September 30, 2015

Chevron Corp. v Yaiguaje: Judicial Activism and Cross Border Complexity

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Case Commented On: *Chevron Corp. v Yaiguaje*, 2015 SCC 42

In 2013, Ecuador's highest court held that Chevron was liable to pay US$9.51 billion to forty-seven indigenous Ecuadorian villagers (the plaintiffs). Prior to this final judgment, in 2012, the plaintiffs started an action to seize Chevron Canada's CAN$15 billion in assets to satisfy the judgment. Chevron Canada's assets include its stakes in the Athabasca Oil Sands, the Hibernia Field, the Hibernia South Extension, the Hebron Field, the Duvernay Shale Field, and the Kitimat LNG Project.

In *Chevron Corp. v Yaiguaje*, the Supreme Court of Canada (SCC) addressed two questions. First, must there be a real and substantial connection between the defendant (or the dispute) and Ontario before an Ontario court has jurisdiction to recognize and enforce a foreign judgment? The Court answered no. Second, can an Ontario court have jurisdiction over a foreign judgment debtor's subsidiary when the subsidiary has no connection to the foreign judgement? The Court answered yes.

The fallout of this case will prove to be divisive. Human rights advocates will celebrate this case, hoping that it signals that Canadian courts will be taking a more active role in holding extraction companies accountable for human rights violations and environmental damages abroad. Skeptics will fear this case, believing that Canada's new role as a judicial trailblazer will come at a cost, discouraging foreign investment and potentially undermining international relations.

The Supreme Court Decision

On its face, this case is about whether Canadian courts have the jurisdiction to enforce foreign judgments. The court only addressed the following two issues.

1. Establishing Jurisdiction Over A Foreign Judgment Debtor

The SCC held that an Ontario court has jurisdiction over a foreign judgment debtor if the foreign court had a real and substantial connection to the defendant or the subject matter of the dispute. In other words, if the foreign court had jurisdiction, an Ontario court has jurisdiction to recognize and enforce its judgment. In the SCC's opinion, the court is merely recognizing and enforcing an existing obligation and not reviewing the substantive merits of the case, and thus, the real and substantial connection test does not need to be applied to the Canadian court. The only other requirement is that the judgment had to be confirmed by the court of final appeal in the foreign jurisdiction in question. The judgment needs to be final. Thus, all a foreign judgment creditor needs to do to start the Canadian process is serve the debtor ex juris and commence an action.

Accordingly, an Ontario court had jurisdiction to enforce the judgment of Ecuador's Court because (a) there was a real and substantial connection between Ecuador's court and the subject

matter of the dispute, and (b) the judgment came from Ecuador's final court of appeal.

2. Establishing Jurisdiction Over A Foreign Judgment Debtor's Wholly-Owned Canadian Subsidiary

The Supreme Court held that there was no difference between establishing jurisdiction over Chevron Canada and establishing jurisdiction over any other "bricks-and-mortar" business operating within Ontario (2015 SCC 42 at paras 79-81). The larger factual context did not matter. If the company is doing business in Ontario and it is served, then the court has jurisdiction. If there is no case, Chevron Canada merely needs to file a motion to dismiss. In other words, the court employed a traditional, presence-based approach to establishing jurisdiction.

3. Important Side Note

The court dismissed the claim by Chevron that there is a requirement that the company have assets in Ontario before it can establish jurisdiction. The court rejected this position, reasoning:

> 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 (2015 SCC 42 at paras 57).

That is, even if Chevron did not have assets in Canada today, it soon could given the globalized energy industry, where energy markets and investments are increasingly and unpredictably crossing national boundaries.

The Effect of The Case

The immediate effect of this case should not be exaggerated; this is merely a finding of jurisdiction. It means nothing more than the plaintiffs have the right to attempt to seek enforcement of the judgment against Chevron. Chevron has a number of arguments against enforcement; one of the most persuasive being the U.S. District Court's ruling that the plaintiff's American lawyer, Mr. Steven Donziger, ghostwrote the Ecuadorian judgment. (*Chevron Corp*. v. *Donziger*, 974 F. Supp. 2d 362 (2014)). In that case, Judge Kaplan held, in a nearly 500-page judgment, that the Ecuadorian ruling resulted from fraud committed by Mr. Donziger and members of the Ecuadorian courts.

Moreover, it is also unlikely that a Canadian court would pierce the corporate veil in such circumstances. However, depending on how Chevron Canada's shares were issued, the plaintiffs may not necessarily need to pierce the corporate veil to extract value from its wholly owned subsidiary. Chevron is the owner of Chevron Canada's shares—not Chevron Canada.

Although the immediate effect of this case may be limited, the judgment is not insignificant. One need not be able to divine the future to see that, moving forward, the impact of this judicial trailblazing may be far reaching.

An expanded version of this post will be published as a case comment in Journal of Energy & Natural Resources Law.

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