WeirFoulds LLP

Security for Appeal Costs: Litigation Tactics Through the Holistic Lens

November 7, 2017

By Jeff Cowan

In *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, a panel of the Ontario Court of Appeal recently reversed, in short order, a decision of one of its members ordering the appellants to pay security for costs.[1] In this protracted international case, the motion judge had ordered the appellants to post $943,000 for security for costs of their appeal of a summary judgment order dismissing their representative claim against Chevron Corporation's Canadian subsidiary.

The appellants are residents of Ecuador and seek to enforce an Ecuadorian judgment obtained in 2011 for US$9.5 billion against Chevron Corporation for environmental damage. In the Ontario action, they joined Chevron Canada, a seventh level, indirect subsidiary of Chevron Corporation. In 2015, the Supreme Court of Canada affirmed the Ontario courts' jurisdiction to hear the case: *Chevron Corporation v. Yaiguaje,* 2015 SCC 42. The Chevron defendants then filed defences asserting that the Ecuadorian judgment was obtained by fraud, as found by the U.S. courts.

The defendants moved for summary judgment, submitting that the assets of Chevron Canada were not exigible pursuant to the *Execution Act*, and that there was no basis to pierce the corporate veil so as to make Chevron Canada's shares and assets available to satisfy the Ecuadorian judgment against Chevron Corporation. The defendants' motion for summary judgment was successful, and the plaintiffs' claim against Chevron Canada was accordingly dismissed. The plaintiffs appealed the order to the Court of Appeal. The Chevron defendants countered by bringing a motion for security for costs of the appeal.

The motion judge ordered that security for costs of $943,000 be posted before the appeal could be heard, finding that the appellants had not established that they were impecunious or that third party litigation funding was unavailable. Because impecuniosity had not been established, the appellants had to demonstrate that their claim had a good chance of success, which on a review of the merits was not established.

The panel of the Court of Appeal found that the motion judge erred in principle in determining the justness of the order sought. Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders, identifying such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns, and the public importance of the litigation. However, the Court of Appeal indicated that there was no utility in imposing rigid criteria. The correct approach in such a case is for the court to consider the order holistically, examining all the circumstances of the case guided by the overriding interests of justice to determine whether it is just that the order be made.

In what it described as the unique factual circumstances of this case, the panel concluded that the interests of justice required that no order for security for costs be made. It noted the following considerations:

-the public interest nature of the litigation in which the appellants had no direct economic interest, as any funds collected would be

used for environmental rehabilitation or health care purposes;

-although there was no direct evidence of impecuniosity, there was no doubt that the environmental devastation to the appellants' lands severely hampered their ability to earn a livelihood;

-in contrast, the defendants had annual gross revenues in the billions of dollars;

– there is no bright line rule that a litigant must establish that third party litigation funding is unavailable to successfully resist a motion in an appeal for security for costs;

– at this stage, it could not be said that the case was wholly devoid of merit;

– while the legal arguments asserted by the appellants were innovative and untested, especially with regard to piercing the corporate veil, this did not foreclose the possibility that one or more of them may eventually prevail; and

– the history of the litigation made it difficult to accept that the motion for security for costs was anything more than a tactical measure.

This decision is an important reminder of the need to both recognize and focus on the "big picture" of the litigation in interlocutory matters. Here, while the *David v. Goliath* perspective was no doubt at play, and Chevron's litigation strategy was initially validated, litigants need continuously to view their approach to a case through the holistic lens of what ultimately will appear just to a court.

---

[1] The panel's decision is dated October 31, 2107. The motion judge's reasons were released September 21, 2017, with reasons reported at 2017 ONCA 741.

For more information or inquiries:

Jeff Cowan

Toronto
416.947.5007

Email:
jcowan@weirfoulds.com

Jeff Cowan is recognized as one of Canada's leading public law litigators.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035