No Independent Jurisdiction Requirement for Proceeding to Enforce a Foreign Judgment in Canada

The Supreme Court of Canada has released its decision in *Chevron Corp v Yaiguaje* (available here). The issue before the court was whether the Ontario courts have jurisdiction to recognize and enforce an Ecuadorian judgment (for over $US 18 billion) where the foreign judgment debtor Chevron Corporation ("Chevron") claims to have no connection with the province, whether through assets or otherwise. On one view, because the process for enforcing a foreign judgment is to commence a new domestic proceeding and thereby sue on the foreign judgment, the enforcement proceeding must have its own independent analysis of jurisdiction. Put another way, there cannot be a proceeding in respect of which the court does not have to have jurisdiction. On a different view, because the analysis of the claim on the foreign judgment considers, among other things, the sufficiency of the rendering court's jurisdiction (Chevron defended on the merits in Ecuador), that is the only required analysis of jurisdiction and there is no need for a separate consideration of the enforcing court's jurisdiction. The Supreme Court of Canada, agreeing with the Court of Appeal for Ontario, has held that the latter view is correct.

In summarizing its conclusion (para 3) the court stated "In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the

action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment."

While the court does not say that NO jurisdictional basis is required, it states that the basis is found simply and wholly in the defendant being served with process (see para 27). This runs counter to the court's foundational decision in *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 which separated the issue of service of process – a pure procedural requirement – from the issue of jurisdiction. To say the service itself founds jurisdiction is arguably to have no jurisdictional requirement at all.

Interestingly, a recent paper (subsequent to the argument before the court) by Professor Linda Silberman and Research Fellow Aaron Simowitz of New York University (available here) considers the same issue in American law and concludes that the dominant view of courts there remains that an action to enforce a foreign judgment requires a "jurisdictional nexus" with the enforcing forum. They note that only a minority of countries allow enforcement of a foreign judgment without any jurisdictional threshold for the enforcement proceedings. They argue that the New York decisions which subsequently are relied on by the Supreme Court of Canada (para 61) are the outliers.

Had the Supreme Court of Canada required a showing of jurisdiction in respect of the enforcement proceeding, it would have had to address how that requirement would be met. Of course, in most cases it would be easily met by the defendant having assets in the jurisdiction. The plaintiff would not have to prove that such assets were present: a good arguable case to that effect would ground jurisdiction. Evidence that assets might, in the future, be brought into the jurisdiction could also suffice.

While the court is correct to note that the considerations in defending the underlying substantive claims are different from those involved in defending enforcement proceedings (para 48), the latter nonetheless allow reasonable scope for defences to be raised, such as fraud, denial of natural justice or contravention of public policy. With no threshold jurisdiction requirement, judgment debtor defendants will now be required to advance and establish those defences in a forum that may have no connection at all with them or the judgment.

The enforcement proceedings were also brought against Chevron Canada, an indirect subsidiary of Chevron that does have a presence in Ontario, although it is not a named defendant in the Ecuadorian judgment. The Supreme Court of Canada held that the Ontario court had jurisdiction over Chevron Canada based on its presence, with no need to consider any other possible basis for jurisdiction. The decision is thus important for confirming the ongoing validity of presence-based jurisdiction (see paras 81-87).

On a pragmatic level, eliminating an analysis of the enforcing court's jurisdiction may simplify the overall analysis, but hardly by much. The court notes (para 77) that " Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Ontario courts. Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following, whether by way of preliminary motions or at trial: that the proper use of Ontario judicial resources justifies a stay under the circumstances; that the Ontario courts should decline to exercise jurisdiction on the basis of *forum non conveniens*; that any one of the available defences to recognition and enforcement (i.e. fraud, denial of natural justice, or public policy) should be accepted in the circumstances; or that a motion under either Rule 20 (summary judgment) or Rule 21 (determination of an issue before trial) of the Rules should be granted." And in respect of Chevron

Canada (para 95), the “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. [We] 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.”