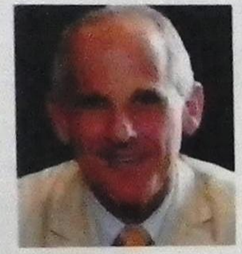
ECUADORIAN PLAINTIFFS APPEAL DECISION AIMING TO SEIZE CHEVRON ASSETS IN ONT.

The lawyers representing Ecuadorian plaintiffs in a lawsuit against Chevron Corporation have applied for leave to appeal a judge's decision to dismiss an action against the company's Canadian subsidiary.

The case, *Yaiguaje v. Chevron Corporation*, made headlines recently after Ontario Superior Court Justice Glenn Hainey said the assets of Chevron Canada Limited could not be seized to pay out a foreign judgment against Chevron Corp., as the seven-level indirect subsidiary is not an asset of the parent company.

The plaintiffs have now applied for leave to appeal the decision to the Ontario Court of Appeal. In their Notice of Appeal, the plaintiffs disputed the judge's finding that the assets of the subsidiary are not assets of Chevron Corp.



Alan Lenczner is representing the Ecuadorian plaintiffs suing Chevron to pay out a foreign judgment.

Alan Lenczner, of Lenczner Slaght Royce Smith Griffin LLP, is representing the plaintiffs. He says the plaintiffs disagree with an assertion by Hainey that Chevron Canada Limited is "a separate legal person" and "not an asset of any other person including its own parent."

In a years-long legal battle, Ecuadorian villagers successfully got a US$18-billion judgment against Texaco, which later merged with Chevron, claiming their region had suffered extensive environmental damage from pollution the company had caused and failed to clean up.

An Ecuadorian appeals court later upheld the decision in 2013, but it reduced the judgment to US$9.5 billion.

After Chevron, which has no assets in Ecuador, refused to pay the judgment, the plaintiffs filed their action in Ontario.

Chevron then challenged whether Ontario courts had jurisdiction to enforce the foreign judgement. The Supreme Court of Canada found in 2015 that the courts did have jurisdiction in the matter, but it stopped short of determining whether Chevron Canada is an asset of Chevron Corp.

The Canadian subsidiary then brought its summary judgment motion to have the action against it dismissed.

The motion judge found that the assets of Chevron Canada could not be seized pursuant to the Execution Act to satisfy the Ecuadorian judgment, saying the act does not give the parent company any interest in the shares of the subsidiary and that it does not create any rights that override the principle of corporate separateness.

Hainey also found that Chevron Canada's corporate veil should not be pierced, as the parent did not have complete control over the subsidiary.

In their Notice of Appeal, the plaintiffs argued Hainey erred in his interpretation of the Execution Act, saying the act is of wider reach than his interpretation.

Lenczner says the judge also misappreended the Supreme Court *BCE* decision, in his determination that Chevron Canada is not an asset of Chevron Corp. Hainey cited a line from the decision that said, "While the corporation is ongoing, shares confer no right to its underlying assets," but Lenczner says this line was taken out of context and that the judge's conclusion was at odds with what the SCC said.

The plaintiffs also argued that Hainey had erred by applying the principle of corporate separateness to a judgment debt of a parent company to "shield from execution the assets of its wholly owned subsidiary" and that the SCC has authorized the piercing of the corporate veil when failing to do so "would result in injustice."

Corporate lawyers, however, have said that the confirmation of the principle of corporate separateness is important.

Arlene O'Neill, of Gardiner Roberts LLP, says that allowing the corporate veil to be pierced in this case would have set a dangerous legal precedent.

"I think corporations have to have comfort in their corporate structures," says O'Neill, who did not act in the case. "This is a case where you have a substantial business in Canada, completely operating on its own healthily, respecting its corporate structure, [with] its own board of directors, real live assets and employees."

A spokesman for Chevron Corporation said the company is confident that any court that rules on the case will rule in its favour.

"The Ontario court rightly found that Chevron Corp. and Chevron Canada Limited are two separate and distinct entities," he said in an emailed statement.

– ALEX ROBINSON

WEST

Alberta anti-fracker still fighting despite Supreme Court loss

Jessica Ernst owns property near the rural community of Rosebud in the Alberta Prairies about an hour-and-a-half northeast of Calgary. Her Toronto-based activist lawyer Murray Klippenstein calls it Ernst's "idyllic retreat into the Alberta countryside she loves so much."

However, Ernst says her dream is being destroyed. She believes fracking (injecting gas or water into fissures underground to widen them and force out oil or gas) by the Calgary-based energy producer Encana Corporation has severely damaged the water quality of her well and the nearby wells of others. Since 2007, she has engaged in a long, litigious and, as yet, unresolved battle with the energy giant, which flatly rejects her claims as "not supported by the facts and without merit."

Jessica Ernst

But Ernst has not only taken on Encana, she has also gone after the Alberta government and the provincially appointed, quasi-judicial board that oversees the energy and utility sector in the province, the Alberta Energy Regulator.

It was Ernst's battle with the AER that brought her before the Supreme Court last year. The AER, like many similar provincially appointed regulators and boards across Canada, has a clause in its foundational legislation that essentially grants its board sweeping immunity from legal action. Section 43 of the Energy Resources Conservation Act reads in part: "No action or proceeding may be brought against the Board or a member of the Board…in respect of any act or thing done purportedly in pursuance of this Act…"

Ernst's persistent and public complaints and what the AER and its predecessor organization say they perceived as threats led the body to refuse to accept further communication from her. Ernst argued this attempt to silence her criticism was contrary to the Charter's 2(b) provision of

Continued on page 12

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Continued from page 11

"freedom of thought, belief, opinion and expression . . . ." But when she tried to take legal action against the AER, it cited its immunity under s. 43 of the act. The Alberta Court of Appeal found that s. 43 did indeed grant the AER immunity from a Charter challenge, so Ernst appealed the matter to the Supreme Court. There the justices divided 4:1:4.

Four of the justices found: "It is plain and obvious that s. 43 (of Alberta's *Energy Resources Conservation Act*) on its face bar's Ernst's claim for Charter damages…." Four of the justices, including Chief Justice Beverley McLachlin, totally disagreed, finding that: "It cannot be said that it is plain and obvious that Ernst cannot establish a breach of s. 2(b) of the Charter." That left Justice Abella, who found that the lack of "proper notice and a full evidentiary record" precluded the court from considering a constitutional argument.

The ultimate result was the defeat of Ernst's claim.

For Klippenstein, the Supreme Court result lacked clarity. "It's noteworthy that the court took a year to release its decision . . . one reason may have been the difficulty in trying to reach a consensus. I don't think this is a blanket approval of a Charter-free zone for government officials or government regulators. What the court decided is by no means clear; maybe someone else will have to bring it back to the Supreme Court."

Understandably, AER spokesman Bob Curran did not have similar reservations. He found the result encouraging, and not just for the Alberta Energy Regulator. "[It's] important for all regulators because it affects our ability to conduct business."

University of Calgary law professor Shaun Fluker, who has blogged on the case, shares the view that it is unfortunate the Supreme Court was so split on the issue. He believes the issue of whether statutory immunity clauses insulate against Charter challenges is a question worthy of consideration. "The ultimate result," he says, "is this particular issue has been left for another day."

While the lawyers and the law professors were disappointed in "a missed opportunity," Ernst was fighting mad. Just days after the Supreme Court decision, she sent a withering, three-page letter to McLachlin. In the letter she says, "it stuns me" that Justice Abella wrote in her judgment that the AER's predecessor board "made the decision to stop communicating with Ernst, in essence finding her to be a vexatious litigant. . . . " In her letter, Ernst pointed out that, "to this day, the regulator has never filed a motion in any court accusing me of being a 'vexatious litigant.' None of the defendants in my case have." She calls the remarks damaging and has demanded that "Justice Abella's statements be retracted or corrected."

– GEOFF ELLWAND

FORMER TAX LAWYER STROTHER CAN'T REOPEN DISCIPLINE DECISION

A Law Society of B.C. review panel decision gave no relief to former Vancouver tax lawyer Robert Strother, under a five-month suspension since February 2015, following a professional misconduct hearing involving a tax shelters deal that ignited 15 years of court wrangles and LSBC hearings and involved $32 million in profit taking.

Strother requested a review of the LSBC hearing panel's decision, claiming the panel considered only extracts from trial transcripts while he wanted the whole transcript entered as evidence so panel members could better weigh it.

The review panel found that the hearing panel's decision about the trial documents created a "fair and open process in all of the applicable circumstances" and that Strother had ample opportunity to put forward his views and any evidence at the hearing that might relate to the extracts used.

Section 47(4) of the Legal Profession Act allows new evidence to be tendered under special circumstances. "In the application before us, we find that there was no special circumstance that compel or allow us to hear evidence that is not part of the record," the panel ruled, dismissing Strother's application. The hearing panel's findings led to a disciplinary hearing and action imposed on Strother.

Strother's case spans almost two decades. As a partner and tax lawyer at Davis & Co., Strother represented Monarch Entertainment Corp. (later known as 346920 Canada Inc.), which offered film industry tax shelters between 1993 and 1997. It was his largest billing account. The federal government in 1997 closed off the shelters; Strother told Monarch he saw no way to continue. Monarch began winding down its business except for ongoing obligations. Its written retainer agreement with Davis & Co., stating the firm would act for no competitors, lapsed on Dec. 31, 1997.

Strother continued to act for Monarch, which had an unwritten retainer agreement with the law firm. The company looked to Strother in late 1997 for new ideas, but then both parties decided to wait until 1998 to explore them.

Monarch's former CFO Paul Darc, laid off in 1997, approached Strother in 1998 wanting to start an accounting business for the film industry. And he had an idea for a tax shelter — but it required an advance favourable ruling from Revenue Canada.

Strother claims he didn't think the idea would fly, but he claimed he was "jollying" Darc along in a bid to gain a part of the new accounting service. On Jan. 30, 1998, Strother (not as a Davis partner) and the CFO started incorporation of Sentinel Hill Ventures and set out to get the needed tax ruling. If successfully obtained, Strother would acquire 50 per cent of the company.

On March 3, 1998, Strother sent a letter from Davis & Co. asking for a ruling from Revenue Canada. On June 23, 1998, Davis & Co. signed a written retainer agreement with Sentinel setting out a percentage earning on shelter subscriptions sold. Revenue Canada provided a favourable ruling in October 1998. Throughout 1998, Strother met with Monarch and acted for the company, but he did not divulge his involvement with