File Number 35682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CHEVRON CORPORATION and CHEVRON CANADA LIMITED

Appellants
(Respondents/Appellants by Cross-Appeal)

- and -

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANTE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE, and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE

Respondents
(Appellants/Respondents by Cross-Appeal)

FACTUM OF THE APPELLANT
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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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ORIGINAL TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

INDEX

Table of Contents

Page

Page

PART I: OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. This appeal raises fundamental issues concerning the jurisdictional reach of provincial superior courts. The courts below held that they have jurisdiction to recognize and enforce a $9.5 billion foreign judgment against a foreign corporation, at the instance of foreign plaintiffs, despite the absence of any connection whatsoever between Ontario and any of the foreign parties, the foreign judgment, or the underlying claim.[1]

2. The real and substantial connection test is the universal test for the assumption of jurisdiction *simpliciter* by a Canadian court over non-residents. It applies in a recognition and enforcement ("R & E") case just as in any other. Both lower courts erred in holding that they could assume jurisdiction over Chevron Corp. on the theory that in R & E cases, jurisdiction *simpliciter* over foreign defendants is irrebuttably established by a provincial rule of court which merely authorizes service *ex juris*.

3. ***Constitutional Restraints on Judicial Authority:*** It is submitted instead that when analyzed with constitutional imperatives in mind, service *ex juris* rules are merely procedural and give rise to only a presumption of jurisdiction, rebuttable if there is in fact no real and substantial connection with the forum. That connection is constitutionally essential to assumed jurisdiction. In R & E cases, the issue is typically self-policing and the presumption will normally be determinative - impossible to rebut where judgment creditors seek R & E in a jurisdiction where some practical purpose will be served. However, this is not the case here, and this Court has made it clear that there are limits to the proper exercise of judicial authority:[2]

> The legitimate exercise of [legislative or adjudicative] power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority.

4. ***Comity:*** The principle of comity also informs jurisdictional analysis in transnational disputes. Its implications here flow from the principle of corporate separateness and the factual findings of the motion judge. With Chevron Corp. having no presence or assets in Ontario, any adjudication of the R & E action can have no practical effect in the province and Ontario has no interest in the outcome. Comity therefore dictates that any adjudication of the validity of the Ecuador Judgment be left to those courts and tribunals elsewhere that have a legitimate interest

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[1] For convenience, the Appellants are hereinafter referred to as "Chevron Corp." and "Chevron Canada" respectively, the Respondents as "the Plaintiffs", and the Ecuadorian judgment as "the Ecuador Judgment".

[2] *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 at para 31, [2012] 1 SCR 572 [*Van Breda SCC*] **[Joint Book of Authorities of Chevron Corp. and Chevron Canada ("JBA"), Vol. I, Tab 23].**

in the outcome and a resulting obligation to decide the question. That is particularly so when the adjudication requires an evaluation of the integrity of the judicial process of another sovereign state.

5. ***Chevron Canada:*** On the motion underlying this appeal, Chevron Corp. put forward evidence establishing that it does not and never will have any presence in Ontario. The Plaintiffs argued that the limited presence of Chevron Canada in Ontario could establish the requisite connection with its indirect parent, Chevron Corp. However, after a careful review of the evidence, the motion judge concluded that there is "no basis in law or fact" to reverse pierce seven corporate veils and treat Chevron Canada's business and assets as those of Chevron Corp.[3] With no arguable case to pierce the corporate veil, there is no connection whatsoever to Ontario, let alone a real and substantial connection, upon which to legitimize the assumption of jurisdiction over Chevron Corp.

6. ***Corporate Separateness:*** The principle of corporate separateness plays an integral role in a Western economy. Canadian corporations and their shareholders and other stakeholders have to date shared justifiable confidence that corporate separateness forms a bedrock principle of our law. The principle is enshrined in Canadian corporate statutes and respected by our courts. This appeal calls for confirmation that as a general rule, the separate legal identity of a corporation may be ignored only in those exceptional circumstances where two criteria are met - complete domination and control of a corporation by its shareholder(s), and use of the corporate vehicle for some fraudulent or improper purpose.[4] The motion judge made well-grounded findings rejecting the first, and the Plaintiffs expressly disavow the second.

7. ***Consistency with Other Jurisdictions:*** If the approach of the courts below were followed, Canada would put itself at odds with that of its most important trading partner and other common law countries. The weight of authority and academic commentary in the U.S. recognizes the need to establish jurisdiction *simpliciter* of an enforcing court. The High Court of Ireland reached the same conclusion earlier this year, expressing surprise at the contrary argument.[5] Moreover, in a recent first instance case with broader jurisdictional implications, the U.S. Supreme Court rejected a "sprawling view of general jurisdiction" as "unacceptably grasping", observing that an expansive view of jurisdiction poses risks to international comity.[6]

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[3] *Yaiguaje v Chevron Corporation*, 2013 ONSC 2527 at paras 88-111, 361 DLR (4th) 489 [Motion Decision] **[Joint Appellants' Record ("Appellants' Record"), Part I, Vol. I, Tab 2, pp. 41-49]**.

[4] Leaving aside established exceptions which have no application in this case, such as where one company acts as agent for another, or where dictated by a taxation or other statute.

[5] *Yukos Capital S.A.R.L. v OAO Tomskneft VNK*, [2014] IEHC 115 (Comm) at para 62 [*Yukos Capital*] **[JBA, Vol. II, Tab 75]**.

[6] *Daimler AG v Bauman*, 134 S Ct 746 (2014) at 759-761 and 763 [*Daimler AG*] **[JBA, Vol. I, Tab 25]**.

8. ***Determining Jurisdictional Facts:*** The requirement for legitimacy in the assumption of jurisdiction, and the desirability of using judicial resources appropriately, have important implications for the process and standard for assessing facts essential to jurisdiction. The "good arguable case" threshold for establishing jurisdictional facts balances the interests of the parties and the judicial system. Although this is a low threshold, the Plaintiffs failed to meet it here. A non-resident defendant who meets the burden of showing there is no requisite connection with the forum should not be required to submit to local judicial authority and defend itself on the merits. It offends the principles of order and fairness to compel it to do so. Neither should courts in jurisdictions that have no interest in a dispute be required to devote resources to it.

9. ***Jurisdictional Overreach:*** A perception of Chevron Corp.'s defence of the claim in other countries led the Court of Appeal to reason that "the Ecuadorian plaintiffs should have an opportunity to attempt to enforce the Ecuadorian Judgment in a court where Chevron will have to respond on the merits" and "[a]t this juncture, Ontario is that jurisdiction."[7] But that perception was unwarranted, and a court's impression of the underlying dispute is an unreliable approach to jurisdictional analysis. Ontario is not a forum of necessity in this case. The Plaintiffs have had a readily available and more logical jurisdiction in which to seek R & E of the Ecuador Judgment, but have refused to take their claim to the U.S. where Chevron Corp. has all of its assets and ample ability to pay.[8] For tactical reasons, they opted to seek recognition in selected "keystone" nations perceived to be favourable for R & E.[9] Canada was chosen as the first. This Court ought not to encourage this conduct by lowering jurisdictional standards.

10. Chevron Corp. took the initiative to defend itself by commencing an action in New York against the Plaintiffs and certain of their advisors. Following a seven week trial, Judge Lewis Kaplan of the Southern District of New York issued a 485-page opinion on March 4, 2014, concluding that the Ecuador Judgment was the product of extensive fraud and corruption and that "[u]ltimately, the [Plaintiff] team wrote the Lago Agrio court's Judgment themselves and promised $500,000 to the Ecuadorian judge to rule in their favor and sign their judgment."[10] In addition, an international arbitration tribunal ordered Ecuador to take steps to prevent

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[7] *Yaiguaje v Chevron Corporation*, 2013 ONCA 758 at paras 70 and 75, 370 DLR (4th) 132 [Appeal Decision] **[Appellants' Record, Part I, Vol. I, Tab 4, pp. 77-78]**.

[8] As the Plaintiffs emphasized in both courts below, from 2008 – 2011 Chevron Corp. had sufficient revenues to pay dividends of $[redacted], and to repurchase an additional $[redacted] in shares: Plaintiffs' Factum before the Ontario Court of Appeal at paras 37-38 [Plaintiffs' Factum] **[Appellants' Record, Part III, Vol. III, Tab 22, p. 47]**; Brief of Exhibits from the Cross-Examination of Frank G. Soler, held October 17, 2012 [Soler Cross Exhibits] at Exhibit 1 (Chevron Corporation 2010 10-K Form at FS-11 to FS-12 and Chevron Corporation 2011 10K Form at FS-9 to FS-11) **[Appellants' Record, Part IV, Vol. III, Tab 23, pp. 72-73 and 81-86]**.

[9] *Chevron Corp. v Donziger*, 974 F Supp (2d) 362 at 475-477 (Part 4), 540-541 (Part 5) (SDNY 2014) [Kaplan Decision] **[JBA, Vol. I, Tab 16]**.

[10] Kaplan Decision at 384 (Part 1) **[JBA, Vol. I, Tab 16]**.

enforcement pending its final decision.[11] If an Ontario court assumes jurisdiction, it will also be required to adjudicate upon the integrity of the Ecuadorian judicial system, but in a case that has no practical consequences.

STATEMENT OF FACTS

Operations and Proceedings in Ecuador

11. In 1964, Texaco Petroleum Company ("TexPet"), a fourth-level subsidiary of Texaco Inc. ("Texaco"), began oil exploration in the Oriente region of the Republic of Ecuador ("the ROE").[12] In 1965, TexPet began operating a petroleum concession for a consortium ("the Consortium") owned in equal shares by TexPet and Gulf Oil Corporation ("Gulf Oil").[13]

12. In 1974, a 25% share in the Consortium was acquired by Petroecuador, the ROE's state-owned oil agency. Within two years, it acquired Gulf Oil's interest and became the majority owner.[14] In 1990, Petroecuador replaced TexPet as operator of the consortium, and in 1992 took over TexPet's interests entirely.[15] Since then, Petroecuador has operated the oil fields in the former concession area itself.[16]

13. In 1993, a putative class action seeking monetary damages for alleged personal injuries and property damage caused by the operations of the consortium was filed in New York against Texaco, allegedly on behalf of 30,000 Ecuadorians ("the *Aguinda* Action").[17]

14. In 1995, TexPet signed a settlement agreement with the ROE and Petroecuador that required TexPet to perform specified remedial environmental work in exchange for a release of itself and its affiliates from all claims "past, present, future, known or unknown" and arising directly or indirectly from the Consortium's operations, except those required by the settlement agreement itself.[18]

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[11] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (9 February 2011), PCA Case No 2009-23 (Permanent Court of Arbitration) (Arbitrators: Dr. Horacio A. Grigera Naón, Professor Vaughan Lowe, Q.C., and V.V. Veeder, Q.C. (President)) **[JBA, Vol. I, Tab 17]**; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (25 January 2012), PCA Case No 2009-23 (Permanent Court of Arbitration) (Arbitrators: Dr. Horacio A. Grigera Naón, Professor Vaughan Lowe, Q.C., and V.V. Veeder, Q.C. (President)) **[JBA, Vol. I, Tab 18]**; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (16 February 2012), PCA Case No 2009-23 (Permanent Court of Arbitration) (Arbitrators: Dr. Horacio A. Grigera Naón, Professor Vaughan Lowe, Q.C., and V.V. Veeder, Q.C. (President)) **[JBA, Vol. I, Tab 9]**.

[12] *Aguinda v Texaco, Inc.*, 303 F (3d) 470 at 473 (2d Cir 2002) [*Aguinda*] **[JBA, Vol. I, Tab 4]**.

[13] *Ibid* **[JBA, Vol. I, Tab 4]**.

[14] *Ibid* **[JBA, Vol. I, Tab 4]**.

[15] *Ibid* **[JBA, Vol. I, Tab 4]**.

[16] Kaplan Decision at 386 (Part 1) **[JBA, Vol. I, Tab 16]**.

[17] *Aguinda* at 473 **[JBA, Vol. I, Tab 4]**.

[18] *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v The Republic of Ecuador* (17 September 2013), PCA Case No 2009-23 at paras 20-23 (Permanent Court of Arbitration) (Arbitrators: Dr. Horacio A. Grigera Naón, Professor Vaughan Lowe, Q.C., and V.V. Veeder, Q.C. (President)) [*BIT Arbitration*] **[JBA, Vol. I, Tab 20]**.

15. The remediation work was completed to the satisfaction of the ROE and Petroecuador and in 1998, a final release was issued, with the ROE representing that any public claims for environmental harm belonged to it "under the Constitution and laws of Ecuador and under international law."[19] Releases were also obtained from the affected provinces and municipalities.[20]

16. In 1999, the ROE enacted the *Environmental Management Act of 1999* ("the EMA") to create a new right of action for individuals to redress public environmental harm, as distinct from individual personal injuries or property damage.[21]

17. Texaco had in the meantime moved to dismiss the *Aguinda* Action on grounds of the plaintiffs' failure to join the ROE, international comity, and *forum non conveniens*.[22] In 2002, the United States Second Circuit Court of Appeals affirmed the dismissal on *forum non conveniens*.[23] Texaco had at an earlier stage offered an undertaking to satisfy any Ecuador judgment obtained by the plaintiffs, but subject to its right to defend against R & E on the grounds permitted by New York's *Recognition of Foreign Country Money Judgments Act*.[24]

18. In 2001, a Chevron subsidiary merged with Texaco and thus Texaco and TexPet became indirect subsidiaries of Chevron Corp, but all three retain their separate corporate existence.[25]

19. In 2003, some of the *Aguinda* plaintiffs and a number of new plaintiffs commenced a different action in Ecuador against Chevron Corp. alone, based on the EMA (the "*Lago Agrio* Action").[26] On February 14, 2011, Judge Zambrano of the Provincial Court of Justice of Sucumbios, Ecuador signed the judgment that is the subject of this R & E action, in the amount

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[19] *Chevron Corporation v Steven Donziger et al*, 768 F Supp (2d) 581 at 598 (SDNY 2011) [*Donziger*] (injunction reversed and vacated on jurisdictional grounds without disturbing the factual findings of fraud) **[JBA, Vol. I, Tab 15]**. On September 17, 2013, the tribunal in an arbitration commenced by Chevron Corp. and TexPet against the ROE pursuant to the Bilateral Investment Treaty between the United States and the ROE issued a Partial Award regarding the interpretation of the settlement agreement and release executed between TexPet, Petroecuador and the ROE. The tribunal found that Chevron Corp. and TexPet were "releasees" and that the settlement agreement and release "have legal effect under Ecuadorian law precluding any 'diffuse' [environmental] claim" against Chevron Corp. and TexPet made by the Republic of Ecuador or "by any individual not claiming personal harm": *BIT Arbitration* at para 112 **[JBA, Vol. I, Tab 20]**.

[20] *BIT Arbitration* at paras 30-31 **[JBA, Vol. I, Tab 20]**.

[21] *Donziger* at 599 **[JBA, Vol. I, Tab 15]**.

[22] *Aguinda* at 474 **[JBA, Vol. I, Tab 4]**.

[23] Kaplan Decision at 389-390 (Part 1) **[JBA, Vol. I, Tab 16]**.

[24] *Chevron Corporation v Naranjo*, 667 F (3d) 232 at 235 (2d Cir 2012) **[JBA, Vol. I, Tab 14]**. Pursuant to New York's *Recognition of Foreign Country Money Judgments Act*, NY CPLR art 53, §5304 **[JBA, Vol. III, Tab 86]** a foreign country judgment is not conclusive (and therefore unenforceable) if, *inter alia*: the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; the foreign court did not have personal jurisdiction over the defendant; the foreign court did not have jurisdiction over the subject matter; the judgment was obtained by fraud; or the cause of action on which the judgment is based is repugnant to the public policy of New York.

[25] *Donziger* at 594 and 600 (footnote 40) **[JBA, Vol. I, Tab 15]**.

[26] Unlike the *Aguinda* Action, this action was not for personal injury or individual property damage, but rather for broadly-defined environmental damages: *Lago Agrio* Action (Sole Chamber of the Provincial Court of Justice of Sucumbios), Proceeding No 2003-0002 (14 February 2011) at 1 **[JBA, Vol. II, Tab 47]**.

of $8.6 billion, with a provision for an additional award of punitive damages in the same amount unless Chevron Corp. issued an apology.[27] Chevron Corp. declined. With a further 10.1% added pursuant to the EMA and for costs, the judgment exceeded US $19 billion.

20. The Appellate Division of the Provincial Court of Justice of Sucumbios affirmed the Ecuador Judgment on January 3, 2012. The Appellate Division stated that it had no competence to rule upon Chevron Corp.'s contention that the judgment had been procured by fraud and corruption, noting that these issues were being litigated in the United States.[28]

21. On November 12, 2013, the National Court of Justice of Ecuador quashed the punitive damages award, but otherwise affirmed the judgment in the amount of approximately US $9.51 billion.[29] As the National Court reviews only legal arguments rather than evidence, it also refused to consider Chevron Corp.'s argument that the judgment was the product of fraud and corruption, noting that such allegations should be decided by other authorities with jurisdiction.[30]

The Ontario Action

22. On May 30, 2012, the Plaintiffs commenced an action for R & E of the Ecuador Judgment in Ontario against Chevron Corp. and two indirect Canadian subsidiaries, Chevron Canada and Chevron Canada Finance Limited, subsequently discontinuing against the latter.[31] Chevron Canada is not a judgment debtor, had no involvement with the Ecuadorian operations, and was not even affiliated with TexPet when it was operating in Ecuador.[32]

23. The Plaintiffs served Chevron Corp. *ex juris* in San Ramon, California on June 6, 2012.[33] Chevron Corp. has not filed a Statement of Defence in this action. It brought a motion under Rule 17 of the Ontario *Rules of Civil Procedure*[34] and section 106 of the *Courts of Justice Act*[35] solely to object to the jurisdiction of the Ontario Court, without consenting or attorning to such jurisdiction.[36] It maintains that position before this Court.

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[27] Motion Decision at para 5 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 10-11]**.
[28] *Lago Agrio* Action (Appellate Division / Sole Division of the Provincial Court of Justice of Sucumbios), Proceeding No 2011-0106 (3 January 2012) at 10 **[JBA, Vol. II, Tab 48]**. See also: *Lago Agrio* Action (Appellate Division / Sole Division of the Provincial Court of Justice of Sucumbios), Proceeding No 2011-0106 (13 January 2012) at 3-5 **[JBA, Vol. II, Tab 49]**.
[29] Appeal Decision at paras 9-10 **[Appellants' Record, Part I, Vol. I, Tab 4, pp. 64-65]**.
[30] Kaplan Decision at 539-540 (Part 5) **[JBA, Vol. I, Tab 16]**.
[31] Motion Decision at paras 9-10 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 13]**.
[32] *Ibid* at paras 12, 17, and 92 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 12, 15-16 and 42]**; Affidavit of Jeffrey C. Wasko, sworn on behalf of Chevron Canada Limited on August 8, 2012 at para 4 [Wasko Affidavit] **[Appellants' Record, Part III, Vol. III, Tab 19, p. 16]**.
[33] Motion Decision at para 19 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 16]**.
[34] *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 17.
[35] *Courts of Justice Act*, RSO 1990, c C43 at s 106.
[36] Appeal Decision at para 13 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 65]**.

24. The motion judge dismissed the jurisdictional challenge. However, after full argument on the corporate separateness issue which was central to that challenge, he found that Chevron Corp. has no business or assets in Ontario, and that there is no basis in fact or law upon which to reverse pierce multiple corporate veils and treat Chevron Canada's business and assets as those of Chevron Corp. He concluded that any decision in this case would therefore be an academic exercise with no practical effect in Ontario. He issued a stay of proceedings, invoking the Court's power to do so on its own motion under section 106 of the *Courts of Justice Act*.[37]

25. The Plaintiffs appealed the stay of proceedings, and Chevron Corp. and Chevron Canada cross-appealed the finding that the Ontario court has jurisdiction.[38] Consistent with their jurisdictional challenge, Chevron Corp. and Chevron Canada restricted their submissions on the Plaintiffs' appeal to observations on the Court's power to act on its own motion. They refrained from affirmative submissions in support of the merely discretionary stay.[39]

26. The Court of Appeal allowed the appeal and dismissed the cross-appeals, set aside the stay and gave the Defendants 30 days to file Statements of Defence.[40] MacPherson J.A. authored the decision, but later stayed it pending applications for leave to appeal to this Court.[41]

Chevron Corp. Has No Connection with Ontario

27. Chevron Corp. has no presence in Ontario, or elsewhere in Canada. It was incorporated in Delaware in 1926 and has its head office in California.[42] With the exception of *de minimus* interests in two Bermudian companies, all its assets have always been located in the U.S., and there is no reason to believe this will ever change.[43] The Plaintiffs filed no contrary evidence.

28. Chevron Corp. does not itself engage in exploring, producing, refining or marketing petroleum products. These activities are carried on by indirect subsidiary corporations,[44] and are detailed in the public disclosure contained in Chevron Corp.'s Form 10-K.[45] Chevron Corp. manages its investments in those subsidiaries and provides them with administrative, financial,

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[37] Motion Decision at paras 88-112 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 41-49]**.
[38] Appeal Decision at paras 3-4 **[Appellants' Record, Part I, Vol. I, Tab 4, pp. 63-64]**.
[39] For the same reasons, Chevron Corp. must again refrain from affirmative submissions in support of the discretionary stay before this Court.
[40] Appeal Decision at para 76 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 78]**.
[41] *Yaiguaje v Chevron Corporation*, 2014 ONCA 40 at paras 20-21, 315 OAC 109 **[Appellants' Record, Part I, Vol. I, Tab 6, p. 88]**.
[42] Affidavit of Frank G. Soler, sworn on behalf of Chevron Corp. on August 7, 2012 at paras 3 and 5 [Soler Affidavit] **[Appellants' Record, Part III, Vol. I, Tab 15, p. 139]**; Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**.
[43] Motion Decision at paras 17, 89-90 and 110 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16, 42 and 49]**.
[44] Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**; Soler Affidavit at para 4 **[Appellants' Record, Part III, Vol. I, Tab 15, pp. 139]**.
[45] Soler Affidavit at Exhibit B (Chevron Corporation 2011 10-K Form) **[Appellants' Record, Part III, Vol. II, Tab 15B, pp. 1ff]**.

management and technological support. With 740 employees of its own,[46] Chevron Corp. advises on the allocation of corporate resources, provides policy guidelines, reviews financial and performance goals, and monitors the performance of its indirect subsidiaries, including Chevron Canada.[47]

29. Chevron Corp. files consolidated financial statements because, as a publicly-traded company, it is required to do so by the U.S. Securities and Exchange Commission.[48]

Chevron Canada is a Seventh-Level Indirect Subsidiary of Chevron Corp.

30. Chevron Canada is a seventh-level indirect subsidiary of Chevron Corp.[49] All but one of the intervening subsidiaries are registered in the U.S.[50] Chevron Canada was incorporated in Canada in 1966,[51] and has its head office in Calgary, Alberta.[52]

31. Chevron Corp. does not own the shares of Chevron Canada.[53] All the voting shares of Chevron Canada are owned by Chevron Canada Capital Company.[54] Chevron Canada Capital Company was incorporated in Nova Scotia in 1999 and is currently extra-provincially registered only in the province of Alberta.[55] It is an investment company which holds the voting shares of Chevron Canada and Chevron Canada Funding Company. It has no assets in Ontario.[56] All of the shares of Chevron Canada Capital Company are owned by Chevron Standard Limited, which was incorporated in Delaware in 1944.[57] Chevron Standard Limited has no assets in Ontario,[58] and is extra-provincially registered in only British Columbia, Alberta, Saskatchewan and Manitoba.[59] In addition to its ownership of the voting shares of Chevron Canada Capital Company, Chevron Standard Limited:

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[46] Answers to Undertakings of Frank G. Soler given at the Cross-Examination held October 17, 2012, Response #4 [Soler's Responses to Undertakings] **[Appellants' Record, Part III, Vol. III, Tab 18, pp. 9]**.
[47] Soler Affidavit at para 4 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 139]**.
[48] Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**; Soler Affidavit at para 9 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 142]**.
[49] Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**; Soler Affidavit at para 7 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 140]**; and Wasko Affidavit at para 7 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 17]**.
[50] Soler Affidavit at paras 7(b), 28, 32, 39, 43, 47, 51, 55 **[Appellants' Record, Part III, Vol. I, Tab 15, pp. 140, 143, 144, 145, 146, 147 and 148]**.
[51] Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**; Soler Affidavit at para 15 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 141]**.
[52] Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**; Wasko Affidavit at para 8 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 17]**.
[53] Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**; Soler Affidavit at para 18 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 142]**.
[54] Motion Decision at para 17 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16]**; Soler Affidavit at para 18 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 142]**.
[55] Soler Affidavit at paras 28 and 29 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 143]**.
[56] *Ibid* at para 29 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 143]**.
[57] *Ibid* at paras 30 and 32 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 144]**.
[58] *Ibid* at para 35 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 144]**.
[59] *Ibid* at para 33 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 144]**.

(a) was until January 2012 a 50% participant in a joint venture which owned and operated an Edmonton isooctane plant, and continued thereafter to maintain an ongoing obligation pursuant to an off take agreement with the buyer;

(b) was until 2004 the owner of oil and gas assets operating in Western Canada; and

(c) continues to hold a one-half interest in Chevron Plaza in Calgary.[60]

32. All of the voting shares of Chevron Standard Limited are owned by Chevron Global Energy Inc.[61] That company was incorporated in Delaware on December 6, 1946,[62] and has never carried on business nor been extra-provincially registered anywhere in Canada.[63]

33. All of the voting shares of Chevron Global Energy Inc. are owned by Texaco Overseas Holdings Inc.[64] The shares of Texaco Overseas Holdings Inc. are owned by Texaco Inc.,[65] the shares of which are owned by Chevron Investments Inc.,[66] a direct subsidiary of Chevron Corp.[67] All were incorporated in Delaware decades ago and none have ever carried on business or been extra-provincially registered in Canada.[68]

34. Chevron Corp. and Chevron Canada have separate boards of directors with no overlap. None of the Chevron Corp. directors or executive officers serve on the board or are involved in managing the operations of Chevron Canada.[69] None of the directors of Chevron Standard Limited, Chevron Global Energy Inc., Texaco Overseas Holdings Inc., Texaco Inc. or Chevron Investments Inc. serve on the boards of directors of either Chevron Corp. or Chevron Canada.[70] All of the directors of Chevron Canada are executives of Chevron Canada.[71]

Chevron Canada is a Well-Capitalized Company Operating Its Own Business

35. Chevron Canada develops and operates its own major projects under the direction and control of its own board of directors and management.[72] It has two divisions which employ over 700 people.[73] The Exploration and Production division engages in oil sands projects and

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[60] *Ibid* at para 34 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 144]**.
[61] *Ibid* at para 36 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 145]**.
[62] *Ibid* at para 39 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 145]**.
[63] *Ibid* at para 40 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 145]**.
[64] *Ibid* at para 41 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 145]**
[65] *Ibid* at para 45 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 146]**.
[66] *Ibid* at para 49 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 146]**.
[67] *Ibid* at para 53 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 147]**.
[68] *Ibid* at paras 39, 40, 43, 44, 47, 48, 51 and 52 **[Appellants' Record, Part III, Vol. I, Tab 15, pp. 145, 146, 147]**.
[69] Motion Decision at paras 17 and 99 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 15-16 and 46]**; Soler Affidavit at para 13 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 141]**.
[70] Soler Affidavit at paras 11, 18, 37, 41, 45, 49 and 54 **[Appellants' Record, Part III, Vol. I, Tab 15, pp. 140-141, 142, 145, 146, 147]**.
[71] Wasko Affidavit at para 11 **[Appellants' Record, Part III, Vol. III, Tab 19, pp. 17-18]**.
[72] Motion Decision at paras 17 and 99 **[Appellants' Record, Part I, Vol. I, Tab 2 pp. 15-16 and 46]**; Soler Affidavit at para 4 **[Appellants' Record, Part III, Vol. I, Tab 15, p. 139]**.
[73] Wasko Affidavit at para 12 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 18]**; Transcripts from Cross-Examination of Jeffrey C. Wasko on his Affidavit sworn August 8, 2012, held October 18, 2012 at 19, lines 6-12 [Wasko Cross Transcripts] **[Appellants' Record, Part III, Vol. III, Tab 20, p. 26]**; Appeal Decision at para 7 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 64]**.

petroleum and natural gas exploration in Alberta; offshore production, development and exploration projects in the Atlantic Canada region; and exploration in the Northwest Territories and the Beaufort Sea.[74] The Products division operates a refinery in British Columbia and is engaged in retail and commercial fuel operations in that province. The Products division also has a lubricant distribution operation in British Columbia and in other provinces, including, to a limited extent and only since May 1, 2012, Ontario.[75]

36. Given the breadth of Chevron Canada's business, each division has its own leadership team responsible for all day to day operations and management, without direction from Chevron Corp. or any other Chevron entity.[76] Chevron Canada funds its own operations without financial contributions from Chevron Corp. or any other Chevron entity.[77] Chevron Corp. does not guarantee Chevron Canada debts. Rather, for major projects, Chevron Corp. has occasionally provided performance guarantees. These are guarantees of future performance rather than of any existing debt obligation, upon which Chevron Corp. has never been called to perform.[78]

37. For example, all of Chevron Canada's capital expenditures from 2006 – 2011 for the Athabasca Oil Sands Project ($[redacted]), the Hibernia Project ($[redacted]) and the Hebron Project ($[redacted]) have been funded from its own operating revenues.[79] In addition to funding all of these Projects from its own cash flow, Chevron Canada declared and paid $[redacted] of dividends during this time period to its immediate parent company, Chevron Canada Capital Company.[80]

38. Chevron Canada business plans and budgets are developed on an annual basis by Chevron Canada employees and reviewed and approved by its senior management.[81] The plans and budgets are then reported through a functional reporting process to Chevron Corp.[82] Chevron Corp. provides input within the context of its own strategic planning and budget

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[74] Wasko Affidavit at para 14 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 18]**.
[75] *Ibid* at para 15 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 18]**.
[76] *Ibid* at para 16 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 19]**.
[77] Motion Decision at para 100 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 46-47]**; Wasko Affidavit at para 19 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 19]**.
[78] Motion Decision at para 101 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 47]**; Wasko Affidavit at para 19 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 19]**.
[79] Motion Decision at para 100 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 46-47]**; Answers to Undertakings of Jeffrey C. Wasko given at the Cross-Examination held October 18, 2012, Response #8 [Wasko's Responses to Undertakings] **[Appellants' Record, Part III, Vol. III, Tab 21, pp. 39-42]**.
[80] Wasko's Responses to Undertakings, Response #8 **[Appellants' Record, Part III, Vol. III, Tab 21, pp. 39-42]**.
[81] Motion Decision at para 100 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 46-47]**; Wasko Affidavit at para 17 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 19]**.
[82] Transcripts from Cross-Examination of Frank G. Soler on his Affidavit sworn August 7, 2012, held October 17, 2012 at 44 (line 19) to 46 (line 7) (as corrected) [Soler Cross Transcripts] **[Appellants' Record, Part III, Vol. III, Tab 16, pp. 5-7]**; as described in Soler Cross Exhibits at Exhibit 4 (Policy [redacted]" and Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, pp. 91 and 133]** and Wasko Cross at 37 (line 20) to 40 (line 4) **[Appellants' Record, Part III, Vol. III, Tab 20, pp. 34-37]**.

processes, and ultimately approves a global consolidated business plan and budget.[83] Once finalized, Chevron Canada is responsible to implement and execute its own business plans and manage its own budget and operations.[84]

39. Chevron Canada employs, trains and directs the activities of its own professional, operational and administrative staff, and pays their salaries and benefits.[85] (In the case of approximately 60 individuals who remain on the payroll of other Chevron entities, Chevron Canada reimburses the cost of the services provided. Chevron Corp. is not one of those entities).[86] Chevron Canada has its own pension plan.[87] (The 49 Chevron Canada employees who are, or once were, on the payroll of a U.S. Chevron entity have entitlements under the Chevron Corp. pension plan, but Chevron Canada reimburses the costs of that pension plan).[88] Of the over 700 Chevron Canada employees, only 30 in senior level positions have any entitlement to Chevron Corp. stock options or share appreciation rights.[89]

40. In Ontario, there are only 13 Chevron Canada employees. Three work out of an office in Mississauga while the other 10 work out of their homes.[90] They are all engaged in selling lubricants and chemicals to third party distributors.[91] Chevron Canada's invoicing occurs from its Vancouver office,[92] and none of the products are stored anywhere in Ontario.[93]

Chevron Corp. Policies are the Antithesis of "Complete Domination and Control"

41. In the Courts below, the Plaintiffs argued that Chevron Corp. exercises granular control over Chevron Canada and that its corporate policies demonstrate the "over-arching power and authority" of Chevron Corp.'s board of directors and Executive Committee.[94] However, the motion judge found on the facts that "the management of Chevron Canada operates its business in a fashion which is separate and distinct from that of its parents up the corporate "family tree", subject to the direction of its own board of directors which does not contain any

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[83] Motion Decision at para 100 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 46-47]**; Wasko Affidavit at para 17 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 19]**.
[84] Wasko Affidavit at para 17 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 17]**; Soler Cross Exhibits at Exhibit 4 (Policy [redacted] and Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 133]**.
[85] Motion Decision at para 99 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 46]**; Wasko Affidavit at para 13 **[Appellants' Record, Part III, Vol. III, Tab 19, p. 18]**.
[86] Wasko Cross Transcripts at 18 (line 16) to 20 (line 11) **[Appellants' Record, Part III, Vol. III, Tab 20, pp. 25-27]**.
[87] *Ibid* at 20 (line 22) to 21 (line 2) **[Appellants' Record, Part III, Vol. III, Tab 20, pp. 27-28]**.
[88] *Ibid* at 20 (line 13) to 21 (line 9) **[Appellants' Record, Part III, Vol. III, Tab 20, pp. 27-28]**.
[89] *Ibid* at 23 (line 9) to 25 (line 23) **[Appellants' Record, Part III, Vol. III, Tab 20, pp. 30-32]**.
[90] Motion Decision at para 18 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 16]**; Wasko's Responses to Undertakings, Response #2 **[Appellants' Record, Part III, Vol. III, Tab 21, p. 38]**.
[91] Wasko Affidavit at para 15 **[Appellants' Record, Part III, Vol. III, Tab 19, p.18]**.
[92] Wasko's Responses to Undertakings, Response #3 **[Appellants' Record, Part III, Vol. III, Tab 21, p. 38]**.
[93] Motion Decision at para 18 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 16]**; Wasko's Responses to Undertakings, Response #5 **[Appellants' Record, Part III, Vol. III, Tab 21, p. 38]**.
[94] Plaintiffs' Factum at paras 74-75 **[Appellants' Record, Part III, Vol. III, Tab 22, pp. 49-50]**.

over-lapping members with the Chevron [Corp.] board or executive."[95] These findings are well-grounded.

42. The corporate policies cited by the Plaintiffs provide for the oversight necessary to meet fiduciary obligations of stewardship and reporting to public shareholders, but delegate significant decision-making authority to indirect subsidiaries, "consistent with the philosophy of decentralized decision making and accountability with a minimum of procedural details".[96]

43. The Plaintiffs also attempted to characterize Chevron Canada's activities as always being subject to Chevron Corp.'s "approval".[97] In fact, Policy [redacted] documents the delegation of very significant commitment and expenditure authority. The [redacted] details the levels of major commitment which require only the "concurrence" of a Reporting Officer or "reporting" to the Executive Committee of Chevron Corp.[98] For example, certain upstream activities do not require even "concurrence" of a Reporting Officer unless the total commitment is over $[redacted] nor "reporting" to the Executive Committee unless it is over $[redacted] or cumulative commitments on the project exceed $[redacted].[99]

44. Below those limits, "Reporting Units have unlimited authority to commit to activities in approved business plans".[100] Consistent with the decentralized system of management, they are expected to further delegate this authority to business units.[101] It is the officers of each subsidiary company who retain authority to execute legally binding documents.[102]

45. Other policies further the same objectives. Policies [redacted] and [redacted] govern the decentralized budgeting process described above.[103] Once the global consolidated business plan and budget are set, Chevron Canada has full authority to make expenditures and

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[95] Motion Decision at para 100 **[Appellants' Record, Part I, Vol. I,Tab 2, pp. 46-47]**.
[96] Soler Cross Exhibits at Exhibit 4 (Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 89]**. See also Soler Cross Exhibits at Exhibit 4 (Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 104]**. The Policies in [redacted] are subject to a Confidentiality Order but Policy [redacted], details the very significant levels of authority delegated to subsidiaries before any obligation arises to seek even the "concurrence" of a reporting officer or make any "reporting" to the Executive Committee. The Policy also provides that authority to execute legally binding documents resides in the officers of each subsidiary.
[97] Plaintiffs' Factum at paras 81-84 **[Appellants' Record, Part III, Vol. III, Tab 22, pp. 52-53]**.
[98] Soler Cross Exhibits at Exhibit 4 (Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 104]**. See also Motion Decision at para 100 **[Appellants' Record, Part I, Vol. I,Tab 2, pp. 46-47]**.
[99] Soler Cross Exhibits at Exhibit 4 (Policy [redacted]" and "[redacted]"). "[redacted]" denotes "Chevron Project Development and Execution Process" **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 104]**.
[100] Soler Cross Exhibits at Exhibit 4 (Policy [redacted]") **[Appellants' Record, Part IV, . III, Tab 24, p. 104]**.
[101] Soler Cross Exhibits at Exhibit 4 (Policy [redacted]" and Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 89]**.
[102] *Ibid* **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 89]**.
[103] Soler Cross Exhibits at Exhibit 4 (Policy [redacted] and Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, pp. 133, 91]**.

commitments excepting only where limited by the authority levels set forth in Policy [redacted].[104] Policies [redacted] and [redacted] explain the reporting process for commitments in excess thereof.[105]

No Allegation of Wrongdoing by Chevron Canada

46. The Plaintiffs disavow any allegation of wrongdoing against Chevron Canada. They allege no deception or fraud nor any improper purpose in the use of the multinational corporate structure which has been in place for decades, or how Chevron Canada operates within it.[106]

PART II: QUESTIONS IN ISSUE

47. The fundamental issue on this appeal is whether an Ontario court has jurisdiction to adjudicate the Plaintiffs' action. That is an issue of law on which the standard of appellate review is correctness.[107] The issues underlying that question and the position of Chevron Corp. on each of them may be summarized as follows:

(a) The real and substantial connection test is a universal test for the assumption of jurisdiction *simpliciter* by a Canadian court in any action, and therefore applies to an enforcing court in an R & E case just as in any other.

(b) Constitutional imperatives preclude any interpretation of provincial legislation or service *ex juris* rules as creating irrebuttable presumptions of jurisdiction over foreign parties.

(c) The doctrine of comity dictates against the assertion of jurisdiction over foreign parties in an action when the adjudication of the issues will involve the judicial integrity of another nation, but be purely academic and of no practical purpose.

(d) The "good arguable case" standard applies to the determination of facts essential to jurisdiction, and in this case to the existence of a real and substantial connection sufficient to warrant the assumption of jurisdiction over a foreign party.

(e) There is no good arguable case for a real and substantial connection with a province when the sole connection between it and any of the parties or the underlying case is the presence of an indirect Canadian subsidiary of a foreign defendant, and when:

   (i) the Canadian subsidiary operates its own substantial business and is not completely subservient to, dominated or controlled by the foreign defendant; and

   (ii) there is not even an allegation let alone any evidence that the corporate structure is being used for any fraudulent or improper purpose.

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[104] Soler Cross Exhibits at Exhibit 4 (Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 104].**

[105] Soler Cross Exhibits at Exhibit 4 (Policy [redacted]" and Policy [redacted]") **[Appellants' Record, Part IV, Vol. III, Tab 24, p. 135].**

[106] Motion Decision at para 105 **[Appellants' Record, Part I, Vol. I,Tab 2, pp. 47-48].**

[107] *Khan Resources Inc. v W M Mining Co., LLC* (2006), 79 OR (3d) 411 at para 7, 208 OAC 204 (CA) [*Khan*] **[JBA, Vol. II, Tab 45].**

PART III: ARGUMENT

THE REAL AND SUBSTANTIAL CONNECTION TEST

48. A real and substantial connection with the forum is necessary to the legitimate exercise of adjudicative power over non-resident parties. In this case, that connection is necessary to the legitimate adjudication of the substantive issues that govern enforceability of a foreign judgment – whether the foreign court had jurisdiction, whether the foreign judgment is vitiated by fraud and corruption, and whether enforcement would otherwise violate Canadian standards of natural justice or public policy.

49. In concluding that jurisdiction of the enforcing court was irrebuttably established by a provincial rule of court which merely authorizes service *ex juris*, the Court of Appeal misapplied the previous jurisprudence of this Court, failed to appreciate the constitutional underpinnings of jurisdictional analysis and the dictates of comity, refused to evaluate the facts essential to jurisdiction, and engaged instead in reasoning suggestive of jurisdictional overreach. The result undermines the values of order and fairness which are at the heart of jurisdictional analysis.

Misapplication of *Beals* and *Morguard*

50. The Court of Appeal treated this Court's decisions in the *Beals*[108] and *Morguard*[109] cases as determinative of the jurisdiction of an enforcing court in an R & E case.[110] However, in neither of those cases was the jurisdiction of the enforcing court addressed, or even in issue, as the judgment debtors were resident in the enforcing jurisdiction in both. In both cases, the Court was concerned only with the substantive issues that arise on the merits in an R & E action. In any R & E case in which jurisdiction is challenged, the court will consider the merits only after having first addressed jurisdiction on a preliminary application.[111]

51. The Court of Appeal's interpretation of *Beals* conflates the substantive issue of the jurisdiction of the foreign court with the entirely separate and threshold question of the adjudicative jurisdiction of the enforcing court. In those rare R & E cases where the jurisdiction of the enforcing court is challenged, the real and substantial connection test must be applied twice, in two different contexts and to two different questions. First, the enforcing court must determine its own jurisdiction on a preliminary motion. If it finds jurisdiction, it then proceeds as

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[108] *Beals v Saldhana*, 2003 SCC 72, [2003] 3 SCR 416 [*Beals*] **[JBA, Vol. I, Tab 10]**.
[109] *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256 **[JBA, Vol. II, Tab 57]**.
[110] Appeal Decision at paras 28-30 **[Appellants' Record, Part I, Vol. I,Tab 4, pp. 68-70]**.
[111] *Van Breda SCC* at para 72 **[JBA, Vol. I, Tab 23]**.

part of its adjudication on the merits to assess whether the foreign court appropriately assumed jurisdiction.

52. The decision of this Court in the *Pro Swing* case, not addressed in the Court of Appeal's reasons, appears to have accepted the existence of a threshold requirement that an enforcing court have jurisdiction *simpliciter*, in the same way as in any other case:[112]

> Under the traditional rule [that only monetary judgments were enforceable], once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced. [Emphasis added]

53. The jurisdiction of the enforcing court was not in issue in *Pro Swing* any more than it was in *Beals* or *Morguard*. However, all three decisions are among a series in which the "real and substantial connection" test has evolved to become the universal test for assumed jurisdiction *simpliciter* in any case. That is apparent from the guidance of both this Court and the Ontario Court of Appeal itself in the *Van Breda* case.

Van Breda and the Correct Approach to Jurisdiction - A Rebuttable Presumption

54. In *Van Breda*, a five-member panel of the Ontario Court of Appeal reformulated the framework for jurisdictional analysis, adopting features of the *Uniform Court Jurisdiction and Proceedings Transfer Act* ("the *Uniform Act*").[113] It did so to "bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards."[114] The *Uniform Act* has been implemented in three provinces, and awaits only proclamation in one other and the Yukon.[115]

55. The Court of Appeal observed that under the *Uniform Act*, the real and substantial connection test "remains the basic governing principle for the assertion of jurisdiction" against non-residents who do not attorn, but that a set of rebuttable presumptions is established for satisfaction of the test.[116] The Court of Appeal adopted the same approach.

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[112] *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52 at para 28, [2006] 2 SCR 612 [*Pro Swing*] **[JBA, Vol. II, Tab 62]**.
[113] Uniform Law Conference of Canada, "Court Jurisdiction and Proceedings Transfer Act" (1994) [*Uniform Act*] **[JBA, Vol. III, Tab 104]**.
[114] *Van Breda v Village Resorts Limited*, 2010 ONCA 84 at para 69, 98 OR (3d) 721 [*Van Breda ONCA*] **[JBA, Vol. II, Tab 74]**.
[115] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 **[JBA, Vol. III, Tab 81]**; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2 (2d Sess) **[JBA, Vol. III, Tab 82]**; *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 **[JBA, Vol. III, Tab 84]**; *Court Jurisdiction and Proceedings Transfer Act*, SPEI 1997, c 61, as amended by SPEI 2008, c 20, s 72(17) (adopted but not yet proclaimed) **[JBA, Vol. III, Tab 83]**; *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7 (adopted but not yet proclaimed) **[JBA, Vol. III, Tab 85]**.
[116] *Van Breda ONCA* at paras 64-65 **[JBA, Vol. II,Tab 74]**.

63. In view of the constitutional restraints on provincial legislative competence, Ontario Rule 17.02(m) must be interpreted as giving rise to only a rebuttable presumption of jurisdiction. As Professor Hogg has pointed out, albeit in the context of original causes of action:[129]

> [R]ules enacted or authorized by a provincial Legislature must come within the provincial legislative power over "the administration of justice in the province" in s. 92(14) of the Constitution Act, 1867. As the words "in the province" emphasize, the service ex juris rules must not exceed the territorial limit on provincial legislative power. It is not clear what that limit is. At one extreme, it could be argued that all service ex juris rules must be unconstitutional, because each authorizes an act (service of process on the defendant) to be done outside the province. But this view has been implicitly rejected by the many judgments that have been rendered on the basis of service ex juris, although admittedly the constitutional issue has usually been ignored.
>
> At the other extreme, it could be argued that all service ex juris rules must be constitutional, because they have no coercive force outside the province: they cannot and do not purport to compel the out-of-province defendant to defend the action, and if a judgment is pronounced against the out-of-province defendant, the judgment is directly enforceable only inside the forum province. But the judgment can of course be enforced against any assets of the out-of-province defendant that are located inside the forum province. It is not easy to see why those assets should be at risk if the plaintiff's cause of action has no connection with the forum province. Moreover, if there is a risk that the judgment will be recognized (and then enforced) in other provinces, as may well be the case, it is obvious that "there must be some limits to the exercise of jurisdiction against persons outside the province." While the test has not been definitively articulated by the Supreme Court of Canada, it now seems clear that the constitutional rule of extraterritoriality requires that the only causes of action in respect of which service ex juris is available are those in which there is a substantial connection with the forum province. [Emphasis added]

64. In *Tolofson v Jensen*, this Court explained that the real and substantial connection test was developed "[t]o prevent overreaching" and "has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest."[130] In the present case, Ontario has no interest at all.

Rule 17.02(m) Is Not Meaningless & Judgment Creditors Are Not Prejudiced

65. There is no foundation for the motion judge's concerns that imposing a jurisdictional requirement would render Rule 17.02(m) meaningless.[131] The drafters of the analogous provision in the *Uniform Act* recognized otherwise.[132] When judgment creditors seek R & E in a logical jurisdiction, Rule 17.02(m) and its *Uniform Act* equivalent will almost always be determinative of jurisdiction, because the judgment debtor will be unable to rebut the presumption. The Courts below failed to appreciate the significance of the presumptive effect of the rule.

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[129] *Ibid* at 13-18 to 13-19 **[JBA, Vol. III, Tab 95]**.
[130] *Tolofson v Jensen*, [1994] 3 SCR 1022 at 1049, 120 DLR (4th) 289 **[JBA, Vol. II, Tab 71]**.
[131] Motion Decision at para 80 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 39]**.
[132] *Uniform Act* at 10.2 ("Comment to s 10") **[JBA, Vol. III, Tab 104]**.

66. A defendant challenging jurisdiction must rebut the presumption with evidence showing the lack of any real and substantial connection with the enforcement jurisdiction. Chevron Corp. and Chevron Canada did so here. A plaintiff can test that evidence on cross-examination, as the Plaintiffs did here. They can also present their own evidence, which the Plaintiffs chose not to do. By virtue of the presumptive effect of Rule 17.02(m), the burden of a jurisdictional challenge will always rest upon the defendant, and plaintiffs in R & E cases will always have a full and fair opportunity to resist that challenge.

67. Nor is there any foundation to the motion judge's concern that judgment creditors could be prejudiced by a "hard and fast" rule requiring assets of the judgment debtor in the enforcing jurisdiction as a "pre-condition" to the adjudication of an R & E action.[133] Chevron Corp. does not base its jurisdictional challenge solely upon the present absence of any assets in Ontario.

68. It is the totality of the evidence, tendered and tested, which shows the absence of any connection whatsoever with Ontario, present or future, and the resulting lack of any practical purpose to this litigation. It is this that undermines the legitimacy of any Ontario pronouncement on the integrity of Ecuador's judicial process, when "there is nothing in Ontario to fight over".[134]

69. In other circumstances, concerns about the mobility of assets in a modern world might engage different considerations and dictate a different conclusion, as for example if there were some reasonable possibility that there were or might in the future be assets in the jurisdiction. This case, however, is not one in which the Plaintiffs do not know where the judgment debtor has its assets. They have refused to seek enforcement in the U.S. where they know Chevron Corp. has sufficient assets to satisfy the Ecuador Judgment if it were recognized there. Moreover, the Plaintiffs offer no evidence to suggest an expectation or even a hope that Chevron Corp. might put assets into Ontario in the future. Their case depends solely upon their attempt to pierce the corporate veil.

70. The Plaintiffs contended below that the position of Chevron Corp. is at odds with the guidance of *Beals* that "[t]he obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment."[135] However, there is no issue in this case of Chevron Corp.'s financial ability to pay. The Plaintiffs' reliance on this passage from *Beals* confuses Chevron Corp.'s argument on jurisdiction with one of the arguments on the merits in *Beals*. Major J. was merely responding to the Defendants'

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[133] Motion Decision at para 81 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 39-40]**.
[134] *Ibid* at paras 109-111 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 48-49]**.

Charter argument that "the Florida judgment cannot be enforced because its enforcement would force them into bankruptcy."[136]

No Support For Plaintiffs in *BNP Paribas*, *Sistem* or Academic Commentary

71. The *BNP Paribas* case cited by the Court of Appeal was decided on the basis of *forum non conveniens*, not jurisdiction *simpliciter*, as the defendants in that case attorned to the jurisdiction of the courts of Ontario. In any event, it pre-dates the evolution of jurisdictional analysis in this Court and is readily distinguishable on the facts.

72. Although the defendants in *BNP Paribas* denied having any assets in Ontario, one of them admitted to previously maintaining a bank account in the province with his wife. Moreover, the plaintiff filed an affidavit attesting to its belief that the defendants still had assets in the province. [137] On those facts, the Court held that the plaintiff "has the right to satisfy itself whether the defendants have or will have assets in Ontario and, if so, to seize them."[138] In contrast, on the facts found by the motion judge, Chevron Corp. has never held any assets in Ontario nor is there any reasonable prospect that it will do so in the future. The Plaintiffs here filed no evidence to suggest otherwise.

73. Nor is there any support for the Plaintiffs in the cases they cited below from the *Sistem v Kyrgyz Republic* dispute. In that case, the plaintiff obtained recognition in Ontario of an international arbitration award against the Kyrgyz Republic, without any jurisdictional challenge, and sought to execute on shares in Centerra Gold Inc. The issue was whether the Centerra shares were owned by the Republic or by its wholly-owned subsidiary ("Kyrgyzaltyn"), but Kyrgyzaltyn attorned so there was no issue of jurisdiction over it either.[139]

74. On a unique set of facts, the Ontario Superior Court found that the Republic had a beneficial interest in the Centerra shares sufficient to warrant seizure. It did so for a multitude of reasons which do not apply in the present case, including the provisions of Krygyz law and the agreement of the parties that Kyrgyzaltyn held the shares "on behalf of the Government."[140]

75. The Plaintiffs' reliance in the Courts below upon a short passage from the Castel text is similarly misplaced:[141]

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[135] *Beals* at para 78 **[JBA, Vol. I, Tab 10]**.
[136] *Ibid* **[JBA, Vol. I, Tab 10]**.
[137] *BNP Paribas (Canada) v Mécs* (2002), 60 OR (3d) 205 at para 13, 22 CPC (5th) 341 (Sup Ct) [*BNP Paribas*] **[JBA, Vol. I, Tab 11]**.
[138] *Ibid* **[JBA, Vol. I, Tab 11]**.
[139] *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v Kyrgyz Republic*, 2012 ONSC 4351 at paras 25–26, 30–37, and 40, 218 ACWS (3d) 316 **[JBA, Vol. II, Tab 68]**.
[140] *Ibid* at paras 54-63 **[JBA, Vol. II, Tab 68]**.
[141] Jean-Gabriel Castel and Janet Walker, *Canadian Conflict of Laws*, 6th ed loose-leaf (consulted on 27 May 2014), vol 1 (Markham: Lexis Nexis Canada Inc., 2005) at 14-11 **[JBA, Vol. III, Tab 92]**.

> An order enforcing a foreign judgment applies only to local assets. Accordingly, 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.

76. Nothing in this passage endorses enforcement orders "in the air", in jurisdictions where there are no assets nor any connection whatsoever. It is implicit that enforcement orders are granted only in jurisdictions in which there are some assets, even if the debtor's principal assets are elsewhere. That is not merely implicit but express in another leading Canadian text:[142]

> Because an action on the foreign judgment is a new legal proceeding, issues of jurisdiction, as discussed in Chapter 5 [Jurisdiction In Personam], must be considered at the outset. If the defendant is resident in the country in which recognition and enforcement is sought, it will be easy to establish jurisdiction. But in many cases the defendant will not be resident there: he or she will only have assets there, which the plaintiff is going after to enforce the judgment. Typically the presence of assets in a province is an insufficient basis for taking jurisdiction over a foreign defendant. But most provinces have made specific provision to allow for service ex juris in such cases. For example, in Ontario service outside the province can be made as of right where the claim is "on a judgment of a court outside Ontario". As explained in Chapter 5, the plaintiff would still need to show a real and substantial connection to the province in which the enforcement was sought. Under this test, the presence of assets may be insufficient to ground substantive proceedings but they should virtually always be sufficient to ground proceedings for recognition and enforcement. [Emphasis added]

Lack of Express Statutory Requirement Does Not Confer Jurisdiction

77. The constitutional underpinnings of jurisdictional analysis demonstrate the flaw in the reliance of the Plaintiffs and the Courts below upon the absence of any express jurisdiction *simpliciter* requirements in Rule 17.02(m), the *Reciprocal Enforcement of Judgments (U.K.) Act*, the *International Commercial Arbitration Act*, or the *Quebec Civil Code*.[143]

78. The Ontario rule is merely procedural and the legislation only provides statutory guidance for the R & E of a foreign judgment, setting out the considerations relevant to the merits of recognition and enforcement. None of these address the preliminary requirement that the court have adjudicative jurisdiction, and statutory silence cannot grant jurisdictional authority which does not otherwise exist and would be constitutionally invalid.

79. U.S. courts have held that an enforcing court must determine whether it has valid jurisdiction over the defendant before proceeding to the merits of an action to recognize and enforce a foreign judgment:[144]

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[142] Stephen G.A. Pitel and Nicolas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law Inc., 2010) at 159-160 **[JBA, Vol. III, Tab 100]**. See also *Lax v Lax* (2004), 70 OR (3d) 520 at para 28, 239 DLR (4th) 683 (CA), additional reasons at (2004), 75 OR (3d) 482 (CA) **[JBA, Vol. II, Tab 50]**.

[143] Motion Decision at paras 60–64 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 31-33]**; Appeal Decision at paras 26-27 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 68]**; and Plaintiffs' Factum at paras 92-97 **[Appellants' Record, Part III, Vol. III, Tab 22, pp. 55-57]**.

[144] *Frontera Resources Azerbaijan Corp. v State Oil Co. of the Azerbaijan*, 582 F (3d) 393 at 397 (2d Cir 2009) **[JBA, Vol. I, Tab 32]**.

> ...[T]he need for personal jurisdiction is fundamental to "the court's power to exercise control over the parties," [Citation omitted]. "Some basis must be shown, whether arising from the respondent's residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power." [Citation omitted]
>
> Because of the primacy of jurisdiction, "jurisdictional questions ordinarily must precede merits determinations in dispositional order." [Citation omitted] "[T]he items listed in Article V [of the New York Convention] as the exclusive defences ... pertain to *substantive* matters rather than to procedure." [Citation omitted] Article V's exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought. [Emphasis added]

The Position in Other Jurisdictions is Instructive

80. The foregoing quotation illustrates that despite some division in the authorities dealing with foreign judgments, the better view in American jurisprudence is that the jurisdiction of an enforcing court depends upon either *in personam* jurisdiction over the judgment debtor or the presence of assets in the jurisdiction.[145] In the context of foreign arbitral awards there is no divided authority and the requirement is clear.[146] It represents the consensus in both contexts in secondary sources and academic commentary.[147]

81. It is apparent from the case law and academic commentary that the decision of the U.S. Supreme Court in *Shaffer v Heitner* is the controlling American authority on jurisdictional requirements in an R & E context.[148] The Court held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[149] This requires that a defendant have such "minimum contacts" with the forum state to make it "reasonable" to require him to defend a lawsuit there.[150] *Shaffer* contains a footnote which is the root of all subsequent jurisdictional analysis in R & E cases:[151]

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant [the judgment debtor] has property,

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[145] Ronald A. Brand, "Recognition Jurisdiction and the Hague Choice of Court Convention" (U Pitt Legal Studies Research Paper Series, Working Paper No 2010-23, June 2010) at 18-19 [Brand] **[JBA, Vol. III, Tab 91]**.
[146] *First Investment Corp. of Marshall Islands v Fujian Mawei Shipbuilding, Ltd.*, 2012 WL 6634992 at 4-9 (5th Cir 2012) **[JBA, Vol. I, Tab 31]**. For a good overview of the law, see Brand at 15-18 **[JBA, Vol. III, Tab 91]**.
[147] *Restatement (Third) Foreign Relations Law of the United States*, §481 cmt g-h (1987) **[JBA, Vol. III, Tab 102]**. See also Brand at 11 and 18-19 **[JBA, Vol. III, Tab 91]**; Dennis Hranitzky, "Procedural Requirements for Recognition - Personal Jurisdiction" (2012) 3 International Execution Against Judgment Debtors §79.5 (WL) **[JBA, Vol. III, Tab 96]**; American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (Pennsylvania: American Law Institute 2006) at 111, 113-117 **[JBA, Vol. III, Tab 88]**; International Commercial Disputes Committee of the Association of the Bar of the City of New York, "Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards", 15 Am Rev Int'l Arb 407 (2004) **[JBA, Vol. III, Tab 97]**; Report of the International Arbitration Club of New York, "Application of the Doctrine of *Forum Non Conveniens* in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions", 24 Am Rev Int'l Arb 1 (2013) at para. 16 **[JBA, Vol. III, Tab 103]**.
[148] Brand at 9-10 **[JBA, Vol. III, Tab 91]**.
[149] *Shaffer v Heitner*, 433 US 186 at 212 (1977) [*Shaffer*] **[JBA, Vol. II, Tab 65]**.
[150] *Ibid* at 203-204 **[JBA, Vol. II, Tab 65]**.
[151] *Ibid* at 210 (footnote 36) **[JBA, Vol. II, Tab 65]**.

> whether or not that State would have jurisdiction to determine the existence of that debt as an original matter. [Emphasis added]

82. *Shaffer* has been consistently applied, with or without detailed discussion, in one line of U.S. appellate authority.[152] While recognizing *Shaffer* as the landmark decision and apparently intending to apply it, a few other intermediate state appellate courts and lower courts have departed from its guidance.[153] This departure is likely due to unusual facts,[154] an erroneous interpretation of the applicable statute,[155] or a misinterpretation of the many authorities applying *Shaffer*.[156] A leading academic has described the departure as an "aberration".[157]

83. Earlier this year, the U.S. Supreme Court addressed some of the issues arising in the case at bar, albeit in a first instance case. In *Daimler AG v. Bauman,* it held that jurisdiction over a foreign corporation could not be based upon the unrelated contacts with the forum of a wholly-owned domestic subsidiary. California thus had no jurisdiction to adjudicate claims by Argentinean plaintiffs against a German multinational for the conduct of its Argentinean subsidiary, notwithstanding the significant business conducted in California by an American subsidiary. An eight justice majority rejected a "sprawling view of general jurisdiction" as "unacceptably grasping",[158] and observed:[159]

> The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.

84. In an *amicus* Brief which attracted favourable comment in the decision, the Solicitor General of the United States of America explained the concerns that expansive assertions of jurisdiction over foreign corporations present from a policy perspective for the forum nation, and

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[152] Brand at 13-15 **[JBA, Vol. III, Tab 91]**.
[153] *Ibid* at 10 and 13-15 **[JBA, Vol. III, Tab 91]** for a discussion of *Lenchyshyn v Pelko Electric, Inc.*, 723 NYS (2d) 285 (App Div 2001) [*Lenchyshyn*] **[JBA, Vol. II, Tab 51]**.
[154] For example, in *Lenchyshyn*, the judgment debtors had removed their assets from Ontario to avoid the judgment, and the plaintiffs filed affidavit evidence asserting that those assets had been moved to New York.
[155] *Lenchyshyn* makes the mistake of treating the *Uniform Foreign Country Money Judgments Recognition Act* as negativing any jurisdictional requirement, merely because it does not specify that there is one. But the *Uniform Foreign Country Money Judgments Recognition Act* merely lists substantive grounds upon which to review the foreign judgment for validity and does not address the jurisdiction of an enforcing court.
[156] In all of the cases cited by *Lenchyshyn* as applying *Shaffer* in which the courts determined they had jurisdiction, there were assets in the jurisdiction, or a reasonable belief that there would be. There were only two cases where the defendants had neither. In one the court held it had no jurisdiction and the other involved a sister state family support order involving special statutory considerations.
[157] Brand at 19 **[JBA, Vol. III, Tab 91]**. In a more recent and less detailed litigation guide, Professor Brand simply identifies the different approaches which exist in the American jurisprudence. The ordering of the discussion confirms the earlier point about the logical primacy of jurisdictional over substantive analysis: Ronald A. Brand, "Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments" (2012-2013) 74 U Pitt L Rev 491 at 492 and 505-507 **[JBA, Vol. III, Tab 90]**.
[158] *Daimler AG* at 759-761 **[JBA, Vol. I, Tab 25]**.
[159] *Ibid* at 763. The minority decision of Sotomayor J., concurring in the result, emphasized that comity dictates that some disputes be left to jurisdictions which have a more legitimate interest in adjudicating them: *Ibid* at 765 of the concurring judgment **[JBA, Vol. I, Tab 25]**.

the importance to corporations of predictability in jurisdictional rules when they are making business and investment decisions.[160]

85. Significantly for the corporate separateness issue, the *amicus* Brief urged the importance of accepting established principles of corporate separateness for jurisdictional purposes, having regard to the fact that an "inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity."[161] These sentiments echo those expressed by this Court in *Van Breda* about the importance of stability and predictability in the promotion of comity, order and fairness in a modern system of private international law.[162]

86. The risks to international comity were also cited by the Irish High Court earlier this year in a case that adopted the U.S. position on the requirement to establish the jurisdiction of an enforcing court before adjudicating the merits in an R & E action. It cited with approval the following views of an international commercial arbitration expert, commenting on the excessive exercise of jurisdiction involved in seeking to enforce an award in a jurisdiction where the judgment debtor has no assets or other connection:[163]

> If neither of the parties to an arbitration, nor the substance of the dispute, has any connection with the particular national forum, jurisdictional issues may arise in seeking to recognise and enforce a foreign arbitral award in that forum. In many states, national courts are unable to exercise jurisdiction unless a defendant (or, in enforcement actions, its assets), has sufficient contacts with the State in question. Indeed, a State's assertion of judicial jurisdiction over parties that had no contacts with the State would raise significant international law issues. [Emphasis in original]

87. In the context of a service *ex juris* rule requiring leave of the court and involving some discretion, the English Court of Appeal has held that assets in the jurisdiction is not a pre-requisite for leave. However, a good arguable case test applies if jurisdiction is challenged, and the plaintiff must ordinarily show some reasonable expectation of benefit from the enforcement action. "Otherwise there would be no useful purpose in the proceedings." Where the foreign judgment resulted from the fraud of the judgment debtor, there was the necessary "reasonable possibility" that he might in future have assets in England.[164]

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[160] Brief for the United States (Solicitor General) as Amicus Curiae Supporting Petitioner in *Daimler AG* (5 July 2013) at 2-3 [Amicus Brief] **[JBA, Vol. III, Tab 105]**. The decision of the Court referred to the importance of these factors, citing the Amicus Brief with approval: *Daimler AG* at 763 **[JBA, Vol. I, Tab 25]**.
[161] Amicus Brief at 2; See also 5 and 18-20 **[JBA, Vol. III, Tab 105]**.
[162] *Van Breda SCC* at para 74 **[JBA, Vol. I, Tab 23]**.
[163] *Yukos Capital* at paras 68-71 **[JBA, Vol. II, Tab 75]**, citing Gary B. Born, *International Commercial Arbitration*, vol 2 (The Netherlands: Kluwer Law International, 2009) at 2399-2400.
[164] *Tasarruf Mevduati Sigorta Fonu v Demirel*, [2007] EWCA Civ 799 at paras 27-29 and 40, [2007] 2 All ER (Comm) 925 (CA) **[JBA, Vol. II, Tab 70]**.

88. More recently, the English Court of Appeal denied service *ex juris* in an arbitral award enforcement case. While acknowledging the need to keep current with "the increasingly sophisticated world of international movement of goods, assets and money", the Court considered it necessary to "stick fast to principle and reality". It concluded that the attempt to pierce the corporate veil to found jurisdiction over a foreign company was "hopeless", and that the purpose of the service *ex juris* rule was only "to enable enforcement of a judgment against assets within this country that belong to a defendant who is out of the jurisdiction."[165]

THE DICTATES OF COMITY

Inconsistency and Errors in the Court of Appeal's Approach

89. The Court of Appeal in the case at bar took an inconsistent approach to the doctrine of comity, detecting "no comity concern" when dismissing the cross-appeals on jurisdiction, but then invoking it on the appeal from the discretionary stay.

90. On the jurisdictional cross-appeals, the Court of Appeal dismissed the imperatives of comity as being of no concern in an R & E case, "because the Ontario court does not purport to intrude on matters that are properly within the jurisdiction of the foreign court [when] [i]ts only inquiry of the foreign court is whether it had a real and substantial connection to the subject matter of the action."[166]

91. This rationale depends upon a misinterpretation of *Beals*, as outlined above. Moreover, when adjudicating the merits of an R & E case like this one, the inquiry is not limited to whether the foreign court properly exercised its jurisdiction. Instead, it extends to the manner in which that jurisdiction was exercised and whether the judgment was procured by fraud and corruption, requiring an evaluation of a foreign country's judicial process.

92. The Court of Appeal's analysis presumes the legitimacy of an Ontario court evaluating the foreign judicial process and determining the validity of a foreign judgment obtained by anyone, against anyone, on any claim, from any court in the world, and regardless of whether Ontario has any interest in the matter whatsoever. Nowhere in its reasons does the Court of Appeal appear to have considered the inappropriateness of an Ontario court adjudicating on the integrity of the Ecuador proceedings when Ontario has no connection whatsoever to any of the foreign parties, the foreign judgment, or the underlying claim and no interest in the matter.

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[165] *Linsen International Limited v Humpuss Transportasi Kimia,* [2011] EWCA Civ 1042 at paras 11-12, 17-24 and 30 **[JBA, Vol. II, Tab 52]**.
[166] Appeal Decision at para 33 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 71]**.

93. Moreover, when discussing the motion judge's discretionary stay, the Court of Appeal relied on the *forum non conveniens* application of comity in *BNP Paribas*, concluding that the case at bar "cries out for assistance" rather than barriers.[167] However, this rationale focuses on the interests of the Plaintiffs to the exclusion of those of the foreign defendant, let alone those of foreign courts. It is the relationship with and respect for foreign courts which should be the focus of inquiry into the implications of comity for jurisdictional analysis.

Comity Is a Balancing Exercise

94. In one of its aspects, comity obviously favours R & E in appropriate circumstances, but it is not a unidirectional concept. It does not dictate that a court must always "grant its assistance", to use the rationale from the *BNP Paribas* decision in 2002.[168] Instead, as this Court has more recently explained, the principle of comity requires "a balancing exercise",[169] and the real and substantial connection test serves to resolve competing considerations:[170]

> The real and substantial connection test arose out of decisions of this Court that were aimed at establishing broad and flexible principles to govern the exercise of provincial powers and the actions of a province's court. It was focussed on two issues: (1) the risk of jurisdictional overreach by provinces and (2) the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries.

95. *Pro Swing* teaches that in assessing jurisdictional questions, "care must be taken to ensure that the law and the justice system are not harmed by engaging them too quickly in a manner that accommodates only one aspect of comity."[171] The same caution was expressed in *Beals* by LeBel J. Although dissenting in the result and on some aspects of the analysis, his observations bear particular consideration given that he wrote for the entire Court in *Van Breda*:

(a) Important differences remain between the considerations applicable to the enforcement of foreign judgments and those of sister provinces, and the principle of comity does not give rise to any absolute obligation in the former case;[172]

(b) While the desirability of facilitating the flow of commerce across international boundaries led this Court in *Morguard* to adopt a more liberal approach to the enforcement of foreign judgments, the principle of comity should still be applied in a "context-sensitive" manner;[173]

(c) "In our enthusiasm to advance beyond the parochialism of the past, we should be careful not to overshoot [the] goal";[174] and

(d) "Jurisdiction should be acknowledged as proper where the forum was a reasonable place to hear the action, taking into account all the circumstances, including judicial efficiency

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[167] Appeal Decision at paras 71-72 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 78]**.
[168] Appeal Decision at para 71 citing *BNP Paribas* **[Appellants' Record, Part I, Vol. I, Tab 4, p. 78]**.
[169] *Pro Swing* at para 27 **[JBA, Vol. II, Tab 62]**.
[170] *Van Breda SCC* at para 22 **[JBA, Vol. I, Tab 23]**.
[171] *Pro Swing* at para 33 **[JBA, Vol. II, Tab 62]**.
[172] *Beals* at paras 166-169 and 174 **[JBA, Vol. I, Tab 10]**.
[173] *Ibid* at para 170 **[JBA, Vol. I, Tab 10]**.
[174] *Ibid* at para 173 **[JBA, Vol. I, Tab 10]**.

> and the legitimate interests of both parties. At the same time, it should not be forgotten that the jurisdiction test is a safeguard of fairness to the defendant."[175]

The Appropriate Use of Judicial Resources Is Relevant

96. Although the motion judge did not see it as relevant to the jurisdictional question, the efficient use of judicial resources was central to his determination that a stay of proceedings was appropriate.[176] This engages another aspect of this Court's reasoning in *Pro Swing*:[177]

> In addition to considering alternate means to reach a particular outcome, a court may consider whether the matter merits the involvement of the Canadian court. ...
>
> ... [W]hen the circumstances give rise to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the matter is worth going forward with.
>
> The appropriateness of using local judicial resources is a factor included in the convenience aspect of the principle of comity. ... [Emphasis added]

97. The longstanding disinclination of the courts to engage in moot disputes applies with even greater force today, in the face of concerns which this Court has voiced about access to justice and the correlative need for increasing efficiency in the use of judicial resources.[178]

Some Legitimate Purpose Required to Pass Judgment on a Foreign Court

98. The dictates of comity are not honoured when, on the conclusions reached by the motion judge, any determination of the validity of the Ecuador Judgment can have no impact whatsoever in Ontario and no useful purpose will be served by the use of its judicial resources.

99. Even more substantively, it does not respect comity for an Ontario court to consider whether the judgment of a foreign court is vitiated by fraud and corruption, when Ontario has no interest in whether it is recognized or not. Comity instead dictates that this question be left to those courts which have a legitimate interest and a resulting obligation to decide it.

NO ARGUABLE CASE FOR PIERCING CHEVRON CANADA'S VEIL

100. In this case, with Chevron Corp. having no presence of its own in Ontario, any real and substantial connection with the province depends upon the Plaintiffs' attempt at multiple reverse piercings of the corporate veil. The motion judge rejected the "bald pleading" that the assets of Chevron Canada are beneficially owned by Chevron Corp., noting that recent authority of this

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[175] *Ibid* at para 181 **[JBA, Vol. I, Tab 10]**.
[176] Motion Decision at para 111 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 49]**.
[177] *Pro Swing* at paras 46-48 **[JBA, Vol. II, Tab 62]**. See also *Khan* at para 24, where it was "the comity factor" which dictated that the court decline jurisdiction **[JBA, Vol. II, Tab 45]**.
[178] *Hryniak v Mauldin*, 2014 SCC 7 at paras 1-4, 366 DLR (4th) 641 **[JBA, Vol. II, Tab 38]**.

Court confirms that the assets of a subsidiary company are not owned by even its immediate parent, let alone one seven levels removed.[179] It is submitted that he was correct to conclude that "[t]here is no basis in law or fact for such a claim" in this case.[180]

Corporate Separateness is a Bedrock Principle of Canadian Corporate Law

101. The fundamental proposition that corporations are separate and distinct legal persons is a bedrock principle of Canadian corporate law.[181] It has been recognized and cited with approval by Canadian courts since the seminal case of *Salomon v. Salomon & Co.*[182] It has "long been the law" in Canada that the independent legal personalities of a parent corporation and its subsidiaries are respected except in very limited circumstances.[183] This Court recently emphasized that, "unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected".[184]

102. The principle of corporate separateness plays an important part in a Western economy. The limited liability offered by the doctrine of corporate separateness is an integral feature of the business landscape, facilitating entrepreneurship and the raising of capital to initiate or expand business operations.[185] As Justice Douglas put it for the U.S. Supreme Court decades ago, "[l]imited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."[186]

103. These sentiments have continued to find expression in the case law ever since.[187] To cast doubt upon the applicability of this principle, in the absence of any of the exceptional circumstances that may warrant a piercing of the corporate veil, would create widespread uncertainty and concern in the Canadian capital markets.[188]

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[179] Motion Decision at para 93 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 43]**, citing *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at paras 34-35, [2008] 3 SCR 560 **[JBA, Vol. I, Tab 9]**.
[180] Motion Decision at para 109 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 48-49]**.
[181] The principle of corporate separateness is also codified in federal and provincial business corporation statutes. See for example s 15(1) and 45(1) of the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*] **[JBA, Vol. III, Tab 77]** and s 15 of Ontario's *Business Corporations Act*, RSO 1990, c B.16 **[JBA, Vol. III, Tab 76]**.
[182] *Salomon v Salomon & Co.*, [1897] AC 22 HL (Eng) **[JBA, Vol. II, Tab 63]**.
[183] *Fairview Donut Inc. v The TDL Group Corp.*, 2012 ONSC 1252 at para 653, 212 ACWS (3d) 635 [*Fairview Donut*], aff'd 2012 ONCA 867, leave to appeal refused, [2013] SCCA No 47 (QL) **[JBA, Vol. I, Tab 30]**.
[184] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para 238, [2013] 1 SCR 271 **[JBA, Vol. II, Tab 69]**.
[185] J. Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3d ed (Toronto: Irwin Law Inc., 2009) at 116, 118-119 **[JBA, Vol. III, Tab 106]**; See also *Clarkson Co. Ltd. v Zhelka et al.*, [1967] 2 OR 565 at para 77, 64 DLR (2d) 457 (HC) [*Clarkson Co. Ltd.*] **[JBA, Vol. I, Tab 22]**.
[186] *Anderson v Abbott*, 321 US 349 at 362 (1944) **[JBA, Vol. I, Tab 6]**.
[187] See for example *Hogarth v Rocky Mountain Slate Inc.*, 2013 ABCA 57 at paras 67-68, 360 DLR (4th) 119, leave to appeal refused, [2013] SCCA No 160 (QL) **[JBA, Vol. II, Tab 37]**.
[188] Kevin P. McGuinness, *Canadian Business Corporations Law*, 2d ed (Markham: Lexis Nexis Canada Inc., 2007) at 74-75 **[JBA, Vol. III, Tab 98]**.

104. A long line of Canadian appellate authority establishes a two-part test for ignoring the separate legal identity of a corporation and its shareholders. Among the most often cited is a decision of Sharpe J. (as he then was) granting summary dismissal of a claim against a parent corporation in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*:[189]

> As just indicated, the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently: [citations omitted]. The evidence before me indicates that the relationship between Canada Life and C.L.M.S. was that of a typical parent and subsidiary.

105. The underlying rationale for the limited circumstances in which the corporate veil may be pierced is "to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights."[190] Where, as here, the court finds that a subsidiary has been set up for a legitimate business purpose, there can be no justification for disregarding its separate legal existence.[191]

106. Canadian law has followed the law in the United Kingdom in rejecting any "group enterprise" theory of corporate liability. In a decision setting aside service *ex juris* upon the multinational parent of a Canadian corporation, the Alberta Court of Appeal observed:[192]

> ... It is true that Broken Hill operates a number of its worldwide companies as an integrated economic unit. But the mere fact it does so does not mean that for legal purposes, separate legal entities will be ignored absent some compelling reason for lifting the corporate veil. As noted in *Adams v. Cape Industries PLC* [1990] 1 Ch. 438 (C.A.) 536, citing Goff, L.J. in *Bank of Tokyo Ltd. v. Karoon*, (Note) [1987] A.C. 45:
>
> > [Counsel] suggested ... that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he

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[189] *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* (1996), 28 OR (3d) 423 at para 22, 62 ACWS (3d) 891 Ct J (Gen Div) [*Transamerica*], aff'd (1997), 74 ACWS (3d) 207 (CA) **[JBA, Vol. II, Tab 73]**. In *Transamerica*, the subsidiary, CLMS, was wholly owned by the defendant, Canada Life, and its board of directors was comprised of Canada Life executives. Despite this evidence, the Court found that the relationship between CLMS and Canada Life was that of a typical parent and subsidiary because CLMS had independent management and conducted a business separate and distinct from that of its parent. The Court held that there was no evidence sufficient to give rise to a triable issue that CLMS was the mere puppet of Canada Life. In the case at bar, unlike in *Transamerica*, Chevron Corp. and Chevron Canada have separate boards of directors with no overlapping executives. See also *Gregorio v Intrans-Corp.* (1994), 18 OR (3d) 527 at para 28, 115 DLR (4th) 200 (CA) [*Gregorio*] **[JBA, Vol. I, Tab 35]**; *Haskett v Equifax Canada Inc.* (2003), 63 OR (3d) 577 at para 61, 224 DLR (4th) 419 (CA) [*Haskett*], leave to appeal refused, [2003] SCCA No 208 (QL) **[JBA, Vol. II, Tab 36]**; *Sauer v Canada (Attorney General)* (2006), 79 OR (3d) 19 at para 89, 144 ACWS (3d) 1129 (Sup Ct), aff'd 2007 ONCA 454, leave to appeal refused, [2007] SCCA No 454 (QL) **[JBA, Vol. II, Tab 64]**; *Boyd v Wright Environmental Management Inc.*, 2008 ONCA 779 at paras 44-45, 303 DLR (4th) 747 **[JBA, Vol. I, Tab 12]**; *Parkland Plumbing & Heating Ltd. v Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256 at paras 49-51, 305 DLR (4th) 577 **[JBA, Vol. II, Tab 60]**; *Abener Energia, S.A. v Sunopta Inc.*, [2009] OJ No 2487 (QL) at paras 18-19, 61 BLR (4th) 313 (Ont Sup Ct), aff'd 2010 ONCA 57 **[JBA, Vol. I, Tab 2]**; *Globex Foreign Exchange Corp. v Launt*, 2011 NSCA 67 at para 57, 335 DLR (4th) 257 **[JBA, Vol. I, Tab 33]**; *Shoppers Drug Mart Inc. v 6470360 Canada Inc.*, 2014 ONCA 85 at para 43, 237 ACWS (3d) 390, leave to appeal submitted, [2014] SCCA No 119 (QL) **[JBA, Vol. II, Tab 67]**.

[190] Motion Decision at para 95(li) **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 43-44]**, quoting *Gregorio* at para 28 **[JBA, Vol. I, Tab 35]**.

[191] See *Haskett* at paras 62-63 **[JBA, Vol. II, Tab 36]**.

[192] *Cunningham v Hamilton* (1995), 169 AR 132 at para 4, 29 Alta LR (3d) 380 (CA) (O'Leary J.A. dissenting in part but not on this point of law) **[JBA, Vol. I, Tab 24]**. See also *Apotex Inc. v Sanofi-Aventis*, [2008] OJ No 85 (QL) at paras 16-18, 163 ACWS (3d) 230 (Ont Sup Ct), aff'd 2008 ONCA 724, 170 ACWS (3d) 741 **[JBA, Vol. I, Tab 7]** and *Martin v Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at paras 117-127, 27 CPC (7th) 32, aff'd 2013 ONSC 1169, OJ No 1182 (Div Ct) **[JBA, Vol. II, Tab 54]**.

> said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged. [Emphasis added]

107. The *Adams v. Cape Industries* case provides an extensive analysis of various veil-piercing theories, following 17 days of oral argument in the English Court of Appeal.[193] It is a leading case in England and is often-cited in Canada. It is of particular interest here as it involved a failed attempt to pierce the corporate veil in aid of an attempt to establish jurisdiction. The issue was the enforceability of a Texas default judgment against the parent of a group of companies which mined asbestos in Africa and sold it in the U.S. through an Illinois marketing agency. Enforcement in the U.K. depended upon the parent company itself having a sufficient presence in the U.S. to warrant the U.S. court having asserted jurisdiction over it.

108. The English Court of Appeal rejected each of the theories advanced - group enterprise, piercing the corporate veil, and agency.[194] In doing so, it commented upon many of the arguments advanced by the Plaintiffs in the courts below, most notably as follows:[195]

> As to the relationship between Cape and N.A.A.C., it is of the very nature of a parent company-subsidiary relationship that the parent company is in a position, if it wishes, to exercise overall control over the general policy of the subsidiary. ... A degree of overall supervision, and to some extent control, was exercised by Cape over N.A.A.C. as is common in the case of any parent-subsidiary relationship - to a large extent through Dr. Gaze. In particular, Cape would indicate to N.A.A.C. the maximum level of expenditure which it should incur and would supervise the level of expenses incurred by Mr. Morgan. Mr. Morgan knew that he had to defer in carrying out the business activities of N.A.A.C. to the policy requirements of Cape as the controlling shareholders of N.A.A.C. Within these policy limits ... the day-to-day running of N.A.A.C. was left to him.

There Are No Allegations, Let Alone Evidence, of Complete Control

109. Taking guidance from *Transamerica*, the motion judge approached his assessment of the evidentiary record on the following basis:[196]

> Complete control requires more than ownership, but necessitates a demonstration that there is complete domination of the subsidiary corporation and the sub does not, in fact, function independently - or, as put in one case, a demonstration that the subsidiary is a "puppet" of the parent... [Citations omitted]

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[193] *Adams v Cape Industries Plc*, [1990] 1 Ch 433 at 505, [1990] 2 WLR 657 (Eng CA) [*Adams*] **[JBA, Vol. I, Tab 3]**.
[194] *Ibid* at 530-532 **[JBA, Vol. I, Tab 3]**. See also 456 for a listing of the issues at the trial level.
[195] *Ibid* at 538 **[JBA, Vol. I, Tab 3]**.
[196] Motion Decision at para 95(li)(a) **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 43-44]**.

110. Mere share ownership does not constitute complete control. Nor does the preparation of consolidated financial statements, the setting of general company policy, the provision of "support" by the parent corporation or reporting to the parent by the subsidiary.[197] These are typical and appropriate aspects of any parent-subsidiary relationship given the legislative requirements in the jurisdiction where Chevron Corp. is domiciled.[198]

111. Chevron Corp.'s Form 10-K makes it obvious that the world-wide operations of the Chevron organization are too vast to be managed by the management team or board of directors of Chevron Corp. itself.[199] They could not comply with their statutory and fiduciary obligations to public shareholders without a structure that provides for reporting from and monitoring of the performance of the company's direct and indirect subsidiaries.

112. Good corporate governance requires the review and approval of business plans and budgets, and the reporting of major commitments and results through operating segments to publicly-traded parent companies. Enhanced legislative requirements, born of high profile corporate governance failures, have imposed strict obligations of supervision and disclosure upon publicly-traded multinationals such as Chevron Corp.

113. The *Sarbanes-Oxley Act of 2002* places a high burden on signing officers to ensure that material information relating to the company and its consolidated subsidiaries is made known to them.[200] For example, under s. 302, corporate signing officers must certify that for purposes of the public disclosure required by the *Securities Exchange Act*, the company has designed "internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared".[201]

114. A degree of control over subsidiaries is also expressly contemplated and allowed under the *CBCA*, the statute under which Chevron Canada was created.[202]

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[197] Motion Decision at para 100 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 46-47]**; See also *Transamerica* at paras 13-16 and 22 **[JBA, Vol. II, Tab 73]** and *International Trademarks, Inc. v Clearly Canadian Beverage Corp.*, [1999] BCJ No 117 (QL) at para 28, 47 BLR (2d) 193 (BCSC) **[JBA, Vol. II, Tab 43]**.

[198] Motion Decision at para 102 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 47]**; See also *Transamerica* at 13-16 and 22 **[JBA, Vol. II, Tab 73]**; *Adams* at 474 and 538 **[JBA, Vol. I, Tab 3]**; and *Fairview Donut* at paras 662-663 **[JBA, Vol. I, Tab 30]**.

[199] Soler Affidavit at Exhibit B (Chevron Corporation 2011 10-K Form) **[Appellants' Record, Part III, Vol. II, Tab 15B, p. 1]**.

[200] *Sarbanes-Oxley Act* of 2002, Pub L No 107-204, 116 Stat 745 [*Sarbanes-Oxley Act*] **[JBA, Vol. III, Tab 87]**.

[201] *Ibid* at §302(a)(4)(B) **[JBA, Vol. III, Tab 87]**. James Hamilton and Ted Trautmann in *Sarbanes-Oxley Manual: A Handbook for the Act and SEC Rules* (Chicago: CCH Incorporated, 2003) at 13 **[JBA, Vol. III, Tab 94]** describe the *Sarbanes-Oxley Act* as a "landmark piece of legislation ... [that] establishes a comprehensive framework to modernize and reform the oversight of public company auditing, improve quality and transparency in financial reporting by those companies, and strengthen the independence of auditors. Congress enacted the law to address systemic and structural weaknesses affecting the capital markets that were revealed by widespread auditing failures and deficiencies in corporate governance, responsibility and disclosure."

[202] *CBCA*, ss. 2(3), 2(5) and 5(2) **[JBA, Vol. III, Tab 77]**.

115. None of the factors that the courts normally consider to determine whether a subsidiary is under the complete domination and control of the parent ("alter ego" or "puppet") are present in this case. Indeed, there are no allegations, let alone evidence, that Chevron Canada is undercapitalized,[203] was formed solely for the purposes of the transaction at issue,[204] fails to observe corporate formalities,[205] was created merely to deflect monies from their proper usage,[206] does not have its own assets, skills or employees,[207] or does not have its own offices, accounting, tax and legal personnel.[208]

116. The motion judge correctly rejected the contention that occasional guarantees of debt financings and project-related performance obligations (none of which were ever called upon), were any indication that Chevron Corp. and Chevron Canada possess a single legal identity.[209]

There Are No Allegations, Let Alone Evidence, of Fraud or Impropriety

117. No fraud or impropriety in the establishment of the corporate structure is even alleged in this case. Indeed, the Appellants expressly disavow it.[210] There is no suggestion whatsoever that the long-established Canadian corporation and its indirect parent exist and carry on business for anything other than legitimate purposes. As the motion judge observed:[211]

> Under Ontario law, the absence of any pleading of such material facts or the adducing of any evidence to support some arguable case on the issue of improper conduct, coupled with the plaintiffs' admission that they are not alleging any wrongdoing against Chevron Canada, are fatal to the plaintiffs' assertion ... that the separate corporate identity of Chevron Canada should be ignored ..."

The Appellants' Theories Have No Merit

118. Unable to establish either of the two criteria required for piercing even a single corporate veil, the Plaintiffs in the courts below put forward several alternate theories for reverse piercing the seven levels between Chevron Corp. and Chevron Canada. None have any merit in Canadian law in the circumstances of this case. The motion judge correctly rejected all of them.[212]

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[203] *Shillingford v Dalbridge Group Inc.* (1996), 197 AR 56 at paras 14 and 27, [1997] 3 WWR 645 (QB) [*Shillingford*] **[JBA, Vol. II, Tab 66]**.
[204] *Ibid* at para 27 **[JBA, Vol. II, Tab 66]**.
[205] See for example *Clarkson Co. Ltd.* at paras 18-20 and 86 **[JBA, Vol. I, Tab 22]**.
[206] *Shillingford* at para 27 **[JBA, Vol. II, Tab 66]**.
[207] *Ibid* at para 28 **[JBA, Vol. II, Tab 66]**.
[208] See for example *Toronto (City) v Famous Players' Canadian Corporation Ltd.*, [1936] SCR 141, 2 DLR 129 **[JBA, Vol. II, Tab 72]**.
[209] Motion Decision at para 101 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 47]**.
[210] Amended Statement of Claim at para 21 [ASOC] **[Appellants' Record, Part II, Vol. I,Tab 9, p. 107]**.
[211] Motion Decision at para 106 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 48]**.
[212] *Ibid* at paras 97-98 and 107 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 45-46 and 48]**.

119. While the Court of Appeal did not address these arguments, it is to be expected that the Plaintiffs will put them forward once again in this Court. Brief comment is thus warranted here on the Plaintiffs' various theories:

(a) Based on *obiter dicta* in this Court's decision in the *Kosmopoulos* case, corporate separateness can be ignored when it would yield a result "too flagrantly opposed to justice";[213]

(b) Corporate separateness should be analyzed differently when seeking to access the assets of a subsidiary to satisfy the liability of a parent ("descending veil piercing") than when the opposite is attempted ("ascending veil piercing"); and

(c) The corporate separateness of Chevron Canada should be assessed using principles developed in completely different circumstances involving special policy considerations – common employers, family law, income tax avoidance, and the vicarious liability of charities.

Obiter in Kosmopoulos is Not the Law in Canada

120. There is no principle in Canadian law that corporate separateness can be ignored merely on the basis that it will yield a result "too flagrantly opposed to justice." Any such suggestion has been authoritatively rejected in a line of authority commencing with the *Transamerica* case.[214]

121. Indeed, the *Kosmopoulos* case actually impales rather than supports the Plaintiffs' position. The case makes it clear that even complete domination and control is not by itself a sufficient ground to pierce the corporate veil. Nor could it be, or there would never be any limited liability for companies owned and operated by a single shareholder. After he incorporated his company, Mr. Kosmopoulos was its sole shareholder and director, carrying on its business in all respects as if it was his own.[215] Despite this total control, this Court concluded that he could not be regarded as the owner of the company's assets.[216]

There is No Ascending v. Descending Veil Piercing Distinction

122. Before the Court of Appeal, the Plaintiffs argued that there are significant legal and policy differences between the "descending" veil piercing from parent to subsidiary sought here, and the more usual "ascending" attempt from subsidiary to parent.[217] There is no authority for

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[213] *Kosmopoulos v Constitution Insurance Co. of Canada*, [1987] 1 SCR 2 at 10-11, 34 DLR (4th) 208 [*Kosmopoulos*] **[JBA, Vol. II, Tab 46].**
[214] *Transamerica* at paras 13-16 **[JBA, Vol. II, Tab 73].**
[215] *Kosmopoulos* at 7 **[JBA, Vol. II, Tab 46].**
[216] *Ibid* at 12 **[JBA, Vol. II, Tab 46].** The case was resolved in Mr. Kosmopoulos' favour on a different basis, namely that he had an insurable interest in those assets sufficient to support a claim on a fire insurance policy obtained in his name rather than that of the corporation.
[217] Plaintiffs' Factum at para 119 **[Appellants' Record, Part III, Vol. III, Tab 22, p. 59].**

this proposition, nor any commercial common sense to the assertion that the assets of a wholly-owned subsidiary deserve no protection from seizure in such circumstances.

123. Multiple third party stakeholders rely every day upon the principle of corporate separateness in their dealings with subsidiary corporations. It would defeat the expectations of these stakeholders if the income and assets upon which they depend for performance of the subsidiary's obligations provided no such security, and if their due diligence need henceforth extend to the ultimate parent company and all of its worldwide subsidiaries.

124. Indeed, there is from a policy standpoint even less justification for "descending" than for "ascending" veil piercing. In the latter case, undercapitalization of a subsidiary conducting operations which expose third parties to the risk of harm is one of the factors which courts consider in the application of the tests for piercing a corporate veil. That factor has no application to a "descending" veil piercing.

Common Employer, Tax, Family and Charitable Trust Cases Do Not Apply

125. ***Common Employer Doctrine:*** In the courts below, the Plaintiffs sought to rely upon the common employer doctrine used in cases such as *Downtown Eatery*.[218] However, that doctrine has been rejected as having no application to the sort of veil piercing sought here:[219]

> These cases involve the common employer doctrine that recognizes that it is possible for an employee to have more than one employer for the purposes of the contractual and fiduciary obligations that exist between an employer and an employee. In the case at bar, this case law is not remotely applicable given that there was no employee-employer relationship between Miquelanti and the Defendants and there was no dealing at all between Miquelanti and FLSmidth (Denmark). [Emphasis added]

126. ***Tax Avoidance:*** The Plaintiffs also cited tax cases which utilize alter ego or agency theories in assessing corporate separateness, but ignored the caution which this Court and others have consistently expressed against relying on such cases in other contexts.[220]

127. ***Family Law:*** The length to which the Plaintiffs were forced to go in search of support for their position was reflected in their reliance below upon passages from a family law case. That reliance ignores the family law context and the Court's explanation of the policy considerations

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[218] *Downtown Eatery (1993) Ltd. v Ontario* (2001), 54 OR (3d) 161 at paras 2-3 and 30-33, 200 DLR (4th) 289 (CA), leave to appeal refused, [2001] SCCA No 397 (QL) **[JBA, Vol. I, Tab 26].**

[219] *Miquelanti Ltda. v FLSmidth & Co. (c.o.b. FLSmidth Krebs Inc.),* 2011 ONSC 3293 at paras 23-24, 203 ACWS (3d) 29 **[JBA, Vol. II, Tab 56];** See also *Durling v Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196 at para 118, 68 CELR (3d) 231 **[JBA, Vol. I, Tab 27].**

[220] *Buanderie centrale de Montréal Inc. v Montreal (City),* [1994] 3 SCR 29 at 49, [1995] 1 CTC 223 **[JBA, Vol. I, Tab 13];** See also *Emtwo Properties Inc. v Cineplex (Western Canada) Inc.,* 2011 BCSC 1072 at para 106, 90 BLR (4th) 231 **[JBA, Vol. I, Tab 29]** and *Fairview Donut* at para 659 **[JBA, Vol. I, Tab 30].**

which sometimes require that the corporate separateness of the business enterprise of one spouse be ignored to ensure that the other spouse and children receive financial support .[221]

128. ***Vicarious Charitable Trust Liability:*** The Plaintiffs' effort to build an "enterprise liability" theory based on *Christian Brothers of Ireland in Canada (Re)* was likewise misguided.[222] That case involved the vicarious liability of non-profit corporations for intentional torts committed by employees. The Court held that the existence of charitable purpose trusts does not affect the exigibility of trust assets.[223] Chevron Canada is not a charitable special-purpose trust. Neither its assets nor its shares are held by Chevron Corp. in trust or otherwise.

Conclusion on Corporate Separateness

129. With no credible basis to pierce the corporate veil in this case, it is clear that Chevron Corp. has no business or assets in Ontario, nor for that matter anywhere in Canada. There is no other connection between Ontario and Chevron Corp. or the Plaintiffs' claim, let alone the real and substantial one required for a Canadian court to assume jurisdiction.

THE "GOOD ARGUABLE CASE" STANDARD BALANCES INTERESTS

130. The motion judge held that the Plaintiffs have "no hope of success" on their attempt to pierce the corporate veil of Chevron Canada and treat its assets as those of Chevron Corp.[224] The Court of Appeal held instead that these issues "deserve to be addressed and determined, if not at trial, at least in the context of a record and legal arguments."[225]

131. However, in this case, the Plaintiffs put corporate separateness in issue in their pleadings, requesting a determination that the corporate veil could be pierced, because that is the sole basis upon which they could assert any connection to Ontario.[226]

132. As outlined above, Chevron Corp. and Chevron Canada bore the burden of rebutting both the assertion of this jurisdictional fact and the presumption created by the foreign judgment. They were obliged to file Affidavits demonstrating their corporate separateness in order to challenge jurisdiction.[227] The Plaintiffs could have adduced their own evidence on the

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[221] *Lynch v Segal* (2006), 82 OR (3d) 641 at paras 36-37, 277 DLR (4th) 36 (CA), leave to appeal refused, [2007] SCCA No 84 (QL) **[JBA, Vol. II, Tab 53].**
[222] Motion Decision at para 107 **[Appellants' Record, Part I, Vol. I, Tab 2, p. 48].** The Motion Decision dismisses the Plaintiff's argument with regard to *Christian Brothers of Ireland in Canada (Re)* (2000), 47 OR (3d) 674, 184 DLR (4th) 445 (CA) [*Christian Brothers*], leave to appeal refused, [2000] SCCA No 277 (QL) **[JBA, Vol. I, Tab 21].**
[223] *Christian Brothers* at para 94 **[JBA, Vol. I, Tab 21].**
[224] Motion Decision at para 109 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 48-49].**
[225] Appeal Decision at para 57 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 75].**
[226] ASOC at paras 15-17 and 20-22 **[Appellants' Record, Part II, Vol. I, Tab 9, pp. 105-106 and 106-107].**
[227] Motion Decision at para 99 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 46].**

issue if any existed, but they offered none. Instead, they took advantage of their opportunity to cross-examine the deponents and seek undertakings and production of documents.

133. For example, and as addressed in more detail below, the Plaintiffs were able to explore the constitution of the boards of directors and the nature of the business of all the companies in the chain of ownership between Chevron Canada and Chevron Corp. They obtained copies of Chevron Corp.'s internal corporate governance policies describing lines of reporting, financial accountability, and the significant scope of decision-making authority accorded to Chevron Canada's management. They obtained copies of the relevant portions of every one of the reports made to Chevron Corp.'s Executive Committee by Chevron Canada on its oil sands and offshore mega-projects (just 13 reports over a 10-year period). They learned that Chevron Canada has funded these mega-projects entirely from its own cash flow.[228]

134. The Plaintiffs thus had a full opportunity to make their case on facts essential to jurisdiction. This will always be so in a case falling within a rule permitting service *ex juris* or under the *Uniform Act*, having regard to the resulting presumption and the burden of rebutting it.

135. The Court of Appeal correctly states that the propriety of a merely discretionary stay was not argued before the motion judge.[229] However, there was full argument upon the implications of corporate separateness for a stay of proceedings.[230] It was central to the jurisdictional challenge and thus to the request for a stay on that basis. The findings of the motion judge on the evidence are undiminished by the fact that he rejected the jurisdictional challenge and chose to address corporate separateness only in the context of a discretionary stay.

136. In another recent decision, the Court of Appeal held that where an allegation is essential to jurisdiction, the court must engage in a threshold assessment of the merits of that allegation and apply a "good arguable case" test thereto:[231]

> [The motion judge] said: "Any allegation of fact that is not put into issue by the defendant is presumed to be true for the purposes of the [jurisdiction] motion" and "[t]he plaintiff is under no obligation to call evidence for any allegation that has not been challenged by the defendant." However, "[i]f a foreign defendant files affidavit evidence challenging the allegations in the statement of claim that are essential to jurisdiction, the threshold for the plaintiff to meet is that it has a good arguable case on those allegations."
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> ...
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> ... while the good arguable case standard can apply solely to the pleadings, where a defendant adduces evidence to challenge the allegations in the statement of claim, the

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[228] Motion Decision at paras 99-100 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 46-47]**.
[229] Appeal Decision at para 53 **[Appellants' Record, Part I, Vol. I, Tab 4, p. 74]**.
[230] Motion Decision at para 109 **[Appellants' Record, Part I, Vol. I, Tab 2, pp. 48-49]**.
[231] *Ontario v Rothmans Inc.*, 2013 ONCA 353 at paras 74 and 101, 115 OR (3d) 561, leave to appeal refused, [2013] SCCA No 327 (QL) [*Rothmans*] **[JBA, Vol. II, Tab 59]**.

good arguable case standard applies to the combination of the pleadings and the evidence adduced by the parties.

137. The use of a good arguable case standard represents an appropriate balancing of the interests of the parties and the judicial system. It ought to be applied to the determination of jurisdictional facts in any case where jurisdiction over a non-resident defendant is challenged. *Rothmans* suggests the bar may be a low one,[232] but the Plaintiffs here fail to meet it.

COURT OF APPEAL REASONING SIGNALS JURISDICTIONAL OVERREACH

Flawed Impression of the Underlying Dispute

138. The reasoning of the Court of Appeal suggests that it was influenced to assert jurisdiction by a perception of the history of Chevron Corp.'s defence of the underlying claim in the courts of other countries. But a court's impression of the underlying dispute is unreliable as an approach to jurisdictional analysis, as may be well-illustrated in this case having regard to the subsequent decision of Judge Kaplan in the Southern District of New York. The reasoning of the Court of Appeal also suggests a "forum of necessity" approach, which was never argued by the Plaintiffs and has no application to this case.

139. The Court of Appeal makes reference to Texaco's initial resistance to the *Aguinda* Action in New York and Chevron's subsequent refusal to accept the judgment of the Ecuadorian court in the *Lago Agrio* one.[233] However, Ecuador was at the time a more appropriate forum than New York in which to litigate the personal injury and damage claims asserted in the original *Aguinda* Action.[234] Chevron can scarcely be faulted for Texaco's *forum non conveniens* opposition to litigating in New York.

140. Much less does that opposition give a different combination of Plaintiffs *carte blanche* to collect on a judgment based on a different cause of action, and regardless of how tainted it may be with fraud and corruption. The Texaco undertaking was offered to the New York Court in the original *Aguinda* Action, implicitly recognizing the United States as the logical place for any enforcement proceedings. In addition, it specifically preserved an ability to defend against enforcement on grounds essentially the same as those available under Canadian law.[235]

141. The threshold jurisdictional question here is whether an Ontario court ought to undertake the adjudication of the substantive issues which arise in an R & E action when there is no

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[232] *Ibid* at para 106 **[JBA, Vol. II, Tab 59]**.
[233] See for example Appeal Decision at paras 65-73 **[Appellants' Record, Part I, Vol. I, Tab 4, pp. 77-78]**.
[234] *Aguinda* at 477-479 **[JBA, Vol. I, Tab 4]**.
[235] See footnote 24. For defences available under Canadian law see *Beals* at paras 39-77 **[JBA, Vol. I, Tab 10]**.

connection whatsoever between the province and any of the parties or the underlying dispute. Jurisdictional analysis ought not to be influenced by sentiments for or against either of the parties and any resulting desire to express an opinion on the merits of the action. Such an approach leads to jurisdictional overreach – which goes to the core of the constitutional limits on jurisdiction imposed by the real and substantial connection test, as explained in *Van Breda*.[236]

142. The existence of a "constitutional imperative" in Canada removes this case from the realm of mere discretion. This is the answer to the *obiter* suggestion of the High Court of Ireland that in some circumstances R & E may be sought merely "in order to obtain the *imprimatur* of a respected court upon the award."[237] That may well be part of the Plaintiffs' motivation here, and the Court of Appeal endorsed the proposition that "[a] party may bring an action for all kinds of strategic reasons".[238] It is submitted instead that, particularly in the unique circumstances of this case:[239]

> Getting a judgment in an inappropriate forum in the hopes of influencing a court elsewhere is (and will always be) a novel idea, tending to destroy all conflict of laws rules on jurisdiction and recognition.

Reliance Upon the Ecuador Judgment is Circular and Unhelpful

143. The Plaintiffs tendered no evidence and instead based their submissions about Chevron Corp.'s conduct upon the Ecuador Judgment itself and the conclusions expressed therein. This is a circular and unhelpful approach when the validity of that judgment is the very issue to be litigated, particularly when numerous U.S. courts and an international tribunal had already expressed serious doubts on that question.[240] That is made even more clear in light of the subsequent opinion of Judge Kaplan in the Southern District of New York.[241]

Ontario Is Not a Forum of Necessity

144. Finally, there is an obvious flaw in the suggestion that "the Ecuadorian plaintiffs should have an opportunity to attempt to enforce the Ecuador Judgment in a court where Chevron will have to respond on the merits" and "[a]t this juncture, Ontario is that jurisdiction."[242] Upon obtaining their Ecuador Judgment, the Plaintiffs had a readily available and logical jurisdiction in

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[236] *Van Breda SCC* at para 23 **[JBA, Vol. I, Tab 23]**.
[237] *Yukos Capital* at para 128 **[JBA, Vol. II, Tab 75]**.
[238] Appeal Decision at para 70 **[Appellants' Record, Part I, Vol. I, Tab 4, pp. 77-78]**.
[239] *Karaha Bodas Co., L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 2011 ABCA 291 at para 11, 515 AR 14, leave to appeal refused, [2011] SCCA No 527 (QL) **[JBA, Vol. II, Tab 44]**.
[240] See for example *BIT Arbitration* **[JBA, Vol. I, Tab 20]** and *Donziger* **[JBA, Vol. I, Tab 15]**.
[241] Kaplan Decision **[JBA, Vol. I, Tab 16]**.
[242] Appeal Decision at paras 70 and 75 **[Appellants' Record, Part I, Vol. I, Tab 4, pp. 77-78]**.

which Chevron Corp. would have to respond with respect to the merits of enforcing the Ecuador Judgment. That jurisdiction was in the United States, where Chevron Corp. has all of its assets.

145. However, the Plaintiffs refused to seek enforcement there. Chevron Corp. therefore took the initiative to litigate the fraud and corruption issues in New York.[243] The Defendants in that case included the Plaintiffs here and certain of their lawyers and other agents in the Ecuadorian litigation. The validity of the Ecuador Judgment was asserted as an affirmative defence.

146. Following a 7-week trial, Judge Kaplan concluded that the Ecuador Judgment was procured by fraud and unenforceable in that jurisdiction.[244] The present appeal concerns jurisdiction and not the merits of the Ecuador Judgment. As such, the decision is cited not for its conclusion but rather to address the reasoning of the Court of Appeal, and in furtherance of our submissions on the dictates of comity. The decisions of Judge Kaplan and of an international arbitral tribunal illustrate that in this transnational dispute, there are other courts and tribunals with an interest and a need to adjudicate the validity of the Ecuador Judgment. The courts of Ontario have none.

PART IV: SUBMISSIONS ON COSTS

147. It is submitted that Chevron Corp. ought to be awarded its costs of this appeal and of the proceedings below.

PART V: ORDER SOUGHT

148. Chevron Corp. respectfully submits that this appeal should be allowed, and the Plaintiffs' claim dismissed, with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2014

NORTON ROSE FULBRIGHT CANADA LLP
Counsel for Chevron Corporation

per: _____
Clarke Hunter Q.C.
Anne Kirker Q.C
Robert Frank
Jung Lee

[243] See *Donziger* **[JBA, Vol. 1, Tab 15].**
[244] Kaplan Decision at 384 (Part 1), 610 (Part 6), and 617 (Part 6) **[JBA, Vol. 1, Tab 16].**

PART VI - TABLE OF AUTHORITIES

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PART VII - STATUTES AND REGULATIONS BEING RELIED UPON

Tab A. *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 17

Tab B. *Courts of Justice Act*, RSO 1990, c C43, s 106

Excerpts from the following statutes are found in the Joint Book of Authorities of the Appellants:

Canada Business Corporations Act, RSC 1985, c C-4, ss 2(3), 2(5), 5(2), 15, 45

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28, s 10(k)

Court Jurisdiction and Proceedings Transfer Act, SNS 2003, c 2 (2d Sess), s 11(k)

Court Jurisdiction and Proceedings Transfer Act, SPEI 1997, c 61, as amended by SPEI 2008, c 20 (adopted but not yet proclaimed), s 10(j)

The Court Jurisdiction and Proceedings Transfer Act, SS 1997, c C-41.1, s 9(k)

Court Jurisdiction and Proceedings Transfer Act, SY 2000, c 7 (adopted but not yet proclaimed), s 10(1)(k)

Business Corporations Act, RSO 1990, c B-16, s 15

Recognition of Foreign Country Money Judgments Act, NY CPLR Article 53, §5304

Sarbanes-Oxley Act of 2002, Pub L No 107-204, 116 Stat 745, s 302(a)(4)(B)

TAB A

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From January 1, 2014 to the e-Laws currency date.

Last amendment: O. Reg. 231/13.

This is the English version of a bilingual regulation.

GENERAL MATTERS

RULE 1CITATION, APPLICATION AND INTERPRETATION

CITATION

Title

1.01 (1) These rules may be cited as the Rules of Civil Procedure. O. Reg. 575/07, s. 6 (1).

Subdivision

(2) In these rules,

(a) all the provisions identified by the same number to the left of the decimal point comprise a Rule (for example, Rule 1, which consists of rules 1.01 to 1.09);

(b) a provision identified by a number with a decimal point is a rule (for example, rule 1.01); and

(c) a rule may be subdivided into,

(i) subrules (for example, subrule 1.01 (2)),

(ii) clauses (for example, clause 1.01 (2) (c) or 2.02 (a)),

(iii) subclauses (for example, subclause 1.01 (2) (c) (iii) or 7.01 (c) (i)),

(iv) paragraphs (for example, paragraph 1 of subrule 52.07 (1)), and

(v) definitions (for example, the definition of "action" in rule 1.03). R.R.O. 1990, Reg. 194, r. 1.01 (2); O. Reg. 284/01, s. 1; O. Reg. 575/07, s. 6 (2).

Alternative Method of Referring to Rules

(3) In a proceeding in a court, it is sufficient to refer to a rule or subdivision of a rule as "rule" followed by the number of the rule, subrule, clause, subclause or paragraph (for example, rule 1.01, rule 1.01 (2), rule 1.01 (2) (c), rule 1.01 (2) (c) (iii) or rule 52.07 (1) 1). R.R.O. 1990, Reg. 194, r. 1.01 (3).

APPLICATION OF RULES

RULE 17SERVICE OUTSIDE ONTARIO

DEFINITION

17.01 In rules 17.02 to 17.06,

"originating process" includes a counterclaim against only parties to the main action, and a crossclaim. R.R.O. 1990. Reg. 194, r. 17.01.

SERVICE OUTSIDE ONTARIO WITHOUT LEAVE

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Property in Ontario

(a) in respect of real or personal property in Ontario;

Administration of Estates

(b) in respect of the administration of the estate of a deceased person,

(i) in respect of real property in Ontario, or

(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

Interpretation of an Instrument

(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,

(i) real or personal property in Ontario, or

(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

Trustee Where Assets Include Property in Ontario

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

Mortgage on Property in Ontario

(e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;

Contracts

(f) in respect of a contract where,

(i) the contract was made in Ontario,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,

(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

Tort Committed in Ontario

(g) in respect of a tort committed in Ontario;

(h) Revoked: O. Reg. 231/13, s. 5.

Injunctions

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;

(j) Revoked: O. Reg. 131/04, s. 9.

(k) Revoked: O. Reg. 131/04, s. 9.

(l) Revoked: O. Reg. 131/04, s. 9.

Judgment of Court Outside Ontario

(m) on a judgment of a court outside Ontario;

Authorized by Statute

(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

Necessary or Proper Party

(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

Person Resident or Carrying on Business in Ontario

(p) against a person ordinarily resident or carrying on business in Ontario;

Counterclaim, Crossclaim or Third Party Claim

(q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

Taxes

(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality. R.R.O. 1990, Reg. 194, r. 17.02; O. Reg. 171/98, s. 2; O. Reg. 131/04, s. 9; O. Reg. 231/13, s. 5.

RÈGLE 17 SIGNIFICATION EN DEHORS DE L'ONTARIO

DÉFINITION

17.01 La définition qui suit s'applique aux règles 17.02 à 17.06.

«acte introductif d'instance» S'entend en outre d'une demande reconventionnelle contre les parties à l'action principale uniquement et d'une demande entre défendeurs. R.R.O. 1990, Règl. 194, règle 17.01.

SIGNIFICATION EN DEHORS DE L'ONTARIO SANS AUTORISATION DU TRIBUNAL

17.02 L'acte introductif d'instance ou l'avis d'un renvoi peut être signifié sans l'autorisation du tribunal à une partie se trouvant en dehors de l'Ontario si la ou les demandes contre cette partie, selon le cas :

Biens se trouvant en Ontario

a) se rapportent à des biens meubles ou immeubles se trouvant en Ontario;

Administration de successions

b) se rapportent à l'administration de la succession d'un défunt relativement :

(i) soit, à des biens immeubles se trouvant en Ontario,

(ii) soit, à des biens meubles, si le défunt, au moment de son décès, était résident de l'Ontario;

Interprétation d'un acte

c) ont pour objet l'interprétation, la rectification, l'exécution forcée ou l'annulation d'un acte scellé, d'un testament, d'un contrat ou d'un autre acte visant :

(i) soit, des biens meubles ou immeubles se trouvant en Ontario,

(ii) soit, les biens meubles d'un défunt qui, au moment de son décès, était résident de l'Ontario;

Fiduciaire si l'actif comprend des biens se trouvant en Ontario

d) sont dirigées contre un fiduciaire relativement à l'exécution d'une fiducie contenue dans un acte, si l'actif de la fiducie comprend des biens meubles ou immeubles se trouvant en Ontario;

Hypothèque sur des biens se trouvant en Ontario

e) se rapportent à la forclusion, à la vente, au paiement, à la possession ou au rachat d'une hypothèque, d'une charge ou d'un privilège sur des biens meubles ou immeubles se trouvant en Ontario;

Contrats

f) se rapportent, selon le cas, à un contrat :

(i) qui a été conclu en Ontario,

(ii) dont les clauses stipulent qu'il doit être régi ou interprété conformément aux lois de l'Ontario,

(iii) dans lequel les parties ont convenu de reconnaître la compétence des tribunaux de l'Ontario pour connaître de toute instance relative au contrat,

(iv) dont l'inexécution a eu lieu en Ontario, même si elle a été précédée ou accompagnée d'une inexécution à l'extérieur de la province qui a rendu impossible l'exécution de la partie du contrat qui devait être exécutée en Ontario;

Délit commis en Ontario

g) se rapportent à un délit commis en Ontario;

h) Abrogé : Règl. de l'Ont. 231/13, art. 5;

Injonctions

i) visent à obtenir une injonction enjoignant à une partie de faire ou de s'abstenir de faire quelque chose en Ontario ou visent des biens meubles ou immeubles se trouvant en Ontario;

j) Abrogé : Règl. de l'Ont. 131/04, art. 9;

k) Abrogé : Règl. de l'Ont. 131/04, art. 9;

l) Abrogé : Règl. de l'Ont. 131/04, art. 9;

Jugement d'un tribunal situé en dehors de l'Ontario

m) se fondent sur un jugement d'un tribunal en dehors de l'Ontario;

Demandes autorisées en vertu d'une loi

n) peuvent, en vertu d'une loi, être opposées à une personne qui se trouve en dehors de l'Ontario au moyen d'une instance introduite en Ontario;

Partie essentielle ou appropriée

o) visent une personne qui se trouve en dehors de l'Ontario et qui est une partie essentielle ou appropriée à une instance intentée à bon droit contre une autre personne qui en a reçu signification en Ontario;

Remarque : Le 1er juillet 2014, l'alinéa o) est abrogé. (Voir : Règl. de l'Ont. 43/14, art. 6 et par. 23 (1)).

Résident de l'Ontario ou personne qui y exploite une entreprise

p) visent une personne qui réside ordinairement en Ontario ou y exploite une entreprise;

Demande reconventionnelle, demande entre défendeurs ou mise en cause

q) font à bon droit l'objet d'une demande reconventionnelle, d'une demande entre défendeurs ou d'une mise en cause en vertu des présentes règles;

Impôts

r) visent le recouvrement par la Couronne ou une municipalité, ou en leur nom, d'impôts ou d'autres créances qui leur sont dus. R.R.O. 1990, Règl. 194, règle 17.02; Règl. de l'Ont. 171/98, art. 2; Règl. de l'Ont. 131/04, art. 9; Règl. de l'Ont. 231/13, art. 5.

TAB **B**

Français

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From December 31, 2011 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 50.

Skip Table of Contents

CONTENTS

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property. R.S.O. 1990, c. C.43, s. 104.

Physical or mental examination

Definition

105. (1) In this section,

"health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction. R.S.O. 1990, c. C.43, s. 105 (1); 1998, c. 18, Sched. G, s. 48.

Order

(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Idem

(3) Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

Further examinations

(4) The court may, on motion, order further physical or mental examinations.

Examiner may ask questions

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence. R.S.O. 1990, c. C.43, s. 105 (2-5).

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

Consolidation of proceedings in different courts

107. (1) Where two or more proceedings are pending in two or more different courts, and the proceedings,

(a) have a question of law or fact in common;

(b) claim relief arising out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason ought to be the subject of an order under this section,

an order may, on motion, be made,

(d) transferring any of the proceedings to another court and requiring the proceedings to be consolidated, or to be heard at the same time, or one immediately after the other; or

(e) requiring any of the proceedings to be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them. R.S.O. 1990, c. C.43, s. 107 (1).

Transfer from Small Claims Court

(2) A proceeding in the Small Claims Court shall not be transferred under clause (1) (d) to the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court. R.S.O. 1990, c. C.43, s. 107 (2); 1996, c. 25, s. 9 (17).

Idem

(3) A proceeding in the Small Claims Court shall not be required under subclause (1) (e) (ii) to be asserted by way of counterclaim in a proceeding in the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court. R.S.O. 1990, c. C.43, s. 107 (3); 1996, c. 25, s. 9 (17).

Motions

Loi sur les tribunaux judiciaires

L.R.O. 1990, CHAPITRE C.43

Période de codification : Du 31 décembre 2011 à la date à laquelle Lois-en-ligne est à jour.

Dernière modification : 2009, chap. 33, annexe 6, art. 50.

SAUTER LE SOMMAIRE

SOMMAIRE

Questions de l'examinateur

(5) Si le tribunal rend l'ordonnance aux termes du présent article, la partie qui se soumet à l'examen répond aux questions du praticien qui sont pertinentes à l'égard de l'examen et ses réponses sont admissibles en preuve. L.R.O. 1990, chap. C.43, par. 105 (2) à (5).

Sursis d'instance

106. Le tribunal peut, de son propre chef ou sur motion présentée par une personne qui est partie ou non au litige, surseoir à une instance aux conditions qu'il estime justes. L.R.O. 1990, chap. C.43, art. 106.

Réunion d'instances devant des tribunaux différents

107. (1) Si plusieurs instances sont en cours devant des tribunaux différents et si, selon le cas :

a) elles ont en commun une question de fait ou de droit;

b) les mesures de redressement demandées se fondent sur la même opération ou le même événement ou sur la même série d'opérations ou d'événements;

c) elles devraient, pour toute autre raison, faire l'objet d'une ordonnance prévue au présent article,

le tribunal peut, sur motion, par ordonnance :

d) soit renvoyer une instance à un autre tribunal et exiger la réunion des instances ou leur instruction simultanée ou en succession immédiate;

e) soit exiger :

(i) qu'il soit sursis à une instance jusqu'à ce qu'une décision soit rendue à l'égard de l'une des autres,

(ii) qu'une instance soit introduite par voie de demande reconventionnelle dans le cadre de l'une des autres. L.R.O. 1990, chap. C.43, par. 107 (1).

Instances renvoyées par la Cour des petites créances

(2) Une instance introduite devant la Cour des petites créances ne peut, sans le consentement du demandeur, être renvoyée à la Cour supérieure de justice en vertu de l'alinéa (1) d). L.R.O. 1990, chap. C.43, par. 107 (2); 1996, chap. 25, par. 9 (17).

Idem

(3) Il ne peut pas être exigé, en vertu du sous-alinéa (1) e) (ii), qu'une instance introduite devant la Cour des petites créances le soit par voie de demande reconventionnelle dans le cadre d'une instance devant la Cour supérieure de justice, sans le consentement du demandeur. L.R.O. 1990, chap. C.43, par. 107 (3); 1996, chap. 25, par. 9 (17).

Motion

(4) La motion est présentée à un juge de la Cour supérieure de justice. L.R.O. 1990, chap. C.43, par. 107 (4); 1996, chap. 25, par. 9 (17).

Directives

(5) L'ordonnance rendue aux termes du paragraphe (1) peut imposer les conditions et donner les directives qui sont estimées justes, y compris dispenser quiconque de la signification de l'avis d'inscription au rôle ou de mise en état et réduire les délais d'inscription au rôle.

Instance renvoyée