File Number: 35682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHEVRON CORPORATION and CHEVRON CANADA LIMITED

Appellants
(Respondents/Appellants by cross-appeal)

and

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

Respondents
(Appellants/Respondents by cross-appeal)

FACTUM OF THE RESPONDENTS TO THE APPEAL OF CHEVRON CANADA LIMITED – REDACTED

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-15(6))

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
130 Adelaide Street West
Suite 2600
Toronto, ON M5H 3P5

Alan J. Lenczner, Q.C. (11387E) (416) 865-3090
Fax: (416) 865-2844
Email: alenczner@litigate.com

Brendan F. Morrison (61635B) (416) 865-3559
Fax: (416) 865-3731
Email: bmorrison@litigate.com

Lawyers for the Respondents
(Appellants/Respondents by Cross-Appeal)

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Eduard J. VanBemmel (613) 786-0212
ed.vanbemmel@gowlings.com
Fax: (613) 788-3500

Agent for Lawyers for the Respondents
(Appellants/Respondents by Cross-Appeal)

TO: THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

AND TO:

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Benjamin Zarnett
Suzy Kauffman
Peter Kolla
Tel: (416) 597-4204
(416) 597-6281
(416) 597-6279
Fax: (416) 979-1234
Email: bzarnett@goodmans.ca
skauffman@goodmans.ca
pkolla@goodmans.ca

Lawyers for the Appellant (Respondent/Appellant by Cross-Appeal), Chevron Canada Limited

NORTON ROSE FULBRIGHT CANADA LLP
Suite 1500
45 O'Connor Street
Ottawa, ON K1P 1A4

Sally Gomery
Tel: (613) 780-8604
Fax: (613) 230-5459
Email: sally.gomery@nortonrosefulbright.com

Ottawa Agent for the Appellant
(Respondent/Appellant by Cross-Appeal),
Chevron Canada Limited

NORTON ROSE FULBRIGHT CANADA LLP
Suite 3700, 400 Third Avenue SW
Calgary, Alberta T1P 4H2

Clarke Hunter, Q.C.
Anne Kirker, Q.C.
Jung Lee
Tel: (403) 267-8292
(403) 867-9564
(403) 267-8308
Fax: (403) 264-5973
Email: Clarke.hunter@nortonrosefulbright.com
anne.kirker@nortonrosefulbright.com
jung.lee@nortonrosefulbright.com

NORTON ROSE FULBRIGHT CANADA LLP
Suite 3800, Royal Bank Plaza
South Tower
200 Bay Street, P.O. Box 84
Toronto, ON M5J 2Z4

Robert Frank
Tel: (416) 202-6741
Fax: (416) 216-3930
Email: Robert.frank@nortonrosefulbright.com

Counsel for the Appellant (Respondent/Appellant by Cross-Appeal), Chevron Corporation

NORTON ROSE FULBRIGHT CANADA LLP
Suite 1500
45 O'Connor Street
Ottawa, ON K1P 1A4

Sally Gomery
Tel: (613) 780-8604
Fax: (613) 230-5459
Email: sally.gomery@nortonrosefulbright.com

Agents for the Appellant (Respondent/Appellant by Cross-Appeal), Chevron Corporation

TABLE OF CONTENTS

Part I - OVERVIEW AND STATEMENT OF FACTS 1

FACTS 3

State of the Pleadings 3

Ownership Means Control 3

Chevron Corp.'s Management and Control 6

Guarantees 7

Employees, LTIP and Pension 13

The Amended Statement of Claim 15

The Court of Appeal for Ontario 15

Part II - QUESTIONS IN ISSUE 16

Part III - STATEMENT OF ARGUMENT 16

The Ontario Superior Court of Justice Does Have Jurisdiction over Chevron Canada 16

The Exigibility of Shares and Assets 20

Justice Triumphs Over Corporate Separateness 20

Enterprise Liability Exists in Canada 23

Traditional Corporate Veil Piercing is Inapplicable Where There is Descending Liability and not the Assumption of Ascending Liability 29

Tort vs. Contract in Piercing Considerations 31

Enterprise Liability 32

Part IV - SUBMISSIONS CONCERNING COSTS 33

Part V - ORDER REQUESTED 33

Part VI - TABLE OF AUTHORITIES 34

Part VII - STATUTES AND REGULATIONS 35

PART I - OVERVIEW AND STATEMENT OF FACTS

1. Chevron Canada Limited ("Chevron Canada") was properly served at its place of business in Ontario with the Amended Statement of Claim pursuant to Rule 16.02(1)(c) of the *Rules of Civil Procedure.* The Ontario Superior Court of Justice has jurisdiction over Chevron Canada.

2. The motion judge was correct in concluding that service in the jurisdiction was made and that, as a result, the Ontario Court has jurisdiction over Chevron Canada:

> [87] Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere "virtual" business. It runs a bricks and mortar office from which it carries out a nontransitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. In the words of Rule 16.02(1)(c), Chevron Canada was served at a "place of business" in this province. This court therefore possesses jurisdiction over Chevron Canada. I therefore dismiss its motion to set aside the earlier service ex juris because, in the result, service in juris was made.[1]

3. A unanimous Court of Appeal for Ontario concurred with the motion judge and determined that Chevron Canada's arguments regarding Rule 17.02(m) and service *ex juris* were inapplicable:

> [37] The motion judge did not rely on rule 17.02(m) in his jurisdictional analysis with respect to Chevron Canada; rather, he grounded his jurisdictional determination in Chevron Canada's physical, non-transitory, carrying on of business in Ontario: ...[2]

4. Chevron Canada is a *CBCA* Company with the right to do business in every province of Canada. The place where its head office is located does not determine jurisdiction. The presence of Chevron Canada in Ontario is sufficient to ground jurisdiction.[3]

---

[1] *Yaiguaje v. Chevron Corp.*, 2013 ONSC 2527 ("Brown Reasons") at para. 87, Joint Appellants' Record ("JAR"), Vol. 1, Tab 2, p. 41

[2] *Yaiguaje v Chevron Corp.*, 2013 ONCA 758, 370 DLR (4th) 132 ("OCA Judgment") at para. 37, JAR, Vol. 1, Tab 4, p. 71

[3] *Incorporated Broadcasters Limited v. CanWest Global Communications Corp.* (2003), 63 OR (3d) 431 (C.A.), leave to appeal to SCC refused, (2003), Respondents' Authorities, Tab 22; *Club Resorts Ltd. v. Van Breda*, [2012] 1

5. Even against an out-of-province defendant, which Chevron Canada is not, there are three ways in which jurisdiction may be asserted:

(a) presence-based jurisdiction;

(b) consent-based jurisdiction; and

(c) assumed jurisdiction.

The real and substantial connection test applies to an out-of-province defendant only in respect of assumed jurisdiction.

6. This Court in *Van Breda* reiterated that the real and substantial connection test does not oust the traditional private international law bases for court jurisdiction:

> [79] However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.[4]

7. Chevron Canada wrongly objects to the jurisdiction of the Ontario Superior Court of Justice and refuses to file its Statement of Defence. Like Chevron Corp., it too has brought no motion to strike out the action, or for summary judgment.

8. The justification for the inclusion of Chevron Canada is that it is wholly owned by Chevron Corp. for the sole benefit of Chevron Corp. and is therefore available for the judgment creditors of Chevron Corp. Ownership by the parent is sufficient to make the subsidiary's shares and assets exigible.

9. 100 percent ownership means 100 percent control.

10. As stated in the Factum of the respondents to Chevron Corp.'s appeal, the presence of assets within the jurisdiction is not a condition precedent to the recognition in Ontario of the

---

S.C.R. 572 ("*Van Breda*"), Respondents' Authorities, Tab 16; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906 (Ont. S.C.J.) ("*Prince*"), Respondents' Authorities, Tab 29

[4] *Van Breda, supra* at para. 79, Respondents' Authorities, Tab 16

foreign judgment. The action in Ontario seeks the enforcement of the obligation of Chevron Corp. to pay a final judgment. The suggestion that Chevron Canada must have a real and substantial connection to the pollution claim that was tried in Ecuador is wrong. The underlying facts of the pollution claim have been decided and those facts are not in issue in the Ontario action. The gravamen of the enforcement action is to domesticate the Ecuadorean Judgment in Ontario so that assets can be seized and sold to satisfy the obligation. Chevron Canada is the asset. It is the very object of the action. Contrary to the submission of Chevron Canada, its Ontario business operations are intrinsically tied to the subject-matter of the enforcement action.

11. At this time, and in this case, the path forged by the Court in 1990 and re-expressed in 2006 must be pursued:

> In *Morguard*, La Forest J. discussed the need to ensure that the evolution of the common law keeps pace with the acceleration, intensification, and nature of the cross-border, social and economic activity. ...[5]

12. There are a number of Canadian cases which have responded to the Court's 1990 exhortation and have applied enterprise liability to situations where a parent has ultimate control of the subsidiary.

FACTS

State of the Pleadings

13. Chevron Corp. and Chevron Canada each refuse to deliver a Statement of Defence. Nevertheless, in their Facta, they attempt to assert allegations that imply a defence of fraud. No allegations of fraud have been pleaded by them and none are in issue in this appeal.

Ownership Means Control

14. Chevron Canada is a seventh level wholly-owned subsidiary of Chevron Corp. Chevron Corp. owns 100 percent of the shares of each descending subsidiary, which in turn owns 100 percent of the next descending subsidiary. None of the intermediary subsidiary companies carries on business. The directors of five of these six subsidiaries are all employees of either

---

[5] *Pro Swing v. Elta Golf Inc.*, [2006] S.C.J. No. 52 at paras. 77 and 78, Respondents' Authorities, Tab 30

Chevron Corp. or of Chevron Global Downstream LLC, itself a wholly-owned subsidiary of Chevron Corp. The four directors of Chevron Canada are all employees. It is obvious that Chevron Canada is wholly-owned and controlled by Chevron Corp. for the sole benefit of Chevron Corp.'s shareholders. Chevron's Corporate Structure Chart, attached at Tab A herein, is illustrative.

15. One hundred percent ownership by Chevron Corp. over the shares and assets of Chevron Canada means it has total control over the affairs of its subsidiary. It can mandate an investment, restrict an expenditure, change the officers and directors and veto any activity. In addition, as outlined in the Responding Factum to Chevron Corp., it identifies itself as a wholly-integrated energy company. Further, the agencies that rate its debt and its commercial paper program are in no doubt that the assets of this unified entity belong unequivocally to Chevron Corp.:

DBRS

> Chevron Corporation (Chevron) is one of the world's largest integrated non-government-owned petroleum companies.
>
> CVX's ratings are supported by its very strong financial profile, the scale and diversity of the Company's integrated operations and its sizeable portfolio of upstream growth projects.
>
> **Strengths**
>
> 1. global diversification in core petroleum segments;
> 2. Good production growth prospects;
> 3. Increasingly focussed Downstream operations;
> 4. Strong balance sheet and financial flexibility.[6]

Moody's

> The ratings upgrade recognizes Chevron's increasingly diversified upstream reserves and production portfolio, the sustainability of its strong financial profile ...[7]

16. Chevron Canada's assets include:

(a) a lubricant business in Ontario;

(b) a large crude oil refinery in British Columbia;

---

[6] DBRS Rating Report, December 7, 2009, Respondents' Record, Tab 9, p. 114

[7] Moody's Investors Service Rating Report: 17 Dec 2007; Moody's Investors Service Rating Report: 02 Mar 2006, Respondents' Record, Tab 9, p. 113 and pp. 115-117

(c) a network of retail gasoline and diesel fuel stations in British Columbia operating under the Chevron brand;

(d) a 20 percent interest in the Athabasca Oil Sands Project in Alberta;

(e) a 26.9 percent interest in the Hibernia Field and 23.6 percent interest in Hibernia South Expansion – offshore Newfoundland and Labrador;

(f) a 26.6 percent interest in the Hebron Field – Newfoundland;

(g) leases in the Northwest Territories;

(h) an interest in the Duvernay Shale Field; and

(i) an interest in the Kitimat LNG Project.

17. Chevron Canada markets and distributes Chevron-branded anti-freezes, automotive oils, greases and gear oils, industrial oils, passenger motor car oils and specialty products. These Chevron-branded products are also sold in the U.S.A. and in other countries, as well as B.C., Alberta, Saskatchewan and Ontario.

18. The trademarks for the lubricant products distributed by Chevron Canada are owned by Chevron Intellectual Property LLC, a wholly-owned indirect subsidiary of Chevron Corp. Chevron Intellectual Property LLC licenses to Chevron Canada the use of these products in Canada.

19. Chevron Corp.'s 1995 10K reveals that Chevron Corp.'s capitalized investment in Hibernia was $806 million. By 1996, it had risen to $941 million and, by 1997, the investment had mounted to $1.3 billion. The defendants refuse to disclose how much more has been invested in Hibernia.

20. With respect to the Athabasca Oil Sands Project, Chevron Corp. refuses to disclose the investment made between 1999 and 2006. The 2006 Annual Report discloses an additional net investment of $2 billion for the Project Expansion. Chevron Canada has indicated that it has expended a further $[redacted] billion in the project between 2006-2011. Total investment, unknown.

21. Similarly, with respect to Hebron, the total investment is unknown because the appellants refuse to disclose it.

22. What is known is, that by 2008, Chevron Canada was indebted to Chevron Canada Capital Company and to another indirect subsidiary of Chevron Corp., [redacted] in the aggregate amount of [redacted]; $6.7 billion were proceeds of borrowings from Chevron Corp. or by subsidiaries guaranteed by Chevron Corp. and [redacted] was from another wholly-owned indirect subsidiary of Chevron Corp., [redacted]. The balance of the borrowings is unexplained.

23. The segment managers for the upstream and downstream Canadian operating segments are executive officers of Chevron Corp. In the case of the Canadian upstream operations, the reporting officer and manager is George Kirkland, a Vice-Chairman of Chevron Corp.[8]

24. When monies are required, monies flow from the group to Chevron Canada. Annually, Chevron Canada returns monies to Chevron Corp. by way of dividends for the benefit of Chevron Corp.'s shareholders and for stock buy-backs.

Chevron Corp.'s Management and Control

25. Beyond ownership of the shares and assets of its subsidiary Chevron Canada, Chevron Corp. indeed exercises effective control over the operations of Chevron Canada. The Executive Committee of Chevron Corp. must approve the annual business plans of Chevron Canada, must approve expenditures for exploration, must approve expenditures for new investments and new joint ventures. Regular reporting to the reporting officer George Kirkland is required. Additional expenditures beyond amounts approved must come to George Kirkland for approval. A review of the tight control exercised by Chevron Corp. over Chevron Canada can be clearly seen from the reports contained in the Respondents' Record at Tabs 2 to 6.[9]

---

[8] Cross-Examination of Frank Soler, October 17, 2012 ("Soler Cross"), pp. 40 and 41, Respondents' Record, Tab 1, pp. 5-6 (filed under seal)

[9] Exhibit 5, 7, 8 and 9 to the Soler Cross, Respondents' Record, Tabs 2 to 6, pp. 7-59 (filed under seal)

Guarantees

26. Chevron Corp. has provided guarantees and renewals of guarantees on behalf of Chevron Canada respecting its funding and performance and indemnity obligations to third parties.

27. In December 1999, the Board of Directors of Chevron Corp. approved Chevron Canada acquiring a [redacted] percent interest [redacted]. Chevron Corp. guaranteed all the obligations of Chevron Canada:

> **Section 3.1 Guaranty**. Subject to the limitations set forth in this Section 3.1, Chevron hereby unconditionally guarantees to [redacted] the full and prompt payment by Chevron Canada of all of its payment obligations under
>
> (a) the [redacted], including, but not limited to:
>
> (i) payment obligations with respect to its share of all costs incurred for any Joint Account in accordance with Section 7.2 of the [redacted] (including without limitation, costs charged to the Joint Account pursuant to Section 7.2 (Costs, Expenses and Liabilities) of the [redacted], Section 7.2 (Costs, Expenses and Liabilities) of the [redacted] Agreement and Sections 6.2(a) and (b) (Costs and Revenues) of the [redacted] Agreement) and
>
> (ii) any other payment obligations of Chevron Canada under Sections 2.10(g), 7.3(b), 10.1, 10.2, 10.3, 15.3, 16.2, 18.2, 23.1, 23.2 and 23.3 and Exhibit C of the [redacted].

28. This Guarantee has been re-affirmed, and amended to expand its scope six times since 1999.

29. In addition, Chevron Corp. guaranteed Chevron Canada's obligations to [redacted] in December 1999:

> **Section 3.1. Guaranty.** Chevron hereby unconditionally guarantees to [redacted] the full and prompt payment by Chevron Canada of all of its payment obligations under the [redacted] Agreement, including, but not limited to its: (a) payment obligations with respect to its proportional share of the full [redacted] and other amounts payable under Section 3.1 and Article 7of the [redacted] Agreement and (b) indemnification obligations under Article 21 of the [redacted] Agreement (collectively, the "Guaranteed Obligations") when and as the same shall become due and payable. All payments by Chevron

> hereunder shall be made in the lawful money of Canada. All demands for payment of any of the Guaranteed Obligations may be made by [redacted], as representative of the parties constituting [redacted] as provided in Section 4.5 hereof. All payments by Chevron of any Guaranteed Obligations shall be made to [redacted] account as may be specified in such demand.
>
> [redacted] hereby agrees to give Chevron prompt written notice of any failure by Chevron Canada to pay any of the Guaranteed Obligations.

30. This Guarantee was re-affirmed and amended on three occasions.

31. Chevron Corp. also guaranteed Chevron Canada's obligations to [redacted] and re-affirmed and amended that Guarantee on three occasions.

32. These Guarantees, both financial and performance, are illustrative of both the determinative involvement of Chevron Corp. in the investments of its subsidiaries and the requirement by third parties that the purse-holding parent make available its balance sheet for the duration of the project.

33. Chevron Corp. advises its shareholders that it manages the investments that it has made on their behalf through the 74 subsidiaries located in many countries of the world, including Canada. It states that it provides management to these subsidiaries as well as financial, administrative and technological support. It notes that "although each subsidiary is responsible for its own affairs, Chevron Corp. manages its investments in these subsidiaries and their affiliates. The investments are grouped into two business segments, Upstream and Downstream, representing the company's 'reportable segments' and 'operating segments'". Upstream and Downstream operations account for more than 90% of Chevron Corp.'s Revenue and Earnings. Upstream operations consist primarily of exploring for, developing and producing crude oil and natural gas. Downstream operations consist primarily of refining crude oil into petroleum products and marketing crude oil and petroleum products.

34. The annual 10K, the equivalent to the Canadian Management Discussion and Analysis, required as a corporate document to be filed with the SEC details the Executive Committee control over decisions regarding capital and exploratory budgets and funding:

> ... 'chief operating decision maker' (CODM). The CODM is the company's Executive Committee (EXCOM), a committee of senior officers that includes the Chief Executive Officer, and EXCOM reports to the Board of Directors of Chevron Corporation.
>
> The operating segments represent components of the company, as described in accounting standards for segment reporting (ASC 280), that engage in activities (a) from which revenues are earned and expenses are incurred; (b) whose operating results are regularly reviewed by the CODM, which makes decisions about resources to be allocated to the segments and assesses their performance; and (c) for which discrete financial information is available.
>
> Segment managers for reportable segments are directly accountable to and maintain regular contact with the company's CODM to discuss the segment's operating activities and financial performance. The CODM approves annual capital and exploratory budgets at the reportable segment level as well as reviews capital and exploratory funding for major projects and approves major changes to the annual capital and exploratory budgets. [emphasis added][10]

35. The granularity of the controls exercised by the Board of Directors of Chevron Corp. and the Executive Committee, a Committee of Senior Officers of Chevron Corp., is spelled out in the Policies issued by Chevron Corp. and in particular the corporate governance policies. These policies are posted, internally, online within the Chevron Group of Companies and are accessible to its 61,000 employees.

36. Policy 190 sets out the Reporting Units and its Officers. Global Upstream, which includes Africa, Latin America, Asia Pacific, Europe, Middle East and North America, all report to the Vice-Chairman of the Board and Executive Vice-President, George Kirkland.

37. Policy 190 clearly demonstrates the over-arching power and authority of the Board of Directors:

> The Board of Directors possesses all powers necessary to manage the business and affairs of the corporation. The Executive Committee receives authority from the Board of Directors and is charged with responsibility to carry out Board policy in the management of the Corporation's business and affairs. This policy sets forth the expressed delegations of commitment, expenditure and human resources authorities

---

[10] Annual 10K (2011), p. 134 of 199, Respondents' Record, Tab 8, p. 105

from the Executive Committee to the Reporting Units. Under these delegations the Reporting Units implement their business plans in a manner consistent with the strategic direction and allocation of capital and human resources established by the Executive Committee.[11]

Roles and Responsibilities

The Executive Committee has primary responsibility for oversight and management of this Policy. The Executive Committee, acting either directly or through corporation committees and staffs:

1. Reviews and concurs in Reporting Unit's multi-year business plan. See Business Plans and Capital Expenditure Budgets.

2. Establishes systems and procedures for assessing the progress of approved Reporting Unit plans, projects and programs to allow the Corporation to effectively carry out its strategic planning and oversight responsibilities. See Policy 190B – Appropriations and Capital Stewardship.

3. Recommends level of capital spending (reviewed annually with the Board) and allocates human and other resources to allow effective implementation of Reporting Unit plans. See Business Plans and Capital Expenditure Budgtets.

4. Monitors Reporting Unit year-end business performance and the application of human resource policy.

The Executive Committee also establishes corporate-wide policies and, in conjunction with subcommittees, provides broad corporate strategic planning, and direction.[12]

190A – Business Plans and Capital Expenditure Budgets

Business plans shall be updated, coordinated and reviewed annually with Reporting Officers, the Strategy & Planning Committee and the Executive Committee. During Executive Committee review, acceptable portions of the business plans will be endorsed and can be executed without further Executive Committee review except as outlined below or as specified in the Table of Commitment Authority or the Table of Human Resources Authority. The following items are to be reported to Executive Committee prior to Implementation:

1. Items Previously Identified for Review – Reporting Units are to report all items in their approved business plans that have been identified by Executive Committee or in the Table of Commitment Authority as warranting further review before proceeding.

---

[11] Policy 190 – Delegation of Commitment, Expenditure and Human Resource Authority, Respondents' Record, Tab 10, pp. 118-119 (filed under seal)

[12] Exhibit 4 to the Soler Cross, Policy 190, JAR, Tab 24, p. 90

> 2. Significant Change – Reporting Units must report to the Executive Committee any significant change to their approved business plans. This includes major acquisitions, joint venture formations and divestitures, significant change in objectives, strategies, business environment, capital and exploratory commitments, operating costs, financial performance, and the human resource plan. Refer to Policy 110 for specific guidelines and requirements for C&E expenditure reporting.
>
> 3. Changes to Capital Expenditures Budget – Reporting Units are subject to capital and exploratory expenditure controls such as the first year's total expenditures and the first year's plan commitments. Any change that increases a Reporting Unit's authorized first year total capital expenditures must be reported to the Executive Committee before the facts or as soon as it is known; however, if the substitutions, additions, transfers or movements would not result in a significant change in the objectives and strategies of approved business plans:
>
> 1. Reporting Units may substitute or add new capital expenditures without before the fact Executive Committee review as long as the total first year expenditures and commitments do not exceed approved budgets.
>
> 2. Reporting Units may transfer up to $100 million in capital budget authorities annually between Production budgets and Exploration budgets, and among strategic business units within the same Reporting Unit, without before the fact reporting to the Executive Committee; however, the Reporting Officer must concur to any such transfers of capital budget authorities in excess of $50 million.
>
> 3. Each Reporting Officer is authorized to move up to a cumulative $100 million annually between reporting units under his or her area of responsibility, or to another Reporting Officer's reporting unit (if each affected Reporting Officer concurs), without first reporting the movement to the Executive Committee.
>
> Capital and exploratory expenditures by strategic business units and reporting units in excess of first-year plan commitments will be reviewed by the Executive Committee at year-end. (See Policy 110).[13]

38. There is no question that the Board of Directors of Chevron Corp. controls the purse strings and spending of any significant amount by its subsidiaries including Chevron Canada. As Policy 110 indicates:

> The Capital and Exploratory Expenditure Budget is developed as part of the business plan and approved by the Board of Directors. It includes all

---

[13] Exhibit 4 to the Soler Cross, Policy 190A, JAR, Tab 24, p. 91

> projects, programs and evaluations (hereafter referred to as 'commitments') that are expected to be authorized (appropriated) during a given year of the business plan …
>
> ***Responsibility***
>
> Annually, following strategic discussions, the Planning Committee establishes guidelines for use by the reporting units in developing their Financial Forecast submissions and Capital and Exploratory Expenditure Budget as part of the business planning process.
>
> Authority to appropriate and expend funds for commitments against the Excom–reviewed C&E Expenditure Budget rests within the reporting unit's respective authority limits, with the exception of commitments that require reporting to Excom or concurrence of the Reporting Officer as stated in Policy 190.
>
> The Capital and Exploratory Expenditure Budget sets the maximum dollar amount a reporting unit may expend during the first year of the multi-year business plan.

39. Policy 120 addresses financial appropriations. An illuminating schedule of authorizations demonstrates the tight control over expenditures by Chevron Corp.'s Reporting Officers, Executive Committee and Board of Directors:

> This policy applies to all operating and service companies and corporate departments and staffs (hereafter, referred to as 'Reporting Units'). The policy covers pre-Appropriation requirements, the preparation of Appropriation Requests and any supplemental Appropriation Requests that may be required …
>
> An Appropriation Request is used to obtain authorization to proceed with a project, program or valuation ('commitment') consistent with the Board-endorsed business plan. Reporting Units must write Appropriation Requests for such commitments in excess of $1 million.[14]

40. Every new project, every expansion of an existing project and every capital expenditure must pass through the levels described above. Every new project is subject to review and revision, and must be approved by the Board of Directors of Chevron Corp. before any project, expansion of project or capital expenditure can be embarked upon. Well-documented Appropriation Requests with rationale and business, legal, regulatory, financial and human

---

[14] Exhibit 4 to the Soler Cross, Policy 190C, Table of Commitment Authority, JAR, Tab 24, pp. 105 to 116

resource justification must be forwarded, in the case of all North American upstream operating companies to CNAEP through the Executive Committee and then on to the Board.[15]

Employees, LTIP and Pension

41. Of the employees working for Chevron Canada, 62 (or nine percent) are on the payroll of another Chevron entity – a point which illustrates the mobility between subsidiaries and operating segments right across the "Chevron Group", a term used by the Chevron witness and common parlance within the Chevron companies.

42. Seven percent of the employees working for Chevron Canada are members of the Chevron Corp. Pension Plan.

43. Thirty of the senior employees working for Chevron Canada are members of Chevron Corp.'s Long Term Incentive Plan and receive share options or share appreciation rights to Chevron Corp. stock.

44. The 2011 10K states that 93 million of an available 160 million units have been granted by Chevron Corp. to employees in the Chevron Group. Plain logic suggests that a large number of the LTIP units are compensation rewards given to more than the 740 persons who are directly employed by Chevron Corp. As with employees who work for Chevron Canada, it is plain logic that so too LTIP units are awarded to employees of direct and indirect subsidiaries throughout the world.

45. Final investment decisions by the Board of Directors regarding new projects or expansions of existing ones abound in the annual 10Ks. In the 2011 10K one finds the following:

(a) "The final investment decision was made for the Tubular Bells deep water project in fourth quarter 2011";[16]

---

[15] Exhibit 10 to the Soler Cross, Respondents' Record, Tab 6, pp. 55-59 (filed under seal)
[16] 2011 10K, p. 80 of 199, Respondents' Record , Tab 8, p. 96

(b) "Nigeria. In December 2011, a final investment decision was reached to develop the 40% owned and operated Sonam natural gas field in the Escravos area"; and[17]

(c) "United Kingdom. In fourth quarter 2011, the company reached a final investment decision for the Clair Ridge Project ..."[18]

46. Once a project is approved, there nevertheless is a requirement for reporting when expenditures exceed, in some cases, [redacted] million, and in some cases [redacted] million. Expenditures to be made in excess of the levels of authority must also be reported to CNAEP, to the Executive Committee of Chevron Corp. and they must be approved by Chevron Corp.

47. With respect to the major projects in Canada, which include but are not limited to, the Athabasca Oil Sands project, the Athabasca Oil Sands expansion, the Hebron project, the Hibernia project and the Hibernia South project, Final Investment Decisions are made by the Board of Directors, and from time to time, Front End Engineering and Design Expenditures ("FEED") are approved by the Executive Committee and/or the Board of Directors. Appropriation Requests are forwarded by CNAEP and regular reporting requirements were submitted by CNAEP to the Executive Committee of Chevron Corp.

48. What these policies indicate is the integration of the Upstream and of the Downstream core businesses and the interrelationship between all the companies of the Chevron Group that engage in those core businesses. The reporting and approval structure is not from the operating subsidiary through its line of indirect subsidiaries to the parent, but rather reporting to a group of people of other companies (CNAEP) within the Chevron Group of Companies and the whole presented as a comprehensive package for the Executive Committee of Chevron Corp. for approval, and to the Board of Directors, to be included within the Business Plan and Annual Budget for annual approval.

---

[17] 2011 10K, pp. 80 and 30 of 199, Respondents' Record, Tab 8, pp. 96 and 84
[18] 2011 10K, p. 80 of 199, Respondents' Record, Tab 8. p. 96

The Amended Statement of Claim

49. The Amended Statement of Claim claims a Declaration that the shares and assets of Chevron Canada are exigible to satisfy the obligations of Chevron Corp. pursuant to a recognition and enforcement judgment of the Ontario Superior Court of Justice.

50. The Amended Statement of Claim also requests the appointment of an equitable receiver over the shares and assets of Chevron Canada as a wholly owned subsidiary of Chevron Corp.[19]

51. The Amended Statement of Claim pleads that Chevron Corp. wholly owns Chevron Canada. It also pleads that Chevron Corp. controls Chevron Canada:

> 17. Chevron wholly owns and controls Chevron Canada. Chevron consolidates the financial results of its wholly owned subsidiaries including Chevron Canada and reports them as its own. Chevron raises capital in the equities markets based on the assets, operations and results of its wholly owned subsidiaries including Chevron Canada. Chevron Canada does not have an independent Board of Directors. Chevron provides a parent guarantee for the debts of its wholly owned subsidiaries including Chevron Canada.[20]

The Court of Appeal for Ontario

52. In addition to supporting the motion judge's reasons for jurisdiction over Chevron Canada, it stated:

> [38] In my view, the trial judge was correct to note Chevron Canada's bricks-and mortar business in Ontario. I would additionally note Chevron Canada's significant relationship with Chevron. Chevron Canada is a wholly-owned subsidiary of Chevron, albeit one owned via intermediate wholly-owned subsidiaries. Chevron guarantees the debt of its indirect subsidiaries which in turn furnish capital to Chevron Canada, and has directly guaranteed certain performance obligations of Chevron Canada. Furthermore, Chevron's income is wholly derived from dividends from indirect subsidiaries that carry out its actual business functions, which include Chevron Canada. In light of the economically significant relationship between Chevron and Chevron Canada, and given that Chevron Canada maintains a non-transitory place of business in Ontario, an Ontario court has jurisdiction to adjudicate a recognition and

---

[19] Amended Statement of Claim, para. 1(c) and (d) and para. 22, JAR, Tab 9, pp. 102 and 107
[20] Amended Statement of Claim, para. 17, JAR, Tab 9, p. 106

> enforcement action against Chevron Canada's indirect corporate parent that also names Chevron Canada as a defendant and seeks the seizure of the shares and assets of Chevron Canada to satisfy a judgment against the corporate parent.[21]

PART II - QUESTIONS IN ISSUE

53. The Ontario Superior Court of Justice does have jurisdiction over Chevron Canada.

54. As a wholly-owned subsidiary of the judgment-debtor, Chevron Corp., the shares and assets of Chevron Canada are exigible to satisfy the debt.

55. Traditional corporate veil piercing is inapplicable where there is descending liability and not the assumption of ascending liability.

56. In the alternative, a proper analysis of corporate separateness, in the modern world, should result in the triumph of fairness, logic, and justice over outmoded concepts that rely on technicality and which lead to a result that would be flagrantly opposed to justice.

PART III - STATEMENT OF ARGUMENT

The Ontario Superior Court of Justice Does Have Jurisdiction over Chevron Canada

57. Rule 16.02(1)(c) of the Ontario *Rules of Civil Procedure* provides for service over a corporation that is present in Ontario:

> **PERSONAL SERVICE**
>
> 16.02 (1) Where a document is to be served personally, the service shall be made,
>
> **Corporation**
>
> (c) on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;

---

[21] OCA, para. 38, JAR, Vol. 1, Tab 4, p. 72

58. Chevron Canada has an office in Mississauga, Ontario. It has employees in Ontario. It conducts business is Ontario. It does not contest service effected upon it in Ontario. The rule, interpreted properly, permits service on a corporation present in Ontario in order to provide jurisdiction of the Ontario Superior Court of Justice over that corporation.

59. All the authorities are uniform that jurisdiction is established by presence. There is no case to the contrary.

60. The real and substantial connection test only applies where a court seeks to assume jurisdiction over a defendant that has no presence in the jurisdiction. The real and substantial connection test serves to extend jurisdiction of a domestic court over an out-of-province defendant. It is not a prerequisite of jurisdiction over a defendant, even and out-of-province defendant, that is present within the jurisdiction. Head office and domicile are irrelevant to the analysis. As stated by the Court of Appeal for Ontario in *Incorporated Broadcasters*:

> [29] In my view, the motions judge erred in applying the real and substantial connection test to determine jurisdiction in this case, except jurisdiction over Mr. Asper. The real and substantial connection test applies where a court seeks to assume jurisdiction over defendants that have no presence in the jurisdiction. The real and substantial connection test serves to extend jurisdiction of the domestic courts over out-of-province defendants. It is not a pre-requisite for the assertion of jurisdiction over defendants, even out-of-province defendants, that may be present in the jurisdiction. That test is concerned with what Sharpe J.A. referred to in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.) as "assumed jurisdiction" not "presence-based jurisdiction". In *Muscutt*, Sharpe J.A. speaking for the court at para. 19 explained that there are "three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court.
>
> . . .
>
> [36] As I have said, it is my view that, with the exception of Mr. Asper, all of the defendants have a presence in Ontario that makes them subject to the jurisdiction of the Ontario courts. CanWest Global is a federally incorporated corporation with its registered office in Winnipeg. However, it carries on business in Ontario in television, newspapers, and radio, specialty cable channels and Internet websites. By choosing to carry on business in Ontario, CanWest Global is subject to the jurisdiction of Ontario courts. See *Hunt v. T&N PLC*, [1993] 4 S.C.R.

> 289 at 323. The defendants Global Television and Global Communications Limited are federally incorporated corporations with registered offices in Ontario carrying on business in Ontario. By virtue of their place of registered office and where they carry on business they are resident in Ontario and therefore subject to the jurisdiction of the Ontario courts. See K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths, 1999) at pp. 266-69. The defendant CanVideo Television Sales (1983) Limited was originally an Ontario corporation and is now a federally incorporated corporation and carries on business from offices in Toronto and is subject to the jurisdiction of the Ontario courts. The defendant CanWest Global Broadcasting Inc. is a federal corporation with its registered office in Quebec but with offices in Toronto. It too is subject to the jurisdiction of Ontario courts.[22]

61. Subsequent courts have relied upon *Incorporated Broadcasters'* concept of presence-based jurisdiction in circumstances involving a corporation carrying on business in the province:

Abdula

> [19] The defendants submit that as result of *Beals*, the only test currently available to determine the issue of jurisdiction is the real and substantial connection test. I disagree. *Beals* dealt with a request by a foreign litigant to enforce a foreign judgment against an Ontario resident. It was not dealing with a situation, like the present case, and like CanWest, and Momentous.ca in which an Ontario resident sought to sue an entity with connections to another jurisdiction but which also carried on business in Ontario. The Court of Appeal in CanWest and Momentous.ca makes it clear that the real and substantial connection test has no application to defendants who have a presence in the jurisdiction.[23]

Prince

> Air Canada concedes that it is present and carries on significant business in Ontario. There is no question that this court has jurisdiction over Air Canada. This court has presence-based jurisdiction: see *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 79; see also *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431, [2003] O.J. NO. 560 (C.A.), at paras. 29-36.[24]

---

[22] *Incorporated Broadcasters*, *supra* at paras. 29 and 36, Respondents' Authorities, Tab 22
[23] *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105 at para. 19, affirmed (2012), 110 O.R. (3d) 256 (C.A.) ("*Abdula*"), Respondents' Authorities, Tab 3
[24] *Prince*, *supra* at para. 14, Respondents' Authorities, Tab 29

62. *Van Breda* did not displace the long-standing principle that actual presence (as distinct from virtual) is sufficient to ground jurisdiction:

> However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.[25]

63. It is logical and must be right that, where a judgment-creditor seeks to recognize a foreign judgment in Ontario, not only does the presence of the defendant ground jurisdiction, but its relationship to the judgment-debtor defendant is a further compelling factor to ground jurisdiction. The Court of Appeal for Ontario described the relationship between Chevron Corp. and Chevron Canada as an "economically significant relationship", one that gives Chevron Corp. effective control and veto over Chevron Canada.

64. The appellant, Chevron Canada refers to *Ontario v. Rothmans*. That case dealt with the assumption of jurisdiction over foreign defendants, not the existence of jurisdiction over a presence-based defendant. In that case, the judge dismissed the motion of six foreign defendants to set aside service *ex juris*. The Court of Appeal upheld the motion judge's determination, but expressly pointed out that, at the pleadings stage, in a contest over jurisdiction, no preliminary determination is made whether the pleadings meet the rule 21.01(1)(b) standard for pleadings:

> 106 In our opinion, on a jurisdiction motion, the motion judge is not required to subject the pleadings to the scrutiny applicable on a rule 21 motion. So long as a statement of claim advances the core elements of a cause of action known to law and appears capable of being amended to cure any pleadings deficiencies such that the claim will have at least some prospect of success, the issue for the motion judge is whether the claimant has established a good arguable case that the cause of action is sufficiently connected to Ontario to permit an Ontario court to assume jurisdiction. If an Ontario court can assume jurisdiction, the issue of the adequacy of the pleadings is properly dealt with on a motion brought under rule 21.01(1)(b).
>
> 107 This approach ensures that a foreign defendant will not be required to come to Ontario to respond to what are nothing more than frivolous

---

[25] *Van Breda, supra* at para. 79, Respondents' Authorities, Tab 16

> allegations but, at the same time, affords persons in Ontario advancing claims against foreign defendants the same opportunity to amend a technically deficient claim as is provided to domestic defendants.[26]

The Exigibility of Shares and Assets

65. One hundred percent ownership of Chevron Canada means Chevron Corp. has absolute control over its subsidiaries' shares and assets. It has the power to hire and terminate officers and directors, invest in or sell assets, and approve or veto any corporate action.

66. Chevron Corp. is a judgment-debtor of the respondents. It has no assets in Ecuador to satisfy the judgment. It owns, beneficially, the shares and assets of Chevron Canada. No other entity has any beneficial interest in those shares and assets. There is no logical reason why those shares and assets are not exigible to satisfy the Ecuadorean Judgment.

67. The Ontario Superior Court of Justice recently confirmed that the shares and assets of an indirect subsidiary are exigible to satisfy the parent's debt.[27]

68. Beyond the fact that there is no other beneficial owner of the shares and assets of Chevron Canada, and that the legal ownership of seven intermediary subsidiaries is but a series of technicalities which can be removed by Chevron Corp., Chevron Corp. has complete dominion and control over the shares and assets of Chevron Canada.

Justice Triumphs Over Corporate Separateness

69. The courts have not applied corporate separateness to questions of ownership. Nor have they applied the principles of corporate separateness to the assets of the parent that are legally, but not beneficially, in the subsidiary.

70. Corporate veil piercing principles do not apply where no attempt is being made to fix a parent with the liability of its subsidiary and where the enforcement action is simply to collect on a judgment against the parent for its own wrongs.

---

[26] *Ontario v. Rothmans Inc.*, [2013] O.J. No. 2367 (C.A.), at paras. 106, 107, 97 and 98, Respondents' Authorities, Tab 27

[27] *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, [2014] O.J. No. 1815 (S.C.J.), Respondents' Authorities, Tab 34

71. The courts, including this Court, have not applied corporate separateness as a strict, inflexible rule. The courts have looked at the substance of the issue and determined an appropriate, just result to right the wrong.

72. In 1987, this Court laid out the principle that "those who have chosen the benefit of incorporation must bear the corresponding burdens...". Corporate separateness will not be contemplated where its application will be to the detriment of third parties:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). 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 control-ling 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": L.C.B. Gower, *Modern Company Law* (4th ed. 1979) at p. 112. ...
>
> ...
>
> ... There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": Gower, supra, at p. 138.[28]

73. In 2006, the Court of Appeal for Ontario stated that the *Salomon v. Salomon* principle was an important one, but not an absolute one:

> [35] The well-known corporate law principle, first enunciated in *Salomon v. Salomon & Co.*, [1897] A.C. 22, [1985-9] All E.R. 33 (H.L.), that the shareholders of a corporation are separate and [page652] distinct from the corporate legal entity is -- as MacPherson J.A. recently noted in *Wildman v. Wildman*, [2006] O.J. No. 3966, 151 A.C.W.S. (3d) 666 (C.A.), at para. 23 -- "an important one" but not, however, "an absolute principle". There is a line of jurisprudence establishing in very general terms that the courts will not enforce the "separate entities" notion where "it would yield a result 'too flagrantly opposed to justice, convenience or the interests of the Revenue' ": *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2, [1987] S.C.J. No. 2, at p. 10 S.C.R., citing L.C.B. Gower, Gower's *Principles of Modern Company Law*, 4th

---

[28] *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 at paras. 12 and 13, Respondents' Authorities, Tab 23

> ed. (London: Stevens & Sons, 1979) at 112. See also *Debora v. Debora*, [2006] O.J. No. 4826 (C.A.), at para. 24; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, [1996] O.J. No. 1568 (Gen. Div.), at pp. 432-34 O.R., affd [1997] O.J. No. 3754, 74 A.C.W.S. (3d) 207 (C.A.); and 642947 *Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417, [2001] O.J. No. 4771 (C.A.), at paras. 67-69.[29]

74. In *Parkland Plumbing*, the Court of Appeal for Ontario in 2009 reiterated this Court's principle in *Kosmopoulos*:

> 49 While a corporation is a legal entity distinct from its shareholders, this principle may be disregarded by 'lifting the corporate veil' and regarding the company as the agent or vehicle of its controlling shareholder or parent corporation where enforcing the 'separate entities' principle would yield a result "too flagrantly opposed to justice": *Kosmopoulos v. Constitution Ins. Co. of Canada*, [1987] 1 S.C.R. 2, at para. 12, citing L.C.B. Gower, *Modern Company Law* 4th ed. (London: Stevens, 1979), at p. 112.[30]

75. The Court of Appeal for Ontario upheld the trial judge's determination to pierce the corporate veil, but then went on to say that one is permitted to lift the corporate veil to determine the issue of "ownership":

> 56 Further, I do not regard the decisions in *Big Creek* and *Phoenix* as presenting any impediment to the trial judge's decision to pierce Celestine's corporate veil. On the contrary, neither *Big Creek* nor *Phoenix* hold that it is impermissible, in a proper case, to lift the veil of a corporation when determining whether it is an owner within the meaning of the Act.[31]

76. The appellant, Chevron Canada, relies on *Sun Indalex*. That case is irrelevant and does not inform the issue of corporate separateness. The questions in issue in that case, the Court's

---

[29] *Lynch v. Segal* (2006), 82 O.R. (3d) 641 (C.A.) at para. 35, Respondents' Authorities, Tab 25
[30] *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, [2009] O.J. No. 1195 (C.A.) at para. 49 ("*Parkland*"), Respondents' Authorities, Tab 28
[31] *Parkland, supra* at para. 56, Respondents' Authorities, Tab 28

discussion and its determination revolve around the *Pension Benefits Act*, the *Bankruptcy Act*, and the application of fiduciary duties.[32]

Enterprise Liability Exists in Canada

77. Enterprise liability exists in Canada and is a modern day evolution of the principle of corporate separateness. It both recognizes the continuance of limited liability and the exception to that principle, namely piercing the corporate veil. However, enterprise liability maintains the first of the two tests for piercing the corporate veil, namely, dominion and control, but treats as illogical and unnecessary, the second test as requiring that the creation of a subsidiary be for an improper purpose. That second test, the improper purpose requirement, is not appropriate in the 21st century with the increasing proliferation of subsidiaries, often single purpose companies, for example, in real estate projects, extractive industry ventures, and commercial shipping. The courts have evolved the principle to ensure that complexity in corporate relationships does not work an injustice.

78. The Court in *Bazley v. Curry* articulated the policy considerations of enterprise liability. Although considered in the context of imposing vicarious liability on a non-negligent employer for the tortious acts of an employee, the overriding factors motivating the Court were: compensation for innocent victims, loss internalization, a just and practical remedy and deterrents:

> [25] ... To return to the approach suggested earlier, precedent does not resolve the issue before us. ...
>
> ...
>
> [28] ... La Forest J., quoting Fridman (at p. 315), went on to note, however, that "neither of the logical bases for vicarious liability succeeds completely in explaining the operation of the doctrine . . . 'express[ing] not so much the true rationale of vicarious liability but an attempt by the law to give some formal, technical explanation of whythe law imposes vicarious liability'" (p. 336). Faced with the absence in the existing law of a coherent principle to explain vicarious liability, La Forest J. found its basis in policy (at p. 336): "the vicarious liability regime is best seen as a response to a number of policy concerns. In its traditional domain,

---

[32] *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271 at paras. 87, 117, 180 and 242, Respondents' Authorities, Tab 35

these are primarily linked to compensation, deterrence and loss internalization."

[29] Fleming has identified similar policies lying at the heart of vicarious liability. In his view, two fundamental concerns underlie the imposition of vicarious liability: (1) provision of a just and practical remedy for the harm; and (2) deterrence of future harm. While different formulations of the policy interests at stake may be made (for example, loss internalization is a hybrid of the two), I believe that these two ideas usefully embrace the main policy considerations that have been advanced.

[30] First and foremost is the concern to provide a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee. Fleming expresses this succinctly (at p. 410): "a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise". The idea that the person who introduces a risk incurs a duty to those who may be injured lies at the heart of tort law. ...

[31] However, effective compensation must also be fair, in the sense that it must seem just to place liability for the wrong on the employer. Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. While the fairness of this proposition is capable of standing alone, it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society. "Vicarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents" (*London Drugs*, *per* La Forest J., at p. 339).

[32] The second major policy consideration underlying vicarious liability is deterrence of future harm. Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision. ...

...

[36] ... I conclude that a meaningful articulation of when vicarious liability should follow in new situations ought to be animated by the twin

> policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions.[33]

79. In the employment context, there have been a number of cases where courts have concluded that the common employer doctrine applies and that an employee may be employed by more than one company at the same time:

> 1 In his valuable text, *Canadian Employment Law* (Aurora: Canada Law Book, 1999), Stacey Ball states, at p. 4-1:
>
> > The courts now recognize that, for purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.[34]

80. In *Downtown Eatery*, the Court of Appeal for Ontario adopted the principles of this Court:

> ... I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.
>
> There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.
>
> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why

---

[33] *Bazley v. Curry*, [1999] 2 S.C.R. 534 at pp. 550, 552, 553, 554, 556, Respondents' Authorities, Tab 7
[34] *Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. 1879 (C.A.) at para. 1 ("*Downtown*"), Respondents' Authorities, Tab 18

> they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.
>
> See also: *Bagby v. Gustavson International Drilling Co.* (1980), 24 A.R. 181 (C.A.); *Olson v. Sprung Instant Greenhouses Ltd.* (1985), 64 A.R. 321 (Q.B.); *Johnston v. Topolinski* (1988), 23 C.C.E.L. 285 (Ont. Dist. Ct.); *MacPhail v. Tackama Forest Products Ltd.* (1993), 50 C.C.E.L. 136 (B.C.S.C.); and *Jacobs v. Harbour Canoe Club Inc.*, [1999] B.C.J. No. 2188 (S.C.).[35] [emphasis added]

81. In that case, the Court of Appeal for Ontario formulated principles that take into account the realities of the modern world and avoid an injustice. Those principles apply with even greater force to the situation where a final Judgment has been obtained after a robust, well-defended eight year trial. Form does not trump substance:

> 36 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, Alouche's situation is a simple, 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.[36]

82. In tax cases, it has long been established that the courts look to the true commercial nature of the tax payer's transactions and pierce the corporate veil when necessary:

> That having been said, this Court must select from the principles set out above the one which is most likely to aid it in disposing of the case before it. I refer to the recognition by the courts of the true commercial

---

[35] *Downtown, supra* at paras. 30, 31 and 32, Respondents' Authorities, Tab 18
[36] *Downtown, supra* at para. 36, Respondents' Authorities, Tab 18

> nature of the taxpayer's transactions when doing so in appropriate cases makes it possible to attain the purposes of the legislation in question. This rule was developed by Dickson C.J. in *Bronfman Trust v. The Queen*, [1987] 1 S.C.R. 32, at pp. 52-53. I reproduce the following passage for the sake of convenience:
>
> > I acknowledge, however, that just as there has been a recent trend away from strict construction of taxation statutes . . . so too has the recent trend in tax cases been towards attempting to ascertain the true commercial and practical nature of the taxpayer's transactions. There has been, in this country and elsewhere, a movement away from tests based on the form of transactions and towards tests based on what Lord Pearce has referred to as a "common sense appreciation of all the guiding features" of the events in question. . . .
>
> This is, I believe, a laudable trend provided it is consistent with the text and purposes of the taxation statute.[37]

83. In *Christian Brothers*, an enterprise liability case, involving, like this case, exigibility, a case that also holds the subsidiaries liable to pay the debt of the parent, Judgment had been rendered against Christian Brothers In Canada, a corporation. It is a faithful application of the enterprise liability theory expressed in *Bazley v. Curry*.

84. The most valuable assets were two British Columbia schools that were legally owned by subsidiary incorporated companies and which subsidiary incorporated companies had raised monies for charitable purposes to build and operate the schools. The issue in the case was whether the trustee of the parent company could sell the assets of the subsidiaries to pay for the Judgment that had been rendered against the parent. The Court of Appeal for Ontario had little difficulty in determining that the assets held for the purposes of the corporation are answerable for the obligation of the corporation as a whole to tort claimants.

> 10 Vancouver College Limited is a Catholic private school in Vancouver. It is itself a registered charity under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Since the incorporation of the school in 1927, the shares of the corporation have been held from time to time by four individual Brothers in trust for "the Christian Brothers of Ireland." The assets of the school are valued at approximately $31,500,000. The

---

[37] *Buanderie centrale de Montréal Inc. v. Montreal (City); Conseil de la santé et des services sociaux de la région de Montréal métropolitain v. Montreal (City)*, [1994] 3 S.C.R. 29 (QL) at para. 27, Respondents' Authorities, Tab 11

liquidator submits that the CBIC owns the shares of the college beneficially. The college submits that its shares are held by the individual Brothers on trust "for the purposes of operating Vancouver College as a Catholic independent school committed to the Congregation's mission to educate young people in British Columbia".

11 St. Thomas More Collegiate Ltd. is a Catholic high school in Burnaby, British Columbia. It is also a registered charity under the Income Tax Act. It was incorporated in 1962. There are three shares of the company, two of which are in the name of The Christian Brothers of Ireland in Canada, while the third is held by John Burnell as Trustee for The Christian Brothers of Ireland in Canada. Mr. Burnell is a teacher at the school but not a Brother. The assets of the school are valued at approximately $7,000,000. The original funding for the school was a gift from the Archdiocese of Vancouver under an agreement that the Brothers would administer the school. The liquidator submits that the CBIC is the beneficial owner of the shares of the company. The position of the school and of Mr. Burnell is that the shares are held in trust "for the charitable purpose of establishing and carrying on a Roman Catholic high school at 7450 - 12th Avenue, Burnaby, British Columbia".

...

13 The three specific questions were stated by the motions judge and answered in the following way:

> (i) Whether, because of its charitable objects, The Christian Brothers of Ireland in Canada is immune from liability to persons with tort claims ("the charitable immunity issue")?

A.: No, the corporation is not immune from liability.

> (ii) If The Christian Brothers of Ireland in Canada is not so immune from liability, whether any or all of its assets are exigible to satisfy any judgments which may be entered against the Corporation by those persons ("the exigibility issue")?

A.: All of the assets are exigible to pay the tort claims. However, if any assets are held as a special purpose trust, then such assets are only exigible to pay tort claims when the wrong was perpetrated within the framework of the particular charitable purpose.

...

91 Because assets held for charitable purposes are not immune from execution on the "trust theory", assets held for one or more than one of the charitable purposes of the corporation are answerable for the obligation of the corporation as a whole to tort claimants, once that obligation is established.

...

CONCLUSION ON THE EXIGIBILITY ISSUE

94 For the purposes of this winding-up procedure, all assets of the CBIC, whether owned beneficially or on trust for one or more charitable

> purposes, are exigible and may be used by the liquidator to pay the claims of the tort victims.[38]

Traditional Corporate Veil Piercing is Inapplicable Where There is Descending Liability and not the Assumption of Ascending Liability

85. One of the features of corporate law is the principle of limited liability, which insulates a corporation's owners (its shareholders) from the debts of the corporation beyond the amount of their investment. Piercing the corporate veil is an exception to the limited liability principle. It evolved at common law to mitigate the harsh results of applying the limited liability principle.

86. Traditional corporate veil piercing theory does not apply where to do so prejudices innocent third parties. It definitely does not apply where there is no attempt being made to affix liability against a parent for the tortious acts of the subsidiary. All of the established authorities that apply the principles of corporate veil piercing concern the appropriateness of naming a parent company as a party defendant in a lawsuit being brought against the subsidiary for its tortious acts. That is not this case.

87. In the alternative, even if one were to apply the principles of piercing the corporate veil to the facts of this case where the parent is the judgment-debtor and the subsidiary represents its assets, the usual tests of dominion and control are met. Chevron Corp. owns 100 percent of Chevron Canada. The profits of Chevron Corp. are made up of the revenue generated by Chevron Canada and dividended up to it. Each of the large projects entered into in Canada by Chevron Canada received prior approval from the executive committee of Chevron Corp. Progress on the business operations from these projects must be reported to the executive committee of Chevron Corp. Annual business plans of Chevron Canada require the approval of Chevron Corp. Chevron Corp. has guaranteed the financial and performance obligations of Chevron Canada with respect to its joint venture partners. Those partners are clearly not willing to engage in large projects without the parent guarantee.

---

[38] *Christian Brothers of Ireland in Canada (Re)*, [2000] O.J. No. 1117 (C.A.) at paras. 10, 11, 12, 13(i) and 13(ii), Respondents' Authorities, Tab 15

88. All of these factors point to effective economic and directional control over the affairs of Chevron Canada for the benefit of Chevron Corp.

89. The requirement of the second part of the test: namely, that the subsidiary was incorporated for an improper purpose, has no logic in the modern world. National, international, and multi-national corporations, like Chevron Corp., all operate through subsidiaries.

90. The starting point of the analysis regarding the principle of piercing the corporate veil is *Salomon v. Salomon* decided 117 years ago, in 1897. It made sense at the time, but has been extended far beyond its original purpose. It is distinguishable on many grounds:

(a) Incorporation, the House of Lords determined, protected the personal assets of the shareholders from liability (ascending liability) but did not protect the investments that the shareholders made in the incorporated entity (descending liability). In this case, there is no question of attaching the personal assets of those who have bought shares of Chevron Corp.;

(b) *Salomon v. Salomon* did not address the effect of incorporation between a company and its wholly-owned subsidiary. The principle of protecting the personal assets of individual shareholders has no application to the relationship between a company and its wholly-owned operating subsidiaries. *Salomon* did not have as its objective protecting the parent from its own judgment-creditors; and

(c) 117 years later, in a trade interrelated world, with transnational companies, the principle of *Salomon* does not apply to domestic subsidiaries which are utilized to carry out enterprise business. Such subsidiaries are advantageous for tax reasons, labour law compliance, environmental licenses, etc., but always for the benefit of Chevron Corp.

91. In 1897, there was no concept of operating subsidiaries and parent holding companies. Nor were there any subsidiary companies in the United Kingdom, let alone seven layers of shell companies.

92. The limited liability principles of *Salomon v. Salomon* in any event are not strict and not absolute. The evolution of the common law gave rise to an exception to limited liability because applying that principle resulted in injustice. That exception was the concept of piercing the corporate veil. The corporate veil test must now be nuanced to reflect the realities of modern business, flow of goods, and transfer of wealth. Parent corporations routinely externalise the risk of tort liability through legally separate subsidiaries even though they derive profit from the very activities that generate the risk. The increasing prevalence of tort liability over the past century has compelled corporations to reorganize in ways that enable them to limit or entirely avoid paying for their harms; evasion methods include sequestering hazardous activities in subsidiary corporations. The stories about harm-causing corporate groups are most frequently publicised in situations involving torts by foreign subsidiaries – the Bhopal and Amoco Cadiz disasters.

93. In today's world, globalizing investment patterns and multi-national corporations have generated massive corporate webs that involve layers of subsidiaries. In its 10K, Chevron Corp. lists 76 wholly-owned subsidiaries in many countries around the world. Limited liability and principles of veil piercing place excessive focus on corporate formalities, so much so that today's mega-corporations, with large legal teams, can carefully guard against liability by establishing subsidiaries and maintaining distinct corporate entities. Formalism ignores the economic reality of the relationship between parent corporations and their subsidiaries. The economic entity that they form is an interconnected web of corporations that function toward a unified goal. The legitimate concerns associated with shareholder liability for corporate debts, stemming from the general desire to protect individual investment freedom, do not apply in the parent-subsidiary context. Piercing the corporate veil of subsidiary corporations does not create unlimited liability for any real people. The only assets reached for the debts of the subsidiary are corporate assets; no individual investor's personal property can be reached. Thus, the original goals of limited liability remain unaffected by the internalization of a parent corporation's risk.

Tort vs. Contract in Piercing Considerations

94. When limited liability was a rising norm, it focussed primarily on contract and not on tort. The first modern negligence case, *Donoghue v. Stevenson*, was decided in 1932.

95. Unlike contract creditors, who may make independent and informed choices about their risks before they loan to or contract with corporations, tort creditors have no opportunity to make choices. Tort creditors do not have an opportunity to bargain for guarantees from a debtor's parent or subsidiaries before they suffer a wrong.

96. Tort-based concerns are at their sharpest when mass personal injury torts, environmental harms, and human rights' violations are at issue. These harms carry the most normative weight and impose the greatest costs on society. In addition, they are the most likely causes of bankruptcy for a subsidiary as it is usually not insured against nor adequately capitalized for harms of this magnitude. If a subsidiary cannot pay for the damages caused by the tort, the tort victims only option is to proceed against the corporate shareholder—the parent corporation. This is economically and normatively preferable to the status quo because, in most cases, the corporate parent is both the cheapest cost-avoider and the most efficient risk-bearer.

Enterprise Liability

97. Chevron Corp. is a corporate enterprise—a conglomerate group, as it describes itself, of parent and subsidiary corporations and subsidiary groups operating for a common purpose. The enterprise behaves as a unified whole from an economic perspective. Thus, in this context, the fiction of the corporation's personhood becomes pure legal formalism at its costliest: the structure that may force society to pay for the harms caused by negligent subsidiary behaviours. This result is especially expensive when the potential harms are greatest, for example, in industries involving hazardous activities or those that potentially impose large human rights or environmental costs on the public.

98. Enterprise theory seeks to marry legal and economic realities. It views the corporate group as a singular unit, rather than viewing each subsidiary as a separate legal entity. Since subsidiaries act for the benefit of the corporation as a whole, enterprise theory follows the profit and holds the various corporate actors in a given web accountable for other actors in the web. Enterprise principles thus apply liability according to the patterns of the economic enterprise, instead of stopping at the contours of the legal fiction.

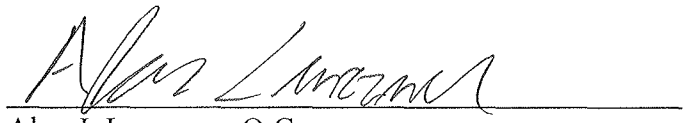
PART IV - SUBMISSIONS CONCERNING COSTS

99. The respondents submit that they are entitled to their costs of this appeal.

PART V - ORDER REQUESTED

100. The respondents respectfully request this Court to dismiss Chevron Canada's appeal with costs and require it to file its Statement of Defence within 30 days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Alan J. Lenczner, Q.C.
Counsel for the Respondents

PART VI - TABLE OF AUTHORITIES

Tab	Case	Paragraph(s) Referenced
3	*Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, affirmed (2012), 110 O.R. (3d) 256 (C.A.)	61
7	*Bazley v. Curry,* [1999] 2 S.C.R. 534	78, 83
11	*Buanderie centrale de Montréal Inc. v. Montreal (City); Conseil de la santé et des services sociaux de la région de Montréal métropolitain v. Montreal (City)*, [1994] 3 S.C.R. 29	82
15	*Christian Brothers of Ireland in Canada (Re)*, [2000] O.J. No. 1117 (C.A.)	83, 84
16	*Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572	4, 6, 62
18	*Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. 1879 (C.A.)	80, 81
22	*Incorporated Broadcasters Limited v. CanWest Global Communications Corp.* (2003), 63 OR (3d) 431, leave to appeal to SCC refused	4, 60, 61
23	*Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R.	72, 74
25	*Lynch v. Segal* (2006), 82 O.R. (3d) 641 (C.A.)	73
27	*Ontario v. Rothmans Inc.*, [2013] O.J. No. 2367 (C.A.)	64
28	*Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, [2009] O.J. No. 1195 (C.A.)	67
29	*Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906 (Ont. S.C.J.)	74, 75
30	*Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612	4, 61
34	*Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, [2014] O.J. No. 1815 (S.C.J.)	11
35	*Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271	76

PART VII - STATUTES AND REGULATIONS

Rules of Civil Procedure, R.R.O. 1990, REGULATION 194

PERSONAL SERVICE

16.02 (1) Where a document is to be served personally, the service shall be made,

Corporation

(c) on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;

RÈGLES DE PROCÉDURE CIVILE, R.R.O. 1990, RÈGLEMENT 194

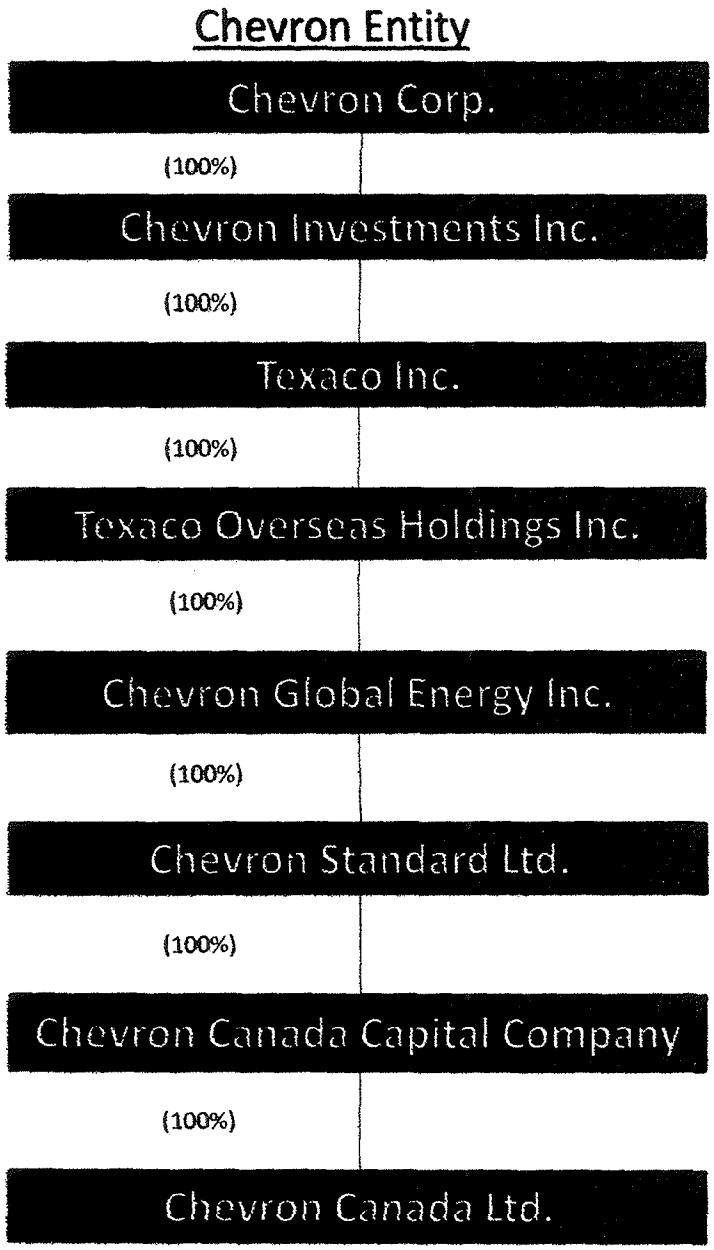
SIGNIFICATION À PERSONNE

16.02 (1) Le document qui doit être signifié à personne l'est comme suit:

Personnes morales

c) s'il s'agit d'une autre personne morale, en laissant une copie du document à un dirigeant, un administrateur ou un mandataire de celle-ci ou à une personne qui paraît assumer la direction d'un établissement de sla personne morale;

CHEVRON CORP. CORPORATE STRUCTURE



Directors

Frank Soler – Corp. Gov. Dept., Chevron Corp.
Kari Endries – [redacted], Chevron Corp.
Michael Woody – [redacted], Chevron Corp.

Frank Soler
Kari Endries

Frank Soler
Kari Endries
Michael Woody

Paul Bennett – [redacted], Chevron Corp.
Joseph Geagea – [redacted] Chevron Corp.
Dale Walsh – [redacted] Chevron Global Downstream LLC
Gary Yesavage – [redacted], Chevron Global Downstream LLC

Frank Soler
Jeff Wasko – Mgr. of Finance /VP & Treas.of Expl. & Prod., Chevron Canada Ltd.
Jeanette Ourada – [redacted], Chevron Corp.

Jeff Lehrmann – Pres., Expl.& Prod., Chevron Canada Ltd.

Jeff Lehrmann
Alan Dunlop – VP, Expl. & Prod. / GM of Asset Dev., Chevron Canada Ltd.
James Gable – Burn. Refinery Mgr. / Can. Cty Chair, Downstream, Chevron Canada Ltd.
Stephen Hutchison – VP, Expl. & Prod. / Mgr. Oil Sands Assets, Chevron Canada Ltd.