Are *Ex Juris* Enforcement Actions Governed By The "Real And Substantial Connection" Test In *Van Breda*?

A Commentary on *Chevron Corp. v. Yaiguaje*

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In *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, released Sept. 4, 2015, the Supreme Court of Canada decided the issue of whether *ex juris* enforcement actions are governed by the "real and substantial connection" test in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572.

The Fact Situation

The plaintiffs are representatives of some 30,000 indigenous Ecuadorian villagers who suffered damages as a result of pollution arising from operations by Texaco in their region. They were successful in obtaining a $9.51 billion USD judgment against Chevron, a U.S. based company which is Texaco's successor. The plaintiffs now seek to enforce this judgment in Ontario against the U.S. based Chevron Corporation ("Chevron") and against Chevron Canada Ltd. ("Chevron Canada"), a seventh-level indirect subsidiary of Chevron.

Chevron was served *ex juris* at its head office in California and Chevron Canada was served initially at an extra-provincially registered office in British Columbia, and then at its place of business in Ontario.

The Defendants' Position

A. Chevron

Chevron took the position that, as it was a foreigner to Ontario, the Ontario courts had no jurisdiction over it in this matter as there was no "real and substantial connection" between Chevron and Ontario, as required by *Van Breda.* Therefore the service *ex juris* on Chevron must be set aside.

B. Chevron Canada

Chevron Canada had several submissions, but the one of main importance was that that while corporations domiciled in Ontario can be brought before the province's courts even in the absence of a relationship between the claim and that province, the same cannot be said for corporations that merely carry on business in Ontario. Relying on *Van Breda*, it argues that in such cases, Ontario courts only have jurisdiction if there is a

connection between the subject matter of the claim and the business conducted in the province.

A. The Supreme Court's Ruling With Respect to Chevron

The Supreme Court held that it had been consistent its in prior decisions in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 and *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 that "jurisdiction in an action limited to recognition and enforcement of a foreign judgment within the province of Ontario is established when service is effected on a defendant against whom a foreign judgment debt is alleged to exist. There is no requirement, nor need, to resort to the real and substantial connection test." [Para. 36]

The Court quoted with approval the reasons of DesChamps, J. in *Pro Swing* as follows:

> "The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms."
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> (Pro Swing, at para. 11)

The Court refused to accede to Chevron's proposition that the law in this regard was changed by *Van Breda.*

The Court noted at para. 40 that in *Van Breda*

> "LeBel J. stated, at para. 85:
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> > 'The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.'"

The Court went on to say:

> [41] "To accept Chevron's argument would be to extend Van Breda into an area in which it was not intended to apply, and in which it has no principled reason to meddle. In fact, and more compellingly, the principles that animate recognition and enforcement indicate that Van Breda's pronouncements should not apply to recognition and enforcement cases."

The Court considered at some length whether it was reasonable to impose a substantial connection test on enforcement actions and concluded it was not, In part, the court stated:

> [44] … the purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation. In other words, the enforcing court's role is not one of substance, but is instead one of facilitation…
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> [46] Second, enforcement is limited to measures — like seizure, garnishment, or execution — that can be taken only within the confines of the jurisdiction, and in accordance with its rules …. as a result, since enforcement concerns only local assets, "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"

The Court went on to note that the demands of comity militate against importing a substantial connection test to enforcement actions:

> [53] As this review of the Court's statements on comity shows, the need to acknowledge and show respect for the legal acts of other states has consistently remained one of the principle's core components. Comity, in this regard, militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored.

The Court also rejected Chevron's argument that the enforcement action ought not be allowed to proceed since it has currently no assets in the province, stating:

> [57] In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality.

The Court took comfort in the fact that other common-law jurisdictions have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment, although some U.S. jurisdictions have taken the contrary position.

The Court in conclusion on this issue stated:

> [75] Case law, principle, relevant statutes and practicality all support a rejection of Chevron's contention. Jurisdiction in an action for recognition and enforcement stems from service being effected on the basis of a foreign judgment rendered in the plaintiff's favour, and against the named defendant. There is no need to demonstrate a real and substantial connection between the dispute and the enforcing forum. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules: Van Breda, at para. 74, quoting Morguard, at p. 1097. Moreover, such a conclusion would be

> inconsistent with this Court's statement in Beals that the doctrine of comity (to which the principles of order and fairness attach) "must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility": para. 27. Cross-border transactions and interactions continue to multiply. As they do, comity requires an increasing willingness on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights.

B. The Supreme Court Ruling with Respect to Chevron Canada

With respect to Chevron Canada's position, the Court held:

> [81] I do not accept Chevron Canada's submissions. Van Breda specifically preserved the traditional jurisdictional grounds of presence and consent. Chevron Canada erroneously seeks to conflate the rules on presence-based jurisdiction and those on assumed jurisdiction, even though they have always developed in their respective spheres. Here, presence-based jurisdiction is made out on the basis of Chevron Canada's office in Mississauga, Ontario, where it was served *in juris*. Carrying on a business in Ontario at which the defendant is served is sufficient to find presence-based jurisdiction.
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> [84] While Van Breda simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, "jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established". In other words,
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> > "[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction": para. 79.
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> [94] Chevron Canada was served in juris, in accordance with Rule 16.02(1)(c), at a place of business it operates in Mississauga, Ontario. Traditional, presence-based jurisdiction is satisfied. Jurisdiction is thus established with respect to it.

C. With Respect to Both Defendants

However the Court was most careful to state that it was only determining the jurisdictional issues and had left open any substantive defences the defendants might have:

> [95] Further, my conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada. I take no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment. Similarly, should the judgment be recognized and enforced against Chevron, it does not automatically follow that Chevron Canada's shares or assets will be available to satisfy Chevron's debt. For instance, shares in a subsidiary belong to the shareholder, not to the subsidiary itself. Only those shares whose ownership is ultimately attributable to the judgment debtor could be the valid target of a recognition and enforcement action.

In short, the litigation will now proceed on its merits and with $9.51 Billion USD at stake, we can foresee the Supreme Court of Canada being asked to revisit this litigation some time in the future with respect to the substantive issues.