Court File No. CV-12-9808-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANDE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE

Plaintiffs

and

CHEVRON CORPORATION, CHEVRON CANADA LIMITED and CHEVRON CANADA FINANCE LIMITED

Defendants

FACTUM OF THE RESPONDENTS/PLAINTIFFS (RETURNABLE FEBRUARY 1, 2016)

January 20, 2016

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FACTUM OF THE RESPONDENTS/PLAINTIFFS (RETURNABLE FEBRUARY 1, 2016)

PART 1 - OVERVIEW

1. The Court of Appeal and the Supreme Court of Canada ordered Chevron Corporation to file its Statement of Defence to the plaintiffs' recognition and enforcement action.

2. Chevron Corporation has delivered a pleading that contains defences which the Supreme Court of Canada in *Beals* clearly stated are not permissible defences.

3. As a consequence, the plaintiffs have moved, pursuant to Rule 21.01, to strike the defences pled by Chevron Corporation as being impermissible defences and thus disclosing no reasonable defence.

4. The threshold issue to be decided is whether Chevron Corporation has pleaded any permissible defences. Only then can the parties determine the scope of production. Permissible pleadings define production and there can be no discussion or determination of productions until it is decided which, if any, pleaded defences remain.

PREMATURITY OF CHEVRON CORPORATION'S MOTION

5. Chevron Corporation's premature motion for production and/or a stay were brought after the plaintiffs' Rule 21 motion. In addition to being premature, the motion is plainly a further attempt to delay and derail the prosecution by the plaintiffs of the Enforcement Action, which the Supreme Court of Canada has greenlighted. As set out in paragraphs 10 and 23 herein, the Supreme Court of Canada and the Court of Appeal have both affirmed the domestic court's obligation to favour the generous enforcement of foreign judgments and criticized Chevron's repeated attempts at delay.

6. Chevron Corporation deliberately mischaracterizes the plaintiffs' motion. The plaintiffs, on three separate occasions, explained to Chevron Corporation that its motion seeks to strike extraneous and impermissible defences and thereby narrow the issues for trial, if any defences remain at all:

> The plaintiffs' motion is based on Rule 21, the language of which I paraphrase:
>
> > The plaintiffs move to strike the defences pled as being impermissible defences in an enforcement action pursuant to the restrictions set out by the Supreme Court of Canada in *Beals v. Saldanha*. Thus the defences do not disclose a reasonable cause of action.
>
> Pursuant to Rule 21.02, no evidence is admissible on the motion save and except the underlying judgments, which are incorporated in the Statement of Claim and which are the subject matter of the enforcement action.
>
> We did indicate to you at our meeting of December 3, 2015 the nature of our motion.
>
> **Reference:** Letter to Larry Lowenstein from Alan Lenczner dated January 8, 2016, Supplementary Responding Motion Record of the Plaintiffs, Tab 3, pp. 113-114
>
> I have made it clear what the plaintiffs' motion is as against Chevron Corporation's pleaded defences. However, I will reiterate what was told to you on December 3, 2015 and stated in our letter of January 8, 2016.
>
> The motion seeks to strike out the defences pleaded as being impermissible defences pursuant to the Supreme Court of Canada's Decision in *Beals v. Saldanha* and the numerous cases that have applied that decision. The defences are impermissible because they do not fall within the three defences allowed by the Court and are defences that could have been raised in Ecuador with reasonable due diligence. The motion is brought pursuant to Rule 21 and we have addressed that Rule in our Notice of Motion.
>
> An enforcement action is doctrinally different than an action at first instance. It proceeds on the established basis that the defendant has litigated in a foreign jurisdiction and has had judgment rendered against it. In such circumstances, the Motions Court is entitled to have put before it and to look at the Judgments from Ecuador and the written submissions of Chevron to appreciate the matters that were put before the Courts of Ecuador. No other evidence is permitted. That is why we object to the extraneous evidence that you have filed. Apart from the evidence of Patricio Garcia Bravo, our extraneous evidence, as you refer to it in Point 4 of your letter of January 11, 2016, is also extraneous. We filed it as an

> alternative and to respond to any evidence of yours that the court might take into account.
>
> . . .
>
> Make no mistake, the motion is a motion to strike pursuant to the Beals Decision. Once the defences are stuck, and in the same breath, we are asking for judgment summarily as there are no defences left standing.
>
> **Reference:** Letter to Larry Lowenstein from Alan Lenczner dated January 12, 2016, Supplementary Responding Motion Record of the Plaintiffs, Tab 4, pp. 115-116

7. Chevron Corporation intentionally mischaracterizes the plaintiffs' strike out motion to perpetrate their egregious delay, which the Court of Appeal has already criticized (see para. 23 herein). Chevron Corporation also seeks to obfuscate the issues and complicate, not simplify, them. The plaintiffs will respond to all the issues raised by Chevron Corporation. As but one example, Chevron Corporation contends that the plaintiffs' summary judgment motion should not proceed because of the large amount involved, $9.51 billion (see paras. 84(b), 86 to 89 of Chevron Corporation's Factum). Chevron Corporation fails to recognize that the quantum of the Ecuadorean Judgment is now *res judicata* and cannot be re-litigated. As it did before Brown J., the Ontario Court of Appeal, and the Supreme Court of Canada, Chevron Corporation confuses an action at first instance with a recognition and enforcement action. All 11 judges ruled against Chevron Corporation on this theory.

8. None of Chevron Corporation's authorities are enforcement cases. Enforcement actions operate under a different regime. First instance authorities are not relevant.

RULE 21

9. Far from requiring massive production and discovery, as Chevron Corporation suggests, Rule 21.01(2) provides that no evidence is admissible on the motion.

10. In an Enforcement Action, the Court can and must review the issues before the foreign court to determine what was raised by the defendant. In this case, this task if fully accomplished by virtue of Chevron Corporation's written submissions at every level of court. Secondary sources are the foreign judgments themselves. It is important to adjudicate the moving party's motions within the boundaries of an Enforcement Action and against an analysis of the content of the pleading. In an Enforcement Action, the enforcing court is mandated to grant its assistance in enforcing an outstanding judgment, not raise barriers:

> [12] ... As set out in *Morguard v. De Savoye Investments Ltd.* [1990] 3 S.C.R. 1077, the purpose of comity is to secure the ends of justice and contemplates the recognition of judgments in multiple jurisdictions. The court should grant its assistance in enforcing an outstanding judgment, not raise barriers. ... [emphasis added]

Reference: *BNP Paribas (Canada) v. Mécs*, [2002] O.J. No. 2795 (S.C.J.), Authorities of the Respondents/Plaintiffs, Tab 1 cited with approval in SCC at para. 71

> [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.
>
> . . .
>
> [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 rose 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. ...
>
> [45] . . . 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.

. . .

> [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. [emphasis added]

Reference: *Chevron Corporation et al v. Yaiguaje et al,* [2015] S.C.J. No. 42 (SCC Decision), at paras. 42, 44, 45 and 48, Motion Record of Chevron Corporation, Volume I, Tab 11, pp. 173-177

11. As the U.S. 2nd Circuit Court of Appeals stated and as is consistent with the principles of international comity:

> The Recognition Act and the common law principles are motivated by an interest to provide for the enforcement of foreign judgments, not to prevent them.
>
> Chevron would turn that framework on its head and render a law designed to facilitate 'generous' judgment enforcement into a regime by which such enforcement could be preemptively avoided. [emphasis added]

Reference: *Chevron Corporation v. Naranjo,* 667 F.3d 232 (2d Cir. January 26, 2012), Authorities of the Respondents/Plaintiffs, Tab 2

12. Chevron Corporation also asks that the action against it be stayed until the "corporate separateness" issue is determined, because it argues, if resolved in its favour, it has no assets in Canada.

13. Chevron Corporation put this argument before both the Court of Appeal and the Supreme Court of Canada as a ground for the Ontario Court not having jurisdiction. It failed, twice, in that argument.

> The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment.
>
> **Reference:** *Beals v. Saldanha,* [2003] S.C.J. No. 77, at para. 78, Authorities of the Respondents/Plaintiffs, Tab 3

> [57] ... 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. Mecs*, (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.
>
> **Reference:** SCC Decision, paras. 57, 58 and 56, Motion Record of Chevron Corporation, Volume I, Tab 11, pp. 181-182

DOCTRINALLY

14. An Enforcement Action differs from an action at common law in that the defendant, the judgment debtor, has had the facts litigated in the forum where it voluntarily appeared and presented its defences. No re-litigation of the facts, or of the law, is permitted in the enforcing jurisdiction. In this case, Chevron Corporation defended itself in Ecuador in an eight year trial. It then appealed the judgment against it to the Intermediate Court of Appeal, a *de novo* court. It further appealed the decision to the National Court of Cassation. Chevron Corporation has had its day in court, yet refuses to abide by the judgment.

RESTRICTED DEFENCES PERMITTED IN THE ENFORCING COURT

15. In the authoritative decision of *Beals v. Saldanha*, the Supreme Court of Canada restricted the defences that can be raised by a judgment debtor to an Enforcement Action. There are three defences only, and no more.

Fraud

16. Although fraud may be pleaded, the Supreme Court has restricted its definition in Enforcement Actions. The defendant cannot, under the guise of a fraud defence, re-litigate the facts.

> 44 Inherent to the defence of fraud is the concern that defendants may try to use this defence as a means of relitigating an action previously decided and so thwart the finality sought in litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defence of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response to a judgment. If this Court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.
>
> **Reference:** *Beals v. Saldanha,* [2003] S.C.J. No. 77, at para. 44, Authorities of the Respondents/Plaintiffs, Tab 3

17. The defendant cannot plead facts and allegations of fraud which were put before the original court. Estoppel by judgment applies.

> 45 Courts have drawn a distinction between "intrinsic fraud" and "extrinsic fraud" in an attempt to clarify the types of fraud that can vitiate the judgment of a foreign court. Extrinsic fraud is identified as fraud going to the jurisdiction of the issuing court or the kind of fraud that misleads the court, foreign or domestic, into believing that it has jurisdiction over the cause of action. Evidence of this kind of fraud, if accepted, will justify setting aside the judgment. On the other hand, intrinsic fraud is fraud which goes to the merits of the case and to the existence of a cause of action. The extent to which evidence of intrinsic fraud can act as a defence

to the recognition of a judgment has not been as clear as that of extrinsic fraud.

. . .

47 ... The court, in Jacobs, acknowledged that in addition to evidence of extrinsic fraud, evidence of intrinsic fraud was admissible where the defendant could establish "proof of new and material facts" that, not being available at the time of trial, were not before the issuing court and demonstrate that the judgment sought to be enforced was obtained by fraud.

. . .

50 What should be the scope of the defence of fraud in relation to foreign judgments? Jacobs, supra, represents a reasonable approach to that defence. It effectively balances the need to guard against fraudulently obtained judgments with the need to treat foreign judgments as final. I agree with Doherty J.A. for the majority in the Court of Appeal that the "new and material facts" dis-cussed in Jacobs must be limited to those facts that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.

. . .

52 Where a foreign judgment was obtained by fraud that was undetectable by the foreign court, it will not be enforced domestically. "Evidence of fraud undetectable by the foreign court" and the mention of "new and material facts" in Jacobs, supra, demand an element of reasonable diligence on the part of a defendant. To repeat Doherty J.A.'s ruling, in order to raise the defence of fraud, a defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment. See para. 43:

> A due diligence requirement is consistent with the policy underlying the recognition and enforcement of foreign judgments. In the modern global village, decisions made by foreign courts acting within Canadian concepts of jurisdiction and in accordance with fundamental principles of fairness should be respected and enforced. <u>That policy does not, however, extend to protect decisions which are based on fraud that could not, through the exercise of reasonable diligence, have been brought to the attention of the foreign court.</u> Respect for the foreign court does not diminish when a refusal to enforce its judgment is based on material that could not, through the exercise of reasonable diligence, have been placed before that court. [Emphasis added.]

Such an approach represents a fair balance between the countervailing goals of comity and fairness to the defendant.

Reference: *Beals v. Saldanha, supra*, at paras. 45, 47, 50 and 52, Authorities of the Respondents/Plaintiffs, Tab 3

Natural Justice

18. The denial of natural justice can be the basis of a challenge to a foreign judgment, but the onus rests on the defendant to prove it.

> 59 As previously stated, the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice.
>
> **Reference:** *Beals v. Saldanha, supra*, at para. 59, Authorities of the Respondents/Plaintiffs, Tab 3

19. The defence of natural justice is restricted to the form and process in the particular case.

> 64 The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness.
>
> **Reference:** *Beals v. Saldanha, supra*, at para. 64, Authorities of the Respondents/Plaintiffs, Tab 3

The Defence of Public Policy

20. The Supreme Court of Canada in *Beals* states:

> 71 The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in *Castel and Walker, supra*, at p. 14-28:
>
> > ... the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts... .
>
> **Reference:** *Beals v. Saldanha, supra*, at para. 71, Authorities of the Respondents/Plaintiffs, Tab 3

21. The defences pled in Chevron Corporation's Statement of Defence are outside the boundaries permitted by *Beals* and the myriad of cases that have applied *Beals*. It seeks to re-litigate defences of fact and law, which it put before the Ecuadorean courts and which found no favour there.

22. The plaintiffs have therefore moved to strike the pleading. No evidence other than the Facta and Judgments are required, or indeed permitted.

23. Chevron Corporation's motion is a continuation of the delay it has engaged in since the very start of the litigation more than 20 years ago. Notably, nowhere does it now contest that it and its predecessor Texaco caused massive contamination of water, plants and crops in the Ecuadorean Amazon causing illness and death to 30,000 indigenous people. The unanimous Court of Appeal recognized the extensive procedural delays engaged in by Chevron Corporation.

> [65] The long history of this litigation, and especially Chevron's role in it, suggests the opposite. The Ecuador plaintiffs first sued Chevron in the United States District Court for the Southern District of New York. Chevron resisted, and persuaded the United States Court of Appeals for the Second Circuit to dismiss the plaintiffs' claims on the basis of forum non conveniens: *Aguinda et al v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).
>
> [66] However, as a condition of obtaining a dismissal of the plaintiffs' claims, Texaco (Chevron's predecessor) made promises and gave undertakings to the court, including (a) a promise to accept service of process in Ecuador and not object to the civil jurisdiction of a court of competent jurisdiction in Ecuador, and (b) recognition of the binding nature of any judgment issued in Ecuador, subject to reserving its right to contest the validity of an Ecuadorian judgment in the circumstances permitted by New York's Recognition of Foreign Country Money~Judgments Act.
>
> [67] Once the Ecuadorian courts made their decisions, Chevron chose not to abide by them. Indeed, Chevron sought and obtained a global injunction from a New York federal district court barring the enforcement of the Ecuadorian judgment in any court in any country in the world: *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011). The United States Court of Appeals for the Second Circuit reversed this decision and remitted the case to the district court with instructions to dismiss

> Chevron's declaratory judgment claim in its entirety: *Chevron Corporation v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).
>
> [68] Now the Ecuadorian plaintiffs have decided to try to have the Ecuadorian judgment enforced in Ontario. Chevron's response is to contest the jurisdiction of the Ontario court; it has not attorned to its jurisdiction.
>
> . . .
>
> [71] In the end, I agree with what Pepall J. said in *BNP Paribas (Canada)*, at para. 12:
>
> > As set out in *Morguard v. De Savoye Investments Ltd.* [1990] 3 S.C.R. 1077, the purpose of comity is to secure the ends of justice and contemplates the recognition of judgments in multiple jurisdictions. The court should grant its assistance in enforcing an outstanding judgment, not raise barriers.
>
> [72] This case cries out for assistance, not unsolicited and premature barriers. ...
>
> . . .
>
> [74] Even before the Ecuadorian judgment was released, Chevron, speaking through a spokesman, stated that Chevron intended to contest the judgment if Chevron lost. He said: 'We're going to fight this until hell freezes over. And then we'll fight it out on the ice."
>
> [75] Chevron's wish is granted. After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction.

Reference: Decision of the Court of Appeal for Ontario dated December 17, 2013 (COA Decision), paras. 65 – 68, 71 – 72 and 74 – 75, Responding Motion Record of the Plaintiffs to Chevron Corporation's Motion of December 7, 2015, Tab 1, pp. 25, and 28-29

24. The Jurisdiction Motions brought by Chevron Corporation and Chevron Canada Limited are recent examples of further delay. They were dismissed by three levels of court, 11 judges being unanimous. Nevertheless, they took over three years to resolve.

25. Chevron Canada's motion arguing that the Ontario Court has no jurisdiction over it, even though it had an office and employees in Ontario and carried on business (sales) in Ontario was, patently, without any merit.

Reference: Decision of Brown J. dated May 13, 2013 (Brown Decision), at paras. 86 and 87, Motion Record of Chevron Corporation, Volume I, Tab 12, p. 242

COA Decision, at paras. 37-38, Responding Motion Record of the Plaintiffs to Chevron Corporation's Motion of December 7, 2015, Tab 1, pp. 16-17

26. Chevron Corporation's arguments that the Ontario Court has no jurisdiction over it were futile. Not only did Rule 17.02 expressly stand in its way, but so too did four Supreme Court of Canada decisions, all decisions on the enforcement of foreign judgments. Chevron Corporation could not point to one case that supported its position.

Reference: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. No. 1077, Authorities of the Respondents/Plaintiffs, Tab 4

Tolofson v. Jensen, [1994] 3 S.C.R. 1022, Authorities of the Respondents/Plaintiffs, Tab 5

Beals v. Saldanha, supra, Authorities of the Respondents/Plaintiffs, Tab 3

Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, Authorities of the Respondents/Plaintiffs, Tab 6

27. Its latest motion, styled as a "Motion for Directions", which seeks to strike the plaintiffs' motion rather than respond to it, is just the latest effort in this decades-long campaign of delay and evasion.

28. Deep pockets against the resources of indigenous people living in the Ecuadorean Amazon and repeated, interminable delay, until "hell freezes over", are Chevron's weapons. The current motions continue Chevron's approach and introduce obfuscation as a critical element. Every one of Chevron's assertions must be unpacked and analyzed to determine if it is consistent with the relevant criteria of the three permitted defences.

29. Without adjudicating the plaintiffs' motion before ordering production, the Court risks drowning in this proceeding in wasteful discovery that will ultimately prove to be irrelevant and unnecessary. The course proposed by Chevron is backward and contrary to every recent holding of the Supreme Court regarding the need for efficient adjudication, as exemplified by *Hryniak*.

PART 2 - FACTS

INTRODUCTION

30. The core of this case is about Chevron Corporation's ("Chevron") refusal to pay $9.51 billion to remediate 1,500 square kilometres of toxic contamination that it deposited, from 1972 to 1990, on the lands, rivers, streams and ponds in the Ecuadorean Amazon. The plaintiffs represent 30,000 indigenous people who drink and bathe in polluted waters, eat crops grown on contaminated lands, and continue to suffer illness, disease, and premature deaths. This case is not about preventing potential damage. It is about paying for the remediation of massive environmental contamination.

31. In 1993, the plaintiffs filed a class action against Texaco, Inc., the predecessor to Chevron, in the U.S.A. Chevron argued that the class action properly belonged in Ecuador as it had everything to do with Ecuador and nothing to do with the U.S.A. The United States' 2nd Circuit Court of Appeals granted Chevron its wish based on promises and undertakings given to the Court which included:

(a) a promise to accept service of process in Ecuador and not to object to the civil jurisdiction of a court of competent jurisdiction in Ecuador;

(b) a recognition of the binding nature of any judgment issued in Ecuador; and

(c) "Texaco also offered to satisfy any judgments in Plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act."

Reference: *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. March 17, 2011) at p. 6, Authorities of the Respondents/Plaintiffs, Tab 7

Chevron now resiles from those undertakings and states:

> We're going to fight this until hell freezes over. And then we'll fight it out on the ice.

Reference: COA Decision, at para. 74, Responding Motion Record of the Plaintiffs to Chevron Corporation's Motion of December 7, 2015, Tab 1, p. 28

THE ECUADOREAN TRIAL

32. The plaintiffs commenced the action in the Town of Lago Agrio in May 2003. The action was vigorously defended by Chevron Corp. As Judge Zambrano stated:

> ...the parties, which have shown themselves to be capable of exercising a passionate and extensive defense of their positions ...

There were 56 judicial inspections with approximately 100 expert reports, six independent expert reports, testimony, documents and depositions.

Reference: Trial Judgment in Ecuador (Zambrano Judgment) at pp. 35, 38 , Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 3A, pp. 674, 677

33. As the Trial Judge stated in His Judgment:

> It should be clear from the record that the defendant, Chevron has been allowed to carry out all the procedures it requested in order to mount its

defense and thus it is not accurate to speak of a lack of proper defense, irreparable harm or favorable treatment to any party.

Reference: Zambrano Judgment at p. 47, Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 3A, p. 686

34. The Trial Judge also noted:

For the complex task of evaluating the presence of environmental harm, the first consideration is that there are more than 100 expert reports in the case file, which constitute an important documented source of evidence, provided by experts nominated by both parties and also provided by experts of the Court not nominated by either party, such that as a whole their information is reliable and allows the judge to come to the conclusion that there are different levels of contaminant elements that are from the hydrocarbons industry in the area of the Concession.

Reference: Zambrano Judgment at p. 95, Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 3A, p. 734

35. The Court also noted:

Thus, analysis of the different expert reports has proceeded considering that the environmental harm that are the object of this lawsuit are not only those that are caused by a direct impact to the ecosystem, but that due to their nature, this type of harm also includes all harm that are direct consequence of environmental impact. In that regard, it is seen that this is a technical matter; therefore the different expert reports presented throughout this lawsuit are considered. Starting with the presence of contamination in the soil, this Court considers the findings of the different experts who have participated in the judicial inspections that were undertaken within this lawsuit and that have presented the results of their experts. The reports presented by the experts nominated by the plaintiff and by the defendant show the presence of different concentrations of hydrocarbons and/or products used during drilling or preparation of oil wells.

Reference: Zambrano Judgment at p. 96, Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 3A, p. 735

36. Further, the Trial Judge states:

> An exhaustive and complicated analysis of the results of the laboratory analyses presented as valid evidence during this lawsuit had to be performed, and the magnitude of this work is underlined in regards to which the experts nominated by Chevron have provided 50,939 results from 2,371 samples, the experts nominated by the plaintiffs have provided the case file with a total of 6,239 results from 466 valid samples; while the experts named by the Court, without nomination by either party, have provided 178 samples and 2,166 results (without considering the sampling done by the expert Cabrera); resulting in a total of 2,311 samples. To this we must add the 608 results presented by expert Jorge Bermeo, and 939 results presented on 109 samples collected by Gerardo Barros, which have also been taken into consideration but with considerations annotated for each case.
>
> **Reference:** Zambrano Judgment at p. 99, Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 3A, p. 738

37. A Texaco representative admitted that 15.834 billion gallons of production water (containing oil and chemicals) were dumped during the period of operations. The Judge said:

> ... Moreover, if we consider the amounts of formation waters dumped in relation to the hazardousness of the substance dumped, that is, the hazards that may arise from dumping formation water into surface waters used for human consumption, it is evident that people using these water sources were exposed to the contaminants that were discharged into it. considering that formation waters have hydrocarbon solvents, such as BTex (benzene, toluene, ethyl benzene and zylene); PAHs (polycyclic hydrocarbons) and TPHs (total petroleum hydrocarbons) which we have already mentioned above because of the hazard they post to human health, the harm and risk become apparent ...
>
> **Reference:** Zambrano Judgment at p. 113, Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 3A, p. 752

THE INTERMEDIATE COURT OF APPEALS

38. The Intermediate Court of Appeals has full *de novo* jurisdiction to review the facts and change both the factual determinations as well as the legal conclusions.

39. Pursuant to Article 114 of the Code of Civil Procedure of Ecuador, the parties may introduce new evidence at the appellate level. Chevron took advantage of this provision to add

approximately 20,000 pages of new evidence to the trial record, which consisted of 216,000 pages of evidence.

40. Chevron filed a 192 page Factum (Alegato) contesting both findings of fact and legal conclusions arrived at by the trial court.

41. On January 3, 2012, the Intermediate Court of Appeals rendered its judgment, dismissing the appeal of Chevron Corporation and the cross-appeal of the Aguinda plaintiffs. In so doing, it exercised its jurisdiction to change some of the facts.

42. It is the Judgment of the Intermediate Court of Appeals of Ecuador, the *de novo* court, that the plaintiffs seek to enforce.

43. The plaintiffs rely on the law of Ecuador, the Declaration of Dr. Patricio Garcia Bravo, unchallenged and uncontradicted, and the U.S. 2nd Circuit Court of Appeals, January 26, 2012 decision.

THE COURT OF CASSATION

44. Chevron Corporation appealed the Judgment of the Intermediate Court of Appeals to the Court of Cassation.

45. Chevron Corporation filed a written submission (Alegato) of 164 pages to the Court of Cassation.

46. That Court, in a 222-page Judgment, reviewed the record, addressed the specific complaints of the appellant and rendered Judgment on November 12, 2013 reducing the Intermediate Court of Appeal's Judgment to $9.51 billion for remediation.

THE MOTION TO STRIKE

47. On the plaintiffs' motion to strike, apart from the submissions to the Ecuadorean Courts and their Judgments, which are sought to be enforced, no other documentation can be filed.

48. The questions before the Court are simple and straightforward. Whether:

(a) the defences pleaded are permitted pursuant to the restrictions in *Beals*; and/or

(b) the subject matter of those defences were raised, or could with reasonable diligence have been raised, but were not; any omission is counted against Chevron Corporation.

49. The resolution of those questions will streamline this proceeding, narrow the issues for production and discovery, and expedite the trial.

50. Chevron Corporation's motion for production is unquestionably an attempt to re-litigate issues that were before the Ecuadorean courts.

THE IMPERMISSIBLE DEFENCES

51. A summary of Chevron Corporation's defences is stated in paragraph 3 of its Statement of Defence:

> 3. The Ecuador judgment described in paragraphs 1 and 9 through 16 of the Amended Amended Statement of Claim (the "Ecuador Judgmenr) cannot be recognized or enforced in Ontario, or elsewhere in Canada, for several reasons:
>
> (a) The Ecuador court did not have jurisdiction over Chevron Corp.;
>
> (b) The Ecuador Judgment is based upon a law applied in a manner which retroactively created a cause of action against Chevron Corp. for which the Republic of Ecuador had previously issued a binding release;

> (c) Chevron Corp. was denied Canadian standards of fairness and natural justice throughout the Ecuador proceedings;
>
> (d) As found by the United States District Court for the Southern District of New York ("SDNY"),1 the Ecuador Judgment was obtained by fraudulent means and rendered by a systemically corrupt and biased court; and
>
> (e) Any recognition and enforcement of the Ecuador Judgment would constitute a violation of the obligations of the Republic of Ecuador ("the ROE") under international law;
>
> all of which offends Canadian standards of natural justice and public policy for the recognition and enforcement of foreign judgments.
>
> **Reference:** Statement of Defence of Chevron Corporation, para. 3, Motion Record of Chevron Corporation, Volume I, Tab 3, pp. 26-27

52. The subject matter of paragraphs 3(a) and (b) were squarely raised in all three levels of the Ecuadorean courts, which all specifically decided against it.

53. With respect to procedures and processes at the Trial at the Intermediate Court of Appeal and at the Court of Cassation, the parties were able to present all the evidence they wanted, amply and without difficulty. After a trial that spanned eight years, a review of the trial judgment and the ability of the parties to file 216,000 pages of evidence, 56 judicial inspections at differing locations in the Amazon and more than 100 experts, it cannot be claimed that there was a lack of due process (see paras. 31 – 36 *supra).*

54. Chevron Corporation had full rights to an appeal *de novo*, and took advantage of it, filed 20,000 more pages of evidence and a submission of 192 pages with 739 footnote references. The parties had substantial and significant access to present their positions fully and completely.

55. Chevron Corporation was given the right to appeal to the Court of Cassation, to which court it filed a submission of 174 pages with 318 footnote references, some to evidence and exhibits.

56. No Canadian litigant would receive as extensive access to justice as did Chevron Corporation.

57. In its Statement of Defence, from paragraphs 5 to 20, Chevron Corporation pleads that it remediated the toxic lands and waters, settled with the Republic of Ecuador and obtained a Release from it.

58. In its 258-page Factum (Alegato) to the trial court, it raised these allegations as a defence in Ecuador. This can be seen from the Alegato and the index attached as **Appendix 1** hereto: For example:

Reference: Alegato of Chevron Corporation to the Trial Court (Trial Alegato), Index, Motion Record of the Plaintiffs for Summary Judgment, Volume I, Tab 2A, pp. 8 and 11

59. In paragraphs 23 and 24 of its Statement of Defence, Chevron Corporation raises the *Environmental Management Act* and its retroactivity.

60. In its Alegato to the trial court, Chevron Corporation addressed this point at item 5.3.

Reference: Trial Alegato, Index, Motion Record of the Plaintiffs for Summary Judgment, Volume I, Tab 2A, p. 11

61. At paragraphs 26 to 31 and 72 to 74 of its Statement of Defence, Chevron Corporation raises the defence that it was a separate company from Texaco and had not merged with it, so as to render it liable.

62. In its Alegato at paragraph 5.1, Chevron Corporation addressed this point to the trial court.

Reference: Trial Alegato, Index, Motion Record of the Plaintiffs for Summary Judgment, Volume I, Tab 2A, pp. 8 -10

63. At paragraphs 51 to 60 and 83 of its Statement of Defence, Chevron Corporation raises Manipulation and Falsification of Expert Evidence, primarily related to the evidence of experts Cabrera and Calmbacher.

64. These allegations were advanced in the Alegato at Chapter II.

Reference: Trial Alegato, Index, Motion Record of the Plaintiffs for Summary Judgment, Volume I, Tab 2A, pp. 9 -10

65. In paragraphs 38 to 49 and 84 of its Statement of Defence, Chevron Corporation raises the issue of Pressure Tactics, Political Interference and Systemic Corruption.

66. In its Alegato , these allegations were advanced:

> 3.7 The Plaintiffs Intend the Judgment to Be the Result of the Pressure Exerted by them on the Court 120
>
> 3.8 This Case Has Been Prejudicially Influenced by the Government of Ecuador 126
>
> **Reference:** Trial Alegato, Index, Motion Record of the Plaintiffs for Summary Judgment, Volume I, Tab 2A, p. 10

67. As a matter of law, the material issue is due diligence. Did Chevron Corporation raise the issues set out in its Statement of Defence with the Ecuadorean Courts or could it, with reasonable diligence, have done so? The answer, as can be seen from Chevron Corporation's Alegato alone, is a resounding: Yes, it could have and Yes, it did.

68. Although unnecessary to do so, the plaintiffs state that Judge Zambrano addressed each of the matters raised by Chevron Corporation in his 188 single spaced Judgment of February 3, 2011, and his March 4 Amplification and Clarification Judgment: some examples:

(a) the Reverse Triangular Merger of Texaco and Chevron at pages 648-650 and 653;

(b) the reports of Calmbacher and Cabrera, neither of which Judge Zambrano accepted or relied upon:

> "the comments and conclusions appearing as stated by Dr. Calmbacher shall not be taken into consideration ..."
>
> p. 688 "... the Court decided to refrain entirely from relying on Expert Cabrera's report when rendering judgment". p. 689, p. 837

(c) the Release of the Republic of Ecuador, p. 717 and 730; and

(d) the EMA and its retroactivity, p. 729 and 735.

THE INTERMEDIATE COURT OF APPEALS

69. The Intermediate Court of Appeals is a court with full *de novo* jurisdiction. That is, its jurisdiction under Ecuadorean statutory law which was reconfirmed by the Cassation Court in this case.

70. The Intermediate Court has the jurisdiction to receive more and new evidence, alter facts and correct legal determinations.

71. Patricio Bravo has provided an unchallenged Declaration as to the jurisdiction, powers and authority of the Intermediate Court.

72. Chevron took full advantage of the Intermediate Court's jurisdiction to file 20,000 pages of new evidence and submit written submissions, 192 pages with 737 footnotes.

73. The Index of the written argument appended hereto as **Appendix 2** demonstrates the extensive points put before the Court: The points raised include, but are not limited to:

(a) IV. A. 3(a) and (b)

(b) IV. C. 4

Reference: Alegato of Chevron Corporation to the Intermediate Court of Appeals, Index, Motion Record of the Plaintiffs for Summary Judgment, Volume I, Tab 2B, pp. 271-276

74. Chevron Corporation had a full opportunity to put before the Intermediate Court, a *de novo* court, all the defences pled in its Statement of Defence in this court.

75. The Intermediate Court received Chevron Corporation's additional evidence, altered some of the facts and issued the unanimous judgment of three judges on January 3, 2012.

76. Although, once again, it is unnecessary to do so, the plaintiffs point to some examples of the Intermediate Court addressing Chevron Corporation's submissions:

(a) Hundreds of thousands documents [sic] submitted by Chevron Corporation bloated the case with everything it considered pertinent to add - so much that at this stage alone there were almost two hundred record binders (about twenty thousand pages), not counting the more than two hundred thousand papers in the first instance case-;

(b) On this matter, which relates to application of the principle of non-retroactivity of the law, we note the difference between the right to the indigenous territories, which was not recognized as a substantive right until subsequent to those that are the basis of this case, and the right to obtain redress for the damages suffered in various forms, which were recognized by the Civil Code long before the start of Texpet's activities in the Amazon and which has been the basis of this claim. The Civil Code does not distinguish the types of damage that may occur but deals with very old rules that without a doubt could not have anticipated the situations being faced now. So it is clear to the Chamber that the rules of the Civil Code did not foresee an enumerated list of typology of damages, and it was not limited. There is no legal basis for the position that the rules of the Civil Code exclude environmental damage from their scope. Beyond this, it is the manner of filing the claim, that is, the formalities or procedure, which is established by the Environmental Management Act of 1999, and as such its application is mandatory, in accordance with rule 20 of Art. 7 of the Civil Code.

(c) In relation to this last rule, it is fitting to remember that the record shows that the action in which these proceedings originate was preceded by another similar one, filed in the United States of America, precisely the country of origin of the defendant. However, that party refused to be judged by the judge of its domicile, alleging that it was not the most convenient forum, but rather the Ecuador forum. It was under this focus that the case was dismissed in the United States of America: Under an offer by Texaco Inc. to submit to Ecuadorian justice. However, Ecuadorian justice issues a judgment, and the defendant Chevron Corp., merged with Texaco Inc., who has appeared in trial with the turns, focuses and attitudes that allow one to see there a true substantial party that seeks to defend its own, alleges lack of jurisdiction because, according to it, it has never operated in Ecuador, and

the topic of the —lack of jurisdiction‖ is asserted depending on the fact that —only‖ Texaco agreed to submit to the jurisdiction of Ecuador, and Chevron, also according to it, is not the successor of Texaco.

(d) The Chamber takes into consideration the judgment of the U.S. Court of Appeals, Second District (New York) of March 17, 2011 (Case No. 10-1020) in which, addressing this same topic, it has been said —Chevron Corporation claims, without citation to relevant case law, that it is not bound by the promises made by its predecessors in interest Texaco and Chevron Texaco, Inc. However, in seeking affirmance of the district court's forum non conveniens dismissal, lawyers from Chevron Texaco appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of plaintiffs' complaint. In so doing, Chevron Texaco bound itself to those concessions. In 2005, Chevron Texaco dropped the name —Texaco‖ and reverted to its original name, Chevron Corporation. There is no indication in the record before us that shortening its name had any effect on Chevron Texaco's legal obligations. Chevron Corporation therefore remains accountable for the promises upon which we and the district court relied in dismissing plaintiffs' action.‖ – Judgment of the U.S. Court of Appeals, Second District (New York).

. . .

So it is irrelevant that Chevron has never operated in Ecuador because, as was just said, the corporate merger with the company Texaco, who did operate in the country, being undeniable, the latter had already been sued when the merger occurred. The promise of Texaco, Inc., before merging with Chevron Corp.; and of Chevron Corp., after the merger, appears as one of the efficient motives for submitting to Ecuadorian justice. As a consequence, Chevron is obligated by the acts of Texaco and subject to our jurisdiction, currently under the competence of this Chamber, without having operated in its favor the allegation that it is not the proper defendant in this trial.

(e) Regarding the nullity of the proceeding —due to procedural fraud and violation of the guarantees of due process,‖ it must be said that the trial court record shows that the defendant has exercised a vigorous and ample defense in the trial — mention as already been made of thousands of pages inflating the record, submitted by that party, in the trial; proposing experts, requestioning and examining these same judicial assistants and witnesses, arriving at each and every proceeding conducted at trial. Thus, the proceeding has been public and, from what is observed, also transparent, with a staggering duration that ordinarily, and it cannot be doubted, affects the interest of the party presenting the complaint in the lawsuit, because, since the complaint, more than eight years have passed as of now only in Ecuador; in short, the evidence and actions – all of them – that were requested by the parties during the procedural investigation were put into process.

(f) In the judgment of February 14, 2011, the effect of the settlements with the municipalities and the Government is also addressed, clearly establishing that these cannot be considered —acts of government‖ because they do not comply with the requirements for the latter. Therefore, as they are not —acts of government,‖ said settlements cannot have erga omnes effects, as they would if the circumstances and conditions of existence of those acts were appropriate and legitimate; conversely, the settlements only bind the contracting parties because it is simply about that, contracts, with effects relative exclusively to those who agreed.

(g) For the Aguarico field, the judgment shows results that appear on page 104,607; meanwhile for the Guanta field, on page 114,575. Regarding the Auca field, the results on page 128,039, and for the Yuca field, page 127,093. It stands out that expert Gino Bianchi, proposed by Chevron and accepted by the Court, found 13 mg/Kg. of benzene in the sample SA-13-JI-AMI on page 76,347. This gaffe, no doubt involuntary, does not affect the merits of the judgment being examined, since, regardless, it refers to an alarming quantity of benzene in the environment. Moreover, expert Bjorn Bjorkman, also proposed by Chevron, and accepted by the Court, on page 105,181 reports 18 mg/Kg. of benzene. As regards the samples JL-LAC-PITI-SD2-SUI-R (1.30-1.90)M that are attributed to expert John Connor, a correction is made in that the first of these was taken by expert Fernando Morales, who also was proposed by the defendant. We can see the results of expert Morales on page 118,776. A correction also is made in that it is not sample JL-LAC-PIT1-SD2-R(2.0-2.5)M, that shows results of 2.5 mg/Kg. of benzene, but rather sample JI-LAC-PIT1-SD1-SU1-R(1.6-2.4)M, also without affecting the opinion issued in the original judgment.

(h) The record shows that Chevron has exercised a vigorous defense of its procedural interest; as stated above, it has been even overwhelming and offensive, filing, literally and markedly, thousands of motions with diverse petitions, some with a legal basis, but others, many times others, containing contradictory, repetitive, and even illegal petitions –such as filing an appeal to strictly procedural orders-, so it was inevitable that those petitions were dismissed in those cases.

Reference: Judgment of Toral dated January 23, 2012 (Toral Judgment), Motion Record of the Plaintiffs for Summary Judgment, Volume III, Tab 3C, pp. 856, 857, 859, 860-861, 684, 865 and 868

THE COURT OF CASSATION

77. Chevron Corporation appealed to the National Court of Cassation and filed a 164 page written submission raising many grounds of appeal. The Index, attached hereto as **Appendix 3**, comprises 11 pages. Some examples will show the breadth of the issues raised:

Reference: Alegato of Chevron Corporation to the Cassation Court, Index, Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 2C, pp. 628 - 638

78. On November 12, 2013, the Court of Cassation rendered its Judgment upholding the remediation award of $9.51 billion. In a 222 page Judgment, three judges addressed the grounds of appeal and the submissions of Chevron. It outlined the main grounds of appeal as follows:

> Appellant argues that the judgment on appeal lacked the following procedural formalities which have led to the incurable nullity of the proceeding and caused a state of defenselessness which has affected the case, as these corresponding nullities were never legally ruled on: 1) Lack of competency and jurisdiction; 2) Improper consolidation of actions; 3) Retroactive application of law in the trial; 4) Drafting of the judgment by a

third party; 5) Procedural fraud; 6) Procedural violation given the nature of the case that is being judged.

Reference: Certified Judgment of the Court of Cassation – November 12, 2013 (Cassation Judgment), Motion Record of the Plaintiffs for Summary Judgment, Volume III, Tab 3D, p. 889

79. The Court of Cassation in the first 50 pages particularizes, with granularity, the assertions of Chevron and then addresses them in the next 170 pages.

PART 3 - LAW AND ARGUMENT

80. The first task of the Court on the plaintiffs' motion will be to determine whether the defences pled in Chevron Corporation's Statement of Defence disclose a reasonable and permissible defence.

81. That motion is scheduled, but not before the Court at this time. Thus, it is premature to address Chevron Corporation's motion regarding production until it is known what, if any, defences pled survive. Production depends upon valid pleadings.

82. In an Enforcement Action, the only permitted defences are those three enumerated in *Beals*. No fourth or other defence is permitted.

Reference: *United States of America v. Yemec*, [2010] O.J. No. 2411, at paras. 28, 29, Authorities of the Respondents/Plaintiffs, Tab 8

83. The *Beals'* permitted defences are further refined by a restriction that, if a matter was raised or could, with reasonable diligence, have been raised in a foreign court, that matter cannot be re-litigated in the Enforcing Court. This is particularly true with regard to any pleading of fraud. (See paragraphs 44-52 of *Beals* reproduced in part at paragraphs 16 and 17 *supra.*)

84. *Beals* has been followed by a long line of lower court judgments, only a few of which will be cited:

> I. Introduction
>
> 1 This is, among other things, a summary trial application in an action to enforce a foreign judgment. The defendant asserts that the foreign judgment was obtained by fraud and seeks, through his own application, an order for discovery of documents that is said to be necessary for him to mount his defence.
>
> . . .
>
> 35 In *Beals*, the court said:
>
> a) as a general but qualified statement, a foreign judgment will not be enforced if obtained by fraud (para. 43);
>
> b) inherent in the defence of fraud is the concern that defendants may use that defence to relitigate issues previously decided, and thus the courts have treated the defence narrowly (para. 44); and
>
> c) in order to raise the defence of fraud, a defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment (para 52).
>
> 36 The court also explained (at para. 45) that fraud going to jurisdiction (formerly called "extrinsic fraud") is fraud that misleads the court into believing that it has jurisdiction over the cause of action, while fraud going to the merits (formerly called "intrinsic fraud") is, as the phrase implies, fraud that relates to the merits of the case and to the existence of a cause of action.
>
> 37 *Beals* was considered by the Court of Appeal in *Lang v. Lapp*, 2010 BCCA 517, 327 D.L.R. (4th) 372. While acknowledging that the Supreme Court of Canada had abandoned the extrinsic fraud/intrinsic fraud nomenclature, the court noted at para. 19 that the endorsed categories were not, strictly speaking, analogous. The extrinsic/intrinsic distinction was evidentiary in nature, whereas the new categories related to the subject-matter of the fraud. Fraud going to the merits of the case was akin to res judicata insofar as an issue that was adjudicated upon, or that should have been raised, should not be relitigated unless the due diligence requirement is met. Fraud going to jurisdiction is different; it can always be raised, "even without satisfying the due diligence requirement" (at paras. 19 and 20).
>
> . . .
>
> 67 I conclude that Mr. Collins is attempting to impeach a judicial finding by the impermissible route of relitigating in a different forum. The same question has already been litigated and decided in the Nevada Action. His attempt to relitigate the issue is an abuse of process: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63. The application for

production of documents relating to the director or shareholder authority issue is therefore dismissed.

. . .

70 In summary, I make the following orders:

. . .

d) in the Enforcement Action, the application by the defendant for dismissal of the action or, alternatively, for an order for further production of documents is dismissed;

Reference: *Nunes v. Collins*, [2012] B.C.J. No. 835, at paras. 1, 35-37, 67 and 70(d), Authorities of the Respondents/Plaintiffs, Tab 9

Sincies Chiementin S.p.A. (Trustee of) v. King, [2010] O.J. No. 5124, at para. 84, Authorities of the Respondents/Plaintiffs, Tab 10

19 In determining whether the California Judgment would survive Ms. Lapp's discharge from bankruptcy, the Court may consider the pleadings and the record in the California action in order to characterize and assess the nature of the California Judgment: *Toban v. Nijjar*, 2005 BCSC 891, paras. 26 and 40,*CLE Owners Inc., supra* at para. 27.

20 In the California action, Ms. Lapp had full opportunity to be heard. On the Main Application she will be able to argue how the California Judgment should be characterized and assessed for the purposes of s. 178 of the BIA. However, at this stage, she cannot attempt to adduce further evidence which was available to her and which she could have placed before the Los Angeles Superior Court of the State of California to challenge the pleaded facts in the California action. Accordingly, any such material is not admissible.

21 The foregoing is consistent with the recent decision of the Supreme Court of Canada in *Chevron Corp. v. Yaiguaje*, 2015 SCC 42. In *Chevron*, the Court states:

[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. ...

Reference: *Lang v. Lapp,* 2015 [2015] B.C.J. No. 2187, at paras. 19-21, Authorities of the Respondents/Plaintiffs, Tab 11

Marcus Food Co. v. DiPanfilo, [2012] O.J. No. 969, at para. 20, Authorities of the Respondents/Plaintiffs, Tab 12

SNH Grundstuecksverwaltungsgesellschaft MBH & Co. Eniorenresidenz Hoppegarten-Neuenhagen KG v. Hanne, [2012] A.J. No. 1067, at para. 43, Authorities of the Respondents/Plaintiffs, Tab 13

Cabaniss v. Cabaniss, [2010] B.C.J. No. 1369, at paras. 54-55, Authorities of the Respondents/Plaintiffs, Tab 14

Natural Justice

85. As previously stated in paragraph 18, *supra*, the defence of natural justice is restricted to the form of the foreign procedure.

Reference: *Beals v. Saldanha, supra*, at para. 64, Authorities of the Respondents/Plaintiffs, Tab 3

86. The content of the natural justice requirement has been amplified in the following case:

> 29 Based on the Supreme Court of Canada's analysis of the natural justice defence, as set forth at paragraph 21, supra, I find that minimum standards of fairness have been applied to the Ontario Defendants by the New York State courts, the Ontario Defendants were afforded fair process and, the Respondent had the full benefit of New York State's procedures through its New York State attorneys including two levels of appeal of the judgment. Based on all of the evidence before me, I find that there is nothing which offends our concept of natural justice. I find that the Respondent has not established the defence of a denial of natural justice.

Reference: *Contacare Inc. v. CIBA Vision Corp.,* [2011] O.J. No. 3349, at paras. 23-28 and 29, Authorities of the Respondents/Plaintiffs, Tab 15

> 61 It is not disputed that in both the German trial and appellate proceedings, Dr. Hanne was represented by counsel. It is not in dispute that Dr. Hanne had adequate notice of the proceedings. Nothing happened during either the trial or appeal which could not have been addressed at that time. Nothing happened during the appeal that could not have been the subject of a complaint leading to a further appeal. Nothing happened at either court that was outside the German rules of procedure.

Reference: *SHN Grundstuecksverwaltungsgesellschaft MBH & Co. Seniorenresidenz Hoppegarten-Neuenhagen KG v. Hanne, supra*, at para. 61, Authorities of the Respondents/Plaintiffs, Tab 13

Public Policy

87. The public policy defence turns on whether the foreign law is contrary to Ontario's view of basic morality. It is not a defence which can apply only because the laws of the foreign state are different from ours.

> 35 Once it is held that a foreign court was a court of competent jurisdiction to pronounce a money judgment *in personam* which meets the requirement of finality, the Court must consider the defences raised which challenge recognition of the foreign judgment for enforcement purposes. There are three such defences: fraud, public policy and denial of natural justice.

Reference: *SHN Grundstuecksverwaltungsgesellschaft MBH & Co. Seniorenresidenz Hoppegarten-Neuenhagen KG v. Hanne, supra*, at para. 35, Authorities of the Respondents/Plaintiffs, Tab 13

Beals v. Saldanha, supra, at para. 71, Authorities of the Respondents/Plaintiffs, Tab 3

88. It is submitted that Chevron Corporation participated in a robust eight year trial, called all the witnesses it desired, filed more than 1,000 motions, engaged in a *de novo* appeal, adding 20,000 pages to the record and then further appealed to the Court of Cassation.

89. There is no factual or legal matter that Chevron Corporation has pled that was not put before the Courts of Ecuador, or could not, with reasonable diligence, have been put before the courts.

90. A judgment that requires a polluter to pay is not contrary to Canadian values or morality.

91. None of the defences pled come within the restricted, allowable defences of *Beals*. They should be struck.

The Kaplan Decision has no Relevance or Status

92. The Decision of Judge Kaplan has no relevance to the pleadings motion. It is a pleading of a legal conclusion.

93. Chevron Corporation pleads that the plaintiffs are bound by the factual findings made by Kaplan J.

> **Reference:** Statement of Defence of Chevron Corporation, para. 4, Motion Record of Chevron Corporation, Volume I, Tab 3, p. 27

94. Chevron Corporation's position is incorrect. Only two of the 47 plaintiffs were parties before that Court. Neither *res judicata* nor issue estoppel applies as two fundamental requirements are absent:

(a) the parties are not the same; and

(b) the issues are not the same.

95. Not even Judge Kaplan himself considered his ruling in that particular proceeding to have any effect on the enforcement actions of the Ecuadorean plaintiffs. Significantly, Judge Kaplan himself stated he was not disrespecting the Ecuadorean legal system and was not inhibiting enforcement by the other 47 plaintiffs:

> ... This Court does not here "set aside the Ecuadorian Judgment." It does not grant worldwide injunction barring any efforts to enforce the Judgment in other countries. And it does not, as Donziger claims, issue "a worldwide anti-collection injunction." It prevents the three defendants who appeared at trial – over whom it has personal jurisdiction – from profiting from their fraud. This does not "disrespect the legal system . . . of

> the country in which the judgment was issued" or those of "other countries" in which the LAPs now, or later may, seek to enforce the Judgment.
>
> **Reference:** Opinion of Kaplan J. dated March 4, 2014, at p. 483, Motion Record of Chevron Canada, Volume II, Tab 14, p. 853
>
> ... Significantly, the NY Judgment did not restrict the other LAPs, who remain free to sell, assign, or transfer their interests, if any, in the Lago Agrio Judgment and to seek to enforce it anywhere in the world. ...
>
> **Reference:** Order of Kaplan J. re stay dated April 25, 2014, at p. 3, Supplementary Responding Motion Record of the Plaintiffs, Tab 1, p. 4

96. In any event, Kaplan J.'s Judgment has been under appeal to the 2nd Circuit Court of Appeals since last April 2015.

97. What is relevant for purposes of Canadian law is that all of Judge Kaplan's findings of fraud were put before one or more of the Ecuadorean Courts.

98. The only two fraud allegations that post-date the February 14, 2011 Judgment of the trial court of Ecuador are:

(a) the Zambrano Judgment was ghostwritten; and

(b) Judge Zambrano was offered, but not paid, a $500,000 bribe.

99. The ghostwriting allegation was first raised in Chevron Corporation's RICO Complaint filed in the U.S. two days after Judge Zambrano's trial decision. It could have and should have been raised before Judge Zambrano by Chevron in its requests later in February for amplification and clarification of the Judgment. In March, Judge Zambrano addressed more than a dozen requests from Chevron, but Chevron refrained from putting the ghostwriting allegation before the

Judge. In any event, Chevron Corporation had a full opportunity and did put the ghostwriting allegation before the subsequent court.

Reference: Certified Amplification Judgment – March 4, 2011, Motion Record of the Plaintiffs for Summary Judgment, Volume II, Tab 3B

100. The offer of a bribe to Judge Zambrano was made known to Chevron by former judge Guerra in June 2011. Chevron Corporation had a full opportunity to put the allegation, and did put the allegation, before the subsequent court.

MISCELLANY

The Judgment of Justice Brown

101. Justice Brown, as he then was, determined, on five separate bases, that the Superior Court of Ontario had jurisdiction to try the Enforcement Action as against Chevron Corporation and Chevron Canada.

102. Justice Brown, on his own initiative, without a motion, argument or law, then stayed the action on various grounds.

103. The stay was overturned on appeal and Justice Brown was roundly criticized by the Court of Appeal.

Reference: COA Decision, paras. 57 and 58, Responding Motion Record of the Plaintiffs to Chevron Corporation's Motion of December 7, 2015, Tab 1, pp. 22 and 23

104. With regard to the issue of piercing the corporate veil, Justice Brown misunderstood the issue, but that is not surprising given that it was not raised in respect of execution of a judgment, but only by Chevron Corporation as a necessary element of the grounding of jurisdiction against it.

105. The Supreme Court of Canada, in the passages recited in paragraph 13, *supra*, determined that whether or not Chevron Corporation has assets in the jurisdiction is irrelevant and immaterial to the prosecution of an Enforcement Action.

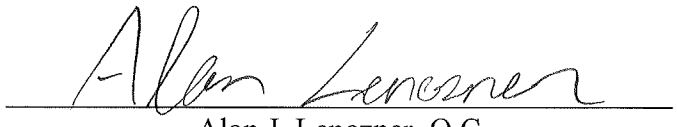
> [58] In this regard, I find persuasive value in the fact that other common law jurisdictions - presumably equally concerned about order and fairness as our own - have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign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

106. No stay is appropriate or available. Chevron's motivation is delay and it should not be countenanced. As the Court of Appeal stated, "This case cries out for assistance, not unsolicited and premature barriers …".

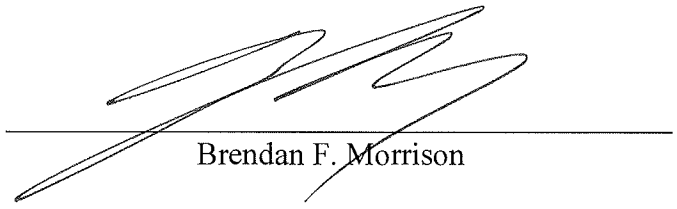
PART 4 - RELIEF SOUGHT

107. Chevron Corporation's motions should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Alan J. Lenczner, Q.C.



Brendan F. Morrison

SCHEDULE "A"

1. *BNP Paribas (Canada) v. Mécs*, [2002] O.J. No. 2795 (S.C.J.)
2. *Chevron Corporation v. Naranjo,* 667 F.3d 232 (2d Cir. January 26, 2012)
3. *Beals v. Saldanha,* [2003] S.C.J. No. 77
4. *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. No. 1077
5. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022
6. *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612
7. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. March 17, 2011)
8. *United States of America v. Yemec*, [2010] O.J. No. 2411
9. *Nunes v. Collins*, [2012] B.C.J. No. 835
10. *Sincies Chiementin S.p.A. (Trustee of) v. King*, [2010] O.J. No. 5124
11. *Lang v. Lapp,* [2015] B.C.J. No. 2187
12. *Marcus Food Co. v. DiPanfilo*, [2012] O.J. No. 969
13. *SNH Grundstuecksverwaltungsgesellschaft MBH & Co. Eniorenresidenz Hoppegarten-Neuenhagen KG v. Hanne*, 2012 ABQB 624
14. *Cabaniss v. Cabaniss*, [2010] B.C.J. No. 1369
15. *Contacare Inc. v. CIBA Vision Corp.,* [2011] O.J. No. 3349

SCHEDULE "B"

Rules of Civil Procedure

Rule 21.01

21.01 **Where Available** —

To Any Party on a Question of Law

(1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

(a) Jurisdiction — the court has no jurisdiction over the subject matter of the action;

(b) Capacity — the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

(c) Another Proceeding Pending — another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

(d) Action Frivolous, Vexatious or Abuse of Process — the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

Rule 17.02

17.02 **Service Outside Ontario Without Leave** — A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

...

(m) **Judgment of Court Outside Ontario** — on a judgment of a court outside Ontario;

TO THE SUBROGATE PRESIDENT OF THE PROVINCIAL COURT OF JUSTICE OF SUCUMBÍOS:

I, Dr. Adolfo Callejas Ribadeneira, counsel of record for CHEVRON CORPORATION, in Summary Oral Proceeding No. 002-2003, filed against my client by María Aguinda et al., considering the state of this case, appear and present the following legal brief, in defense of the interests of my client.

As Your Honor is aware, my client continues to receive new evidence of plaintiffs' fraud that affects the validity of this proceeding. I therefore reserve the right to supplement this *alegato* with this evidence and respectfully request that no judgment be entered until all such evidence has been received, investigated, and addressed by this Court.

This legal brief covers the following topics as set out in the index below for your convenience:

CERT. INTERMARK VER: JD

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CERT. INTERMARK VER: JD

CERT. INTERMARK VER: JD

CERT. INTERMARK VER: JD

TO THE ACTING CHIEF JUDGE OF THE SUCUMBIOS PROVINCIAL COURT:

I, Adolfo Callejas Ribadeneira, Legal Counsel for **CHEVRON CORPORATION** in summary oral proceeding No. 002-2003, brought against my client by María Aguinda *et al.*, whereby it is within the term pursuant to Articles 324 and 306 of the Code of Civil Procedure, respectfully appear before you and state:

I disagree with the judgment of February 14, 2011, at 8:37 a.m., clarified and extended by the order of March 4, 2011, at 3:10 p.m., and therefore I hereby formulate the following **APPEAL** against said decision and the referenced clarifying and amplifying order, insofar as it was unfavorable to me; this, without prejudice to the arguments made in the text of the present writing, and the arguments of nullity that are part of this appeal, in accordance with the provisions of Art. 320[1] of the Code of Civil Procedure.

The appeal will be heard and decided by the Sole Chamber of the Sucumbíos Provincial Court, as specified in the law.

In order to facilitate consideration of this appeal, I include the following Table of Contents:

TABLE OF CONTENTS

[1] "Art. 320.- The law establishes the remedies of appeal, cassation and petition for review of denial of an appeal, **without prejudice to the possibility of claiming nullity of the process in filing them.**"

[initials]

[initials]

* * * * *

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Defendants

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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE RESPONDENTS/PLAINTIFFS (MOTION RETURNABLE FEBRUARY 1, 2016)

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