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No Canadian Connection? No Problem! Supreme Court Permits Actions to Enforce Foreign Judgments Without Proof of Canadian Assets or Other Links

Brad Pitt's production company reportedly beat out George Clooney's to win the film rights to *Law of the Jungle*, a book about the epic and controversial Ecuadorian legal proceedings against Chevron Corp.. Chevron alleges that the resulting Ecuadorian judgment, awarding US$ 9.5 billion in damages for environmental contamination, was procured by bribery, fraud and political interference. Until now, the US courts have agreed - rendering the judgment unenforceable in Chevron's home jurisdiction and leading the Ecuadorian plaintiffs to bring enforcement proceedings in Canada and elsewhere. The Supreme Court of Canada's recent *Chevron* decision is unlikely to make it into any Hollywood movie.[1] However, the *Chevron* decision should be of considerable interest to parties holding judgments from foreign courts and searching for assets of judgment debtors. The Supreme Court has laid out the welcome mat to these foreign judgment creditors, holding that they are free to bring enforcement proceedings in Canada without proving any connection between Canada and either the judgment debtor or the foreign legal proceedings. Indeed, proceedings may be launched even without evidence that the judgment debtor has any assets in Canada.

[1] *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 ("*Chevron*")

Background to the Canadian *Chevron* Proceedings

The plaintiffs in the *Chevron* case are 47 Ecuadorian residents who claim to represent indigenous Ecuadorian villagers allegedly harmed by the former operations of Texaco in Ecuador. Chevron, which later merged with Texaco, defended itself against the plaintiffs' claims in the Ecuadorian courts. The lengthy and complex saga of these proceedings, featuring lurid accusations and counter-accusations, has received worldwide attention in books, magazine articles and a pro-plaintiff documentary film - outtakes of which were later filed by Chevron as proof of fraud by the plaintiffs' lead counsel and other wrongdoing by Ecuadorian officials.

Chevron has no assets in Ecuador, but has substantial assets in the United States. Ordinarily, a foreign judgment creditor would seek to enforce the judgment where the debtor has its largest and most well known assets. However, in 2014, Judge Kaplan of the U.S. District Court held that the Ecuadorian judgment was unenforceable due to fraud and bribery.[2] Faced with this situation, the plaintiffs turned to the Canadian courts and sued both Chevron (which has no direct presence in Canada) and its seventh-level Canadian subsidiary ("Chevron Canada"). Chevron Canada is a complete stranger to the Ecuadorian judgment, but the plaintiffs alleged that its shares were available to satisfy the judgment.

No Canadian Connection Needed

Chevron's jurisdictional objection to the Ontario enforcement action relied on the "real and substantial connection" test that the Supreme Court articulated in its *Van Breda* decision.[3] In that case, the Supreme Court appeared to limit the reach of Canadian courts over foreign defendants to cases where either the litigants or the subject matter of the dispute have a real and substantial connection to a Canadian province. Here, there was clearly no Canadian connection

[2] *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014)

[3] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

to either the plaintiffs or the subject matter of the dispute. Chevron argued that since it had no presence in Canada, nor any assets located here, it too had no relevant Canadian connection.

The Supreme Court did not find that Chevron had any Canadian connection, but decided that this did not matter. It ruled that actions for enforcement of foreign judgments are fundamentally different from ordinary actions of first instance. No real and substantial connection to a Canadian province is required in such cases - only one between the foreign court and the action resulting in the foreign judgment. It offered two principled reasons for this distinction and one very practical one.

First, the Supreme Court articulated the “crucial difference” between a recognition and enforcement action and an action of first instance. In an action of first instance, the real and substantial connection test serves the purpose of ensuring that the connection between a state and a dispute is not weak or hypothetical. In such cases, the lack of a real and substantial connection would undermine principles of international comity. However, unlike the tort action considered in *Van Breda*, the only purpose of an action to enforce a foreign judgment is to allow a pre-existing obligation to be fulfilled and each jurisdiction arguably has an equal interest in the obligation resulting from the judgment. Given that the enforcing court makes no determination of the merits of a legal claim, the Supreme Court ruled that there is no concern about the legitimacy of an exercise of state power. Enforcement is limited to actions (such as the seizure of assets) wholly within the jurisdiction and with no coercive force outside of it.

Second, the Supreme Court held that considerations of international comity favoured a liberal and generous approach to the recognition of foreign judgments. The need for order and fairness in international adjudication was satisfied by ensuring a real and substantial connection between the foreign court and the underlying dispute. This connection was not contested by Chevron as it had appeared before the Ecuadorian courts to defend itself.

In addition to these issues of principle, the Supreme Court was very much alive to the practical difficulties of enforcing foreign judgments in a world where "assets such as receivables or bank deposits may be in one jurisdiction one day, and in another the next". The Court held that "in today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality".[4]

Finally, the Supreme Court confirmed that *Van Breda* applied to assumed jurisdiction over foreign defendants and did not overrule traditional rules of presence-based jurisdiction. Thus, as Chevron Canada had a "bricks and mortar" office in Ontario, there was no need to enquire as to the degree of its connection to the action.

What the Supreme Court Did Not Decide

Within hours of the release of the *Chevron* judgment, pro-plaintiff groups were describing it as a victory for communities seeking redress against multinational corporations. In fact, the Supreme Court was careful to avoid commenting on Chevron's potential defences to the enforcement action based on issues of natural justice, fraud or public policy. Moreover, the Supreme Court also was careful to take no position on the issue of the distinct corporate personalities of Chevron and Chevron Canada. It emphasized that, even if the Ecuadorian judgment were recognized in Canada, it would not automatically follow that any of Chevron Canada's shares or assets would be available to satisfy Chevron's debt. Any hopes or fears that the Supreme Court would use the *Chevron* decision to re-examine the principles for lifting the corporate veil were entirely misplaced.

Nonetheless, the Canadian Chevron litigation is part of a broader trend whereby plaintiffs located in developing countries are seeking

[4] *Chevron*, supra., paras.56-57

relief in Canadian courts against multinational corporations. For example, in the *Hudbay* case,[5] residents of Guatemala are asking the Ontario courts to find that a Canadian parent company owes an independent duty of care to foreign persons harmed by the actions of its foreign subsidiary.

Opportunities for Foreign Judgment Creditors

The *Chevron* decision confirms that Canada is a very favourable jurisdiction for the recognition and enforcement of foreign judgments. For some time, Canadian law has allowed such judgments to be enforced on a summary basis. Once the judgment creditor establishes that the foreign court was a competent jurisdiction to render the judgment, the merits of its decision will not be re-examined and a judgment debtor has only narrow defences to the action.[6] Now, it is also clear that the jurisdiction of a Canadian court cannot be an objection in such proceedings.

Why would any foreign judgment creditor bother with recognition and enforcement proceedings in Canada without proof of the debtor's assets being located here? The Court answered this question by observing that a creditor may want to enforce where the debtor's assets "may end up being located one day".[7] Toronto is the second largest financial centre in North America and Canadian banks and corporations do business throughout the world. Capturing assets that may eventually go through a Canadian jurisdiction (even momentarily) can therefore be a powerful source of leverage for creditors taking global enforcement measures.

by Robert Wisner and Karen Carteri

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[5] *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

[6] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Beals v. Saldanha*, 2003 SCC 72

[7] *Chevron*, supra., para.68

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a cautionary note

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