CITATION: Yaiguaje v. Chevron Corporation, 2013 ONSC 2527
COURT FILE NO.: CV-12-9808-00CL
DATE: 20130501

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje, Simon Lusitande Yaiguaje, Armonado 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, Plaintiffs

AND:

Chevron Corporation, Chevron Canada Limited and Chevron Canada Finance Limited, Defendants

BEFORE: D. M. Brown J.

COUNSEL: A. Mark, C. Hunter, Q.C., A. Kirker, Q.C., R. Frank, for the Moving Party Defendant, Chevron Corporation

B. Zarnett, S. Kauffman and P. Kolla, for the Moving Party Defendant, Chevron Canada Limited,

A. Lenczner, Q.C. and B. Morrison, for the Responding Party Plaintiffs

HEARD: November 29 and 30, 2012, and January 25, 2013.

REASONS FOR DECISION

I. Motions to stay an Ontario action to recognize and enforce an Ecuadorean judgment

[1] When a foreign plaintiff obtains a final, monetary foreign judgment against a foreign defendant and brings an action in Ontario for the recognition and enforcement of the judgment, what does the foreign plaintiff need to demonstrate in order to secure the recognition and enforcement of the judgment by a court of this province? The plaintiffs in this action state that they need only show that a real and substantial connection existed between the foreign court and the subject-matter and/or defendant in the foreign proceeding and, in this case, of that there is no doubt. The defendants contend that the plaintiffs need to demonstrate more – that a real and substantial connection exists between the defendants and this jurisdiction. The defendants take the position that no such connection exists and they move to strike out the service *ex juris* on them of the Amended Statement of Claim or to stay the plaintiffs' action.

[2] In 2011 the plaintiffs, residents of Ecuador, obtained a judgment in an Ecuador trial court which required the defendant, Chevron Corporation, to pay damages of approximately $18 billion. The trial judgment was upheld by an Ecuadorean intermediate court of appeal which, the parties agreed, turned the trial judgment into a final judgment for purposes of recognition and enforcement (the "Judgment").

[3] In 2012 the plaintiffs commenced an action in this Court seeking recognition and enforcement of the Judgment. The plaintiffs sued not only the judgment debtor, Chevron Corp., but also one of its indirectly-held subsidiaries, the defendant, Chevron Canada Ltd. Neither defendant has filed a statement of defence. Instead, both defendants have brought motions to set aside service of the originating process or to stay this action on the basis that this Court lacks jurisdiction to hear the action.

[4] For the reasons set out below, I dismiss the defendants' request to set aside the service of the originating process, but I grant the defendants' motions to stay the action.

II. Overview of the dispute between the parties

[5] A brief history of the dispute between the plaintiffs and Chevron Corp. can be found in the January, 2012 decision of the United States Court of Appeals, Second Circuit, in *Chevron Corporation v. Naranjo*:

> The story of the conflict between Chevron and residents of the Lago Agrio region of the Ecuadorian Amazon must be among the most extensively told in the history of the American federal judiciary. We and other courts have previously described in detail the parties' underlying dispute, which concerns allegations that Chevron's predecessor extensively polluted the Lago Agrio region of Ecuador and claims that Chevron is liable for the resulting damages…
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> From 1964 through 1992, Texaco and its subsidiary, Texaco Petroleum, or TexPet – with various partners, including the Ecuadorian government – engaged in oil extraction in the Lago Agrio region of the Ecuadorian Amazon. In 1992, Texaco withdrew from the extraction efforts… The next year, the [Lago Agrio Plaintiffs "LAPs"] filed suit in the Southern District of New York, alleging a variety of environmental, health, and other tort

> claims related to the extraction activities. The district court (Rakoff, *J.*) dismissed the plaintiffs' claims on grounds of international comity and forum non conveniens, stating that the case had "everything to do with Ecuador, and nothing to do with the United States."
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> We initially disagreed with the district court, requiring that Texaco make "a commitment . . . to submit to the jurisdiction of the Ecuadorian courts" before a forum non conveniens dismissal was appropriate... After several more years of legal wrangling, Texaco accepted the condition established by this Court, but reserved, in its words, "its right to contest [the] validity [of an Ecuadorian judgment] only in the limited circumstances permitted by New York's Recognition of Foreign Country Judgments Act."
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> In 1994, while the litigation was ongoing in the Southern District of New York, Texaco entered into a settlement with the Ecuadorian government and its government owned oil company, Petroecuador ("the GOE settlement"). Under the settlement, as Chevron has previously characterized it before this Court, "TexPet funded certain environmental remediation projects in exchange for . . . a release from liability for environmental impact falling outside the scope of that settlement." .... The settlement was finalized in 1998, after Chevron – which had acquired Texaco in 2001... – spent roughly $40 million on the remediation. Ecuador and Chevron continue to litigate the validity and effect of the settlement before a Bilateral Investment Treaty arbitration panel...
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> After the dismissal of the New York action, the LAPs initiated a lawsuit against Chevron in Ecuador, the GOE settlement notwithstanding. After seven years of litigation, on February 14, 2011, the trial court issued its decision, finding Chevron liable for $8.6 billion of damages, with a $8.6 billion punitive damages award to be added unless Chevron apologized within fourteen days of the opinion's issuance. Chevron did not apologize; the pending judgment is thus for $17.2 billion.[1]

[6] The trial judgment was affirmed by decision of an intermediate court, the Appellate Division of the Provincial Court of Justice of Sucumbios, on January 3, 2012. The parties agree, and I accept, that the affirmation of the trial judgment made it enforceable under Ecuadorean law and therefore a final Judgment. The parties advised that in November, 2012, the highest appeal court of Ecuador had granted leave to appeal the Judgment. That appeal remained pending as of the date of the hearing of these motions.

[7] In 2011 Chevron sought a global anti-enforcement injunction against the plaintiffs in the United States District Court for the Southern District of New York. In its January 26, 2012 decision the United States Court of Appeals for the Second Circuit described the history and result of that effort by Chevron:

> Chevron brought the present action in part under New York's Uniform Foreign Country Money-Judgments Recognition Act ("the Recognition Act"), N.Y. C.P.L.R. §§5301-

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[1] *Chevron Corporation v. Naranjo*, 667 F.3d 232 (2012, U.S.C.A., 2nd Cir.), at 234-237. (citations omitted).

5309, which allows judgment-creditors to enforce foreign judgments in New York courts, subject to several exceptions. Chevron, a potential judgment-debtor, sought a global anti-enforcement injunction against the LAPs and Donziger prohibiting the latter from attempting to enforce an allegedly fraudulent judgment entered by an Ecuadorian court against Chevron.

On March 7, 2011, the Southern District of New York (Kaplan, *J.*) granted the global injunction, which the defendants-appellants now challenge. Chevron Corp v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) ("Donziger"). In an earlier order, we vacated that injunction and stayed the district court's proceedings pending the present opinion. Chevron Corp. v. Naranjo, No. 11-1150-cv(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011). We conclude that the district court erred in construing the Recognition Act to grant putative judgment-debtors a cause of action to challenge foreign judgments before enforcement of those judgments is sought. Judgment-debtors can challenge a foreign judgment's validity under the Recognition Act only defensively, in response to an attempted enforcement – an effort that the defendants-appellees have not yet undertaken anywhere, and might never undertake in New York. Consistent with our earlier order, we therefore reverse the district court's decision, vacate the injunction, and remand to the district court with instructions to dismiss Chevron's declaratory judgment claim in its entirety.[2]

[8] In reversing the decision of the District Court, the Court of Appeal Second Circuit stated:

The [plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets. There is no indication that they will select New York as one of the jurisdictions in which they will undertake enforcement efforts, and if they do, they will have to present their claim to a New York court which will then apply the standards of the Recognition Act before any adverse consequence may befall Chevron. It is unclear what is to be gained by provoking a decision about the effect in New York of a foreign judgment that may never be presented in New York. If such an advisory opinion were available, any losing party in litigation anywhere in the world with assets in New York could seek to litigate the validity of the foreign judgment in this jurisdiction.[3]

III. The plaintiffs' claim and the defendants' motions

A. The Amended Statement of Claim

[9] On May 30, 2012, the plaintiffs commenced this action seeking several forms of relief from this Court:

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[2] *Ibid.*, p. 234.
[3] *Ibid.*, pp. 245-6. (emphasis added)

(i) Judgment in the amount of the Canadian equivalent of U.S. $18.256 billion "resulting from the final Judgment of the Appellate Division of the Provincial Court of Justice of Sucumbios of Ecuador of January 3, 2012", together with "the Canadian equivalent of costs to be determined by the Ecuadorean Court";

(ii) A declaration that the shares of Chevron Canada Limited and Chevron Finance Canada Limited "are exigible to satisfy the Judgment of this Honourable Court";

(iii) "the appointment of an equitable Receiver over the shares and assets of Chevron Canada Limited and of Chevron Canada Finance Limited, which are wholly owned subsidiaries of Chevron Corporation"; and,

(iv) Costs and pre-judgment interest.

[10] The plaintiffs discontinued the action as against Chevron Finance Canada Limited on August 24, 2012.

[11] In their Amended Statement of Claim the plaintiffs pleaded that the Judgment of the Appellate Division is a final judgment and "is exigible against the assets of Chevron in whatever jurisdiction any may be found, including Canada". They continued:

> 13. As a consequence of the Decision of the Supreme Court of Canada in *Beals v. Saldanha* and subsequent jurisprudence, Chevron is estopped from challenging any fact, finding or determination of law in the Ecuadorian Decisions on the merits. Further, Chevron is restricted from challenging the Ecuadorian Decisions on the basis of fraud unless it can demonstrate that the allegations are new, not the subject of prior adjudication and were not discoverable by the exercise of due diligence.

[12] In the section of its Claim entitled "Recognition of the Judgment in Canada", the plaintiffs plead that "in Canada, Chevron has two wholly-owned subsidiaries: Chevron Canada Limited and Chevron Canada Financial Limited (collectively, "Chevron Canada") and Chevron beneficially owns the assets of Chevron Canada." The plaintiffs plead that "Chevron wholly owns and controls Chevron Canada". The Claim continues:

> 18. As a condition of obtaining the dismissal of the action in New York, Texaco promised not only to submit to the jurisdiction of the Ecuadorean Court, but also to satisfy the Judgment.
>
> 19. After the Judgment, Chevron has resiled from that position. Chevron now repudiates its undertaking to the New York Court to respect and pay the Judgment rendered in the jurisdiction of its own choosing and, through its general counsel, has stated that "[w]e're going to fight this until Hell freezes over and then fight it out on the ice".
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> 20. As a result of the allegations in [specified paragraphs] and the fact that the great majority of its assets are held in 73 subsidiaries…Chevron Canada is a necessary party to this action in order to achieve equity and fairness between parties and to yield a result that is not "too flagrantly opposed to justice…"

21. The plaintiffs do not allege any wrongdoing against Chevron Canada. The action is for collection of a judgment debt.

22. The plaintiffs seek the appointment of an equitable Receiver to seize the shares and assets of Chevron Canada, the entire beneficial ownership of which belongs to the Judgment-Debtor, Chevron.

23. Service out of Ontario is authorized by Rule 17.02(m) and (o) of the *Rules of Civil Procedure*.

B. The defendants' motions

[13] As mentioned, neither of the remaining defendants – Chevron Corporation or Chevron Canada Limited– has filed a statement of defence. Instead, they have brought two motions, one by Chevron Corporation, and another by Chevron Canada Limited. Both motions seek substantially the same relief:

(i) An order setting aside service *ex juris* of the Amended Statement of Claim against them; and,

(ii) A declaration that this Court has no jurisdiction to hear this action and an order dismissing, or permanently staying, this action.

Both moving parties made it clear in their notices of motion that they were not attorning to the jurisdiction of this court.

[14] In its notice of motion Chevron stated that it did not reside or conduct business in Ontario, had no assets in Ontario, and did not own the shares of Chevron Canada or Chevron Finance. The "grounds" in support of its motion included the following:

6. There is no real and substantial connection between Ontario and Chevron Corp., or Ontario and the foreign judgment of the Provincial Court of Sucumbios in Lago Agrio, Ecuador;

7. Service outside of Ontario is not authorized;

8. This Honourable Court lacks jurisdiction to hear this action, and cannot assume it.

In its factum Chevron stated that it brought its motion "solely to object to the jurisdiction of this Court, without consenting or attorning to such jurisdiction". In its notice of motion it relied upon Rule 17 of the *Rules of Civil Procedure*, as well as section 106 of the *Courts of Justice Act*.

[15] In support of its motion, Chevron Canada stated that the Ecuadorean Judgment was only against Chevron, Chevron Canada had never been a party to the Ecuadorean proceedings and, accordingly, Chevron Canada was not a judgment debtor of the plaintiffs. Reciting that it had been served *ex juris* with the plaintiffs' originating process, Chevron Canada stated:

> A foreign judgment against a different, separate legal entity provides absolutely no basis for jurisdiction over Chevron Canada, which is not the judgment debtor. Here the absence of jurisdiction over Chevron Canada is all the more apparent given that there is no jurisdiction over the judgment debtor itself in this Honourable Court. Under the circumstances, given the subject matter of the action and the absence of a real and substantial connection, this Court has no jurisdiction over this action with respect to Chevron Canada.

In its notice of motion Chevron Canada invoked Rules 17.02, 17.04, 17.06 and 21.01(3)(a) of the *Rules of Civil Procedure*, together with section 106 of the *CJA*.

[16] Chevron and Chevron Canada filed evidence on these motions; the plaintiffs did not. Some commercially sensitive evidence of the defendants was filed on a confidential basis pursuant to the protective order made by Patillo J. on October 1, 2012.

C. Basic facts about the Chevron defendants

[17] The following uncontested facts emerged from the affidavits of Frank Soler, a Chevron employee, sworn on August 7, 2012, and Jeffrey Wasko, a Chevron Canada employee, sworn August 8, 2012:

(i) Chevron was incorporated in the State of Delaware, U.S.A. and has its head office in San Ramon, California;

(ii) Chevron does not itself engage in the exploring, producing, refining or marketing of petroleum products; those activities are carried on by its indirect subsidiaries;

(iii) Chevron is not currently, and never has been, registered to carry on business in Ontario or anywhere else in Canada;

(iv) With the exception of its interest in two Bermudian companies, all of Chevron's assets are owned and located in the U.S.A.;

(v) Chevron does not own the shares of Chevron Canada;

(vi) Chevron Canada is an operating company which is a 7th level indirect subsidiary of Chevron;

(vii) Chevron files consolidated financial statements because it is required by the U.S. Securities and Exchange Commission to do so;

(viii) Chevron Canada was incorporated in 1966 under the *Canada Corporations Act* with its head office, at the time incorporation, in Ottawa, Ontario. In 1980 it was continued under the *Canada Business Corporations Act* with its registered head office in Vancouver, British Columbia. Then, in 2003 it amalgamated under the *CBCA* with its registered office in Calgary, Alberta;

(ix) As of August, 2012, Chevron Canada was registered extra-provincially in a number of provinces, but not in Ontario;

(x) Chevron Canada has never carried on business in Ecuador;

(xi) All of the shares of Chevron Canada are owned by Chevron Canada Capital Company; and,

(xii) Chevron and Chevron Canada have separate and independent boards of directors, and none of the Chevron directors or executive officers serve on the board or are involved in managing the operations of Chevron Canada.

[18] Chevron Canada sells some of its lubricant and chemical products in Ontario. Since May, 2012, it has had 13 employees in Ontario, three of whom work out of its Mississauga, Ontario office, with the remainder working out of their homes. The staff at the Mississauga location consist of sales personnel and some administrative support staff, although invoicing is not done out of that office. A budget is created for the Ontario operations. Chevron Canada does not operate any depot or warehouse facilities in Ontario to store the products sold by its Ontario sales staff.

D. Service of originating process

[19] Chevron was served with the Amended Statement of Claim in San Ramon, California.

[20] Chevron Canada was served with the Amended Statement of Claim at its extra-provincially registered office in Vancouver, British Columbia. Sometime after Chevron Canada had filed its factum on these motions, the plaintiffs served a copy of the Amended Statement of Claim on Chevron Canada at its Mississauga, Ontario office. So, although the plaintiffs initially relied on the service *ex juris* rules to support their service of their originating process on Chevron Canada, by the time of the hearing of these motions the plaintiffs were relying on their service of the Ontario office of Chevron Canada.

IV. Positions of the parties on these motions

A. Chevron

[21] The lynchpin of Chevron's argument is that the "real and substantial connection" test, which was articulated by the Supreme Court of Canada in the case of *Van Breda v. Village Resorts Limited*[4] as the essential requirement for a court assuming jurisdiction over the initial adjudication of a claim on its merits, applies with equal force to an action which seeks the recognition and enforcement of the judgment of a foreign court which has already conducted the adjudication on the merits and issued a final judgment. As Chevron put it in its factum:

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[4] 2012 SCC 17.

56. Jurisdiction *simpliciter* is a basic threshold requirement that must exist before a court can adjudicate any dispute.

57. At common law, there are three ways a court can take jurisdiction over a defendant: (i) presence-based jurisdiction; (ii) consent-based jurisdiction; and, (iii) assumed jurisdiction.

58. Chevron Corp. is not present in this forum nor does it consent to the jurisdiction of this Court. Therefore, the issue is whether this Court can 'assume' jurisdiction. This Court can only assume jurisdiction where there is a "real and substantial" connection between the forum and the defendant and the subject matter of the action.

[22] Chevron summarized the issues, and its position on them, as follows:

55. The issues on this Motion and the position of Chevron Corp. with respect to them are as follows:

(a) There is no reasonable basis in the pleadings themselves, or in any evidence before the Court, upon which to ignore the separate legal personalities of Chevron Corp. and its indirect Canadian subsidiary and thereby treat Chevron Corp. as having any business, assets or any connection with Ontario.

(b) Therefore, there is not the requisite "real and substantial" connection between Ontario and Chevron Corp. or the Plaintiffs' claim upon which this Honourable Court could assume jurisdiction over the action.

[23] The reason for that conclusion, Chevron argued, was that the plaintiffs' action constituted "an unusual 'reverse piercing' of the corporate veil, so that the business and assets of [Chevron Canada] are treated as those of Chevron Corp." Chevron continued:

11. 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 this Court to exercise jurisdiction over either of them.

12. As most recently explained by the Supreme Court of Canada in *Van Breda*, the "real and substantial connection" test for the exercise of jurisdiction embodies the fundamental principles of order and fairness, efficiency and comity. It recognizes that any court's assumption of jurisdiction over a foreign defendant is subject to limits. While those limits will vary depending upon the circumstances, those principles clearly dictate that this Court must decline jurisdiction in the circumstances of this case.

13. It is a rare judgment creditor that seeks recognition and enforcement in a jurisdiction disconnected entirely from the parties and the subject matter of the dispute, and in which no exigible assets are now or are reasonably expected to ever be. Consequently, there is rarely a question about whether a court can assume jurisdiction of a recognition and enforcement action in such circumstances. *This does not mean, however, that the*

threshold question of jurisdiction simpliciter need not be addressed before a court proceeds to adjudicate the substantive issues which may arise in an enforcement action, and which would clearly arise if this one were allowed to proceed.

14. *Given the absence of any Chevron Corp. presence or assets in Ontario and the unique circumstances under which the Plaintiffs seek to invoke this Court's jurisdiction, it would offend principles of order, fairness and justice, waste valuable judicial resources, and be an abuse of international comity for this Court to assume jurisdiction over the action.* (emphasis added)

[24] In Chevron's view, even where a plaintiff seeking to enforce a foreign judgment is able to point to some presumptive connection with the receiving jurisdiction, such as Ontario, it is open to the foreign judgment debtor to rebut that presumption. As put in its factum:

67. Where the foreign defendant challenging jurisdiction files affidavit evidence challenging allegations in the Statement of Claim that are essential to jurisdiction, the plaintiff must show that it has a "good arguable case" with respect to those allegations.

B. Chevron Canada

[25] The legal position advanced by Chevron Canada echoed that taken by Chevron. In its factum Chevron Canada submitted:

5. Chevron Canada submits that service of process on it outside Ontario, without leave, was not authorized under the *Rules of Civil Procedure* and should be set aside. Neither Rule 17.02(m) nor (o), relied on by the Plaintiffs in the ASOC for authority to effect service *ex juris*, applies here. Service should therefore be set aside under Rule 17.06(2)(a).

6. Secondly, Chevron Canada submits that this Court has no jurisdiction over it with respect to this action because the two-step test for assuming jurisdiction is not met. The first step of the test requires that the action fall within one of the categories that raise a rebuttable presumption of jurisdiction; there are no grounds here for any such presumption. The second step requires that, even where there are grounds for a presumption of jurisdiction, there must in fact be a "real and substantial connection" between the jurisdiction and the subject matter of the action. There is no such connection here. The action should accordingly be dismissed or permanently stayed.

7. The Plaintiffs have attempted to circumvent both elements of the jurisdictional test by alleging that Chevron Corp. beneficially owns the assets of Chevron Canada, urging that this Court should "pierce the corporate veil" and treat the foreign judgment against Chevron Corp. as somehow being also a judgment against its indirect subsidiary, Chevron Canada. Piercing the corporate veil requires the Plaintiffs to both allege and demonstrate that:

(a) Chevron Corp. exercises "complete domination or control" over Chevron Canada, and

(b) the corporate relationship between Chevron Corp. and Chevron Canada was established, or Chevron Canada is operated, solely for a fraudulent or improper purpose.

8. Not only have the Plaintiffs not made allegations that (if true) would meet the prerequisites necessary to pierce a corporate veil, but the uncontradicted evidence on this motion demonstrates that there is no actual basis to "pierce the corporate veil" in any event. Indeed, the Plaintiffs have pleaded facts that are inconsistent with the prerequisites for piercing the corporate veil. This attempt to establish jurisdiction over Chevron Canada is untenable.

C. Plaintiffs

[26] The plaintiffs' responding argument, as set out in their factum, was as follows:

5. The law and the principles applicable to the jurisdiction of a domestic court to recognize and enforce a foreign judgment are distinct and different from the law and principles applicable to the jurisdiction of a court in determining whether to try a cause of action at first instance.

6. The moving parties' Facta use the wrong test. The real and substantial connection test needs only to be satisfied at the cause of action stage in the trial process. Once satisfied at that stage, the remaining requirement is that set out by the Supreme Court of Canada.

7. The moving parties' Facta ignore this distinction. The first instance principles, real and substantial connection, personal jurisdiction, and attornment, have all been well satisfied in the Ecuadorean Court and in its trial process...Chevron attorned to the jurisdiction of the Ecuadorean Court and vigorously opposed the plaintiffs' claims throughout an eight year trial.

8. The over-arching principles of respect by a domestic tribunal for the judgment of a foreign court are made imperative in the judgments of the Supreme Court of Canada in *Morguard v. De Savoye* and in *Beals v. Saldanha.* The only pre-condition to Ontario jurisdiction is that the foreign court, which rendered the judgment, had a real and substantial connection to the litigants or the subject matter of the dispute. Subject to limited defences, which are to be advanced in a Statement of Defence, there is no further impediment to jurisdiction...

9. ... recognition and enforcement of a foreign judgment does not depend on the location of the judgment debtor's assets. The Court is only concerned with whether the judgment being recognized is final in the foreign jurisdiction and whether there was jurisdiction over the defendant by reason of subject matter jurisdiction or attornment or proper service. Recognition of the Ecuadorean Final Judgment falls squarely within established precedent and principles.

...

> 11. ... Rule 17.02(m) is premised on a foreign defendant and on a foreign judgment. Applying a real and substantial connection test to the Rule would undermine it.

V. The traditional procedure to seek the recognition and enforcement of a foreign judgment

[27] Absent the existence of a statutory mechanism to enforce foreign judgments, bringing an action on the foreign judgment is the standard common law method to secure the recognition and enforcement of the foreign judgment. In his dissenting reasons in *Beals v. Saldanha*, LeBel J. described the typical way in which a plaintiff seeks to enforce a foreign judgment in a Canadian court:

> Claimants who seek to have foreign judgments recognized or enforced in this country ask for the support and cooperation of Canadian courts. They thus face the initial burden of showing that the judgment is valid on its face and was issued by a court acting through fair process and with properly restrained jurisdiction based on a real and substantial connection to the action. The petitioner must convince the receiving court that the values of international comity require it to exercise its power in favour of enforcing the judgment. Once this burden has been met, the judgment is *prima facie* enforceable by a Canadian court. The common law has long recognized, however, that the defendant can still establish that the judgment should not be enforced by showing that one of a number of defences to recognition and enforcement applies. The defences relevant to this appeal are commonly grouped under the heading of "impeachment" defences, since all are based on the notion that the way the foreign judgment was obtained was in some way tainted or contrary to Canadian notions of justice. (Other potential defences, such as the foreign public law exception to enforceability in Canada, which might apply, for example, to a tax claim, are not implicated by the facts of this case.)[5]

[28] As Pitel and Rafferty put it in their text, *Conflict of Laws*, while an action on the foreign judgment is a separate action "requiring all the procedural steps of an action, it is based not on the original claim the plaintiff had pursued against the defendant but rather on the obligation created by the foreign judgment".[6]

[29] The decision of the Supreme Court of Canada in *Beals v. Saldanha* established that under Canadian law three defences are available to a domestic defendant in contesting the recognition of a final foreign judgment: (i) fraud; (ii) lack of natural justice; and, (iii) public policy. As to the first defence:

> [F]raud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence

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[5] *Beals v. Saldanha*, [2003] S.C.J. No. 77, para. 210.
[6] Stephen Pitel and Nicholas Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010), p. 159.

> that was before the foreign court, the domestic court can decline recognition of the judgment.[7]

[30] With regard to the defence of a lack of natural justice, a defendant may prove unfairness in the foreign legal system in that the foreign court did not apply minimum standards of fairness.[8] Finally, the defence of public policy may be used to challenge the enforcement of a foreign judgment by condemning the foreign law on which the judgment is based as contrary to the Canadian concept of justice and basic morality.[9]

[31] In his dissent in *Beals*, LeBel J. argued that the liberalization of the recognition of foreign judgments to include those in which a real and substantial connection existed between the originating court and the matter in dispute should be accompanied by an expansion of the defences available to resist an action for recognition and enforcement for the following reason:

> [T]he nominate defences should be looked at as examples of a single underlying principle governing the exercise of the receiving court's power to recognize and enforce a foreign judgment. The claimant must come before the Canadian court with clean hands, and the court will not accept a judgment whose enforcement would amount to an abuse of its process or bring the administration of justice in Canada into disrepute. Serious consideration should be given to the possibility of a residual category of judgments, beyond those addressed by the defences of public policy, fraud and natural justice, that should not be enforced because they, too, engage this principle - in short, because their enforcement would shock the conscience of Canadians.[10]

The majority in *Beals* did not accept that argument.

VI. *Van Breda*, *Morguard* and *Beals*

A. Van Breda

[32] As noted, in advancing their arguments, the defendants relied heavily on the recent decision of the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.* Let me start my legal analysis by considering the scope and content of that decision.

[33] At issue in *Van Breda* was the question about where a tort claim should be litigated, more specifically, whether the Ontario court enjoyed the jurisdiction to adjudicate a tort claim where the event causing the injury had taken place in Cuba. The Supreme Court of Canada upheld the decision of the motions judge that the Ontario court possessed the jurisdiction to hear the claim and that the Ontario claim should not be stayed on the basis of *foreign non conveniens*.

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[7] *Beals, supra.*, para. 51.
[8] *Ibid.*, paras. 60 and 61.
[9] *Ibid.*, paras. 71, 72 and 75.
[10] *Ibid.*, para. 218.

[34] In writing the decision of the court, LeBel J. made two preliminary points. First, he recognized the inter-connectedness of three fundamental issues in the area of private international law:

> Three categories of issues - jurisdiction, *forum non conveniens* and the recognition of foreign judgments - are intertwined in this branch of the law. Thus, the framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and *vice versa*. Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others.[11]

LeBel J. immediately continued by stating:

> This said, the central focus of these appeals is on jurisdiction and the appropriate forum.

[35] Second, LeBel J. pointed out the constitutional underpinnings of private international law in Canada:

> Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country...The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question...(citations omitted) and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution...[12]

[36] LeBel J. wrote that "in developing the real and substantial connection test, the Court crafted a constitutional principle rather than a simple conflicts rule":

> 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 courts. 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.[13]

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[11] *Van Breda*, supra., para. 16.
[12] *Ibid.*, para. 21.
[13] *Ibid.*, para. 22.

[37] The objective of the real and substantial connection test, from a constitutional standpoint, is to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts:

> In its constitutional sense, it places limits on the reach of the jurisdiction of a province's courts and on the application of provincial laws to interprovincial or international situations. It also requires that all Canadian courts recognize and enforce decisions rendered by courts of the other Canadian provinces on the basis of a proper assumption of jurisdiction. But it does not establish the actual content of rules and principles of private international law, nor does it require that those rules and principles be uniform.[14]

[38] Tracing the dominant emergence of the real and substantial connection test back to the Court's decision in *Morguard Investments Ltd. v. De Savoye*,[15] LeBel J. summarized the two main purposes of the real and substantial connection test:

> In *Morguard*, the Court held that *the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation.* Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, *and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced...*[16] (emphasis added)

[39] Against that background, LeBel J. identified the issue which was before the Supreme Court of Canada in the *Van Breda* case:

> This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits...[17]

More specifically, he described the task of the Court as follows:

> [T]his Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside

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[14] *Ibid.*, para. 23.
[15] [1990] 3 S.C.R. 1077
[16] *Van Breda, supra.*, para. 26.
[17] *Ibid.*, para. 34.

> Canada or outside the province. I will also consider how jurisdiction should be exercised or declined under the doctrine of *forum non conveniens*...[18]

[40] LeBel J. then went on to develop a list of presumptive connecting factors for tort cases to inform the analysis by a court as to whether it should assume jurisdiction over a matter for the purpose of conducting an adjudication of it on the merits.[19] As I read the *Van Breda* decision, it was in that context that LeBel J. identified four presumptive connecting facts which would entitle a court to assume jurisdiction over a dispute.[20] While acknowledging that the factors authorizing service *ex juris* in Rule 17.02 of the Ontario *Rules of Civil Procedure* were not adopted as conflicts rules, nonetheless LeBel J. concluded that they offered guidance for the development of the area of private international law concerning the assumption of jurisdiction because "they represent an expression of wisdom and experience drawn from the life of the law".[21]

[41] So, while the Supreme Court of Canada situated its analysis in *Van Breda* in the larger context of the various areas of private international law, as well as in the constitutional underpinnings of that law, the meat of its analysis dealt with putting flesh on the bones of the real and substantial connection test in the specific context of when a Canadian court could assume jurisdiction over the adjudication of a tort dispute on its merits where some of the events had taken place outside of the territorial jurisdiction of the court.

[42] Of course, in the present case the plaintiffs are not asking an Ontario court to assume jurisdiction to hear and determine a *lis* between the parties on its merits. The court in Ecuador already has conducted a trial and issued a judgment on the merits. The issue, as framed by the moving party defendants, is whether an Ontario court possesses the jurisdiction to entertain an action by a successful foreign plaintiff to secure the recognition and enforcement of a foreign judgment in this province. One therefore must turn to the decisions of the Supreme Court of Canada in *Morguard* and *Beals v. Saldanha* to ascertain how that Court situated and developed the real and substantial connection test in the context of the recognition of foreign judgments.

B. Morguard

[43] At issue in the *Morguard* case was whether a personal judgment validly given in Alberta against a non-resident defendant could be enforced in British Columbia where the defendant resided.[22] The Supreme Court of Canada decided that it could, so long as the Alberta court had "properly, or appropriately, exercised jurisdiction".[23] Where the defendant had not been within the jurisdiction of the Alberta court at the time of the action nor had submitted to its jurisdiction either by agreement or attornment, the Supreme Court of Canada found that the Alberta court

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[18] *Ibid.*, para. 68.
[19] *Ibid.*, paras. 78, 80 and 81.
[20] *Ibid.*, para. 90.
[21] *Ibid.*, para. 83.
[22] *Morguard, supra.*, para. 13
[23] *Ibid.*, para. 41.

would properly exercise jurisdiction if it possessed a real and substantial connection with the action.[24]

[44] In reaching that conclusion the Supreme Court of Canada commented on two matters which have some bearing on the present motions. First, the Court adopted a formulation of the principle of comity which it viewed as according with the modern reality of global trade. LaForest J. wrote:

> For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the Unites States in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64, in a passage cited by Estey J. in *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, as follows:
>
> > "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...
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> As Dickson J. in *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at p. 400, citing Marshall C.J. in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), stated, "common interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner...[25]

[45] Second, LaForest J. adverted to the link between the real and substantial connection test and the constitutional restriction on the legislative power of the province which had granted the judgment now sought to be recognized and enforced elsewhere:

> *The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province".* As Guérin J. observed in *Dupont v. Taronga* Holdings Ltd. (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct.), at p. 339, ..."In the case of service outside of the issuing province, service *ex juris* must measure up to constitutional rules." *The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces.* That was the view taken by Guérin J. in *Taronga* where, at p. 340, he cites Professor Hogg, op. cit., at p. 278, as follows:

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[24] *Ibid.*, para. 51
[25] *Ibid.*, para. 31.

> In *Moran v. Pyle*, Dickson J. emphasized that the "sole issue" was whether Saskatchewan's rules regarding jurisdiction based on service ex juris had been complied with. He did not consider whether there were constitutional limits on the jurisdiction which could be conferred by the Saskatchewan Legislature on the Saskatchewan courts. But the rule which he announced could serve satisfactorily as a statement of the constitutional limits of provincial-court jurisdiction over defendants outside the province, requiring as it does a substantial connection between the defendant and the forum province of a kind which makes it reasonable to infer that the defendant has voluntarily submitted himself to the risk of litigation in the courts of the forum province.
>
> I must confess to finding this approach attractive, but as I noted earlier, the case was not argued in constitutional terms and it is unnecessary to pronounce definitively on the issue...[26]

[46] Of course, two features of the *Morguard* fact-situation are not present in this case. *Morguard* involved the issue of the inter-provincial recognition and enforcement of judgments, and the Court's view of comity was shaped strongly by the fact that both the "foreign" and "domestic" courts were sister provinces within the Confederation. Second, in *Morguard* the defendant against whom the plaintiff sought to enforce the "foreign" judgment resided in the recognizing jurisdiction, British Columbia.

C. Beals

[47] Of these two distinguishing features, the first – the recognition of a foreign state judgment - was addressed by the Supreme Court of Canada in its 2003 decision in *Beals v. Saldanha*, a case which dealt with an action brought in an Ontario court against Ontario resident defendants to enforce a default judgment obtained against them in Florida. The Supreme Court of Canada held that the real and substantial connection test should apply to the law concerning the enforcement and recognition of foreign judgments.[27] It stated the content of the real and substantial connection test in the following terms:

> *Morguard* established that the courts of one province or territory should recognize and enforce the judgments of another province or territory, if that court had properly exercised jurisdiction in the action, namely that it had a real and substantial connection with either the subject matter of the action or the defendant. A substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action.[28]

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[26] *Ibid.*, para. 52.
[27] *Beals, supra.* para. 28.
[28] *Ibid.*, para. 23.

[48] Major, J., writing for the majority of the Court, summarized the principles governing the recognition and enforcement of a foreign judgment:

> There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in *Morguard, supra*. A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties. Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.[29]

[49] In response to the judgment debtors' argument in that case that the Florida judgment could not be enforced against them because such enforcement would force them into bankruptcy and therefore infringe the principles of fundamental justice protected by the *Canadian Charter of Rights and Freedoms*, Major J. stated:

> The 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.[30]

[50] LeBel J. wrote a dissenting judgment in which he agreed with the adoption of a real and substantial connection test for the purpose of recognizing and enforcing foreign judgments, but proposed a test which required tighter connections with the originating jurisdiction and which afforded more liberal defences to an action for recognition and enforcement to ensure a fair process for the defendant. In many respects LeBel J. proposed the adoption of principles of recognition found in the U.S. Uniform Model Law.[31] In the course of his reasons LeBel J. made several observations which bear upon the issue in this case.

[51] First, LeBel J. talked about the different role played by constitutional imperatives in the analysis concerning the recognition of judgments from other provinces as contrasted with those from other nations:

> *Morguard* thus strongly suggested that the recognition and enforcement of foreign-country judgments should be subject to a more liberal test informed by an updated understanding of international comity. It is equally clear from a reading of *Morguard* and its progeny that the considerations informing the application of the test to foreign-country judgments are not identical to those that shape conflict rules within Canada. As I observed in *Spar, supra*, at para. 51, "it is important to emphasize that *Morguard*

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[29] *Ibid.*, para. 37.
[30] *Ibid.*, para. 78.
[31] See, for example, *Beals*, para. 195.

> and *Hunt* were decided in the context of interprovincial jurisdictional disputes ... [and that] the specific findings of these decisions cannot easily be extended beyond this context". See also *Hunt, supra*, at p. 328. Although constitutional considerations and considerations of international comity both point towards a more liberal jurisdiction test, important differences remain between them.
>
> *One of those differences is that the rules that apply within the Canadian federation are "constitutional imperatives". Comity as between sovereign nations is not an obligation in the same sense, although it is more than a matter of mere discretion or preference...*
>
> ...
>
> The provinces, on the other hand, are constitutionally bound both to observe the limits on their own power to assert jurisdiction over defendants outside the province, and to recognize the properly assumed jurisdiction of courts in sister provinces; for them, this is "a matter of absolute obligation". This obligation reflects the unity in diversity that is characteristic of our federal state.[32]

[52] Second, while *Beals* was decided before *Van Breda*, in the course of his dissent LeBel J. made some comments which anticipated the defendants' arguments on the present motions that a two-step real and substantial connection analysis applies to the recognition of foreign judgments:

> There is an important difference between the inquiry conducted by a court assuming jurisdiction at the outset of the action and the test applied by a court asked to recognize and enforce a judgment at the end. In the former case, two steps are involved: the court must first determine that it has a basis for jurisdiction, and if it does it must go on to decide whether it should nevertheless decline to exercise that jurisdiction because another forum is clearly more appropriate for the hearing of the action. In the latter case of a receiving court, only the first step in this inquiry is relevant. *Provided that the originating court had a reasonable basis for jurisdiction, the defendant had its chance to appear there and argue forum non conveniens, and cannot question the originating court's decision on that issue in the receiving court.*[33]

[53] *Beals*, like *Morguard*, involved a recognition and enforcement action brought in a court in the province in which the defendants resided. In the present case, the Chevron defendants argued that they did not reside in Ontario, so some other connection between them and Ontario needed to exist in order for the Ontario court to assume jurisdiction over the action against them.

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[32] *Ibid.*, paras. 166, 167 and 169 (emphasis added).
[33] *Ibid.*, para. 185. (emphasis added)

D. Pro Swing

[54] After the decision in *Beals*, but before its decision in *Van Breda*, the Supreme Court of Canada, in *Pro Swing Inc. v. Elta Golf Inc.*,[34] considered whether a proceeding could be brought in Ontario, against an Ontario resident, for the recognition and enforcement of a consent Ohio order and an order made that the Ontario resident was in contempt of that consent foreign order. The Supreme Court of Canada held that the traditional common law rule limited the recognition and enforcement of foreign orders to final money judgments, although it advocated a change in that principle. In different portions of their judgment, the majority made the following two statements of general principle:

> The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms.
> ...
>
> As this Court confirmed in *Beals v. Saldanha*... absent evidence of fraud or of a violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered.[35]

Later, in their judgment, the majority stated this general principle in a slightly different way:

> Under the traditional rule, *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. In the case of an equitable order, it is at this stage that considerations specific to the particular nature of such orders should be contemplated....[36] (emphasis added)

The Court did not expand on its reference to the establishment of the jurisdiction of the enforcing court.

VII. Canadian cases and academic commentary on the issue of jurisdiction *simpliciter* in foreign judgment recognition cases

[55] The second feature which distinguishes this case from *Morguard* – the judgment debtor does not reside in the jurisdiction of the receiving court – has not been considered by the Supreme Court of Canada in any case dealing with the appropriate test for recognizing a foreign state judgment. Other courts and academic commentators have considered the issue, and it is to them that I now turn.

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[34] [2006] 2 S.C.R. 612.
[35] *Ibid.*, paras. 11 and 12.
[36] *Ibid.*, para. 28.

[56] In *BNP Paribas (Canada) v. Mécs*[37] the judgment creditor had obtained a final judgment against the judgment debtor in the Quebec courts. The judgment creditor applied to enforce the judgment in Ontario. The judgment debtor resided in Hungary and he filed evidence that he had no assets in Ontario. Although the issue before the court was whether the principle of *forum non conveniens* applied to a proceeding to enforce a foreign judgment, and although the judgment debtor did not challenge the jurisdiction of the Ontario court to recognize the Quebec judgment, in the course of her reasons Pepall J. (as she then was) stated that "the court should grant its assistance in enforcing an outstanding judgment, not raise barriers".[38] She then considered the relevance of the presence of assets in Ontario to the question of the recognition of the Quebec judgment:

> The defendants took exception to evidence of the plaintiff's belief that the defendants have assets in Ontario on the grounds that the plaintiff's affidavit is in contravention of Rule 39.01(4) which requires identification of the source of information and belief evidence. *In my view, this is immaterial as the existence of assets of the judgment debtors in Ontario is irrelevant to the question of whether the court should grant recognition to the Quebec judgment. The plaintiff has the right to satisfy itself whether the defendants have or will have assets in Ontario and, if so, to seize them. If it is unsuccessful in this regard, it simply will be in the same position as other judgment creditors.*[39]

[57] Professor Janet Walker, in her Conflicts of Laws volume in *Halsbury's Laws of Canada*, echoed the decision in *BNP Paribas* when writing:

> A foreign judgment is like a debt between the parties to it, in that it is not enforceable directly by execution, but it is capable of forming the basis for a local order for its enforcement. *Since the order may be executed only against local assets, there is no basis for staying the proceedings on grounds that the forum is inappropriate or that the judgment debtor's principal assets are elsewhere.*[40]

[58] Professors Pitel and Rafferty expressed a contrary view in their text, *Conflict of Laws*, where they wrote:

> 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*

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[37] (2002), 60 O.R. (3d) 205 (S.C.J.)
[38] *Ibid.*, para. 12.
[39] *Ibid.*, para. 13 (emphasis added).
[40] *Halsbury's Laws of Canada, Conflict of Laws, 2011 Reissue* (Toronto: LexisNexis, 2011), §HCF-69. See also, Castel & Walker, *Canadian Conflict of Laws, Sixth Edition* (Toronto: LexisNexis, 2005), p. 14-10.

> *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.* Once jurisdiction is established, the enforcement proceedings typically follow an accelerated procedure available for cases where facts are not in dispute, such as a motion for summary judgment.[41]

[59] Pitel and Rafferty did not address the situation where a judgment creditor wishes to enforce a foreign judgment in a domestic court in anticipation of assets of the judgment debtor coming into that jurisdiction or the case where a dispute exists as to whether or not assets of the judgment debtor are located in the receiving jurisdiction.

VIII. Recognition of foreign judgments or awards under Ontario statutes

A. Reciprocal Enforcement of Judgments (U.K.) Act[42]

[60] The only statutory mechanism under Ontario law to enforce a judgment of a foreign state is the *Reciprocal Enforcement of Judgments (U.K.) Act*. The Schedule to that Act consists of the *Convention between Canada and the United Kingdom for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters* (the "U.K. Convention"). Articles III and IV of the U.K. Convention set down the procedure for seeking recognition of the foreign judgment and the grounds upon which the receiving state may refuse to grant recognition:

> Article III
>
> 1. Where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article VI to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings) to have the judgment registered, and *on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered.*
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> ...

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[41] Pitel and Rafferty, *supra.*, pp. 159-160.
[42] R.S.O. 1990, c. R.6.

Article IV

1. Registration of a judgment shall be refused or set aside if: (a) the judgment has been satisfied; (b) the judgment is not enforceable in the territory of origin; (c) the original court is not regarded by the registering court as having jurisdiction; (d) the judgment was obtained by fraud; (e) enforcement of the judgment would be contrary to public policy in the territory of the registering court; (f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court; or (g) in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the original court and did not submit to its jurisdiction.

2. The law of the registering court may provide that registration of a judgment may or shall be set aside if: (a) the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear; (b) another judgment has been given by a court having jurisdiction in the matter in dispute prior to the date of judgment in the original court; or (c) the judgment is not final or an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the territory of origin.

[61] Turning to the procedure to apply to register a foreign judgment under that Act, Article VI, Section 3 of the Schedule states:

3. The practice and procedure governing registration (including notice to the judgment debtor and applications to set registration aside) shall, except as otherwise provided in this Convention, be governed by the law of the registering court.

Rule 73.02 of the *Rules of Civil Procedure* specifies the form of the notice of application to register a U.K. judgment, together with the necessary supporting affidavit evidence.

[62] As can be seen from Articles III and IV of the Schedule, on its face the Act does not require, as a condition of the Ontario court accepting jurisdiction to recognize the United Kingdom judgment, that the judgment debtor either resides in Ontario or possesses assets in Ontario. Since service *ex juris* of a notice of application to enforce a U.K. judgment would be available under Rule 17.02(m), to import a requirement in the case of such a judgment to demonstrate the presence of the judgment debtor in Ontario or the presence of its assets in Ontario before an Ontario court could recognize the U.K. judgment under the Act would add a condition to recognition not expressly stated in the U.K. Convention which is the Schedule to the Act.

B. International Commercial Arbitration Act[43]

[63] Under the *International Commercial Arbitration Act*, recognition of foreign commercial arbitral awards is governed by sections 35 and 36 of the Model Law. Article 35(1) of the Model Law states:

> 35. (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

[64] Article 36 of the Model Law provides that "recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only" in specified circumstances. Neither the absence of the judgment debtor from the jurisdiction of the receiving court nor the absence of assets in the receiving jurisdiction is specified as a circumstance in which a refusal to recognize can be made.[44]

IX. American law

[65] During the course of the initial hearing of these motions, I observed to counsel that they had not included in their authorities the decisions of any American courts which might have considered the issue in dispute. I indicated to counsel that I intended to instruct my law clerk to look at that area of the law and, if he found any American cases on point, I would afford the parties an opportunity to make further submissions on what impact, if any, the American case law should have on these motions. That hearing took place on January 25, 2013. I wish to thank all counsel for their most useful submissions on the state of the American case law in this area.

[66] All parties submitted that the American case law had no bearing on the issues to be determined on these motions and that I should not take that jurisprudence into account. I do not share the parties' view that when considering principles of private international law concerning the recognition of foreign judgments, an Ontario court should not at least inquire into the state of the law in the United States. The integration of the Canadian and American economies makes that an unrealistic and parochial position to take. As LaForest J. observed in *Morguard*, "modern states...cannot live in splendid isolation",[45] "the business community operates in a world economy",[46] and "accommodating the flow of wealth, skills and people across state lines has now become imperative".[47] LeBel J., in his dissent in *Beals*, in considering the demands of international comity, measured the breadth of the majority's "real and substantial connection"

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[43] R.S.O. 1990, c.I.9.
[44] Both sides referred to the decision of the Alberta Courts in *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara.* Although in one decision the Alberta Court of Appeal made comments regarding the appropriate forum in which to enforce the arbitral award (2011 ABCA 291, para. 4), the issue of the jurisdiction of the Alberta courts did not arise in that case because the judgment debtor had defended the enforcement action (2010 ABQB 172, para. 2).
[45] *Morguard, supra.*, para. 29.
[46] *Ibid.*, para. 34.
[47] *Ibid.*, para. 34.

test against the scope of the tests for recognition found in the laws of some of our major trading partners.[48]

[67] That said, having reviewed the submissions of the parties on the relevant American law and having reviewed the authorities to which they referred, I have concluded that the American jurisprudence does not afford assistance on the specific issue before me on these motions for two reasons.

[68] First, much of the recent American jurisprudence has involved the consideration of state legislation which has adopted the *Uniform Foreign Money-Judgments Recognition Act* (the "Uniform Act"). Several significant differences exist between the principles contained in the Uniform Act and the Canadian common law on the recognition and enforcement of foreign judgments. Those differences demand that a Canadian court approach with caution the principles of American law in this area.

[69] Second, the American authorities are not *ad idem* on the issue raised by these motions. One stream of cases, led by the decision of the New York Court of Appeals in *Lenchyshyn v. Pelko Electric, Inc.*,[49] can be read as standing for the proposition that the recognition and enforcement of a foreign judgment does not depend upon the recognizing court possessing personal jurisdiction over the judgment debtor:[50]

> We conclude, however, that a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts. No such requirement can be found in the CPLR, and none inheres in the Due Process Clause of the United States Constitution from which jurisdictional basis requirements derive.[51]

The New York Court of Appeals went on to state:

> Moreover, although defendants assert that they currently have no assets in New York, that assertion has no relation to their jurisdictional objection...In any event, plaintiffs sufficiently allege that defendants have assets in New York...Plaintiffs should be given the opportunity to enforce the Ontario judgment by levying against whatever assets of defendants may be owed to Pelonis by the New York corporation. Such assets and/or debts would have a New York situs, which is all that is required to subject them to levy or restraint here as a means of enforcing the domesticated Ontario judgment...Moreover, even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps *in futuro*, whenever it might appear that defendants are maintaining assets in New York,

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[48] *Beals, supra.*, para. 206.
[49] 723 N.Y.S. 2d 285 (App. Div., 2001).
[50] *Ibid.*, p. 286.
[51] *Ibid.*, p. 289.

> including at any time during the initial life of the domesticated Ontario money judgment or any subsequent renewal period...[52]

[70] The position taken by the New York Court of Appeals was followed by the Texas Court of Appeals, Fourteenth District, Houston, in *Haaksman v. Diamond Off-Shore (Bermuda), Ltd.*, in which the court stated:

> We agree with the New York case and conclude even if a judgment debtor does not currently have property in Texas, a judgment creditor should be allowed the opportunity to obtain recognition of his foreign-money judgment and later pursue enforcement if or when the judgment debtor appears to be maintaining assets in Texas.[53]

[71] The other line of cases, exemplified by the decision of the Michigan Court of Appeals in *Electrolines, Inc. v. Prudential Assurance Company, Ltd.*,[54] have taken a different approach to the need to demonstrate the personal jurisdiction of the recognizing court over the defendant. In *Electrolines* the Michigan Court of Appeals stated:

> We hold that where plaintiff failed to identify any property owned by defendants in Michigan, the trial court erred in holding that it was unnecessary for plaintiff to demonstrate that the Michigan court had personal jurisdiction over defendants in this common-law enforcement action.[55]
>
> ...
>
> We have not found any authorities indicating that the foundational requirement of demonstrating a trial court's jurisdiction over a person or property is inapplicable in enforcement proceedings...[56]

[72] Further, as the drafters of the 2005 version of the *Uniform Act* observed in respect of section 6 of the Act dealing with the procedure for recognition of a foreign country judgment:

> Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186, 210 n. 36 (1977). This act takes no position on that issue.

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[52] *Ibid.*, p. 291.
[53] 260 S.W. 3d 476 (2008), 481.
[54] 677 N.W. 2d 874 (2004).
[55] *Ibid.*, p. 880.
[56] *Ibid.*, p. 884.

X. Principles governing motions to set aside service *ex juris*

A. The *Rules of Civil Procedure*

[73] Rule 17.02 of the Ontario *Rules of Civil Procedure* authorizes the service of an originating process outside of Ontario without leave of the court in certain circumstances:

> 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,
>
> ...
>
> (m) on a judgment of a court outside Ontario...

An originating process served outside of Ontario without leave must disclose the facts which support the provision of Rule 17.02 relied upon in support of such service.[57]

[74] In the *Van Breda* case, the Court of Appeal discussed the jurisdictional implications of Rule 17.02:

> In *Muscutt*, at para. 51, we adopted a statement from Janet Walker in G.D. Watson & L. Jeffrey, eds., *Holmested and Watson: Ontario Civil Procedure* (Carswell: Toronto, 2001), at p. 17-19, that *the grounds outlined in rule 17.02 "provide a rough guide to the kinds of cases in which persons outside Ontario will be regarded as subject to the jurisdiction of the Ontario courts". In my view, there are now several reasons that justify elevating the weight to be given rule 17.02 by saying that, with the exception of subrules 17.02(h) ("damages sustained in Ontario") and (o) ("a necessary or proper party"), if a case falls within one of the connections listed in rule 17.02, a real and substantial connection for the purposes of assuming jurisdiction against the defendant shall be presumed to exist.* As with *CJPTA*, s. 10, this presumption would not preclude a plaintiff from proving a real and substantial connection in other circumstances and does not preclude the defendant from demonstrating that, notwithstanding the fact that the case falls under rule 17.02, in the particular circumstances of the case, the real and substantial connection test is not met.[58]

The Court of Appeal did not discuss what, if any, distinctive consideration should be given to Rule 17.02(m) dealing with foreign judgments, which is not surprising given that the *Van Breda* case was concerned with the issue of whether an Ontario court could assume jurisdiction to conduct the initial adjudication on the merits of the particular claim.

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[57] Rule 17.04(1); *Kuchocki v. Fasken Martineau DuMoulin* (2005), 13 C.P.C. (6th) 350 (Ont. S.C.J.), paras. 18 to 22.
[58] *Van Breda*, OCA, para. 72.

[75] In its decision in *Van Breda* the Supreme Court of Canada stated that "it has been observed, though, that rule 17.02 is purely procedural in nature and does not by itself establish jurisdiction in a case (P.M. Perell and J.W. Morden, *The Law of Civil Procedure in Ontario* (2010), at p. 121)." Yet, in considering the Court of Appeal's approach to the role played by the Rule 17.02 factors in any jurisdictional analysis, the Supreme Court of Canada seemed to infuse some of the factors enumerated in Rule 17.02 with something more than a merely procedural conflict-of-laws life:

> At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law.[59]

Indeed, of the four presumptive factors for assumed jurisdiction in tort cases identified by the Supreme Court of Canada in *Van Breda*, two were drawn from Rule 17.02: (i) the tort was committed in the province (Rule 17.02(g)); and (ii) a contract connected with the dispute was made in the province (Rule 17.02(f)(i)).[60] Of course, the Supreme Court stated that the presumption of jurisdiction with respect to a factor is a rebuttable one, with it being open to the defendant to demonstrate that the presumptive factor does not point to any real relationship between the subject matter of the litigation and the forum, or only points to a weak relationship between them.[61]

B. Moving to set aside service *ex juris*

[76] The jurisprudence concerning challenging service *ex juris* under the Ontario *Rules of Civil Procedure* generally has involved cases where the plaintiff commenced suit in Ontario to secure an initial adjudication of its claim on the merits. The relevant legal principles governing motions to set aside service *ex juris* in *those* circumstances are well established and really not in dispute on these motions:

(i) Where a defendant moves to set aside service *ex juris* on the ground that there is no real and substantial connection with Ontario, the question will be whether there is a good arguable case that the connection exists;

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[59] *Van Breda*, SCC, para. 83.
[60] *Van Breda*, SCC, para. 90
[61] *Ibid.*, paras. 81 and 95.

(ii) In determining whether a sufficient real and substantial connection exists, the court must follow the approach approved by the Supreme Court of Canada in *Van Breda*;

(iii) Issues relating to *forum non conveniens* arise only where the jurisdictional requirement of a real and substantial connection would be satisfied in respect of Ontario and another jurisdiction;

(iv) In ascertaining whether a real and substantial connection exists, the statement of claim will be the starting point of the analysis as it contains the material facts from which the cause of action arose. Any allegation of fact that is not put into issue by the defendant is presumed to be true for purposes of the motion. The plaintiff is under no obligation to call evidence for any allegation that has not been challenged by the defendant;

(v) However, where a pleading lacks sufficient particularity with respect to the required jurisdictional connections, the plaintiff bears the burden of supplementing the pleading with affidavit evidence establishing such a connection;

(vi) Also, if the 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;

(vii) In considering whether a "good arguable case" is made that a real and substantial connection exists, the court does not try the merits according to the civil standard of proof for the purpose of resolving issues of fact that arise. A plaintiff need only show that a "good arguable case" for an assumption of jurisdiction is made out. A "good arguable case" has been compared to a "serious issue to be tried" or a "genuine issue" or "with some chance of success".[62] The threshold test is a low one.[63]

XI. Analysis: Setting aside service *ex juris*

A. Chevron

[77] For several reasons, I am not persuaded by the defendants that, at common law, an Ontario court lacks the jurisdiction to entertain an action to recognize and enforce a final judgment of a foreign state absent a showing that the judgment debtor defendant has some real and substantial connection with Ontario either through its presence in the jurisdiction or the presence of its assets in the jurisdiction, which essentially was the legal position advocated by both defendants.

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[62] *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548, para.36, leave to appeal ref'd 2012 CanLII 28261.
[63] See, generally, *Schreiber v. Mulroney* (2007), 88 O.R. (3d) 605 (S.C.J.); *Ontario v. Rothmans*, 2012 ONSC 22, para. 36.

[78] First, the decisions in *Morguard* and *Beals* dealing with the recognition of foreign judgments contained no such suggestion. True, neither case involved a non-resident judgment debtor defendant, but both decisions tied the demonstration of a real and substantial connection to what went on in the originating state, not in the receiving state.

[79] Second, it is far from clear to me that the decision in *Van Breda* acted to alter the principles articulated in *Morguard* and *Beals*. As a motions judge, I am in no position to speculate about what the Supreme Court of Canada may have intended in all respects by its decision in *Van Breda*. I can only read what the Court said in its judgment. That judgment was squarely focused on the issue of the ability of a Canadian court to assume jurisdiction in a tort claim where the accident occurred outside of Canada. While an Ontario court must not over-reach by assuming jurisdiction over the adjudication on the merits of events which bear a real and substantial connection to some other location, at the same time, as a matter of international comity, an Ontario court must exercise restraint when asked to decline recognizing the final judgment of a foreign state. That holds especially true where no dispute exists that the foreign state possessed a real and substantial connection with both the subject-matter of the litigation and, in the case of Chevron, the defendant, by virtue of it submitting to the jurisdiction of that court. I agree with the remarks of Pepall J. (as she then was) in the *BNP Paribas* case that our "court should grant its assistance in enforcing an outstanding judgment, not raise barriers".[64]

[80] Third, the decisions of the Court of Appeal and Supreme Court of Canada in *Van Breda* both placed significant jurisdictional weight on the grounds enumerated in Rule 17.02, save for those in Rules 17.02(h) and (o). The Court of Appeal "elevated the weight" to be given to Rule 17.02 grounds, taking the view that cases which fell under them were ones in which the Ontario court enjoyed presumptive assumed jurisdiction.[65] The Supreme Court of Canada viewed some Rule 17.02 grounds as "certain connections that the courts could use as presumptive connecting factors" because "they represent an expression of wisdom and experience drawn from the life of the law".[66] Viewed in that light, Rule 17.02(m) grants an Ontario court jurisdiction over a non-resident defendant who is the judgment debtor "on a judgment of a court outside Ontario". To accede to the defendants' argument that Rule 17.02(m) must be read within the (un-stated) context of the Ontario court otherwise enjoying some real and substantial connection to the defendant would render the sub-rule meaningless. Of course the Ontario court will have no connection to the subject-matter of the judgment - it is a foreign judgment which by its very nature has no connection with Ontario. Nor will there be a connection, in the sense of an *in personam* connection, between the defendant and the Ontario court; the sub-rule specifically contemplates that a non-Ontario resident will be the defendant in the action. Which leaves only a connection between Ontario and an asset of the defendant. But, as I have stated, my reading of *Morguard* and *Beals* does not disclose the presence of assets to be a jurisdictional pre-condition to a recognition and enforcement judgment, notwithstanding the commercial reality that

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[64] *Ibid.*, para. 12.
[65] *Van Breda*, OCA, para. 72.
[66] *Van Breda*, SCC, para. 83.

judgment creditors usually do not chase judgment debtors in jurisdictions where they have no assets.

[81] Fourth, an additional reason why I am not prepared to adopt the principle advanced by the defendants is that one can foresee circumstances where legitimate reasons would exist to seek the recognition and enforcement of a foreign judgment against a non-resident judgment debtor which, at the time of the recognition action, possessed no assets in Ontario. Often, in enforcement proceedings, timing is everything. In an age of electronic international banking, funds once in the hands of a judgment debtor can quickly leave a jurisdiction. While it is highly unlikely that a judgment debtor would move assets into a jurisdiction in the face of a pending recognition action, in some circumstances judgment debtors may not control the timing or location of the receipt of an asset due to them; control may rest in the hands of a third party as a result of contract or otherwise. Where a judgment creditor under a foreign judgment learns that its judgment debtor may come into possession of an asset in the foreseeable future, it might want the recognition of its foreign judgment in advance of that event so that it could invoke some of the enforcement mechanisms of the receiving jurisdiction, such as garnishment. To insist that the judgment creditor under a foreign judgment await the arrival of the judgment debtor's asset in the jurisdiction before seeking recognition and enforcement could well prejudice the ability of the judgment creditor to recover on its judgment. Given the wide variety of circumstances - including timing - in which a judgment debtor might come into possession of an asset, I do not think it prudent to lay down a hard and fast rule that assets of the judgment debtor must exist in the receiving jurisdiction as a pre-condition to the receiving jurisdiction entertaining a recognition and enforcement action.

[82] Fifth, I have examined above the requirements of the two Ontario statutes which deal with the recognition of foreign judgments or awards: the *Reciprocal Enforcement of Judgments (U.K.) Act* and the *International Commercial Arbitration Act*. Neither act, nor its underlying Convention or Model Law, expressly requires, as a condition of registering a foreign judgment or arbitral award, that the defendant be located in Ontario or that it possess assets in Ontario. In my view, in an age of global commerce, one should take care to ensure that Ontario's common law does not end up taking a more restrictive approach to the recognition and enforcement of foreign judgments than found in its statutes concerning the recognition and enforcement of foreign arbitral awards.

[83] Now, the present case is a very unusual one. Normally the whole issue of the recognition and enforcement of foreign judgments is self-regulating. Judgment creditor plaintiffs generally do not throw good money after bad by going around seeking to enforce their foreign judgments in jurisdictions in which their judgment debtors do not have assets. That would be a waste of money. No doubt that practical commercial reality accounts for the paucity of Canadian cases in this area – judgment creditors tend to go forward only in those jurisdictions where little doubt exists that their judgment debtors possess assets. As the Court of Appeal observed in *Lax v. Lax*:

> The purpose of enforcing a foreign judgment within Ontario is to execute on assets of the judgment debtor that are within the province. When a judgment debtor of a foreign action comes into the province, if the person brings assets, it is only at that time that a judgment creditor will want to seek to enforce the foreign judgment here.[67]

Consequently, the abstract (albeit important) principle of private international law put in issue on these motions rarely sees the light of day because economic considerations regulate the selection of the recognition forum.

[84] Here, the plaintiffs have obtained an enormous final judgment against Chevron. The judgment debtor acknowledges that it owns assets in the United States. As I stated during the hearing, the jurisdiction in which the judgment debtor owns assets is only a short distance from this courthouse – in less than an hour's drive one can cross a bridge which takes you into the very state in which Chevron initiated its anti-enforcement injunction proceedings. Yet, the plaintiffs have not sought the recognition and enforcement of their foreign judgment in the place of their judgment debtor's residence or place of business and, instead, have come to Ontario arguing that the assets nominally held by a stranger to the foreign Judgment should be made available to satisfy it.

[85] Unusual fact situations are not the best ones upon which to set down broad-reaching principles of law. On my reading of the *Van Breda* decision, it did not purport to displace the principles previously articulated by the Supreme Court of Canada in *Morguard* and *Beals*. Accordingly, I am not prepared to adopt, as the defendants argued, a blanket principle that an Ontario court lacks jurisdiction to entertain a common law action to recognize and enforce a foreign judgment against an out-of-jurisdiction judgment debtor in the absence of a showing that the defendant has some real and substantial connection to Ontario or currently possesses assets in Ontario. The Ontario legislature, through Rule 17.02(m) of the *Rules of Civil Procedure*, authorized the institution in Ontario of proceedings to recognize and enforce foreign judgments against non-resident defendants, and no jurisprudence binding on me has expressly placed a gloss on that ability to assume jurisdiction by requiring the plaintiff to demonstrate that the non-resident judgment debtor defendant otherwise has a real and substantial connection with Ontario. Accordingly, I am not prepared to grant the motion by Chevron to set aside the service *ex juris* on it of the plaintiffs' Amended Statement of Claim.

B. Chevron Canada

[86] As to the motion of Chevron Canada to set aside the service *ex juris* on it, while there are strong grounds to doubt that the purported service of the Amended Statement of Claim on Chevron Canada in British Columbia was effective, relying as the plaintiffs did on the "necessary party" provision of Rule 17.02(o) which requires that the proceeding be "properly brought against another person served in Ontario", the issue was rendered of little import in light of the subsequent service of the Amended Statement of Claim on Chevron Canada at its Mississauga, Ontario office.

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[67] (2004), 70 O.R. (3d) 520 (C.A.), para. 28.

[87] Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere "virtual" business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. In the words of Rule 16.02(1)(c), Chevron Canada was served at a "place of business" in this province. This court therefore possesses jurisdiction over Chevron Canada. I therefore dismiss its motion to set aside the earlier service *ex juris* because, in the result, service *in juris* was made.

XII. Analysis: Stay under *CJA* s. 106

[88] That does not end the analysis in this most unusual case. Both defendants invoked the power of this Court to stay a proceeding under section 106 of the *Courts of Justice Act*, albeit on the basis that this Court lacked jurisdiction. That section also entitles a court, "on its own initiative", to stay a proceeding. In my view, a stay of this action is justified in light of the very unique facts presented by this case. By way of my "bottom-line", I accept the following submission made by Chevron in its factum:

> 117. [B]ecause Chevron Corp. does not have assets here, and there is no reasonable prospect that it will do so in the future, there is no prospect for any recovery here. To allow the Plaintiffs' academic exercise to take place in the Ontario judicial system would, therefore, be an utter and unnecessary waste of valuable judicial resources…

Let me explain why I have reached my conclusion.

[89] First, the evidence supports findings that (i) Chevron is not the owner of any assets in Ontario, (ii) it has not owned any assets in Ontario in the past, and (iii) it has no intention of owning any assets in Ontario in the future. In its factum Chevron asserted:

> 77. Chevron Corp. has no presence, business activity, or assets in Ontario or elsewhere in Canada. This has been the case for 86 years and there is no reasonable basis to believe that these arrangements will change.

While courts must subject to scrutiny assertions by judgment debtors that they do not intend to engage in certain future conduct regarding their assets, Chevron's established history of not owning assets in Ontario points to a deliberate corporate policy to avoid such ownership in this jurisdiction. Accordingly, this is not the case of a judgment debtor who says one thing today to a court, but likely will do quite the opposite in the event court rules in its favour on the motion to stay. Chevron obviously has structured its corporate affairs, including its asset ownership, in a very deliberate way, and the evidence disclosed no reasonable or likely prospect of Chevron owing assets in Ontario in the near or mid-term.

[90] Second, the evidence disclosed that Chevron does not conduct any business in Ontario.

[91] Thirdly, and consequently, the plaintiff judgment creditors are left with asserting that the assets owned by a 7th generation indirectly-owned subsidiary – Chevron Canada – arguably are available for execution against Chevron as judgment debtor. Similarly, the only basis upon which the plaintiffs can support their claim against Chevron Canada – which is not a party to the

Ecuadorean Judgment – is that the assets of Chevron Canada "are" the assets of Chevron for purposes of satisfying the Judgment.

[92] On their face the shares of Chevron Canada are not exigible in satisfaction of the Judgment since their registered owner, Chevron Canada Capital Company, was not a party to the Judgment, nor is it a party to this action.

[93] Although in their Amended Statement of Claim the plaintiffs pleaded that the assets of Chevron Canada "are beneficially-owned by Chevron and, through it, by the shareholders of Chevron", as noted Chevron does not own the shares of Chevron Canada - Chevron Canada Capital Company does. Moreover, under Canadian law, a shareholder in a corporation does not possess a legal or equitable interest in the assets of the company.[68] As put by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*:

> An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares...While the corporation is on-going, shares confer no right to its underlying assets.
>
> A share "is not an isolated piece of property ... [but] a 'bundle' of interrelated rights and liabilities"...These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.[69]

Accordingly, the plaintiffs' bald pleading that Chevron beneficially owns the assets of Chevron Canada is inconsistent with the basic principles of Canadian corporate law.

[94] To get around the separate corporate personality of Chevron Canada[70] and the absence of Chevron assets in Ontario, the plaintiff judgment creditors, in effect, sought to pierce the corporate veil of Chevron Canada. The gist of their pleading in that regard was that Chevron controlled and managed Chevron Canada, the implication being, although not expressly pleaded, that Chevron Canada in fact had no independent existence as a corporate entity.[71] As the plaintiffs described Chevron Canada in their factum: "its assets are the assets of Chevron Corp."

[95] Usually arguments concerning piercing the corporate veil involve an effort by a claimant to go through the limited liability possessed by the corporate form to attach liability to the owner/shareholder of the limited liability corporation. The plaintiffs' allegations in this case are somewhat unusual in that they attempt to transfer responsibility for an obligation of the owner/shareholder (albeit an indirect owner/shareholder) onto the corporate entity. Nevertheless, from the case law placed before me on these motions, the principles governing the circumstances in which a court will look beyond the separate legal personality of a corporation and pierce the

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[68] *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, at 12-13.
[69] [2008] 3 S.C.R. 560, paras. 34 and 35, citations omitted.
[70] *Canada Business Corporations Act*, s.15(1).
[71] See Amended Statement of Claim, paras. 15 to 17.

corporate veil for purposes of attaching liability on another person may be summarized as follows:

(i) The separate legal personality of the corporation should not be lightly disregarded and a shareholder is liable for the wrongs of a corporation only in very limited circumstances;

(ii) As a general proposition, courts may look behind corporate structures (a) where a principal-agent relationship between two related corporations leads to liability despite separate legal personalities, (b) where it is necessary to do so to give effect to legislation, especially taxation statutes, or (c) where it can be shown that (1) the *alter ego* exercises complete control over the corporation or corporations whose separate legal identity is to be ignored and (2) the corporation or corporations whose separate legal identity is to be ignored are instruments of fraud or a mechanism to shield the *alter ego* from its liability for illegal activity; [72]

(iii) As put by the Court of Appeal in *Gregorio v. Intrans-Corp.*, this latter circumstance, sometimes called the *alter ego* basis of piercing the corporate veil, "is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights":[73]

a. 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[74] - or, as put in one case, a demonstration that the subsidiary is a "puppet" of the parent.[75] A list of some of the criteria by which to assess the independence of the subsidiary was set out by the Court of Appeal in *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce*;[76] and,

b. The impropriety must be linked to the use of the corporate structure to avoid or conceal liability for that impropriety;[77]

(iv) The fact that a parent corporation operates a number of world-wide companies as an integrated economic unit does not mean that separate legal entities will be ignored absent some compelling reason for lifting the corporate veil.[78] Ontario courts have

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[72] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), paras. 19 to 23. See also the cases cited by Perell J. in *Miquelanti Ltda. v. FLSmidth & Co.*, 2011 ONSC 3293, paras. 18 to 21.

[73] (1994), 18 O.R. (3d) 527 (C.A.), para. 28.

[74] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), para. 22, appeal dismissed [1997] O.J. No. 3754 (C.A.).

[75] *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (C.A.), para. 43, leave to appeal ref'd, [1974] S.C.R. viii.

[76] *Canada Life Assurance, supra.*, para. 42.

[77] *Shoppers Drug Mart v. 6470360 Canada Inc.*, 2012 ONSC 5167, para. 77, quoting *Trustor AB v. Smallbone and others (No. 2)*, [2001] 3 All ER 987 (HC), at 996.

[78] *Cunningham v. Hamilton*, [1995] A.J. No. 476 (C.A.), para. 4.

not adopted the "group enterprise theory" of corporate liability.[79] I adopt, as an accurate statement of the law prevailing in Ontario on this point, the following statements by the United Kingdom Court of Appeal in *Adams v. Cape Industries Plc.*:

> There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies...is a separate legal entity possessed of separate legal rights and liabilities..."
>
> Our law...recognizes the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.[80]

[96] The plaintiffs' pleading does not assert a principal-agent relationship between Chevron and Chevron Canada, nor does it plead any necessity to pierce the corporate veil to satisfy any legislative imperatives. When read as a whole, the plaintiffs' pleading relies on the *alter ego* principle to pierce the corporate veil.

[97] But, before dealing with that allegation, let me comment on the pleading made by the plaintiffs in paragraph 20 of their Amended Statement of Claim that "Chevron Canada is a necessary party to this action in order to achieve equity and fairness between the parties and to yield a result that is not 'too flagrantly opposed to justice'". In *Constitution Insurance Co. of Canada v. Kosmopoulos* Wilson J. wrote:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.* [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, Modern Company Law (4th ed. 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice ... But a number of factors lead me to think it would be unwise to do so.[81]

[98] I adopt the analysis of Sharpe J. (as he then was) in the *Transamerica* case in which he rejected the contention that based on this passage in the reasons of Wilson J. a principle existed that a court could pierce the corporate veil when it is just and equitable to do so:

> In my view, the argument advanced by Transamerica reads far too much into a dictum plainly not intended to constitute an in-depth analysis of an important area of the law or

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[79] See the cases cited in *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196, para. 109.
[80] [1990] 1 Ch. 433 (C.A.), at pp. 532 and 536.
[81] [1987] 1 S.C.R. 2, pp. 10-11.

> to reverse a legal principle which, for almost 100 years, has served as a cornerstone of corporate law.
>
> It was conceded in argument that no case since Kosmopoulos has applied the preferred "just and equitable" test...
>
> There are undoubtedly situations where justice requires that the corporate veil be lifted. The cases and authorities already cited indicate that it will be difficult to define precisely when the corporate veil is to be lifted, but that lack of a precise test does not mean that a court is free to act as it pleases on some loosely defined "just and equitable" standard.[82]

Subsequently the Court of Appeal, in referring to the "too flagrantly opposed to justice" phrase used in the *Kosmopoulos* case, stated:

> But this does not mean that courts enjoy 'carte blanche' to lift the corporate veil absent fraudulent or improper conduct whenever it appears 'just and equitable' to do so.[83]

The Court of Appeal then adopted the analysis employed by Sharpe J. in the *Transamerica* case.

[99] Turning back, then, to the plaintiffs' argument based on the *alter ego* principle of piercing the corporate veil, a substantial amount of evidence was filed on these motions about the legal and economic relationship between Chevron and its indirectly-owned subsidiary, Chevron Canada. Much of that evidence was filed on a confidential basis pursuant to the protective order of Patillo J. I need not recite that evidence in any detail. Suffice it to say, the evidence demonstrated 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 over-lapping members with the Chevron board or executive. As Jeffrey Wasko, an officer of Chevron Canada, stated in his affidavit in respect of that company's 650 employees: "Chevron Canada employs, trains and directs the activities of its own professional, operational and administrative staff; it pays their salaries and benefits; and it provides Workers' Compensation coverage as required."

[100] As part of a worldwide "family" of companies, Chevron Canada is subject to certain "family" budget reporting requirements and large capital expenditure approval processes, but it initiates its own plans and budgets, it funds its own day to day operations, and the capital expenditures made by it in recent years for the major Athabasca Oil Sands Project, Hibernia Project and Hebron Project were funded from its own operating revenues. Mr. Wasko deposed:

> Chevron Canada is a fully capitalized corporation which funds its own day to day operations without financial contributions from Chevron Corp. or any other Chevron entity.

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[82] *Transamerica*, Gen. Div., paras. 15, 16 and 21.
[83] *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, para. 50.

This corporate structure has been in place since 1966; it was not a recent creation designed to blunt the effect of the Ecuadorean Judgment. I do not regard the existence of a central review and approval process for large capital expenditures, especially of the magnitude found in the resource extraction industry, as signifying a complete domination by the parent of the indirect subsidiary such as to dissolve the separate legal identity of the subsidiary, especially when, as the evidence showed in this case, the indirect subsidiary carries on its own business operations. Put another way, the centralized strategic planning and allocation of large amounts of capital, by itself, does not undermine the separate legal entity of a company down the corporate chain which operates a tangible business managed by separate directors, officers and senior managers.

[101] Nor does the fact that on several occasions Chevron guaranteed debt financings and project-related performance obligations of Chevron Canada indicate that the corporations possess a single legal identity.[84] Certainly the lenders in those cases proceeded on the basis that parent and indirect sub were separate legal entities, otherwise they would not have asked for the guarantees of the ultimate parent. Moreover, inter-corporate guarantees are common-place in our commercial world. The granting of a guarantee by Company A does not merge its assets, in the eyes of the law, with those of borrower Company B. The guarantee does expose the separate assets of Company A to the risk of execution in the event of a default by Company B, but that result simply flows from the contractual terms agreed to by Company A, not some dissolution of its corporate separatedness.

[102] Chevron Canada files its own tax returns and corporate statements. That Chevron files a consolidated set of financial statements simply reflects the legal reporting requirements of its home jurisdiction, in particular the *Sarbanes-Oxley Act of 2002* and the *Securities and Exchange Act of 1934*; it is not an *indicia* of the complete domination and control of the subsidiary by the parent.[85] The same observation applies to the common reporting requirements found in the Chevron family of companies. At a time when legislators are insisting on higher standards of corporate governance for related groups of companies, including the disclosure of material information, efforts to comply with those requirements do not signify that the individual companies have lost their separate legal identities.

[103] Nor does the dividending-up by Chevron Canada of some of its operating profits to its parent, Chevron Canada Capital Company, which, in turn, may issue dividends up the chain signify, in itself, complete domination of the subsidiary's operations. The distribution of profits from sub to parent via dividends is a standard fact of inter-corporate life. No evidence in this case suggested that the flow of dividends reflected complete domination in the sense used by the *alter ego* cases.

[104] In my view, when taken as a whole, the evidence filed on these motions supports a finding that the relationship between Chevron and Chevron Canada is, to echo the language of

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[84] None of the guarantees were ever called on.

[85] See also the reasoning of Molloy J. in *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, [2001] O.J. No. 2790 (S.C.J.), para. 19; appeal dismissed, except on an unrelated point (2002), 61 O.R. (3d) 786 (C.A.).

Sharpe J. (as he then was) in the *Transamerica* case, "that of a typical parent and subsidiary",[86] not an instance of a parent corporation exercising complete domination and control over the subsidiary. Or, to phrase that conclusion in the language of the Court of Appeal in the *Canada Life Assurance* case, the evidence demonstrates that Chevron Canada "looks as though it has its own business, rather than being completely subservient to and dependent upon its parent".[87]

[105] Nor do the plaintiffs allege any improper conduct which would support a piercing of the corporate veil of Chevron Canada. In paragraph 21 of their Amended Statement of Claim the plaintiffs specifically pleaded:

> The plaintiffs do not allege any wrongdoing against Chevron Canada.

Even the most liberal reading of the Amended Statement of Claim does not disclose any pleading of material facts which would suggest or hint that the activities of Chevron Canada were or are in any way, shape or form carried on as instruments of fraud or as a mechanism or conduit to avoid or to conceal liability for an impropriety committed by Chevron. The Amended Statement of Claim contains no pleading of facts which links Chevron Canada in any way to the events which gave rise to the Ecuadorean Judgment or to events designed to shield Chevron from any liability under that Judgment.

[106] 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 in the Amended Statement of Claim that the separate corporate identity of Chevron Canada should be ignored so that its assets become available for execution in satisfaction of the Judgment rendered against its ultimate parent.

[107] The plaintiffs submitted that support for its assertions about the exigibility of Chevron Canada's assets could be found in the recent Supreme Court of Canada case law on vicarious liability, specifically the comments made by that Court in *Bazley v. Curry* that when an employer's enterprise created risk in the community, then the person who created the risk should bear the loss caused by its employees.[88] I fail to see how that principle assists the plaintiffs in bridging the gap between the separate legal personalities of Chevron and Chevron Canada, more particularly in light of the plaintiffs' specific pleading that they do not allege any wrongdoing against Chevron Canada. Nor do I see the relevance of the plantiffs' argument derived from the decision of the Court of Appeal in *Christian Brothers of Ireland in Canada (Re)*.[89] That case simply held that in proceedings winding-up a corporation, some of its assets were not cloaked

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[86] *Transamerica*, Gen. Div., *supra.*, para. 22. See also the observations of Strathy J. (as he then was) in *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, paras. 662-663.
[87] *Canada Life Assurance, supra.*, para. 43.
[88] [1999] 2 S.C.R. 534, para. 31.
[89] (2000), 47 O.R. (3d) 674 (C.A.).

with a form of charitable immunity which would remove them from the winding-up process. The present case does not raise that issue.[90]

[108] The plaintiffs also argued that because in its October 15, 2012 Decision the Ecuadorean Trial Court held that the assets of Chevron's subsidiaries would be available to satisfy the Judgment against Chevron, the issue of piercing the corporate veil had been rendered *res judicata* against Chevron and Chevron Canada. I disagree. Chevron Canada was not a party to the Ecuadorean proceedings; *res judicata* could not arise. In any event, the legal attributes of a *CBCA* corporation, such as Chevron Canada, including the exigibility of its assets to satisfy a judgment, are matters falling to be decided under Canadian, not Ecuadorean, law.

[109] While I appreciate that these are not motions for summary judgment, nor do the moving parties rely on the "no reasonable cause of action" branch of Rule 21,[91] on a motion invoking the Court's jurisdiction to stay an action under section 106 of the *Courts of Justice Act*, a court is entitled, in part, to measure the strength of the plaintiffs' case. As disclosed by the material facts pleaded in their Amended Statement of Claim and the affidavit and cross-examination evidence filed on this motion, the plaintiffs have no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and ignored so that its assets become exigible to satisfy a Judgment against its ultimate parent. There is no basis in law or fact for such a claim.

[110] By way of summary, Chevron does not possess any assets in this jurisdiction at this time. The evidence also disclosed that no realistic prospect exists that Chevron will bring any assets into this jurisdiction in the foreseeable future, certainly not within the initial lifespan of a writ of seizure and sale, which is six years.[92] The plaintiffs' contention that the assets of Chevron Canada "are" the assets of Chevron has no basis in law or fact, as I explained above. Accordingly, any recognition of the Ecuadorian Judgment by this Court would have no practical effect whatsoever in light of the absence of exigible assets of the judgment debtor in this jurisdiction.

[111] Were I to permit the plaintiffs' action to proceed to the next step – the filing of statements of defence and the adjudication of the defences Chevron intends to assert against the Ecuadorean Judgment[93] - the evidence disclosed that a bitter, protracted and expensive recognition fight would ensue consuming significant time and judicial resources of this Court. Chevron is on record saying: "We will fight until hell freezes over and then fight it out on the ice." While Ontario enjoys a bountiful supply of ice for part of each year, Ontario is not the place for that fight. This is not to say that a court should acquiesce in the face of rhetorical sabre-rattling by a defendant. Far from it. Important considerations of international comity accompany any request

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[90] Nor do I see the relevance of the plaintiffs' argument based on the "common employer" doctrine, the treatment of related companies under taxation legislation, or the treatment of family-owned corporations in matrimonial litigation: Plaintiffs' Factum, paras. 197 to 200. Those contexts are completely different than that in the present case, and those contexts raise quite different policy considerations.

[91] Rule 21.01(1)(b).

[92] Rule 60.06(6).

[93] Those defences were described by the U.S. Court of Appeals, Second Circuit, in *Chevron Corporation v. Naranjo, supra.*, at p. 236-7.

for the recognition of a judgment rendered by a foreign court. But, this very unusual case has a long history from which this receiving court can measure the practical consequences of dedicating its resources to such a fight. The evidence disclosed that there is nothing in Ontario to fight over. Ontario courts should be reluctant to dedicate their resources to disputes where, in dollar and cents terms, there is nothing to fight over. In my view, the parties should take their fight elsewhere to some jurisdiction where any ultimate recognition of the Ecuadorian Judgment will have a practical effect.

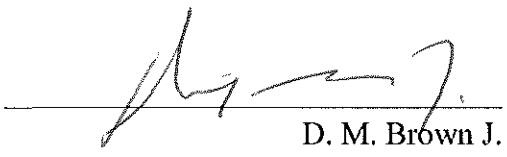
XIII. Conclusion

[112] For the reasons set out above, I dismiss that part of the defendants' motions seeking to set aside the service on them of the Amended Statement of Claim. However, I grant the further relief sought in those motions and I stay this action, but without prejudice to the plaintiffs' right to move to lift the stay on new evidence that Chevron possesses, or is likely to shortly possess, assets in this jurisdiction.

[113] I would encourage the parties to attempt to settle the costs of these motions. If they cannot, I require any party seeking an award of costs to serve and file with my office written cost submissions, together with a Bill of Costs, by May 17, 2013. Any party who opposes any request for costs made by another party shall serve and file with my office responding written cost submissions by May 31, 2013.

[114] Such responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air".[94] The costs submissions shall not exceed five pages in length, excluding the Bill of Costs.

[115] The sealing order made by Patillo J. is continued until further order of this Court.



D. M. Brown J.

Date: May 1, 2013

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[94] (2003), 64 O.R. (3d) 135 (S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States of America v. Yemec*, [2007] O.J. No. 2066 (Div. Ct.), para. 54.