Court File No. CV-12-980800CL

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

REPLY FACTUM OF THE PLAINTIFFS TO THE RULE 21 MOTION RETURNABLE SEPTEMBER 12, 2016

September 2, 2016

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
2600-130 Adelaide Street West
Toronto ON M5H 3P5

Alan J. Lenczner, Q.C. (11387E)
Tel: (416) 865-3090
Fax: (416) 865-2844
Email: alenczner@litigate.com
Brendan F. Morrison (61635B)
Tel: (416) 865-3559
Fax: (416) 865-3731
Email: bmorrison@litigate.com

KOSKIE MINSKY LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

Kirk M. Baert (30942O)
Tel: (416) 595-2117
Fax: (416) 204-2889
Email: kmbaert@kmlaw.ca

Celeste Poltak (46207A)
Tel: (416) 595-2701
Fax: (416) 204-2909
Email: cpoltak@kmlaw.ca

Garth Myers (62307G)
Tel: (416) 595-2102
Fax: (416) 977-3316
Email: gmyers@kmlaw.ca

Lawyers for the Plaintiffs

TO: **OSLER HOSKIN & HARCOURT LLP**
P.O. Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Larry Lowenstein (23120C)
Tel.: (416) 862.6454
llowenstein@osler.com
Laura K. Fric (36545Q)
Tel.: (416) 862.5899
lfric@osler.com

Fax: (416) 862.6666

Lawyers for the Defendant,
Chevron Corporation

AND TO: **NORTON ROSE FULBRIGHT CANADA LLP**
Royal Bank Plaza, South Tower
3800-200 Bay St, P.O. Box 84
Toronto, ON M5J 2Z4

Clarke Hunter, Q.C.
Tel: 1 (403) 267-8292
Fax: 1 (403) 264-5973
Anne Kirker, Q.C.
Tel: 1 (403) 267-9564
Fax: 1 (403) 264-5973
Robert Frank (35456F)
Tel: (416) 216-6741

Fax: (416) 216-3930

Lawyers for the Defendant,
Chevron Corporation

1. In its Responding Factum, Chevron Corporation ("Chevron") persists in addressing the strike out issue through a first instance lens. This is no longer a first instance case. The issues are to be determined by *Beals*. Most of the authorities relied on by Chevron are first instance cases which have no application here.

2. *Beals* firmly sets out a Canadian mandated regime that balances the important principle of respect for foreign judgments with a judgment-debtor's right to oppose enforcement.

3. The regime mandated by the Supreme Court of Canada has been applied and followed in numerous cases.

"The Supreme Court of Canada has made it clear that the 'fraud' defence does not permit defendants like Mr. DiPanfilo to try to re-litigate any of the merits of the action that led to the foreign judgment sought to be enforced by the plaintiff. See: *Beals v. Saldanha*, at para. 35, 39-41, 43-55. That important principle has direct application in the circumstances of this case, especially given that all of the individual factual arguments now advanced by the respondent could have, with reasonable diligence, been brought to the attention of the Kansas court. Accordingly, there is no need to address or consider the arguments advanced by the respondent in any greater detail. The arguments must be rejected as being legally unavailable to the respondent."

Reference: *Marcus Food Co. v. DiPanfilo*, [2012] O.J. No. 969, at para. 20, Authorities of the Plaintiffs, Tab 13

4. The permitted defences are limited and must be raised in Canada, in proceedings in Canada. The Ontario Superior Court of Justice is not influenced by a collateral attack in the U.S.A. on an enforceable judgment from Ecuador.

5. The Judgment of Judge Kaplan is a collateral attack. In order to circumvent the U.S. 2nd Circuit Court of Appeals' 2012 Judgment determining that a worldwide injunction prohibiting the plaintiffs from enforcing their Ecuadorean Judgment was unavailable as a preemptive strike, Judge Kaplan made the following determinations:

(a) the Ecuadorean Judgment is not declared to be invalid;

(b) the only two plaintiffs that were before him could seek to enforce it in any other country; and

(c) Chevron had a constructive trust over any monies that the two individual plaintiffs personally received. Chevron and Judge Kaplan knew, from the Ecuadorean judgments, that the two individual plaintiffs were not to receive any monies.

6. Judge Kaplan's Decision has no probative value in the Ontario proceeding. It cannot be enforced against the 47 plaintiffs in Ontario. It is not *res judicata*. Issue estoppel also does not apply.

7. As a matter of proper pleading, a 450-page Judgment containing facts, evidence, argument, analysis and U.S. law regarding the application of the RICO and other statutes cannot be, under Ontario law, incorporated by reference.

Reference: *Sauer v. Canada (Attorney General)*, [2005] O.J. No. 4237, at paras. 7 – 10, Reply Authorities of the Plaintiffs, Tab 1

Leadbeater v. Ontario, [2001] O.J. No. 3472 (S.C.J.), at paras. 5 – 9, Reply Authorities of the Plaintiffs, Tab 2

8. To the extent that Chevron submits, again, that the Kaplan Decision ousts the Superior Court's jurisdiction to try the enforcement case against Chevron, that argument was run in the Supreme Court of Canada and was denied.

9. As the Supreme Court of Canada determined, even with regard to whether the presence of assets is necessary to ground jurisdiction for an enforcement action to proceed in Ontario, the Court declined to follow U.S. law or precedent. The Supreme Court of Canada followed its own Canadian precedents.

10. The Supreme Court of Canada would never accept the U.S. position as determined by Judge Kaplan and upheld by the U.S. 2nd Circuit Court of Appeals. In those judgments, there is an irreconcilable inconsistency. On the one hand, it determined that the Ecuadorean Judgment was unassailable until a foreign judgment creditor comes to New York to enforce it, while on the other hand, the judgment-debtor can use its home country court to have it declare the Ecuadorean Judgment to have been procured by fraud, but not invalid or unenforceable elsewhere.

11. The illogicality of the proceeding before Judge Kaplan is stark. Chevron did not bring a treble damages action in the U.S.A. and then abandon its entire claim for damages only to obtain a constructive trust over monies that Steven Donziger would receive as a contingency fee, the Ecuadorean Judgment making it plain that the two plaintiffs would not receive any monies. Judge Kaplan knew that the sole purpose of the action before him was to influence a foreign court that had the judgment-creditors and the foreign judgment squarely before it for enforcement.

12. The U.S. Judgment does not respect comity or the ability of foreign courts to apply their own laws appropriately. The Supreme Court of Canada did not pay heed to Judge Kaplan's Decision when it was raised before it.

13. To counterbalance Judge Kaplan's conclusions on the two main allegations of offering a bribe to Judge Zambrano and of the plaintiffs ghost writing his judgment, this Court should be aware that in a subsequent arbitration proceeding between Chevron Corp. and the Republic of Ecuador, Chevron's main witness regarding the "bribe" and the "ghost writing" allegations, former Judge Guerra, resiled from the testimony he gave before Judge Kaplan both as to the circumstances surrounding the "bribe" and the "ghost writing". In addition, the Republic of Ecuador produced a forensic expert's report on the examination of the hard drive from the

relevant computers demonstrating that Judge Zambrano wrote the Judgment. The transcript of Guerra's testimony in the arbitration is filed with this Court.

14. Chevron, egregiously and irresponsibly, contends that the Ecuadorean Courts did not have jurisdiction to try the action in the first place–see paras. 51 - 53 in particular. Chevron ignores its agreement, undertaking and consent that it gave to the U.S. 2nd Circuit Court of Appeals to attorn to the jurisdiction of the Ecuadorean Courts as a condition of obtaining the removal of the plaintiffs' class action suit from the U.S.A. to Ecuador. The U.S. 2nd Circuit Court of Appeals expressly stated that, but for this undertaking and consent, it would not have removed the case from the U.S.A.

15. The Supreme Court of Canada, in its analysis whether there was jurisdiction in Ontario to oblige Chevron Corp. to file a defence and to proceed to trial, addressed the fact and concluded that the Ecuadorean Courts had jurisdiction. Chevron's contentions of non-jurisdiction of the Ecuadorean Courts ignores and undermines 20 years of litigation and determinations against it.

16. The thrust of Chevron's arguments is to re-litigate, from the very beginning, every argument it can muster. *Beals* does not allow this. None of Chevron's arguments address or counter the findings of widespread pollution and contamination that Chevron was found to have caused. The evidence leading to the conclusions of massive pollution was overwhelming from the thousands of chemical samples and analysis and expert reports placed before the judge as well as visible to the judge who travelled to the well sites and viewed the devastation and harm firsthand.

17. Chevron's answer to the *de novo* aspect of the Intermediate Court of Appeals is to claim that every judge in every court in Ecuador is corrupt. Or if that is not sufficient, to claim that "there was political interference with the legal system and intimidation of judges …" – see para.

20(a). No Canadian Court can be called upon to adjudge the entire judicial and political system of a foreign nation in a discrete enforcement action. *Beals* cannot be interpreted to envisage allowing a defence of such compass. *Beals* is focussed on the particular judgment being brought to be enforced in Canada and allows only the defence of fraud or corruption of the particular judge involved in the case, not of the country's entire judicial system. In *Oakwell Engineering*, the Ontario Court of Appeal corroborated the Supreme Court's interpretation of the "third and final defence" of public policy:

> "19 In *Beals*, Major J. described the scope of the public policy defence at paragraphs 71 and 75:
>
> > 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 ...
> >
> > How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.
> >
> > ...
> >
> > The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have narrow application [emphasis in original].
>
> 20 The application judge concluded that 'in the present case the asserted repugnancy is in the facts emanating out of Singapore, not the laws of Singapore' and, accordingly, he concluded that the defence of public policy is not available.

21 Enernorth's attack on the judgment in question is not that it resulted from a law that is contrary to the fundamental morality of the Canadian legal system, but rather that it is the product of a corrupt legal system, with biased judges, in a jurisdiction that operates outside the rule of law."

Reference: *Oakwell Engineering Ltd. v. Enernorth Industries Inc*., [2006] O.J. No. 2289, at paras. 19 to 21, Authorities of the Plaintiff, Tab 19

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September, 2016

Alan J. Lenczner, Q.C.
Brendan F. Morrison
Lenczner Slaght Royce Smith Griffin LLP

Kirk M. Baert
Celeste Poltak
Garth Myers
Koskie Minsky LLP

Lawyers for the Plaintiffs

SCHEDULE A

1. *Marcus Food Co. v. DiPanfilo*, [2012] O.J. No. 969
2. *Sauer v. Canada (Attorney General)*, [2005] O.J. No. 4237
3. *Leadbeater v. Ontario,* [2001] O.J. No. 3472 (S.C.J.)
4. *Oakwell Engineering Ltd. v. Enernorth Industries Inc*., [2006] O.J. No. 2289

SCHEDULE B

None cited.

DANIEL CARLOS LUSITANDE YAIGUAJE et al.
Plaintiffs

-and-

CHEVRON CORPORATION et al.
Defendants

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

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PROCEEDING COMMENCED AT TORONTO

REPLY FACTUM OF THE MOVING PARTIES/PLAINTIFFS MOTION RETURNABLE SEPTEMBER, 2016

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Alan J. Lenczner, Q.C. (11387E)
Tel: (416) 865-3090
Fax: (416) 865-2844
Email: alenczner@litigate.com
Brendan F. Morrison (61635B)
Tel: (416) 865-3559
Fax (416) 865-3731
Email: bmorrison@litigate.com

Lawyers for the Plaintiffs