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This article examines the background of a more than decade long environmental case between Ecuadorian Plaintiffs and the multinational oil producer Chevron. It considers the legal context giving rise to the current proceedings between the parties in Ontario and discusses the Canadian jurisprudence on the recognition and enforcement of foreign judgments in Canada.

Lago Agrio-Transnational Enforcement of Judgments

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The Supreme Court of Canada has recently[1] granted leave to appeal from the decision of the Ontario Court of Appeal, which had quashed the lower court's decision to stay an action commenced in Ontario by Ecuadorian Plaintiffs against Chevron Corp. and Chevron Canada (the "Ontario Action"). The Ontario Action seeks to recognize and enforce an $18.2 billion[2] Judgment ("Ecuadorian Judgment") in favour of Ecuadorian Plaintiffs ("Plaintiffs") in a protracted environmental litigation against Chevron Corp., a Delaware based corporation. The Plaintiffs had selected amongst other jurisdictions,[3] Ontario to enforce the Ecuadorian Judgment obtained in their favour on February 14, 2011 in Lago Agrio, Ecuador.

By Statement of Claim issued on May 30, 2012, the Plaintiffs commenced an action in Ontario against Chevron Corp. ("Chevron"), Chevron Canada Limited ("Chevron Canada") and Chevron Canada Finance Limited ("Chevron Finance"), seeking *inter alia*, a declaration that Chevron Canada Limited and Chevron Canada Finance were exigible to satisfy the Ecuadorian Judgment. The Plaintiffs discontinued the action as against Chevron Canada Finance on August 24, 2012. Neither of the remaining Defendants has filed a Statement of Defence to date.

Instead, the Defendants challenged Ontario's jurisdiction to hear the action and moved to set aside service of the originating process or to stay the action in Ontario. In a decision dated May 1, 2013, Justice Brown dismissed the Defendants' request to set aside the service of the Statement of Claim but granted the Defendant's motion to stay the action. On December 17, 2013, the Court of Appeal reversed the lower court's decision to stay the action. Now, the case is headed for the Supreme Court of Canada.

Background[4]

From 1964 to 1992, Texaco, through its subsidiary Texaco Petroleum ("TexPet"), was involved in oil extraction in a concession in Ecuador's Lago Agrio region. From 1972 onwards, this extraction was done in consortium with CEPE (later Petroecuador), the state-owned oil company. Texaco was a minority participant beginning in 1974 when CEPE obtained majority ownership.[5] Petroecuador took over as operator of the oil extraction in 1990 and has been the sole owner of the former consortium facilities in the Lago Agrio region since 1992.[6]

In 1993, following the end of Texaco's oil extraction activity in Ecuador, a group of Ecuadorian Plaintiffs brought class action suits against Texaco in the Southern District of New York, alleging environmental, health, and other tort

[1] On April 3, 2014
[2] All figures in USD
[3] Brazil and Argentina are the other jurisdictions where actions have been commenced by the Plaintiffs to enforce the Judgment

[4] Extracts of this article have been taken from an article co-written by the same author with Gregory Sheppard and Yousuf Aftab, entitled Lago Agrio comes to Canada: A High-Profile "Stress Test" for the Principles in *Beals v. Saldanha'*, published in the Commercial Litigation and Arbitration Review, Volume 1, Number 3, August 2012
[5] *Aguinda v. Texaco Inc.,* 303 F. 3d 470 (2d Cir. 2002)
[6] *Chevron v. Donziger*, 768F. Supp. 2d 581, 597-601 (S.D.N.Y. 2011), rev'd on ohter grounds, 303 F. 3d 470 (2d Cir. 2002)

claims related to Texaco's activities in the region. In 2001, Texaco successfully obtained a dismissal of the case on *forum non conveniens* grounds, with the agreement that it would attorn to the jurisdiction of the Ecuadorian courts- reserving the right to "contest [the] validity of [an Ecuadorian Judgment] only in the limited circumstances permitted by New York's Recognition of Foreign Country Judgments Act."[7]

Meanwhile, in 1994, during the first round of litigation in the New York courts, Texaco entered into a settlement with the Ecuadorian government and Petroecuador to remediate environmental damage caused by TexPet's extraction activities in exchange for a release from liability for any environmental claims falling outside of the scope of the settlement.[8] Texaco's remediation of the affected sites began in 1995 and lasted until 1998, by which time approximately $40 million had been spent to remediate environmental damage caused by what Texaco claimed was its share of the consortium's activities. In 1998, the settlement was finalized and Ecuador certified the adequacy of the remediation and released the company from liability. [9]

Chevron became a party to the proceedings in 2001 by acquiring Texaco, and thereby becoming an indirect shareholder of TexPet, shortly before the New York action was dismissed.[10] As a result of the *forum non conveniens* decision, the Plaintiffs sued Chevron in Lago Agrio, Ecuador, in 2003, asserting collective claims to environmental redress. On February 14, 2011, the trial court issued its decision in the Plaintiff's favour, finding Chevron liable for $18.2 billion in damages.

In November 2012, the highest appeal court of Ecuador, the Court of Cassation affirmed the judgment of the intermediate appeal court for damages for remediation and costs totaling $9.51 billion against Chevron, but allowed Chevron's appeal with respective to punitive damages.

The end of the Ecuadorian litigation marked the beginning of a vast web of international litigation. The Ecuadorian Plaintiffs sought to enforce the Ecuadorian Judgment in a number of different jurisdictions while Chevron sought to stop the Plaintiff's efforts to enforce it. As one academic noted, "the term parallel litigation doesn't even begin to describe all this- it's more in the nature of byzantine geometry."[11]

The leading case on the recognition and enforcement of foreign judgments in Canada is the Supreme Court of Canada's decision in *Beals v. Saldanha* [*Beals*].[12] In *Beals*, the Court held that it was incumbent upon Canadian Courts to

[7] Aguinda v. Texaco, 143F. Supp. 2d 534, 538 (S.D.N.Y. 2001), aff'd, 303 F. 3d 470 (2d Cir. 2002)
[8] 1994 Memorandum of Understanding, accessible at http://www.theamazonpost.com/wp-content/uploads/1994-Memorandum-of-Understanding.pdf
[9] 1998 Final Release
[10] D. Cassel, Defrauding Chevron in Ecuador: Doug Cassel's Reply to the Plaintiff's Legal Team, April 10, 2012, accessible at http://www3.nd.edu/~ndlaw/faculty/cassel/DEFRAUDING-CHEVRON-IN-ECUADOR-DOUGCASSELS-REPLY-TO-THE-PLAINTIFFS-LEGAL-TEAM.pdf
[11] S. Perry, George Bermann: A man with many hats, Global Arbitration Review Interview dated May 10, 2012 available at http://globalarbitrationreview.com/news/article/30531/a-man-hats
[12] *Beals v. Saldanha* [2003] S.C.J. No 77, 234 D.L.R. (4th) 1.

recognize the judgments of foreign courts properly exercising jurisdiction because international comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law.[13]

The Ontario Superior Court Decision[14]

On May 1, 2013, the Ontario Superior Court dismissed the Defendants' motion to set aside the service *ex juris* of the Amended Statement of Claim against the Defendants. However, it granted the Defendants' motion to stay the action in Ontario under section 106 of the *Courts of Justice Act*.

Chevron submitted that an Ontario court had no jurisdiction to entertain an action to recognize and enforce a final judgment of a foreign state absent a showing that the judgment debtor defendant had some real and substantial connection with Ontario either through its presence in the jurisdiction or the presence of its assets in the jurisdiction. Chevron stated that it was not present in Ontario and it did not consent to the jurisdiction of the Ontario Court. Chevron stated that it did not own the shares of Chevron Canada or Chevron Finance. Chevron relied upon Rule 17 of the *Rules of Civil Procedure*,[15] as well as section 106 of the *Courts of Justice Act*. Chevron Canada's submissions echoed the position taken by Chevron.

The motion judge, Justice Brown rejected the Defendants' submission that the Ontario Court lacked 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 had some real and substantial connection to Ontario or possessed assets in Ontario.

Justice Brown turned to the test enunciated by the Supreme Court of Canada in *Beals* to ascertain how the Court developed the real and substantial connection test in the context of the recognition of foreign judgment. In *Beals*, Justice Major, writing for the majority, stated that the test to decide recognition and enforcement of a foreign judgment is whether the foreign court properly assumed jurisdiction by applying the real and substantial connection test. The test requires that a significant connection exist between the defendants, the cause of action, the subject matter of the action and the foreign court.

Justice Brown went on to state:

> 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 plaintiff's Amended Statement of Claim.

[13] *Ibid*. at para 28
[14] *Yaiguaje v. Chevron Corporation*, 2013 ONSC 2527 (CanLII)
[15] governing service *ex juris*

With respect to the service *ex juris* on Chevron Canada, Justice Brown grounded his analysis on Rule 16.02(1)(c). Chevron Canada was served at a place of business in Ontario. Therefore, the Ontario Court did have jurisdiction over this Defendant.

Justice Brown did not end his analysis there. The Defendants had invoked the discretionary power of the Court to stay a proceeding under section 106 of the *Courts of Justice Act*, on the basis that the Court lacked jurisdiction. That section entitles a court, "on its own initiative", to stay the proceedings. Justice Brown concluded that the absence of Chevron assets in Ontario as well as the Plaintiffs' no hope of success in piercing Chevron Canada's corporate veil would render any recognition of the Ecuadorian Judgment by the Court impractical. He went on to state that Ontario courts should be reluctant to dedicate their resources to disputes where there was nothing to fight over. Justice Brown granted a stay of the action, without prejudice to the plaintiff's right to move to lift the stay on new evidence.

The Plaintiffs appealed the decision. The Defendants cross-appealed.

The Ontario Court of Appeal decision[16]

The Ontario Court of Appeal agreed with Justice Brown that Ontario courts had jurisdiction to determine whether a judgment of the Ecuadorian court should be recognized and enforced in Ontario. The Court of Appeal rejected the Defendants' submission that the Court should apply the real and substantial connection test at two stages of the recognition and enforcement process. Justice MacPherson writing for the Court of Appeal stated that:

> 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.
>
> (…)
>
> 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… 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.
>
> (…)
>
> 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.[17]

[16] *Yaiguaje v. Chevron Corporation*, 2013 ONCA 758 (CanLII)

[17] *Ibid*. at paras 32 to 35

The Court of Appeal also set aside the motion judge's stay of the proceeding. The Court of Appeal concluded that the circumstances which entitle a court to grant a stay on its own motion are rare. The ultimate success of the plaintiffs on the merits of the action or on collecting from the judgment debtors against whom they brought the action, should not be relevant factors for a court to consider when granting a stay of the action.

Conclusion

Following the decision in *Beals*, Canada has been recognized as a favourable jurisdiction for the recognition and enforcement of foreign judgments. It is perhaps for this very reason that the plaintiffs chose this jurisdiction to enforce the Ecuadorian Judgement. However, at this time, it is unclear whether the Supreme Court of Canada will revise the test enunciated in *Beals* and ultimately limit international comity.

If the Supreme Court reaffirms the test in *Beals*, the Defendants will have to file their pleadings in Ontario and avail themselves of the available defences to impeach the Ecuadorian Judgment. Chevron has said that "it will fight the [Judgment] until hell freezes over. And then, [it] will fight it out on the ice."[18]

[18] *Ibid.* at para 74

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