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The continuing saga in *Yaiguaje v. Chevron* Corporation: a lesson in security for costs and the enforcement of foreign judgments

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By Megan Mah

The judicial history in *Yaiguaje v. Chevron Corporation* spans several jurisdictions and dates back to the early 1990s, while the facts underlying the dispute date back to the 1960s. The matter has reached appeal courts, including the Supreme Court of Canada, and has prompted a review of several issues relevant to the conduct of business internationally, including the enforcement of foreign judgments and piercing the corporate veil.

The Ontario Court of Appeal's most recent decision in *Yaiguaje v. Chevron Corporation*,[1] released on September 21, 2017, provides a useful review of the test for obtaining an order for security for costs, and establishes that courts should not approach security for costs differently in cases involving the enforcement of a foreign judgment.

The plaintiffs in the action, representing approximately 30,000 indigenous villagers from Ecuador's Oriente region, obtained a judgment of approximately $9.5 billion against Chevron Corporation from an Ecuadorian court in February 2011. The Ecuadorian judgment related to oil extraction activities in the Oriente region of Ecuador between 1964 and 1992 by Texaco Inc., a corporation that later merged with Chevron, which caused extensive environmental damage in the region.

At the time of the judgment, Chevron did not have any assets in Ecuador and refused to acknowledge the validity of the Ecuadorian judgment following its release. The Ecuadorian plaintiffs subsequently sought to enforce the judgment in various jurisdictions around the world, including New York and Ontario.[2]

In 2012, the Ecuadorian plaintiffs commenced an action in Ontario, seeking to enforce the Ecuadorian judgment against Chevron and its seventh level subsidiary, Chevron Canada. In response, Chevron and Chevron Canada contested the jurisdiction of Ontario courts to enforce the Ecuadorian judgment. In September 2015, the Supreme Court of Canada affirmed Ontario's jurisdiction over the claim.

Following the Supreme Court of Canada's ruling, Chevron and Chevron Canada brought motions for summary judgment, seeking dismissal of the claims on the basis of Chevron Canada's separate corporate personality from Chevron. In response, the Ecuadorian plaintiffs brought a cross-motion for summary judgment, seeking a declaration that Chevron Canada's assets were available to satisfy the judgment debt, and a motion seeking to add Chevron Canada Capital Company, a sixth-level subsidiary of Chevron, as a defendant to the action.

In January 2017, the motion judge granted Chevron and Chevron Canada's motion for summary judgment and dismissed the Ecuadorian plaintiffs' cross-motion and motion to add an additional defendant. The Ecuadorian plaintiffs subsequently appealed the decision.

Chevron and Chevron Canada then brought a motion for security for costs under Rules 61.01(1)(b) and 56.01(1)(a) of the *Rules of Civil Procedure*, seeking $1,022,951.47 from the Ecuadorian plaintiffs for both the appeal and the proceedings in the lower court.

The Ecuadorian plaintiffs submitted that security for costs should not be awarded given the merits of their appeal and Chevron's delay in bringing its motion for security for costs. They also argued that the Court of Appeal should adopt a new approach to the law of security for costs that recognizes that (1) the matter is part of an action for recognition and enforcement of a foreign judgment, and (2) the original Ecuadorian action essentially amounts to a class action.

Chevron and Chevron Canada contested this argument, arguing that the principle of comity does not require the Ecuadorian plaintiffs to be treated more favourably than domestic litigants. The Court of Appeal accepted this argument, and awarded security for costs in the amount of $591,335.14 for Chevron Canada and $351,616.33 for Chevron.

Writing for the Court, Epstein J.A. reviewed the test for security for costs that was previously established in *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div Ct.), aff'd 2009 ONCA 415. Under this test, if the plaintiffs can demonstrate impecuniosity on a balance of probabilities, they can resist a motion for security for costs by showing that their claim is not plainly devoid of merit, a relatively low evidentiary threshold. However, where the plaintiffs are unable to demonstrate impecuniosity, they must show that there is a good chance of success on the main action or appeal in order to resist the motion for security for costs.

In this case, there was no dispute that the Ecuadorian plaintiffs resided outside of Ontario, and Epstein J.A. found that the Ecuadorian plaintiffs failed to demonstrate that they were impecunious, as they failed to file supporting evidence as to their income, expenses and liability, including information related to their financial backers. Therefore, the Court was required to analyze the merits of the claim for enforcement.

Epstein J.A. found that the Ecuadorian plaintiffs did not demonstrate that their appeal had a good chance of success, as the motion judge had found that absent a piercing of the corporate veil, the assets of Chevron Canada were not available for execution and seizure to satisfy the Ecuadorian judgment.

Addressing the Ecuadorian plaintiffs' assertion that the Court of Appeal should adopt a new approach to the law of security for costs in the circumstances of this case, Epstein J.A. held that a motion for security for costs should not be treated differently simply because the action to which it relates concerns the recognition and enforcement of a foreign judgment.

Although the Supreme Court's 2015 decision in *Yaiguaje v. Chevron Corporation* suggests that Canadian courts should take a generous approach in finding *jurisdiction* to allow litigants holding foreign judgments to bring enforcement actions in Canada, the Court of Appeal's recent decision in this case demonstrates that *procedural* matters related to such actions will not necessarily be afforded such a generous approach. The Court of Appeal's decision suggests that procedural matters, such as an award of security for costs, should not be treated differently solely because the main action concerns the enforcement of a foreign judgment.

[1] *Yaiguaje v Chevron Corporation*, 2017 ONCA 741.
[2]In 2014, the District Court for the Southern District of New York found that the Ecuadorian judgment had been obtained by fraud, which prevented the judgment from being enforced in the United States. The decision was upheld by the United States Court of Appeal for the Second Circuit, and the Supreme Court declined to grant certiorari for a further appeal.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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