



Parent Company Liability in Tort for the Actions of Foreign Subsidiaries

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June 17, 2015



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Preamble

"The limited-liability company is the building-block of capitalism, mobilising resources for investment. But its central tenet, that investors are not generally responsible for the liabilities of the firms they invest in, faces growing challenge. A decision by the Court of Appeal stretches almost to breaking point the 'corporate veil' that has protected parent companies from the sins of their subsidiaries."

The Economist,

May 2012, about *Chandler v Cape PLC*

The
Economist

Overview

International Developments

Canadian Context

Traditional Rules on Parent Liability

Cases on Duty of Care Owed by Parents to Parties Dealing with a Subsidiary

Enforceability of Foreign Judgments

Best Practices in an Uncertain Legal Environment

International Developments

In November 2014, Amnesty International held a conference on Developments in Transnational Litigation

United Kingdom

- 12 cases – all settled pre-trial, for example,
 - BP Oil – environmental
 - Trafigura – environmental (Cote d'Ivoire)
 - Moterrico Metals – environmental (Peru)
 - Shell – environmental (Niger Delta)
 - Barrick Gold – human rights (Tanzania)

Australia

- BHP Billiton – environmental (PNG)

International Developments (cont'd)

United States

In *Kiobel* the U.S. Supreme Court decided that the *Alien Torts Act* was subject to the presumption against extraterritoriality, thereby narrowing significantly the bases on which claims based in foreign jurisdictions can be addressed in U.S. courts.

Still, there are active cases:

- Exxon (Indonesia)
- Chevron (Ecuador)

Amnesty International seeks laws

- making parent companies liable for human rights abuses arising in their global operations;
- eliminating *forum non conveniens*.

International Developments (cont'd)

***Chandler v. Cape PLC*, [2012] 3 All ER 640 (CA)**

The U.K. Court of Appeal considered whether the parent company of the plaintiff's employer owed a duty of care to ensure a safe work environment because the parent had assumed responsibility for the safety of employees of its subsidiary.

Cape PLC and its subsidiary Cape Products were highly integrated and had centralized governance processes. Cape PLC was closely involved in the response to asbestos contamination at Cape Products.

Held that a duty of care will be owed if a parent corporation assumes responsibility for the conduct or behaviour of a subsidiary.

Canadian Context: The Honourable Ian Binnie

"[I]s it right that the idea of a 'corporate veil' be used in 2012 to block the claims, for example, of Latin American villagers seeking compensation for the destruction of their environment by tailings from a Canadian owned mine? Why should the cost of the environmental devastation fall entirely on the heads of its victims? Why shouldn't legal responsibility follow the money up the corporate food chain?"

The Honourable Ian Binnie, 2012, at the Coxford
Lecture

Traditional Rules on Parent Liability

Sources of Parent Corporation Liability:

Statutory

- Bill C-300 (a failed bill)
- Bill C-298 (a failed bill)

Tort Law

Traditional Rules on Parent Liability (cont'd)

Shareholders are liable for corporate conduct only in very limited circumstances.

Piercing the corporate veil occurs whenever the court imposes liability on shareholders of a corporation by disregarding the corporate form.

Piercing the corporate veil traditionally occurred if

- the subsidiary was completely dominated and controlled by the parent, did not function independently and was used as a shield for fraudulent or improper conduct;
- statute required the corporate veil to be pierced.

Traditional Rules on Parent Liability (cont'd)

Plaintiffs are attempting to impose liability directly on the parent corporation to circumvent the high burden for piercing the veil.

Two legal mechanisms for imposing liability directly on a parent corporation:

- **Agency:** The subsidiary was an agent for a parent that completely dominated and controlled the subsidiary
- **Tort:** The parent owed a duty of care to the individuals who dealt with the subsidiary

Choc v. Hudbay Minerals Inc.

2013 ONSC 1414

Facts: Plaintiffs are indigenous Guatemalans who sued Hudbay and its then–wholly owned subsidiaries, HMI Nickel Inc. and CGN, alleging that security staff retained by Hudbay’s subsidiaries committed human rights abuses, including gang rape and murder.

Defendants brought a motion to strike the plaintiffs’ claim for disclosing no reasonable cause of action arguing:

- Parents do not owe a duty of care to the persons with whom a foreign subsidiary interacts in the course of its commercial activities;
- Parent corporations cannot be responsible for their subsidiaries’ conduct.

Choc v. Hudbay Minerals Inc.

2013 ONSC 1414 (cont'd)

Court refused to pierce the corporate veil, holding that although the plaintiffs pleaded that CGN was completely controlled, subservient and dependent upon Hudbay, they did not plead that CGN was used for a fraudulent or improper purpose.

Separate legal personality may still be disregarded if it can be established, at trial, that CGN was an agent of Hudbay.

Choc v. Hudbay Minerals Inc.

2013 ONSC 1414 (cont'd)

In applying the *Anns* test for a novel duty of care owed by a parent corporation to those dealing with a subsidiary, the court accepted the plaintiff's pleadings on these grounds:

- **Reasonable foreseeability:** Hudbay knew or should have known that violent human rights abuses are frequently perpetrated by security personnel in Guatemala, particularly given the existing social and political environment.
- **Proximity:** Hudbay had repeatedly turned its mind, in both public statements and through its corporate governance practices, to ongoing issues relating to its subsidiaries, including their relationship with indigenous persons.
- **Policy considerations:** Recognizing a duty would promote high standards of corporate social responsibility, promote the government's goal of reducing human rights abuses abroad and facilitate the global evolution of tort law.

Garcia v. Tahoe Resources Inc., (BCSC)

Claimed that Tahoe Resources exercised control and was liable both in tort and in agency for the conduct of its wholly owned Guatemalan subsidiary Minera San Rafael (MSR) because Tahoe Resources imposed its corporate social responsibility policies on MSR

The plaintiffs maintained that Tahoe Resources was aware of the risks created by its security personnel and that if Tahoe Resources failed to properly train and supervise the personnel, harm would result.

Alleged that Tahoe Resources breached its duty of care by failing to conduct background checks, supervise and implement controls for its security personnel.

Raised interesting jurisdictional issues for parent company facing allegations.

Nevsun Resources Ltd. (BCSC)

Nevsun Resources owned a 60% interest in Bisha Mining Share Co. (BMSC), and the Eritrean government owned a 40% interest.

BMSC subcontracted operation of the mine to companies controlled by the Eritrean government or ruling party to operate the mine. These companies have been observed to use forced labour and engage in other human rights abuses

Former employees of these subcontractors have brought a claim against Nevsun Resources in British Columbia seeking to impose tortious liability on Nevsun for the conduct of these subcontractors.

Yaiguaje v. Chevron Corp., 2013 ONCA 758

Application was brought to enforce a US\$9.51 billion Ecuadorian judgment for environmental damages against the Chevron parent company by claiming against its subsidiary, Chevron Canada in Ontario.

The subject matter and the close relationship between Chevron and Chevron Canada was sufficient to create a real and substantial connection between Chevron Canada and the litigation.

Ontario Court of Appeal recognized that Ontario has jurisdiction for the enforcement action. However, it did not consider whether the assets of Chevron Canada could be seized to satisfy a judgment.

Yaiguaje v. Chevron Corp.

- Supreme Court Decision Pending

The logo for DAVIES, consisting of the word "DAVIES" in white, uppercase letters inside a red square.

Chevron Corp. maintains that the plaintiffs should enforce their judgment in the United States, where Chevron Corp. is domiciled.

Chevron Corp. maintains that absent a decision to pierce the corporate veil, no legal or factual basis exists to treat Chevron Canada's business and assets as those of Chevron Corp.

The economically significant relationship between Chevron Corp. and Chevron Canada does not detract from their separate legal identities.

Plaintiffs maintain that Chevron Canada is an asset of Chevron Corp. and they can bring an enforcement action in any jurisdiction where Chevron Corp.'s assets are located.

Best Practices in an Uncertain Legal Environment

Key Questions:

How much direction and oversight should parent corporations be exercising over their subsidiaries?

- Local versus enterprise-wide policies
- Centralized versus decentralized compliance
- Record-keeping and regulatory filings
- Central databases versus official minute books

How independent should subsidiaries be?

- Location of the mind and management
- Alignment with the parent's strategies

Best Practices in an Uncertain Legal Environment (cont'd)

What factors should be considered when nominating subsidiary directors?

- Independent versus internal directors
- Interlocking boards
- Knowledge of relevant business lines
- Experience, expertise and education

How do directors of a subsidiary ensure they are acting in the best interest of the subsidiary, given that

- the parent often nominates directors
- business objectives may be established at the parent level
- best interests of the subsidiary may differ from those of the parent if either one is in financial distress

Best Practices in an Uncertain Legal Environment (cont'd)

What factors should be considered when creating subsidiaries?

- Approval process
- Use of shelf-companies
- Choice of jurisdiction

Discussion

