

September 11, 2015

Catherine O'Hagan Wolfe
Clerk, U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
New York, NY 10007

Re: *Chevron Corp. v. Donziger* (Nos. 14-0826, 14-0832) – Supplemental authority under Rule 28(j)
Chevron Corp. v. Yajjuaje, [2015] S.C.R. 42 (Can. Sept. 4, 2015) (attached)

Dear Ms. Wolfe:

Last Friday, the Supreme Court of Canada unanimously held that the Ecuadorian judgment “merits the assistance and attention of the Ontario courts.” Op. ¶77. In so holding, the Court affirmed two lower courts and rejected Chevron’s argument that Canadian courts lack jurisdiction to determine the judgment’s enforceability. Three aspects of the decision bear emphasis:

First, although its holding was jurisdictional, the Court grounded its analysis in international-comity principles, much as this Court did in *Chevron v. Naranjo*, 667 F.3d 232 (2012). “Facilitating comity and reciprocity,” the Court emphasized, are “two of the backbones” of the foreign-money-judgment-enforcement regime; they “call[] for assistance, not barriers.” Op. ¶69. As “[c]ross-border transactions and interactions continue to multiply[,] ... comity requires an increasing willingness on the part of courts to recognize the acts of other states”—not thwart them. Op. ¶75.

Second, just as *Naranjo* “stress[ed]” that the Ecuadorian plaintiffs “may seek to enforce [their] judgment in any country in the world where Chevron has assets,” Op. ¶7, the Supreme Court did likewise: It explained that Chevron “may be called upon to answer for [its] debts in various jurisdictions” because of its “own behaviour and legal noncompliance.” Op. ¶55.

Third, the Court emphasized—as did *Naranjo*—that “no unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings.” *Id.*; *Naranjo*, 667 F.3d at 246 (deeming this a “far better remedy” than a preemptive attack). After noting that Judge Kaplan’s “decision and the underlying allegations of fraud are not before this Court,” the Court made clear that on remand Chevron may raise “any one of the available defences to recognition and enforcement”—including “fraud, denial of natural justice, or public policy.” Op. ¶¶7, 77.

In short, the Canadian decision reinforces what *Naranjo* already recognized: permitting a preemptive collateral attack would do great violence to international comity, while accomplishing nothing. That’s also why there is no such cause of action, no standing, and no need for equitable relief. If Chevron must defend itself in Canada no matter what happens here, what is to be gained by injecting the U.S. courts into the fray?

Respectfully submitted,

/s/ Deepak Gupta
Counsel for the *Donziger Appellants*



SUPREME COURT OF CANADA

CITATION: Chevron Corp. v. Yaiguaje, 2015 SCC 42

DATE: 20150904

DOCKET: 35682

BETWEEN:

Chevron Corporation and Chevron Canada Limited

Appellants

and

**Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa,
Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje,
Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje,
Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje,
Luis Agustin Payaguaje Piaguaje, Emilio Martin Lusitande Yaiguaje,
Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar,
Carlos Grefa Huatatoaca, 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 Donald Payaguaje Payaguaje and Delfin Leonidas Payaguaje**

Payaguaje

Respondents

- and -

**International Human Rights Program at the University of Toronto Faculty of
Law, MiningWatch Canada, Canadian Centre for International Justice and
Justice and Corporate Accountability Project**

Interveners

CORAM: McLachlin C.J. and Abella, Rothstein, Cromwell, Karakatsanis, Wagner and Gascon JJ.

REASONS FOR JUDGMENT: Gascon J. (McLachlin C.J. and Abella, Rothstein,
(paras. 1 to 96) Cromwell, Karakatsanis and Wagner JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

CHEVRON CORP. v. YAIGUAJE

**Chevron Corporation and
Chevron Canada Limited**

Appellants

v.

**Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa,
Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje,
Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje,
Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje,
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Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar,
Carlos Grefa Huatatocha, Catalina Antonia Aguinda Salazar,
Lidia Alexandria Aguinda Aguinda, Clide Ramiro Aguinda Aguinda,
Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila,
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Alfredo Donald Payaguaje Payaguaje and
Delfin Leonidas Payaguaje Payaguaje**

Respondents

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**International Human Rights Program at the University of Toronto
Faculty of Law, MiningWatch Canada,
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Interveners

Indexed as: Chevron Corp. v. Yaiguaje

2015 SCC 42

File No.: 35682.

2014: December 11; 2015: September 4.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Private international law — Foreign judgments — Recognition — Enforcement — Foreign judgment creditor sought recognition and enforcement of foreign judgment in Ontario against U.S. foreign judgment debtor's and Canadian seventh-level indirect subsidiary — Foreign judgment debtor served ex juris at U.S. head office — Subsidiary served in juris at place of business in Ontario — Whether a real and substantial connection must exist between defendant or dispute and Ontario for jurisdiction to be established — Whether Ontario courts have jurisdiction over foreign judgment debtor's subsidiary when subsidiary is a third party to the judgment for which recognition and enforcement is sought.

The oil-rich Lago Agrio region of Ecuador has long attracted the exploration and extraction activities of global oil companies, including Texaco. As a

result of those activities, the region is said to have suffered extensive environmental pollution that has disrupted the lives and jeopardized the futures of its residents. For over 20 years, the 47 respondents/plaintiffs, who represent approximately 30,000 indigenous Ecuadorian villagers, have been seeking legal accountability and financial and environmental reparation for harms they allegedly suffered due to Texaco's former operations in the region. Texaco has since merged with Chevron, a U.S. corporation. The Appellate Division of the Provincial Court of Justice of Sucumbíos affirmed an Ecuadorian trial judge's award of US\$8.6 billion in environmental damages and US\$8.6 billion in punitive damages against Chevron. Ecuador's Court of Cassation upheld the judgment except on the issue of punitive damages. In the end, the total amount owed was reduced to US\$9.51 billion.

Since the initial judgment, Chevron has fought the plaintiffs in the U.S. courts and has refused to acknowledge or pay the debt. As Chevron does not hold any Ecuadorian assets, the plaintiffs commenced an action for recognition and enforcement of the Ecuadorian judgment in the Ontario Superior Court of Justice. It served Chevron at its head office in California, and served Chevron Canada, a seventh-level indirect subsidiary of Chevron, first at an extra-provincially registered office in British Columbia, and then at its place of business in Ontario. *Inter alia*, the plaintiffs sought the Canadian equivalent of the award resulting from the judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos. Chevron and Chevron Canada each sought orders setting aside service *ex juris* of the amended

statement of claim, declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying the action.

The motion judge ruled in the plaintiffs' favour with respect to jurisdiction. However, he exercised the court's power to stay the proceeding on its own initiative pursuant to s. 106 of the Ontario *Courts of Justice Act*. The Court of Appeal held this was not an appropriate case in which to impose a discretionary stay under s. 106. On the jurisdictional issue, it held that, as the foreign court had a real and substantial connection with the subject matter of the dispute or with the defendant, an Ontario court has jurisdiction to determine whether the foreign judgment should be recognized and enforced in Ontario against Chevron. With respect to Chevron Canada, in view of its bricks-and-mortar business in Ontario and its significant relationship with Chevron, the Court of Appeal found that an Ontario court has jurisdiction to adjudicate a recognition and enforcement action that also named it as a defendant.

Held: The appeal should be dismissed.

Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. There is no need to demonstrate a real and substantial connection between the dispute or the defendant

and the enforcing forum. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules, and would be inconsistent with this Court's statement that the doctrine of comity must be permitted to evolve concomitantly with international business relations, cross-border transactions, and mobility.

This Court has never required there to be a real and substantial connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings. An unambiguous statement by this Court that a real and substantial connection is not necessary will have the benefit of providing a fixed, clear and predictable rule, allowing parties to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect and will help to avert needless and wasteful jurisdictional inquiries.

Two considerations of principle support the view that the real and substantial connection test should not be extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. As the enforcing court is not creating a new substantive obligation, there can be no

concern that the parties are situated elsewhere, or that the facts underlying the dispute are properly addressed in another court. The only important element is the foreign judgment and the legal obligation it has created. Furthermore, enforcement is limited to measures that can be taken only within the confines of the jurisdiction and in accordance with its rules, and the enforcing court's judgment has no coercive force outside its jurisdiction. Similarly, enforcement is limited to seizable assets found within its territory. As a result, any potential constitutional concerns relating to conflict of laws simply do not arise in recognition and enforcement cases: since the obligation created by a foreign judgment is universal, each jurisdiction has an equal interest in the obligation resulting from the foreign judgment, and no concern about territorial overreach could emerge.

Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. The need to acknowledge and show respect for the legal action of other states has consistently remained one of comity's core components, and militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The goal of modern conflicts systems rests on the principle of comity, which calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity. This is true of all areas of private international law, including the recognition and enforcement of foreign judgments. In recognition and enforcement proceedings, order and fairness are protected by

ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. No unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings — through their own behaviour and legal noncompliance, they have made themselves the subject of outstanding obligations, so they may be called upon to answer for their debts in various jurisdictions. They are also provided with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted. Requiring a defendant to be present or to have assets in the enforcing jurisdiction would only undermine order and fairness: presence will frequently be absent given the very nature of the proceeding at issue, and requiring assets in the enforcing jurisdiction when recognition and enforcement proceedings are instituted would risk depriving creditors of access to funds that might eventually enter the jurisdiction. In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality.

Finding that there is no requirement of a real and substantial connection between the defendant or the action and the enforcing court in an action for recognition and enforcement is also supported by the choices made by the Ontario

legislature, all other common law provinces and territories, Quebec, other international common law jurisdictions and most Canadian conflict of laws scholars.

In this case, jurisdiction is established with respect to Chevron. It attorned to the jurisdiction of the Ecuadorian courts, it was served *ex juris* at its head office, and the amended statement of claim alleged that it was a foreign debtor pursuant to a judgment of an Ecuadorian court. While this judgment has since been varied by a higher court, this occurred after the amended statement of claim had been filed; even if the total amount owed was reduced, the judgment remains largely intact. The plaintiffs have sufficiently pleaded the Ontario courts' jurisdiction over Chevron.

The question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction. Where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists. To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. This is a question of fact: the court must inquire into whether the company has some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time. Here, the motion judge's factual findings have not been contested. They are sufficient to establish presence-based jurisdiction. Chevron Canada has a physical office in Ontario, where it was served. Its business activities at this office are sustained; it has representatives

who provide services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances. The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction.

The establishment of jurisdiction does not mean that the plaintiffs will necessarily succeed in having the Ecuadorian judgment recognized and enforced. A finding of jurisdiction does nothing more than afford the plaintiffs the opportunity to seek recognition and enforcement of the Ecuadorian judgment. Once past the jurisdictional stage, Chevron and Chevron Canada can use the available procedural tools to try to dispose of the plaintiffs' allegations. This possibility is foreign to and remote from the questions that must be resolved on this appeal. Further, the conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada or whether Chevron Canada's shares or assets will be available to satisfy Chevron's debt.

Cases Cited

Applied: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; **distinguished:** *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; **referred to:** *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2002); *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (2011); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2012); *Chevron Corp. v.*

Donziger, 974 F. Supp. 2d 362 (2014); *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *BNP Paribas (Canada) v. Mécs* (2002), 60 O.R. (3d) 205; *Tasarruf Mevduati Sigorta Fonu v. Demirel*, [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508; *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*, [2014] IEHC 115; *Lenchyshyn v. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (2001); *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (2014); *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (2008); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905 (2002); *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874 (2004); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory”*, 283 F.3d 208 (2002), *cert. denied*, 537 U.S. 822 (2002); *CSA8-Garden Village LLC v. Dewar*, 2013 ONSC 6229, 369 D.L.R. (4th) 125; *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549; *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Ontario v. Rothman’s Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Wilson v. Hull* (1995), 174 A.R. 81; *Ingersoll Packing Co. v. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330; *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, *aff’d* 2014 ONCA 285, 120 O.R. (3d) 140; *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, *aff’d* 2012 ONCA 211, 110 O.R. (3d) 256; *Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315; *Patterson v. EM*

Technologies, Inc., 2013 ONSC 5849; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560.

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Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. 1990, c. R.6.

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Hourigan J.J.A.), 2013 ONCA 758, 118 O.R. (3d) 1, 313 O.A.C. 285, 370 D.L.R. (4th) 132, 52 C.P.C. (7th) 229, 15 B.L.R. (5th) 285, [2013] O.J. No. 5719 (QL), 2013 CarswellOnt 17574 (WL Can.), setting aside a decision of Brown J., 2013 ONSC 2527, 361 D.L.R. (4th) 489, 15 B.L.R. (5th) 226, [2013] O.J. No. 1955 (QL), 2013 CarswellOnt 5729 (WL Can.). Appeal dismissed.

Clarke Hunter, Q.C., Anne Kirker, Q.C., and Robert Frank, for the appellant Chevron Corporation.

Benjamin Zarnett, Suzy Kauffman and Peter Kolla, for the appellant Chevron Canada Limited.

Alan J. Lenczner, Q.C., Brendan F. Morrison and Chris J. Hutchison, for the respondents.

Murray Klippenstein, Renu Mandhane and W. Cory Wanless, for the interveners the International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada and the Canadian Centre for International Justice.

A. Dimitri Lascaris and James Yap, for the intervener the Justice and Corporate Accountability Project.

The judgment of the Court was delivered by

GASCON J. —

I. Overview

[1] In a world in which businesses, assets, and people cross borders with ease, courts are increasingly called upon to recognize and enforce judgments from other jurisdictions. Sometimes, successful recognition and enforcement in another forum is the only means by which a foreign judgment creditor can obtain its due. Normally, a judgment creditor will choose to commence recognition and enforcement proceedings in a forum where the judgment debtor has assets. In this case, however, the Court is asked to determine whether the Ontario courts have jurisdiction to recognize and enforce an Ecuadorian judgment where the foreign judgment debtor, Chevron Corporation (“Chevron”), claims to have no connection with the province, whether through assets or otherwise. The Court is also asked to determine whether the Ontario courts have jurisdiction over a Canadian subsidiary of Chevron, Chevron Canada Limited (“Chevron Canada”), a stranger to the foreign judgment for which recognition and enforcement is being sought.

[2] The courts below found that jurisdiction existed over Chevron. They held that the only connection that must be proven for recognition and enforcement to proceed is one between the foreign court and the original action on the merits; there is no preliminary need to prove a connection with Ontario for jurisdiction to exist in recognition and enforcement proceedings. They also found there to be an independent jurisdictional basis for proceeding against Chevron Canada due to the place of business it operates in the province, and at which it had been duly served.

[3] I agree with the outcomes reached by the courts below with respect to both Chevron and Chevron Canada and I would dismiss the appeal. In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment. This is the case for Chevron. Jurisdiction also exists here with respect to Chevron Canada because it was validly served at a place of business it operates in the province. On the traditional jurisdictional grounds, this is sufficient to find jurisdiction.

II. Backgrounds and Facts

[4] The dispute underlying the appeal originated in the Lago Agrio region of Ecuador. The oil-rich area has long attracted the exploration and extraction activities of global oil companies, including Texaco, Inc. (“Texaco”). As a result of those activities, the region is said to have suffered extensive environmental pollution that has, in turn, disrupted the lives and jeopardized the futures of its residents. The 47 respondents (the “plaintiffs”) represent approximately 30,000 indigenous Ecuadorian

villagers. For over 20 years, they have been seeking legal accountability as well as financial and environmental reparation for harms they allegedly have suffered due to Texaco's former operations in the region. Texaco has since merged with Chevron.

[5] In 1993, the plaintiffs filed suit against Texaco in the United States District Court for the Southern District of New York. In 2001, after lengthy interim proceedings, the District Court dismissed their suit on the grounds of international comity and *forum non conveniens*. The following year, the United States Court of Appeals for the Second Circuit upheld that judgment, relying in part on a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts should its motion to dismiss succeed: *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

[6] In 2003, the plaintiffs filed suit against Chevron in the Provincial Court of Justice of Sucumbíos. Several years of litigation ensued. In 2011, Judge Zambrano ruled in the plaintiffs' favour, and ordered Chevron to pay US\$8.6 billion in environmental damages, as well as US\$8.6 billion in punitive damages that were to be awarded unless Chevron apologized within 14 days of the judgment. As Chevron did not apologize, the punitive damages award remained intact. In January 2012, the Appellate Division of the Provincial Court of Justice of Sucumbíos affirmed the trial judgment. In November 2013, Ecuador's Court of Cassation upheld the Appellate Division's judgment, except on the issue of punitive damages. In the end, the total amount owed was reduced to US\$9.51 billion.

[7] Meanwhile, Chevron instituted further U.S. proceedings against the plaintiffs' American lawyer, Steven Donziger, and two of his Ecuadorian clients, seeking equitable relief. Chevron alleged that Mr. Donziger and his team had corrupted the Ecuadorian proceedings by, among other things, ghost-writing the trial judgment and paying Judge Zambrano US\$500,000 to release it as his own. In 2011, Judge Kaplan of the United States District Court for the Southern District of New York granted preliminary relief in the form of a global anti-enforcement injunction with respect to the Ecuadorian judgment: *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011). The United States Court of Appeals for the Second Circuit overturned this injunction in 2012, stressing that "[t]he [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": *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), at pp. 245-56. In 2014, Judge Kaplan of the District Court held that the Ecuadorian judgment had resulted from fraud committed by Mr. Donziger and others on the Ecuadorian courts: *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). That decision and the underlying allegations of fraud are not before this Court.

[8] Since the initial judgment, Chevron has refused to acknowledge or pay the debt that the trial court said it owed, and it does not hold any Ecuadorian assets. Faced with this situation, the plaintiffs have turned to the Canadian courts for assistance in enforcing the Ecuadorian judgment, and obtaining their financial due. On May 30, 2012, after the Appellate Division's decision but prior to the release of the 2013 judgment of the Court of Cassation, they commenced an action for

recognition and enforcement of the Ecuadorian judgment against Chevron, Chevron Canada and Chevron Canada Finance Limited in the Ontario Superior Court of Justice. The action against the latter has since been discontinued.

[9] Chevron, a U.S. corporation incorporated in Delaware, was served at its head office in San Ramon, California. Chevron Canada, a Canadian corporation governed by the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, with its head office in Alberta, is a seventh-level indirect subsidiary of Chevron, which has 100 per cent ownership of every company in the chain between itself and Chevron Canada. The plaintiffs initially served Chevron Canada with their amended statement of claim at an extra-provincially registered office in British Columbia. Later, they served the company at a place of business it operates in Mississauga, Ontario.

[10] In serving Chevron in San Ramon, the plaintiffs relied upon Rule 17.02(m) of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ("Rules") which provides that service may be effected outside of Ontario without leave where the proceeding consists of a claim "on a judgment of a court outside Ontario". In serving Chevron Canada at its Mississauga office, the plaintiffs relied upon Rule 16.02(1)(c), which requires that personal service be made on a corporation "by leaving a copy of the document . . . with a person at any place of business of the corporation who appears to be in control or management of the place of business".

[11] In their amended statement of claim, the plaintiffs sought: (a) the Canadian equivalent of the award of US\$18,256,718,000 resulting from the 2012

judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos; (b) the Canadian equivalent of costs to be determined by the Ecuadorian court; (c) a declaration that the shares of Chevron Canada are available to satisfy the judgment of the Ontario court; (d) the appointment of an equitable receiver over the shares and assets of Chevron Canada; (e) prejudgment interest from January 3, 2012; and (f) all costs of the proceedings on a substantial indemnity basis, plus all applicable taxes. In response, the appellants each brought a motion in which they sought substantially the same relief: (1) an order setting aside service *ex juris* of the amended statement of claim; and (2) an order declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying it.

III. Judicial History

A. *Ontario Superior Court of Justice (Commercial List) (Brown J.), 2013 ONSC 2527, 361 D.L.R. (4th) 489*

(1) Order Setting Aside Service *Ex Juris*

[12] The motion judge was asked to determine the prerequisites for establishing that an Ontario court has jurisdiction in an action to recognize and enforce a foreign judgment. Chevron contended that the “real and substantial connection” test for establishing jurisdiction articulated by this Court in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, applies not only to the question whether a court can assume jurisdiction over a dispute in order to decide its

merits, but also to whether an enforcing court has jurisdiction in an action to recognize and enforce a foreign judgment. The plaintiffs replied that the “real and substantial connection” test for jurisdiction does not apply to the enforcing court. Rather, in an action for recognition and enforcement, it need only be established that the foreign court had a real and substantial connection with the dispute’s parties or with its subject matter. The motion judge ruled in the plaintiffs’ favour, dismissing Chevron’s motion. He offered five reasons for his conclusion.

[13] First, in his view, this Court’s leading cases on recognition and enforcement — *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 — contain no suggestion that a real and substantial connection between the foreign judgment debtor and Ontario is needed. Second, he found that there is nothing in *Van Breda* to suggest that it altered the principles laid down in *Morguard* and *Beals*. Third, requiring that Rule 17.02(m) 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” because the Ontario court will, of course, have no connection with the subject matter of the judgment, given that “it is a foreign judgment which by its very nature has no connection with Ontario”: para. 80. Nor will there be an *in personam* connection between the defendant and Ontario, as “the sub-rule specifically contemplates that a non-Ontario resident will be the defendant in the action”: *ibid*. Fourth, the judge held that there may be legitimate reasons (for instance, the practical reality that assets can exit a jurisdiction quickly) for seeking the recognition and

enforcement of a foreign judgment against a non-resident debtor who has no assets in Ontario. To insist that the debtor have assets in the jurisdiction before a judgment creditor can seek recognition and enforcement could harm the creditor's ability to recover the debt. Fifth, the motion judge considered two analogous Ontario statutes — the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6, and the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 — and found that neither of these legislative schemes establishes a requirement that the defendant be located or possess assets in Ontario before a creditor can register a foreign judgment or arbitral award. In “an age of global commerce”, he added, it would be misguided to have a more restrictive common law approach than a statutory one: para 82.

[14] The motion judge also found that jurisdiction existed over Chevron Canada, which had initially contended that because it was not a judgment debtor, there was no basis upon which to serve it *ex juris* in British Columbia. The judge observed, however, that the situation had changed since Chevron Canada had brought its motion: the plaintiffs had served the corporation at a “bricks and mortar” office it operates in Mississauga, Ontario (para. 87). This constituted a “place of business” within the meaning of Rule 16.02(1)(c), and service at that location was sufficient to establish jurisdiction.

(2) Order of a Stay Under Section 106 of the *Courts of Justice Act*

[15] In spite of these conclusions, the motion judge found that this was an appropriate case in which to exercise the court's power to stay a proceeding “on its

own initiative” pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. He so held for several reasons. First, Chevron does not own, has never owned, and has no intention of owning assets in Ontario. Second, Chevron conducts no business in Ontario. Third, there is no basis for asserting that Chevron Canada’s assets are Chevron’s assets for the purposes of satisfying the Ecuadorian judgment. Chevron does not own Chevron Canada’s shares. Nor is there a legal basis for piercing Chevron Canada’s corporate veil. In the judge’s view, even though “[i]mportant considerations of international comity accompany any request for the recognition of a judgment rendered by a foreign court . . . , the evidence [in this case] disclosed that there is nothing in Ontario to fight over”, and thus no reason to allow the claim to proceed any further: para. 111.

B. *Ontario Court of Appeal (MacPherson, Gillese and Hourigan J.J.A.), 2013 ONCA 758, 118 O.R. (3d) 1*

[16] The plaintiffs appealed the stay entered by the motion judge. Chevron and Chevron Canada cross-appealed his conclusion that the Ontario courts have jurisdiction.

(1) Entering of the Stay

[17] To maintain consistency with their jurisdictional challenge, Chevron and Chevron Canada made no submissions before the Ontario Court of Appeal in support

of the stay that had been granted. They made no submissions on this point before this Court either. This issue is therefore not before us.

[18] In this regard, I would simply note that the Court of Appeal rejected the view that this was an appropriate case in which to impose a discretionary stay under s. 106. MacPherson J.A., writing for the court, emphasized that Chevron and Chevron Canada — both “sophisticated parties with excellent legal representation” — had decided not to attorn to the jurisdiction of the Ontario courts: para. 45. They referenced s. 106 in their submissions only insofar as it potentially supported a stay on the basis of lack of jurisdiction, not on the basis on which it had ultimately been granted. The stay was entirely the initiative of the motion judge. According to the Court of Appeal, a s. 106 stay should only be granted in rare circumstances, and the bar to granting it should be raised even higher when it is not requested by the parties. In fact, the s. 106 stay in this case constituted a “disguised, unrequested and premature Rule 20 and/or Rule 21 motion”: para. 57. In MacPherson J.A.’s view, the motion judge had effectively imported a *forum non conveniens* motion into his reasoning on the stay, even though no such motion had been before him. The issues that the motion judge had addressed deserved to be fully canvassed on the basis of a complete record and full legal argument.

[19] I note as well that the Court of Appeal found that although the motion judge’s analysis with respect to jurisdiction relied on the notion of comity, he underplayed comity’s importance in the reasons he gave in support of the stay. The

Court of Appeal disagreed that allowing the case to be heard on the merits would constitute a mere “academic exercise”: para. 70. In its view, in light of Chevron’s considerable efforts to stall proceedings up to that point, the plaintiffs “[did] not deserve to have their entire case fail on the basis of an argument against their position that was not even made, and to which they did not have an opportunity to respond”: *ibid.* It found that while the plaintiffs may not ultimately succeed on the merits, or in collecting from the judgment debtor, this was not relevant to a determination of whether to grant a discretionary stay at this stage of the proceedings. For the Court of Appeal, “[t]his case cried out for assistance, not unsolicited and premature barriers”: para. 72.

(2) Jurisdiction to Determine Whether the Ecuadorian Judgment Should Be Recognized and Enforced

[20] On the jurisdictional issue, the Court of Appeal agreed with the motion judge’s analysis. It found this Court’s judgment in *Beals* to be “crystal clear” about how the real and substantial connection test is to be applied in an action for recognition and enforcement of a foreign judgment. The sole question is whether the foreign court properly assumed jurisdiction, in the sense that it had a real and substantial connection with the subject matter of the dispute or with the defendant. In other words, there need not be an inquiry into the relationship between “the legal dispute in the foreign country and the domestic Canadian court being asked to recognize and enforce the foreign judgment”.

[21] MacPherson J.A. found that this Court's decision in *Van Breda* did not alter this analysis. In his view, *Van Breda* applies to actions at first instance, not to actions for recognition and enforcement. In a first instance case, "an Ontario court exceeds its constitutional authority when it assumes jurisdiction of a case where there is no real and substantial connection to Ontario": para. 32. Assuming jurisdiction in such a case "offends the principle of comity because one or more other jurisdictions have a real and substantial connection to the subject matter of the litigation and Ontario does not": *ibid.* No constitutional issues or comity concerns arise when merely recognizing and enforcing a foreign judgment, "because the Ontario court does not purport to intrude on matters that are properly within the jurisdiction of the foreign court": para. 33. In the result, MacPherson J.A. held that "it is clear that the Ecuadorian judgment for US\$9.51 billion against Chevron satisfied the requirement of rule 17.02(m)": para 35. Thus, "an Ontario court has jurisdiction to determine whether the Ecuadorian judgment against Chevron may be recognized and enforced in Ontario": *ibid.*

[22] With respect to Chevron Canada, the Court of Appeal held that the motion judge had been "correct to note Chevron Canada's bricks-and-mortar business in Ontario": para. 38. In addition, the court found that "Chevron Canada's significant relationship with Chevron" was also relevant to whether jurisdiction was legitimately found: *ibid.* An Ontario court thus has jurisdiction to adjudicate a recognition and enforcement action against Chevron that also names Chevron Canada as a defendant.

IV. Issues

[23] The appeal raises two issues:

(a) In an action to recognize and enforce a foreign judgment, must there be a real and substantial connection between the defendant or the dispute and Ontario for jurisdiction to be established?

(b) Do the Ontario courts have jurisdiction over Chevron Canada, a third party to the judgment for which recognition and enforcement is sought?

V. Analysis

A. *Establishing Jurisdiction Over Foreign Debtors in Actions to Recognize and Enforce Foreign Judgments*

[24] Chevron submits that before proceeding with an action to recognize and enforce a foreign judgment, an Ontario enforcing court must follow a two-step process. First, it must determine its own jurisdiction by applying the real and substantial connection test articulated by this Court in *Van Breda*. For Chevron, this test applies to actions to recognize and enforce foreign judgments just as it does to actions at first instance. Chevron suggests that one way — and in many cases the only way — in which this first component can be satisfied is if the defendant has assets in Ontario, or if there is a reasonable prospect of his or her having assets in

Ontario in the future. Second, if jurisdiction is found, then the enforcing court should proceed to assess whether the foreign court appropriately assumed jurisdiction. Chevron does not dispute that this second component is satisfied here: a real and substantial connection undoubtedly existed between the subject matter of the litigation, Chevron and the Ecuadorian court that rendered the foreign judgment.

[25] In support of its position, Chevron relies on a passage from this Court's decision in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 28: "Under the traditional rule [that only monetary judgments were enforceable], once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced (Chevron's factum, at para. 52 (emphasis added by Chevron)). It contends that the requirement of a preliminary finding of jurisdiction did not need to be addressed in the Court's previous leading cases on recognition and enforcement — *Morguard* and *Beals* — as in each of those cases, the judgment debtor was resident in the province.

[26] Chevron further argues that this position is consistent with *Van Breda*. There, the Court emphasized that pursuant to the Constitution, Canadian courts can only adjudicate disputes where doing so constitutes a legitimate exercise of state power: para. 31. Chevron suggests that in actions to recognize and enforce foreign judgments, this constitutional legitimacy must still exist. Ontario courts risk jurisdictional overreach if they assume jurisdiction in cases like this one, in which the

province has no interest. Moreover, assuming jurisdiction in such a case risks undermining, not furthering, the notion of comity. The rules for service *ex juris* create mere presumptions of jurisdiction that are “rebuttable if there is no real and substantial connection with the province”: Chevron’s factum, at para. 57.

[27] I agree with the Ontario Court of Appeal and the motion judge that the approach favoured by Chevron is sound neither in law nor in policy. Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. It is true that in any case in which a Canadian court exercises authority over a party, some basis must exist for its doing so. It does not follow, however, that jurisdiction is and can only be established using the real and substantial connection test, whether that test is satisfied by the existence of assets alone or on another basis. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. I arrive at this conclusion for several reasons. First, this Court has rightly never imposed a requirement to prove a real and substantial connection between the defendant or the dispute and the province in actions to recognize and enforce foreign judgments. Second, the distinct principles that underlie actions for recognition and enforcement as opposed to actions at first instance support this position. Third, the experiences of

other jurisdictions, convincing academic commentary, and the fact that comparable statutory provisions exist in provincial legislation reinforce this approach. Finally, practical considerations militate against adopting Chevron's submission.

(1) Jurisprudential Guidance Prior to *Van Breda*

[28] Contrary to Chevron's contention, this Court has never required there to be a real and substantial connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings.

[29] This Court's modern judgments on recognition and enforcement begin with the 1990 decision in *Morguard*. There, the Court expanded the traditionally limited bases upon which foreign judgments could be recognized and enforced. Before *Morguard*, a foreign judgment would be recognized and enforced only if the defendant in the original action had been present in the foreign jurisdiction, or had consented to the court's jurisdiction: S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 53; *Morguard*, at p. 1092. These traditional bases for recognition and enforcement attracted criticism as being unduly restrictive, particularly as between sister provinces: see, e.g., V. Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989) 9 *Oxford J. Legal Stud.* 547.

[30] In *Morguard*, La Forest J., writing for the Court, held that the judgments of another province could and should also be recognized and enforced where the other province's court assumed jurisdiction on the basis of a real and substantial

connection between the action and that province: pp. 1102 and 1108. In his view, the traditional grounds for recognition and enforcement had been retained based on a misguided notion of comity, unsuited to “the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner”: p. 1096. Moreover, the traditional recognition and enforcement rules were tailored to circumstances that had existed at a time when it would have been difficult for the defendant to defend “an action initiated in a far corner of the world in the then state of travel and communications”: p. 1097. The need to revisit the traditional rules was particularly acute in a federal state like Canada, to which “considerations underlying the rules of comity apply with much greater force”: p. 1098.

[31] In arriving at his conclusions, La Forest J.’s analysis focused entirely on whether the court of the other province or territory had “properly, or appropriately, exercised jurisdiction in the action”: p. 1102. He intimated no need to interrogate the enforcing court’s jurisdiction, either in his discussion of the law or in its application to the facts of the case. Instead, once a real and substantial connection between the original court and the action is demonstrated, and it is clear that the original court had jurisdiction, the resulting judgment “should be recognized and be enforceable” in the other provinces: p. 1108.

[32] This Court revisited the prerequisites to recognition and enforcement in 2003 in *Beals*. It held that the real and substantial connection test should also apply to the money judgments of other countries’ courts. In reasons written by Major J., the

majority of the Court found that the principles of order, fairness, and comity that underlay the decision in *Morguard*, while originally cast in the interprovincial context, were equally compelling internationally: paras. 25-27. According to Major J., “[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law”: para. 28. Where a real and substantial connection existed between the foreign court and the action’s subject matter or its defendants, the foreign judgment should be recognized and enforced: para. 29.

[33] Here again, the Court did not articulate or imply a need to inquire into the enforcing court’s jurisdiction; the focus remained squarely on the foreign jurisdiction. In Major J.’s view, the following conditions must 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. . . .

If a foreign court did not properly take jurisdiction, its judgment will not be enforced. . . .

. . .

Once the “real and substantial connection” test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.

(*Beals*, at paras. 37-39)

[34] Thus, in the recognition and enforcement context, the real and substantial connection test operates simply to ensure that the foreign court from which the judgment originated properly assumed jurisdiction over the dispute. Once this is demonstrated, the defendant has an opportunity to prove that one of the defences to recognition and enforcement should apply. No mention is made of any need to prove a connection between the enforcing jurisdiction and the action. In the end, the test articulated for recognition and enforcement in *Morguard* and *Beals* is “seemingly straightforward”: T. J. Monestier, “Jurisdiction and the Enforcement of Foreign Judgments” (2014), 42 *Adv. Q.* 107, at p. 110.

[35] Three years later, in *Pro Swing*, the Court once more extended the scope of Canadian recognition and enforcement law, this time in relation to non-monetary foreign judgments. Traditionally, to be recognizable and enforceable, a foreign judgment had to be “(a) for a debt, or definite sum of money” and “(b) final and conclusive”: para. 10, quoting *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75). In *Pro Swing*, the Court held that non-monetary foreign judgments should also be capable of being recognized and enforced in Canada. In its view, “the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce”: para. 31. Chevron contends that it was in the course of this judgment that the Court clearly expressed what had been implicit in *Morguard* and *Beals*: the need to assess the Canadian forum’s jurisdiction

before recognizing and enforcing the foreign judgment. In this regard, Chevron points to para. 28 of the majority's reasons, where Deschamps J. wrote: "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."

[36] I cannot accede to Chevron's submission that this phrase was intended to alter this Court's clear guidance in *Morguard* and *Beals* for two reasons. First, this Court's insistence in *Pro Swing* that jurisdiction must be established prior to determining whether the foreign judgment should be recognized and enforced is hardly controversial: jurisdiction must, of course, always be established regardless of the type of action being brought. Otherwise, the court will lack the power to hear and determine the case. Where Chevron's submission fails, however, is in assuming that the only way to establish jurisdiction is by proving the existence of a real and substantial connection between the foreign judgment debtor and the Canadian forum. In my view, jurisdiction in an action limited to recognition and enforcement of a foreign judgment within the province of Ontario is established when service is effected on a defendant against whom a foreign judgment debt is alleged to exist. There is no requirement, nor need, to resort to the real and substantial connection test.

[37] Second, Deschamps J. clearly stated the prerequisites to recognition and enforcement elsewhere in her reasons, and did not insist or expand upon such a requirement. She wrote:

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.

(*Pro Swing*, at para. 11)

This statement is consistent with *Morguard* and *Beals*: there is no need to probe the relationship between the enforcing forum and the action or the defendant. Deschamps J.'s one prior, passing reference to the need for the enforcing court to have jurisdiction cannot serve as a basis for inferring the existence of a significant, and previously unstated, hurdle to recognition and enforcement that simply does not exist. As is evident from her reasons, she retained the focus on jurisdiction in the original foreign proceeding.

(2) Effect of *Van Breda*

[38] Chevron also places considerable reliance upon this Court's decision in *Van Breda*. In my view, this reliance is misplaced. While there is no denying that the *Van Breda* decision carries great importance in many areas of Canadian conflict of laws, its intended scope should not be overstated. Nothing in *Van Breda* altered the jurisdictional inquiry in actions to recognize and enforce foreign judgments as established by this Court in *Morguard*, *Beals* and *Pro Swing*.

[39] In *Van Breda*, LeBel J. clearly specified the limited areas of private international law to which the decision was intended to apply. First, he noted at para.

16 that three categories of issues are “intertwined” in private international law: jurisdiction, *forum non conveniens* and the recognition of foreign judgments. Although he acknowledged that “[n]one of the divisions of private international law can be safely analysed and applied in isolation from the others”, LeBel J. nonetheless cautioned that “the central focus of these appeals is on jurisdiction and the appropriate forum”, that is, only two of the three categories of issues at play in private international law: para. 16. He went on to propose an analytical framework and legal principles applicable to the assumption of jurisdiction (one way of establishing jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). Nowhere did he purport to analyze or modify the principles applicable to the recognition and enforcement of foreign judgments, the area of private international law that is the central focus of this appeal.

[40] Second, LeBel J. further — and repeatedly — confined the principles he developed in *Van Breda* to the assumption of jurisdiction in tort actions. For example, he said: “. . . this 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 Canada or outside the province”: para. 68. He later added the following: “Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list”: para. 80. Perhaps most tellingly, LeBel J. stated, at para. 85: “The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory

of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.”

[41] To accept Chevron’s argument would be to extend *Van Breda* into an area in which it was not intended to apply, and in which it has no principled reason to meddle. In fact, and more compellingly, the principles that animate recognition and enforcement indicate that *Van Breda*’s pronouncements should not apply to recognition and enforcement cases. It is to these principles that I will now turn.

(3) Principles Underlying Actions for Recognition and Enforcement

[42] Two considerations of principle support the view that the real and substantial connection test should not be extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. Second, the notion of comity, which has consistently underlain actions for recognition and enforcement, militates in favour of generous enforcement rules.

(a) *Purpose of Recognition and Enforcement Proceedings*

[43] Canadian law recognizes that the purpose of an action to recognize and enforce a foreign judgment is to allow a pre-existing obligation to be fulfilled; that is, to ensure that a debt already owed by the defendant is paid. As Pitel and Rafferty

explain, such an action “is based not on the original claim the plaintiff had pursued against the defendant but rather on the obligation created by the foreign judgment”: p. 159; see also P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at ¶11.177. The following comment made by McLachlin C.J. in *Pro Swing* (although in dissent) also reflects this logic: “Barring exceptional concerns, a court’s focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself”: para. 77.

[44] Important consequences flow from this observation. First, the purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation. In other words, the enforcing court’s role is not one of substance, but is instead one of facilitation: *Pro Swing*, at para. 11. The court merely offers an enforcement mechanism to facilitate the collection of a debt within the jurisdiction. This entails that the enforcing court does not exercise jurisdiction in the same way as it does in actions at first instance. In a first instance case like *Van Breda*, the focus is on whether the court has jurisdiction to determine the merits of a substantive legal claim; in a recognition and enforcement case, the court does not create a new substantive obligation, but instead assists with the fulfillment of an existing one.

[45] It follows that there can be no concern that the parties are located elsewhere, or that the facts underlying the dispute are properly addressed in another court, factors that might serve to undermine the existence of a real and substantial

connection with the forum in first instance adjudication. The defendant will, of course, not have a significant connection with the forum, otherwise an independent jurisdictional basis would already exist for proceeding against him or her. Moreover, the facts underlying the original judgment are irrelevant, except insofar as they relate to potential defences to enforcement. The only important element is the foreign judgment itself, and the legal obligation it has created. Simply put, the logic for mandating a connection with the enforcing jurisdiction finds no place.

[46] Second, enforcement is limited to measures — like seizure, garnishment, or execution — that can be taken only within the confines of the jurisdiction, and in accordance with its rules: *Pro Swing*, at para. 11; J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 11-52. The recognition and enforcement of a judgment therefore has a limited impact: as Walker states, “[a]n order enforcing a foreign judgment applies only to local assets” (p. 14-11). The enforcing court’s judgment has no coercive force outside its jurisdiction. Whether recognition and enforcement should proceed depends entirely on the enforcing forum’s laws. The dispute does not contain a foreign element that would make resort to the real and substantial connection test necessary. Walker adds that, as a result, since enforcement concerns only local assets, “there is no basis for staying the proceedings on the grounds that the forum is inappropriate or that the judgment debtor’s principal assets are elsewhere”: *ibid.*

[47] Third, and flowing from this reality, any potential constitutional concerns that might sometimes emerge in conflict of laws cases simply do not arise in recognition and enforcement proceedings. In *Morguard*, the Court elaborated a conflict of laws rule and also hinted, without deciding, that the test might have constitutional foundations: pp. 1109-10. In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, the Court confirmed that *Morguard* had created a constitutional principle that was applicable to the assumption of jurisdiction. LeBel J. later reaffirmed and clarified this in *Van Breda*, where he noted that the real and substantial connection test has a dual nature: first, it serves as a constitutional principle; second, it constitutes a conflict of laws rule: at paras. 22-24. He stated that “in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state’s power of adjudication”; he added that the test “suggests that the connection between a state and a dispute cannot be weak or hypothetical”, as such a connection “would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute”: para. 32.

[48] No concern about the legitimacy of the exercise of state power exists in actions to recognize and enforce foreign judgments against judgment debtors. As I have explained, when such an action comes before a Canadian court, the court is not assuming jurisdiction over the parties in the same way as would occur in a first instance case. The enforcing court has no interest in adjudicating the original rights of the parties. Rather, the court merely seeks to assist in the enforcement of what has

already been decided in another forum. As Deschamps J. aptly stated in *Pro Swing*, “[t]he enforcing court . . . lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms”: para. 11. The manner in which the court exercises control over the parties is thus different — and far less invasive — than in an action at first instance.

[49] In most recognition and enforcement proceedings, the only factor that draws a foreign judgment creditor to the province is the potential for assets upon which to ultimately enforce the judgment. Enforcement is limited to the seizable assets found within the province. No constitutional concern about the legitimacy of this exercise of jurisdiction emerges. I acknowledge that, under provincial legislation, a recognition and enforcement judgment issued in one province may be capable of being “registered” in another province, thus offering some advantage to plaintiffs who have already successfully obtained a recognition and enforcement judgment. Nevertheless, the existence of such legislation does not alter the basic fact that absent some obligation to enforce another forum’s judgments, the judicial system of each province controls access to its jurisdiction’s enforcement mechanisms, whenever a foreign judgment creditor seeks to seize assets within its territory in satisfaction of a foreign judgment debt.

[50] In addition, the obligation created by a foreign judgment is universal; there is no competing claim to jurisdiction with respect to it. If each jurisdiction has an equal interest in the obligation resulting from a foreign judgment, it is hard to see

how any concern about territorial overreach could emerge. Simply put, there can be no concern about jurisdictional overreach if no jurisdiction can reach further into the matter than any other. The purposes that underlie recognition and enforcement proceedings simply do not require proof of a real and substantial connection between the dispute and Ontario, whether for constitutional reasons or otherwise.

(b) *The Notion of Comity in Recognition and Enforcement Proceedings*

[51] Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. In *Morguard*, this Court stated that comity refers to “the deference and respect due by other states to the actions of a state legitimately taken within its territory”, as well as “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”: pp. 1095-96, quoting with approval the U.S. Supreme Court’s foundational articulation of the concept of comity in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64; see also *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, per Estey J., concurring.

[52] The Court’s formulation of the notion of comity in *Morguard* was quoted with approval in *Beals*: para. 20. In *Hunt*, the Court observed that “ideas of ‘comity’ are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions”: p. 325. In *Tolofson v. Jensen*,

[1994] 3 S.C.R. 1022, the Court again referred to the notion of comity, stating that it entails respect for the authority of each state “to make and apply law within its territorial limit”, and that “to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, [states] will in great measure recognize the determination of legal issues in other states”: p. 1047. In *Pro Swing*, the Court described comity as a “balancing exercise” between “respect for a nation’s acts, international duty, convenience and protection of a nation’s citizens”: para. 27. Finally, in *Van Breda*, LeBel J. emphasized that the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity: para. 74. This is true of all areas of private international law, including that of the recognition and enforcement of foreign judgments.

[53] As this review of the Court’s statements on comity shows, the need to acknowledge and show respect for the legal acts of other states has consistently remained one of the principle’s core components. Comity, in this regard, militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The concepts of order and fairness in which comity is grounded are not affronted by rejecting Chevron’s proposed extension of the real and substantial connection test. This is so for several reasons.

[54] First, in recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant

was not present in or did not attach to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. The judgment debtor is free to make this argument in the recognition and enforcement proceedings, and indeed will have already had the opportunity to contest the jurisdiction of the foreign court in the foreign proceedings. Here, for instance, it is accepted that Chevron attached to the jurisdiction of the Ecuadorian courts. As Walker writes, “[t]he jurisdictional requirements of order and fairness considered in the context of *direct* jurisdiction operate to promote the international acceptance of the adjudication of a matter by a Canadian court”: p. 14-1 (emphasis in original). There is no similar requirement of international acceptance in the context of the recognition and enforcement of a foreign judgment.

[55] Second, no unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings. In essence, through their own behaviour and legal noncompliance, the debtors have made themselves the subject of outstanding obligations. It is for this reason that they may be called upon to answer for their debts in various jurisdictions. Of course, the principles of order and fairness are also protected by providing a foreign judgment debtor with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted: see *Beals*, at paras. 39 *et seq.*

[56] Third, contrary to Chevron’s argument, a requirement that the defendant have a real and substantial connection with the enforcing court in the sense of being present or having assets in the province would only undermine order and fairness. In recognition and enforcement proceedings, besides an unlikely attachment by the

defendant, the only way a real and substantial connection with the enforcing forum could be achieved, in the end, is through presence or assets in the jurisdiction. However, presence will frequently be absent given the very nature of the proceeding at issue. Indeed, Rule 17.02(m) is implicitly based on an expectation that the defendant in a claim on a judgment of a court outside Ontario will not be present in the province. Requiring assets to be present in the jurisdiction when recognition and enforcement proceedings are instituted is also not conducive to order or fairness. For one thing, assets such as receivables or bank deposits may be in one jurisdiction one day, and in another the next. If jurisdiction over recognition and enforcement proceedings were dependent upon the presence of assets at the time of the proceedings, this may ultimately prove to only benefit those debtors whose goal is to escape rather than answer for their liabilities, while risking depriving creditors of access to funds that might eventually enter the jurisdiction.

[57] In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality. The motion judge rightly opined as follows on this subject:

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. [para. 81]

I note that in one Ontario lower court decision, albeit in the context of *forum non conveniens*, the existence of assets has been held to be irrelevant to the jurisdictional inquiry: see *BNP Paribas (Canada) v. Mécs*, (2002), 60 O.R. (3d) 205 (S.C.J.).

[58] In this regard, I find persuasive value in the fact that other common law jurisdictions — presumably equally concerned about order and fairness as our own — have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment.

[59] In *Tasarruf Mevduati Sigorta Fonu v. Demirel*, [2007] 1 W.L.R. 2508, for example, the England and Wales Court of Appeal (Civil Division) held that “a claimant seeking to enforce a foreign judgment by action does not have to show that there are assets in the jurisdiction. To require him to do so would be tantamount to construing the rule as if it were limited in that way”: para. 29. The court also held that to be granted permission to serve *ex juris* (permission that is needed under the

applicable English procedural rules), the claimant is required to show “that he has a good arguable case in the action, that is that he has a good arguable case that judgment should be given based upon the foreign judgment”: para. 29. The court continued, holding that the claimant “must ordinarily . . . show further that he can reasonably expect a benefit from such a judgment”: *ibid.* However, on the facts of the case, it held that service *ex juris* should be permitted where the defendant did not possess assets in England at the time, but had a “reasonable possibility” of having assets in London “one of these days”: para. 40.

[60] The High Court of Ireland followed a similar approach in *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*, [2014] IEHC 115, in an arbitration context, holding that “the presence of assets within the jurisdiction is not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce a Convention Award”: para. 112. Although the court quoted with approval the passages from *Tasarruf* to the effect that the applicant must demonstrate that some potential benefit would accrue should the recognition and enforcement action succeed, it nevertheless accepted, with no hesitation, that “the seeking of recognition and enforcement of an award in a country where the losing party may have no assets in order to obtain the imprimatur of a respected court upon the award is acceptable”: para. 128.

[61] The U.S. courts appear to be divided on the prerequisites to recognition and enforcement: see R. A. Brand, “Federal Judicial Center International Litigation

Guide: Recognition and Enforcement of Foreign Judgments” (2013), 74 *U. Pitt. L. Rev.* 491. Some, as exemplified by the decision in *Lenchyshyn v. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (App. Div. 2001), take a broad approach. In *Lenchyshyn*, the Supreme Court of New York, Appellate Division, held that personal jurisdiction need not be established over judgment debtors for recognition and enforcement to proceed. In the court’s view, “[r]equiring that the judgment debtor have a ‘presence’ in or some other jurisdictional nexus to the state of enforcement would unduly protect a judgment debtor and enable him easily to escape his just obligations under a foreign country money judgment” (p. 292); moreover, no constitutional obligation exists to satisfy such a requirement (p. 289). The court concluded that “even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment . . . 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”: p. 291. The same court recently reiterated the *Lenchyshyn* approach in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (App. Div. 2014). Other state and district courts have also adopted its reasoning: *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (Tex. App. 2008); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905 (N.D. Iowa 2002).

[62] As the motion judge below correctly pointed out, some U.S. courts have taken a different approach. For instance, the Michigan Court of Appeals stated the following in *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874 (2004):

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.

...

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. [pp. 880 and 884]

Other U.S. courts have adopted an even more extreme position, holding that “attachment of assets of the judgment debtor within the state is not sufficient to provide jurisdiction, and that personal jurisdiction over the judgment debtor is necessary”: Brand, at p. 506, citing *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory”*, 283 F.3d 208 (4th Cir. 2002), cert. denied, 537 U.S. 822 (2002).

[63] As this review of the case law indicates, many courts in common law jurisdictions have been hesitant to make the presence of assets a prerequisite to jurisdiction in recognition and enforcement proceedings. While it is true that some have nonetheless seen fit to limit the existence of jurisdiction in other ways (notably, by requiring that judgment creditors prove that a benefit will result from successful recognition and enforcement proceedings), they have done so in the context of different procedural rules and distinct constitutional considerations.

[64] Turning to the works of Canadian conflict of laws scholars, most support the view that requiring a real and substantial connection through the defendant being

present or having assets in the province is not necessary for the purposes of a recognition and enforcement action. Walker, for instance, writes:

The security of crossborder transactions rests on the confidence that the law will enable the prompt and effective determination of the effect of judgments from other legal systems. For this reason, there are no separate or additional jurisdictional requirements, such as the residence of the defendant or the presence of the defendant's assets in the jurisdiction, for a court to determine whether a foreign judgment may be recognized or enforced. [Emphasis added; p. 14-1.]

[65] Perell and Morden express a similar view:

Subject to the defences, a Canadian court will enforce a foreign judgment if the foreign court or foreign jurisdiction had a “real and substantial connection” to the dispute. However, it is not necessary for the plaintiffs to establish that Ontario has a real and substantial connection with the litigation; it is sufficient to show that the foreign court that gave the judgment had a real and substantial connection with the matter. [Footnotes omitted; ¶11.181.]

[66] Pitel and Rafferty take a somewhat different position in the following passage:

Because an action on the foreign judgment is a new legal proceeding, issues of jurisdiction . . . must be considered at the outset. If the defendant is resident in the country in which recognition and enforcement is sought, it will be easy to establish jurisdiction. But in many cases the defendant will not be resident there: he or she will only have assets there, which the plaintiff is going after to enforce the judgment. Typically the presence of assets in a province is an insufficient basis for taking jurisdiction over a foreign defendant. But most provinces have made specific provision to allow for service *ex juris* in such cases. For example, in Ontario service outside the province can be made as of right where the claim is “on a judgment of a court outside Ontario.” . . . [T]he plaintiff

would still need to show a real and substantial connection to the province in which 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. [Footnote omitted; pp. 159-60.]

[67] This statement, however, has been criticized by at least one lower court judge who “decline[d] to follow that theory for the following reasons: (1) they cite no authority for the theory that they advance (neither case law nor academic commentary); and (2) the preponderance of precedent is to the contrary”: *CSA8-Garden Village LLC v. Dewar*, 2013 ONSC 6229, 369 D.L.R. (4th) 125, at para. 43. I am inclined to agree with this criticism. Pitel and Rafferty’s statement does not accord with the principles discussed above that underlie actions for the recognition and enforcement of foreign judgments.

[68] In my view, there is nothing improper in allowing foreign judgment creditors to choose where they wish to enforce their judgments and to assess where, in all likelihood, their debtors’ assets could be found or may end up being located one day. In this regard, it is the existence of clear, liberal and simple rules for the recognition and enforcement of foreign judgments that facilitates the flow of wealth, skills and people across borders in a fair and orderly manner: Walker, at p. 14-1. Requiring a real and substantial connection through the presence of assets in the enforcing jurisdiction would serve only to hinder these considerations, which are important for commercial dealings in an increasingly globalized economy. It is true that the absence of assets upon which to enforce a foreign judgment may, in some

situations, have an impact on the legitimate use of the judicial resources of an enforcing court, and in turn on the court's exercise of its discretionary power to stay the proceeding. The absence of assets may also influence the appropriateness of the choice of a given forum for the enforcement proceedings. These issues do not relate, however, to the existence of jurisdiction, but to its exercise; as this Court emphasized in *Van Breda*, "a clear distinction must be drawn between the existence and the exercise of jurisdiction": para. 101.

[69] Facilitating comity and reciprocity, two of the backbones of private international law, calls for assistance, not barriers. Neither this Court's jurisprudence nor the principles underlying recognition and enforcement actions requires imposing additional jurisdictional restrictions on the determination of whether a foreign judgment is binding and enforceable in Ontario. The principle of comity does not require that Chevron's submissions be adopted. On the contrary, an unambiguous statement by this Court that a real and substantial connection is not necessary will have the benefit of providing a "fixed, clear and predictable" rule, which some say is necessary in this area: T. J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007), 33 *Queen's L.J.* 179, at p. 192. Such a rule will clearly be consistent with the dictates of order and fairness; it will also allow parties "to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect", as LeBel J. in *Van Breda* insisted they should be able to do: para. 73. Moreover, a clear rule will help to avert needless and wasteful jurisdictional inquiries that merely thwart the proceedings from their

eventual resumption. As some have noted, our courts “should exercise care in interpreting rules and developing legal principles so as not to encourage unnecessary motions”, since “[i]n many cases, the defendant’s challenge to service *ex juris* is just another dilatory tactic that provincial rules of civil procedure have sought to avoid”: G. D. Watson and F. Au, “Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard” (2000), 23 *Adv. Q.* 167, at p. 205. To accept Chevron’s submissions would be to ignore this wise counsel.

(4) Relevant Legislation

[70] Finally, the choices made by the Ontario legislature provide an additional useful perspective, one that reinforces the validity of the approach favoured by this Court’s jurisprudence and the principles discussed above. Two points are of note. First, the Rules do not require that the court probe the relationship between the dispute and the province, whether by inquiring into the existence of assets or otherwise. Rule 17.02 establishes the bases upon which a party can serve an adversary with an originating process or notice of a reference outside Ontario without needing to seek leave of the court to do so. Rule 17.02(m) provides that one basis for service exists where the claim is “on a judgment of a court outside Ontario”, which, naturally, contemplates recognition and enforcement proceedings. While the Rules do not in and of themselves confer jurisdiction (see Perell and Morden, at ¶2.306), they nevertheless “represent an expression of wisdom and experience drawn from the life of the law” (*Van Breda*, at para. 83) and offer useful guidance with respect to the

intentions of the Ontario legislators. That the legislators have not seen fit to craft specific jurisdictional rules respecting foreign judgments is indicative of their intention to have the Rules alone govern, and therefore to maintain the existence of broad jurisdictional bases in actions for recognition and enforcement.

[71] Second, analogous provisions found in other Ontario statutes do not impose an obligation on the plaintiff to establish that the defendant has assets in the province or some other conceivable connection with the forum. For example, the Ontario *International Commercial Arbitration Act*, which permits registration of foreign arbitral awards, does not require that the debtor be present or have assets in Ontario. Article 35(1) of the Schedule to that Act provides that “[a]n arbitral award . . . 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.” Article 36(1) lists various grounds for refusing recognition or enforcement of such awards. None of those grounds is based upon the absence of a real and substantial connection between either the underlying dispute or the defendant and Ontario, or upon an absence of assets. Similarly, the *Reciprocal Enforcement of Judgments (U.K.) Act*, which facilitates the recognition and enforcement of judgments from the United Kingdom, does not permit a debtor to escape enforcement by demonstrating that no real and substantial connection exists between the debtor or the dispute and the forum. Finally, the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5, which supplies an expedited mechanism for registering and enforcing the

judgments of the other Canadian provinces and territories, contains no such requirement either.

[72] I note that all the common law provinces and territories have statutes providing for the recognition and enforcement of foreign arbitral awards or of judgments from the United Kingdom. They also have similar statutes providing for the expedited registration or recognition of judgments from specified jurisdictions. In Quebec, it is art. 3155 of the *Civil Code of Québec* that provides for the recognition and enforcement of foreign decisions. It notably does not require a connection between the foreign debtor and the province. In *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, this Court found that “the basic principle laid down in art. 3155 . . . is that any decision rendered by a foreign authority must be recognized unless an exception applies”: para. 22. The Court acknowledged that the enumerated exceptions are “limited”: *ibid.* I note that none of them concerns a jurisdictional hurdle in the enforcing state. This shows that the Quebec legislature did not intend a connection between the foreign debtor and the province to be a prerequisite to recognition and enforcement.

[73] I acknowledge that the Uniform Law Conference of Canada (“ULCC”) took a different approach in drafting the *Court Jurisdiction and Proceedings Transfer Act* (“CJPTA”) (online) in the 1990s. The CJPTA has been passed, with some variations, in five jurisdictions (Saskatchewan, Prince Edward Island, Yukon, British Columbia, and Nova Scotia), though it has only come into force in three of them.

Section 3(e) of the CJPTA provides that one circumstance in which a court has territorial competence in a proceeding is if “there is a real and substantial connection between [*the enacting province or territory*] and the facts on which the proceeding against that person is based” (emphasis in original; text in brackets in original). Section 10 states that a real and substantial connection “is presumed to exist if the proceeding . . . (k) is for enforcement of a judgment of a court made in or outside [*the enacting province or territory*] or an arbitral award made in or outside [*the enacting province or territory*]” (emphasis in original; text in brackets in original). Thus, the foreign judgment creates a rebuttable presumption of jurisdiction, which the judgment debtor can contest. Yet, in spite of this possibility, V. Black, S. G. A. Pitel and M. Sobkin point out that, as of 2012, “no defendant [had] succeeded in rebutting a s. 10 presumption” in the provinces in which the CJPTA was in force at that time: *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (2012), at pp. 146-47. As this Court observed in *Van Breda*, “[l]egislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system”: para. 34. The legislatures are therefore free to adopt legislation like the CJPTA that departs from the common law, so long as they do so within constitutional limits. Ontario, however, has not done so.

[74] As a result, to find in this case that there is no requirement of a real and substantial connection between the forum and the dispute in an action for recognition and enforcement would neither pervert the Ontario legislators’ intentions, nor risk

some other unforeseen outcome. Instead, such a finding would be respectful of the legislative choices already made by the province, while leaving open legal space in which it is free to develop its own conflict of laws rules, if it so chooses. This decision is limited to common law recognition and enforcement principles.

(5) Summary

[75] Case law, principle, relevant statutes and practicality all support a rejection of Chevron's contention. Jurisdiction in an action for recognition and enforcement stems from service being effected on the basis of a foreign judgment rendered in the plaintiff's favour, and against the named defendant. There is no need to demonstrate a real and substantial connection between the dispute and the enforcing forum. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules: *Van Breda*, at para. 74, quoting *Morguard*, at p. 1097. Moreover, such a conclusion would be inconsistent with this Court's statement in *Beals* that the doctrine of comity (to which the principles of order and fairness attach) "must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility": para. 27. Cross-border transactions and interactions continue to multiply. As they do, comity requires an increasing willingness on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights.

[76] In this case, jurisdiction is established with respect to Chevron, which was served *ex juris* pursuant to Rule 17.02(m) of the Rules. The plaintiffs alleged in their amended statement of claim that Chevron was a foreign debtor as a result of “the final Judgment of the Appellate Division of the Provincial Court of Justice of Sucumbios of Ecuador of January 3, 2012”: Joint A.R., vol. 1, p. 102. While this judgment has since been varied by the Court of Cassation, this occurred after the amended statement of claim had been filed. The original judgment remains largely intact, although, as noted, the Court of Cassation reduced the total amount owed. The plaintiffs have sufficiently pleaded the Ontario courts’ jurisdiction over Chevron.

[77] In closing on this first issue, I wish to emphasize that when jurisdiction is found to exist, it does not necessarily follow that it will or should be exercised: A. Briggs, *The Conflict of Laws* (3rd ed. 2013), at pp. 52-53; see also *Van Breda*, at para. 101. Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Ontario courts. Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following, whether by way of preliminary motions or at trial: that the proper use of Ontario judicial resources justifies a stay under the circumstances; that the Ontario courts should decline to exercise jurisdiction on the basis of *forum non conveniens*; that any one of the available defences to recognition and enforcement (i.e. fraud, denial of natural justice, or public policy) should be accepted in the circumstances; or that a motion under either Rule 20 (summary judgment) or Rule 21 (determination of an issue before trial) of the Rules should be granted. The availability of these

potential arguments, however, does not oust the jurisdiction of the Ontario courts over the plaintiffs' action for recognition and enforcement.

B. *Jurisdiction With Respect to Chevron Canada*

[78] For its part, Chevron Canada contends that — whatever might be the case for Chevron — jurisdiction cannot be established over it, a stranger to the original foreign judgment. It advances two primary submissions. First, in its view, the Court of Appeal erroneously found jurisdiction over Chevron without inquiring into the nature of the relationship between that defendant or the subject matter of the action and Ontario. This error allegedly had important consequences on the issue of whether jurisdiction exists over Chevron Canada. Given that I have found that jurisdiction properly exists over Chevron, this submission is now moot.

[79] Chevron Canada's second submission is that the other factors relied upon by the Court of Appeal to find jurisdiction (C.A. reasons, at para. 38) — namely, Chevron Canada's "bricks-and-mortar business in Ontario" and its "economically significant relationship" with Chevron — do not in fact establish jurisdiction. Chevron Canada argues that while corporations domiciled in Ontario can be brought before the province's courts even in the absence of a relationship between the claim and that province, the same cannot be said for corporations that merely carry on business in Ontario. Relying on *Van Breda*, it argues that in such cases, Ontario courts only have jurisdiction if there is a connection between the subject matter of the claim and the business conducted in the province. According to Chevron Canada,

while the Court in *Van Breda* maintained the traditional jurisdictional grounds of presence and consent, it also limited the instances in which presence-based jurisdiction can be said to exist. For corporations, the Court recognized that the existence of an office other than the head office is not an independent jurisdictional ground, but is properly considered part of carrying on business in the province. In Chevron Canada's view, carrying on business from an office is only a presumptive connecting factor that can be rebutted by showing that there is no connection between the claim and the business the corporation conducts in the province. This flows from the constitutional limits on the state's exercise of power and applies regardless of whether service is effected *ex juris* or *in juris*.

[80] Chevron Canada further submits that the existence of its "economically significant relationship" with Chevron is insufficient to find jurisdiction: Chevron Canada's factum, at para. 65. Such a finding would disregard the concept of separate corporate personality, "a bedrock principle of law" since *Salomon v. Salomon & Co.*, [1897] A.C. 22. This case is not one of the limited instances in which piercing the corporate veil is permissible. Chevron Canada adds that in every action, there must be a "good arguable case" that a sufficient connection with Ontario exists before the province's courts can exercise jurisdiction: Chevron Canada's factum, at para. 86, citing *Ontario v. Rothman's Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561, at para. 54. In its submission, there is none here.

[81] I do not accept Chevron Canada's submissions. *Van Breda* specifically preserved the traditional jurisdictional grounds of presence and consent. Chevron Canada erroneously seeks to conflate the rules on presence-based jurisdiction and those on assumed jurisdiction, even though they have always developed in their respective spheres. Here, presence-based jurisdiction is made out on the basis of Chevron Canada's office in Mississauga, Ontario, where it was served *in juris*. Carrying on a business in Ontario at which the defendant is served is sufficient to find presence-based jurisdiction. Several Ontario courts have found this to be the case. The reference in *Van Breda* to constitutional conflict of laws principles does not change the fact that a sufficient jurisdictional basis exists to allow the plaintiffs' case to proceed against Chevron Canada. In any event, even in the context of the rules on assumed jurisdiction, which I do not need to consider in this case, it would be inappropriate to import the connecting factors for tort claims identified in *Van Breda* into the recognition and enforcement context without further analysis.

(1) *Van Breda* and the Traditional Jurisdictional Grounds

[82] *Van Breda* was a case about assumed jurisdiction, one of three bases for asserting jurisdiction *in personam* over an out-of-province defendant. The other two bases, known as the "traditional" jurisdictional grounds, are presence-based jurisdiction and consent-based jurisdiction: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), at para. 19.

[83] Chevron Canada's appeal concerns the traditional ground of presence. Presence-based jurisdiction has existed at common law for several decades; its historical roots "cannot be over-emphasized": S. G. A. Pitel and C. D. Dusten, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006), 85 *Can. Bar Rev.* 61, at p. 69. It "is based upon the requirement and sufficiency of personal service of the originating process within the province or territory of the forum (service *in juris*)": J.-G. Castel, *Introduction to Conflict of Laws* (4th ed. 2002), at p. 83. If service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action: T. J. Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013), 36 *Fordham Int'l L.J.* 396, at p. 449. Assumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris*: Pitel and Rafferty, at p. 53. When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.

[84] While *Van Breda* simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, "jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established". In other words,

“[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction”: para. 79.

[85] To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. Whether a corporation is “carrying on business” in the province is a question of fact: *Wilson v. Hull* (1995), 174 A.R. 81 (C.A.), at para. 52; *Ingersoll Packing Co. v. New York Central & Hudson River R.R. Co.* (1918), 42 O.L.R. 330 (S.C. App. Div.), at p. 337. In *Wilson*, in the context of statutory registration of a foreign judgment, the Alberta Court of Appeal was asked to assess whether a company was carrying on business in the jurisdiction. It held that to make this determination, the court must inquire into whether the company has “some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time”: para. 13. These factors are and always have been compelling indicia of corporate presence; as the cases cited in *Adams v. Cape Industries Plc*, [1990] 1 Ch. 433, at pp. 467-68, per Scott J., demonstrate, the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor: LeBel J. accepted this in *Van Breda* when he held that “carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there”: para. 87.

[86] The motion judge in this case made the following factual findings concerning Chevron Canada's Mississauga office:

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. [para. 87]

These findings have not been contested. They are sufficient to establish presence-based jurisdiction. Chevron Canada has a physical office in Mississauga, Ontario, where it was served pursuant to Rule 16.02(1)(c), which provides that valid service can be made at a place of business in Ontario. Chevron Canada's business activities at this office are sustained; it has representatives who provide services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances: *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.), at para. 36; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, appeal dismissed and cross-appeal allowed 2014 ONCA 285; 120 O.R. (3d) 140; *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, aff'd 2012 ONCA 211, 110 O.R. (3d) 256; *Wilson; Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315 (H.C.J.).

[87] The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction. As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a

real and substantial connection exists: *Incorporated Broadcasters Ltd.*, at para. 29, cited with approval in *Prince* (C.A.), at para. 48; *Patterson v. EM Technologies, Inc.*, 2013 ONSC 5849, at paras. 13-16. In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case.

(2) Effect of the Constitutional Principles Developed in *Van Breda*

[88] Nonetheless, Chevron Canada adds constitutional flavour to its submissions, contending that LeBel J.'s comments in *Van Breda* on the prerequisites for assuming jurisdiction over corporate defendants should apply to all types of jurisdiction — presence-based, consent-based, and assumed — by virtue of the real and substantial connection test as a constitutional principle: Chevron Canada's factum, at paras. 42-50. As noted in my discussion of Chevron, LeBel J. articulated this constitutional principle as suggesting that "the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute": *Van Breda*, at para. 32.

[89] In my view, the real and substantial connection test as a constitutional principle does not dictate that it is "illegitimate" to find jurisdiction over Chevron Canada in this case. Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario

court's request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved. As the Ontario Court of Appeal put it in *Incorporated Business Ltd.*, at para. 33, “[t]here is no constitutional impediment to a court asserting jurisdiction over a person having a presence in the province”, at least as presence is established in this case. To accept Chevron Canada’s submission to the contrary would be to endorse an unduly “narrow” view of jurisdiction, one towards which this Court has shown no prior inclination: J. Blom, “New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet” (2013) 53 *Can. Bus. L.J.* 1, at p. 12. For Ontario courts to have jurisdiction over Chevron Canada in this case, mere presence through the carrying on of business in the province, combined with service therein, suffices to find jurisdiction on the traditional grounds. There is no need to resort to the *Van Breda* criteria for assumed jurisdiction in tort claims in such a situation. To accept Chevron Canada’s submissions would be to permit a total conflation of presence-based and assumed jurisdiction. As Briggs has noted, “[c]ommon law jurisdiction draws a fundamental distinction between cases where the defendant is and is not within the territorial jurisdiction of the court when the proceedings are commenced”: p. 112.

[90] Because jurisdiction over Chevron Canada exists on the basis of the traditional grounds, I need not consider how jurisdiction might be found over a third party who is not present in and does not attorn to the jurisdiction of the Ontario

courts, but who is alleged to be capable of satisfying a foreign judgment debt. I offer only two comments in this regard.

[91] First, it should be remembered that the specific connecting factors that LeBel J. established in *Van Breda* were designed for and should be confined to the assumption of jurisdiction in tort actions. His comments with respect to carrying on business in the jurisdiction, at paras. 85 and 87, were tailored to that context. The same is true of the examples he gave to show how the presumption of jurisdiction can be rebutted in respect of the connecting factors he identified. LeBel J.'s statement that the presumptive connecting factor of "carrying on business in the province . . . can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province" must be confined accordingly: para. 96. The connecting factors that he identified for tort claims did not purport to be an inventory covering all claims known to law, and the appropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue.

[92] In the recognition and enforcement context, it would hardly make sense to require that the carrying on of business in the province relate to the subject matter of the dispute. The subject matter of recognition and enforcement proceedings is the collection of a debt. A debt is enforceable against any and all assets of a given debtor, not merely those that may have a relationship to the claim. For instance, suppose a foreign judgment is validly rendered against Corporation A in a foreign country as a result of a liability of its Division I, which operates solely in that country.

If Corporation A operates a place of business for its separate and unrelated Division II in Ontario, where all its available and recoverable assets happen to be located, it could not be argued that the foreign judgment creditor cannot execute and enforce it in Ontario against Corporation A because the business activities of the latter in the province are not related to the liability created by the foreign judgment.

[93] Second, one aspect of the plaintiffs' claim in this case is for enforcement of Chevron's obligation to pay the foreign judgment using the shares and assets of Chevron Canada to satisfy its parent corporation's debt obligation. In this respect, the subject matter of the claim is not the Ecuadorian events that led to the foreign judgment to which Chevron Canada is a stranger, but rather, at least arguably, the collection of a debt using shares and assets that are alleged to be available for enforcement purposes. In an enforcement process like this for the collection of a debt against a third party, assets in the jurisdiction through the carrying on of business activities are undoubtedly tied to the subject matter of the claim. From that standpoint, seizable assets are not merely the subject matter of the dispute, they are its core. In this regard, the third party is the direct object of the proceedings. When a plaintiff seeks enforcement against a third party to satisfy a foreign judgment debt, the existence of assets in the province may therefore well be a highly relevant connecting factor of the sort needed for such an action to proceed. Indeed, it is hard to identify who, besides the province, would have jurisdiction over a company for enforcement processes against that company's assets in the province.

(3) Conclusion

[94] Chevron Canada was served *in juris*, in accordance with Rule 16.02(1)(c), at a place of business it operates in Mississauga, Ontario. Traditional, presence-based jurisdiction is satisfied. Jurisdiction is thus established with respect to it. As indicated for Chevron, the establishment of jurisdiction does not mean that the plaintiffs will necessarily succeed in having the Ecuadorian judgment recognized and enforced against Chevron Canada. A finding of jurisdiction does nothing more than afford the plaintiffs the opportunity to seek recognition and enforcement of the Ecuadorian judgment. Once past the jurisdictional stage, Chevron Canada, like Chevron, can use the available procedural tools to try to dispose of the plaintiffs' allegations. This possibility is foreign to and remote from the questions that must be resolved on this appeal.

[95] Further, my conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada. I take no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment. Similarly, should the judgment be recognized and enforced against Chevron, it does not automatically follow that Chevron Canada's shares or assets will be available to satisfy Chevron's debt. For instance, shares in a subsidiary belong to the shareholder, not to the subsidiary itself. Only those shares whose ownership is ultimately attributable to the judgment debtor could be the valid target

of a recognition and enforcement action. It is not at the early stage of assessing jurisdiction that courts should determine whether the shares or assets of Chevron Canada are available to satisfy Chevron's debt. As such, contrary to the appellants' submissions, this is not a case in which the Court is called upon to alter the fundamental principle of corporate separateness as reiterated in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at least not at this juncture. In that regard, the deference allegedly owed to the motion judge's findings concerning the separate corporate personalities of the appellants and the absence of a valid foundation for the Ontario courts' exercise of jurisdiction is misplaced. These findings were reached in the context of the s. 106 stay. As I stated above, the Court of Appeal reversed that stay, and this issue is not on appeal before us.

VI. Disposition

[96] For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

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