

Briefing Memo from Amazon Defense Coalition of Ecuador (FDA)

Showdown in Toronto Courts: Indigenous Peoples v. Chevron

The Battle to Strengthen the Rights of Indigenous Peoples Everywhere

Press event with Indigenous leaders and lawyers: April 16, 11 a.m. in downtown Toronto (location TBA)

Time of court hearing (attended by leaders from Ecuador and Canada): April 17-18, 10 a.m.

Location of court hearing: Ontario Court of Appeal, 130 Queen Street West, Toronto

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Huge Stakes of the Litigation

The legal action brought against the U.S. oil and gas company Chevron in Canadian courts to enforce a historic \$12 billion Ecuador environmental judgment faces a critical court hearing on **April 17th and 18th in the Ontario Court of Appeal in Toronto**. A three-judge panel will determine whether the assets of Chevron's wholly-owned subsidiary, Chevron Canada, can be seized by the affected Indigenous peoples and farmer communities in Ecuador to force the company to comply with the judgment ordering clean-up of what many consider to be the world's worst oil pollution disaster. Chevron has spent more than two decades evading its liability to Indigenous peoples (the Siona, Cofan, Secoya and Huaorani) who along with dozens of farmer communities inhabit the country's Northern Amazon region. One Chevron official threatened the Ecuadorian peoples with a "lifetime of litigation" if they persisted in pursuing the case. Cancer rates and other health problems in the affected region continue to afflict scores of innocent people and traditional lifestyles have been decimated by the oil pollution.

Because U.S.-based Chevron holds all of its Canadian assets in its wholly-owned subsidiary in Canada, a victory for Chevron in the upcoming hearing likely would deprive the Ecuadorians of collecting even the first dollar of their judgment which was won after an eight-year trial and later affirmed unanimously by Ecuador's Supreme Court. While Chevron shareholders reap billions of dollars in profit annually from Chevron Canada, company management claims the same subsidiary should not be considered an asset of the parent company when it comes to paying damages. This is something that the affected peoples of Ecuador and First Nations communities in Canada consider profoundly unfair, especially given that Chevron (after having insisted on jurisdiction in Ecuador) sold off its assets in the country during the trial as the evidence against it mounted. Chevron's goal – unethical as it may be – was to try to make itself "judgment proof" in Ecuador. That forced the Indigenous peoples and farmer communities from the Amazon to chase the company around the globe, including into Canada, to force compliance with their judgment. A decision by the Ontario Court of Appeal on the subsidiary liability issue will be issued in several weeks.

Impact On Oil Industry and Role of UN Declaration

A victory for the villagers before the Ontario court would pose an enormous financial risk to Chevron while strengthening Indigenous rights and human rights protections for communities throughout the world. It would do this by eliminating the ability of large corporations to evade liabilities through complex cross-border structuring. It also would force the resource extraction industry (oil, gas, and mining) to re-align its incentive structure such that the ancestral lands of Indigenous peoples can be better protected from environmental harms. The matter also provides an opportunity for the Canadian legal system to apply the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in a case where justice has been long evaded.

The UN Declaration recognizes the inherent rights of Indigenous peoples to their lands, territories and resources and the corresponding obligation of States to provide redress and access to justice for violations of those rights. Canada is part of several consensus resolutions of the UN General Assembly affirming the rights of Indigenous peoples as human rights. Canada's Prime Minister has affirmed Canada's unqualified support for the full implementation of the UN Declaration. Justice requires that large corporate entities not be allowed to hide behind their corporate veils to evade responsibility for the violation of the rights of Indigenous peoples. Corporate entities involved in resource extraction activities cannot be permitted to evade the rule of law, especially when fundamental issues of human rights are at stake.

Role of Ecuador's Amazon Defense Coalition/Frente de Defensa de la Amazonia (FDA)

The grass roots coalition in Ecuador's Northern Amazon region that is executing the judgment against Chevron is the Amazon Defense Coalition, or Frente de Defensa de la Amazonia. Known by its Spanish acronym, FDA, the group was founded in 1994 and is the sole beneficiary of the judgment and responsible for its enforcement in Canada. The FDA's current president, Carmen Cartuche, will be attending the court hearing along with Ecuadorian Indigenous leaders Domingo Peas and Rafael Pandam, the President of the Indigenous Amazonian Parliament of Ecuador.* The FDA's founder and one of its current leaders, Luis Yanza, is a past recipient of the Goldman Environmental Prize (known as the "Nobel" of the environment) and the organization has attracted the support of organizations and celebrities around the world. The FDA represents the interests of all of the estimated 30,000 people from roughly 80 Indigenous bands and farmer communities who live in the impacted area of Chevron's operations, known as the "Oriente" in Ecuador. Those affected include both Indigenous peoples and mestizo communities who have migrated to the Amazon from other parts of Ecuador. Dozens of communities and organizations – such as women's groups, teacher's associations, and education groups – are also members of the FDA and help advocate for those impacted by the pollution.

The FDA recently signed a joint protocol with Canada's national Indigenous federation, the Assembly of First Nations (AFN), to hold Chevron accountable for environmental harms in both countries. The protocol was signed by Ms. Cartuche of the FDA; Canada National Chief Perry Bellegarde of the AFN; Jamie Vargas, National Chief of Ecuador; and Marlon Vargas, the President of the Confederation of Indigenous Nationalities of the Ecuadorian Amazon. The FDA recently hosted former Canadian National Chief Phil Fontaine and Grand Chief Ed John in the affected area of Ecuador, where they criticized Chevron's refusal to clean up its contamination. Grand Chief John recently spoke about the urgency of the Ecuador situation at the AFN's national meeting where a resolution in support of the enforcement of the environmental judgment was approved by unanimous consensus.

* The environmental case against Chevron in Ecuador is similar to a U.S.-style class action case with named plaintiffs but without a personal injury component. The main remedy under Ecuadorian law was and remains environmental remediation of the damage caused. The named Ecuadorian plaintiffs were part of a group that brought the case in 1993 on behalf of an estimated 30,000 affected persons who live in the impacted area. The FDA represents the interests of all Indigenous peoples and farmer communities in the recovery of the judgment and will be responsible for spending any proceeds collected on environmental clean-up, as ordered in the final judgment of Ecuador's courts. The FDA is the only organizational entity that is a plaintiff in the lawsuit and is entitled to receive a small percentage of the final proceeds under Ecuador's Environmental Management Act.

The FDA's lawyers in Canada include, among others, Alan Lenczner and Brendan Morrison of Lenczner Slaght in Toronto; Peter Grant, the Aboriginal rights specialist from Vancouver; Kirk M. Baert and Celeste Poltak of Koskie Minsky in Toronto; and Anton Tabuns, a sole practitioner in Toronto. In Ecuador, the FDA's attorneys include Patricio Salazar, Agustin Salazar, and Angel Cajo; in the United States, its legal team includes Steven R. Donziger and Aaron Page. All of the FDA's attorneys assist in the enforcement of the judgment against Chevron.

Broader Significance of Litigation

The underlying environmental damages case, *Aguinda v. ChevronTexaco*, is widely viewed as one of the most important corporate accountability and Indigenous rights litigations ever. It represents the first time that Indigenous and farmer communities from the rainforest have won a multi-billion dollar judgment against a North American oil company. It also represents one of the largest foreign enforcement actions in history. Whatever the outcome, the case will re-shape corporate and human rights law not only in Canada but also in the United States and throughout the world. Chevron has paid an estimated \$2 billion to hire 2,000 lawyers to fight the affected communities since the beginning of the case. Several major Chevron shareholders have criticized management for its “material mishandling” of the litigation while Chevron has been on the losing end of three consecutive unanimous appellate decisions in Canadian courts. See [this blog](#) for a general overview of Chevron’s challenges in the case.

Specific Issues In Play

The three-judge panel in Ontario will decide or address several issues with national and global implications, as follows:

- Whether private corporations can obtain effective impunity for their human rights violations by blocking Indigenous peoples from collecting court judgments from their wholly-owned subsidiaries, in an era when the rights of Indigenous peoples are becoming increasingly central to Canadian and international jurisprudence;
- Whether international human rights instruments, including the U.N. Declaration on the Rights of Indigenous Peoples, can be used to interpret Canadian law and the Canadian Constitution in the context of the judgment enforcement action against Chevron;
- Whether Canadian courts in an age of increased environmental responsibility will allow corporations such as Chevron to sell assets in certain countries to evade liability for proven environmental devastation;
- Whether Canadian courts will respect principles of international legal comity by enforcing an Ecuadorian judgment against a large American corporation, when that judgment engages the protection of Indigenous peoples’ rights;
- Whether Canada’s *Execution Act* – which allows for a creditor to collect a debt – can be applied to an asset seizure of a Canadian subsidiary of a foreign parent company that has engaged in environmental/corporate wrongdoing in a foreign jurisdiction.

Repercussions from all of these issues will play out over the wider Canadian and international legal landscape with important impacts on the rights of both corporations and Indigenous peoples.

Ecuador Legal Decision Against Chevron

Three levels of courts in Ecuador, including the country’s Supreme Court, found that Chevron (operating as Texaco) deliberately and systematically dumped billions of gallons of untreated carcinogenic oil waste into the Ecuadorian rainforest when it operated in the country from 1964 to 1992. The dumping and subsequent cover-up resulted in devastation so bad that has become known as the “Amazon Chernobyl”. In 1993, Ecuadorian Indigenous peoples and villagers in the area brought a lawsuit against Chevron in New York. Chevron fought to have the lawsuit transferred to Ecuador, and proceedings began in the Latin

American nation in 2003 after the oil company accepted Ecuadorian jurisdiction. After an eight-year trial slowed by Chevron's delaying tactics, the Ecuadorian plaintiffs obtained a \$9.5 billion judgment against the oil giant in 2011 which was confirmed unanimously by Ecuador's Supreme Court in 2013. Chevron sold all its assets in Ecuador before the judgment was rendered, thus forcing the villagers to pursue collection in other jurisdictions. The judgment is now worth \$12 billion with interest.

The Canada Enforcement Case

The Ecuadorians commenced a judgment enforcement action in the Ontario Superior Court of Justice in 2012 against Chevron Corporation (Chevron) and Chevron Canada, the Canadian subsidiary. The subsidiary holds an estimated \$15 billion to \$25 billion worth of assets in Canada, more than enough to pay the entirety of the judgement. Chevron and Chevron Canada immediately challenged the jurisdiction of Ontario courts, but the Canadian Supreme Court rejected that argument in 2015 in a unanimous decision. Chevron then tried to remove its subsidiary from the enforcement action in an attempt to immunize its assets from collection. It also tried to force the Ecuadorian plaintiffs to put up almost \$1 million to secure Chevron's own legal costs in trying to evade enforcement of its liability to the people of Ecuador. As the Ontario Court of Appeal stated when rejecting Chevron's latter tactic: "The history of this litigation, which has been ongoing for almost twenty-five years, makes clear that Chevron Corporation...will employ all available means to resist enforcement of the Ecuadorian judgment...this reality makes it difficult to accept that the motion for security for costs was anything more than a measure intended to bring an end to the litigation."

Key Legal Issue: Subsidiary Liability

In Canada, Chevron is claiming that Chevron Canada's assets cannot be seized due to corporate separateness between the American parent company and the Canadian subsidiary. The legal team for the Ecuadorian communities has argued that Chevron Canada's assets are available to satisfy a debt of the parent under Canada's *Execution Act* and that it will not be necessary to pierce Chevron's corporate veil to win the case, as Chevron claims. However, even if the court finds that the *Execution Act* is not applicable, the affected Ecuadorian communities and their Canadian allies have stressed that the time is now ripe for a reformulation of the Canadian legal system's approach to piercing the corporate veil. The Ontario Court of Appeal has suggested that it may be ready to re-think Canada's view of corporate veil piercing, commenting as follows in a recent decision in the case:

There is no doubt that the legal arguments asserted by the [plaintiffs] are innovative and untested, especially with regard to piercing the corporate veil. But this does not foreclose the possibility that one or more of them may eventually prevail. That is how the common law evolves. Innovative or novel arguments are made and the law develops, either gradually or in leaps and bounds.

What A Chevron Victory Might Mean

If Chevron's argument about subsidiary liability is accepted, it could create a nightmare scenario for Indigenous peoples and all human rights victims in Canada and the world over. To avoid paying a judgment, all a private corporation would have to do (under Chevron's legal formulation) is to remove its assets from the jurisdiction in which it committed an offence, and place them in a wholly-owned subsidiary. Because Chevron sold all of its assets in Ecuador, it is trying to leave the affected communities unable to collect even one dollar of their judgment. Such a decision would bestow blanket immunity on Chevron and other human rights abusers, arguably violating bedrock principles of international law in the process.

What A Victory for Indigenous Peoples Might Mean

Conversely, if the Indigenous peoples and farmer communities are successful it will set a historic precedent for corporate accountability. Canadian First Nations have realized the critical significance of the lawsuit. Canada's Assembly of First Nations (which represents 634 nationalities) recently passed a resolution in support of the FDA "to address issues of mutual concern regarding protection of the environment, protection of Aboriginal and treaty rights, and corporate and social responsibility." The resolution also called on the Government of Canada to table legislation "to enable Indigenous peoples from other countries to expeditiously enforce awards and compensation orders of foreign courts in Canada against any corporation conducting business in Canada."

Canada's National Chief Bellegarde, former National Chief Fontaine and Grand Chief Ed John have lent their support to the Ecuadorian communities, signalling a momentous alliance between the Indigenous peoples of Canada and Ecuador. Chevron also realizes how high the stakes are. As the Ontario Court of Appeal stated, Chevron has shown that it will employ "all available means" to keep this precedent from being set. In the context of the litigation, Chevron has been accused of bribing witnesses, threatening judges in Ecuador, attacking human rights defenders, and other unsavoury acts. Canadian courts must not allow Chevron to use its massive resources to abuse the civil justice system or use its byzantine corporate structure – it maintains roughly 1,500 subsidiaries around the world – to evade responsibility for the harm it has caused in Ecuador.

Amazon Defense Coalition of Ecuador/Frente de Defensa de la Amazonia (FDA)
Defending Ecuador's Amazon Communities Against Chevron
April 2018

Important Links:

[Summary of evidence against Chevron relied on by Ecuador's courts](#)

[Studies documenting high cancer rates in Chevron's area of operations in Ecuador](#)

[History of Ecuador's FDA – the coalition enforcing the pollution judgment in Canada](#)

[Canada Supreme Court decision from 2015 in favour of Ecuadorians](#)

[Resolution from Canadian Chiefs in support of Ecuadorian Indigenous peoples](#)

[CBC article on visit of former National Chief Phil Fontaine to Ecuador](#)

[Article about cancer victim and legendary nurse Rosa Moreno](#)

[Article on Chevron litigation in Canada by Greenpeace co-founder Weyler](#)

[Report on Chevron's fraud in trying to attack the Ecuador judgment in U.S. courts](#)

[Press release and referral letter to the U.S. Department of Justice regarding Chevron's witness bribery](#)

[Profile of Alan Lenczner, lawyer for the Ecuadorians](#)

[Article on Peter Grant, Aboriginal Rights specialist and lawyer for the Ecuadorians](#)