David Persists Against Goliath – Ontario Court of Appeal Overturns Security for Costs Order Against Ecuadorian Claimants

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In the latest development in the *Yaiguaje v Chevron Corporation* saga, the Ontario Court of Appeal ("OCA") has vacated a security for costs order against the Ecuadorian claimants.

In February 2011, an Ecuadorian court found that Chevron Corporation was liable for $9.5 billion in damages relating to oil extraction activities in Ecuador's Oriente region. Chevron Corporation did not have assets in Ecuador at the time of the judgment. Chevron Corporation has resisted enforcement of the Ecuadorian judgment.

In 2012, the Ecuadorian claimants sought to have the Ecuadorian judgment enforced in Ontario against Chevron Corporation and Chevron Canada, a seventh level subsidiary of Chevron Corporation. In 2015, the Supreme Court of Canada ruled that Ontario courts have jurisdiction to decide whether the Ecuadorian judgment is enforceable in Ontario.

Soon after the Supreme Court of Canada's decision, Chevron Corporation and Chevron Canada brought a motion for summary judgment to the Ontario Superior Court of Justice. On January 20, 2017, the motion judge granted summary judgment and terminated the Ecuadorians' enforcement proceeding against Chevron Corporation and Chevron Canada. The Ecuadorian claimants appealed the decision. At the same time, Chevron Corporation and Chevron Canada brought a motion for security for costs.

On September 21, 2017, the motion judge granted Chevron's motion requiring the Ecuadorian claimants to post nearly $1 million as security for costs for the appeal and all lower court proceedings.

A security for costs order requires a litigant to pay or deposit money (or a different form of security) into court to secure payment of court costs to its opponent if the litigant is not successful. The court's decision to order security for costs is discretionary. In determining whether an order should be made for security for costs, the "overarching principle to be applied to all the circumstances is the justness of the order sought".[1]

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[1] *Pickard v London Police Services Board*, 2010 ONCA 643, at para 17.

The requirement to post $1 million inevitably would have been a significant roadblock to the Ecuadorians further pursuing:

- An appeal of the motion judge's termination of the enforcement proceeding against Chevron Corporation and Chevron Canada, and
- Enforcement of the Ecuadorian court's decision against Chevron Corporation.

On October 31, 2017, the OCA held that the motions judge erred by failing to consider all the circumstances of the case and not conducting a "holistic analysis" about whether ordering security for costs would be just.[2]

Based on "the unique factual circumstances" of the case, the OCA concluded that in the Ecuadorians' case, "the interests of justice require that no order for security for costs be made".[3]

The OCA considered:

- The public interest nature of the litigation, given that the claimants do not have a financial interest in the enforcement of the Ecuadorian judgment
- The impracticality of obtaining evidence of impecuniosity from 30,000 class members
- Chevron Corporation's and Chevron Canada's enormous revenues relative to the $1 million security for costs order
- The availability (or not) of third party litigation funding, and
- That it is not clear at this early stage of the enforcement proceeding that the Ecuadorians will not succeed.[4]

The OCA emphasized that innovative and untested legal arguments must be allowed to be tested, and must not be "thwarted for procedural or tactical reasons".[5] Further, while the OCA acknowledged that Chevron Corporation and Chevron Canada have the right to employ all available means to resist enforcement of the Ecuadorian judgment, the OCA found that "this reality makes it difficult to accept that the motion for security for costs was anything more than a measure intended to bring an end to the litigation".[6]

This decision signals that a multinational, multi-billion dollar company will not be so readily permitted to suppress a disadvantaged opponent's legal rights using tactics designed to exhaust the opponent and the opponent's resources. Instead, the OCA is prepared to exercise its discretion to not thwart this David and Goliath enforcement proceeding prior to determination of the merits.

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2 *Yaiguaje v Chevron Corporation*, 2017 ONCA 827, at para 23.
3 *Ibid*, at para 26.
4 *Ibid*.
5 *Ibid*.
6 *Ibid*.

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