Blaney McMurtry LLP

PUBLICATION

Supreme Court Issues Decision that has Implications for Canadian Subsidiaries, Foreign-Owned Parents

Date: March 02, 2016
Author: Varoujan Arman
Blaneys on Business

Original Newsletter(s) this article was published in: Blaneys on Business: March 2016

The Supreme Court of Canada has issued a decision in a case called *Chevron Corp. v. Yaiguaje* that has implications for large multi-national corporations with subsidiaries in Canada.

The effect of the decision is to open the door to ignoring the separate legal personality of a local subsidiary and put its assets at risk in order to satisfy a judgment obtained against its foreign parent corporation in a foreign jurisdiction.

The decision is therefore a possible victory for foreign plaintiffs who are being thwarted in their enforcement efforts by complex corporate structures that shield assets from them under the legal fiction of separate corporate personalities.

The decision concerns creditors who obtain judgment in another country but who are unable to locate assets to satisfy the judgment debt in that jurisdiction. If the debtor has assets in Canada (or is suspected of having assets), the creditor seeks Canadian judgment on the same terms as the foreign judgment so that the Canadian assets may be pursued.

The only traditional defences available to such actions are if the original judgment was obtained by fraud, by violation of the rules of natural justice, or if the enforcement of the judgment would be contrary to public policy [1].

Global oil giant, Texaco (which merged with Chevron, a U.S. corporation), was sued in Ecuador for causing serious environmental damage as a result of its oil extraction operations. The Ecuadorian court awarded judgment against Chevron for US $9.51 billion. Unable to satisfy the judgment debt in Ecuador (where Chevron holds no assets), and tied up in litigation on the same matter in the United States, the plaintiffs turned to Canada and launched an action in

Ontario for recognition and enforcement of the judgment against Chevron Canada, a seventh-level indirect subsidiary of Chevron U.S.

The Supreme Court was tasked with deciding the following issues: (1) whether there must be a "real and substantial connection" between the defendant or the dispute and Ontario, and (2) whether the Ontario court has jurisdiction over Chevron Canada. The Court answered "no" to the first question and "yes" to the second.

The court emphasized that Canada takes a generous and liberal approach to recognition and enforcement proceedings, and stressed the importance of "comity" -- the recognition of the legitimate judicial acts of other nations. The court confirmed that there is no requirement for a connection between the substance of the dispute and the new jurisdiction where enforcement is sought. The enforcing court only needs proof that the judgment was issued by a court of competent jurisdiction, is final, and proof of its amount. There is no requirement for a debtor to have assets in Canada at the time enforcement is sought. The court pointed out that in the global and electronic age, such a requirement would impede a creditor's right to access assets that may eventually flow into Canada.

Regarding whether the Ontario court has jurisdiction over Chevron Canada, this too does not require a "real or substantial connection" between Chevron Canada and the Ecuadorian dispute. The court only requires traditional, presence-based jurisdiction, which is established if the defendant carries on business in Canada at the time of the action. Here, the court noted the importance of Chevron's bricks and mortar operation within Ontario, which was much more than just a "virtual" office.

The *Chevron* decision is an unequivocal confirmation by Canada's highest court that the judgments of foreign nations with comparable legal systems are to be treated with considerable respect.

The ruling that the Ontario court has jurisdiction over Chevron Canada, a separate and distinct corporate entity from Chevron U.S., is an important development as conventional wisdom, based on the application of traditional legal doctrine that corporations have a separate and distinct legal personality from their shareholders, is at risk of being turned on its head.

While Chevron Canada can still raise the defence that it is an unrelated and distinct corporate entity and should therefore not be subject to enforcement proceedings, the plaintiffs' efforts have not been thwarted at the jurisdictional stage.

It therefore remains to be seen whether the courts will revisit the wisdom of long-standing corporate law doctrine and ignoring form over substance in the interests of doing justice.

[1] See *Beals v Saldanha*, [2003] SCJ No 77 (SCC) at paras. 35 and 40

Varoujan Arman is a member of Blaney McMurtry's commercial litigation, insurance defence litigation and Architectural, Construction, and Engineering Services (ACES) groups. He appears regularly before the Superior Court of Justice; has appeared before the Divisional Court for Ontario and has drafted written submissions for the Ontario Court of Appeal. Varoujan has been published in several leading legal publications including the Advocates Quarterly and the Oxford Journal of Intellectual Property Law and Practice. This article is adapted from his original as published in Commercial Litigation Update, the newsletter of Blaney McMurtry's Commercial Litigation practice group.

Varoujan may be reached directly at 416.596.2884 or varman@blaney.com.