COURT OF APPEAL FOR ONTARIO

CITATION: Yaiguaje v. Chevron Corporation, 2013 ONCA 758
DATE: 20131217
DOCKET: C57019

MacPherson, Gillese and Hourigan JJ.A.

BETWEEN

Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje, Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje, Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje, Luis Agustin Payaguaje Piaguaje, Emilio Martin Lusitande Yaiguaje, Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar, Carlos Greea Huatatoca, Catalina Antonia Aguinda Salazar, Lidia Alexandria Aguinda Aguinda, Clide Ramiro Aguinda Aguinda, Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila, Lucio Enrique Grefa Tanguila, Patricio Wilson Aguinda Aguinda, Patricio Alberto Chimbo Yumbo, Segundo Angel Amanta Milan, Francisco Matias Alvarado Yumbo, Olga Gloria Grefa Cerda, Narcisa Aida Tanguila Naryaez, Bertha Antonia Yumbo Tanguila, Gloria Lucrecia Tanguila Grefa, Francisco Victor Tanguila Grefa, Rosa Teresa Chimbo Tanguila, Maria Clelia Reascos Revelo, Heleodoro Pataron Guaraca, Celia Irene Viveros Cusangua, Lorenzo Jose Alvarado Yumbo, Francisco Alvarado Yumbo, Jose Gabriel Revelo Llore, Luisa Delia Tanguila Narvaez, Jose Miguel Ipiales Chicaiza, Hugo Gerardo Camacho Naranjo, Maria Magdalena Rodriguez Barcenes, Elias Roberto Piyahuaje Payahuaje, Lourdes Beatriz Chimbo Tanguila, Octavio Ismael Cordova Huanca, Maria Hortencia Viveros Cusangua, Guillermo Vincente Payaguaje Lusitande, Alfredo Donaldo Payaguaje Payaguaje and Delfin Leonidas Payaguaje Payaguaje

Plaintiffs (Appellants/Respondents by way of cross-appeal)

and

Chevron Corporation, Chevron Canada Limited and Chevron Canada Finance Limited

Defendants (Respondents/Appellants by way of cross-appeal)

Alan J. Lenczner, Q.C., and Brendan Morrison, for the appellants/respondents by way of cross-appeal

Clarke Hunter, Q.C., Anne Kirker, Q.C., and Robert Frank, for the respondent/appellant by way of cross-appeal Chevron Corporation

Benjamin Zarnett, Suzy Kauffman and Peter Kolla, for the respondent/appellant by way of cross-appeal Chevron Canada Limited

Heard: October 31 and November 1, 2013

On appeal from the order of Justice D. M. Brown of the Superior Court of Justice, dated May 1, 2013, with reasons reported at 2013 ONSC 2527.

MacPherson J.A.:

A. INTRODUCTION

[1] In an Ontario action, the plaintiff residents of rural provinces in Ecuador seek recognition and enforcement of a judgment of an Ecuadorian court. The Ecuador court's judgment was for approximately US$18 billion[1] and was made against one of world's largest corporations, Chevron Corporation ("Chevron"). The plaintiffs sought to enforce this judgment in Ontario against Chevron and its Canadian subsidiary Chevron Canada Limited ("Chevron Canada").

[2] In a judgment dated May 1, 2013, Brown J. of the Superior Court of Justice held that the Ontario court had jurisdiction to hear the action. However, he stayed the action on the basis that "Chevron does not possess any assets in this jurisdiction at this time" and "the plaintiffs have no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and

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[1] This amount has subsequently been reduced on appeal, as discussed in para. 10 of these reasons.

ignored so that its assets become exigible to satisfy the Judgment against its ultimate parent" (paras. 109-110).

[3] The Ecuadorian plaintiffs appeal from the component of the motion judge's Order imposing the stay.

[4] Chevron and Chevron Canada cross-appeal from the component of the motion judge's Order holding that an Ontario court has jurisdiction to consider the recognition and enforcement of the Ecuadorian court's judgment.

B. FACTS

(1) The parties and events

[5] The 47 plaintiffs are residents of the Sucumbíos and Orellana provinces in Ecuador. These plaintiffs represent approximately 30,000 residents of Sucumbíos province whose lands, waterways, livelihoods, and way of life were harmed by environmental pollution over a period of about 18 years, from 1972 to 1990.

[6] Chevron is an American corporation incorporated in Delaware and with its head office in San Ramon, California.

[7] Chevron Canada is an operating company and a seventh level indirect subsidiary of Chevron. Its registered head office is in Calgary, Alberta. Chevron Canada employs over 700 people, including 13 employees in Ontario selling lubricant and chemical products. Chevron Canada has an office in Mississauga.

[8] The plaintiffs are indigenous Ecuadorian villagers. The underlying dispute between the plaintiffs and the defendants concerns allegations that Texaco, which subsequently merged with Chevron, extensively polluted the Lago Agrio region of Ecuador between 1972 and 1990. In 1993, the plaintiffs filed suit in the United States District Court for the Southern District of New York (a federal trial court), alleging various environmental and health tort claims. The action was eventually dismissed, but the United States Court of Appeals for the Second Circuit required Texaco to make a commitment to submit to the jurisdiction of the Ecuadorian courts as a condition to the dismissal of this suit. Texaco did so, reserving its right to contest the validity of an Ecuadorian judgment in the circumstances permitted by New York's *Recognition of Foreign Country Money-Judgments Act*. While the U.S. litigation was ongoing, Texaco entered into a settlement with the Ecuadorian government which, according to Chevron, released Texaco (and therefore Chevron) from liability for the environmental impact of their extractive activities in return for funding of certain remediation projects.

[9] Subsequently, the Ecuadorian plaintiffs filed suit against Chevron in Ecuador. On February 14, 2011, the trial court found Chevron liable for approximately US$18 billion, which was affirmed by the Ecuadorian intermediate appellate court on January 3, 2012. Chevron contends that the trial judgment was obtained through fraud, bribery and other illegal means. The parties agree

that the affirmation by the Ecuadorian appellate court rendered the trial judgment a final judgment, although in November 2012 the Court of Cassation, the highest appeal court in Ecuador for cases such as this one, granted leave to appeal.

[10] In fact, after this appeal was argued on October 31 and November 1, 2013, the Court of Cassation affirmed the judgment of the intermediate appeal court for damages for remediation and costs totalling US$9.51 billion against Chevron, but allowed Chevron's appeal with respect to punitive damages.

[11] In 2011, Chevron sought, and briefly obtained, a global anti-enforcement injunction that would bar the enforcement of an allegedly fraudulent judgment entered by an Ecuadorean court against Chevron. On appeal, this injunction was quashed. U.S. proceedings relating to the allegedly fraudulent conduct of the plaintiffs in procuring the Ecuadorian judgment continue to date.

[12] The bottom line is this: there is a final judgment in Ecuador against Chevron for US$9.51 billion. The Ecuador plaintiffs seek to have this order recognized and enforced in Ontario against Chevron and Chevron Canada.

[13] Neither Chevron nor Chevron Canada has filed a statement of defence to the Ontario action. They have explicitly disclaimed attorning to the jurisdiction of the Ontario court. However, both brought motions seeking substantially the same relief: (1) an order setting aside service *ex juris* of the Amended Statement of Claim against them; and (2) a declaration that the Ontario Superior Court has

no jurisdiction to hear the action and an order dismissing, or permanently staying, the action.

(2) The motion judge's decision

[14] The motion judge was not prepared to make an order setting aside service *ex juris* of the Amended Statement of Claim. With respect to Chevron, he concluded, at para. 85:

> On my reading of the *Van Breda* decision, it did not purport to displace the principles previously articulated by the Supreme Court of Canada in *Morguard* and *Beals*. Accordingly, I am not prepared to adopt, as the defendants argued, a blanket principle that an Ontario court lacks jurisdiction to entertain a common law action to recognize and enforce a foreign judgment against an out-of-jurisdiction judgment debtor in the absence of a showing that the defendant has some real and substantial connection to Ontario or currently possesses assets in Ontario. The Ontario legislature, through Rule 17.02(m) of the *Rules of Civil Procedure*, authorized the institution in Ontario of proceedings to recognize and enforce foreign judgments against non-resident defendants, and no jurisprudence binding on me has expressly placed a gloss on that ability to assume jurisdiction by requiring the plaintiff to demonstrate that the non-resident judgment debtor defendant otherwise has a real and substantial connection with Ontario. Accordingly, I am not prepared to grant the motion by Chevron to set aside the service *ex juris* on it of the plaintiffs' Amended Statement of Claim.

[15] With respect to Chevron Canada, the motion judge reasoned, at paras. 86-87:

> As to the motion of Chevron Canada to set aside service *ex juris* on it, while there are strong grounds to doubt that the purported service of the Amended Statement of Claim on Chevron Canada in British Columbia was effective, relying as the plaintiffs did on the "necessary party" provision of Rule 17.02(o) which requires that the proceeding be "properly brought against another person served in Ontario", the issue was rendered of little import in light of the subsequent service of the Amended Statement of Claim on Chevron Canada at its Mississauga, Ontario office.
>
> Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere "virtual" business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. In the words of Rule 16.02(1)(c), Chevron Canada was served at a "place of business" in this province. This court therefore possesses jurisdiction over Chevron Canada. I therefore dismiss its motion to set aside the earlier service *ex juris* because, in the result, service *in juris* was made.

[16] However, these conclusions did not end the matter in the motion judge's eyes. He continued, at para. 88:

> That does not end the analysis in this most unusual case. Both defendants invoked the power of this Court to stay a proceeding under section 106 of the *Courts of Justice Act*, albeit on the basis that this Court lacked jurisdiction. That section also entitles a court, "on its own initiative", to stay a proceeding. In my view, a stay of this action is justified in light of the very unique facts presented by this case. By way of my "bottom-line", I accept the following submission made by Chevron in its factum:
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> > 117. [B]ecause Chevron Corp. does not have assets here, and there is no

> reasonable prospect that it will do so in the future, there is no prospect for any recovery here. To allow the Plaintiffs' academic exercise to take place in the Ontario judicial system would, therefore, be an utter and unnecessary waste of valuable judicial resources...

[17] The motion judge then went on to consider whether the absence of Chevron assets in Ontario could be cured by piercing Chevron Canada's corporate veil. He concluded, at para. 109, that "the plaintiffs have no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and ignored so that its assets become exigible to satisfy a Judgment against its ultimate parent."

[18] In the result, the motion judge granted the Chevron and Chevron Canada motions and stayed the action, albeit "without prejudice to the plaintiffs' right to move to lift the stay on new evidence that Chevron possesses, or is likely to shortly possess, assets in this jurisdiction."

[19] The Ecuadorian plaintiffs appeal the stay component of the motion judge's Order. Chevron and Chevron Canada cross-appeal the jurisdictional component of the Order.

C. ISSUES

[20] The issue on the appeal is: did the motion judge err by, on his own initiative, staying the action?

[21] The issue on the cross-appeals is: did the motion judge err by concluding that an Ontario court has jurisdiction to determine whether the judgment of the Ecuadorian court should be recognized and enforced in Ontario?

D. ANALYSIS

[22] Since the cross-appeals raise a jurisdictional issue whereas the appeal raises a substantive issue, I find it convenient to consider the cross-appeals first and then turn to the appeal.

(1) Chevron and Chevron Canada's cross-appeals – jurisdiction

[23] The respondents contend that the motion judge erred by concluding that an Ontario court has jurisdiction to determine whether the judgment of the Ecuadorian court should be recognized and enforced in Ontario.

[24] The motion judge stated his conclusion in this fashion, at para. 77:

> For several reasons, I am not persuaded by the defendants that, at common law, an Ontario court lacks the jurisdiction to entertain an action to recognize and enforce a final judgment of a foreign state absent a showing that the judgment debtor has some real and substantial connection with Ontario either through its presence in the jurisdiction or the presence of its assets in the jurisdiction, which essentially was the legal position advocated by both defendants.

[25] The respondents contend that the real and substantial connection test applies at two stages of the recognition and enforcement process – was there a real and substantial connection between the subject matter of the litigation and

there a real and substantial connection between the subject matter of the litigation and the foreign court (Ecuador) that rendered the judgment, and is there a real and substantial connection between the subject matter of the litigation and the court (Ontario) being asked to recognize and enforce the judgment? The respondents concede that the answer to the first question is "Yes", but assert that, if the motion judge had addressed it, the answer to the second question should have been "No".

[26] The motion judge rejected this double application of the real and substantial connection test. He began by surveying, in considerable detail, the relevant case law, including *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 ("*Morguard*"); *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 ("*Beals*"); *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 ("*Pro Swing*"); and *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572 ("*Van Breda*"). He also examined academic commentary, as well as the recognition of foreign judgments under Ontario statutes, including the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R. 6, and the *International Commercial Arbitration Act*, R.S.O. 1990, c. I. 9, American jurisprudence, and the principles governing motions to set aside service *ex juris*.

[27] I agree with the motion judge's analysis on this issue.

[28] The leading cases dealing with the recognition and enforcement of foreign judgments are *Morguard* and *Beals*. *Morguard* dealt with the enforcement of an Alberta judgment in British Columbia, *Beals* with the enforcement of a Florida judgment in Ontario. Obviously, *Beals* is directly on point in this appeal.

[29] In my view, *Beals* is crystal clear about how the real and substantial connection test is to be applied. Major J. stated, at paras. 18, 23, 28, 32 and 37:

> In *Morguard*, *supra*, the "real and substantial connection" test for the recognition and enforcement of interprovincial judgments was adopted. *Morguard* did not decide whether that test applied to foreign judgments.
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> ...
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> *Morguard* established that the courts of one province or territory should recognize and enforce the judgments of another province or territory, if that court had properly exercised jurisdiction in the action, namely that it had a real and substantial connection with either the subject matter of the action or the defendant. A substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action.
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> ...
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> International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in *Morguard*, *supra*, and further discussed in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a

> different approach by statute, the "real and substantial connection" test should apply to the law with respect to the enforcement and recognition of foreign judgments.
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> ...
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> *The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court.* Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.
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> ...
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> *There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in Morguard, supra.* A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties. Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.
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> [Emphasis Added.]

[30] The import of these passages, especially the emphasized portions, is clear: in recognition and enforcement actions relating to foreign (e.g. Ecuadorian)

judgments in Canadian jurisdictions (e.g. Ontario), the exclusive focus of the real and substantial connection test is on the foreign jurisdiction. There is no parallel or even secondary inquiry into the relationship between the legal dispute in the foreign country and the domestic Canadian court being asked to recognize and enforce the foreign judgment. See also: *Pro Swing*, at para. 11; *BNP Paribas (Canada) v. Mécs* (2002), 60 O.R. (3d) 205 (S.C.J.) ("*BNP Paribas (Canada)*"), at para. 13; and Janet Walker, *Halsbury's Laws of Canada, Conflict of Laws, 2011 Reissue* (Toronto: Ont.: LexisNexis Canada, 2011), HCF-69.

[31] Finally, I note that I do not accept the respondents' argument that the Supreme Court of Canada's decision in *Van Breda* changes the Canadian landscape for the recognition and enforcement of foreign judgments. *Van Breda* is not a recognition and enforcement case; it is a jurisdiction *simpliciter* case. On this issue, I explicitly agree with the motion judge's analysis, at paras. 41 and 85:

> So, while the Supreme Court of Canada situated its analysis in *Van Breda* in the larger context of the various areas of private international law, as well as in the constitutional underpinnings of that law, the meat of its analysis dealt with putting flesh on the bones of the real and substantial connection test in the specific context of when a Canadian court could assume jurisdiction over the adjudication of a tort dispute on its merits where some of the events had taken place outside of the territorial jurisdiction of the court.
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> ...
>
> On my reading of the *Van Breda* decision, it did not purport to displace the principles previously articulated

> by the Supreme Court of Canada in *Morguard* and *Beals*. Accordingly, I am not prepared to adopt, as the defendants argued, a blanket principle that an Ontario court lacks jurisdiction to entertain a common law action to recognize and enforce a foreign judgment against an out-of-jurisdiction judgment debtor in the absence of a showing that the defendant has some real and substantial connection to Ontario or currently possesses assets in Ontario. The Ontario legislature, through Rule 17.02(m) of the *Rules of Civil Procedure*, authorized the institution in Ontario of proceedings to recognize and enforce foreign judgments against non-resident defendants, and no jurisprudence binding on me has expressly placed a gloss on that ability to assume jurisdiction by requiring the plaintiff to demonstrate that the non-resident judgment debtor defendant otherwise has a real and substantial connection with Ontario.

[32] There are fundamental differences in the constitutional limitations and imperatives of comity between an action of first instance and an action to enforce a judgment. In an action of first instance, an Ontario court exceeds its constitutional authority when it assumes jurisdiction of a case where there is no real and substantial connection to Ontario. Similarly, the assumption of jurisdiction in such circumstances offends the principle of comity because one or more other jurisdictions have a real and substantial connection to the subject matter of the litigation and Ontario does not.

[33] In the case of an action to enforce, there is no constitutional issue because the decision of the court is limited to the enforceability of the judgment in Ontario. Clearly this determination is within the constitutional authority of the court. There is also no comity concern because the Ontario court does not purport to intrude

on matters that are properly within the jurisdiction of the foreign court. Its only inquiry of the foreign court is whether it had a real and substantial connection to the subject matter of the action; once that is established, the analysis shifts to a consideration of whether the judgment is enforceable in Ontario as a matter of domestic law.

[34] Therefore, in a case of first instance the requirement of a finding of a real and substantial connection between the subject matter of the litigation and Ontario is necessary in order to respect the principle of comity and to assure that the court's constitutional authority is not exceeded. These constitutional and comity imperatives are not in issue where the court is being ask to enforce a foreign judgment and thus there is no need to undertake an analysis of whether there is a real and substantial connection between Ontario and the subject matter of the judgment.

[35] In sum, I accept the trial judge's determination that *Van Breda* did not displace the *Beals/Morguard* test for the assumption of jurisdiction in the recognition and enforcement context. Applying the principles enunciated in *Beals* and *Morguard* to Chevron, it is clear that the Ecuadorian judgment for US$9.51 billion against Chevron satisfied the requirement of rule 17.02(m). Therefore, an Ontario court has jurisdiction to determine whether the Ecuadorian judgment against Chevron may be recognized and enforced in Ontario.

[36] However, the jurisdictional analysis with respect to Chevron Canada is distinct. Chevron Canada was not a party to the Ecuadorian action, and was not found liable under the Ecuadorian judgment. Accordingly, rule 17.02(m) is not applicable with respect to Chevron Canada.

[37] The motion judge did not rely on rule 17.02(m) in his jurisdictional analysis with respect to Chevron Canada; rather, he grounded his jurisdictional determination in Chevron Canada's physical, non-transitory, carrying on of business in Ontario:

> Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere "virtual" business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. In the words of Rule 16.02(1)(c), Chevron Canada was served at a "place of business" in this province. This court therefore possesses jurisdiction over Chevron Canada.

[38] In my view, the trial judge was correct to note Chevron Canada's bricks-and-mortar business in Ontario. I would additionally note Chevron Canada's significant relationship with Chevron. Chevron Canada is a wholly-owned subsidiary of Chevron, albeit one owned via intermediate wholly-owned subsidiaries. Chevron guarantees the debt of its indirect subsidiaries which in turn furnish capital to Chevron Canada, and has directly guaranteed certain performance obligations of Chevron Canada. Furthermore, Chevron's income is wholly derived from dividends from indirect subsidiaries that carry out its actual

business functions, which include Chevron Canada. In light of the economically significant relationship between Chevron and Chevron Canada, and given that Chevron Canada maintains a non-transitory place of business in Ontario, an Ontario court has jurisdiction to adjudicate a recognition and enforcement action against Chevron Canada's indirect corporate parent that also names Chevron Canada as a defendant and seeks the seizure of the shares and assets of Chevron Canada to satisfy a judgment against the corporate parent.

[39] Chevron Canada is entitled to dispute that its assets (or that Chevron Canada in its entirety) are exigible for the judgment debts of Chevron. However, this argument is not availing at this juncture where only jurisdiction is in issue. The usual concerns regarding the piercing of the corporate veil – unanticipated personal liability by a shareholder, or unanticipated liability of a shareholder being imputed to a corporation – are not present at the stage of this preliminary jurisdictional determination. They may be appropriately addressed after the jurisdictional stage, when Chevron Canada has an opportunity to file a statement of defence.

[40] For these reasons, I would dismiss the cross-appeals of both Chevron and Chevron Canada.

(2) The Ecuador plaintiffs' appeal – the stay order

[41] The appellants assert that the motion judge erred by granting a stay of their recognition and enforcement action. He did this on his own initiative pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("*CJA*"):

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[42] The test for appellate interference with a discretionary order was enunciated by Blair J.A. in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 22:

> The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or his discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

[43] See also: *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (C.A.), at paras. 40-42.

[44] In my view, the motion judge erred by granting the stay in this case. I say this for several reasons.

[45] First, the defendants in this action, Chevron and Chevron Canada, are sophisticated parties with excellent legal representation. They chose not to attorn to the jurisdiction of the Ontario court, except to bring a motion seeking a dismissal or stay of the action on the basis of lack of jurisdiction. Although both

parties cited s. 106 of the *CJA* in their notices of motion, they did so only in the context of it potentially supporting the grant of a stay on the basis of lack of jurisdiction.

[46] In its Notice of Motion, Chevron explicitly sought:

> 2. An order declaring that this Honourable Court has *no jurisdiction* to hear this action and, *on that basis*, dismissing or in the alternative *permanently staying this action* against Chevron Corp; [Emphasis added.]

[47] The legal grounds for Chevron's motion were stated as:

> 6. There is no real and substantial connection between Ontario and Chevron Corp., or Ontario and the foreign judgment of the Provincial Court of Sucumbíos in Lago Agrio, Ecuador;
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> ...
>
> 8. This Honourable Court lacks jurisdiction to hear this action, and cannot assume it;

[48] In its Notice of Motion, Chevron Canada sought:

> (b) An order dismissing or in the alternative *permanently staying this action* as against Chevron Canada, on the basis that this Court has *no jurisdiction*;
>
> [Emphasis added.]

[49] The legal grounds for Chevron Canada's motion commenced with this statement:

> (a) *This motion is about the lack of jurisdiction of this Honourable Court over the claims herein against Chevron Canada.* Chevron Canada accordingly brings this motion without attornment to the jurisdiction of this Court. [Emphasis added.]

[50] The limited position of, and relief sought by, Chevron and Chevron Canada in their motion in the Superior Court were confirmed in their appeal facta.

[51] In its factum Chevron stated, at para. 142: "Consistency with its jurisdictional challenge prevented Chevron Corp. from requesting a stay of proceedings on merely discretionary grounds." It continued, at para. 148:

> Chevron Corp. observes that among the extraordinary circumstances present in this case is the fact that to avoid attorning and forfeiting its jurisdictional challenge, *Chevron Corp. itself is precluded from requesting a discretionary stay on any basis other than jurisdiction.*
>
> [Emphasis added.]

[52] Similarly, in its factum Chevron Canada stated:

> 43. **T**he law regarding stays under s. 106 on grounds other than lack of jurisdiction was not put before the motion judge, and no arguments to that effect were made, because the Respondents did not – and do not – wish to attorn to the jurisdiction of the Court.
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> ...
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> 46. As noted above, Chevron Canada, while citing s. 106 of the *CJA* in support of the stay it sought on jurisdictional grounds, did not request a stay on the broader discretionary basis on which one was granted.

[53] The point I draw from these passages in the respondents' notice of motion and appeal facta is this: the motion judge's stay in a major case involving poor and vulnerable foreign residents, one of the world's largest corporations, a long and difficult process in a foreign court, and a huge damages award, was entirely his own construct; no party sought it. Consequently, this issue was not argued

before the trial judge, and no cases were put before him regarding the appropriateness of granting a discretionary stay.

[54] While s. 106 of the *CJA* entitles the court to grant a stay on its own motion, the circumstances under which it may appropriately do so are rare. As stated by Epstein J. in *Gruner v. McCormack* (2000), 45 C.P.C. (4th) 273 (Ont. S.C.J.), at para. 30,

> To justify a stay, the defendant must satisfy the court that a continuance of the action would work as injustice because it would be oppressive or vexatious or an abuse of the process of the court and that the stay would not cause an injustice to the plaintiff.

[55] In my view, the onus should be equally high, and should be applied perhaps even more stringently, when, as here, a stay has not been requested. This is particularly true in the context of a recognition and enforcement action: see *1247902 Ontario Inc. v. Carlisle Power Systems Ltd.*, [2003] O.J. No. 6300.

[56] Second, I do not accept, as Chevron asserts in the passage set out above from para. 148 of its factum, that it is an "extraordinary circumstance" that it was precluded from requesting a discretionary stay on any basis other than jurisdiction. Chevron and Chevron Canada made a decision with their eyes wide open – they could refuse to attorn to the jurisdiction of the Ontario court and use that, and that alone, as a basis to resist the Ecuador plaintiffs' action in Ontario, or they could accept the jurisdiction of the Ontario court and defend the action using the full panoply of Ontario substantive and procedural law available to

them. Both chose the former option, as they were entitled to do. However, having made this choice, the expected, not "extraordinary", circumstance that followed was that both companies were limited to making only a jurisdictional objection in their motions.

[57] Third, against the backdrop of no law and no argument on the *CJA* s. 106 stay issue, a fair reading of the motion judge's reasons supports the appellant's argument that what he did was embark on a disguised, unrequested, and premature Rule 20 and/or Rule 21 motion. The motion judge made significant findings about the corporate and legal structures of Chevron and Chevron Canada and the viability of the Ecuador plaintiffs' action as pleaded in the Amended Statement of Claim. In my view, these issues deserve to be addressed and determined, if not at a trial, at least in the context of a record and legal arguments made under the umbrella of either Rule 20 or Rule 21 (or both). To grant this stay without giving the plaintiffs the option to make legal arguments and compile a record would constitute an injustice to the plaintiffs.

[58] Fourth, and similarly, I agree with the appellants that even though there was no *forum non conveniens* motion before the motion judge, he essentially improperly imported such a motion into his reasoning on the stay. The motion judge said, at para. 84:

> Here, the plaintiffs have obtained an enormous final judgment against Chevron. The judgment debtor

> acknowledges that it owns assets in the United States. As I stated during the hearing, the jurisdiction in which the judgment debtor owns assets is only a short distance from this courthouse – in less than an hour's drive one can cross a bridge which takes you into the very state in which Chevron initiated its anti-enforcement injunction proceedings. Yet, the plaintiffs have not sought the recognition and enforcement of their foreign judgment in the place of their judgment debtor's residence or place of business and, instead, have come to Ontario arguing that the assets nominally held by a stranger to the foreign Judgment should be made available to satisfy it.
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> ...
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> In my view, the parties should take their fight elsewhere to some jurisdiction where any ultimate recognition of the Ecuadorian Judgment will have some practical effect.

[59] With respect, there is a serious problem with this analysis, namely, the motion judge regards the following as obvious: the location of Chevron's head office (San Ramon, California), Chevron's place of business (various locations in the United States), and the lack of any connection between Chevron and Chevron Canada, thus rendering the latter "a stranger to the foreign Judgment". In my view, these issues are at the heart of the conflict between the parties; they cannot be decided by easy resort to a potential action in New York. It was an error in principle for the motion judge to order a stay on these grounds absent a hearing on this matter and an opportunity for the plaintiffs to fully contest this very issue.

[60] Additionally, it is not clear that the *forum non conveniens* analysis is apposite in the recognition and enforcement context. As stated by Pepall J. in *BNP Paribas (Canada)*, at para. 13:

> [T]he existence of assets of the judgment debtors in Ontario is irrelevant to the question of whether the court should grant recognition to the [foreign] judgment. The plaintiff has the right to satisfy itself whether the defendants have or will have assets in Ontario and, if so, to seize them. If it is unsuccessful in this regard, it simply will be in the same position as other judgment creditors.

[61] Fifth, there is, with respect, a disconnect between the rationale underlying the motion judge's reasons on the jurisdiction issue and the tenor and content of his reasons on the discretionary stay issue.

[62] The motion judge's jurisdiction analysis is well-anchored in the comity foundation at the heart of *Morguard* and *Beals*. It properly opens the door to this hugely significant decision of Ecuador's highest court possibly being recognized and enforced in a jurisdiction, Ontario, where enforcement may be significant to the parties.

[63] However, as the appellants assert in their factum, the motion judge's discretionary stay analysis "completely undermines the jurisdiction of the Court" by pointing to a myriad of factors – New York as the better forum, the absence of assets owned by Chevron in Ontario, Chevron Canada's separate corporate personality – that suggest that the case not be heard in Ontario. In my view,

although these factors might ultimately derail the appellants' recognition and enforcement action in Ontario, the derailment is premature in the context of the respondents not raising the discretionary stay issue, no argument on this question, and devastating consequences for the appellants.

[64] Sixth, I do not share the motion judge's concern, at para. 111, that if a stay were not granted, "a bitter, protracted and expensive recognition fight would ensue consuming significant time and judicial resources of this Court...Ontario courts should be reluctant to dedicate their resources to disputes where, in dollar and cents terms, there is nothing to fight over. In my view, the parties should take their fight elsewhere to some jurisdiction where any ultimate recognition of the Ecuadorian Judgment will have a practical effect."

[65] The long history of this litigation, and especially Chevron's role in it, suggests the opposite. The Ecuador plaintiffs first sued Chevron in the United States District Court for the Southern District of New York. Chevron resisted, and persuaded the United States Court of Appeals for the Second Circuit to dismiss the plaintiffs' claims on the basis of *forum non conveniens*: *Aguinda et al v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

[66] However, as a condition of obtaining a dismissal of the plaintiffs' claims, Texaco (Chevron's predecessor) made promises and gave undertakings to the court, including (a) a promise to accept service of process in Ecuador and not

object to the civil jurisdiction of a court of competent jurisdiction in Ecuador, and (b) recognition of the binding nature of any judgment issued in Ecuador, subject to reserving its right to contest the validity of an Ecuadorian judgment in the circumstances permitted by New York's *Recognition of Foreign Country Money-Judgments Act*.

[67] Once the Ecuadorian courts made their decisions, Chevron chose not to abide by them. Indeed, Chevron sought and obtained a global injunction from a New York federal district court barring the enforcement of the Ecuadorian judgment in any court in any country in the world: *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011). The United States Court of Appeals for the Second Circuit reversed this decision and remitted the case to the district court with instructions to dismiss Chevron's declaratory judgment claim in its entirety: *Chevron Corporation v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

[68] Now the Ecuadorian plaintiffs have decided to try to have the Ecuadorian judgment enforced in Ontario. Chevron's response is to contest the jurisdiction of the Ontario court; it has not attorned to its jurisdiction.

[69] The picture from the above history is an obvious one. For 20 years, Chevron has contested the legal proceedings of every court involved in this litigation – in the United States, Ecuador and Canada. Chevron even sought,

and briefly obtained, a global injunction against enforcement of the Ecuadorian judgment.

[70] In these circumstances, I cannot agree with the motion judge that the Ecuadorian plaintiffs' recognition and enforcement action in Ontario is an "academic exercise" and would be "an utter and unnecessary waste of valuable judicial resources." In these circumstances, the Ecuadorian plaintiffs do not deserve to have their entire case fail on the basis of an argument against their position that was not even made, and to which they did not have an opportunity to respond. In these circumstances, the Ecuadorian plaintiffs should have an opportunity to attempt to enforce the Ecuadorian judgment in a court where Chevron will have to respond on the merits. That the plaintiffs in this case may ultimately not succeed on the merits of their recognition and enforcement action, or that they may not succeed in successfully collecting from the judgment debtors against whom they bring this action, are not relevant factors for a court to consider in determining whether to grant a discretionary stay before the defendants have even attorned to the jurisdiction of the Ontario court. A party may bring an action for all kinds of strategic reasons, recognizing that their chances of collection on the judgment are minimal. It is not the role of the court to weed out cases on this basis and it is a risky practice for a judge to second-guess counsel on strategy in the name of judicial economy.

[71] In the end, I agree with what Pepall J. said in *BNP Paribas (Canada)*, at para. 12:

> As set out in *Morguard v. De Savoye Investments Ltd.* [1990] 3 S.C.R. 1077, the purpose of comity is to secure the ends of justice and contemplates the recognition of judgments in multiple jurisdictions. The court should grant its assistance in enforcing an outstanding judgment, not raise barriers.

[72] This case cries out for assistance, not unsolicited and premature barriers. Chevron and Chevron Canada can decide not to attorn to the jurisdiction of the Ontario courts, and let the recognition and enforcement process take its course. Or they can attorn to the jurisdiction of the Ontario courts and mount relevant challenges to recognition and enforcement, for example, through a Rule 20 motion, a Rule 21 motion, or a *forum non conveniens* motion brought on a proper record.

[73] For these reasons, I would allow the appeal.

E. DISPOSITION

[74] Even before the Ecuadorian judgment was released, Chevron, speaking through a spokesman, stated that Chevron intended to contest the judgment if Chevron lost. He said: "We're going to fight this until hell freezes over. And then we'll fight it out on the ice."

[75] Chevron's wish is granted. After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment

heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction.

[76] I would dismiss the cross-appeals. I would allow the appeal, set aside the stay of the action, and order the respondents to serve and file Statements of Defence within 30 days.

[77] The appellants are entitled to their costs fixed at $100,000, inclusive of disbursements and HST, payable as follows: Chevron – $50,000; Chevron Canada – $50,000.

Released: JCM

DEC 17 2013

J.C. MacPherson J.A.

I agree. R.G. Gillese J.A.

I agree. E.A. Cronk J.A.