.)). Further,

he found that the principle applies equally to groups of companies, like Chevron Corporation's group of companies of which Chevron Canada is a part.

[36] Because the principle of corporate separateness applied to Chevron Corporation and Chevron Canada, Hainey J. held that the appellants had to meet the test for piercing Chevron Canada's corporate veil, established in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, (1996), 28 O.R. (3d) 423 (Gen. Div.), affirmed: (1997) 74 A.C.W.S. (3d) 207 (Ont. C.A.). That case held, at pp. 433-34, that "courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct." The appellants did not allege that the corporate structure of which Chevron Canada is a part was designed or used as an instrument of fraud or wrongdoing. This was fatal to their claim: para. 65.

[37] Hainey J. also held that the appellants failed to establish that Chevron Corporation had "total effective control" over Chevron Canada to meet the first part of the *Transamerica test*. That test requires more than ownership, but "complete domination of the subsidiary corporation" such that the subsidiary does not function independently or is a "puppet" of the parent: paras. 69, 72.

[38] Finally, Hainey J. rejected the appellants' argument that corporate separateness should not be applied where it will yield a result "too flagrantly opposed to justice." In his view, the jurisprudence established that courts do not

have a *carte blanche* to pierce the corporate veil where it appears just to do so, absent fraudulent or improper conduct: paras. 66-68.

(ii) The motion to add CCCC as a party

[39] Over a month after arguments concluded on the summary judgment motions, the appellants brought a motion to further amend their Amended Statement of Claim to add CCCC as a defendant. Hainey J. dismissed this motion: *Yaiguaje v. Chevron Corporation*, 2017 ONSC 604, 275 A.C.W.S. (3d) 729. He held that, because the appellants sought the same relief against CCCC as they did against Chevron Canada, their claim against CCCC could not succeed for the same reasons that it could not against Chevron Canada. Hainey J. further held that the appellants did not establish that the courts of Ontario would have jurisdiction over CCCC, a company incorporated in Nova Scotia with no assets or operations in Ontario.

(iii) The costs order

[40] Hainey J. awarded costs on a partial indemnity basis in the amounts of $533,001.81 to Chevron Canada and $313,283 to Chevron Corporation: *Yaiguaje v. Chevron Corporation*, 2017 ONSC 3217 (unreported: (26 May 2017), Toronto CV-12-9808-00CL).

[41] Hainey J. noted that the “ordinary rule is that a successful party receives its costs on a partial indemnity scale.” Given the high stakes of the litigation, the

various theories the appellants advanced, and the appellants' numerous requests for additional discovery and cross-examination, it was reasonable for the appellants to expect Chevron Corporation and Chevron Canada to expend significant resources to defend the claims.

[42] Hainey J. rejected the appellants' submissions that he should award no or only nominal costs because the appellants' action raised novel points of law that were in the public interest. He adopted Chevron Canada's submissions that this would "detract from the finding that there was no legal basis to involve Chevron Canada in this high stakes litigation." He also rejected that the appellants' claim against Chevron Canada was analogous to a class proceeding to which s. 31(1) of the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6 applied. In any event, the appellants' claim was not a test case, did not raise a novel point of law, and was not in the public interest.

[43] As the appellants were partially successful on their motion to strike Chevron Corporation's defences, Hainey J. reduced Chevron Corporation's claim for costs by $50,000.

(6) Proceedings for security for costs in this court

[44] When the appellants appealed to this court from Hainey J.'s orders, Chevron Corporation and Chevron Canada sought an order for security for costs totalling over $1 million. The motion judge concluded that the appellants had demonstrated

neither impecuniosity, nor that third party litigation funding was unavailable. Nor had they demonstrated that their appeal had a strong chance of success. Thus, the motion judge ordered security for costs in the amount of $591,335.14 for Chevron Canada, and $351,616.33 for Chevron Corporation: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741, 137 O.R. (3d) 729.

[45] A three-judge panel of this court set aside the motion judge's ruling: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1. The panel held that, in deciding motions for security for costs, "judges are obliged to first consider the specific provisions of the Rules governing those motions and then effectively to take a step back and consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront" (para. 22). As the motion judge failed to undertake the second part of this analysis, it fell to the panel to evaluate the justness of the order.

[46] The panel concluded that, in the unique circumstances of this litigation, the interests of justice required that no order for security for costs be made. While the appellants' legal arguments were "innovative and untested", this did not foreclose the possibility that one or more of them may eventually prevail. It could not be said at that stage that the case was wholly devoid of merit. Moreover, given the nearly 25-year history of this litigation, the panel found it "difficult to accept that the motion for security for costs was anything more than a measure intended to bring an end to the litigation" (para. 26).

C. ISSUES

[47] These appeals raise the following issues:

(1) Did Hainey J. err in his interpretation of the *Act*, such that Chevron Canada's shares and assets are exigible to satisfy the judgment debt of Chevron Corporation?

(2) Did Hainey J. err in failing to pierce the corporate veil?

(3) Did Hainey J. err in dismissing the motion to add CCCC as a party?

(4) Should the appellants' motion to tender fresh evidence on appeal be granted?

(5) Should leave to appeal the costs order be granted and, if so, should this court interfere with the costs order?

D. ANALYSIS

(1) The *Execution Act*

[48] At the outset, it is necessary to address the appellants' submission to the effect that, because this case involves the enforcement of a foreign judgment, this court must, for reasons of comity, interpret the *Act* in an especially expansive manner to facilitate the collection of the debt.

[49] A foreign judgment is evidence of a debt. Absent the establishment of one of the limited defences available to a judgment debtor, an enforcing court in Canada need only be satisfied that it was issued by a court of competent

jurisdiction, that it is final, and that the amount of the judgment is correct. Thus satisfied, “the enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms”: *Pro Swing Inc. v. ETLA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 111. See also *Chevron* (SCC), at para. 46.

[50] Critically, enforcement of a foreign judgment is done in accordance with domestic law regarding the enforcement of domestic judgments. It would hardly be equitable to have one set of enforcement rules for domestic judgments and a second, far more expansive set of rules for foreign judgments. So the task for this court is to determine whether Hainey J. erred in his application of domestic debtor-creditor law in finding that under the *Act*, the shares and assets of Chevron Canada are not exigible to satisfy Chevron Corporation’s debt.

[51] I must also address at the outset one of the appellants’ requests because it is a legal impossibility. They seek a declaration against Chevron Canada that the shares of its company are exigible. Such an order cannot be made. A corporation’s shares do not belong to the corporation, but to the shareholders: *Chevron* (SCC), at para. 95. In fact, under s. 30(1) of the *Canada Business Corporation Act,* R.S.C. 1985, c. C-44 (the “*CBCA*”), corporations are prohibited from owning their own shares.

[52] Turning to what the *Act* does permit, a judgment creditor is granted extensive rights to collect on a judgment debt. The relevant sections of the *Act* for present purposes are as follows:

> 14(1) The interest of an execution debtor in a security or security entitlement may be seized by the sheriff in accordance with sections 47 to 51 of the *Securities Transfer Act, 2006*.
>
> …
>
> (3) Every seizure and sale made by the sheriff shall include all dividends, distributions, interest and other rights to payment in respect of the security, if issued by an issuer incorporated or otherwise organized under Ontario law, or in respect of the security entitlement and, after the seizure becomes effective, the issuer or securities intermediary shall not pay the dividends, distributions or interest or give effect to other rights to payment to or on behalf of anyone except the sheriff or a person who acquires or takes the security or security entitlement from the sheriff.
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> ***
>
> 18(1) The sheriff may seize and sell any equitable or other right, property, interest or equity of redemption in or in respect of any goods, chattels or personal property, including leasehold interests in any land of the execution debtor, and, except where the sale is under an execution against goods issued out of the Small Claims Court, the sale conveys whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods, chattels or personal property at the time of the delivery of the execution to the sheriff for execution, and, where the sale is under an execution against goods issued out of the Small Claims Court, the sale conveys whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods, chattels or personal property at the time of the seizure.

[53] The appellants rely on s. 18(1) to argue that it permits the seizure of any interest and further submit that Chevron Corporation has an “indirect interest” in

Chevron Canada. In oral argument, Mr. Lenczner undertook a detailed review of various internal documents produced by Chevron Corporation and Chevron Canada, wherein Chevron Canada sought approval from Chevron Corporation to undertake certain corporate actions, such as investment in oil exploration projects. The point of this exercise, he said, was to demonstrate the extent of Chevron Corporation's interest in Chevron Canada. This submission reflects a fundamental misunderstanding of the *Act*.

[54] It is common ground that the *Act* is procedural only and does not purport to grant substantive rights to judgment creditors. Its only function is to facilitate the collection of judgments through the various methods provided therein to enforce the judgment debtor's existing rights. The sheriff effectively steps into the judgment debtor's shoes and enforces his or her rights for the benefit of the judgment creditor.

[55] The difficulty in the present case is that Chevron Corporation has no existing rights as against the assets of Chevron Canada. It is not enough to state that Chevron Corporation has an amorphous indirect right to the assets of Chevron Canada; there must be an existing legal right that permits seizure of the assets. To understand why Chevron Corporation does not hold such a right, it is necessary to consider how the *Act* operates in practice, basic principles of corporate law, and the policy implications of the appellants' submission.

[56] I start with a review of how the *Act* operates. If a judgment debtor is a corporation with money in the bank, the sheriff may seize that money. If it owns equipment, the sheriff may seize that equipment and sell it. Shares that a judgment debtor owns are also exigible and may be seized and sold by the sheriff. But the assets of the issuing corporation are not exigible: Kevin P. McGuinness, *Canadian Business Corporations Law*, 3rd ed., vol. 1 (Markham: LexisNexis Canada, 2017) at para. 6.71. So, for example, if a judgment debtor owns 10,000 shares of Corporation A, the sheriff may seize and sell those shares. However, the sheriff cannot attempt to execute the judgment at the corporate offices of Corporation A by seizing assets owned by Corporation A. To do so would be to violate fundamental principles of corporate law.

[57] It is important to understand the distinction between corporations and their shareholders. Pursuant to s. 15(1) of the *CBCA*, Parliament has made a clear policy choice that corporations have “the rights, powers and privileges of a natural person.” This is not, as the appellants suggest, a mere legal fiction. It is a bedrock principle of our corporate law. Consistent with the law established in *Salomon*, Parliament has entrenched in our law the notion of corporate separateness. That means that corporations are separate entities from their shareholders, capable of carrying on business and incurring debts on their own behalf. Thus, if a judgment debtor is a parent corporation, it and not its shareholders or subsidiaries, is

responsible for the debts it incurs. It also means that a corporation's assets are its own and do not belong to related corporations.

[58] A shareholder of a corporation does not have a right to claim a proportionate share of the corporation's assets while it is ongoing. That right only arises if and when the corporation is wound up: *BCE Inc. v. Debentureholders,* 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 34. This makes logical sense because the corporation is deemed to be a natural person. While it is extant, it holds its assets. When it ceases to exist, the assets are distributed to the shareholders, subject to claims from creditors and others, because there is at that point no existing entity capable of holding the assets.

[59] If we accept the appellants' submission, a judgment creditor would have greater rights to the issuing corporation's assets than a judgment debtor shareholder because access would occur while the corporation is ongoing. This enforcement of future contingent rights is also contrary to the wording of s. 18(1) of the *Act*. It does not purport to enforce future rights, such as a right upon wind-up. It allows only for the enforcement of rights as "at the time of the delivery of the execution to the sheriff for execution."

[60] In the case at bar, granting the rights sought would be even more extraordinary because it would ignore the corporate separateness of the various subsidiaries in between Chevron Corporation and Chevron Canada. The

appellants would have this court proceed on the basis that Chevron Canada's shares are directly owned by Chevron Corporation. They are not. CCCC owns those shares, and it is not a party to this action. Another corporation owns CCCC's shares and so it goes up the corporate chain. We are being asked to ignore the legal reality of the way Chevron Corporation structured its subsidiary corporations. Clearly we are being asked to pierce the corporate veil, notwithstanding appellant counsel's assertion, made in reply, that we are not.

[61] The appellants' proposed interpretation of the *Act* would also have a significant policy impact on how corporations carry on business in Canada. Corporations have stakeholders. Creditors, shareholders, and employees, among others, rely on the corporate separateness doctrine that is long-established in our jurisprudence and that is a deliberate policy choice made in the *CBCA*. Those stakeholders 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 some related corporation.

[62] Finally, it is necessary to address the appellants' policy submission that it is unconscionable that a parent corporation can incorporate a number of wholly-owned subsidiaries and secrete valuable assets away from judgment creditors. That submission is not consistent with how the *Act* operates. Let us assume for the moment that Chevron Corporation held in Canada 100 percent of the shares of a subsidiary corporation. Those shares could be seized and sold. If that

subsidiary had substantial assets, the sale price of the shares would reflect the value of the underlying assets. Even if the assets were held by a distant subsidiary protected by a series of 100-percent-owned subsidiaries, the sale price of the shares in the first subsidiary would reflect the underlying value of the ultimate assets. Therefore, there would be no need for the sheriff to seize and sell the assets of the first subsidiary corporation because he or she would achieve the same result, without violating the principle of corporate separateness, by selling its shares. In either case the judgment debtor would obtain the value of the underlying assets.

[63] In summary, I am not persuaded that Hainey J. erred in rejecting the appellants' submission that under the *Act*, Chevron Canada's shares and assets are exigible to satisfy the Ecuadorian judgment. The appellants' interpretation is not supported by the wording of the *Act* and would violate fundamental principles of our corporate law. Reading the *Act* in the way the appellants suggest would amount to the granting of extraordinary rights to a judgment creditor through a purely procedural statute, designed to permit only the enforcement of existing rights.

(2) Piercing the corporate veil

[64] The appellants alternatively submit that this court has the ability to pierce the corporate veil when the interests of justice demand it. In support of that

argument, they rely on Wilson J.'s remarks in *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, where she stated at p. 10:

> The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue".

[65] *Kosmopoulos* was decided approximately thirty years ago. Not surprisingly, the law has developed. The starting point is the decision of Sharpe J., as he then was, in *Transamerica*. Justice Sharpe rejected the notion that the test for piercing a corporate veil is "anything like a just and equitable standard" (p. 433). Relying on Gower: *Principles of Modern Company Law*, 5th ed. (London: Sweet & Maxwell, 1992), he found, at p. 433, that there are only three circumstances where the court will pierce a 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 facade" 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.

[66] With respect to cases where it is alleged that a subsidiary corporation is a mere facade that protects its parent corporation, in order to ignore the corporate separateness principle, the court must be satisfied 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: *Transamerica,* at pp. 433-34.

[67] This court has repeatedly rejected an independent just and equitable ground for piercing the corporate veil in favour of the approach taken in *Transamerica*: see *Boyd v. Wright Environmental Management Inc.*, 2008 ONCA 779, 243 O.A.C. 185, at paras. 44-45; *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, 250 O.A.C. 232, at paras. 50-51; and *Indocondo Building Corp v. Sloan*, 2015 ONCA 752, 259 A.C.W.S. (3d) 691, at para. 9.

[68] The Supreme Court of Canada has protected the principle of corporate separateness without suggesting a standalone just and equitable exception. In *Sun Indalex Finance v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 238, Cromwell J. rejected the submission that a subsidiary should be liable for a breach of fiduciary duty committed by its parent corporation, holding that "unless there is a legal basis for ignoring the separate corporate personality of separate entities, those separate corporate existences must be respected." See also

Continental Bank Leasing Corp. v. Canada, [1998] 2 S.C.R. 298, at paras. 108-112.

[69] The appellants rely on a number of cases that they submit demonstrate that the principle of corporate separateness is sufficiently malleable that courts are free to ignore it when they see fit. However, an examination of those cases makes clear that their reliance is misplaced:

- *Lynch v. Segal* (2006), 82 O.R. (3d) 641 (C.A.), involved the use of a corporation to disguise property so that the defendant's wife and children would not have access to it for support purposes. This is precisely the type of abusive use of a corporation that *Transamerica* says justifies an exception to the corporate separateness principle.
- *Downtown Eatery (1993) Limited v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), was an employment case where this court found that the plaintiff had entered into an employment contract with a non-legal entity and was paid by a corporation that was simply acting as the paymaster for a group of companies. This court held that in those unique circumstances, the entire group of companies had in fact employed the plaintiff. In my view, this conclusion rested more on the plaintiff's relationship to the group of companies rather than the relationships among the companies in the group.
- *Buanderie centrale de Montréal Inc. v. Montreal (City)*, [1994] 3 S.C.R. 29, is actually an example of one of the exceptions to the corporate

separateness principle listed in *Transamerica*. This was a case where the corporate veil was pierced because it was provided for by statute.

- *Bazley v. Curry*, [1999] 2 S.C.R. 534, is a vicarious liability case. That doctrine makes one person liable for the acts of another. There must, however, be some basis for imposing vicarious liability. In that case, it was the employment relationship and the question was whether the employee's wrongful act was sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. There is no suggestion in the present case that Chevron Corporation and Chevron Canada were engaged in any employment, agency, or other relationship in undertaking oil exploration in Ecuador.

[70] The *Transamerica* test is consistent with the principle reflected in the various business corporation statutes in Canada that corporate separateness is the rule. Where the corporate form is being abused to the point that the corporation is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct, the law recognizes an exception to this rule. It is important that courts be rigorous in their application of the *Transamerica* test because the rule is provided for in statute and stakeholders of corporations have a right to believe that, absent extraordinary circumstances, they may deal with the corporation as a natural person.

[71] The significance of the *Transamerica* decision should not be underestimated. In a single case, Sharpe J. synthesized the jurisprudence regarding piercing the corporate veil. More importantly, he brought clarity and certainty to our law by providing a framework for determining when it is appropriate to ignore the principle of corporate separateness. This can be contrasted to the state of the American jurisprudence, where years of cases decided with no identifiable and consistent test has resulted in an *ad hoc* and unpredictable application of the remedy: Jonathan Macey & Joshua Mitts, “Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil” (2014) 100:1 Cornell L. Rev. 99.

[72] The current state of the law in the United States is comparable to the state of the Canadian jurisprudence at the time of *Kosmopoulos*. The appellants misinterpret Wilson J.’s statement in that case, quoted above at para. 64, as an endorsement of a standalone just and equitable standard for piercing the corporate veil. It was not. Rather, the court was decrying the absence of a coherent set of criteria for ignoring corporate separateness. Wilson J. stated, at p. 12, that corporate separateness should not ignored to “ameliorate its ill effects on a case-by-case basis”. *Transamerica* rejected the *ad hoc* approach previously employed and achieved the needed certainty in the law. The question for determination in this case is whether this court is prepared to sacrifice certainty for the sake of expediency.

[73] The appellants advance a number of arguments to justify ignoring the corporate separateness between Chevron Corporation and Chevron Canada. I do not find any of them to be persuasive.

[74] First, they submit that Hainey J. erred in finding that Chevron Corporation did not wield sufficient control of Chevron Canada to meet the first part of the *Transamerica* test. I need not consider that argument, as it is plain that the appellants cannot meet the second part of the conjunctive test. Chevron Canada was incorporated over 50 years ago. There is no allegation of wrongdoing on its part and no suggestion that it was established or used for fraudulent or improper purposes. Indeed, in their Amended Statement of Claim, the appellants specifically plead that Chevron Canada has not engaged in any inappropriate conduct. As Hainey J. correctly found, under the *Transamerica* test, this is a complete bar to the request to pierce the corporate veil.

[75] Next the appellants argue that *Transamerica* is not applicable because in this case we are dealing with the enforcement of a judgment debt, not a case of first instance where the issue is establishing liability. This submission cannot be accepted. If it were, a judgment against any corporation could be enforced against the assets of any other related corporation. Resourceful litigators would not sue multiple related corporations who could rely on the *Transamerica* test. Instead, they would pick one company to sue and then enforce their judgment against all related corporations who would then be barred from relying on the *Transamerica*

test. The non-judgment debtor corporation would thus lose all of its protection as a natural person under the *CBCA*. The exception to the rule of corporate separateness would become the rule once judgment was obtained.[3]

[76] Not only is such an argument problematic from a policy standpoint, it comes dangerously close to the adoption of the group enterprise theory of liability. That theory holds that where several corporations operate closely as part of the same "group" of corporations, they are in reality a single enterprise and should, accordingly, be responsible for each other's debts. It has been consistently rejected by our courts: *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (C.A.), at paras. 30- 31 and *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, 112 O.R. (3d) 190, at paras. 651-665, affirmed: 2012 ONCA 867, 225 A.C.W.S. (3d) 31, leave to appeal refused: [2013] S.C.C.A. No. 47.[4] It has also been rejected in England: see *Adams v. Cape* [1990], 1 Ch. 433 (Eng. C.A.) at pp. 532 and 536-38.

[77] There is good reason for this rejection. There is a difference between economic reality and legal reality. The fact that on an operational level corporate separateness is more nuanced among a group of related corporations is of no

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[3] An example of this court applying the principle of corporate separateness in the enforcement context is *Belokon v. Krygyz*, 2016 ONCA 981, 136 O.R. (3d) 39, leave to appeal refused: [2017] S.C.C.A. Nos. 74 & 75.

[4] The sole exception in this court appears to be *Manley Inc. v. Fallis* (1977), 2 B.L.R. 277 (Ont. C.A.). However, on closer examination the court was simply endorsing that an employee could owe a fiduciary duty to both his employer and its parent corporation.

moment. It is the legal reality, as provided for in the relevant business corporation statutes, that counts. The *CBCA* permits subsidiary corporations but also says that each corporation is a natural person. If Parliament wished to carve out an exception to the natural person rule for subsidiaries, it would have been very easy to do so.

[78] As stated by Mary Elisabeth Kors in her article, “Altered Egos: Deciphering Substantive Consolidation” (1998), 59 U. Pitt. L. Rev. 381, at pp. 437-38, there are also good policy reasons for the rejection of this sweeping doctrine:

> While enterprise liability may offer some appeal, measuring the extent of an “economic unit” introduces an intolerable level of uncertainty into the question of liability. The task of marking the limits of liability on the basis of incorporation is relatively simple: the corporation has either complied with the technical requirements of incorporation or it has not. Extending liability to the edges of the enterprise requires courts to determine the scope of the economic enterprise. The answer to this issue will rarely, if ever, be clear. Creditors extending credit would not be able to determine with any precision the liabilities for which the debtor will be responsible and the assets that will be available to satisfy their claims. Such uncertainty substantially reduces both the efficiency and fairness of corporate law.

[79] The appellants further submit that the corporate separateness of Chevron Corporation and Chevron Canada should be ignored for policy reasons. Yet they provide no guidance regarding the basis upon which it will be appropriate to pierce the corporate veil in future cases. Once the *Transamerica* test is jettisoned and no principled basis for piercing the corporate veil replaces it, we are left with a purely

ad hoc test. In the end, Mr. Lenczner's submissions boil down to an exhortation that we should do the right thing for his clients, untethered to the jurisprudence, the statutory rights of corporations, or any discernible principle. Even if we were free to do that, which we are not, this case illustrates the difficulties with this approach. At this stage, the equities of this case are far from clear. On the one hand, the appellants have suffered devastating loss through no fault of their own. On the other, on the finding of the United States courts, the Ecuadorian judgment against Chevron Corporation was the result of a massive fraud.[5]

[80] It is also important to remember the context in which the request to pierce the corporate veil is being made in this case. It is common ground that the judgment debtor has more than enough assets to satisfy the Ecuadorian judgment. This is also not a case where the judgment debtor's assets are being funnelled to a related corporation and as a consequence the judgment creditor cannot execute on its judgment. In fact, the appellants allege that the opposite is true. They say the profits of Chevron Canada are being funnelled up to Chevron Corporation as dividends. If they are correct, Chevron Canada is actually enhancing the ability of Chevron Corporation to pay the Ecuadorian judgment.

[81] As noted above, the appellants' submissions fail to acknowledge that the real fact driving their appearance in the Canadian courts is that they have not

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[5] In making this observation, this court is not purporting to adopt the findings of the United States courts.

enforced their judgment in the United States. The reason for this seems clear, but in his oral submissions, Mr. Lenczner stated that the existing United States court order does not prohibit his clients from enforcing the Ecuadorian judgment, whereas in his factum filed on the costs appeal he asserted that his clients are prohibited from enforcing that judgment in the United States. Query if there truly is no prohibition, why he is in the Ontario courts making novel legal arguments to get at the assets of a seventh level subsidiary?

[82] Whatever the reason for not enforcing the Ecuadorian judgment in the United States, it is clear that the difficulties the appellants are encountering in collecting the judgment are not related to Chevron Corporation's structuring of its subsidiaries. What we are 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.

[83] To be clear, as this court stated in its reasons on the review of the security for costs order, the common law is not set in stone. It evolves over time to respond to pressing legal issues. The existing rules for piercing the corporate veil can and likely will evolve. But the law must evolve on a principled basis and in a manner that brings certainty and clarity, not in a way that sows confusion and is devoid of principle.

(3) Adding CCCC as a party

[84] I agree with Hainey J. that it was not appropriate to add CCCC as a party because the claim against its assets must fail for the same reasons that the claim against Chevron Canada's assets must fail. Accordingly, the amended pleading was not legally tenable and did not disclose a cause of action as against CCCC. The test under rule 5.04(2) was not met: see *Steel Tree Structures Ltd. v. Gemco Solar Inc.*, 2016 ONSC 955.

(4) Fresh evidence

[85] I would deny the appellant's motion for fresh evidence. The documents proposed to be tendered relate primarily to the interactions among Chevron Canada and its subsidiaries. They are, at best, of marginal relevance to the matters at issue on these appeals and could not have affected the result of the motions. Accordingly, they do not meet the test for admission articulated in *R. v. Palmer*, [1980] 1 S.C.R. 759, at p. 775.

(5) Costs

[86] In my view, Hainey J. erred when he found that this was not public interest litigation. As this court held in its reasons on the review of the security for costs order, at para. 26:

> The appellants are seeking to enforce a judgment in which they have no direct economic interest. Funds collected on the judgment will be paid into a trust and net

> funds are to be used for environmental rehabilitation or health care purposes. This is public interest litigation.

[87] I agree with Mr. Zarnett's submission that the fact that this is public interest litigation does not mean that the appellants are immune from the usual costs consequences of an unsuccessful action. This court in its reasons on the review of the security for costs order was dealing with whether it was just to deny the appellants their day in court on the basis of a security for costs order. It did not consider whether the appellants should ultimately be ordered to pay costs.

[88] Despite the foregoing, the fact that this is public interest litigation impacts on the quantum of costs. It should have been factored into Hainey J.'s analysis of a reasonable amount of costs in all of the circumstances. This constituted an error in principle and thus it is appropriate to grant leave to appeal the costs award: *Walsh Energy Inc. v. Better Business Bureau of Ottawa-Hull Incorporated*, 2018 ONCA 383, at para. 40; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303. It also falls to this court to make the proper costs award in all of the circumstances.

[89] In my view, when the true nature of the litigation is considered, the amounts awarded below were excessive. I would reduce those amounts to $150,000 to Chevron Canada and $100,000 to Chevron Corporation, all-inclusive.

E. DISPOSITION

[90] For the foregoing reasons, I would dismiss the appeals of the motion judge's orders, save for his costs award. I would grant leave to appeal that order and reduce the amounts awarded in accordance with these reasons.

[91] The parties agreed on the costs of these appeals. Pursuant to that agreement, I would order that the appellants pay Chevron Canada and Chevron Corporation jointly their costs of the appeal in the all-inclusive total amount of $100,000.

"C.W. Hourigan J.A."
"I Agree. Grant Huscroft J.A."

Nordheimer J.A. (concurring):

[92] I have read the reasons of my colleague, Hourigan J.A., and agree with the result that he reaches. I also largely agree with the careful analysis he has undertaken. Specifically, I agree with his analysis in respect of the interpretation of the *Execution Act*, R.S.O. 1990, c. E.24 and his conclusion that Chevron Corporation has no exigible interest in the assets or shares of Chevron Canada – or indeed in any of its indirect subsidiaries – on the basis of the *Act* alone. However, I part company with him on (i) whether the test established in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), affirmed [1997] O.J. No. 3754 (C.A.) is the appropriate one to apply in these circumstances and (ii) on the general approach he adopts with respect to when it is appropriate to pierce the corporate veil.

[93] What is at the root of this case is whether the corporate veil can be pierced in situations where it would be necessary to do so in order to permit a judgment creditor to realize on a judgment that would otherwise go unsatisfied. While I accept my colleague's conclusion that it would not be appropriate to do so in this case, for the reasons that he gives at paras. 79-82, I do not agree with what I perceive to be the thrust of his reasons, that is, 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.

[94] In my view, the decision in *Transamerica*, as important as it was in providing a clear test for lifting the corporate veil, should not have its scope expanded beyond the situations from which it arose. Of considerable importance on this point is the fact that the decision in *Transamerica* dealt with imposing liability on a party through the mechanism of lifting the corporate veil. It did not deal with the situation here, that is, the enforcement of a judgment debt. In the latter situation, liability has already been established. The proceeding has moved past that hurdle to a stage that concerns the remedies that are available to enforce a valid judgment.

[95] I am not satisfied that the *Transamerica* test can simply be lifted out of the liability context and then dropped into, and applied to, the judgment enforcement context. Among other reasons for that conclusion is the fact that it would appear to be very difficult to conceive of a factual situation where the *Transamerica* test could be met by a judgment creditor, that is, where the corporate structure would be found to have been "used as a shield for fraudulent or improper conduct" solely in the execution context.

[96] In his analysis on this point, my colleague downplays the significance of the observation of Wilson J. in *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, where she said, at pp. 10-11:

> The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern*

> *Company Law* (4th ed. 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College*, *supra*, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
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> [Emphasis added.]

[97] My colleague says that this quotation from Wilson J. was not "an endorsement of a standalone just and equitable standard for piercing the corporate veil" but was, rather, simply the court "decrying the absence of a coherent set of criteria for ignoring corporate separateness".

[98] I do not read Wilson J.'s decision in that way. I agree that she was expressing concern about the lack of a consistent principle for lifting the corporate veil, but I do not view her reasons as dismissing the concept that the corporate veil can be pierced when not doing so would yield a result "too flagrantly opposed to justice". Indeed, Wilson J. stated that she theoretically had "no doubt" that the veil could be lifted to do justice. Moreover, the result in *Kosmopoulos* was based, in part, on the court seeing a need to take a more expansive view of an "insurable interest" than that which had been adopted in the United Kingdom, because of the corporate separateness principle. In reaching her conclusion, Wilson J. referred to the decision in *Salomon v. Salomon & Co.*, [1897] A.C. 22 (U.K. H.L.) and noted that "[t]he unhappy consequences of that case for corporate creditors are well-known". She also said, at p. 27:

> I have already noted that while in the case of a single shareholder corporation courts are unlikely to lift the corporate veil for the benefit of that single shareholder, they may be willing to lift the corporate veil "in the interests of third parties who would otherwise suffer as a result of that choice": *Gower*, *supra*, at p. 138.

[99] I can envisage situations where a judgment creditor would be such a third party. Indeed, the appellants might well fall into that category were it not for the findings of the U.S. courts respecting the fraudulent manner in which the Ecuadorian judgment, that the appellants seek to enforce, is alleged to have been obtained.

[100] In response to this perspective, my colleague says, at para. 67, that this court "has repeatedly rejected an independent just and equitable ground for piercing the corporate veil in favour of the approach taken in *Transamerica*". He then cites three decisions of this court as examples of that approach. However, it does not seem to me that those cases fully support the broad proposition that he states.

[101] I begin by noting that all of those cases were again decisions respecting liability, not judgment enforcement decisions. But, in any event, it seems to me that those cases are not as restricted as my colleague suggests. For example, in *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, 250 O.A.C. 232, this court reversed a decision of the Divisional Court and upheld the trial judge's decision to pierce the corporate veil. In doing so, Cronk

J.A., at para. 49, expressly reiterated the above quotation from *Kosmopoulos*. In doing so, she did not suggest that the decision in *Transamerica* had eliminated that general principle. Nor in *Transamerica* itself did this court, in its appeal book endorsement, affirmatively foreclose other bases upon which the corporate veil might be pierced in future cases.

[102] I also do not agree with my colleague's assertion that all four cases relied upon by the appellants do not support their position. In particular, it seems to me that the decision in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 397 is, in fact, a situation where the corporate veil was pierced because not to do so would result in manifest unfairness.

[103] In that case, the employer operated a nightclub enterprise through various related corporations. The employee signed an employment agreement with the nightclub entity but was paid by a related corporation. The employee was fired and sued for wrongful dismissal. However, the employer had reorganized its corporate structure by the end of the trial. The corporation that the employee named in his suit no longer had any assets to satisfy the judgment against it. As a result, the sheriff executed the judgment by seizing assets owned by a corporation related to the judgment debtor. The related corporation then sued the employee for conversion in a subsequent action. The employee counterclaimed that he was entitled to enforce his judgment against corporations related to the

employer judgment debtor. The trial judge dismissed the employee's counterclaim.

[104] This court reversed the decision on appeal. Importantly, the new corporate structure did not preclude this court from granting a remedy. Justices Borins and MacPherson said, at paras. 35-43:

> [The employer] could easily have operated the nightclub through a single company. They chose not to. There is nothing unlawful or suspicious about their choice…
>
> However, although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, [the employee's] situation is a simply, common and important one – he is a man who had a job, with a salary, benefits and duties. He was fired – wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.
>
> […]
>
> In these circumstances, when he was wrongfully dismissed, [the employee] did his best – he sued the company which had paid him. Later, it turned out that that company had no assets. Yet the nightclub continued in business, various companies continued to operate it and, presumably, [the corporation's shareholders] continued to make money. In these circumstances, [the employee] decided to try to collect the money to which a superior court of justice had determined he was entitled. In our

> view, the common employer doctrine provides support for his attempt.
>
> …In these circumstances […] we conclude that [the employer] when he was wrongfully dismissed was all of [the related corporations]. This group of companies functioned as a single, integrated unit in relation to the operation of [the nightclub].
>
> [The related organizations went through various reorganizations before the end of the trial]. The trial judge found that there was nothing nefarious about these reorganizations; they were undertaken for business reasons unrelated to [the employee's action]. We see no reason to disagree with this conclusion.
>
> The question which the reorganizations pose is whether [the judgment] […] should also be enforced against the successor or merged companies which have been created by the reorganizations.
>
> We have no hesitation in answering this question in the affirmative.
>
> [Emphasis added.]

[105] In my view, *Downtown Eatery* provides some support for the proposition that the law on piercing the corporate veil might allow the appellants to enforce their Ecuadorian judgment against Chevron Canada. I say this for three reasons.

[106] First, this court pierced the corporate veil of the related corporations in *Downtown Eatery* despite the express finding that neither the corporate structure, nor the reorganization leaving the judgment debtor corporation without assets, was fraudulent.

[107] Second, this court enunciated a principle that the law should not allow even legitimate corporate structures to work an “injustice”. This strikes me as the invocation of a general equitable jurisdiction to ensure that persons who hold valid judgments have an enforceable remedy.

[108] And third, unlike the cases my colleague cites at paras. 67-68, *Downtown Eatery* is a case of the enforcement of one corporation’s judgment debt against a related corporation. It is arguably therefore far more relevant to the instant appeal than *Transamerica*. Moreover, the decision in *Downtown Eatery* post-dates *Transamerica*. Thus, it can be seen as an example of how *Transamerica* has not been applied in the debt enforcement context.

[109] Further, the decision in *Bazley v. Curry*, [1999] 2 S.C.R. 534 also tends to support the concept that equitable principles may be relied upon to override the principle of corporate separateness where it is necessary to do justice. Indeed, it seems difficult to see a legal foundation for the imposition of vicarious liability, other than a foundation in equity. I note that in *Bazley*, McLachlin J. expressly based the imposition of vicarious liability on two policy considerations, the first of which was to provide “a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee.” Transferred into this context, a party, who holds a valid judgment, has, by definition, been found to have suffered a wrong. I can conceive of situations, albeit rare ones, where piercing the corporate veil for enforcement purposes would be necessary in order to provide a “just and practical

remedy" to a person who holds a valid judgment, especially in the context of related corporations.

[110] Another concern that my colleague expresses regarding any deviation from the corporate separateness principle is that "it comes dangerously close to the adoption of the group enterprise theory of liability". First, I note that this concern again relates to liability and not to enforcement. I also note that the decision in *Downtown Eatery* could be seen as having already adopted the group enterprise theory of liability, or at least a variation of it.

[111] Second, my colleague says that, if Parliament had wished to carve out an exception to the corporate separateness principle for subsidiaries, it could have done so. While that is undoubtedly correct, the fact that Parliament has not made such an exception has not prevented the courts from invoking equity to make exceptions, as the whole concept of lifting the corporate veil makes clear.

[112] Third, my colleague refers to an article by Mary Elisabeth Kors in which she rejects this doctrine because, in her view, the concept of group enterprise is vague or amorphous. While that may be a legitimate concern in some instances, there is nothing vague or amorphous about a situation where a corporation owns 100% of the shares of another corporation. For example, in this case, the corporate structure that exists between Chevron Corporation and Chevron Canada is very clear. On this point, I would add, in passing, that the motions judge's blanket

conclusion, at para. 36, that “Chevron Canada is not an asset of Chevron” is one that is completely detached from real-world realities. Although the law dictates that only the shares of a corporation can be the assets of another person (and not the corporation itself), it is crystal clear that Chevron Canada is an asset of Chevron Corporation, as that term is understood in common business parlance. All of Chevron Canada’s shares are owned by Chevron Corporation (albeit indirectly) and, as the evidence in this case makes clear, it is ultimately controlled, for all practical purposes, by Chevron Corporation. Consequently, there are no innocent shareholders that would be affected by the execution of the Ecuadorian judgment against Chevron Canada – a concern that is often raised as militating against any effort to interfere with corporate separateness.

[113] It seems clear that the genesis of the courts’ corporate veil piercing power stems from its equitable jurisdiction: see, e.g., *A-C-H International Inc. v. Royal Bank* (2005), 254 D.L.R. (4th) 327 (Ont. C.A.), at para. 29; and *Burke Estate v. Royal & Sun Alliance Insurance Co. of Canada*, 2011 NBCA 98, 381 N.B.R. (2d) 81, at paras. 54 and 58. The origins of equity flow from the need to ameliorate the harshness of positive law in principled circumstances. In fact, some commentators describe equity as the “conscience of law”. It draws upon principles of natural law to “harmoniz[e] law with the needs and requirements of evolving social structures and relationships”: Leonard I. Rotman, “The ‘Fusion’ of Law and Equity?: A

Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016) 2(2) Can. J. Comp. Cont. L. 497 at pp. 503-04.

[114] The importance of equity in our system of laws is highlighted by the precedence it takes over the common law. It is "[trite] law that where common law and equity conflict, equity is to prevail": *Bathgate v. National Hockey League Pension Society* (1992), 11 O.R. (3d) 449 (Gen. Div.), cited with approval by the Supreme Court of Canada in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 641. This court, and the Superior Court of Justice, have been expressly entrusted with such equitable powers under s. 96 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[115] As such, in my view, 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. On this issue, I agree with the majority of the opinions offered in the most recent decision of the Supreme Court of the United Kingdom on this subject in *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34, [2013] 2 A.C. 415. Although Lords Sumption and Neuberger, held that corporate veil piercing should be restricted to circumstances that are akin to the ones identified in *Transamerica*, the five other justices gave concurring reasons – each explaining why the jurisdiction to pierce

the corporate veil was not so narrow. As Lord Neuberger himself said, at para. 80, the doctrine of piercing the corporate veil:

> …has been generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available.

[116] My colleague states the ultimate question in this case as being "whether this court is prepared to sacrifice certainty for the sake of expediency." With respect, I believe that puts the question too starkly. It is not a question of expediency. It is a question of equity. Consequently, I would reframe the question: Is this court prepared to recognize that there may be situations where equity would demand a departure from the strict application of the corporate separateness principle in the context of the enforceability of a valid judgment, whether foreign or domestic? I suggest that that question should be answered in the affirmative while, at the same time, recognizing that the situations where such a remedy will be appropriate are likely to be rare and exceptional. On that latter point, I adopt the observation made by Lord Mance in *Prest*, at para. 100:

> It is however often dangerous to seek to foreclose all possible future situations which may arise and I would not wish to do so. What can be said with confidence is that the strength of the principle in *Salomon's* case and the number of other tools which the law has available mean that, if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare.

[117] However, even accepting my reframed question as the proper one, my colleague aptly puts the dilemma that this court faces in answering it, at para. 79 of his reasons. On the one hand, we have an apparently valid foreign judgment. On the other hand, we have a finding by the U.S. courts that the judgment was obtained by fraud. Comity demands that this court, at this stage, should respect both decisions. But, at the same time, we must recognize the obvious conflict between them. Because of the manner in which this matter has proceeded, our courts have not yet been called upon to make their own determination of the validity of the Ecuadorian judgment. Absent such a finding, even on my approach to the judgment enforceability question, the circumstances here cannot rise to the level that would be necessary to conclude that the result is “too flagrantly opposed to justice” as to permit the corporate veil to be pierced.

[118] In the end result, I agree that the appeals must be dismissed, save for the costs appeal.

Released: “G.H.” May 23, 2018

“I.V.B. Nordheimer J.A.”

SCHEDULE I

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP/ KOSKIE MINSKY LLP

37 plaintiffs

Daniel Carlos Lusitande Yaiguaje
Benancio Fredy Chimbo Grefa
Miguel Mario Payaguaje Payaguaje
Teodoro Gonzalo Piaguaje Payaguaje
Simon Lusitande Yaiguaje
Armando Wilmer Piaguaje Payaguaje
Angel Justino Piaguaje Lucitante
Javier Piaguaje Payaguaje
Fermin Piaguaje
Luis Agustin Payaguaje Piaguaje
Emilio Martin Lusitande Yaiguaje
Reinaldo Lusitande Yaiguaje
Maria Victoria Aguinda Salazar
Carlos Grefa Huatatoca
Catalina Antonia Aguinda Salazar
Lidia Alexandria Aguinda Aguinda
Clide Ramiro Aguinda Aguinda
Luis Armando Chimbo Yumbo
Beatriz Mercedes Grefa Tanguila
Lucio Enrique Grefa Tanguila
Patricio Wilson Aguinda Aguinda
Patricio Alberto Chimbo Yumbo
Francisco matias Alvarado Yumbo
Olga Gloria Grefa Cerda
Narcisa Aida Tanguila Narvaez
Bertha Antonia Yumbo Tanguila
Gloria Lucrecia Tanguila Grefa
Celia Irene Viveros Cusangua
Lorenzo Jose Alvarado Yumbo
Francisco Alvarado Yumbo
Luisa Delia Tanguila Narvaez
Elias Roberto Piyahuaje Payahuaje
Lourdes Beatriz Chimbo Tanguila
Octavio Ismael Cordova Huanca
Guillermo Vincente Payaguaje Lusitande
Alfredo Donaldo Payaguaje Payaguaje
Delfin Leonidas Payaguaje Payaguaje

SCHEDULE II

GRANT HUBERMAN BARRISTERS & SOLICITORS
10 plaintiffs (as per Notice of Change of October 4, 2017)

Segundo Angel Amanta Milan
Heleodoro Pataron Guaraca
Hugo Gerardo Camacho Naranjo
Maria Clelia Reascos Revelo
Maria Magdalena Rodriguez Barcenes
Francisco Victor Tanguila Grefa
Rosa Teressa Chimbo Tanguila
Maria Hortencia Viveros Cusangua
Jose Gabriel Revelo Llore
Jose Miguel Ipiales Chicaiza