

Commercial Litigation Bulletin

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Enforcing Foreign Judgments in Canada

By Brian Chung

The Supreme Court of Canada recently clarified the law on enforcing foreign judgments in Canada.¹ This decision is important for creditors who hold judgments obtained outside Canada because it affirms the overwhelming trend by Canadian courts towards the greater ease of enforcing such judgments in Canada.

The Supreme Court concluded that foreign judgment creditors are free to bring enforcement proceedings in Canada without proving any connection between Canada and either the judgment debtor or the foreign legal proceedings. As well, recognition and enforcement proceedings may be launched in Canada even without establishing that the judgment debtor has any assets in Canada.

Background

In the 1960s, Texaco (later acquired by Chevron) undertook oil exploration and drilling operations in Eastern Ecuador. Over a 26-year period, Texaco's operations destroyed large parts of Ecuador's rainforest by dumping billions of gallons of wastewater and other hazardous drilling byproducts in rivers, leaving behind unlined containment pits of petroleum and other contaminants. Thousands of Amazon settlers and indigenous groups suffered from intestinal diseases, skin ailments and fatal cancers. One report concluded that Texaco's pollution caused 2,091 cases of cancer among residents and led to 1,401 deaths from 1985 to 1998. Chevron denied those reports, arguing that the health

complaints stem from bacterial contamination caused by poor sanitation.

Texaco undertook some clean-up work which the Ecuadorian government accepted as adequate, even though it manifestly was not.

A group of plaintiffs, representing approximately 30,000 indigenous Ecuadorian villagers, sued Chevron.

After a series of protracted legal proceedings in the United States and Ecuador, the plaintiffs obtained a US\$9.5 billion judgment against Chevron from an Ecuadorian court. The plaintiffs could not enforce the judgment in Ecuador because Chevron had no assets there. After the judgment, in 2011, Chevron also obtained an injunction to prevent the enforcement of the judgment anywhere in the world. That decision was later overturned by the Second Circuit in the United States.

In a further attempt to thwart the plaintiffs' efforts to collect on the judgment, Chevron brought a civil lawsuit in U.S. federal court under the *Racketeer Influenced and Corrupt Organizations Act* against the plaintiffs' lawyers and consultants, alleging that the Ecuadorian judgment was the product of fraud and conspiracy. In a nearly 500-page decision, Judge Kaplan agreed, and granted equitable relief in the imposition of a constructive trust with respect to any amounts received under the Ecuadorian judgment. The decision is being appealed.

¹ *Chevron Corp. v. Yaiguaje*, 2015 SCC 42.

Recognition and Enforcement in Canada

The plaintiffs eventually turned to the Canadian courts, suing both Chevron Corp. and its seventh-level Canadian subsidiary, Chevron Canada. Chevron Canada was not a defendant in the Ecuadorian proceedings, but the plaintiffs argued that its shares were available to satisfy the judgment.

The Supreme Court allowed the claim to proceed against Chevron Canada, despite that corporation not having any “real and substantial connection” to Ecuador. Chevron itself had attorned to the jurisdiction of the Ecuadorian courts; there is no question that it is bound by the judgment of those courts unless the judgment is held to have been obtained by fraud or in breach of the rules of natural justice. The fact that Chevron Canada is a subsidiary of Chevron Corp., and had an office in Ontario was sufficient to establish jurisdiction over it. The decision is in line with the current economic realities of a globalized world, recognizing that it would be impractical to require a judgment creditor to wait until a foreign debtor is present or has assets in the jurisdiction before enforcing a pre-existing debt.

What you need to know

The Process

A creditor can enforce a judgment obtained outside Canada in Ontario by commencing an action against the judgment debtor, seeking recognition and enforcement. The judgment must be final and conclusive, and it must be for a definite sum of money, or is otherwise sufficiently clear, and limited in scope.

The court must also be satisfied that either:

1. there was a “real and substantial connection” between the foreign court and the litigants, or with the subject matter of the dispute – for example, the defendant attorned to the jurisdiction of the foreign court; or
2. that traditional “presence-based jurisdiction” was satisfied – for example, the judgment debtor was served with the claim in Ontario.

If one of the above criteria is satisfied, it may still be open to the defendant to argue any or all of the available defences to recognition and enforcement. For example, it is likely, given Judge Kaplan’s findings, that Chevron will argue that the Ecuadorian judgment should not be enforced because it was obtained by fraud.

Take Away

The Supreme Court affirmed that the approach to be taken by Canadian courts in recognition and enforcement actions should be “generous and liberal.” Therefore, a creditor who obtains a judgment outside of Canada can apply to a Canadian court to recognize the judgment and enforce it against the debtor’s assets in Canada.

It is not necessary for a judgment debtor to have existing assets in Canada. In today’s globalized economy and electronic age, assets move in and out of jurisdictions at ease. A creditor can therefore gain a powerful source of leverage by limiting a judgment debtor’s ability to move assets in and out of Canada, particularly in large economic hubs like Toronto.

If the judgment is recognized in one province, a foreign plaintiff can obtain recognition on a province-by-province basis with relative ease (judgments that are already recognized in one province can be registered in most others).

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