File Number: 35682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHEVRON CORPORATION and CHEVRON CANADA LIMITED

Appellants
(Respondents/Appellants by cross-appeal)

and

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 GREFA 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 NARVAEZ, 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

Respondents
(Appellants/Respondents by cross-appeal)

FACTUM OF THE RESPONDENTS
TO THE APPEAL OF CHEVRON CORPORATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-15(6))

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
130 Adelaide Street West
Suite 2600
Toronto, ON M5H 3P5

Alan J. Lenczner, Q.C. (11387E) (416) 865-3090
Fax: (416) 865-2844
Email: alenczner@litigate.com

Brendan F. Morrison (61635B) (416) 865-3559
Fax: (416) 865-3731
Email: bmorrison@litigate.com

Lawyers for the Respondents
(Appellants/Respondents by Cross-Appeal)

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Eduard J. VanBemmel (613) 786-0212
ed.vanbemmel@gowlings.com
Fax: (613) 788-3500

Agent for Lawyers for the Respondents
(Appellants/Respondents by Cross-Appeal)

TO: THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

AND TO:

NORTON ROSE FULBRIGHT CANADA LLP
Suite 3700, 400 Third Avenue SW
Calgary, Alberta T1P 4H2

Clarke Hunter, Q.C.
Anne Kirker, Q.C.
Jung Lee
Tel: (403) 267-8292
(403) 867-9564
(403) 267-8308
Fax: (403) 264-5973
Email: Clarke.hunter@nortonrosefulbright.com
anne.kirker@nortonrosefulbright.com
jung.lee@nortonrosefulbright.com

NORTON ROSE FULBRIGHT CANADA LLP
Suite 1500
45 O'Connor Street
Ottawa, ON K1P 1A4

Sally Gomery
Tel: (613) 780-8604
Fax: (613) 230-5459
Email: sally.gomery@nortonrosefulbright.com

Agents for the Appellant (Respondent/Appellant by Cross-Appeal), Chevron Corporation

NORTON ROSE FULBRIGHT CANADA LLP
Suite 3800, Royal Bank Plaza
South Tower
200 Bay Street, P.O. Box 84
Toronto, ON M5J 2Z4

Robert Frank
Tel: (416) 202-6741
Fax: (416) 216-3930
Email: Robert.frank@nortonrosefulbright.com

Counsel for the Appellant (Respondent/Appellant by Cross-Appeal), Chevron Corporation

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Benjamin Zarnett
Suzy Kauffman
Peter Kolla
Tel: (416) 597-4204
(416) 597-6281
(416) 597-6279
Fax: (416) 979-1234
Email: bzarnett@goodmans.ca
skauffman@goodmans.ca
pkolla@goodmans.ca

Lawyers for the Appellant (Respondent/Appellant by Cross-Appeal), Chevron Canada Limited

NORTON ROSE FULBRIGHT CANADA LLP
Suite 1500
45 O'Connor Street
Ottawa, ON K1P 1A4

Sally Gomery
Tel: (613) 780-8604
Fax: (613) 230-5459
Email: sally.gomery@nortonrosefulbright.com

Ottawa Agent for the Appellant (Respondent/Appellant by Cross-Appeal), Chevron Canada Limited

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. The core of this case is about Chevron Corporation's ("Chevron") refusal to pay $9.51 billion to remediate 1,500 square kilometres of toxic contamination that it deposited, from 1972 to 1990, on the lands, rivers, streams and ponds in the Ecuadorean Amazon. The respondents represent 30,000 indigenous people who drink and bathe in polluted waters, eat crops grown on contaminated lands, and continue to suffer illness, disease, and premature deaths. This case is not about preventing potential damage. It is about paying for the remediation of massive environmental contamination.

2. Chevron sold its Ecuadorean assets in 1992 and quit Ecuador. Chevron now refuses to file a Statement of Defence to the recognition and enforcement action of the respondents. It alleges that the Ontario Superior Court of Justice has no jurisdiction to hear the matter. It therefore does not attorn to the jurisdiction. Nevertheless, in its Factum, it raises arguments as if it had been successful in *forum non conveniens* and strike out motions; motions it has never brought because it contests the jurisdiction of the Ontario Superior Court to entertain the action.

3. In 1993, the respondents filed a class action against Texaco, Inc., the predecessor to Chevron, in the U.S.A. Chevron argued that the class action properly belonged in Ecuador as it had everything to do with Ecuador and nothing to do with the U.S.A. The United States' 2nd Circuit Court of Appeals granted Chevron its wish based on promises and undertakings given to the Court which included:

(a) a promise to accept service of process in Ecuador and not to object to the civil jurisdiction of a court of competent jurisdiction in Ecuador;

(b) a recognition of the binding nature of any judgment issued in Ecuador; and

(c) "Texaco also offered to satisfy any judgments in Plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act."[1]

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[1] *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. March 17, 2011) at p. 6, Respondents' Authorities, Tab 33

Chevron now resiles from those undertakings and states:

> We're going to fight this until hell freezes over. And then we'll fight it out on the ice.[2]

4. As the Court of Appeal for Ontario stated:

> For 20 years, Chevron has contested the legal proceedings of every court involved in this litigation – in the United States [8 years in the *forum non conveniens* motion] in Ecuador [10 years in three levels of court] and Canada.[3]

5. Chevron does not contest that the Ecuadorean Court had jurisdiction to try this case. From 2003 to February 2011, Chevron participated and defended itself vigorously in an eight year trial that featured 216,000 pages of evidence, examinations and cross-examinations, more than 100 expert reports, 50 well-site visits and approximately 1,000 in-trial motions. A Remediation Judgment was issued on February 14, 2011. Chevron appealed to the Intermediate Court of Appeal, which undertook a *de novo* review of the evidentiary record and legal submissions. Chevron fully participated by filing significant, comprehensive briefs. The Intermediate Court of Appeal rendered its Judgment in January 2012 upholding the Remediation Award. Chevron then further appealed to Ecuador's National Court of Cassation which upheld the Remediation Award of $9.51 billion to be paid to a trustee to remediate the contaminated lands and water and to provide health clinics to treat the thousands of ill and diseased indigenous people.

6. In January 2012, in overturning a world-wide injunction issued by Kaplan J., the U.S. 2nd Circuit Court of Appeals referred to the necessity to respect international comity and greenlighted the respondents' right of choice in choosing any jurisdiction to enforce their Judgment:

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[2] *Yaiguaje v. Chevron Corp.*, 2013 ONCA 758 ("OCA Judgment") at para. 74, Joint Appellants' Record, ("JAR"), Vol. 1, Tab 4, p. 78

[3] OCA Judgment at para. 69, JAR, Tab 4, p. 77

> The LAPs [Lago Agrio Plaintiffs – the Respondents] hold a judgment from an Ecuadorean Court. They may seek to enforce that judgment in any court in the world where Chevron has assets.[4]

7. This Court has endorsed the same principle of comity:

> Consequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience. This fosters mobility and a world economy.[5]

8. Chevron and its wholly-owned subsidiary, Chevron Canada Limited ("Chevron Canada"), contest the Amended Statement of Claim solely and uniquely on the basis of lack of jurisdiction of the Ontario Superior Court of Justice to proceed with the recognition and enforcement action.

9. Justice David Brown, on May 1, 2013, issued Reasons that identified five bases grounding the jurisdiction of the Ontario Court to entertain an action to recognize and enforce the final Ecuadorean Judgment:

> [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 defendant 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.[6]

10. The Court of Appeal for Ontario, on December 17, 2013, dismissed the appeal on jurisdiction basing its reasoning on this Court's substantial body of law developed since 1990 and on various statutes:

> [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*

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[4] *Chevron Corporation v. Naranjo,* 667 F.3d 232 (2d Cir. January 26, 2012) at p. 27, Respondents' Authorities, Tab 13

[5] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at para. 39, Respondents' Authorities, Tab 36

[6] *Yaiguaje v. Chevron Corp.*, 2013 ONSC 2527 ("Brown Reasons") at para. 77, JAR, Vol. 1, Tab 2, p. 38

> *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.[7]

11. In its landmark decision in 1990 in *Morguard*, the Court recognized the rapidly changing world of inter-provincial and international commerce and the need to accommodate the free flow of trade and commerce across boundaries carrying with it the legal and enforcement mechanisms appropriate to those activities.[8] The Court fashioned a new regime for the recognition and enforcement of foreign judgments based upon the principles of comity, reciprocity, and respect for the judgment of a foreign court where that foreign court had a real and substantial connection to the litigants or the subject matter of the dispute. Chevron does not dispute that the Ecuadorean Courts had a real and substantial connection to the cause of action.

12. In 1993, in *Beals*, the Court emphatically reaffirmed the doctrines of comity, reciprocity and respect for the judgment of a foreign court imposing again only one precondition to the recognition in Canada of the foreign judgment, namely: that the foreign court had a real and substantial connection to the litigants or subject matter of the dispute.[9] In *Pro Swing* (2006) and in *Van Breda* (2012), the Court reaffirmed and reiterated the principles expressed in *Beals*.[10] Numerous judgments of Provincial Courts of Appeal and of Superior Courts across Canada have relied on and followed *Beals*.[11] In this case, there is no doubt that the Ecuadorean Courts had jurisdiction both over Chevron and over the cause of action.

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[7] OCA Judgment at para. 26, JAR, Tab 4, p. 68
[8] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. No. 1077 ("*Morguard*"), Respondents' Authorities, Tab 26
[9] *Beals v. Saldanha*, [2003] S.C.J. No. 77 ("*Beals*"), Respondents' Authorities, Tab 8
[10] *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 ("*Pro Swing*") at paras. 77-78, Respondents' Authorities, Tab 30; *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572 ("*Van Breda*"), Respondents' Authorities, Tab 16
[11] Followed in 29 cases, mentioned in 196 cases, explained in 25 cases

> The traditional common law position is that foreign judgments are recognizable and enforceable only if they meet two conditions. First, they must be for a definite sum of money. Second, they must be final and conclusive. These requirements ensure that in ordinary cases the merits of foreign judgments are not considered by an enforcing court. Barring exceptional concerns, a court's focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself.[12]

13. In its submissions, Chevron fails to distinguish the great difference between the principles and the rationale for recognizing and enforcing a foreign judgment and those that apply to the assumption of original jurisdiction to hear a case at first instance.

14. At first instance, the domestic court's concern is that it not usurp a foreign court's sovereignty to try the case. In order not to invade a foreign court's sovereignty, the domestic court must ensure that it has a real and substantial connection to the subject matter of the litigation before it will try the case.

15. In an action to recognize and enforce a foreign judgment, on the other hand, the judgment-debtor has had his day in court. The enforcing court must only be satisfied that the foreign trial court assumed jurisdiction properly. The receiving court will then lend its assistance, as a matter of comity and reciprocity, to ensure that the obligation represented by the judgment is respected and enforced. This procedure is necessary to support the underlying principle that recognizes the 21st century free flow of commerce, trade and people throughout the world. No wrong doer can escape liability by moving out of the jurisdiction of the trial court.

16. Contrary to Chevron's submissions, *Van Breda* does not trump or alter *Morguard, Beals* and the subsequent cases. Nor does *Van Breda* suggest that there must be a double application of the real and substantial connection test. *Van Breda* expresses the principles applicable to assuming jurisdiction at first instance.

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[12] *Pro Swing, supra* at paras. 77-78, Respondents' Authorities, Tab 30

17. Further, the Supreme Court of Canada, Justice Pepall and text writers have expressly rejected the requirement that a plaintiff first demonstrate the presence of assets in the jurisdiction before the domestic court recognizes and enforces a foreign judgment:

Beals	The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment.[13]
BNP	In my view, this is immaterial as the existence of assets of the judgment debtors in Ontario is irrelevant to the question of whether the court should grant recognition to the Quebec judgment.[14]

18. In any event, Chevron does have exigible assets in the jurisdiction. Chevron is a holding company whose entire revenue generating operations are in indirect subsidiaries located in many countries around the world. Chevron Canada is a seventh level subsidiary, but is 100 percent owned by Chevron. The intervening, 100 percent owned subsidiaries are passive companies with no active business, no independent boards of directors, and their corporate officers are employees of the Chevron Group. Chevron Canada is the Canadian operating subsidiary with assets that exceed $15 billion. The shares and assets of Chevron Canada are owned by Chevron. They are exigible pursuant to the provisions of Ontario's *Execution Act*, Ontario's *Rules of Civil Procedure* and established authority. Once the Ecuadorean Judgment is recognized and enforced in Canada, the assets of the judgment-debtor Chevron, namely its 100 percent beneficial ownership of the shares and assets of Chevron Canada, can be seized and sold to satisfy the Judgment.

19. This is not a case of piercing the corporate veil in an attempt to affix the liability of a subsidiary onto a parent. This is a case of seizing the assets of the judgment-debtor parent to satisfy its own liabilities. As the Court has stated:

> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third

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[13] *Beals*, *supra* at para. 78, Respondents' Authorities, Tab 8

[14] *BNP Paribas (Canada) v. Mécs*, [2002] O.J. No. 2795 (S.C.J.) at para. 13 ("*BNP*"), Respondents' Authorities, Tab 10

> parties who would otherwise suffer as a result of that choice": Gower, supra, at p. 138.[15]

20. Even if the facts were to be analyzed on corporate veil principles, there is a sufficient relationship between the parent and its operating subsidiary in Canada by way of spending approvals, corporate guarantees to third parties, annual dividend remittances, and policy requirements to satisfy the principle in *Kosmopoulos*:

> 49 While a corporation is a legal entity distinct from its shareholders, this principle may be disregarded by 'lifting the corporate veil' and regarding the company as the agent or vehicle of its controlling shareholder or parent corporation where enforcing the 'separate entities' principle would yield a result "too flagrantly opposed to justice": *Kosmopoulos v. Constitution Ins. Co. of Canada*, [1987] 1 S.C.R. 2, at para. 12, citing L.C.B. Gower, *Modern Company Law* 4th ed. (London: Stevens, 1979), at p. 112.[16]

The respondents will address corporate separateness in the accompanying Factum responding to the submissions of Chevron Canada.

21. Chevron's submission, that the approach of the courts below puts Canada at odds with the U.S.A. and other common law countries, is not correct. Once again, Chevron fails to distinguish between first instance cases and enforcement cases. *Daimler v. A.G. Bauman* is a first instance case, not a recognition and enforcement case.[17] The American cases do not require that there be assets within the jurisdiction to enforce a foreign judgment.

22. Chevron's reference to the arbitration proceeding involving the Republic of Ecuador is irrelevant to the sole issue of jurisdiction. Further, the respondents are not a party to that yet incomplete arbitration. Chevron's reference to the District Court Judgment is disingenuous. The District Court acknowledged that the respondents had every right to enforce the Ecuadorean Judgment in a court outside the U.S.A. The District Court enjoined the respondents from

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[15] *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 at para. 13, Respondents' Authorities, Tab 23

[16] *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, [2009] O.J. No. 1195 (C.A.) at para. 49, Respondents' Authorities, Tab 28

[17] *Daimler v. A.G. Bauman*, 134 S Ct 746 (2014), Joint Book of Authorities of the Appellants, Vol. 1, Tab 25

initiating any enforcement action in the U.S.A. thus making access to justice even more imperative in Canada.

The Parties

23. The 47 respondents are residents of the Sucumbios and Orellana Provinces located in the Amazon region of Ecuador. These respondents represent approximately 30,000 residents of those provinces. They hold a Judgment against Chevron for $9.51 billion, being the cost of remediating the lands and waterways from which they derive their livelihoods. Their way of life has been harmed by environmental pollution from oil extraction operations that continued for over 18 years.

24. The appellant Chevron is a publicly-listed American corporation whose shares trade on the New York Stock Exchange. It was incorporated in Delaware. Its head office is in San Ramon, California. It conducts no revenue generating business itself. Its extractive industry operations are conducted by wholly-owned subsidiaries in more than 30 countries in the world. The operating subsidiaries are indirect subsidiaries, although each link in the chain is wholly and beneficially owned by Chevron. Chevron, itself, refers to this chain as the "Chevron Group of Companies".

25. Chevron does not even own its own head office building. It is a collection of lawyers, accountants, human resource personnel, treasury, controller and auditing staff, all of whom support the operational activities of the Chevron Group and particularly the indirect operating subsidiaries.

The Judicial History

A. The First U.S. Proceeding

26. In 1993, the respondents filed a class action suit in the District Court of the Southern District of New York claiming damages against the defendant, Texaco, Inc. Texaco, Inc. subsequently amalgamated and merged with Chevron.[18]

27. Chevron moved and was successful in dismissing the respondents' claims on the basis of *forum non conveniens*. The dismissal was upheld by the United States' 2nd Circuit Court of Appeals. As a condition of obtaining the dismissal, Chevron made promises and gave undertakings to the court referred to in paragraph 3, *supra*.

28. In a March 17, 2011 Decision of the United States Court of Appeals for the Second Circuit, the court once again referred to the earlier *forum non conveniens* motion and stated:

> Here, Texaco (Chevron) had been trying to convince the district court that Ecuador would serve as an adequate alternative forum for resolution of its dispute with plaintiffs. As part of those efforts, Texaco assured the district court that it would recognize the binding nature of any judgment issued in Ecuador. Doing so displayed Texaco's (Chevron) well-founded belief that such a promise would make the district court more likely to grant its motion to dismiss. Had Texaco taken a different approach and agreed to participate in the Ecuadorian litigation, but announced an intention to disregard any judgment the Ecuadorian courts might issue, dismissal could have been (to say the least) less likely.[19]

Chevron's certiorari proceeding to the US Supreme Court was refused.

B. The Ecuadorean Proceedings

29. The respondents commenced the action in the Town of Lago Agrio in May 2003. The action was vigorously defended by Chevron. As Judge Zambrano stated:

> ...the parties, which have shown themselves to be capable of exercising a passionate and extensive defense of their positions ...[20]

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[18] *Republic of Ecuador v. Chevron Corp., supra* at p. 3, footnote 1: "Chevron Corporation merged with TexPet's parent company, Texaco in 2001 to form ChevronTexaco, Inc. In 2005, ChevronTexaco changed its name back to Chevron Corporation." See also footnote 3 on p. 6, Respondents' Authorities, Tab 33

[19] *Republic of Ecuador v. Chevron Corp., supra* at pp. 6 and 7, Respondents' Authorities, Tab 33

[20] Trial Judgment of Nicolas Zambrano Lozada dated February 14, 2011 ("Trial Judgment") at pp. 35 and 38, Respondents' Authorities, Tab 39

30. There were 56 judicial inspections with approximately 100 expert reports, six independent expert reports, testimony, documents and depositions.

31. As the Trial Judge stated in His Judgment:

> It should be clear from the record that the defendant, Chevron has been allowed to carry out all the procedures it requested in order to mount its defense and thus it is not accurate to speak of a lack of proper defense, irreparable harm, or favorable treatment to any party.[21]

32. The Trial Judge also noted:

> For the complex task of [evaluating] the presence of environmental harm, the first consideration is that there are more than 100 expert reports in the case file, which constitute an important documented source of evidence, provided by experts nominated by both parties and also provided by experts of the Court not nominated by either party, such that as a whole their information is reliable and allows the Judge to come to the conclusion that there are different levels of contaminant elements that are from the hydrocarbons industry in the area of the Concession.[22]

33. The Court also noted:

> Thus, analysis of the different expert reports has proceeded considering that the environmental harm that are the object of this lawsuit are not only those that are caused by a direct impact to the ecosystem, but that due to their nature, this type of harm also includes all harm that are direct consequence of environmental impact. In that regard, it is seen that this is a technical matter; therefore the different expert reports presented throughout this lawsuit are considered. Starting with the presence of contamination in the soil, this Court considers the findings of the different experts who have participated in the judicial inspections that were undertaken within this lawsuit and that have presented the results of their experts. The reports presented by the experts nominated by the plaintiff and by the defendant show the presence of different concentrations of hydrocarbons and/or products used during drilling or preparation of oil wells.

34. Further, the Trial Judge states:

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[21] Trial Judgment at p. 47, Respondents' Authorities, Tab 39
[22] Trial Judgment at pp. 95 and 96, Respondents' Authorities, Tab 39

> An exhaustive and complicated analysis of the results of the laboratory analyses presented as valid evidence during this lawsuit had to be performed, and the magnitude of this work is underlined in regards to which the experts nominated by Chevron have provided 50,939 results from 2,371 samples, the experts nominated by the plaintiffs have provided the case file with a total of 6,239 results from 466 valid samples; while the experts named by the Court, without nomination by either party, have provided 178 samples and 2,166 results (without considering the sampling done by the expert Cabrera); resulting in a total of 2,311 samples. To this we must add the 608 results presented by expert Jorge Bermeo, and 939 results presented on 109 samples collected by Gerardo Barros, which have also been taken into consideration but with considerations annotated for each case.[23]

35. A Texaco representative admitted that 15.834 billion gallons of production water (containing oil and chemicals) were dumped during the period of operations. The Judge said:

> Moreover, if we consider the amounts of formation waters dumped in relation to the hazardousness of the substance dumped, that is, the hazards that may arise from dumping formation water into surface waters used for human consumption, it is evident that people using these water sources were exposed to the contaminants that were discharged into it. considering that formation waters have hydrocarbon solvents, such as BTex (benzene, toluene, ethyl benzene and zylene); PAHs (polycyclic hydrocarbons) and TPHs (total petroleum hydrocarbons) which we have already mentioned above because of the hazard they post to human health, the harm and risk become apparent.[24]

36. In the result, Judge Nicolas Zambrano Lozada of the Sucumbios Provincial Court of Justice issued Judgment on February 14, 2011 in the amount of USD $18,238,480.00. This amount was ordered for the cleanup of soils, remediation of ground waters including rivers, estuaries, and wetlands, restoration of the native flora, fauna and aquatic life and for mitigation to the health of affected persons and for punitive damages.

37. By further Decision for Amplification dated March 4, 2011, Judge Zambrano addressed 27 requests made by Chevron for clarification or amplification. He did not disturb his prior Judgment.

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[23] Trial Judgment at p. 99, Respondents' Authorities, Tab 39
[24] Trial Judgment at p. 113, Respondents' Authorities, Tab 39

38. By Decision dated January 3, 2012, the Appellate Division of the Provincial Court of Justice of Sucumbios, by way of a *de novo* appeal, reaffirmed the February 14, 2011 Judgment and ordered Chevron to pay the Judgment and, in addition, 0.10 percent of the Judgment as legal fees.[25] A *de novo* appeal in Ecuador permits and authorizes the three appeal judges to review the entire record and make new findings of fact, without restriction or deference.

39. By Decision dated November 22, 2013, the National Court of Cassation upheld the compensatory award for remediation in an amount of $9.51 billion and allowed Chevron's appeal in respect of the punitive damages.

C. The Second American Proceeding

40. In 2011, Chevron sought an anti-enforcement injunction against the plaintiffs and others prohibiting the latter from enforcing the Ecuadorean Judgment in any court, in any country, other than in the New York District Court.

41. Judge Kaplan of the District Court granted Chevron a world-wide injunction. His Decision was overturned on appeal by the U.S. 2nd Circuit Court of Appeals on two bases:

(a) Chevron could not obtain a Declaratory Judgment declaring a foreign judgment unenforceable on the preemptive suit of a judgment-debtor. Chevron could only resist the foreign judgment on the limited grounds specified in the New York *Foreign Money Judgments Recognition Act* if and when the judgment-creditor sought to enforce the foreign judgment in New York; and

(b) on the basis of international comity.[26]

42. The Court of Appeals recognized that the LAPs may choose to enforce their judgment outside the U.S.A. and stated:

> The LAPs hold a judgment from an Ecuadorean court. They may seek to enforce that judgment in any country in the world where Chevron has assets.[27]

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[25] Appeal Decision of Milton Toral Zevallos dated January 3, 2012, Respondents' Authorities, Tab 4
[26] *Chevron Corporation v. Naranjo*, *supra* at pp. 16, 18 and 19, Respondents' Authorities, Tab 13

43. The Court of Appeals was aware that Chevron operated through subsidiaries as that was a live issue in the trial proceedings in the Lago Agrio trial court.

44. In reaching its conclusion, the U.S. 2nd Circuit Court of Appeals gave prevalence to the principle of international comity and expressly emphasized the freedom of a foreign judgment-creditor to enforce the judgment against a U.S. corporation anywhere in the world:

> This does not mean that international comity is not relevant to the disposition of this case. A decision by a court in one jurisdiction, pursuant to a legislative enactment in that jurisdiction, to decline to enforce a judgment rendered in a foreign jurisdiction necessarily touches on international comity concerns. It is a particularly weighty matter for a court in one country to declare that another country's legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations. That inquiry may be necessary, however, when a party seeks to invoke the authority of one court to enforce a foreign judgment.
>
> But when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems.
>
> The district court opinion here nowhere addresses the legal rules that would govern the enforceability of an Ecuadorian judgment under the laws of France, Russia, Brazil, Singapore, Saudi Arabia or any of the scores of countries, with widely varying legal systems, in which the plaintiffs might undertake to enforce their judgment. Nor is it clear how a conclusion that the judgment may not be enforced in New York, based on analysis of a New York statute that undertakes to address nothing more than whether New York will recognize the judgment, could authorize a court sitting in New York to address the rules applicable in other countries, or to enjoin the plaintiffs from even presenting the issue to the courts of other countries for adjudication under their own laws. Nothing in the New York statute, or in any precedent interpreting it, authorizes a court to enjoin parties holding a judgment issued in one

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[27] *Chevron Corporation v. Naranjo*, *supra* at pp. 21 and 27, Respondents' Authorities, Tab 13

> foreign country from attempting to enforce that judgment in yet another foreign country.[28] [emphasis added]

45. Chevron is once again seeking to prevent the respondents from realizing on their legitimate judgment. As the U.S. 2nd Circuit Court of Appeals stated and as is consistent with the principles of international comity:

> The Recognition Act and the common law principles are motivated by an interest to provide for the enforcement of foreign judgments, not to prevent them.
>
> Chevron would turn that framework on its head and render a law designed to facilitate 'generous' judgment enforcement into a regime by which such enforcement could be preemptively avoided.[29] [emphasis added]

46. To the same effect, Justice Pepall referring to Morguard held:

> [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. ...[30]

D. The Statement of Claim in the Ontario Superior Court of Justice

47. The plaintiffs' Amended Statement of Claim was served on the defendants on or before June 6, 2012. The Amended Statement of Claim was served on Chevron pursuant to Rule 17.02(m) of the Ontario *Rules of Civil Procedure*. The Amended Statement of Claim was served on Chevron Canada at its office in Mississauga, Ontario.

48. The Amended Statement of Claim pleads and includes the essential, necessary facts to bring this action for:

(a) recognition of a final Judgment from Ecuador;

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[28] *Chevron Corporation v. Naranjo*, *supra* at pp. 23 and 24, Respondents' Authorities, Tab 13
[29] *Chevron Corporation v. Naranjo*, *supra* at pp. 18 and 19, Respondents' Authorities, Tab 13
[30] *BNP*, *supra* at para. 12, Respondents' Authorities, Tab 10

(b) enforcement of that Judgment against Chevron; and

(c) the appointment of an equitable receiver over the shares and assets of Chevron Canada.[31]

49. The Ecuadorean Judgments are incorporated by reference in the Amended Statement of Claim.

E. Chevron: A Global Energy Company. An Integrated Energy Company.

50. Chevron has been for decades a public company that has raised substantial funds from shareholders and debt holders. Chevron consolidates its results and presents one financial statement of earnings and balance sheet. These owners receive Annual Reports from Chevron and have access to the mandated 10Qs and 10Ks, filed with the SEC.

51. The requirement of the Annual Reports, 10Qs and 10Ks is that they accurately describe the business, operations, financial condition, etc. of Chevron and that no statement contained therein is untrue or misleading. Chevron's shareholder owners are entitled to rely fully on Chevron's published documents to understand the business, operations and capital deployment of their company. These filings are not merely a matter of corporate governance, as Chevron suggests, but are ongoing truthful representations of the assets, liabilities and business operations of the company.

52. In its Annual Reports, Chevron makes the claims:

> Chevron is a global energy company with substantial business activities in the following countries: Angola, Argentina, Australia ... Brazil ... Canada ... the United Kingdom.
>
> ...
>
> Earnings of the company depend mostly on the profitability of its upstream and downstream business segments.
>
> ...

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[31] Amended Statement of Claim, JAR, Vol. 1, pp. 100 to 110

> To sustain its long-term competitive position in the upstream business, the company must develop and replenish an inventory of projects that offer attractive financial returns for the investment required.
>
> ...
>
> Chevron Texaco is the world's fourth-largest publicly traded, integrated energy company based on oil-equivalent reserves and production.
>
> Becoming the world's top-performing energy company requires the ability to produce sustainable long-term results.
>
> Not only was 2003 one of our best years ever, but we also built a solid foundation that should enable us to deliver sustained, strong performance into the future and continue to achieve our long-stated goal to be No. 1 in total stockholder return among our peer groups. [emphasis added]

53. Under the heading "Sustained Results":

> Chevron Texaco is committed to creating long-term stockholder value while delivering new energy supplies to meet growing worldwide demand. In 2004, we achieved milestones in our two main business – upstream and downstream – that are delivering strong results now and for the future.
>
> 2006 was an exceptional year for our company. We continue to deliver value to our stockholders and to make strategic investments that will drive sustained, superior performance over the long-term.
>
> As one of the world's leading integrated energy companies, Chevron holds crude oil and natural gas assets in the key energy basins of the world.
>
> Chevron is one of the world's leading integrated energy companies. We have approximately 56,000 employees, and our subsidiaries conduct business in more than 180 countries.
>
> 2007 was a year of significant achievement for our company. We reported record earnings, led our peer group in total stockholder return, and advanced our robust queue of major capital projects, which are creating a strong foundation for long-term growth.
>
> To build upon our organizational capability, in 2007 we restructured the upstream business into four operating companies – North America; Asia-Pacific; Africa and Latin America; and Eurasia; Europe and Middle East. This new structure will strengthen our focus on long-term growth, enhance business partnerships, and drive more efficiency, standardization and collaboration across the organization.

> To our stockholders:
>
> 2008 was a momentuous year for Chevron. We report our fifth consecutive year of record earnings. We had exceptional success finding new sources of crude oil and natural gas. We started up five major capital projects, with more to follow.
>
> Our financial performance for 2009 contributed to a strong balance sheet and returns for investors. Total stockholder return – a critical measure of our performance – was No. I among our top competitors over the past five years. We increased our annual dividend in 2009 for the 22nd consecutive year.
>
> A significant majority of Chevron's upstream investment is made outside of the United States.[32] [emphasis added]

54. In its annual 10K, Chevron tells its owners under the heading "Chevron's Strategic Direction":

> Chevron's primary objective is to create shareholder value and achieve sustained financial results from its operations that will enable it to outperform its competitors. In the upstream, the company's strategies are to grow profitably in core areas, build new legacy positions and commercialize the company's equity natural gas resource base while growing a high impact natural gas business. In the downstream, the strategies are to improve returns and grow earnings across the value chain.[33] [emphasis added]

F. Consolidated Financial Statements

55. Chevron earns no revenue directly and has no direct earnings. All of its money comes from indirect subsidiaries that carry out its extractive business functions. It does not own its own head office building or the buildings in Chevron Park that house the offices of many of its subsidiaries.[34]

56. Chevron has and continues to use the earnings of its indirect subsidiaries to reward its shareholders. In 2008, it paid out as dividends to its shareholders $5.162 billion; in 2009, $5.302 billion; in 2010, $5.674 billion; in 2011, $6.139 billion. In four years, a total of $22.275 billion has been paid to Chevron shareholders from revenue earned by Chevron subsidiaries.

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[32] Annual Report (2011), p. 10, Respondents' Record, Tab 7, pp. 60-71
[33] Annual 10K, p. 9, Respondents' Record, Tab 8, p. 77
[34] Cross-examination of Soler of October 17, 2012, p. 24, Respondents' Record (Under Seal), Tab 1, p. 4

57. Additionally, Chevron utilized dividends to repurchase its shares on the market. Between September 2007 and July 2010, it bought back 118,996,749 shares at a cost of $10.16 billion; and from July 1, 2010 to December 31, 2011, a further $5 billion worth; totalling over $15 billion.

G. Investments

58. The Annual Reports detail the billions of dollars of annual investments made by Chevron in upstream and downstream operations.

59. In the 2004 Annual Report, it is stated:

> In 2004, Chevron Texaco's capital and exploratory budget is estimated to be $8.5 billion. We follow a disciplined approach to ensure that these funds are directed towards the highest-quality opportunities with the greatest potential for enabling growth and increasing stockholder value. [emphasis added]

60. In the 2006 Annual Report, it is stated:

> In 2006, we invested almost $13 billion in our exploration and production operations.
>
> Of that $13 billion, $2 billion was approved for investments in Canada's Athabasca Oil Sands. [emphasis added]

The $2 billion was a net additional $2 billion to expand the original project. Although the initial investment in the Athabasca Oil Sands was made in 1999-2000, the appellants refuse to disclose how much was invested in this project between 1999-2006.

61. In 2007, the Annual Report states:

> Capital and exploratory expenditures for the year were $20 billion, and return on capital employed was 23.1 percent.

The $20 billion was spent in various projects in many different countries.

62. Chevron's 10K for 2011 indicates that Capital and Exploratory Expenditures were $29 billion, with $26.5 billion for investment in new projects and expansion of existing projects. In 2009 and 2010, Capital Expenditures were $19.843 billion and $19.612 billion respectively.

63. The capital that is invested, year upon year, either comes from the Consolidated Statement of Operations and Cashflows, i.e. from the indirect subsidiaries, or from the capital markets, i.e. shares issued by Chevron, or from various debt instruments. Chevron, which controls the balance sheet and cash flows, guarantees the debt instruments.

H. Borrowings, Financial and Performance Guarantees

64. For more than a decade, Chevron has issued debt securities in the public markets. If for a direct or indirect subsidiary, the debt is unconditionally guaranteed by Chevron. In 2010, Chevron had short and long term debt of $11 billion, and $9.684 billion as of December 31, 2011. These debts are represented by 13 interest bearing notes and debentures with varying maturity dates. The monies raised pursuant to consecutive shelf registration statements are used for general corporate purposes including for new and expanding capex projects. In 2013, Chevron had debt of $19.96 billion represented by 16 interest bearing notes and debentures.

65. Chevron currently has an automatic shelf registration statement filed with the SEC for an unspecified amount of nonconvertible debt securities issued or guaranteed by the company.

66. The major debt rating agencies routinely evaluate the company's debt. The rating is entirely dependent on the earnings and operations of the subsidiaries.[35]

67. In June 2002, a number of indirect subsidiaries filed a Registration Statement with the SEC and raised $4 billion of debt in the public markets. Chevron unconditionally guaranteed the borrowing. Of that amount, $3 billion was provided to Chevron Canada.

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[35] Moody's Investors Service Rating Report: 17 Dec. 2007; DBRS Rating Report, December 17, 2009; Moody's Investors Service Rating Report: 02 Mar 2006, Respondents' Record, Tab 9, pp. 113-117

68. In July 2002, by virtue of a bond issue of Chevron Texaco Capital Company, an indirect subsidiary of Chevron and unconditionally guaranteed by it, Chevron Canada received a further $1 billion.

69. In addition, Chevron Canada received a further $2.7 billion from another financing guaranteed by Chevron.

70. There can be no doubt that Chevron Canada is financed directly or indirectly by Chevron or from its other subsidiaries.

71. These Guarantees, both financial and performance, are illustrative of both the commitment and control of Chevron in the investments of its subsidiaries and the requirement by third parties that the purse holding parent make available its balance sheet for the duration of the project.

The Courts Below

A. Decision of Brown J.

72. Justice Brown provided five separate grounds supporting the jurisdiction of the Ontario Superior Court of Justice to enforce the Ecuadorean Judgment. Those reasons encompass the application of the rationale behind statutes and authorities including:

(a) the Decisions of the Court in *Morguard* and *Beals*;

(b) Rule 17.02 of the *Rules of Civil Procedure*;

(c) *The Reciprocal Enforcement of Judgments (U.K.) Act*;

(d) *The International Commercial Arbitration Act*; and

(e) *BNP Paribas (Canada) v. Mécs.*[36]

73. Justice Brown then, on his own motion, and without alerting the parties thereto or receiving any argument, submissions or case law, stayed the action.

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[36] Brown Reasons at paras. 78 to 82, JAR, Vol. 1, Tab 2, pp. 38-40

B. The Court of Appeal for Ontario

74. The Court of Appeal for Ontario (the "OCA") allowed the respondents' appeal of the stay of the action and dismissed the appellants' cross-appeal of Brown J.'s finding of jurisdiction.

75. The OCA introduced the issue as follows:

> [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.[37]

76. The OCA concurred with Brown J.'s analysis of the "crystal clear" basis for jurisdiction.

> [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.
> >
> > . . .
> >
> > *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.
> >
> > 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,*

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[37] OCA Judgment at paras. 13, JAR, Vol. 1, Tab 4, pp. 65 and 73

> *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.
>
> ...
>
> *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.
>
> ...
>
> *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. [emphasis added][38]

77. The OCA identified the rationale for the fundamental principles underlying recognition and enforcement of foreign judgments.

> [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

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[38] OCA Judgment at paras. 28 and 29, JAR, Vol. 1, pp. 68 to 69

> domestic Canadian court being asked to recognize and enforce the foreign judgment. See also: *Pro Swing*, at para. 11; *BNP Paribas (Canada) v. Mecs* (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.
>
> ...
>
> [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.[39]

78. The OCA allowed the appeal from the stay on the following bases:[40]

(a) it was contrary to established authority;[41]

(b) the sophisticated parties, Chevron and Chevron Canada, chose not to attorn to the jurisdiction of the Ontario Court and brought no motion for a stay;

(c) the Motions Judge embarked on a disguised, unrequested, and premature Rule 20 and/or Rule 21 motion;

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[39] OCA Judgment at paras. 30, 32 and 33, JAR, Vol. 1 pp. 69, 70 and 71

[40] OCA Judgment at paras. 41 to 61, JAR, Vol. 1, pp. 72 to 76

[41] *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.) at para. 22, Respondents' Authorities, Tab 32; *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (C.A.) at paras. 40-42, Respondents' Authorities, Tab 17; *Gruner v. McCormack* (2000), 45 C.P.C. (4th) 273 (Ont. S.C.J.) at para. 30, Respondents' Authorities, Tab 19; and *1247902 Ontario Inc. v. Carlisle Power Systems Ltd.*, [2003] O.J. No. 6300 (Div. Ct.) at paras. 8 and 9, Respondents' Authorities, Tab 1

> [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.[42]

(d) even though there was no *forum non conveniens* motion, the Motions Judge improperly imported such a motion into the basis for his stay;

> [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.[43]

PART II - QUESTIONS IN ISSUE

79. The recognition and enforcement of a foreign judgment in Canada: the approach, the underlying rationale of comity, the test, order and fairness, and no requirement to have assets in the jurisdiction.

80. The distinction between the jurisdiction to enforce a foreign judgment and the original assumption of jurisdiction at first instance.

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[42] OCA Judgment at para. 57, JAR, Vol. 1, at p. 75
[43] OCA Judgment at para. 60, JAR, Vol. 1, at p. 76

PART III - STATEMENT OF ARGUMENT

The Approach

81. Courts in Canada, the U.S.A. and Europe have uniformly adopted a generous and liberal approach to the recognition and enforcement of a foreign money judgment. This approach is consistent with the ever expanding flow of commerce, wealth and people across the globe:

Morguard

> [29] ... In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.
>
> ...
>
> [41] A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?[44]

Beals

> [23] *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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[44] *Morguard, supra* at paras. 29 and 41, Respondents' Authorities, Tab 26

> ...
>
> [166] *Morguard* thus strongly suggested that the recognition and enforcement of foreign-country judgments should be subject to a more liberal test informed by an updated understanding of international comity. ...[45]

BNP

> [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. ...[46]

82. The U.S.A. adopts a similar liberal and generous approach to the enforcement of a foreign judgment, recognizing the necessity therefor in the modern global economy:

> The Recognition Act and the common law principles are motivated by an interest to provide for the enforcement of foreign judgments, not to prevent them.
>
> Chevron would turn that framework on its head and render a law designed to facilitate 'generous' judgment enforcement into a regime by which such enforcement could be preemptively avoided.[47]

The Underlying Rationale of Comity

83. In its 1990 Judgment, the Supreme Court of Canada swept away the parochial interests of provinces and of nations and recognized the requirements of the modern world to accommodate the free flow of trade and commerce across boundaries carrying with them the all-important legal and enforcement mechanisms appropriate to those activities. The over-arching principles of respect by a domestic tribunal for the judgment of a foreign court are made imperative in the Judgments of the Court in *Morguard* and in *Beals*:

Morguard

> 29 Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries ...
>
> ...
>
> 31 The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community

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[45] *Beals, supra* at paras. 23 and 166, Respondents' Authorities, Tab 8
[46] *BNP, supra* at para. 12, Respondents' Authorities, Tab 10
[47] *Chevron Corporation v. Naranjo, supra* at pp. 18 and 19, Respondents' Authorities, Tab 13

> exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.
>
> 34 The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.[48]

Beals

> 27 The importance of comity was analysed at length in *Morguard, supra*. This doctrine must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility. The doctrine of comity is
>
> > grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
> >
> > (*Morguard, supra*, at p. 1096)
>
> This doctrine is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although *Morguard* recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 *Can. Bus. L.J.* 373, at p. 375).[49]

84. Comity and reciprocity between courts of many nations are the backbone of international trade and the flow of wealth across countries. The respect by a domestic court of the judgment of a foreign court ensures that contract-breakers and tortfeasors cannot escape liability by quitting a country. Honest responsible people rely on and benefit from the exercise of comity and reciprocity.

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[48] *Morguard, supra* at paras. 29 and 34, Respondents' Authorities, Tab 26
[49] *Beals, supra* at para. 27, Respondents' Authorities, Tab 8

The Test

85. The test for the recognition and enforcement of a foreign judgment was firmly established in *Beals* and has been followed by the Court and appellate and superior courts for more than 20 years. The only precondition to the recognition and enforcement of a foreign judgment in Ontario is that the foreign court, which rendered the judgment, had a real and substantial connection to the litigants or the subject matter of the dispute. The Court made it abundantly clear that where the foreign court met the real and substantial connection test over the litigants or the subject matter of the cause of action, principles of international comity should impel our domestic courts to recognize and enforce the foreign judgment. To be clear, the "real and substantial connection test" only applies to the foreign court:

> 32 The "real and substantial connection" test requires that a significant connection exist be-tween 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.
>
> ...
>
> 35 A Canadian defendant sued in a foreign jurisdiction has the ability to redress any real or apparent unfairness from the foreign proceedings and the judgment's subsequent enforcement in Canada. The defences applicable in Ontario are natural justice, public policy and fraud. In addition, defendants sued abroad can raise the doctrine of forum non conveniens. This would apply in the usual way where it is claimed that the proceedings are not, on the basis of convenience, expense and other considerations, in the proper forum.
>
> ...
>
> 37 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.
>
> ...
>
> 175 The "real and substantial connection" test is simply a way of asking whether it was appropriate for the originating forum to take jurisdiction over the matter. If the originating court is an appropriate forum, then it is reasonable to expect the defendant to defend his interests there and to live with the consequences if he decides not to do so. Conversely, if it is not reasonable in the circumstances to expect the defendant to go to the originating court, then it was probably not appropriate for it to take jurisdiction. ...
>
> ...
>
> 39 Once the "real and substantial connection" test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.[50] [emphasis added]

86. The three dissenting judges in *Pro Swing* would have further extended the principles of comity to permit the enforcement of foreign non-money orders.[51] Their expression indicates an evolution towards recognizing foreign orders even where they are not money judgments.

Order and Fairness

87. The requirements of order and fairness were met by the ability of the defendant to object to the assumption of jurisdiction by the foreign court, by means of a *forum non conveniens* motion in that court. In this case, Chevron sought and fought to have the plaintiffs' claims tried and adjudicated in Ecuador.

88. Fairness was met by the ability of the defendant to defend itself fully before the foreign court.[52] Chevron participated in an eight year trial and vigorously defended its position.

89. Chevron then initiated a full *de novo* appeal of the trial record. Chevron appealed that Intermediate Appeal Decision to the National Court of Cassation.

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[50] *Beals, supra* at paras. 32, 35, 37, 175 and 39, Respondents' Authorities, Tab 8
[51] *Pro Swing, supra* at paras. 84 and 87, Respondents' Authorities, Tab 30
[52] *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at p. 326, Respondents' Authorities, Tab 21

90. Fairness has been achieved. Chevron has had its day in the very court that it sought. Chevron now still has an opportunity to defend the enforcement action in Ontario by filing a Statement of Defence and raising any of the three defences of: fraud, natural justice and public policy.

Consistency with Rule 17.02(m), the *Reciprocal Enforcement of Judgments Act*, the *International Commercial Arbitration Act* and the *Quebec Civil Code*

91. The established authorities reflect the legislative intent as set out in Rule 17.02(m), the *Quebec Civil Code*, the *International Commercial Arbitration Act* and the *Reciprocal Enforcement of Judgments Act*. It must be right that the common law is consistent with the express wording of statutes which pose no preconditions to the recognition and enforcement of foreign arbitral awards and no preconditions with respect to the enforcement of judgments of the U.K. courts.

92. Rule 17.02(m) provides that:

> **SERVICE OUTSIDE ONTARIO WITHOUT LEAVE**
>
> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> ...
>
> **Judgment of Court Outside Ontario**
>
> (m) on a judgment of a court outside Ontario;[53]

93. The only possible interpretation of this provision is that the legislature provided for territorial jurisdiction in Ontario where:

(a) a foreign court rendered a judgment; and

(b) the judgment debtor is not in Ontario.

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[53] Rule 17.02(m), *Rules of Civil Procedure*, R.R.O. 1990, REGULATION 194

As the motion judge correctly determined, the Rule is the foundation for the jurisdiction to recognize and enforce a foreign judgment. Otherwise, there would be no purpose in allowing service of a foreign defendant outside Ontario.[54]

94. The *Quebec Civil Code* has a similar provision. Article 3155 of the *Quebec Civil Code* provides:

> 3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following case: ...

None of the expressed exceptions apply.[55]

95. The Ontario *International Commercial Arbitration Act* provides:

> **Article 35.** *Recognition and enforcement*
>
> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
>
> ...
>
> **Article 36** *Grounds for refusing recognition or enforcement*
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:[56]

None of the sections apply. Neither the absence of the judgment-debtor from the jurisdiction of the receiving court, nor the absence of assets in the receiving jurisdiction is specified as a circumstance in which a refusal to recognize can be made.[57]

96. The *Reciprocal Enforcement of Judgments (U.K.) Act* provides for reciprocity between the U.K. and Ontario for each other's judgments. The *Act* does not require, as a condition of the

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[54] Brown Reasons at para. 80, JAR, Vol. 1, Tab 2, p. 34
[55] *Quebec Civil Code*, 1991, c. 64, a. 3155
[56] *International Commercial Arbitration Act*, R.S.O. 1990, c.I.9, Articles 35 and 36
[57] Brown Reasons at para. 65, JAR, Vol. 1, Tab 2, p. 33

Ontario Court accepting jurisdiction to recognize a United Kingdom Judgment, that the judgment-debtor either resides in Ontario or possess assets in Ontario.

> Article III
>
> 1. Where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article VI to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings) to have the judgment registered, and on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered.
>
> Article IV
>
> 1. Registration of a judgment shall be refused or set aside if: (a) the judgment has been satisfied; (b) the judgment is not enforceable in the territory of origin; (c) the original court is not regarded by the registering court as having jurisdiction; (d) the judgment was obtained by fraud; (e) enforcement of the judgment would be contrary to public policy in the territory of the registering court; (f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court; or (g) in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the original court and did not submit to its jurisdiction.
>
> 2. The law of the registering court may provide that registration of a judgment may or shall be set aside if: (a) the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear; (b) another judgment has been given by a court having jurisdiction in the matter in dispute prior to the date of judgment in the original court; or (c) the judgment is not final or an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the territory of origin.[58]

97. Service *ex juris* of a Notice of Application to enforce a U.K. Judgment is available under Rule 17.02(m). Therefore to import a requirement in the case of such a judgment to demonstrate the presence of the judgment-debtor in Ontario or the presence of its assets in Ontario, before an

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[58] *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c.R.6, Articles III and IV

Ontario Court could recognize the U.K. Judgment under the *Act*, would add a condition to recognition not stated in the U.K. Convention. [59]

98. The legislative expression of Rule 17.02(m) and the Ontario statutes is reinforced by the Decisions of *Morguard* and of *Beals*. Only a demonstration by the moving parties that the Ecuadorean Court did not have either in personam or subject matter jurisdiction will prevent the Ontario Court from enforcing the Judgment.[60]

The Principles of *Van Breda* do not apply to the Recognition and Enforcement of a Foreign Judgment

99. *Van Breda* is uniquely about the assumption of jurisdiction to adjudicate claims at first instance in Ontario.

> First, were the Ontario courts right to assume jurisdiction over the claims of the respondents *Van Breda* and *Charron* and over the appellant, Club Resorts?
>
> This case concerns the elaboration of the 'real and substantial connection' test as an appropriate common law conflicts rule for the assumption of jurisdiction.[61]

100. *Van Breda* does not address the recognition and enforcement of a foreign judgment. It does not purport to, nor does it, alter either the philosophy behind, or the tests promulgated, in *Beals*.

101. Ms. Van Breda's accident and physical injuries happened in Cuba. At the time of her trip, she was living in Ontario, but after the accident, she did not return to Ontario and relocated to British Columbia. Nevertheless, she brought her action in Ontario and the Court found that the real and substantial connection test was satisfied because she had made the arrangement for the trip with one defendant, Denis, who had an agreement with Club Resorts of the Cayman

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[59] Brown Reasons at paras. 60-62, JAR, Vol. 1, Tab 2, pp. 32-33
[60] Brown Reasons at paras. 77-79, JAR, Vol. 1, Tab 2, pp. 38-39
[61] *Van Breda, supra* at paras. 17 and 34, Respondents' Authorities, Tab 16

Islands under which he found tennis and squash professionals and sent them to Club Resorts hotels in Cuba, where Ms. Van Breda sustained her injury.[62]

102. Mr. Charron died while scuba diving in Cuba. The action met the real and substantial connection test because the SuperClubs Group of Companies, to which Club Resorts belonged, maintained an office near Toronto and that Club Resorts had availed itself of that office's services.[63]

103. In *Van Breda*, the Court was concerned with the common law conflicts rule for the assumption of jurisdiction and that it not appropriate unto itself jurisdiction properly exercisable by a foreign court. In this case, the U.S. 2nd Circuit Court of Appeals has expressly greenlighted enforcement of the Ecuadorean Judgment by a court outside the U.S.A.

104. The Court considered the risk of jurisdictional overreach and fashioned the real and substantial connection test to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts.

105. The enforcement of a foreign judgment is decidedly different. Enforcement proceedings involve the lending of assistance to an already adjudicated obligation. They are completely different in philosophy and principle from the prosecution of a claim that may have little or no connection with the domestic jurisdiction:

> 26 In *Morguard*, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced.[64]

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[62] *Van Breda, supra* at para. 114, Respondents' Authorities, Tab 16
[63] *Van Breda, supra* at para. 113, Respondents' Authorities, Tab 16
[64] *Van Breda, supra* at para. 26, Respondents' Authorities, Tab 16

No Requirement to Have Assets in the Jurisdiction

106. There is no requirement in Canada that the plaintiff establish the presence of exigible assets in the jurisdiction in order to ground the jurisdiction. In fact, the Court and other courts and text writers have held and expressly stated that no such requirement is needed:

Beals

> The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment.[65]

BNP

> In my view, this is immaterial as the existence of assets of the judgment debtors in Ontario is irrelevant to the question of whether the court should grant recognition to the Quebec judgment.[66]

107. As the authors of *Canadian Conflict of Laws* state:

> An order enforcing a foreign judgment applies only to local assets. Accordingly, there is no basis for staying the proceedings on the grounds that the forum is inappropriate or that the judgment debtor's principal assets are elsewhere.[67]

U.S. Jurisprudence

108. Justice Brown concluded that American case law was not helpful on this issue for two reasons:

> [68] First, much of the recent American jurisprudence has involved the consideration of state legislation which has adopted the *Uniform Foreign Money-Judgments Recognition Act* (the "Uniform Act"). Several significant differences exist between the principles contained in the Uniform Act and the Canadian common law on the recognition and enforcement of foreign judgments. Those differences demand that a Canadian court approach with caution the principles of American law in this area.
>
> [69] Second, the American authorities are not *ad idem* on the issue raised by these motions. One stream of cases, led by the decision of the New York Court of Appeals in *Lenchyshyn v. Pelko Electric, Inc.*, can be read as standing for the proposition that the recognition and enforcement of a

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[65] *Beals*, *supra* at para. 78, Respondents' Authorities, Tab 8
[66] *BNP*, *supra* at para. 13, Respondents' Authorities, Tab 10
[67] Castel & Walker, *Canadian Conflict of Laws*, 6th ed., (Markham, ON: LexisNexis Canada, Inc., 2005), p. 14-10, Respondents' Authorities, Tab 12

> foreign judgment does not depend upon the recognizing court possessing personal jurisdiction over the judgment debtor: ...[68]

109. Nevertheless, in spite of the fact that Chevron submitted to Brown J. that U.S. law does not govern these motions and that, "as such, the court need not reach a conclusion on the state of U.S. law," it now refers to *Shaffer v. Heitner* as a controlling authority and suggests that property in the state is necessary to ground jurisdiction.

110. The Appellate Decision of the Supreme Court of New York in *Lenchyshyn v. Pelko Electric* specifically refers to *Shaffer v. Heitner* and determines that no jurisdictional basis for proceeding against the judgment-debtor need be shown before a foreign judgment will be recognized or enforced in a given state. In particular, the appellate division held that judgment could be recognized and enforced: "Moreover, even if the defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR Article 53 ..."

> Those courts that have cited the Shaffer footnote have held uniformly that no jurisdictional basis for proceeding against the judgment debtor need be shown before a foreign judgment will be recognized or enforced in a given state ...[69]

111. The Decision in *Lenchyshyn* has been followed and applied in a number of other cases including *Pure Fishing Inc. v. Silver Star Co.* – a decision from Iowa in 2002; *Attorney General of Canada v. Gorman* – a decision from New York in 2003; *Haaksman v. Diamond Offshore (Bermuda) Ltd.* – a decision from Texas in 2008; and *Beluga Chartering v. Timber S.A.* – a decision from Texas in 2009.[70]

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[68] Brown Reasons at paras. 68 and 69, JAR, Vol. 1, Tab 2, pp. 34-35

[69] *Lenchyshyn et al v. Pelko Electric, Inc.,* 281 A.D.2d 42, 2001 N.Y. App. Div. LEXIS 1663 at pp. 4 and 5, Respondents' Authorities, Tab 24

[70] *Pure Fishing, Inc. f/k/a Berkley, Inc. v. Silver Star Co., Ltd.,* 202 F. Supp. 2d 905, 2002 U.S. Dist. LEXIS 6671 at pp. 2 and 3, Respondents' Authorities, Tab 31; *Attorney General of Canada v. Gorman*, 769 N.Y.S.2d 369 at p. 7, Respondents' Authorities, Tab 5; *Haaksman v. Diamond Off-Shore (Bermuda), Ltd.,* 260 S.W.3d 476, 2008 Tex. App. LEXIS 2978 at p. 3, Respondents' Authorities, Tab 20; *Beluga Chartering B.V. v. Timber, S.A.*, 294 S.W.3d 300, 2009 Tex. App. LEXIS 5663 at pp. 2 and 3, Respondents' Authorities, Tab 9

112. All of the above cases emphasize the principle that the domestic state court, absent personal jurisdiction, nevertheless has jurisdiction to recognize a foreign judgment. The only pre-conditions are that the foreign court had personal jurisdiction over the defendant or subject matter jurisdiction over the case and that the judgment was final.

Chevron Does Have Assets in the Jurisdiction

113. In any event, and the Court should so declare, by its sole and beneficial ownership of the shares and assets of Chevron Canada, Chevron has exigible assets in Ontario. Chevron promotes its business, worldwide and in required regulatory filings, as an integrated global energy company. Its financial statements, which underpin the share value, the ratings on its debt and its attractiveness to the ultimate owners, the shareholders, are presented on a consolidated basis. Its revenue and its profits flow from its upstream and downstream business segments all of which are held in indirect subsidiaries operating around the world. Dividends from these operating subsidiaries flow to Chevron, which in turn pays out dividends from those earnings to its shareholders – $22 billion in the past four years. Dividends from the operating subsidiaries flow up to Chevron, which has used the money to repurchase its shares on the market – over $15 billion in the past four years.

114. A series of questions illuminates the ownership of Chevron Canada by Chevron. Does a shareholder of Chevron, who purchases a share for approximately US $115, only have an interest in the collection of individuals who staff the head office, or in the underlying, revenue generating physical assets that are in Chevron Canada? If Chevron Canada's shares or assets were to be sold, who has the right to authorize that sale or veto any such sale?

The *Execution Act* – Exigibility

115. The provisions of the Ontario *Execution Act,* which are broadly and liberally interpreted, permit and authorize the sheriff to seize an interest of a judgment-debtor. An interest encompasses a legal, beneficial, direct and indirect interest.[71]

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[71] *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, [2014] O.J. No. 1815 (S.C.J.) at paras. 47-53, Respondents' Authorities, Tab 34

116. Section 18(1) of the *Execution Act* expressly provides that "[t]he sheriff may seize and sell any equitable or other right, personal property, interest or equity of redemption in or in respect of any good, chattels or personal property". Where an execution debtor's "interest" in a security or security entitlement is at issue, that interest may be seized in accordance with certain procedures set out in the *Securities Transfer Act.*

117. The *Execution Act* is clear that every seizure and sale of an interest in a security or security entitlement "shall include all dividends, distributions, interest and other rights to payment".

118. The *Execution Act* is remedial in nature and is to be construed liberally, so as to ensure that the statute's objectives are attained according to the statute's true intent, meaning and spirit. The provisions of the *Execution Act*, including section 18(1), should therefore be interpreted in a manner that facilitates the process of enforcing judgments, not in a manner that would deny creditors a remedy.

119. The Court of Appeal for Ontario granted a creditor declaratory relief enabling the sheriff to seize an equitable interest in shares. In *1454495 Ontario Inc. v. J=Systems Inc.*, the Court held that the debtor's residual rights in certain shares constituted an interest that could be seized and sold pursuant to section 18(1) of the *Execution Act*, notwithstanding that another party also had significant rights in the shares, including possession and the right to vote.[72]

120. The Legislature quite clearly contemplated the exigibility of a beneficial interest. A beneficial interest in an asset is quite clearly captured by section 18(1) of the *Execution Act.* In *Banglar Progoti Ltd. v. Ranka Enterprises Inc.*, Madam Justice Pepall (as she then was) granted a declaration that the debtor had a 100 percent beneficial interest in certain real property, and that that interest could be seized pursuant to a writ of seizure and sale.[73]

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[72] *1454495 Ontario Inc. v. J=Systems Inc.*, [2002] O.J. No. 486 (S.C.J.) at paras. 3-4 and 23-25, Respondents' Authorities, Tab 2

[73] *Banglar Progoti Ltd. v. Ranka Enterprises Inc.*, [2009] O.J. No. 1470 (S.C.J.) at paras. 8 and 27-29, Respondents' Authorities, Tab 6

Responses to Chevron's Irrelevant Submissions on Jurisdiction

121. Chevron relies on *Daimler v. Bauman*. It ignores the distinction that is made in cases both in Canada and in the U.S.A. between enforcement actions and first instance cases, of which *Daimler* is one. A review and analysis of *Daimler*, which discusses the limits of the jurisdictional reach of a state applying its own statutes, demonstrates that the facts of that case could not meet the real and substantial connection test. Both the wrongdoer and the wrongdoing alleged had no connection to the U.S.A.

122. Chevron submits that "comity dictates that any adjudication of the validity of the Ecuadorean judgment be left to those courts and tribunals elsewhere that have a legitimate interest in the outcome ..." There are five fundamental errors with this submission.

123. First, *Beals* has established that a foreign judgment debtor can raise defences to the enforcement action on the grounds of fraud, failure of natural justice, and on policy grounds. But to do so, Chevron must file a Statement of Defence, which it has refused to do. International comity is concerned with providing a forum for the enforcement action, not with deciding to close its courts even before a Statement of Defence has been filed.

124. Second, the U.S. 2nd Circuit Court of Appeals, in this case, has not appropriated sole jurisdiction to enforce the Ecuadorean Judgment. To the contrary, it has expressly recognized and authorized the enforcement action to be brought and determined in another country. This Court has also expressly recognized that foreign judgments may be enforced in multiple jurisdictions.

125. Third, the enforcement of the Ecuadorean Judgment has nothing to do with any of the facts or circumstances occurring in the U.S.A. The underlying facts of contamination took place in Ecuador. The trials and appeals took place in Ecuador, the jurisdiction that Chevron selected.

126. Fourth, Chevron's submission is, in essence, a *forum non conveniens* motion, but without a motion record and no facts. As the Court stated in *Van Breda:*

> [102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum.

> The court cannot decline to exercise its jurisdiction unless the defendant invokes forum non conveniens. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.[74]

127. Fifth, as Chevron knows, the respondents are currently prohibited from even initiating an enforcement action in the U.S.A.[75]

128. Chevron's submission that the respondents have refused to take their enforcement claim to the U.S.A. for "tactical reasons" is wrong at law and wrong in fact. No law dictates to a judgment-creditor where the enforcement action must be brought. This Court has repeatedly indicated that the judgment-creditor has freedom of choice. (See paras. 7 and 81, *supra.*)

129. The respondents cannot now, in any event, initiate an enforcement action in the U.S.A. Kaplan J. recognized that the respondents were free to seek to enforce their Ecuadorean Judgment in Canada and elsewhere. He barred them from initiating an enforcement action in the U.S.A. Ontario is now a forum of necessity. The respondents' access to justice is now in Ontario.[76]

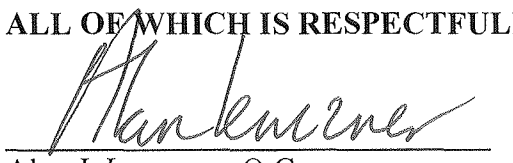
PART IV - SUBMISSIONS CONCERNING COSTS

130. The respondents submit that they are entitled to their costs of this appeal.

PART V - ORDER REQUESTED

131. The respondents respectfully request this Court to dismiss Chevron's appeal with costs and require it to file its Statement of Defence within 30 days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Alan J. Lenczner, Q.C.
Counsel for the respondents

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[74] *Van Breda, supra* at para. 102, Respondents' Authorities, Tab 16
[75] *Chevron Corp. v. Donziger et al* 974 F.Supp. (2nd) 362 (S.D.N.Y.) (2014) at pp. 479, 480, 483 and 484, Respondents' Authorities, Tab 14
[76] *Van Breda et al v. Village Resorts* (2010), 98 O.R. (3d) 721 (C.A.) at para. 100, Respondents' Authorities, Tab 37; *West Van Inc. v. Daisley et al* (2014), 119 O.R. (3d) 481 (C.A.) at paras. 17-20, Respondents' Authorities, Tab 38

PART VI - TABLE OF AUTHORITIES

Tab	Case	Paragraph(s) Referenced
24	*Lenchyshyn et al v. Pelko Electric, Inc.*, 281 A.D.2d 42, 2001 N.Y. App. Div. LEXIS 1663	110
26	*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. No. 1077	11, 16, 46, 72, 81, 83, 98
28	*Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, [2009] O.J. No. 1195 (C.A.)	20
30	*Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612	12, 86
31	*Pure Fishing, Inc. f/k/a Berkley, Inc. v. Silver Star Co., Ltd.*, 202 F. Supp. 2d 905, 2002 U.S. Dist. LEXIS 6671	111
32	*Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.)	78
33	*Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. March 17, 2011)	3, 26, 28
34	*Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, [2014] O.J. No. 1815 (S.C.J.)	115
36	*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022	7
37	*Van Breda et al v. Village Resorts Limited et al* (2010), 98 O.R. (3d) 721 (C.A.)	129
38	*West Van Inc. v. Daisley et al* (2014), 119 O.R. (3d) 481 (C.A.)	129
39	Trial Judgment of Nicolas Zambrano Lozada dated February 14, 2011	29, 31, 32, 34, 35

PART VII - STATUTES AND REGULATIONS

***Rules of Civil Procedure,* R.R.O. 1990, REGULATION 194**

SERVICE OUTSIDE ONTARIO WITHOUT LEAVE

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

...

Judgment of Court Outside Ontario

(m) on a judgment of a court outside Ontario

***Quebec Civil Code*, 1991, c. 64, a. 3155**

3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following case: ...

***International Commercial Arbitration Act*, R.S.O. 1990, C.I.9, Articles 35 and 36**

Article 35. *Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

...

Article 36 *Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

Reciprocal Enforcement of Judgments Act, **R.S.O. 1990, Ch.R.5**

Registration of judgment

2. (1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to any court in Ontario having jurisdiction over the subject-matter of the judgment, or, despite the subject-matter, to the Superior Court of Justice at any time within six years after the date of the judgment to have the judgment registered in that court, and on any such application the court may, subject to this Act, order the judgment to be registered. R.S.O. 1990, c. R.5, s. 2 (1); 2006, c. 19, Sched. C, s. 1 (1).

Notice of application to register

(2) Reasonable notice of the application shall be given to the judgment debtor in all cases in which the judgment debtor was not personally served with process in the original action and did not appear or defend or otherwise submit to the jurisdiction of the original court, but in all other cases the order may be made without notice. R.S.O. 1990, c. R.5, s. 2 (2).

Registration of judgment

(3) The judgment may be registered by filing with the registrar or clerk of the registering court an exemplification or a certified copy of the judgment, together with the order for such registration, whereupon the judgment shall be entered as a judgment of the registering court. R.S.O. 1990, c. R.5, s. 2 (3).

Reciprocal Enforcement of Judgments (U.K.) Act, **R.S.O. 1990, CHAPTER R.6**

PART III
ENFORCEMENT OF JUDGMENTS

ARTICLE III

1. Where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article VI to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings) to have the judgment registered, and on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered.

ARTICLE IV

1. Registration of a judgment shall be refused or set aside if

(a) the judgment has been satisfied;

(b) the judgment is not enforceable in the territory of origin;

(c) the original court is not regarded by the registering court as having jurisdiction;

(d) the judgment was obtained by fraud;

(e) enforcement of the judgment would be contrary to public policy in the territory of the registering court;

(f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court; or

(g) in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the original court and did not submit to its jurisdiction.

2. The law of the registering court may provide that registration of a judgment may or shall be set aside if

(a) the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear;

(b) another judgment has been given by a court having jurisdiction in the matter in dispute prior to the date of judgment in the original court; or

(c) the judgment is not final or an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the territory of origin.

***Execution Act*, R.S.O. 1990, c. E.24, ss. 18(1) and 14(1) and (3)**

Seizure of execution debtor's interest in security, security entitlement

14. (1) The interest of an execution debtor in a security or security entitlement may be seized by the sheriff in accordance with sections 47 to 51 of the Securities Transfer Act, 2006. 2006, c. 8, s. 143 (1).

. . .

Seizure includes dividends, other rights to payment

(3) Every seizure and sale made by the sheriff shall include all dividends, distributions, interest and other rights to payment in respect of the security, if issued by an issuer incorporated or otherwise organized under Ontario law, or in respect of the security entitlement and, after the

seizure becomes effective, the issuer or securities intermediary shall not pay the dividends, distributions or interest or give effect to other rights to payment to or on behalf of anyone except the sheriff or a person who acquires or takes the security or security entitlement from the sheriff. 2006, c. 8, s. 143 (1).

Seizure and sale of rights in chattels, etc.

18. (1) The sheriff may seize and sell any equitable or other right, property, interest or equity of redemption in or in respect of any goods, chattels or personal property, including leasehold interests in any land of the execution debtor, and, except where the sale is under an execution against goods issued out of the Small Claims Court, the sale conveys whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods, chattels or personal property at the time of the delivery of the execution to the sheriff for execution, and, where the sale is under an execution against goods issued out of the Small Claims Court, the sale conveys whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods, chattels or personal property at the time of the seizure. R.S.O. 1990, c. E.24, s. 18; 2010, c. 16, Sched. 2, s. 3 (26).

***Securities Transfer Act*, S.O. 2006, c. 8, 22. 48-51**

Seizure of interest in certificated security

48. (1) Except as otherwise provided in subsection (2) and in section 51, the interest of a judgment debtor in a certificated security may be seized only by actual seizure of the security certificate by a sheriff. 2006, c. 8, s. 48 (1).

Same

(2) A certificated security for which the security certificate has been surrendered to the issuer may be seized by a sheriff serving a notice of seizure on the issuer at the issuer's chief executive office. 2006, c. 8, s. 48 (2).

Seizure of interest in uncertificated security

49. Except as otherwise provided in section 51, the interest of a judgment debtor in an uncertificated security may be seized only by a sheriff serving a notice of seizure on the issuer at the issuer's chief executive office. 2006, c. 8, s. 49.

Seizure of interest in security entitlement

50. Except as otherwise provided in section 51, the interest of a judgment debtor in a security entitlement may be seized only by a sheriff

serving a notice of seizure on the securities intermediary with whom the judgment debtor's securities account is maintained. 2006, c. 8, s. 50.

Notice of seizure to secured party

51. The interest of a judgment debtor in any of the following may be seized by a sheriff serving a notice of seizure on the secured party:

1. A certificated security for which the security certificate is in the possession of a secured party.

2. An uncertificated security registered in the name of a secured party.

3. A security entitlement maintained in the name of a secured party. 2006, c. 8, s. 51.

RÈGLES DE PROCÉDURE CIVILE, R.R.O. 1990, RÈGLEMENT 194

SIGNIFICATION EN DEHORS DE L'ONTARIO SANS AUTORISATION DU TRIBUNAL

17.02 L'acte introductif d'instance ou l'avis d'un renvoi peut être signifié sans l'autorisation du tribunal à une partie se trouvant en dehors de l'Ontario si la ou les demandes contre cette partie, selon le cas :

. . .

Jugement d'un tribunal situé en dehors de l'Ontario

m) se fondent sur un jugement d'un tribunal en dehors de l'Ontario;

QUEBEC CIVIL CODE, 1991, c. 64, a. 3155

3155. Toute décision rendue hors du Québec est reconnue et, le cas échéant, déclarée exécutoire par l'autorité du Québec, sauf dans les cas suivants: ...

LOI SUR L'ARBITRAGE COMMERCIAL INTERNATIONAL, L.R.O. 1990, CHAPITRE I.9

Article 35 Reconnaissance et exécution

(1)La sentence arbitrale, quel que soit le pays où elle a été rendue, est reconnue comme ayant force obligatoire et, sur requête adressée par écrit au tribunal compétent, est exécutée sous réserve des dispositions du présent article et de l'article 36.

...

Article 36 Motifs de refus de la reconnaissance ou de l'exécution

(1)La reconnaissance ou l'exécution d'une sentence arbitrale, quel que soit le pays où elle a été rendue, ne peut être refusée que :

a) sur la demande de la partie contre laquelle elle est invoquée, si ladite partie présente au tribunal compétent auquel est demandée la reconnaissance ou l'exécution la preuve :

LOI SUR L'EXÉCUTION RÉCIPROQUE DE JUDGEMENTS, L.R.O. 1990, CHAPITRE R.5

Enregistrement d'un jugement

2. (1) Lorsqu'un jugement a été rendu par le tribunal d'un État accordant la réciprocité, le créancier en vertu du jugement peut, dans les six ans de la date de ce dernier, s'adresser, par voie de requête, au

tribunal de l'Ontario compétent pour connaître de l'objet du jugement, afin de faire enregistrer le jugement au greffe de ce tribunal. Le tribunal peut alors, sous réserve de la présente loi, ordonner l'enregistrement du jugement. La requête peut toutefois être présentée à la Cour supérieure de justice, quel que soit l'objet du jugement. L.R.O. 1990, chap. R.5, par. 2 (1); 2006, chap. 19, annexe C, par. 1 (1).

Avis de la requête demandant l'enregistrement

(2) Un avis suffisant de la requête doit être donné au débiteur en vertu du jugement qui n'a pas reçu signification à personne des actes de procédure de l'action initiale, et qui n'a pas comparu, présenté de défense ni reconnu autrement la compétence du tribunal d'origine. Dans tous les autres cas, l'ordonnance peut être rendue sans préavis. L.R.O. 1990, chap. R.5, par. 2 (2).

Enregistrement du jugement

(3) L'enregistrement du jugement peut se faire par voie de dépôt au greffe du tribunal d'enregistrement d'une ampliation ou d'une copie certifiée conforme du jugement, accompagnée de l'ordonnance d'enregistrement. Le jugement est alors inscrit à titre de jugement de ce tribunal. L.R.O. 1990, chap. R.5, par. 2 (3).

Loi sur l'exécution réciproque de jugements (Royaume-Uni), L.R.O. 1990, CHAPITRE R.6

PARTIE III
EXÉCUTION DES JUGEMENTS

ARTICLE III

1. Lorsqu'un jugement a été rendu par un tribunal d'un État contractant, la partie gagnante peut demander, conformément aux dispositions de l'article VI, l'enregistrement de ce jugement à un tribunal de l'autre État contractant à tout moment dans les six ans de la date du jugement (ou, s'il y a eu appel, dans les six ans de la date du dernier jugement rendu dans cette affaire). Le tribunal de l'enregistrement ordonne, sous réserve des procédures simples et rapides qui peuvent être prévues par chaque État contractant et sous réserve des autres dispositions de la présente Convention, que le jugement soit enregistré.

ARTICLE IV

1. L'enregistrement d'un jugement doit être refusé ou annulé

a) si les obligations pécuniaires résultant du jugement sont éteintes;

b) si le jugement n'est pas susceptible d'exécution sur le territoire d'origine;

c) si le tribunal d'origine n'est pas considéré comme compétent par le tribunal de l'enregistrement;

d) si le jugement a été obtenu par des manoeuvres frauduleuses;

e) si l'exécution du jugement serait contraire à l'ordre public dans le territoire du tribunal de l'enregistrement;

f) s'il s'agit d'un jugement qui émane d'un pays ou d'un territoire autre que le territoire d'origine et a été enregistré au tribunal d'origine ou est devenu exécutoire sur le territoire d'origine de la même manière qu'un jugement rendu par ce tribunal; ou

g) si, de l'avis du tribunal de l'enregistrement, la partie perdante bénéficie de l'immunité de la juridiction de ce tribunal ou si elle bénéficiait de l'immunité devant le tribunal d'origine et ne s'était pas soumise à la compétence de ce tribunal.

2. La loi du tribunal de l'enregistrement peut rendre obligatoire ou facultative l'annulation de l'enregistrement d'un jugement

a) si l'acte introductif d'instance émanant du tribunal d'origine n'a pas été signifié à la partie perdante, défenderesse lors de la poursuite initiale, ou que cette partie n'a pas été informée de l'action intentée en temps utile pour lui permettre de présenter une défense et, dans l'un ou l'autre cas, n'a pas comparu;

b) si un autre jugement a été rendu par un tribunal compétent à l'égard du litige avant la date du jugement rendu par le tribunal d'origine; ou

c) lorsqu'il ne s'agit pas d'un jugement final, ou lorsqu'un appel est pendant ou que la partie perdante a droit d'en appeler ou de demander l'autorisation d'en appeler à l'encontre du jugement dans le territoire d'origine.

***Loi sur l'exécution forcée*, L.R.O. 1990, CHAPITRE E.24**

Saisie de l'intérêt du débiteur sur une valeur mobilière ou un droit intermédié

14. (1) L'intérêt d'un débiteur saisi sur une valeur mobilière ou un droit intermédié peut être saisi par le shérif conformément aux articles 47 à 51 de la Loi de 2006 sur le transfert des valeurs mobilières. 2006, chap. 8, par. 143 (1).

. . .

Saisie des dividendes et autres créances

(3) La saisie et la vente que fait le shérif comprennent les dividendes, les distributions, les intérêts et les autres créances relatifs à la valeur mobilière qui a été émise par un émetteur constitué ou, à défaut, organisé selon la loi de l'Ontario ou au droit intermédié. Dès que la saisie prend effet, l'émetteur ou l'intermédiaire ne doit pas effectuer de versement relativement à ces dividendes, distributions ou intérêts à quiconque ni pour son compte, ni donner effet aux autres créances, sauf au shérif ou aux personnes qui acquièrent ou reçoivent de lui la valeur mobilière ou le droit intermédié. 2006, chap. 8, par. 143 (1).

Saisie-exécution des droits sur des biens meubles

18. (1) Le shérif peut saisir et vendre les droits, notamment en equity, le droit de propriété, l'intérêt ou le droit de rachat à l'égard des objets ou des biens meubles, y compris tout droit de tenure à bail sur un bien-fonds du débiteur saisi. La vente transfère les droits, notamment en equity, le droit de propriété, l'intérêt ou le droit de rachat que possédait le débiteur saisi ou auxquels il avait droit au moment de la remise de l'exécution forcée au shérif, sauf si la vente est faite en vertu d'une exécution forcée visant des objets prononcée par la Cour des petites créances. La vente, dans ce cas, transfère les droits précités que possédait le débiteur saisi ou auxquels il avait droit au moment de la saisie. L.R.O. 1990, chap. E.24, art. 18; 2010, chap. 16, annexe 2, par. 3 (26).

***Loi de 2006 sur le transfert des valeurs mobilières*, L.O. 2006, CHAPITRE 8**

Saisie d'un intérêt sur une valeur mobilière avec certificat

48. (1) Sauf disposition contraire du paragraphe (2) et de l'article 51, l'intérêt d'un débiteur judiciaire sur une valeur mobilière avec certificat ne peut être saisi que par la saisie de ce certificat par un shérif. 2006, chap. 8, par. 48 (1).

Idem

(2) La valeur mobilière dont le certificat a été remis à l'émetteur peut être saisie par un shérif au moyen d'un avis de saisie signifié à l'émetteur au bureau de sa direction. 2006, chap. 8, par. 48 (2).

Saisie d'un intérêt sur une valeur mobilière sans certificat

49. Sauf disposition contraire de l'article 51, l'intérêt d'un débiteur judiciaire sur une valeur mobilière sans certificat ne peut être saisi que par un shérif au moyen d'un avis de saisie signifié à l'émetteur au bureau de sa direction. 2006, chap. 8, art. 49.

Saisie d'un intérêt sur un droit intermédié

50. Sauf disposition contraire de l'article 51, l'intérêt d'un débiteur judiciaire sur un droit intermédié ne peut être saisi que par un shérif au moyen d'un avis de saisie signifié à l'intermédiaire en valeurs mobilières qui tient le compte de titres du débiteur. 2006, chap. 8, art. 50.

Signification d'un avis de saisie au créancier garanti

51. Peut être saisi par un shérif au moyen d'un avis de saisie signifié au créancier garanti l'intérêt d'un débiteur judiciaire sur ce qui suit :

1. Une valeur mobilière dont le certificat est en la possession du créancier garanti.

2. Une valeur mobilière sans certificat inscrite au nom du créancier garanti.

3. Un droit intermédié conservé au nom du créancier garanti. 2006, chap. 8, art. 51.