

OCTOBER 2017

Should Security for Costs Motions be Treated Differently when a Foreign Judgment is Involved?



Marco P. Falco

Partner, Litigation & Written
Advocacy

PHONE

416 777 5421

EMAIL

mfalco@torkinmanes.com

Marco is a partner in the Litigation Department at Torkin Manes. He provides written advocacy for a wide range of civil disputes, including commercial litigation and administrative law. He specializes in applications for judicial review and civil appeals.

An order for security for costs can be made for a range of reasons. Its primary purpose is to give protection to the moving party by ensuring funds are available to cover their litigation costs. Where security for costs is sought against a litigant seeking to enforce a foreign judgment in Ontario, however, should the Court be less inclined to make such an order? A recent decision of the Ontario Court of Appeal, *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741, answers this question in the negative.

Facts

Yaiguaje involved an attempt by Ecuadorian plaintiffs to enforce a judgment of an Ecuadorian Court of \$9.5 billion dollars in Ontario (the “Ecuadorian Judgment”) against Chevron Canada, being the seventh-level, indirect subsidiary of the Chevron Corporation (“Chevron”).

In 2015, the Supreme Court of Canada held that Ontario had jurisdiction over the matter in *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 (the “Supreme Court Judgment”).

After the Supreme Court Judgment

was rendered, Chevron and Chevron Canada brought a motion for summary judgment seeking the dismissal of the Ecuadorian plaintiffs’ action on the basis that Chevron Canada had a separate corporate personality from Chevron. The Ecuadorian plaintiffs brought a cross-motion, seeking, amongst other things, a declaration that Chevron Canada’s assets were exigible in order to satisfy Chevron’s Ecuadorian judgment debt.

The motion judge granted Chevron’s motion for summary judgment and dismissed the Ecuadorian plaintiffs’ cross-motion. The Ecuadorian plaintiffs appealed these decisions to the Ontario Court of Appeal.

Chevron and Chevron Canada then sought security for costs against the Ecuadorian plaintiffs at the Court of Appeal in the amount of approximately \$1 million. They argued that the Ecuadorian plaintiffs were not ordinarily resident in Ontario, were not impecunious, and did not establish that their appeal had a good chance of success.

The Court of Appeal granted

Chevron's motion for security for costs, ordering the Ecuadorian plaintiffs to pay Chevron \$351,616.33 and Chevron Canada \$591,335.14.

In so ruling, the Court applied the standard analysis for security for costs on an appeal under Rule 61.06(1)(b) of the *Rules of Civil Procedure*. The Court held that:

i. *The Ecuadorian plaintiffs failed to show they were impecunious.* The only evidence tendered by the plaintiffs were three settlement agreements showing that third-party funders to the plaintiffs' litigation had "disavowed their financial interest in the Ecuadorian judgment". There was no evidence as to the plaintiffs' income, expenses and liability.

ii. *The Ecuadorian plaintiffs failed to show their appeal had a good chance of success.* Under the *Execution Act*, it was unlikely that Chevron Canada had any "right or interest" in Chevron's assets. Moreover, it was unlikely the Court of Appeal would "pierce the corporate veil" between Chevron and Chevron Canada, which were in a "typical parent / subsidiary relationship", in order to satisfy the Ecuadorian Judgment.

Does a Liberal Approach to Enforcing Foreign Judgments Change the Test for Security for Costs?

In addition to the standard considerations for awarding security for costs set out above, the Ecuadorian plaintiffs argued that the previous Supreme Court of Canada Judgment,

which called for a "generous and liberal approach to the recognition and enforcement of foreign judgments" in Canada, meant that the Court of Appeal should be hesitant to impose an additional burden on the plaintiffs' appeal by requiring them to post security.

In response, Chevron and Chevron Canada argued that security for costs is typically ordered against parties who are "ordinarily resident outside of Ontario" and that no special considerations should apply to parties seeking to enforce foreign judgments in Ontario.

The Court of Appeal agreed with Chevron. It held that there was no good reason a "meritorious motion for security for costs should be denied because the action to which it relates concerns [the] recognition and enforcement of a foreign judgment".

The Court noted that despite the judicial trend toward encouraging international comity by enforcing and recognizing foreign judgments in Canada, a plaintiff seeking to enforce a foreign judgment in Ontario should not be placed in a better position than a domestic litigant when it came to ordering security. With respect to the previous Supreme Court Judgment in *Chevron*, the Court of Appeal held:

In my view, the Supreme Court's *Chevron* decision...stands for the proposition that Canadian Courts should take a generous approach in finding jurisdiction to allow litigants holding foreign judgments to bring

enforcement actions in Canada. I do not read that decision as saying that, when such enforcement actions are brought before Canadian courts, they should be treated differently than cases involving domestic litigants.

The policy underlying a security for costs order is to offer the party seeking security a degree of protection for the costs incurred during the litigation. According to the Court of Appeal, this goal "is no less important when the main appeal concerns enforcement of a foreign judgment, particularly when the respondent is 'exposed to the risk of being forced to go to a foreign jurisdiction to enforce [a costs order]'".

Accordingly, the Court held that there was no basis for approaching security for costs differently on an appeal that involved a foreign judgment. Where, as in this case, there is a valid claim for security for costs, the fact that the underlying proceeding involves the recognition or enforcement of a foreign judgment is irrelevant.

Conclusion

The Court of Appeal's decision in *Yaiguaje* represents an effort to retain control over the litigation process where foreign parties and judgments are involved.

While the Court acknowledged the judicial trend towards promoting international comity and co-operation through the enforcement of foreign judgments in Ontario, this trend has no bearing on the purely

domestic aspects of litigation, such as an award of security for costs on appeal. Ultimately, the fact that the litigation in *Yaiguaje* involved a foreign judgment was irrelevant to whether Chevron was entitled to an order for security.

The main message of *Yaiguaje* is clear: parties seeking to enforce foreign judgments in Ontario are subject to the ordinary burdens of domestic litigation, including the possibility of having to post security for costs.