THE ‘REAL AND SUBTANTIAL’ TEST AND THE SASQUATCH

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1. **Current Status.** The issue of real and substantial connection is currently undergoing review by the Supreme Court of Canada in a matter pitting the courts of Utah and those of Canada. Has the connection Test become illusory, or better put, so amorphous that its application is in jeopardy? In North American folklore, Bigfoot or Sasquatch is a hairy, upright-walking, ape-like being who reportedly dwells in the wilderness and leaves behind large footprints. Over the years, the creature has inspired numerous commercial ventures and hoaxes. Do we dare draw an analogy between the Test and the Sasquatch?

2. **Knight Brothers as the White Knight.** The United States District Court, Central Division for the District of Utah rendered a judgment which has grown with interest to over a million dollars, which Plaintiff now seeks to enforce in Canada before the Superior Court of Montreal.

   2.1 In the matter of *Knight Brothers, l.l.c. c. Central Bearing Corporation Ltd.,* 2016 QCCS 3471 (CanLII), the Quebec Superior Court pointed out that the Utah court held that for the purpose of determining personal jurisdiction, it considered payments made to Plaintiff from the common account in the corporate Defendant’s [Central Bearing] name and a certified copy from the Montreal, Canada, Registrar of Companies which showed that Central Bearing was registered as doing business under the names of Bearing Engineering and CBI.

3. **Sufficient minimum contacts.** The Utah Court found that Plaintiff had shown that David Barer has *sufficient minimum contacts* with the state of Utah to establish personal jurisdiction over him. There was purposeful availment of the privilege of conducting business in Utah in hiring a Utah company in Utah to perform work in Utah. There was nexus between those forum-related contacts and Plaintiff's causes of action since they all arose out of the work performed.

   3.1 In the face of this prima facie showing, the Court held Barer did not meet his burden of demonstrating the presence of some other considerations that would render jurisdiction unreasonable.

4. **Exemplification.** In order to execute the Utah judgment in Quebec, Plaintiff sought its exemplification [validation] before the Quebec Superior Court in Montreal where the assets and residence of the personal Defendant were found. In granting exemplification, the Quebec Court relied on article **3168 of the Quebec Civil Code (C.C.Q.)** which declares that in personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized only in the following cases:

(1) the defendant was domiciled in the State where the decision was rendered;

(2) the defendant possessed an establishment in the State where the decision was rendered and the dispute relates to its activities in that State;

(3) injury was suffered in the State where the decision was rendered and it resulted from a fault which was committed in that State or from an injurious act which occurred there;

(4) the obligations arising from a contract were to be performed in that State;

(5) the parties have submitted to the foreign authorities the present or future disputes between themselves arising out of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;

(6) the defendant has submitted to the jurisdiction of the foreign authorities.

5. **Test subsumed.** While article 3168 C.C.Q. does not refer to the real and substantial test, the Court referred to the case of *Spar Aerospace Ltd. v. American Mobile Satellite Corp., [2002] 4 SCR 205, 2002 SCC 78 (CanLII)* where the Supreme Court affirmed the fact that the real and substantial connection test is not an additional criterion that should be found in Quebec law and at paragraph 55 of that decision, that the dispositions of Book Ten of the *Civil Code* which includes article 3168 subsumes the real and substantial connection test as expressed by the Common Law jurisprudence.

The Court found that the tests in article 3168 applied, especially with regard to the submission to the foreign jurisdiction.

The case was taken to the Quebec Court of Appeal (Barer c. Knight Brothers, 2017 QCCA 597 (CanLII)) which pithily held:

Without endorsing all the reasons of the judge of first instance, we are nevertheless all of the view that there were sufficient elements to allow to conclude as he did.

From there, the case found its way to the Supreme Court of Canada which was argued in April 2018 and judgment is expected by December 2018. Further guidance may be found in the *Chevron* judgment of the Supreme Court of Canada detained below.

Chevron Corporation v. Yaiguaje, 2015 SCC 42 (CanLII):

Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. There is no need to demonstrate a real and substantial connection between the dispute or the defendant and the enforcing forum. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules, and would be inconsistent with this Court's statement that the doctrine of comity must be permitted to evolve concomitantly with international business relations, cross-border transactions, and mobility.

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

Two considerations of principle support the view that the real and substantial connection test should not be extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. As the enforcing court is not creating a new substantive obligation, there can be no concern that the parties are situated elsewhere, or that the facts underlying the dispute are properly addressed in another court. The only important element is the foreign judgment and the legal obligation it has created. Furthermore, enforcement is limited to measures that can be taken only within the confines of the jurisdiction and in accordance with its rules, and the enforcing court's judgment has no coercive force outside its jurisdiction. Similarly, enforcement is limited to seizable assets found within its territory. As a result, any potential constitutional concerns relating to conflict of laws simply do not arise in recognition and enforcement cases: since the obligation created by a foreign judgment is universal, each jurisdiction has an equal interest in the obligation resulting from the foreign judgment, and no concern about territorial overreach could emerge.

Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. The need to acknowledge and show respect for the legal action of other states has consistently remained one of comity's core components, and militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The goal of modern conflicts systems rests on the principle of comity, which calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity. This is true of all areas of private international law, including the recognition and enforcement of foreign judgments. In recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. No unfairness results to judgment debtors from

having to defend against recognition and enforcement proceedings — through their own behaviour and legal noncompliance, they have made themselves the subject of outstanding obligations, so they may be called upon to answer for their debts in various jurisdictions. They are also provided with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted. Requiring a defendant to be present or to have assets in the enforcing jurisdiction would only undermine order and fairness: presence will frequently be absent given the very nature of the proceeding at issue, and requiring assets in the enforcing jurisdiction when recognition and enforcement proceedings are instituted would risk depriving creditors of access to funds that might eventually enter the jurisdiction. In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality.

Finding that there is no requirement of a real and substantial connection between the defendant or the action and the enforcing court in an action for recognition and enforcement is also supported by the choices made by the Ontario legislature, all other common law provinces and territories, Quebec, other international common law jurisdictions and most Canadian conflict of laws scholars.

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

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

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