SCC File No.: 35682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CHEVRON CORPORATION and CHEVRON CANADA LIMITED

APPELLANTS
(Respondents/Appellants)

-and-

DANIEL CARLOS LUSITANDE YAIGUAJE, et al. (see attached)

RESPONDENTS
(Appellants/Respondents)

-and-

INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW, MININGWATCH CANADA AND THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE and JUSTICE AND CORPORATE ACCOUNTABILITY PROJECT

INTERVENERS

FACTUM OF THE INTERVENER, JUSTICE AND CORPORATE ACCOUNTABILITY PROJECT ("JCAP")

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The intervener Justice and Corporate Accountability Project ("JCAP") provides legal support to communities in other countries whose rights and lives have been affected by the activities of (primarily Canadian) multinational businesses, often in the resource extractive industries. Depending on the social and political situation of the countries in which they are situated, these communities can be exposed to a range of abuses, such as war crimes, torture, and environmental degradation as a result of these business activities. The outcome of this appeal has the potential to have a profound impact on the ability of such communities to seek redress.

2. JCAP's submissions in this appeal are directed towards ensuring that Canadian rules of private international law afford such communities access to justice and effective remedies. In particular, JCAP is concerned with ensuring the continued development of the forum of necessity doctrine in Canadian law. This doctrine promotes access to justice by allowing a Canadian court to assert jurisdiction where the plaintiff has no viable recourse elsewhere.

3. JCAP submits that no jurisdictional analysis is warranted in recognition and enforcement proceedings. However, this appeal has also raised constitutional issues. JCAP submits that any development of the constitutional aspect of Canadian private international law should preserve the constitutional viability of the forum of necessity doctrine. Further, should this Court decide that a jurisdictional analysis is warranted in the recognition and enforcement context, then the forum of necessity doctrine should be adopted and incorporated into that analysis.

4. In addition, JCAP agrees with the position of the joint interveners University of Toronto International Human Rights Clinic, MiningWatch Canada, and Canadian Centre for International Justice in regard to the issue of whether the plaintiffs should be permitted to pierce the corporate veil. Furthermore, JCAP submits that there is a significant distinction between piercing the corporate veil and making a subsidiary's assets available to satisfy a judgment against the parent. It is the latter, not the former, that is at issue in this case.

PART II – STATEMENT OF ISSUES

5. In this appeal, JCAP makes the following submissions:

- the real and substantial connection test for jurisdiction *simpliciter* does not apply to recognition and enforcement proceedings;
- the existence of a real and substantial connection is not a constitutional requirement in the international context;
- should the Court decide that the real and substantial connection test for jurisdiction *simpliciter* does apply in this case, it should also affirm the existence of the forum of necessity doctrine and apply it to the facts of this appeal; and
- piercing of the corporate veil is not an issue in this case.

PART III – STATEMENT OF ARGUMENT

A –The real and substantial connection test for jurisdiction *simpliciter* should not apply to recognition and enforcement proceedings

6. JCAP's position on the main issue in this appeal is that the real and substantial connection test for jurisdiction *simpliciter* should not apply to recognition and enforcement proceedings.

7. There is no benefit to subjecting recognition and enforcement proceedings to a rigorous jurisdictional threshold. Practical considerations alone should ensure that recognition and enforcement proceedings are brought only where there is a valid reason to do so. Even where that is not the case, a foreign defendant that comes to Canada to contest jurisdiction can just as easily come to Canada to contest the validity of the judgment or the exigibility of the assets targeted. In contrast with a jurisdictional objection to a trial of a first instance claim, it conserves little, if any, resources to permit a defendant to contest jurisdiction in a recognition and enforcement proceeding.

8. On the other hand, having such a rule has the potential to add significant delay to a proceeding. The communities that JCAP serves are particularly prejudiced by such delays.

9. Western multinational companies often do business in underdeveloped countries with weak public governance and rule of law institutions. Conducting operations in such volatile environments can create a risk of grave human rights and environmental abuses. When such abuses do happen, allegations often arise that the company itself shares responsibility for what

occurred. The present appeal is one example of such a situation. Similar cases have also reached Canadian courts.[1]

10. This appeal is a prime illustration of how rules of private international law can severely delay access to justice in such cases. The plaintiffs originally filed their claim in New York federal court in 1993, believing Ecuadorian courts to be ill-equipped to conduct a fair trial in such a matter. The defendants, however, sought a *forum non conveniens* dismissal, arguing that the Ecuadorian court system was fair and just. This jurisdictional dispute stalled the case for almost a decade, until the Second Circuit Court of Appeals finally granted the defendants a *forum non conveniens* stay in 2002. Years after completion of trial in Ecuador, the proceeding (amid allegations that the judgment was tainted by fraud) finds itself mired in jurisdictional objections again.

11. To local communities seeking redress against powerful multinational corporations, such delays are more than just a matter of lost time. They are an issue of access to justice. These communities are often impoverished and marginalized even in the context of the developing countries in which they reside. Such countries, in turn, are often dwarfed in economic stature by some of the world's largest multinational businesses. Such a deep inequality of arms can be exploited to great effect by a powerful multinational corporation, if the relevant legal system affords them the procedural mechanisms to do so. This is a serious consideration for communities with limited resources who are contemplating legal action.

B – The existence of a real and substantial connection is not a constitutional requirement in the international context

12. Both appellants have drawn on constitutional principles set out in Canadian private international law jurisprudence to try and frame the existence of a real and substantial connection as a constitutional requirement in this case.[2] This is a misapplication of the principles set out in the jurisprudence. In fact, the constitutional requirement only applies in

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[1] See e.g. *Choc v. Hudbay Minerals Inc*, 2013 ONSC 1414, Intervenors' Authorities, Tab 5; *Anvil Mining Ltd. c. Association canadienne contre l'impunité*, 2012 QCCA 117, Intervenors' Authorities, Tab 2.
[2] Chevron Canada factum at paras. 49-51; Chevron Corporation factum at paras. 60-64.

the interprovincial context as an obligation between fellow members of the Canadian federation. It does not apply in a purely international case such as this one.

13. La Forest J. stated in *Hunt v. T&N plc* that "courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place." However, the surrounding context of this pronouncement makes it clear that it referred only to the obligations owed between provinces in a federal state:

> But this appeal is concerned with the provinces within Confederation. *Morguard* requires that the rules of private international law must be adapted to the structure of our federation … And **courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place**. In terms of policy, the presence of such blocking statutes is an anachronism, not even, so we were told, aimed at interprovincial litigation at its inception in the 1940s, but definitely inimical to such litigation if applied on the interprovincial level… If blocking statutes of the type now in effect in both Ontario and Quebec were possible under the Constitution, they would have the potential of affecting the rights of litigants in all the other provinces…[3] [Emphasis added]

14. Indeed, in *Hunt*, La Forest J. was merely affirming the constitutional status of the principles he laid out in *Morguard Investments Ltd. v. De Savoye*, in which he ruled that the structure of the Canadian federation required courts in each province to accord "full faith and credit" to the judgments of courts in other provinces. As a necessary corollary to this principle, however, La Forest J. noted that courts must also refrain from asserting jurisdiction over a dispute more properly belonging in the courts of another province:

> To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service *ex juris* in all the provinces are broad, in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province… As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long

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[3] *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at paras. 63, 64, Intervenors' Authorities, Tab 7.

> as that court has properly, or appropriately, exercised jurisdiction in the action.4 [Emphasis added]

15. Thus, unless this Court is of the view that Canadian courts also owe "full faith and credit" to the judgments of courts outside the country *as a matter of constitutional imperative*, there is no reason to frame the real and substantial connection test as a constitutional requirement in international cases such as this one. The academic authorities cited by the appellants in support of their positions on this issue – Professor Hogg[5] and Professor Castel[6] – both acknowledge that the constitutional obligations of Canadian private international law are of force only in the interprovincial context.[7]

16. In fact, this Court has already explicitly declined to extend this constitutional requirement to the international context in *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., where LeBel J. rejected the appellants' argument that *Morguard* and *Hunt* imposed the real and substantial connection test as a constitutional requirement that had to be satisfied in addition to the statutory rules of jurisdiction under Quebec's Civil Code.[8] In doing so, he noted that:

> …it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes. In my opinion, the specific findings of these decisions cannot easily be extended beyond this context. In particular, the two cases… speak directly to the context of interprovincial comity within the structure of the Canadian federation.[9] [Emphasis added]

17. LeBel J. further elaborated on the difference between interprovincial comity and international comity in *Beals v. Saldanha*:

> Although constitutional considerations and considerations of international comity both point towards a more liberal jurisdiction test, important differences remain between them…One of those

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[4] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077, at paras. 41, 44, , Intervenors' Authorities, Tab 8.
[5] Chevron Corporation factum at paras. 62-63.
[6] Chevron Canada factum at para. 51.
[7] See Peter Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed supplemented (Toronto: Carswell, 2013) at pp. 13-30; 13-31, Intervenors' Authorities, Tab 16; Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, loose-leaf, 5th ed (Markham, ON: Lexis Nexis Butterworths, 2004) at pp. 2-4; 2-5; 2-13, Intervenors' Authorities, Tab 15.
[8] *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., 2002 SCC 78 at paras. 51-54, Intervenors' Authorities, Tab 10.
[9] *Ibid*. at para. 51, Intervenors' Authorities, Tab 10,

> differences is that the rules that apply within the Canadian federation are "constitutional imperatives". Comity as between sovereign nations is not an obligation in the same sense… [10]
> [Emphasis added]

18. This analysis is also consistent with this Court's pronouncement in *Club Resorts Ltd. v. Van Breda* that "the territorial limits… on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*."[11] Section 92, through subsections 13 and 14, gives each province the power to make laws in relation to procedural rights and civil and property rights "in the province." If a court in one province were to take jurisdiction over a dispute originating in another province, application of the different laws in the first province would have the effect of modifying the procedural rights and civil and property rights of parties in the second province, and therefore intrude on that province's jurisdiction under section 92. On the other hand, foreign states are obviously not parties to the Constitution. The Constitution thus grants no powers to foreign states; and so neither does it impose upon a province's superior courts an obligation to respect the constitutional jurisdiction of courts in foreign states.

19. The competing interpretation of this passage from *Van Breda* – that the territorial jurisdiction of a province's superior courts is constrained by the limitation of its *own* legislature's lawmaking jurisdiction to matters "in the province" as set out in sections 92(13) and 92(14) – cannot be right. Such a simplistic interpretation would indeed impose a constitutional limit on a Canadian court's territorial jurisdiction in international as well as interprovincial disputes. But it would also create a host of irresolvable conceptual incongruities. For instance, it would necessarily imply that a province's superior courts also have no adjudicative jurisdiction over matters falling within the heads of power enumerated in section 91. Further, if Parliament were to legislate with extraterritorial effect – which it clearly has the power to do[12] – no provincial superior court would be able to adjudicate these effects. This interpretation – as Castel and Walker have pointed out – would also fly in the face of the opening words of sections 91 and 92 which clearly state that the enumerated heads of power apply to *legislative* jurisdiction and

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[10] *Beals v. Saldanha*, 2003 SCC 72 at paras. 166-67, Intervenors' Authorities, Tab 4.
[11] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 31, Intervenors' Authorities, Tab 6.
[12] See e.g. *Hunt* at "Indeed the federal Parliament…", at para. 63, Intervenors' Authorities, Tab 7.

not adjudicative jurisdiction.[13] Finally, it would also contradict an established line of cases since *Morguard* which have all emphasized that "[t]he considerations underlying the rules of comity apply with much greater force between the units of a federal state."[14] If there is to be any difference at all between the strictures of comity in the interprovincial and international contexts, it must surely be that the former is a matter of constitutional obligation whereas the latter is not.

20. Of particular concern to JCAP, the extension of the constitutional requirement to the international context would also cast uncertainty on the constitutionality of the forum of necessity doctrine. This doctrine allows a court to assume jurisdiction over a dispute over which it would not normally have jurisdiction otherwise, if it would be unreasonable to require the plaintiff to file the claim anywhere else. For instance, in civil claims for human rights violations such as torture and genocide, plaintiffs often cannot return to the forum where the harm occurred without risking their lives or further injury.

21. Over the past quarter-century, the forum of necessity doctrine has become an established component of Canadian private international law. Originating in Switzerland, it was first introduced in Canada in 1991 through article 3136 of Quebec's Civil Code.[15] It was subsequently statutorily adopted in both British Columbia[16] and Nova Scotia,[17] and was affirmed as part of Ontario law by the Ontario Court of Appeal in the *Van Breda* case in 2010.[18] It has also been recognized by common law courts in Alberta.[19]

22. This Court has itself acknowledged the "possible application" of the doctrine (which has now also spread to the European Union as well as Belgium, Mexico, the Netherlands, Uruguay,

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[13] Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, loose-leaf, 5th ed (Markham, ON: Lexis Nexis Butterworths, 2004) at pp. 2-1, Intervenors' Authorities, Tab 15.
[14] See e.g. *Morguard* at para. 35, Intervenors' Authorities, Tab 8; *Hunt* at para. 13, Intervenors' Authorities, Tab 7; *Antwerp Bulkcarriers, N.V. (Re)*, 2001 SCC 91 at para. 51, Intervenors' Authorities, Tab 1; *Spar Aerospace* at paras. 51-54, Intervenors' Authorities, Tab 10; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, at para. 51, Intervenors' Authorities, Tab 12.
[15] *Civil Code of Quebec*, S.Q. 1991, c. 64, art. 3136.
[16] *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 6.
[17] *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2, s. 7.
[18] *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 at para. 54, Intervenors' Authorities, Tab 13.
[19] See *Ayles v. Arsenault*, 2011 ABQB 493 at paras. 33, 66, Intervenors' Authorities, Tab 3; *Sears Canada Inc. v. C & S Interior Designs Ltd.*, 2012 ABQB 573 at para. 15, Intervenors' Authorities, Tab 9.

Argentina, Austria, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Poland, Portugal, Romania, Russia, South Africa, Spain, and Turkey[20]) in jurisdictional cases.[21]

23. However, if a real and substantial connection were constitutionally required in international cases, it would threaten to disrupt the development of the emerging doctrine. Forum of necessity is largely unaffected by constitutional restraints on jurisdiction in the interprovincial context, because cases where justice cannot be obtained by instituting proceedings in another Canadian province will arise rarely, if at all. But the same is not true in the international context, where the need for the forum of necessity doctrine becomes much more acute.

24. For all these reasons, a constitutional principle that derives, in part, from the notion "that any concerns about differential quality of justice among the provinces can have no real foundation" has no application in the international context, because the same cannot be said in the international context (on which point the appellants in this case would likely agree). More sensible is the approach suggested by LeBel J. in *Beals v. Saldanha*: "A context-sensitive jurisdiction test ought to take into account the possibility that the quality of justice [in a foreign jurisdiction] may not meet Canadian standards."[22] [Emphasis added] This encapsulates perfectly the basic principle that underpins the forum of necessity doctrine.

C – If the real and substantial connection test applies, the forum of necessity doctrine should also apply

25. If this Court decides that recognition and enforcement proceedings are indeed subject to a threshold jurisdictional test, then JCAP further submits that the forum of necessity doctrine should also be part of that test. This, of course, would require the Court to recognize the doctrine's existence – as well as its application to the test for jurisdiction *simpliciter* in first instance claims – before applying it to the facts of this appeal.

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[20] See Chilenye Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, (2014) 30(78) Utrecht Journal of International and European Law 24 at 32, Intervenors' Authorities, Tab 14.
[21] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 100, Intervenors' Authorities, Tab 6.
[22] *Beals v. Saldanha*, 2003 SCC 72 at para. 171, Intervenors' Authorities, Tab 4.

26. Forum of necessity is a live issue in this appeal because the respondents have been affirmatively enjoined from even attempting to secure enforcement of the Ecuadorian judgment in the United States. Given these circumstances, a serious question arises as to whether it is reasonable to require the respondents to bring proceedings in the US. This means that Ontario may well be a forum of necessity. JCAP therefore submits that, if this Court finds that recognition and enforcement proceedings are subject to a threshold jurisdictional test and that that test is not met in this case, then the Court should go on to consider whether it should nonetheless find jurisdiction under the forum of necessity doctrine.

27. This Court has repeatedly emphasized that order and fairness are the guiding principles that govern the development of Canadian private international law.[23] Although the two principles are often framed in opposition to each other as if there is a balance that needs to be achieved between them,[24] forum of necessity is a mechanism that promotes both at the same time. After all, a precondition to order in society is that individuals who feel aggrieved have access to a forum that allows them to resolve their disputes in an *orderly* manner. Meanwhile, fairness is also achieved if that forum is one that is capable of adjudicating the dispute according to established principles of law that are fair and just to all parties. Thus, it is in the interests of both order and fairness to affirm the existence of the forum of necessity doctrine in Canadian law.

D – Piercing the corporate veil is not an issue in this case

28. JCAP has considered the submissions of the joint interveners University of Toronto International Human Rights Clinic, MiningWatch Canada, and Canadian Centre for International Justice on the piercing the corporate veil issue, and JCAP agrees with those submissions.

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[23] See e.g. *Morguard* at para. 32, Intervenors' Authorities, Tab 8; *Van Breda* at para. 74, Intervenors' Authorities, Tab 6.
[24] See e.g. *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 SCR 1022 at "The imputed injustice… into a Quebecer?", at paras. 55, 56, Intervenors' Authorities, Tab 11; *Beals v. Saldanha*, 2003 SCC 72 at para. 40, Intervenors' Authorities, Tab 4.

29. Furthermore, it bears emphasizing that there is a conceptual distinction between piercing the corporate veil and making a subsidiary's assets available to satisfy a judgment against its parent. It is the latter, not the former, that is at issue in this case.

30. Piercing the corporate veil means assimilating the identities of parent and subsidiary into one, and thereby negating the distinct legal personhood of each. However, making a subsidiary's assets available to satisfy a judgment against its parent does not contradict the principle of separate corporate personality. The appellant Chevron Corporation's submission that asserting jurisdiction in this case would amount to undoing a cog in the western economic system[25] is overstated.

31. For instance, the respondents raise arguments with respect to enterprise liability.[26] Enterprise liability, a form of vicarious liability, does not violate the principle of separate corporate personality. On the contrary, the very term "vicarious liability" implies a multiplicity of persons. Rather, what enterprise liability does is simply affirm the principle that legal persons, just as natural persons, can be held responsible for the actions of others with whom they have certain relationships of collaboration or control. This is no more an assault upon the principle of corporate personhood than the tort of conspiracy is an assault upon individualism.

PART IV - SUBMISSIONS CONCERNING COSTS

32. JCAP does not seek any costs and asks that no costs be awarded against it.

PART V - ORDER SOUGHT

33. JCAP respectfully seeks leave to present oral submissions at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2014

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[25] Chevron Corporation factum at paras. 102-03.
[26] Factum of the Respondents to the Appeal of Chevron Canada Limited, paras. 79-84.

PART VI - TABLE OF AUTHORITIES

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14	Chilenye Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, (2014) 30(78) Utrecht Journal of International and European Law 24	22
15	Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, loose-leaf, 5th ed (Markham, ON: Lexis Nexis Butterworths, 2004)	15, 19
16	Peter Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed supplemented (Toronto: Carswell, 2013)	15

PART VII - TABLE OF STATUTES

***Civil Code of Quebec*, SQ 1991, c 64, art. 3136** 3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required 3136. Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec.
***Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 6** 6. Residual discretion A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that (a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.
***Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2, s 7** 7. A court that under Section 4 lacks territorial competence in a proceeding may hear the proceeding notwithstanding that Section if it considers that (a) there is no court outside the Province in which the plaintiff can commence the proceeding; or (b) the commencement of the proceeding in a court outside the Province cannot reasonably be required.