Chapter 3

Chevron Corp v. Yaiguaje — Enforcing Foreign Judgments and Piercing Veils

Young Park[*]

Introduction

On February 14, 2011, Justice Zambrano of the Provincial Court of Justice of Sucumbíos in Ecuador issued a judgment against Chevron Corporation, one of the world's largest corporations, in the amount of U.S. $8.6 billion in remediation damages and U.S. $8.6 billion in punitive damages. The judgment was in favour of 47 plaintiffs representing approximately 30,000 indigenous villagers in the Lago Agrio region of Ecuador, whose lands had been contaminated by the oil extraction activities carried out by Texaco for close to two decades. Chevron acquired Texaco in 2001. Justice Zambrano rendered his judgment after a vigorously contested trial that lasted close to eight years. In November 2013, Ecuador's highest court affirmed Justice Zambrano's ruling but reduced the total damages awarded against Chevron to U.S. $9.51 billion (the "Ecuadorian Judgment").

Chevron refused to pay. As Chevron had no assets in Ecuador, the plaintiffs have sought to enforce the Ecuadorian Judgment in various jurisdictions. In March 2014, Judge Kaplan of the United States District Court in New York held that Ecuadorian Judgment was unenforceable in the United States as it had been obtained by fraud.[1] In May 2012, the plaintiffs commenced an action in Ontario to enforce the Ecuadorian Judgment against Chevron. Chevron has never conducted business in Canada and has no assets in Canada. The plaintiffs also sued Chevron

[*] September 28, 2015. Young Park is a litigation partner at Fogler, Rubinoff LLP in Toronto whose advocacy practice includes cross border litigation, land contamination disputes, regulatory and administrative hearings, appellate advocacy and complex business disputes.

[1] *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y., 2014). Judge Kaplan issued an injunction enjoining the plaintiffs from enforcing the Ecuadorian Judgment in the United States based on his findings that the plaintiffs' U.S. attorney Steve Donziger and his Ecuadorian legal team had corrupted the case by ghost writing the report of an impartial court appointed expert on damages and bribing an inexperienced Judge Zambrano with $500,000 to rule in their favour and sign a judgment that they had written. The U.S. Court of Appeals for the Second Circuit heard oral arguments in the appeal of this decision in April 2015. At the time this article was written in September 2015, the decision of the U.S. Court of Appeals was still pending.

Canada Limited, claiming that the shares and assets of Chevron's indirect subsidiary are available for execution to satisfy Chevron's debt under the Ecuadorian Judgment. Chevron Canada was not a party to the proceedings in Ecuador, and was not involved in Texaco's operations in Lago Agrio.

Chevron and Chevron Canada challenged the jurisdiction of the Ontario court to hear this enforcement action. In a decision released on May 1, 2013,[2] the motion judge held that the Ontario court had jurisdiction over both defendants. But Justice Brown stayed the action on his own initiative under s. 106 of the *Courts of Justice Act* as he believed it would likely fail.[3] Both sides appealed.

On December 17, 2013, the Ontario Court of Appeal affirmed that the Ontario court had jurisdiction over Chevron and Chevron Canada but overturned the stay, ruling that Justice Brown had erred in embarking upon a disguised and unrequested motion to dismiss and strike the action without a proper evidentiary record or giving the plaintiffs an opportunity to respond.[4] Chevron and Chevron Canada appealed to the Supreme Court of Canada on the issue of jurisdiction only.

The Supreme Court released its decision in *Chevron Corp. v. Yaiguaje*[5] on September 4, 2015. In a unanimous decision written by Justice Gascon, the Supreme Court held that the only prerequisite for jurisdiction *simpliciter* in an action to enforce a foreign judgment in Canada[6] is that (1) the foreign court had a real and substantial connection with the subject matter of the dispute or the defendants, or (2) the traditional bases of jurisdiction of presence or consent were satisfied.[7] If this prerequisite was fulfilled, then the service of the statement of claim *ex juris* on the foreign defendant in accordance with the enforcing court's rules of procedure conferred jurisdiction on that court. This was "an unambiguous statement by this Court" that a real and substantial connection between the domestic court

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2 *Yaiguaje v. Chevron Corp.* (2013), 361 D.L.R. (4th) 489, 15 B.L.R. (5th) 226, 2013 CarswellOnt 5729 (Ont. S.C.J. [Commercial List]), additional reasons 2013 CarswellOnt 7602, 229 A.C.W.S. (3d) 49, 2013 ONSC 3325 (Ont. S.C.J. [Commercial List]), reversed in part (2013), 370 D.L.R. (4th) 132, 118 O.R. (3d) 1, 313 O.A.C. 285 (Ont. C.A.), affirmed 2015 CarswellOnt 13353, 2015 CarswellOnt 13354, 256 A.C.W.S. (3d) 583 (S.C.C.) [hereinafter, "*Chevron Motion Decision*"].

3 *Ibid.*, at paras. 109-110.

4 *Yaiguaje v. Chevron Corp.* (2013), 370 D.L.R. (4th) 132, 118 O.R. (3d) 1, 313 O.A.C. 285 (Ont. C.A.) at para. 57, affirmed 2015 CarswellOnt 13353, 2015 CarswellOnt 13354, 256 A.C.W.S. (3d) 583 (S.C.C.) [hereinafter, "*Chevron Appeal Decision*"], at para. 57.

5 *Chevron Corp. v. Yaiguaje*, 2015 CarswellOnt 13353, 2015 CarswellOnt 13354, 256 A.C.W.S. (3d) 583 (S.C.C.) [hereinafter "*Chevron*"].

6 *Chevron* is a recognition and enforcement decision arising from Ontario, which has not enacted the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"). The CJPTA has been passed in five common law jurisdictions: Saskatchewan, Prince Edward Island (not yet in force), Yukon (not yet in force), British Columbia and Nova Scotia. Quebec has also enacted its own conflicts rules in the *Civil Code of Québec*. *Chevron* provides guidance for all Canadian jurisdictions but it is directly applicable to the common law jurisdictions that have not enacted the CJPTA. See *Chevron*, *supra*, footnote 5, at para. 73.

7 *Chevron*, *supra*, footnote 5, at para. 27.

and the foreign judgment debtor is not necessary.[8] The Supreme Court also affirmed the lower court's ruling that traditional, presence-based jurisdiction existed over Chevron Canada as it had conducted a sustained "bricks and mortars" business in Ontario through its employees.

One unique aspect of *Chevron* is that the plaintiffs sought to enforce a foreign judgment in a jurisdiction where the foreign judgment debtor was not present and had no assets, which distinguished it from the Supreme Court's previous enforcement decisions of *Morguard*[9] (an action in British Columbia to enforce a judgment of the Alberta court against a resident of British Columbia) and *Beals*[10] (an action in Ontario to enforce a judgment of a Florida court against residents of Ontario). This unique aspect did not, however, warrant a departure from *Morguard* and *Beals*.

Chevron has implications on the exposure that multinational companies face in Canada to recognition and enforcement proceedings arising from their operations abroad. It could also be argued that certain comments made by the Court of Appeal in *Chevron* may have expanded the grounds for piercing the corporate veil. I examine these implications below.

Before reviewing *Chevron*, it is necessary to place this decision in its proper context in Canadian conflicts of laws.

Framework

Canadian private international law consists of three principal and intertwined areas: (1) jurisdiction *simpliciter* (does the court have jurisdiction over the subject matter of a dispute or the parties);[11] (2) the doctrine of *forum non conveniens* (should the court exercise its jurisdiction); and (3) recognition and enforcement of foreign judgments.[12]

In its leading decision on jurisdiction *simpliciter* in *Van Breda*, the Supreme Court affirmed that there are three grounds for jurisdiction *simpliciter*: (1) presence of the defendant in the jurisdiction; (2) consent of the defendant to the jurisdiction; and (3) a real and substantial connection between the court and the subject matter of the action or the defendants. Presence and consent are the traditional grounds of jurisdiction. The third

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8 *Ibid.*, at para. 69.

9 *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217 (S.C.C.) [hereinafter "*Morguard*"].

10 *Beals v. Saldanha* (2003), 234 D.L.R. (4th) 1, [2003] 3 S.C.R. 416, 70 O.R. (3d) 94 (note) (S.C.C.) [hereinafter, "*Beals*"].

11 *Van Breda v. Village Resorts Ltd.* (2012), 343 D.L.R. (4th) 577, (*sub nom.* Club Resorts Ltd. v. Van Breda) [2012] 1 S.C.R. 572, (*sub nom.* Charron Estate v. Village Resorts Ltd.) 114 O.R. (3d) 79 (note) (S.C.C.) [hereinafter, "*Van Breda*"], at paras. 17, 19, 46 and 79.

12 *Van Breda*, *supra*, footnote 11, at paras. 15-16 and 101; *Chevron*, *supra*, footnote 5, at para. 39; *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.* (2010), 325 D.L.R. (4th) 685, 103 O.R. (3d) 467, 270 O.A.C. 36 (Ont. C.A.) at paras. 35-37, additional reasons 2010 CarswellOnt 9693, 2010 ONCA 886 (Ont. C.A.), affirmed (2012), 343 D.L.R. (4th) 1, [2012] 1 S.C.R. 359, 113 O.R. (3d) 640 (note) (S.C.C.).

ground represents a modern development in Canadian private international law. When jurisdiction *simpliciter* is based on a real and substantial connection, the court is said to *assume* jurisdiction.[13]

Van Breda was an action of first instance. *Chevron* was an enforcement action. In actions of first instance, the court focuses on whether it has jurisdiction to determine the merits of the claim. In enforcement actions, the court focuses on the obligation created by the foreign judgment. If the foreign judgment is a final decision of a court of competent jurisdiction, the enforcing court's only role is to facilitate the collection of the debt owed under that judgment within its territory. The enforcing court does not evaluate the merits of the underlying claim since it has been adjudicated by the foreign court.[14]

The goal of any modern conflicts system is "to accommodate the movement of people, wealth and skills across state lines"[15] and to facilitate exchanges between people in different jurisdictions with different legal systems.[16] In this sense, the principle of comity is one of "two . . . backbones of private international law".[17] Comity has been described as "the deference and respect due by other states to the actions of a state legitimately taken within its territory".[18] Comity in turn is grounded in the goals of order and fairness, which are paramount "in a modern world where business, assets and people cross borders with ease.[19] A modern conflicts system that promotes stability and certainty also advances reciprocity of other nations in the recognition and enforcement of judgments, which has been described as the other backbone of Canadian private international law.[20]

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13 *Van Breda*, *supra*, footnote 11, at para. 79; *Morguard*, *supra*, footnote 9; *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577, 60 O.R. (3d) 20, 160 O.A.C. 1 (Ont. C.A.), at para. 19, additional reasons (2002), 213 D.L.R. (4th) 661, 162 O.A.C. 122, 13 C.C.L.T. (3d) 238 (Ont. C.A.) [hereinafter, "Muscutt"], at para. 19.

14 *Chevron*, *supra*, footnote 5, at paras. 43-44.

15 *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289, (*sub nom.* Lucas (Litigation Guardian of) v. Gagnon) [1994] 3 S.C.R. 1022, [1995] 1 W.W.R. 609 (S.C.C.) at p. 1047; *Chevron*, *supra*, footnote 5, at para. 52.

16 *Van Breda*, *supra*, footnote 11, at para. 74.

17 *Chevron*, *supra*, footnote 5, at paras. 52 and 69.

18 *Morguard*, *supra*, footnote 9, at pp 1095-1096; *Pro Swing Inc. v. ELTA Golf Inc.* (2006), 52 C.P.R. (4th) 321, 273 D.L.R. (4th) 663, [2006] 2 S.C.R. 612 (S.C.C.) at para. 27: ". . . or a balancing exercise between 'respect for a nation's acts, international duty and protection of a nation's citizens'".

19 *Van Breda*, *supra*, footnote 11, at para. 1.

20 *Chevron*, *supra*, footnote 5, at paras. 52 and 69; *Van Breda*, *supra*, footnote 11, at para. 74.

Chevron

History

From 1972 to 1990, Texaco engaged in oil extractive activities in the oil rich Lago Agrio region of the Ecuadorian Amazon. Extensive environmental contamination resulted from Texaco's activities. In 1993, residents of Los Agrio brought an action against Texaco in the Southern District Court of New York for various environmental, health and other tort claims relating to these extraction activities. In 2002, Texaco obtained a stay of the New York proceedings on the basis of *forum non conveniens*, conditional on Texaco's agreement to attorn to the jurisdiction of the Ecuadorian courts.[21]

In 2004, the Ecuadorian plaintiffs commenced an action in Ecuador against Chevron, which acquired Texaco in 2001. After more than seven years of trial, Justice Zambrano of the Provincial Court of Sucumbíos issued a judgment against Chevron for U.S. $8.6 billion and an additional U.S. $8.6 billion if Chevron did not apologize within 14 days of the judgment. Chevron did not apologize.

On January 3, 2012, the Appellate Division of the Provincial Court of Justice of Sucumbíos affirmed the trial judgment. On November 4, 2013, the Court of Cassation (the highest court in Ecuador) affirmed the trial judgment but reduced the damages award to U.S. $9.51 billion. This is the final judgment in Ecuador against Chevron.

In May 2012, the Plaintiffs commenced an action in Ontario to enforce the Ecuadorian Judgment against Chevron and Chevron Canada.

Chevron is a Delaware corporation with its head office in San Ramon, California. It has never been registered to conduct business in Canada and has no assets in Canada. Chevron Canada is a "seventh level indirect subsidiary of Chevron" and was incorporated under the *Canada Business Corporations Act*. Chevron Canada had its head office in Calgary, Alberta and an office in Mississauga, Ontario with 13 employees selling lubricants and other chemical products. Chevron Canada has never conducted any business in Ecuador. Chevron Canada's shares are owned by Chevron Canada Capital Company, not Chevron.

While "[t]he plaintiffs do not allege any wrong doing against Chevron Canada", they sought a declaration that Chevron Canada's shares and assets "are exigible to satisfy the judgment of this Honourable Court".

Chevron was served *ex juris* with the Amended Statement of Claim in San Ramon, California in accordance with rule 17.02(m)[22] of the *Rules of Civil Procedure*. Chevron Canada was served *in juris* at its Mississauga office under rule 16.02(a)(c).[23]

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[21] *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir., 2002).

Motion

Chevron and Chevron Canada moved to stay the action under s. 106 of the *Courts of Justice Act* for want of jurisdiction. They argued that the Ontario court did not have jurisdiction *simpliciter* because there was no real and substantial connection between Ontario and the defendants as Chevron had no assets in Ontario. They cited *Van Breda* to support their position.

The motion judge rejected this argument. Justice Brown held that the Supreme Court's decisions in *Morguard*[24] and *Beals*[25] made clear that the only pre-condition for jurisdiction *simpliciter* over foreign defendants in an enforcement action in Canada was that there was a real and substantial connection between the foreign court and the dispute or the litigants.

In this case, the defendants conceded that the courts of Ecuador had a real and substantial connection with the underlying dispute as the claims arose from the extensive pollution caused by Texaco's oil extractive activities in Ecuador and Chevron had attorned to the jurisdiction of Ecuador and vigorously contested the claims at all levels of the courts of Ecuador for over nine years.

Van Breda did not support Chevron's position since it was a jurisdiction *simpliciter* decision on whether the Ontario court could assume jurisdiction over an action of first instance in tort, where some of the events that resulted in injuries occurred in Cuba. It was not an enforcement action.

With regard to Chevron Canada, Justice Brown held that since Chevron Canada carried on a non-transitory bricks and mortar business with human means in Ontario, the Ontario court had traditional, presence-based jurisdiction over Chevron Canada when it was personally served with the Amended Statement of Claim at its place of business.[26]

Justice Brown, however, stayed the action on his own initiative under s. 106 of the *Courts of Justice Act* because he believed it would likely fail as "Chevron does not have assets here, and there is no reasonable prospect that it will do so in the future", and (2) "the plaintiffs have no hope of success in

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22 Rule 17.02(m) permits a party to be served outside of Ontario, without court order, "on a judgment of a court outside of Ontario".

23 Rule 16.02(1)(c) provides that personal service of an originating process can be made on a corporation by leaving a copy of the document with a person at a place of business of the corporation.

24 La Forest J. modernized Canadian private international laws by holding that the judgment of the court of a province can and should be enforced by the court of a sister province against a resident judgment debtor provided that there was a real and substantial connection between the court of first instance and the underlying dispute and the defendants. Prior to *Morguard*, the receiving court would not enforce the judgment of a court from a sister province unless the judgment debtor defendant had been present or attorned to the jurisdiction of the first court. See *Muscutt*, *supra*, footnote 13 at paras. 30-34.

25 The Supreme Court extended the ruling in *Morguard* to judgments of foreign courts.

26 *Chevron Motion Decision*, *supra*, footnote 2 at para. 87.

their assertion that the corporate veil of Chevron Canada should be pierced and ignored so that its assets become exigible to satisfy the Judgment against its ultimate parent".[27]

Court of Appeal

The Court of Appeal affirmed Justice Brown's ruling on jurisdiction *simpliciter*. MacPherson J.A. for the court held that the Supreme Court's decision in *Beals* made it "crystal clear" that in enforcement actions of foreign judgments, the real and substantial connection test is only applied to the foreign court and the subject matter of the dispute or the parties. This test is not applied between the enforcing court and the foreign judgment debtor.[28] Since there was no dispute that there had been a real and substantial connection between the Ecuadorian court and the subject matter of the action and Chevron, MacPherson J.A. ruled that service *ex juris* of the Amended Statement of Claim on Chevron conferred jurisdiction on the Ontario court.

With regard to Chevron Canada, MacPherson J.A. affirmed Justice Brown's ruling that traditional, presence-based jurisdiction existed as it carried on a physical, non-transitory business in Ontario. MacPherson J.A. went on to "additionally note" that the "economically significant relationship between Chevron and Chevron Canada" supported jurisdiction *simpliciter*, as reflected by the facts that Chevron Canada is a wholly owned, indirect subsidiary of Chevron, Chevron guarantees the debt of its indirect subsidiaries, which in turn provide capital to Chevron Canada, Chevron guarantees some performance obligations of Chevron Canada and Chevron's income is wholly derived from dividends from its indirect subsidiaries, including Chevron Canada.[29]

MacPherson J.A. overturned the stay that Justice Brown had imposed on the action. Given his view that Justice Brown had embarked on disguised and unrequested motions to dismiss or strike the action in the absence of argument or a proper evidentiary record, the Court of Appeal wrote that to grant the stay "would constitute an injustice to the plaintiffs".[30]

Supreme Court of Canada

Chevron and Chevron Canada appealed to the Supreme Court of Canada on the Court of Appeal's ruling on jurisdiction but did not challenge the Court of Appeal's decision to overturn Justice Brown's stay.

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27 *Chevron Motion Decision*, *supra*, footnote 2, at paras. 109-110.
28 *Beals*, *supra*, footnote 10, at para. 32.
29 *Chevron Appeal Decision*, *supra*, footnote 4, at paras. 37 and 38.
30 *Chevron Appeal Decision*, *supra*, footnote 4, at para. 79.

The Supreme Court dismissed the appeal. In so doing, Gascon J. made the "unambiguous statement" that in actions to enforce foreign judgments, the real and substantial connection test only applies as between the foreign court and the subject matter of the action at first instance or the defendant. If so, jurisdiction *simpliciter* exists based on the service *ex juris* of the originating process on the foreign judgment debtor under the domestic court's rules of procedure. The enforcing court does not need to determine whether it has a real and substantial connection with the foreign judgment debtor.

Gascon J. rejected Chevron's argument that *Van Breda* altered the Supreme Court's jurisprudence on the enforcement of foreign judgments in *Morguard* and *Beals*. He agreed with the lower courts that these decisions were clear that the exclusive focus of the real and substantial connection test in enforcement actions is on the relationship between the foreign court and the subject matter of the underlying dispute or the parties.

The fact that the foreign judgment debtor does not have assets in Ontario is not material to jurisdiction *simpliciter*. The court should not second-guess the strategic decisions made by a foreign judgment creditor in bringing an enforcement action in a jurisdiction where the foreign judgment debtor does not have assets, especially in "today's globalized world and electronic age". Gascon J. adopted these comments of the motion judge:[31]

> In an age of electronic international banking, funds once in the hands of a judgment debtor can quickly leave a jurisdiction. While it is highly unlikely that a judgment debtor would move assets into a jurisdiction in the face of a pending recognition action, in some circumstances judgment debtors may not control the timing or location of the receipt of an asset due to them; control may rest in the hands of a third party as a result of contract or otherwise. Where a judgment creditor under a foreign judgment learns that its judgment debtor may come into possession of an asset in the foreseeable future, it might want the recognition of its foreign judgment in advance of that event so that it could invoke some of the enforcement mechanisms of the receiving jurisdiction, such as garnishment. To insist that the judgment creditor under a foreign judgment await the arrival of the judgment debtor's asset in the jurisdiction before seeking recognition and enforcement could well prejudice the ability of the judgment creditor to recover on its judgment. Given the wide variety of circumstances - including timing - in which a judgment debtor might come into possession of an asset, I do not think it prudent to lay down a hard and fast rule that assets of the judgment debtor must exist in the receiving jurisdiction as a pre-condition to the receiving jurisdiction entertaining a recognition and enforcement action.

Justice Gascon based his ruling, in part, on the fundamental difference between a case of first instance (where a court is asked to adjudicate the legal rights between parties) and an enforcement action (where the receiving

[31] *Chevron*, *supra*, footnote 5, at para. 57; *Chevron Motion Decision*, *supra*, footnote 2, at para. 81.

court is asked to enforce a debt that is based on a foreign judgment). In the latter, the receiving court is simply asked to enforce the foreign judgment against the foreign judgment debtor in its territory based on the available enforcement mechanisms.

Justice Gascon also held that traditional, presence-based jurisdiction over Chevron Canada existed. It was not contested that Chevron Canada had a physical office in Ontario where its business activities were sustained and performed by employees who provided services to customers in Ontario.[32] Mere presence by carrying on business in Ontario combined with valid personal service under Rule 16.02(1)(c) were sufficient, on their own, for jurisdiction *simpliciter*.[33] The Supreme Court in effect rejected the Court of Appeal's suggestion that Chevron's "economically significant relationship" with Chevron was a relevant factor in the jurisdiction *simpliciter* analysis.[34]

The Supreme Court was careful to note that a finding of jurisdiction *simpliciter* does not mean that the plaintiffs will succeed in enforcing the Ecuadorian Judgment against Chevron or Chevron Canada. Once past the jurisdictional phase, Chevron may oppose enforcement by moving to stay the action as *forum non conveniens* or by relying on the available defences to enforcement, namely fraud,[35] a denial of natural justice[36] or public policy.[37] Similarly, Chevron Canada could move for a summary judgment or for a determination before trial dismissing the plaintiffs' claim to ignore the separate corporate personality Chevron Canada.[38]

Gascon J. took "no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment". If the judgment is enforced against Chevron Canada, "it does not automatically follow that Chevron Canada's shares or assets will be available to

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32 *Chevron*, *supra*, footnote 5, at paras. 85 and 86.

33 *Chevron*, *supra*, footnote 5, at para. 89.

34 *Chevron*, *supra*, footnote 5, at paras. 80, 81 and 89.

35 The domestic court will not enforce foreign judgments obtained by fraud. The defendant bears the onus of showing that the facts sought to be raised could not been discovered by the exercise of due diligence prior to the foreign judgment: *Beals*, *supra*, footnote 10, at paras. 43 and 50.

36 Foreign judgments that result from proceedings that are contrary to Canadian notions of fundamental justice will not be enforced. The heart of this defence is that the defendant was denied fair or due process in the foreign proceeding as evidenced by lack of judicial independence, lack of adequate notice and denial of the opportunity to defend: *Beals*, *supra*, footnote 10, at paras. 59-62.

37 Foreign judgments that are contrary to the Canadian concept of justice will not be enforced. *Chevron*, *supra*, footnote 5, at para. 77. The focus of the public policy defence is on repugnant foreign laws, which are contrary to the fundamental morality of the Canadian legal system or judgments rendered by a foreign court that is proven to be corrupt or biased: *Beals*, *supra*, footnote 10, at paras. 71-72.

38 *Chevron*, *supra*, footnote 5, at paras. 77 and 95.

satisfy Chevron's debt". At this preliminary stage, "this is not a case in which the Court is called upon to alter the fundamental principle of corporate separateness".[39]

Implications of *Chevron*

Chevron gives rise to two implications. First, foreign multinational companies now face an increased exposure to enforcement actions in Canada arising out of their activities abroad. Second, it may appear that a foreign judgment creditor seeking to enforce a foreign judgment in Canada against a foreign corporation may have a new basis to target the assets or shares of the foreign corporation's Canadian subsidiary. I discuss each implication in turn.

(1) Enforcing Foreign Judgments after Chevron

Foreign multinational companies found liable in a foreign jurisdiction for their operations — e.g., for causing environmental contamination — face increased exposure in Canada to enforcement actions. By making an "unambiguous statement" that a real and substantial connection between the enforcing forum and the foreign judgment debtor is not required, the Supreme Court has removed a procedural roadblock for enforcement actions. This clear guidance will likely deter preliminary jurisdiction disputes and force defendants to focus on defending the action on the merits — i.e., based on the defences of fraud, denial of natural justice and public policy.

From the plaintiffs' perspective, *Chevron* provides a clear road map on commencing enforcement proceedings against a foreign judgment debtor in Canada. Since jurisdiction *simpliciter* in such actions does not require the foreign judgment debtor to have assets in the domestic forum, *Chevron* provides foreign judgment creditors with the flexibility to commence enforcement proceedings in Canada for strategic reasons — i.e., in anticipation that the foreign judgment debtor will receive assets (e.g., accounts receivables) from a third party in the forum in the future.

(2) Piercing the corporate veil after Chevron

At first blush, it may appear that *Chevron* expanded the grounds for piercing the corporate veil. Foreign judgment creditors may perhaps be inspired by *Chevron* to commence similar claims to seize the assets of a Canadian subsidiary to satisfy the judgment debt owed by its foreign parent

[39] *Chevron*, *supra*, footnote 5, at para. 95.

corporation. But despite first appearances, *Chevron* does not encroach on the separate legal personality of a corporation by expanding the basis for piercing the corporate veil.

Since 1887, it has been a bedrock principle of corporate law that a corporation is a separate legal entity.[40] It follows that a parent corporation is not liable for the acts or omissions of its subsidiaries. Similarly, an individual who owns 100 percent of the shares of a corporation is not liable for that corporation's conduct. For the same reason, a subsidiary is not liable for the conduct of its shareholders, including its parent corporation. In *Chevron*, the plaintiffs attempted to reverse pierce the corporate veil to transfer the liability of the parent for a judgment debt to its subsidiary. Normally, an attempt to pierce the veil seeks to attach liability to the owner of the corporation.[41]

The motion judge in *Chevron* summarized the three limited circumstances in which the courts may lift the corporate veil:[42]

1. the alter ego doctrine, where

(a) the subsidiary is completely dominated by the parent;[43] and

(b) the subsidiary is used as "nothing more than a conduit by the parent to avoid liability" [44] or as a shield for the parent's fraudulent or improper conduct;[45]

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40 *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.).

41 *Chevron Motion Decision*, *supra*, footnote 2, at para. 23 and 95.

42 *Chevron Motion Decision*, *supra*, footnote 2, at para. 95; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, 2 O.T.C. 146, 1996 CarswellOnt 1699 (Ont. Gen. Div.), affirmed 1997 CarswellOnt 3496, 74 A.C.W.S. (3d) 207, [1997] O.J. No. 3754 (Ont. C.A.) [hereinafter, "*Transamerica*"]; *Gregorio v. Intrans-Corp.* (1994), 115 D.L.R. (4th) 200, 18 O.R. (3d) 527, 72 O.A.C. 51 (Ont. C.A.), additional reasons (1994), 15 B.L.R. (2d) 109n, 1994 CarswellOnt 3827 (Ont. C.A.) [hereinafter, "*Gregario*"].

43 100 percent ownership is not enough to demonstrate complete control. It must be shown that the subsidiary does not function independently from the parent and has no authority over the subject matter: *Transamerica*, *supra*, footnote 42, at paras. 22-23; *United Canadian Malt Ltd. v. Outboard Marine Corp. of Canada Ltd.* (2000), 48 O.R. (3d) 352, 34 C.E.L.R. (N.S.) 116, 2000 CarswellOnt 1445 (Ont. S.C.J.) at para. 22, additional reasons 2000 CarswellOnt 1949, 97 A.C.W.S. (3d) 870 (Ont. S.C.J.).

44 *Gregorio*, *supra*, footnote 42, at para. 24.

45 *642947 Ontario Ltd. v. Fleischer* (2001), 209 D.L.R. (4th) 182, 56 O.R. (3d) 417, 152 O.A.C. 313 (Ont. C.A.) at para. 68. The corporate veil will not be lifted simply because a corporation has been involved in wrongdoing. "To put it another way, the corporate veil should be pierced not where a corporation has misappropriated funds, but where the very use of the corporation is to hide that misappropriation": *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2012 CarswellOnt 11346, 221 A.C.W.S. (3d) 327, [2012] O.J. No. 4320 (Ont. S.C.J.) at paras. 723-73, additional reasons 2012 CarswellOnt 12155, 222 A.C.W.S. (3d) 36, 2012 ONSC 5580 (Ont. S.C.J.), reversed (2014), 372 D.L.R. (4th) 90, 314 O.A.C. 341, 23 B.L.R. (5th) 26 (Ont. C.A.), leave to appeal refused 2014 CarswellOnt 8632, 2014 CarswellOnt 8633 (S.C.C.). See also *Choc v. Hudbay Minerals Inc.* (2013), 116 O.R.

2. where the subsidiary is as an agent for the parent and on that basis can be held liable for the parent's conduct; and[46]

3. when required by statute, i.e., taxation statutes, or contract.[47]

But the plaintiffs did not plead any of these grounds. Instead, they alleged the following:[48]

> . . . Chevron beneficially owns the assets of Chevron Canada.
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> Chevron wholly owns and controls Chevron Canada.
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> 20. Chevron Canada is a necessary party to this action in order to achieve equity and fairness between parties and to yield a result that is not "too flagrantly opposed to justice . . ."
>
> 21. The plaintiffs do not allege any wrong doing against Chevron Canada. The action is for collection of a judgment debt.
>
> 22. The plaintiffs seek . . . to seize the shares and assets of Chevron Canada.

In naming Chevron Canada "to achieve equity and fairness" and to yield a result that is not "too flagrantly opposed to justice", the plaintiffs relied on Justice Wilson's comments in *Kosmopoulous*:[49]

> The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "*too flagrantly opposed to justice* . . .". I have no doubt that *theoretically* the veil could be lifted *in this case to do justice*. . . *But a number of factors lead me to think it would be unwise to do so*. [Emphasis added.]

Justice Wilson's statement that the veil may "theoretically" be lifted when it would "yield a result too flagrantly opposed to justice'" was *obiter* as she ruled that it would be "unwise to do so" in that case. Further, Justice Wilson's "just and equitable" dictum made in 1987 has never been followed.[50] In contrast, the weight of the subsequent jurisprudence has disavowed the "just and equitable" dictum.[51]

(3d) 674, 17 B.L.R. (5th) 303, 4 C.C.L.T. (4th) 65 (Ont. S.C.J.) [hereinafter, "*Hudbay*"], at paras. 47-58.

46 *Hudbay*, *supra*, footnote 45, at para. 49; *Clarkson Co. v. Zhelka* (1967), 64 D.L.R. (2d) 457, [1967] 2 O.R. 565, 1967 CarswellOnt 144 (Ont. H.C.).

47 *Transamerica*, *supra*, footnote 42.

48 *Chevron Motion Decision*, *supra*, footnote 2, at para. 12.

49 *Kosmopoulos v. Constitution Insurance Co. of Canada* (1987), (*sub nom.* Constitution Insurance Co. of Canada v. Kosmopoulos) 34 D.L.R. (4th) 208, [1987] 1 S.C.R. 2, 63 O.R. (2d) 731 (note) (S.C.C.), at pp 10-11.

50 *Transamerica*, *supra*, footnote 42, at paras. 15, 16 and 21; *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.* (2009), 305 D.L.R. (4th) 577, 250 O.A.C. 232, 78 C.L.R. (3d) 1 (Ont. C.A.) [hereinafter, "*Parkland Plumbing*"], at para. 50.

Justice Brown did not expand the alter ego exception. He applied the entrenched law and stayed the action against Chevron Canada as he believed it had no hope of success.[52]

The Court of Appeal overturned the stay. Justice MacPherson rejected Justice Brown's view that the plaintiffs' action is an "academic exercise" and would be "an utter and unnecessary waste of valuable judicial resources". Justice MacPherson had a "serious problem" with the motion judge's analysis:

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

When viewed in isolation, this passage might suggest that, on a proper evidentiary record and after an adequate hearing, Chevron Canada might not be a stranger to the Ecuadorian Judgment or may be liable under it if the plaintiffs can establish that it had close relationship with Chevron. In this regard, it should be highlighted that MacPherson J.A. relied on the "economically significant relationship" between Chevron and Chevron Canada to support his ruling that Ontario had jurisdiction *simpliciter* over Chevron Canada.[53]

The Supreme Court did not address the distinct corporate personalities of Chevron and Chevron Canada because the issue of the stay was not before it. While the court's ruling on jurisdiction *simpliciter* did not prejudice future arguments on the distinct corporate personalities, Justice Gascon took no position on whether "Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment."[54] This issue has been sent back to the Superior Court of Justice where it will be determined either on a motion to dismiss by Chevron Canada or at trial.

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[51] *Chevron Motion Decision*, *supra*, footnote 2, at paras. 97-99; *Transamerica*, *supra*, footnote 42, at paras. 15-16 and 21. In *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.* (2009), 305 D.L.R. (4th) 577, 250 O.A.C. 232, 78 C.L.R. (3d) 1 (Ont. C.A.) at para. 50, the Ontario Court of Appeal said that the "too flagrantly opposed to justice" phrase in *Kosmopoulos* "does not mean that courts enjoy 'carte blanche' to lift the corporate veil absent fraudulent or improper conduct whenever it appears 'just and equitable' to do so". See also *Parkland Plumbing*, *supra*, footnote 50, at para. 50.

[52] *Chevron Motion Decision*, *supra*, footnote 2, at para. 109.

[53] *Chevron Appeal Decision*, *supra*, footnote 4, at para. 38.

[54] *Chevron*, *supra*, footnote 5, at para. 95.

It might be argued that the Court of Appeal's decision in *Chevron* permits foreign judgment creditors to seize the assets of a Canadian subsidiary to satisfy the judgment debt of its foreign parent if they prove a close or economically significant relationship between the two. It may even be argued that the Court of Appeal expanded the alter ego doctrine by reviving the just and equitable dictum. Resourceful plaintiffs' lawyers may be inspired by *Chevron* to test the limits of the alter ego principle in future cases.

But a careful review of the decisions in Chevron makes it clear that the bedrock principle of corporate law and the limited exceptions remain unchanged:

1. Justice MacPherson's decision to overturn the stay was based on his view that the exceptional circumstances in which a judge may stay an action on his own initiative under s. 106 of the *Courts of Justice Act* did not exist.

2. Justice MacPherson was focused on the lack of fair process as the motion judge stayed the action without giving the plaintiffs any opportunity to respond. As such, he did not need to comment on the distinct personality issue.[55]

3. That the plaintiffs may not succeed in collecting from the judgment debtor is not relevant in determining whether to grant a stay. "A party may bring an action for all kinds of strategic reasons, recognizing that their chances of collection on the judgment are minimal. It is not the role of the court to weed out cases on this basis and it is a risky practice for a judge to second-guess counsel on strategy in the name of judicial economy."[56]

4. The Supreme Court rejected the notion that a close relationship between Chevron and Chevron Canada is relevant to jurisdiction *simpliciter*, ruling that Chevron Canada's presence in Ontario combined with *in juris* service at its place of business in Ontario were sufficient, on their own, for jurisdiction to exist.

Conclusion

The Supreme Court has provided clear guidance in *Chevron*. A real and substantial connection between the domestic court and a foreign judgment debtor in an enforcement action is not necessary. So long as a real

[55] *Chevron Appeal Decision*, *supra*, footnote 4, at paras. 57 and 70.
[56] *Ibid.*, at para. 70.

and substantial connection exists between the foreign court and the dispute or the parties, service *ex juris* of a statement of claim on the foreign judgment debtor confers jurisdiction on the domestic court.

This unambiguous ruling in *Chevron* advances order and predictability in this branch of Canada's private international laws. Foreign judgment creditors looking to collect on a foreign judgment in Canada have a clear path for enforcement. By removing a procedural roadblock to enforcement actions, *Chevron* has increased the exposure of multinational companies to enforcement actions in Canada. *Chevron* should also incentivize foreign judgment debtors facing enforcement actions in Canada to focus on their defences on the merits and deter wasteful jurisdictional inquiries.

A close reading of *Chevron* shows that the law on piercing the corporate veil remains unchanged. Nonetheless, the Court of Appeal's decision may spawn creative claims to seize the assets of a Canadian subsidiary to satisfy the judgment debt of its foreign parent. Some may even argue that *Chevron* has revived the discredited just and equitable test for piercing corporate veils. Canadian common law in this area will develop, as it always does, incrementally as such claims are advanced and adjudicated. Courts that determine such cases by applying *Chevron* should conclude that it did not attenuate the sacrosanct principle of the separate legal personality of a corporation.