# Assumed Jurisdiction in Canada: What Next?

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## Introduction

For the past quarter century, as litigation has become increasingly global, Canadian courts have been developing a framework to address a difficult question: when is it appropriate for a Canadian court to assume jurisdiction over a foreign entity? While there have been several pronouncements from the Supreme Court of Canada, the test continues to evolve. On December 11, 2014, the Supreme Court will hear oral arguments with respect to whether the Canadian courts have jurisdiction to enforce an almost $10 billion[1] Ecuadorian judgment against certain Chevron companies in Canada. The Supreme Court's views will impact directly on global companies doing business in Canada.

## The Common Law in Canada

The traditional private international law routes for a Canadian court to establish jurisdiction over a foreign subject were limited. This restrictive approach to the establishment of jurisdiction originated in 19th century England, and reflected some of the practicalities of that era. While these routes are still in effect, the doctrine of assumed jurisdiction (by application of the "real and substantial connection test", described below), has greatly expanded the scope of a Canadian court's ability to hear an action in the first instance, or enforce a judgment of, a case where the plaintiff or the subject matter is of a foreign jurisdiction.

One traditional route is that a party may attorn to the jurisdiction of a provincial court. For a plaintiff, the jurisdiction of the court will implicitly be consented to by the commencement of the claim.[2] For a defendant, if they choose to defend the matter on the merits, or challenge the result, this will constitute an implicit consent to the jurisdiction of the court. [3]

Alternatively, the parties may have entered into agreements that nominate a particular court for the resolution of the dispute between them, and may rely on those agreements to found jurisdiction.[4] The choice of a particular court may also be implied from the circumstances surrounding the transaction, such

[1] All figures in USD.
[2] See for example, *Follwell v Holmes,* [2006] OJ NO 4387 (SCJ).
[3] See for example, *MNR v Glazer,* 2011 ABQB 559.
[4] See for example, *Uninet Technologies Inc v Communication Services Inc,* 2005 BCCA 114.

as when highly sophisticated parties have sought to avoid the application of local law to their dealings.[5] Where parties have not planned for dispute resolution, for example in a tort claim, the parties may stipulate a forum after their dispute has arisen.

Where the parties have not attorned or consented to the court's jurisdiction, the court may nevertheless exercise jurisdiction based on the residence of the defendant at the date of the commencement of the proceeding. Corporations have been subject to the jurisdiction of a particular court where they may be served in the forum, in accordance with the local rules of practice.[6] Generally, a business may be served where the entity has a registered office or business address, or where it is carrying on business.

In Quebec, which is a civil law jurisdiction, the rules and principles for private international law are provided for in Book Ten of the *Civil Code of Quebec*.[7]

## The Evolution of the Test for Assumed Jurisdiction

In a series of cases beginning with the landmark decision of *Morguard*[8] in 1990, the Supreme Court of Canada recognized that provincial and international borders are increasingly permeable to trade and commerce. Faced with the traditional private law bases for jurisdiction, the Court noted that its "approach to the recognition and enforcement of foreign[9] judgments would appear ripe for reappraisal."[10] It was clear that by the twentieth century, global commerce necessitated that Canadian provinces be able to assume jurisdiction over a defendant, and recognize and enforce foreign judgments.

Consequently, in *Morguard*, which concerned an interprovincial recognition and enforcement action, the Court established that where a "real and substantial connection" existed between the foreign court and the subject matter of the case, a court could appropriately assume jurisdiction to recognize and enforce the foreign court's judgment. Key to the formulation of the real and substantial connection test were the principles of comity, reciprocity and respect for the judgment of a foreign court. The Court noted that

[5] See for example, *Kolibri Capital Corp v LSOF Canada I, LP,* [2004] OJ No 1468.
[6] See for example, Rule 17.02 *Ontario Rules of Civil Procedure,* RRO 1990, Reg 194.
[7] SQ 1991, c 64.
[8] *Morguard Investments Ltd v De Savoye,* [1990] SCJ No 135 [*Morguard*]. This case dealt with the recognition and enforcement of an Alberta judgment in British Columbia.
[9] In Canada, the enforcement of a judgment by one province in another province is considered to be the enforcement of a "foreign" judgment.
[10] *Morguard*, *supra* note 8 at 34.

greater comity is required in an era where the business community operates in a world economy, and where accommodating the flow of wealth, skills and people across state lines has become imperative.[11]

The real and substantial connection test does not oust the traditional private international law bases for a court's jurisdiction,[12] but instead supplements, and greatly enhances, the ability for a Canadian court to recognize and enforce a foreign judgment, or assume jurisdiction.

Following *Morguard*,[13] Canada grappled with the substance of the "real and substantial connection" test, but it was clear that an increasingly deferential approach to foreign judgments was being adopted. In light of this increased deference, a few years later, while noting that the term "real and substantial connection" was not yet fully defined, the Supreme Court stated that the test was developed "[t]o prevent overreaching" and "has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest." [14]

Refinements to the real and substantial connection test continued to develop. In the case of *Beals v Saldanha*[15] in 2003, the Court confirmed that the real and substantial connection approach permitted Canadian courts to recognize and enforce overseas judgments. The Court confirmed that there was only one precondition to the recognition and enforcement in Canada of a foreign judgment: that the foreign court had a real and substantial connection to the plaintiffs or the subject matter of the dispute. Further, in 2006,[16] the Court held that non-monetary judgments could, in principle, be enforced.[17]

Most recently, in 2012, the Court in *Club Resorts Ltd v Van Breda*[18] sought to clarify the real and substantial connection test when assuming jurisdiction over a case in the first instance (as opposed to simple recognition). In clarifying the framework for the assumption of jurisdiction, the Court stated, "[p]arties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect."[19]

The Court held that there were two steps in applying the real and substantial connection test to the assumption of jurisdiction in a case of first instance. First, the plaintiff has the burden of establishing a

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[11] *Ibid*.
[12] *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at 79 [*Van Breda*].
[13] *Morguard*, supra note 8.
[14] *Tolofson v Jensen*, [1994] SCJ No 110 at 41 [*Tolofson*]. This case held that the location where a tort occurred should determine the applicable law, because the court has a real and substantial connection with the location of the tort.
[15] *Beals v Saldanha*, 2003 SCC 72 [*Beals*].
[16] *Pro Swing Inc v Elta Golf Inc,* 2006 SCC 52.
[17] On the facts of the case, however, the foreign judgment in issue (which was a foreign contempt order) was not actually enforced.
[18] *Van Breda*, *supra* note 12. The case concerned two claims against foreign defendants, brought in Ontario for personal injuries that occurred while the plaintiffs were on vacation in Cuba.
[19] *Van Breda, supra* note 12 at 73.

presumptive factor[20] connecting either the defendant, or the dispute, to the local forum. The use of presumptive factors, rather than a broad judicial discretion to decide whether a connection exists, allows for greater order in the ability to predict the assumption of jurisdiction. If no presumptive connecting factor applies, the effect of the real and substantial connection test is that the court should not assume jurisdiction.[21]

The second part of the test comes into play if the plaintiff successfully establishes that a presumptive connecting factor applies. The burden then shifts to the defendant to rebut the presumption of jurisdiction by showing that the presumptive factor only points to a weak relationship between the subject matter of the dispute and the forum.[22] The Court emphasized the need for a relatively strong connection between the dispute and the forum, and the need to achieve order and predictability in the resolution of jurisdictional disputes.

If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist, or because the presumption of jurisdiction that flows from one of those factors has been rebutted, the court must dismiss or stay the action.[23]

Although the Court in *Van Breda* clarified the framework for the assumption of jurisdiction analysis, it declined to elaborate on *how strong* a connection must be to satisfy the real and substantial connection test. While the Court stated that the connection cannot be "weak or hypothetical"[24] as an insubstantial connection would cast doubt on the legitimacy of the exercise of state power over foreign parties, overall, the court appears to have left the issue of exactly how strong the connection must be, to another day. As it stands currently, the test is so broad that there appear to be very few situations in which it would not be met. This may – or may not – soon be clarified.

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[20] In cases involving tort claims, the Court recognized the following factors as presumptive connecting factors that afford a court *prima facie* jurisdiction over a dispute: (i) the defendant is domiciled or resident in the province; (ii) the defendant carries on business in the province; (iii) the tort was committed in the province; or (iv) a contract connected with the dispute was made in the province. The Court also left the door open for courts to identify new presumptive connecting factors over time. *Van Breda, supra* note 12 at 90-91.
[21] *Van Breda, supra* note 12 at 93.
[22] *Van Breda, supra* note 12 at 95-97. Some examples provided by the Court were: (i) where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation; and (ii) where the presumptive connecting factor is the fact that a defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province.
[23] *Van Breda, supra* note 12 at 100.
[24] *Van Breda, supra* note 12 at 32.

**The Saga of *Yaiguaje v Chevron***

The decades-long environmental litigation between Chevron Corporation ("Chevron Corp") and a group of Ecuadorian Plaintiffs (the "Plaintiffs") is currently working its way through the Canadian court system, with the Supreme Court of Canada set to hear submissions, beginning on December 11, 2014, concerning the ability of a Canadian court to enforce an Ecuadorian judgment.

*History of the Chevron Case*

The history of the case begins in 1964, when Texaco Petroleum Company ("TexPet"), a fourth-level subsidiary of Texaco Inc ("Texaco"), began oil exploration in the Republic of Ecuador in the Lago Agrio region. In 1972, TexPet and Petroecuador, the state-owned oil company, formed a consortium to operate the oil extraction in the area. Petroecuador became the sole owner of the former consortium facilities in 1992. In 1993, a class action seeking monetary damages for alleged personal injuries and property damage caused by the operations of the oil exploration, was filed in New York on behalf of 30,000 Ecuadorians. In 2002, the United States Second Circuit Court of Appeals dismissed the action against Texaco on the grounds of *forum non conveniens*, with the agreement that Texaco attorn to the jurisdiction of the Ecuadorian courts. While the early rounds of litigation in New York were ongoing, Texaco settled with the Ecuadorian government and Petroecuador, and undertook to provide $40 million in remediation work, which represented the share of environmental damage caused by TexPet.

Chevron Corp became a party to the proceedings in 2001, when a Chevron Corp subsidiary merged with Texaco. Consequently, Texaco and TexPet became indirect subsidiaries of Chevron Corp. As a result of the *forum non conveniens* decision, in 2003, some of the plaintiffs from the 1993 class action, as well as a number of new plaintiffs, commenced a new action in Ecuador against Chevron Corp alone, based on Ecuador's *Environmental Management Act*.[25] The Ecuadorian judgment was rendered against Chevron Corp in February 2011, in the amount of $18.2 billion, and was reduced to $9.51 billion in a November 2013 decision of Ecuador's National Court of Justice.

However, in March 2014, the U.S. District Court for the Southern District of New York ruled that the $9.51 billion judgment was the product of fraud and racketeering activity.[26] If left undisturbed,[27] this ruling would make it impossible to collect on the judgment in the United States, and difficult to collect on the judgment in Canada. The current chapter in this saga involves the Ecuadorian Plaintiffs' attempt to have recognized

[25] *1999 Environmental Management Act,* Official Registry No 37, July 30, 1999, Article 43. This Act created a new right of action for individuals in Ecuador to redress public environmental harm.
[26] Chevron Corp sued the Plaintiffs' counsel under the Racketeer Influenced and Corrupt Organizations ("RICO") Act. U.S. District Judge Lewis Kaplan ruled that fabricated scientific evidence, forged documents, coercion and bribery had been used by Plaintiffs' counsel.
[27] An appeal was filed in July 2014.

and enforced in Canada the $9.51 billion judgment against Chevron Corp, and its subsidiary, Chevron Canada, which is a threshold issue. In the event that the Plaintiffs are successful, the Defendants will then be able to raise the issue of fraud as a bar to the enforcement.

*The Parties in the Canadian Enforcement Action*

Chevron Canada is a seventh level indirect subsidiary of Chevron Corp, with a registered head office in Calgary, Alberta. Chevron Canada's major business activities include petroleum and natural gas exploration in Canada, but not in Ontario. Its only business involvement with Ontario is that since May 2012, it has had 13 employees in Ontario selling products, three of whom work out of an office in Ontario.

Chevron Corp is a Delaware corporation, with a head office in California. It does not reside or conduct business in Ontario, and has no assets in Ontario. Chevron Corp conducts no revenue generating business itself; its extractive industry operations are conducted by wholly-owned subsidiaries in more than 30 countries in the world.

*The Canadian Enforcement Action*

The Plaintiffs commenced their action in the Ontario Superior Court of Justice by way of an Amended Statement of Claim dated May 31, 2012. The defendants, Chevron Corp and Chevron Canada, both refused to file a Statement of Defence, and instead brought a motion to object to the jurisdiction of the Ontario court, without consenting or attorning to such jurisdiction.

The motion judge relied on the local practice rules for service in Ontario as a ground for assuming jurisdiction over both Chevron Corp[28] and Chevron Canada,[29] and thus dismissed the jurisdictional challenge. However, after considering the absence of Chevron Corp's assets in Ontario, the motion judge stayed the action,[30] concluding that the Plaintiffs had "no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and ignored."[31]

The Plaintiffs appealed the stay of the action, and the defendants cross-appealed the finding that the Ontario court had jurisdiction *simpliciter* to hear the action. The Court of Appeal for Ontario set aside the stay, and dismissed the cross-appeal. In setting aside the stay, the Court noted that no party had sought a stay, and no law or evidence was heard on the matter: it was an error for the motion judge to consider the merits of the case prematurely on the jurisdiction motion.

[28] Ontario *Rules of Civil Procedure* 17.02(m), *supra* note 6.
[29] Ontario *Rules of Civil Procedure* 17.02(o) and 16.02(1)(c), *supra* note 6.
[30] by invoking the court's power to do so under s. 106 of the *Courts of Justice Act*, RRO 1990, Reg 194.
[31] *Yaiguaje v Chevron Corporation*, 2013 ONSC 2527 at 109.

In holding that Ontario had jurisdiction over the enforcement action, the Court clarified that the test for recognizing and enforcing foreign judgments remains the one articulated in *Beals*:[32] to recognize and enforce a foreign judgment in Ontario, an Ontario court must be satisfied that the foreign court had a real and substantial connection to the initial claim. Thus, "the exclusive focus of the real and substantial connection test is on the foreign jurisdiction."[33] Ontario courts are *not* required to also demonstrate that there is a real and substantial connection between Ontario and the legal dispute in the foreign country. Jurisdictional ties to Ontario are only required when determining if the Ontario court should hear an action in the first instance, not an enforcement action. Consequently, the Court found that Ontario had jurisdiction over Chevron Corp because there was a "real and substantial connection" between Chevron Corp and the Ecuadorian court that that issued the judgment.

The Court sought to explain the fundamental differences between an action of first instance and an action to enforce a judgment. The Court noted that in an action of first instance, if there is no real and substantial connection to the local forum seeking to enforce the judgment, then the principle of comity would be offended because one or more jurisdictions would have a real and substantial connection to the litigation, but the local forum would not. Further, if there was no connection to Ontario, there would be constitutional limitations on the ability to hear the case.[34] However in a recognition and enforcement action, there is no constitutional issue because the decision of the court is limited to the enforceability of the judgment in Ontario, and there is no comity concern because the local forum does not purport to intrude on matters that are properly within the jurisdiction of the foreign court.[35]

As Chevron Canada was not a party to the underlying Ecuadorian acts, the Court of Appeal did not apply the "real and substantial connection" test to Chevron Canada. Instead, the Court held that it had jurisdiction over Chevron Canada because of the combined effect of the three following factors: (i) there was jurisdiction over Chevron Corp; (ii) Chevron Canada carried on business at an Ontario office; and (iii) Chevron Canada had an "economically significant relationship" with Chevron Corp. Thus, even though Chevron Canada was not liable under the Ecuadorian judgment, the Court held that an Ontario court has jurisdiction to determine the merits of an enforcement action against Chevron Canada because of its non-transitory place of business in Ontario, and its economically significant relationship with Chevron Corp.

## ***Chevron*** **at the Supreme Court of Canada**

[32] *Supra* note 15.
[33] *Yaiguaje v Chevron Corporation*, 2013 ONCA 758 at 30 [*Chevron ONCA*].
[34] *Chevron ONCA, supra* note 33 at 31.
[35] *Chevron ONCA, supra* note 33 at 32.

The appeal of *Yaiguaje v Chevron*[36] is particularly important to multi-national enterprises operating in Canada, because it involves an attempt to enforce in Canada a foreign judgment against a non-Canadian judgment debtor and against its Canadian subsidiary which was not a party to the litigation.

The Court of Appeal decision presently clarifies that Ontario courts will recognize and enforce a foreign judgment imposed on a foreign defendant, if there is a real and substantial connection between the foreign country and the legal dispute. This is so regardless of the strength of the connection between Ontario and the legal dispute.

In its appeal to the Supreme Court, Chevron Corp suggests that Ontario does not have jurisdiction to recognize and enforce the Ecuadorian judgment against it for several reasons, including:

1. Chevron Corp seeks to rely on the "rebuttable presumption" of jurisdiction, as set out in *Van Breda*. Chevron Corp suggests that the local practice rule under which it was served[37] merely gives rise to a rebuttable presumption of jurisdiction.[38]

2. Chevron Corp suggests that in a recognition and enforcement action where the jurisdiction of the enforcing court is challenged, the real and substantial connection test must be applied *twice*. First, the enforcing court must determine its own jurisdiction on a preliminary motion. If it finds jurisdiction, it then must proceed to assess whether the foreign court appropriately assumed jurisdiction.[39]

3. Further, because it has no presence or assets in Ontario, Chevron Corp suggests that any adjudication of the recognition and enforcement action will have no practical effect. Consequently, Ontario has no interest in the outcome of the motion, and comity dictates that the validity of the original Ecuadorian action should be left to a court that has a legitimate interest in the outcome – i.e. a court in a jurisdiction where Chevron Corp has assets.[40]

In respect of the latter point, Chevron Corp seeks to distinguish its case from that of *Morguard* and *Beals*. It notes that in those cases, the judgment debtors were resident in the enforcing jurisdiction.[41] Chevron Corp states "The Court of Appeal's analysis presumed the legitimacy of an Ontario court evaluating the foreign judicial process and determining the validity of a foreign judgment obtained by anyone, against anyone, on any claim, from any court in the world, and regardless of whether Ontario has any interest in

[36] *Chevron ONCA, supra* note 33.
[37] Ontario *Rules of Civil Procedure, supra* note 6 at 17.02(m).
[38] Factum of the Appellant Chevron Corp at 59.
[39] *Ibid* at 51.
[40] *Ibid* at 4.
[41] *Ibid* at 50.

the matter whatsoever."[42] Chevron Corp suggests that comity is not a unidirectional concept that dictates that a court must always grant its assistance.[43]

Chevron Canada also asserts that Ontario has no jurisdiction over it. It notes that the Court of Appeal failed to apply the real and substantial test to Chevron Canada, and incorrectly held that the court had jurisdiction even though the foreign court did not.[44] Further, Chevron Canada disagrees with the three factors that the Court of Appeal based its jurisdiction on: (i) it states that the Court has no jurisdiction over Chevron Corp, and therefore no jurisdiction over Chevron Canada;[45] (ii) the fact that Chevron Canada "carried on business" at an Ontario office is not sufficient, as it only creates a rebuttable presumption of jurisdiction;[46] and (iii) the Court's finding that Chevron Canada had an "economically significant relationship" with Chevron Corp, detracts from the separate legal identities of the two corporations, and is unsupported.[47]

*What can we expect the Supreme Court to discuss?*

There are several key areas that we hope the Supreme Court will address in its judgment.

Undoubtedly, a key issue will be how the real and substantial connection test applies to an action in the first instance, as opposed to a recognition and enforcement action. The Plaintiffs assert that the characterization of the real and substantial connection test developed in *Morguard* and *Beals* for the recognition and enforcement of a foreign judgment, remains the applicable test to apply on the facts of its case - namely, that Ontario courts will recognize and enforce a foreign judgment imposed on a defendant, if there is a real and substantial connection between the foreign country and the legal dispute. By contrast, the Plaintiffs assert that the real and substantial connection test is something different when hearing an action in the first instance, as laid out in *Van Breda*.[48] Specifically, in an action in the first instance, the plaintiff has the burden of establishing a presumptive factor connecting either the defendant, or the dispute, to the local forum, and the burden then shifts to the defendant to rebut the presumption of jurisdiction by showing that the presumptive factor only points to a weak relationship between the subject matter of the dispute and the forum.

Given the historical judicial reverence for the principle of comity, it would appear that in a recognition and enforcement action, it would be inappropriate for the Supreme Court to drastically change course and

[42] *Ibid* at 92.
[43] *Ibid* at 94.
[44] Factum of the Appellant Chevron Canada at 7.
[45] *Ibid* at 6.
[46] *Ibid* at 8.
[47] *Ibid* at 9.
[48] *Supra* note 12.

impose a requirement that establishes a connection to the local forum, as asserted by the defendants. Comity dictates that our courts not demean the decisions of another jurisdiction. Any concerns regarding the validity of the judgment may be addressed after the local forum has recognized the judgment, by the application of the defences which bar enforcement of a foreign judgment (such as fraud, public policy reasons, or natural justice). In contrast, when hearing an action in the first instance, a connection to the local forum provides a safe-guard that our courts do not "overreach", in the words of Justice La Forest,[49] into a matter in which they have little interest.

As a necessary corollary, the Court will likely address whether there are any limits to the principle of comity. Chevron Corp appears to suggest that one limit ought to be that the defendant has assets in the local forum, such that the local forum has an interest in the outcome of the motion. At present, the principle of comity appears to be so far reaching that any judgment will be enforced in Canada, subject to the defences of fraud, public policy, or natural justice, which are only considered once the court has already assumed jurisdiction. Perhaps it is time to revisit the words of Justice LeBel in his dissent in *Beals*: "in our enthusiasm to advance beyond the parochialism of the past, we should be careful not to overshoot [the] goal."[50]

Finally, what is the test to determine if a court can recognize and enforce a judgment against a non-party? This is an issue that Canadian courts have yet to discuss, and will constitute a decision of great importance for global corporations currently conducting business in Canada.

[49] *Tolofson, supra* note 14.
[50] *Beals, supra* note 15 at 173.