FOREIGN JUDGMENTS

Case Comment on Chevron Corp. v. Yaiguaje

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Beginning with the landmark decision of *Morguard Investments Ltd. v. De Savoye*,[1] the Supreme Court of Canada has gradually but consistently removed barriers to the recognition and enforcement of foreign judgments. In *Chevron Corp. v. Yaiguaje*,[2] Chevron and its indirect Canadian subsidiary Chevron Canada Limited tried to swim against this tide and add a new requirement to the established test.

Set in this context, it is not surprising that the defendants were unsuccessful. The Supreme Court of Canada in a unanimous decision released September 4, 2015, dismissed Chevron and Chevron Canada's appeal. In doing so, the Court reinforced its previous jurisprudence that a foreign judgment can be enforced where the original court assumed jurisdiction on the basis of a real and substantial connection between the action and its territory.

The Court also highlighted and perhaps expanded the traditional ground of presence-based jurisdiction – holding that a court will have jurisdiction in any province in which a corporation operates a physical business.

The case will be one to watch, not only for its compelling story, but also for its implications for cross-border litigation and ultimately fundamental principles of corporate law.

The Saga Continues

To understand *Chevron* requires a brief interlude into the litigation among Chevron, the indigenous Ecuadorians, and their American counsel, which has already been the subject of at least one *New York Times* best-selling novel and is being developed into a major motion picture.[3]

The lawsuit began over 20 years ago when 47 indigenous Ecuadorians acting on behalf of thousands sued Texaco (which since merged with Chevron) in New York alleging extensive environmental damage to the Lago Agrio region of Ecuador. The New York suit was dismissed in 2001 for jurisdictional reasons and two years later, the plaintiffs sued again in Ecuador.[4]

The plaintiffs were resoundingly successful before the Ecuadorian courts. In, 2011 Judge Zambrano of the Provincial Court of Justice of Sucumbíos ordered Chevron to pay US$8.6 billion in environmental damages and an additional US$8.6 billion in punitive damages that were to be awarded unless Chevron apologized within 14 days of the judgment. Chevron did not apologize. But the judgment was later reduced on appeal to $9.5 billion.[5]

Chevron had concerns about the propriety of the judgement. It refused and has continued to refuse to pay any portion of it. As put by one Chevron spokesperson in a now often-quoted statement (at least by plaintiffs' counsel): "We're going to fight this until Hell freezes over – and then we'll fight it out on the ice."[6]

Chevron took the extraordinary step of suing the plaintiffs' American counsel, Steven Donzigan, and three of the plaintiffs in the U.S. District Court for the Southern District of New York alleging that they had corrupted the Ecuadorian proceedings. Those proceedings have gone to trial and in 2014, U.S. District Judge Lewis Kaplan found that Donzigan and the Ecuadorian lawyers he led had submitted fraudulent evidence, had coerced one judge to use a supposedly impartial expert, and had written the judgment in exchange for a promise to pay $500,000 of the recovery.

Among the relief granted was an injunction enjoining the three defendants from

[1] [1990] S.C.R. 1077.
[2] 2015 SCC 42 ("*Chevron*").

[3] http://www.nytimes.com/best-sellers-books/2014-10-12/overview.html and http://fortune.com/2015/04/27/brad-pitt-george-clooney-film-rights-chevron-donziger/.
[4] *Chevron*, at paragraphs 4 to 5.
[5] *Chevron*, at paragraph 6.
[6] Plaintiffs' brief, at paragraph 3.

commencing enforcement proceedings in the United States.[7] The case remains under appeal.

Meanwhile in 2012, the plaintiffs brought enforcement proceeding in Ontario against Chevron, Chevron Canada and Chevron Canada Finance Limited in the Ontario Superior Court of Justice. The plaintiffs sought the CDN equivalent of $18 billion and a declaration that the shares of Chevron Canada are available to satisfy the judgment of the Ontario court.[8]

These enforcement proceedings presented facts that were, if not unique, at least striking. The plaintiffs are trying to enforce a judgment in a jurisdiction in which the judgment debtor has no assets and has no intention of ever having assets and against a corporate subsidiary that was not party to the original judgment. Their reasons for doing so appear to be largely tactical and were described by Judge Kaplan as part of a multi-jurisdictional "keystone strategy" designed to "increase the odds of obtaining expedient and significant recovery" and to "keep Chevron on its heels" and to smooth the way for recognition of the Ecuadorian judgment in the United States.[9]

These unique facts gave the defendants the rare opportunity to challenge the jurisdiction of the Ontario courts in an enforcement proceeding. The core thrust of jurisdiction cases for the past twenty years has been based on the real and substantial connection test developed in *Morguard*. Meanwhile, Chevron had no connection to Ontario and Chevron Canada had no connection to the judgement. Both defendants brought motions applying to strike or stay the claim on the basis that the Court lacked jurisdiction.

Time to Get Real and Substantial

By the time the case made its way to the Supreme Court of Canada, it had become largely focused on Chevron's appeal, which was based on the proposition that the real and substantial connection test was a "universal test for the assumption of jurisdiction *simpliciter*" and that it applied to proceedings for recognition and enforcement of a foreign judgment in addition to all other proceedings.[10]

In Chevron's submission, before an enforcing court could consider whether the foreign court had a real and substantial connection, it must first – as a separate analytical step – conclude that there is a real and substantial connection between the dispute and the enforcing forum. However, such a connection would exist in almost all cases as it could be presumed when service was validly affected *ex juris* and could not be rebutted so long as there was "some practical purpose served" by the proceeding.[11]

Chevron's argument was always going to be a long shot because none of the leading Supreme Court of Canada decisions in this area had required this step. But it would be unfair to say it was completely unsupported. Chevron could rely on broad principles articulated in the recent decision in *Club Resorts v. Van Breda*.[12] Further, other common law jurisdictions are divided on whether the judgment debtor must have assets in the jurisdiction in order to support jurisdiction in an enforcement proceeding.[13]

After reviewing its leading decisions, the Supreme Court identified two reasons why the real and substantial connection test should not be extended in considering the jurisdiction of the enforcing court. The Court first focused on the purpose of these proceedings, distinguishing them from actions of first instance. It noted that in an action for recognition and enforcement, the court is not adjudicating the merits of a substantive claim, but is instead lending its assistance to enforce an already-adjudicated obligation. This assistance is limited to measures that can be taken against assets within the jurisdiction. Thus, the enforcing court's judgment has no extra-territorial coercive power that mitigates any constitutional concerns that might arise.[14]

The Court then focused on the notion of comity. This amorphous concept has laid at

[7] Case 1:11-cv-00691-LAK-JCF Document 1874, Filed 03/04/14, at 2.

[8] *Chevron*, at paragraph 11.

[9] Case 1:11-cv-00691-LAK-JCF Document 1874 Filed 03/04/14, at 471 and 479.

[10] Factum of the Appellant, Chevron Corporation, at paragraphs 2 to 4.

[11] Factum of the Appellant, Chevron Corporation, at paragraphs 2 to 4.

[12] 2012 SCC 17.

[13] *Chevron*, at paragraphs 59 to 63.

[14] *Chevron*, at paragraphs 43 to 50.

the foundation of the jurisdiction analysis since *Morguard*. In *Chevron*, the Court emphasized the component of comity that mandates "respect for the legal acts of other states."[15] It also considered the related principles of order and fairness noting that there was no unfairness to judgment debtors from having to defend recognition and enforcement proceedings as a result of their own legal non-compliance. Underlying this analysis were the practical realities of the modern global economy where assets and people can quickly and easily move between jurisdictions. Simply put, the Court was not willing to erect new barriers to enforcement when, in its view, the case law, principle, relevant statutes and practicality all supported a rejection.[16]

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A more limited part of the appeal, but one of potentially broader application, is the Court's decision with respect to Chevron Canada. Chevron Canada was not a party to the Ecuadorian judgment and as a result, jurisdiction over it could not be established based only on service. Instead, the Supreme Court of Canada, as had the court of first instance, invoked the traditional ground of presence, which the Court found was established based on Chevron Canada's office in Mississauga and service on Chevron Canada at that office.[17]

Unmentioned in the judgment is that Chevron Canada's "bricks-and-mortar business" in Ontario only began in 2012 and consisted of 13 employees selling lubricant and chemical products, three of whom worked out of the physical office.[18] Thus, a possible potential implication from this decision is that companies could be sued in any Canadian province in which they have a physical presence – no matter how *de minimis* and irrespective of whether that presence relates to the underlying matters in dispute.

Because jurisdiction over Chevron was based on presence, the Court did not consider how jurisdiction might be found in an enforcement case against a third party like Chevron Canada who did not attorn and who was not present in the jurisdiction. The Court did make two comments in *obiter* that are worthy of note. The first was the fact that the third party carried on a business related to the dispute will be unlikely to materially affect the jurisdiction analysis because the subject matter of the proceeding is not the underlying dispute but collection of a debt. The second is that assets within the jurisdiction are likely to be a "highly relevant connecting factor of the sort needed for an action to proceed" because in an action for debt collection, assets are the core connection to the claim.[19]

Both comments are discordant with the Court's earlier reasoning in that they do not account for the fact that the third party did not participate in the original proceedings. As a result, the enforcement proceeding is not vis-à-vis the third party an "already adjudicated obligation." The Court is not merely facilitating the enforcement of a judgment; it is extending the obligation created by the judgment to the third party. Further, the test for jurisdiction in enforcement cases is based on a real and substantial connection between the original court and the dispute. This test is meaningless to a party that had no connection with and did not participate in the underlying dispute, as was the case here. For both reasons, one would expect a more robust test for jurisdiction when an enforcement proceeding is brought against a third party who is not present in the jurisdiction. However, this is not the course the Supreme Court suggested the law should follow.

Conclusion

One of the takeaways from *Chevron* is the sheer difficulty that global companies face in jurisdiction applications whether they are made in the enforcement context or otherwise.[20] However, the issues in this case were exceedingly fact specific. It should be rare that a creditor tries to collect a debt in a jurisdiction in which the debtor has no assets or against a third party to the judgment.

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[15] *Chevron*, at paragraph 53.

[16] *Chevron*, at paragraphs 51 to 67 and 75.

[17] *Chevron*, at paragraph 81.

[18] Chevron Canada's Factum, at paragraph 123.

[19] *Chevron*, at paragraphs 92 and 93.

[20] The recent decision of *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628 canvassed plaintiffs' recent success in this area. The case itself is noteworthy because it is one of the few instances where a court has found that it did not have jurisdiction over a global company.

Whether this will remain true will depend on how the case progresses as it moves past the jurisdictional phase and on to the substantive merits. The Court expressly left to another day whether Chevron Canada can be properly considered a judgment debtor and whether, even if the judgement is enforceable against Chevron, the shares of Chevron Canada are available to satisfy the debt.[21] We will have to wait and see how these issues unfold. But resolution of these issues in the plaintiffs' favour could put Canadian companies at risk of being added to lawsuits that have little or no connection to their businesses.

[21] *Chevron*, at paragraph 87.