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Ecuadorian Villagers Ordered to Post Security for Chevron's Legal Costs

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This latest decision from the Ontario Court of Appeal is yet another chapter in the long-running saga of *Yaiguaje v. Chevron*, an Ontario action by Ecuadorian villagers seeking to enforce a US$9.5 billion Ecuadorian judgment against Chevron and Chevron Canada relating to pollution from resource extraction activities in Ecuador.

In a decision released September 21, 2017,[i] Justice Gloria J. Epstein, of the Ontario Court of Appeal, ordered that the plaintiffs post security for costs in the amount of approximately $950,000 – $600,000 for Chevron Canada and $350,000 for Chevron Corporation – in order to continue with an appeal from a summary judgment order dismissing the plaintiffs' action against Chevron Canada and its motion to add Chevron Canada Capital Company as a defendant in the action.

Background in Ecuador

From 1964 to 1992, Texaco Inc., its subsidiaries and various partners engaged in oil extraction activities in the Lago Agrio region of Ecuador's Amazon basin. Litigation followed against Texaco alleging a variety of environmental, health and other tort claims related to Texaco's extraction activity. Texaco and the Ecuadorian plaintiffs finalized a settlement in 1998. Chevron Corporation acquired Texaco in 2001. Litigation continued to take place concerning the validity and the effect of the settlement.

The Ecuadorian plaintiffs in this case represent approximately 30,000 indigenous villagers from Ecuador's Oriente Region. After seven years of litigation, in February of 2011, an Ecuadorian trial court found Chevron liable for US$17.2 billion. The amount of the judgment was subsequently reduced to US$9.5 billion.

Chevron, which has no assets in Ecuador, refused to acknowledge the Ecuadorian judgment. The plaintiffs have sought to enforce the judgment in various jurisdictions around the world.

North American Litigation

In 2011, Chevron sought and obtained a global anti-enforcement injunction against the plaintiffs in the United States District Court for the Southern District of New York. The judge found that the Ecuadorian judgment had been obtained by fraud and prohibited the judgment from being enforced in the United States. On appeal, the United States Court of Appeal, Second Circuit, held that the plaintiffs could seek to enforce the judgment in any country in the world where Chevron had assets.

In 2012, the plaintiffs commenced an action in Ontario against Chevron and Chevron Canada, seeking to enforce the judgment. Chevron and Chevron Canada initially disputed whether

Ontario courts had *jurisdiction simplicitor* to recognize and enforce the judgment. Ultimately, the Supreme Court of Canada, in a decision released in September 2015,[ii] held that Ontario courts had jurisdiction over the enforcement action. However, the Supreme Court also held that Chevron and Chevron Canada were free to argue against enforcement based on their separate corporate personalities and any other applicable defences.

After the Supreme Court ruled, the enforcement proceedings came back before Justice Hainey of the Ontario Superior Court of Justice on two motions for summary judgment. Chevron Canada moved for summary judgment against the plaintiffs and the plaintiffs moved for summary judgment against Chevron Canada. In addition, the plaintiffs moved to strike the defences pleaded by Chevron in its statement of defence.

Chevron is a Delaware company with its head office in California. Chevron Canada is a seventh level indirect subsidiary of Chevron with its head office in Calgary, Alberta. The plaintiffs, in addition to seeking payment of the US$9.5 billion, are also seeking a declaration that the shares of Chevron Canada are exigible to satisfy the Ecuadorian judgment.

In a decision released January 20, 2017,[iii] Justice Hainey found in favour of Chevron Canada on both issues. He held that the shares and assets of Chevron Canada were not exigible and available for execution and seizure pursuant to the *Execution Act* to satisfy the Ecuadorian judgment against Chevron and Chevron Canada's corporate veil should not be pierced so that its shares and assets are available to satisfy the judgment.

Court of Appeal's Security for Costs Ruling

The plaintiffs have appealed that decision to the Ontario Court of Appeal. Chevron Canada and Chevron brought a motion in the Court of Appeal, seeking an order for security for costs in excess of over $1 million, plus $160,000 for the appeal and the rest for the previous proceedings.

In granting the motion, Justice Epstein ordered that the Ecuadorian plaintiffs post a total of $942,950 in security for costs, as a condition of continuing with their appeal of the January 2017 order of Justice Hainey dismissing their action.

Justice Epstein held that the general principles for posting security for costs apply to such a motion in the Court of Appeal. Where an order for security for costs could be made under the *Rules of Civil Procedure*, they also could be made in an appeal subject to the Court of Appeal making such order "*as is just*".

The *Rules of Civil Procedure* provide that where plaintiffs are ordinarily resident outside of Ontario the court may order security for costs. Justice Epstein found that in this case there was no dispute that the Ecuadorian plaintiffs reside outside of Ontario. The issue and relevant considerations were: could they demonstrate on a balance of probability that they were

impecunious and where impecuniosity is not shown could they demonstrate that there was a good chance of success on the appeal.

Query whether the Court of Appeal's decision on security for costs will mean the end of this *Yaiguaje v. Chevron* enforcement action in Canada?

Novel Submission

In addition, the Ecuadorian plaintiffs also advanced what the judge referred to as "a novel submission", one that their counsel submitted should become part of the law pertaining to security for costs, i.e. that in an action for recognition and enforcement of a foreign judgment which was tantamount to a class action, security for costs should never be ordered.

Justice Epstein found that the plaintiffs could not demonstrate impecuniosity. They had filed no evidence as to their finances beyond three settlement agreements which she held were not "evidence" in any event.

As for the merits of the appeal, Justice Epstein agreed with Justice Hainey's analysis and concluded that the plaintiffs did not have a good chance of success on the appeal.

Justice Epstein considered in detail the plaintiffs argument that the court should adopt "*a new approach*" to recognition and enforcement actions. However, she did not accept the plaintiffs submission that the action was analogous to a class proceeding. She held that even if she were to accept that argument, this would not prevent security for costs being ordered where the justice of the case warrants it.

Justice Epstein held that litigants seeking to enforce a foreign judgment should not be put in a more advantageous position than domestic litigants. The Supreme Court of Canada's earlier decision in the case did not change that principle. It stood for the proposition that Canadian courts should take a generous approach in finding jurisdiction to allow litigants holding foreign judgments to bring enforcement actions. Justice Epstein held that she did not read the decision as saying that when such enforcement actions are brought before Canadian courts they should be treated differently than cases involving domestic litigants. In fact, she held that the Supreme Court's *Chevron* decision actually undercut the plaintiffs argument. In that decision, Justice Gascon held, "*enforcement is limited to measures – like seizures, garnishments or executions – that can be taken only within the confines of the jurisdiction, and in accordance with its rules*" and that "*whether recognition and enforcement should proceed depends entirely on the enforcing forum's laws*".

As a result, the Court of Appeal was unable to accept as a general rule, that courts should approach security for costs differently in an appeal involving enforcements of foreign judgments.

[i] *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741.
[ii] *Chevron Corp. v. Yaiguaje*, [2015] 3 SCR 69.
[iii] *Yaiguaje v Chevron Corporation*, 2017 ONSC 135.