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ONTARIO COURT OF APPEAL SETS ASIDE SECURITY FOR COSTS ORDER IN YAIGUAJE V. CHEVRON CASE

By Jack D. Coop

In a decision released on October 31, 2017, a three judge panel of the Ontario Court of Appeal overturned a September 21, 2017 decision by the Court of Appeal motions judge that required the Ecuadorian plaintiffs in this case to post $942,951 as security for costs as a condition of proceeding with their appeals to the Court of Appeal.

In a LinkedIn blog posted in early October, I queried whether such a significant security for costs award would spell the end of this enforcement action in Canada against Chevron. Apparently not.

As with all decisions in the continuing *Yaiguaje v. Chevron* saga, the current one is important to environmental lawyers, particularly given the recent growth of interest by governments in encouraging corporate social responsibility by companies operating extractive industries on foreign soil[1].

BACKGROUND

The appellants are residents of Ecuador who hold an Ecuadorian judgment of US$9.5 billion against Chevron Corporation obtained in 2011, relating to pollution of the Ecuadorian rainforest by Chevron's predecessor, Texaco. The plaintiffs attempted to enforce their judgment in the U.S., but were unsuccessful. As a result, they began this enforcement action in Ontario, against both Chevron Corporation and Chevron Canada Limited (collectively, "**Chevron**").

In 2013, on motion by Chevron challenging the jurisdiction of the Superior Court of Justice to recognize and enforce the Ecuadorian judgment, and in the alternative seeking a stay of the action, the Ontario Superior Court of Justice stayed the action[2]. This decision was appealed all the way to the Supreme Court of Canada. Without prejudging the merits of the action, the Supreme


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[1] See, for example, Global Affairs Canada's "Enhanced Corporate Social Responsibility Strategy to Stren Sector Abroad", at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics strat-rse.aspx?lang=eng.

[2] See: https://www.canlii.org/en/ca/scc/doc/2015/2015scc42/2015scc42.html.

Court ruled that jurisdiction to commence the action existed, and it should not be stayed[3].

Chevron filed statements of defence in the main action, and in 2016 brought a motion for summary judgment, asking the Ontario Superior Court to terminate the action as against Chevron Canada Limited on the basis of that corporation's separate corporate personality from its parent, Chevron Corporation. In a decision released January 20, 2017, Hainey J. granted the motion and terminated the action against Chevron Canada[4]. We reported on the Hainey J. decision here.

The plaintiffs appealed the summary judgment decision to the Ontario Court of Appeal. In the appeal proceeding, Chevron brought a motion before a single judge of the Court of Appeal for an order for security for costs for the entire proceedings, including the appeal. In a decision released September 21, 2017, Epstein J. granted the motion and required the Ecuadorian plaintiffs to post $942,951 as security for costs[5]. In essence, the judge accepted that the requirements of Ontario's security for costs rules had been met[6], the plaintiffs being ordinarily resident outside the jurisdiction, and further that the plaintiffs failed to establish that they were impecunious or that their appeal had a good chance of success. My partner, Blair Bowen, reported on the Epstein J. decision here.

COURT OF APPEAL OVERTURNS ORDER FOR SECURITY FOR COSTS

In a unanimous decision, the OCA ruled that it would be unjust to require the plaintiffs to post security for costs, and set aside that order[7].

The Court noted that[8]:

> In an appeal, rule 61.06(1)(b) authorizes this court to make such an order for security for costs of the proceeding and the appeal "as is just" where an order for costs could be made under r. 56.01.

The Court stressed that the rule is "permissive", and that,

> Even where the requirements of the rule have been met, a motion judge has discretion to refuse to make the order: *Pickard v. London Police Services Board*, 2010 ONCA 643, 268 O.A.C. 153, at para. 17.
>
> [19] In determining whether an order should be made for security for costs, the "overarching principle to be applied to all the circumstances is the justness of the order

[3] See: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15497/index.do. The Supreme Court decision provides a useful background on the history of this case.
[4] See: https://www.canlii.org/en/on/onsc/doc/2017/2017onsc135/2017onsc135.html.
[5] See: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741, http://www.ontariocourts.ca/decisions/2017/2017ONCA0741.pdf.
[6] Rules 56.01 and 61.06.
[7] *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, see: https://www.canlii.org/en/on/onca/doc/2017/2017onca827/2017onca827.html.
[8] Ibid., para. 17.

> sought": *Pickard*, at para. 17 and *Ravenda Homes Ltd. v. 1372708 Ontario Inc*., 2017 ONCA 556, at para. 4[9].

Despite the deference usually afforded a motions judge, the Court concluded that the judge "erred in principle" in determining the **justness** of the order sought, in awarding security for costs[10].

Although the courts have attempted to articulate the factors to be considered in determining the "justness" of security for costs orders[11], the court directed that[12]:

> It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made.

The Court then stated that "we conclude that the unique factual circumstances of this case compel the conclusion that the interests of justice require that no order for security for costs be made." The particular circumstances noted by the Court included[13]:

(a) **Public interest litigation**. The appellants are seeking to enforce a judgment in which they have no direct economic interest – this is public interest litigation.

(b) **Impecuniosity v. severe impact to livelihood**. While the appellants led no direct evidence of impecuniosity before the motions judge, "it would be highly impractical to obtain this evidence from the representative plaintiffs, let alone the 30,000 people who would indirectly benefit from the enforcement of the judgment". Moreover, accepting the facts underlying the Ecuadorian judgment as true, "there can be no doubt that the environmental devastation to the appellants' lands has severely hampered their ability to earn a livelihood".

(c) **Defendants' need for security for costs**. With annual gross revenues in the billions of dollars, Chevron does not require protection for cost awards.

(d) **Third party funding**. In this case, the appellants should not be required to establish that they have no third party funding in order to successfully resist a motion in an appeal for security for costs, particularly where their counsel is operating under a contingency

[9] Ibid., paras. 18 and 19.
[10] Ibid., paras. 21-26.
[11] The courts have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns, and the public importance of the litigation. See ibid., para. 24.
[12] Ibid., para. 25.
[13] Ibid., para. 26.

arrangement and where there is evidence Chevron has sued some of their former third party funders, and caused them to withdraw financial support.

(e) **Merit**. It cannot be said, at this stage, that this is a case that is wholly devoid of merit. Even the motion judge acknowledged that it might be possible to establish that Chevron Canada's shares are exigible under the *Execution Act*.

(f) **Allow evolution in the law**. Although the "legal arguments of the appellants are innovative and untested, especially with regard to piercing the corporate veil…this does not foreclose the possibility that one or more of them may eventually prevail." In order to encourage evolution of the common law, particularly in our appeal court and at the Supreme Court, it would not be just to thwart such "potential advancements…for procedural or tactical reasons".

(g) **Motion was an attempt to end the litigation**. Although Chevron is entitled to "employ all available means to resist enforcement of the Ecuadorian judgment", it appeared to the Court that the motion for security for costs was nothing "more than a measure intended to bring an end to the litigation".

ANALYSIS

The Court of Appeal's decision will be extremely heartening to environmentalists, and environmental justice critics who would like to see improved corporate social responsibility by companies operating extractive industries on foreign soil. However, from a legal perspective, it may be of considerable concern to civil litigators, as well as environmental litigators who defend alleged public interest claims.

The Court takes the unprecedented step of effectively converting a security for costs motion in which the moving parties presumptively met the technical requirements of the security for costs rules, into a motion for a "protective costs order". Certainly, many of the factors examined by the Court are factors considered by the courts when determining whether to make a protective costs order: e.g. public interest litigation, plaintiffs are impecunious, third party funding is not available, the claim is *prima facie* meritorious[14].

And in principle, there is no reason why the Court should not be able to consider these factors in determining what is "just" on a security for costs motion, given the consequences of awarding security for costs may be the same for an environmental group as failing to obtain a protective costs order – the end of the action.

However, the Court does not apply those protective cost order factors in the same way as they are normally applied on a protective costs motion. For example, it does not place on the appellants the

[14] See, for example: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, and *Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue and Minister of National Revenue*, [2007] 1 S.C.R. 38. In Ontario, also see: *Lockridge v. Director, Ministry of the Environment*, 2012 ONSC 2316, at paras. 137-177.

onus of establishing that *special circumstances* exist to warrant this extraordinary exercise of its powers to displace the normal costs rule, and relieve the plaintiffs of costs. The Court does not require actual proof of impecuniosity, proof that third party is not available, and proof that the claim is *prima facie* meritorious.

Instead of proof of impecuniosity, the Court only requires proof of impact to livelihood – a much lower bar. Instead of proof of no third party funding, the Court only requires proof of a contingency fee arrangement or that some third party funders dropped out – again, a much lower bar. Instead of proof of *prima facie* merit, the Court only requires proof of "possible" merit – again, a much lower bar – in fact a bar so low that it could be met in most any case.

Moreover, the Court's desire to permit a possible "evolution in the law", undermines the very purpose of having a summary judgment rule. Why attempt to encourage the early and cost effective disposition of litigation where there is "no genuine issue for trial" - as determined by Hainey J. in this case - when appeals of such determinations will be effectively encouraged by the court's willingness to vacate an otherwise meritorious security for costs order simply because the court wants to look at the "innovative and untested" arguments of the appellant?

One cannot help but be sympathetic to the 30,000 Ecuadorians who have been environmentally devastated in this case and who may benefit from being able to make such "innovative and untested" arguments in the Ontario Court of Appeal. Terminating this action early through the award of a prohibitive security for costs order naturally raises judicial concerns about the plight of these people, and who will assume corporate social responsibility for their devastation.

On the other hand, from a legal perspective, one must ask whether the Court's decision creates a much more lenient set of factors for successfully opposing a security for costs motion. Has the Court effectively set such a low bar as to be at odds with the approach taken by courts on other security for costs and protective costs motions?

Also, one must ask whether the Court's decision will have the unintended effect of encouraging meritless civil litigation by environmental interest groups. Without the normal rules of costs being applied, such litigation may be given a free pass, and waste valuable court resources.