Modernizing Corporate Veil Piercing in Canada: Revisiting Yaiguaje v. Chevron and its Transnational Governance Gap

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Abstract: *In a global economy characterized by the proliferation of multinational corporations (MNCs), state-based legal systems continue to grapple with governance gaps in oversight over corporate activities abroad. Relatedly, the past year saw multiple governments, including Canada, pledging to reach net-zero carbon emissions and increasingly focused on the UN Sustainable Development Goals (SDGs), which carries with it promises of international accountability and inclusive development. However, as illustrated by Yaiguaje v. Chevron, there is an accountability gap where subsidiaries of Western MNCs may commit legal violations abroad without facing liability, on technicalities rather than on the merits. This article proposes that a solution to such a gap can be found in Canadian courts' power to pierce the corporate veil to hold MNCs accountable for such harms, and it takes the position that there is room in Canadian corporate veil piercing doctrine to do so. Corporate veil piercing refers to the equitable doctrine whereby courts set aside limited liability in defined circumstances, such as to attach Canadian parent company assets when its subsidiaries have committed tort violations abroad. As human rights and climate litigation rises in Canada and globally, this article explores how current cracks in Canadian corporate veil piercing doctrine present an opportunity for modernization that aligns with Canada's commitments towards sustainable development and international promises of access to justice.*

Résumé: *Dans une économie mondiale caractérisée par la prolifération des multinationales, les systèmes juridiques étatiques continuent de se débattre avec les lacunes de la gouvernance en matière de surveillance des activités des entreprises à l'étranger. Au cours de la dernière année, de nombreux gouvernements, dont le Canada, se sont engagés à atteindre des émissions nettes de carbone nulles et à se concentrer de plus en plus sur les Objectifs de développement durable (ODD) des Nations Unies, qui comportent des promesses de responsabilité internationale et de développement inclusif. Cependant, comme l'illustre l'affaire Yaiguaje c. Chevron, il existe une lacune en matière de responsabilité, les filiales des multinationales occidentales pouvant commettre des violations de la loi à l'étranger sans être tenues responsables, sur des points techniques plutôt que sur le fond de l'affaire. Cet article propose qu'une solution à cette lacune puisse être trouvée dans le pouvoir des tribunaux canadiens de percer le voile corporatif afin de tenir les multinationales responsables de tels préjudices, et il prend la position qu'il y a de la place dans la doctrine canadienne de percée du voile corporatif pour le faire. La percée du voile corporatif fait référence à la doctrine équitable selon laquelle les tribunaux mettent de côté la responsabilité limitée dans des circonstances définies, par exemple pour saisir les actifs de la société mère canadienne lorsque ses filiales ont commis des violations délictuelles à l'étranger. Alors que les litiges relatifs aux droits humains et au climat augmentent au Canada et dans le monde, cet article explore comment les fissures actuelles dans la doctrine canadienne de la levée du voile corporatif offrent une opportunité de modernisation qui s'aligne sur les engagements du Canada envers le développement durable et les promesses internationales d'accès à la justice.*

Titre en français : Moderniser la levée du voile corporatif au Canada : Revisiter l'affaire Yaiguaje c. Chevron et son déficit de gouvernance transnationale

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> *"It strikes me that, looking at the corporate structure as a whole, there is something wrong with that picture… the way in which those structures are now being used is to have profits taken from the bottom level corporations, sucked up to the top, then using the corporate veil to leave responsibility at the bottom, where there is no money left."*[1]
>
> The Honourable Mr. Justice Ian Binnie

1. INTRODUCTION

From the 1960s to the 1990s, a Chevron subsidiary engaged in oil operations that polluted large swaths of the Amazon and damaged the health and livelihoods of over 30,000 Indigenous persons and small-scale farmers.[2] Over the next few decades, a representative group of these victims traversed continents to seek legal relief for these harms, as they brought legal claims in Ecuador, the United States, and Canada against various related corporate entities.[3] Even though multiple court opinions found that there was indeed wrongdoing and liability on the part of the Chevron subsidiary, the case was punted between jurisdictions and the plaintiffs were unable to find a court that was able to enforce a judgment against Chevron, due to legal technicalities.[4] A key fact is that as the drawn-out litigation progressed, Chevron and Texaco quietly removed all subsidiary assets from Ecuador, and this removal subsequently prevented the enforcement of an eventual USD $9.5 billion judgment against Chevron in 2018, even though the judgment was affirmed by Ecuador's highest court.[5] In the relevant Canadian proceedings, the Court of Appeal for Ontario's dismissal of the case in *Yaiguaje v Chevron*, based in large part on a refusal to pierce the corporate veil between Chevron and its wholly owned seventh-level subsidiary, sounded a death knell for the plaintiffs'

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1 The Honourable Justice Ian Binnie, "An Interview with the Honourable Justice Ian Binnie" (2013) 44:3 Ottawa L Rev 571 at 588.

2 See *Aguinda v Texaco, Inc*, 303 F (3d) 470 (2d Cir 2002) at 473 [*Aguinda*]; *Yaiguaje v Chevron Corporation*, 2018 ONCA 472 at para 3 [*Yaiguaje*]. See also Nicole Daniel, "Goliath Strikes Back: The Yaiguaje v Chevron Saga Continues" (24 October 2017), online: *The Court* <thecourt.ca/goliath-strikes-back-the-yaiguaje-v-chevron-saga-continues/> [Daniel].

3 See *Yaiguaje*, *supra* note 2 at paras 3, 5.

4 *Ibid* at paras 3, 5, 12.

5 *Ibid* at paras 3-4; The Associated Press, "Top Ecuador court upholds $9 billion ruling against Chevron", *National Post* (11 July 2018), online: <nationalpost.com/pmn/news-pmn/top-ecuador-court-upholds-9-billion-ruling-against-chevron>.

hope for justice.[6] Unfortunately, the barriers impeding this search for justice are commonplace for individuals alleging human rights and environmental violations against multinationals, including multinational corporations ("MNCs") domiciled in Canada.[7]

Canada's dominant market position in the global mining sector and the global rise in climate change litigation signals a need for the Canadian legal system to enforce effective oversight of subsidiaries abroad.[8] Further, the Canadian government has repeatedly stated its endorsement of the UN Guiding Principles for Business and Human Rights and the UN Sustainable Development Goals (SDGs),[9] both of which include the principles of access to remedy for all and inclusive development.[10] However, Canada's mining industry continues to be criticized for its track record of human rights abuses overseas, and *Yaiguaje* presents a controversial opinion that could dilute the ability of Canadian courts to provide oversight over multinational operations abroad.[11] On the other hand, the Supreme Court of Canada's recent judgment in *Nevsun Resources Ltd v Araya* landed on the side of increasing corporate responsibility and added to the continuing debate over transnational corporate accountability.[12]

Faced with this governance gap and an ongoing debate over MNC oversight structures, this article takes the view that corporate veil piercing is a viable solution, both economically

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6 Chevron Corporation owns 100 percent of the shares of each descending subsidiary that in turn owns 100 percent of the shares of the next subsidiary, including Chevron Canada Capital Company's 100 percent ownership of Chevron Canada. See *Yaiguaje v Chevron Corp*, 2017 ONSC 135 at para 33 [*Yaiguaje ONSC*].

7 The legal obstacles faced by the plaintiffs in *Chevron v Yaiguaje* parallel the situations experienced by plaintiff groups in the high-profile *Garcia v Tahoe Resources Inc* case and the ongoing *Choc v Hudbay Minerals Inc* case, as all three implicate subsidiary wrongdoing abroad. See *Garcia v Tahoe Resources Inc*, 2017 BCCA 39 [*Garcia*]; *Choc v Hudbay Minerals Inc et al*, 2013 ONSC 998.

8 See KPMG, "Canadian Mining 2020: A Year of New Opportunities" (February 2020), online: <https://home.kpmg/ca/en/home/insights/2020/02/canadian-mining-2020.html>. See also Joana Setzer and Rebecca Byrnes, "Policy Report: Global Trends in Climate Change Litigation: 2019 Snapshot", *London School of Economics Grantham Research Institute on Climate Change and the Environment* (July 2019), online: <lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> at 3, 6.

9 See "Canada takes action on the 2030 Agenda and the Sustainable Development Goals" (13 July 2021), online: *Governmant of Canada* <canada.ca/en/employment-social-development/programs/agenda-2030.html>; See "Towards Canada's 2030 Agenda National Strategy" (last modified 15 July 2019), online: *Government of Canada* <canada.ca/en/employment-social-development/programs/agenda-2030/national-strategy.html>; "Sustainable Development Goal fact sheets: The 2030 Agenda for Sustainable Development" (20 October 2020), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/daily-quotidien/201020/dq201020b-eng.htm>.

10 See *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 1 (I), UNGAOR 70th Sess, UN Doc A/RES/70/1 (2015) ["Transforming our world"]; OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (New York and Geneva: UN, 2011), online (pdf): <ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> [UNGP].

11 See Section 3.5. See also "World Report 2020: Canada" (2020), online: *Human Rights Watch* <hrw.org/world-report/2020/country-chapters/canada>.

12 2020 SCC 5 [*Nevsun*]. See also Richard Swan & Gannon Beaulne, "Legal uncertainty increasing when doing business abroad" (1 June 2020), online: *Canadian Mining Journal* <canadianminingjournal.com/features/legal-uncertainty-increasing-when-doing-business-abroad/>.

and theoretically, for increasing accountability for Canadian multinationals operating abroad. This article will first introduce key concepts for understanding veil piercing doctrine, followed by a dive into Canadian doctrinal elements through *Yaiguaje*. Next, it will present the case for modernization of corporate veil piercing, with an analysis of the policy impetus for reformulation and economics-based support for using corporate veil piercing to address the governance gap. The article will conclude with recommendations and options for the modernization of veil piercing in the context of transnational corporate accountability.

2. CORPORATE VEIL PIERCING DOCTRINE

2.1. Key Concepts and Definitions

This section will briefly introduce key concepts and terms that will be used throughout the rest of this article, including limited liability, corporate shareholders, corporate veil piercing, liability and enforcement stages, and torts and customary international law ("CIL") claims.

Limited liability refers to the rule that investors in a corporation are not liable for more than the amount that they have invested.[13] Thus, an individual who buys stock or a bond for $100 would risk that $100 but nothing more. In this way, investors in the firm could not be held liable for the limited liability entity's other debts.[14] For example, an investor who invests $100 could not be asked to personally pay out a court judgment of $200. However, in legal theory, shareholders that are themselves corporations ("corporate shareholders") have been distinguished from other equity investors, especially when the corporate shareholder is a parent company.[15] Limited liability has been described as a "traditional cornerstone" in corporate law,[16] but it remains subject to controversy and its merits continue to be debated.[17]

In Canada, "piercing the corporate veil" refers to the common law judicial power whereby courts can set aside limited liability or separate legal personality,[18] which can be for the purpose of making shareholders liable for a corporation's debts.[19] Early Canadian decisions

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13 See Frank H Easterbrook & Daniel R Fischel, "Limited Liability and the Corporation" (1985) 52:1 U Chicago L Rev 89 at 89–90 [Easterbrook & Fischel].

14 See David W Leebron, "Limited Liability, Tort Victims, and Creditors" (1991) 91:7 Colum L Rev 1565 at 1570–72 [Leebron].

15 See Theresa A Gabaldon, "Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders" (1992) 45:6 Vand L Rev 1387 at 1398–99; Philip I Blumberg, "Limited Liability and Corporate Groups" (1986) 11 J Corp L 573 at 574–75 [Blumberg].

16 See Blumberg, *supra* note 15 at 574.

17 See Rutheford B Campbell, "Limited Liability for Corporate Shareholders: Myth or Matter-of-Fact" (1975) 63:1 Ky LJ 23 at 23–25. See generally Robert J Rhee, "Bonding Limited Liability" (2010) 51:4 Wm & Mary L Rev 1417; Michael Simkovic, "Limited Liability and the Known Unknown" (2018) 68:2 Duke LJ 275.

18 For reference, separate legal personality refers to the legal fiction that affords a corporation status as a legal person, whereby the corporation is recognized as an entity distinct from its shareholders, officers, employees, and agents. See Mohamed F Khimji & Christopher C Nicholls, "Piercing the Corporate Veil Reframed as Evasion and Concealment" (2015) 48:2 UBC L Rev 401 at 404–05 [Khimji & Nicholls, "Corporate Veil Reframed"].

19 *Ibid* at 406.

applying the principle of corporate veil piercing drew on English court cases.[20] The doctrine can be applied in both contracts and torts cases. An empirical study of the doctrine in Canada demonstrated that the manner in which courts apply veil piercing is highly contextual and differs based on case-specific factors.[21] Generally recognized grounds for corporate veil piercing have included concepts such as agency or use of the corporate structure for improper purposes.[22] In explaining their reasons, Canadian courts, including the Supreme Court, have also relied on preventing manifest unfairness, general interests of justice, and the role of equitable remedies as the "conscience" of law.[23] The exact formulation of the doctrine remains debated.

This article focuses on cases that may proceed on legal theories of domestic torts and violations of CIL, as these are the primary viable legal approaches in Canada. The use of tort claims to seek recourse for actions of MNCs has garnered increased academic attention,[24] and tort theories have increasingly been chosen by plaintiffs as a legal vehicle in recent years,[25] including for human rights violations.[26] Next, violations of CIL are important to the discussion because of the recent landmark Supreme Court of Canada decision in *Nevsun*.[27] The majority not only recognized a cause of action within Canadian law for breaches of CIL, but also focused in their dicta on the significance of human rights law, stating that the "past 70 years have seen a proliferation of human rights law" that has "signified a revolutionary shift in international law to a human-centric conception of global order."[28] In *Nevsun*, the majority allowed plaintiffs' claims on the human rights prohibitions of forced labour, slavery, crimes against humanity,

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20 See Mohamed F Khimji & Christopher C Nicholls, "Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study" (2015) 41:1 Queen's LJ 207 at 213.

21 *Ibid* at 212.

22 *Ibid* at 215–16 (The term "agent" is defined vaguely in veil piercing cases, as courts rarely clarify whether they mean the legal definition of a principal-agent relationship, and they often appear to use the lay meaning of the word instead).

23 See *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2, DLR 34 (4th) 208 at para 14 [*Kosmopoulos*]; *Downtown Eatery (1993) Ltd v Ontario*, [2001] 54 OR (3d) 161, OJ No 1879 at para 36 [*Downtown Eatery*]; *Yaiguaje*, *supra* note 2 at para 113. See also Khimji & Nicholls, "Corporate Veil Reframed", *supra* note 18 at 408.

24 See Mark A Geistfeld, "The Law and Economics of Tort Liability for Human Rights Violations in Global Supply Chains" (2019) 10:2 J Eur Tort L 1; Carrie Bradshaw, "Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court" (2020) 32:1 J Envtl L 1 at 139; Milena Sterio, "Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act" (2018) 50 Case W Res J Intl L 127; Christopher W Peterson, "Piercing the Corporate Veil by Tort Creditors" (2017) 13:1 J Bus & Tech L. See also "Human Rights Violations in Global Supply Chains" (2019) 10:2 J Eur Tort L (The Journal of European Tort Law dedicated a special issue to this topic in August 2019).

25 See e.g. Richard Meeran, "Tort Litigation Against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States" (2011) 3:1 City U Hong Kong L Rev 1 at 1 ("Over the past 17 years, conventional tort litigation has been increasingly successful in holding multinational corporations … accountable for human rights violations …").

26 See Susana C Mijares Peña, "Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc" (2014) 5:1 Western J Legal Studies at 1, 12–18; Geistfeld, *supra* note 24 at 134–140; Khimji & Nicholls, "Corporate Veil Reframed", *supra* note 18 at 412–413.

27 See *Nevsun*, *supra* note 12.

28 *Ibid*.

and cruel, inhuman or degrading treatment to be tried in Canadian trial courts.[29] Thus, this article's policy arguments are accordingly tailored to these prominent legal vehicles.

Yaiguaje involves a discussion of corporate veil piercing at two different stages within Canadian law: the liability stage and the enforcement stage. The justices in the case distinguish between the earlier stage of imposing liability on a party through lifting the corporate veil, as opposed to the stage of enforcing a judgment where liability has already been proven.[30] The enforcement stage can involve either the enforcement of a domestic judgment, which is often automatic, or the enforcement of a foreign judgment, which is allowed under Canadian common law.[31] Canadian courts have generally adopted a liberal approach to enforcement of foreign judgments, which has been affirmed by the Supreme Court of Canada.[32] For both torts-based and CIL-based claims, corporate veil piercing is a method for attaching related company assets and providing ultimate relief. At the liability stage, corporate veil piercing occurs in some cases through courts directly imposing liability for a parent corporation for legal violations committed by or through a subsidiary.[33] At the enforcement stage, piercing the corporate veil would allow Canadian parent companies to pay out damages when its foreign subsidiaries are found liable for either domestic torts or CIL breaches, as applicable, in its local jurisdiction. *Yaiguaje* focuses on the enforcement stage.

3. CASE STUDY AND GOVERNANCE GAPS: *YAIGUAJE V CHEVRON*

Yaiguaje is a prototypical example of multinationals using the corporate form to escape liability and a fitting springboard for discussion of modernization. *Yaiguaje* provides a useful survey of both sides of the legal debate in Canada on the topic of corporate veil piercing, as the majority opinion and concurring judgment advance conflicting interpretations of the law, and the dissonance within the case has sparked scholarly debate. Further, even the *Yaiguaje* majority that dismissed the plaintiffs' case admitted that corporate veil piercing doctrine may and "likely will" evolve in the future.[34]

3.1. Factual Background: Human Rights Violations

The plaintiffs in the *Yaiguaje* case are Indigenous Ecuadorian individuals, representing over 30,000 community members, who sought recourse for extensive environmental pollution caused by a Texaco subsidiary from 1964 to 1992.[35] Texaco subsequently merged into Chevron Corporation, which is incorporated in the United States and has its head office in California.[36]

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29 *Ibid*.

30 See *Yaiguaje*, *supra* note 2 at para 94.

31 See Samaneh Hosseini & Zev Smith, "Litigation and Enforcement in Canada: Overview" (1 January 2020), online: *Thomson Reuters Practical Law* <practicallaw.thomsonreuters.com/7-502-0711>.

32 See *Yaiguaje SCC*, 2015 SCC 42, [2015] 3 SCR 69 [*Yaiguaje SCC*] [cited to SCR]. See also David Crerar & Kalie McCrystal, "Supreme Court of Canada Confirms Generous and Liberal Approach to the Recognition and Enforcement of Foreign Judgments" (2015) 3:4 Energy Reg Q 1.

33 See Tan Cheng-Han, Jiangyu Wang & Christian Hofmann, "Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives" (2019) 16:1 Berkeley Bus LJ 140 at 140–41.

34 See *Yaiguaje*, *supra* note 2 at para 83.

35 *Ibid* at paras 1, 8.

36 *Ibid* at para 2.

The environmental harms caused by the Texaco subsidiary are relatively uncontested, as the majority in *Yaiguaje* recognized that the facts demonstrated "lasting damages to [the Indigenous plaintiffs'] lands, their health, and their way of life . . . through no fault of their own."[37] NGOs have reported that the environmental damage includes destruction of previously vibrant biodiversity and abundant resources through water and soil pollution spanning over 450,000 hectares, the creation of over 800 hydrocarbon waste pits, and the dumping of over 60 million litres of waste water into Amazonian streams.[38] Independent studies published by the *London School of Hygiene and Tropical Medicine* and the *International Journal of Epidemiology* supported a link between the pollution and health risks to the peoples of the Ecuadorian Amazon, concluding that exposure to oil contaminants greatly exceeded internationally recognized safety limits and was linked to cancer in the community.[39]

The corporate structure of Chevron is also relevant for context. At the time of litigation, Chevron Canada was a wholly owned seventh level subsidiary of Chevron Corporation. Each corporation in between wholly owned 100 percent of the shares of the next subsidiary beneath it.[40] None of the intermediate entities between Chevron Canada and Chevron Corporation conducted business.[41] Management control lay with Chevron Corporation at the top, as the majority of the directors of the intermediate subsidiaries were employees of Chevron Corporation or Chevron Global Downstream LLC, which is also wholly owned by Chevron Corporation.[42]

3.2. Procedural History: International and Canadian Litigation

These environmental and human rights violations were litigated all over the world, including the United States, Ecuador, and Canada. The plaintiffs first filed a class action in the United States, but the case was dismissed on jurisdictional grounds after a decade of litigation.[43] This dismissal, affirmed by the United States Court of Appeals for the Second Circuit in 2002, was based on Chevron's argument of *forum non conveniens*, as the U.S. court held that Ecuador provided an adequate alternative forum and that the case should be heard in Ecuador instead.[44] The plaintiffs had originally argued their preference for U.S. courts, due to the lack of recognition of tort claims and certain procedural processes in Ecuador, but the defendants

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37 *Ibid* at para 8.

38 See Europe – Third World Center, Written Statement, A/HRC/26/NGO/74, "Human rights violations and access to justice for the victims of Chevron in Ecuador" (11 November 2014), online: <cetim.ch/human-rights-violations-and-access-to-justice-for-the-victims-of-chevron-in-ecuador/>; *Aguinda v Texaco Inc*, 1994 US Dist LEXIS 4718 (SDNY).

39 See Miguel San Sebastián & Juan Antonio Córdoba, translated by Kristen Keating, "'Yana Curi' Report: The impact of oil development on the health of the people of the Ecuadorian Amazon" (June 1999) at 13–14, online (pdf): *London School of Hygiene and Tropical Medicine* <chevroninecuador.org/assets/docs/yana-curi-eng.pdf>; Anna-Karin Hurtig & Miguel San Sebastián, "Geographical differences in cancer incidence in the Amazon basin of Ecuador in relation to residence near oil fields" (2002) 31:5 Intl J of Epidemiology 1021.

40 See *Yaiguaje ONSC 2017*, *supra* note 6 at 33.

41 *Ibid*.

42 *Ibid*.

43 See *Aguinda*, *supra* note 2 at 474. See also *Yaiguaje*, *supra* note 2 at para 3; Daniel, *supra* note 2.

44 See *Aguinda*, *supra* note 2 at 476.

ultimately succeeded in convincing U.S. courts that Ecuadorian courts were independent, impartial, and an adequate alternative forum for litigating the case.[45] In fact, Chevron and Texaco in turn filed at least 14 sworn affidavits praising the impartiality and competency of Ecuador's courts as part of its legal strategy to dismiss the case in the United States.[46] Chevron filed a memorandum promising to submit to jurisdiction in Ecuador, with assurances that it would "satisfy judgments that might be entered in plaintiffs' favor," but with a disclaimer that this was subject to New York's *Recognition of Foreign Money Judgments Act* (NY CPLR § 5304).[47] This key loophole provided an excuse for defendants to refuse to satisfy judgments that would fall under the NY CPLR § 5304 provision for non-recognition, based on a showing that Ecuadorian courts were not sufficiently impartial or did not comport with due process of law.[48] This demonstrates bad faith and goes against the principles of any justice system that purports to hold companies accountable. The multinational oil company first argued that the United States was improper, thereby obtaining a dismissal of the American case by arguing that Ecuador could be an impartial forum and promising to satisfy judgments there, while leaving a backup route for claiming that Ecuadorian courts were not properly impartial, and thereafter relying on this back door to refuse to enforce the Ecuadorian judgment in the United States.[49] At best, this was an MNC relying on a governance gap to obstruct access to justice. At worst, this was an MNC deciding from the beginning to never pay out any of its exploited proceeds to the victims and communities, and leading various courts on a wild goose chase for the appearance of propriety, without any real inclination to respect the rule of law.

Upon the U.S. courts' dismissal of the class action, a new action was brought by plaintiffs before Ecuadorian courts, which was followed by an eight-year trial and two appeals; this led to a USD$9.5 billion judgment against Chevron Corporation.[50] However, at that point, Chevron had quietly removed all assets from Ecuador, and there were no assets to be enjoined for the judgment.[51] Chevron again objected to jurisdiction, this time of the Ecuadorian courts, and refused to honor the Ecuadorian judgment. Even before the judgment was released, a Chevron spokesperson stated that the company would "fight this until hell freezes over. And then we'll fight it out on the ice."[52] Chevron stood by those words, and it refused to pay any part of the

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45 See *Aguinda v Texaco Inc*, 142 F Supp (2d) 534 at 538–39, 542 (SDNY 2001).

46 At least 14 separate legal affidavits were produced by Chevron or Texaco in support of their legal positions and praising Ecuador's courts for impartiality, filed from 1995 to 2000. "Examples of Chevron's High Praise of Ecuador's Courts" (Winter 2009), online (pdf): *Chevron in Ecuador: Clean Up Ecuador Campaign* <chevroninecuador.org/assets/docs/affidavit-packet-part2.pdf>.

47 Memorandum of Law from Texaco Inc to SDNY in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity (11 January 1999) in *Aguinda v Texaco Inc* and *Jota v Texaco Inc* at 16–17, online (pdf): <conjur.com.br/dl/peticao-chevron-apresentada-corte.pdf>. Chevron promises that "[i]f this Court dismisses these cases on forum non conveniens or comity grounds, Texaco will… accept service of process in Ecuador and not object to the civil jurisdiction of a court of competent jurisdiction in *Ecuador*… [and] Texaco will satisfy judgments that might be entered in plaintiffs' favor, subject to Texaco's rights under New York's Recognition of Foreign Country Money Judgments Act."

48 *New York's Recognition of Foreign Country Money Judgments Act*, NY CPLR § 5304 (2012).

49 *Ibid* at section 3.2.

50 See *Yaiguaje*, *supra* note 2 at para 3.

51 *Ibid* at paras 2, 4.

52 *Yaiguaje v Chevron Corp*, 2013 ONCA 758 at para 74 [*Yaiguaje Appeal*].

judgment to the affected Ecuadorian plaintiffs.[53] Chevron alternated between arguing that the Ecuadorian courts' judgments were "illegitimate," "unenforceable," and based on fraud by a corrupt Ecuadorian court.[54] After multiple proceedings in the United States, a district court held that the Ecuadorian judgment could not be enforced in the United States, though its judgment was not based on any fraudulent behaviour by the plaintiffs but a controversial finding of fraud by their counsel in the Ecuadorian proceedings, Steven Donziger.[55] Having no recourse in Ecuador or the United States, the plaintiffs next turned to Canada for judgment enforcement.[56]

In Canada, the case was filed in Ontario courts. The Ontario Superior Court of Justice stayed the action upon declaring that Ontario courts did not have jurisdiction.[57] However, the Court of Appeal for Ontario reversed the lower court's decision and affirmed the existence of jurisdiction, and it stated that plaintiffs should have an opportunity to enforce the Ecuadorian judgment in an appropriate jurisdiction where Chevron would have to respond on the merits, whereas an early stay of proceedings would be an "unsolicited and premature barrier" in a case that "cries out for assistance."[58] On appeal, the Supreme Court of Canada confirmed that Ontario courts had jurisdiction.[59] The Supreme Court stated that Canadian courts have adopted a "generous and liberal approach to the recognition and enforcement of foreign judgments" with respect to determining jurisdiction, as long as the foreign court has a "real and substantial connection with the litigants or with the subject matter" or the traditional bases of jurisdiction were satisfied.[60] The proceedings then returned to the Ontario Superior Court of Justice, where Justice Glenn Hainey granted defendants' motion for summary judgment, effectively putting

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53 See Daniel, *supra* note 2.

54 "Texaco/Chevron lawsuits (re Ecuador)" (last visited 11 Oct 2021), online: *Business & Human Rights Resource Centre* <business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1/>.

55 The judgment finding fraud on the part of Steven Donziger is highly contested and controversial, and multiple human rights groups and NGOs have expressed support for Donziger and against the ruling. See International Association of Democratic Lawyers, News Release, "Over 475 lawyers, legal organizations and human rights defenders support lawyer Steven Donziger" (18 May 2020), online: *International Association of Democratic Lawyers* <iadllaw.org/2020/05/over-475-lawyers-legal-organizations-and-human-rights-defenders-support-lawyer-steven-donziger/>; Frente de Defensa de la Amazonía, Press Release, "Amnesty International Demands Criminal Investigation of Chevron Over Witness Bribery and Fraud in Ecuador Pollution Litigation" (27 June 2019), online: *Frente de Defensa de la Amazonía* <makechevroncleanup.com/press-releases/2019/6/27/amnesty-international-demands-criminal-investigation-of-chevron-over-witness-bribery-and-fraud-in-ecuador-pollution-litigation>; Global Witness, Press Release, "Systematic Pursuit of NY Lawyer Steven Donziger Fails Basic Principles of Due Process - Global Witness to Monitor" (26 September 2018), online: *Global Witness* <globalwitness.org/en/press-releases/systematic-pursuit-ny-lawyer-steven-donziger-fails-basic-principles-due-process-global-witness-monitor/>; Rex Weyler, "Steven Donziger: The man who stood up to an oil giant, and paid the price" (26 February 2020), online: *Greenpeace International* <greenpeace.org/international/story/28741/steven-donziger-chevron-oil-amazon-contamination-injustice/>. See also *Yaiguaje*, *supra* note 2 at para 5.

56 See Alex Robinson, "Chevron Case Heads to Court of Appeal Again", *Law Times* (16 April 2018), online: <lawtimesnews.com/news/general/chevron-case-heads-to-court-of-appeal-again/263007>.

57 See *Yaiguaje v Chevron Corp*, 2013 ONSC 2527 [*Yaiguaje ONSC 2013*].

58 *Yaiguaje Appeal*, *supra* note 52 at paras 70, 72, 75.

59 See *Yaiguaje SCC*, *supra* note 32.

60 *Ibid* at 72.

a stop to plaintiffs' claims against Chevron Canada on non-jurisdictional grounds.[61] The appeal from this lower court went next to the Court of Appeal for Ontario.

3.3. Majority Decision of the Court of Appeal for Ontario

The majority judgment by the Court of Appeal for Ontario in *Yaiguaje* was decided by Justice C. William Hourigan and Justice Grant Huscroft.[62] This decision dealt with an appeal from the lower court's ruling on two issues: (1) whether the *Execution Act* permits enforcement of the Ecuadorian judgment on shares of Chevron Canada, and (2) in the alternative, whether the corporate veil should be pierced to permit enforcement of the Ecuadorian judgment on Chevron Canada's shares.[63] The previous lower court had ruled in the negative on both points.[64] The Court of Appeal dismissed the plaintiffs' appeals on both arguments, and it affirmed the lower court's judgment that the Ecuadorian judgment could not be enforced in Canada under either the *Execution Act* or through corporate veil piercing.

This article does not discuss the majority's decision on the first point, with regards to Canada's *Execution Act*, other than noting that the majority's position on the first point sparked controversy over whether shares indirectly owned by Chevron through a wholly owned sixth-level subsidiary should be able to be attached.[65] This result can be criticized based on arguments on the definition of ownership, but that is a longer discussion and may be addressed by legislative reform of the *Execution Act*.

In reaching their decision on the second point, the majority upheld the principle of corporate separateness,[66] refused to pierce the corporate veil, and relied on the stringent interpretation of the corporate veil piercing test established in *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co*.[67] Justice Hourigan, writing for the majority, emphasized that the *Transamerica* test only allows for corporate veil piercing in three limited circumstances:

> (1) When the court is construing a statute, contract or other document;
>
> (2) When the court is satisfied that a company is a 'mere facade' protecting its parent corporation, which must be demonstrated by fulfilling a two-factor test showing that:
>
> (i) There is complete control of the subsidiary, such that the subsidiary is

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61 See *Yaiguaje ONSC 2017*, *supra* note 6 at para 121.

62 See *Yaiguaje*, *supra* note 2 at para 1.

63 *Ibid* at para 7.

64 See *Yaiguaje ONSC 2017*, *supra* note 6.

65 See *Yaiguaje*, *supra* note 2 at paras 33, 62; Angela Swan, "The Elephant in the Room: How 'Piercing the Corporate Veil' Led the Court Astray in Yaiguaje v. Chevron Corporation" (30 April 2018), online: *Mondaq* <mondaq.com/canada/shareholders/696836/the-elephant-in-the-room-how-piercing-the-corporate-veil39-led-the-court-astray-in-yaiguaje-v-chevron-corporation>.

66 Corporate separateness refers to the principle that corporations are separate entities from their shareholders, or that parent companies are separate entities from its properly constituted subsidiaries. This means that a corporation's assets or a subsidiary's assets are its own, and those assets do not belong to related corporations, even if they are within the same family. See *Yaiguaje*, *supra* note 2 at para 57.

67 *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423, 1996 CanLII 7979 [*Transamerica*].

> the "mere puppet" of the parent corporation; and
>
> (ii) The subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity, or
>
> (3) When it can be established that the company is an authorized agent of its controllers or its members, corporate or human.[68]

The majority held that the second circumstance's two-factor "mere façade" test was not met. Firstly, Justice Hourigan stated that Chevron Corporation did not wield "sufficient control" over Chevron Canada to demonstrate complete control, and that he "need not consider that argument, as it is plain that the appellants cannot meet the second part of the conjunctive test."[69] On the second factor, Justice Hourigan stated that there were no allegations that Chevron Canada was incorporated for fraudulent or improper purposes, and that it had been incorporated over 50 years ago.[70] Justice Hourigan supported this decision with the fact that appellants had specifically pled that Chevron Canada did not engage in inappropriate conduct, and Justice Hourigan construed that as a complete bar to a request for corporate veil piercing.[71]

The majority stated that the Court of Appeal for Ontario has "repeatedly rejected an independent just and equitable ground" for piercing the corporate veil.[72] Justice Hourigan supported this argument with his contention that the Supreme Court of Canada "has protected the principle of corporate separateness without suggesting a standalone just and equitable exception," which the concurring opinion refutes.[73] Justice Hourigan refers to a decision where Justice Cromwell had written that "separate corporate existences must be respected . . . unless there is a legal basis for ignoring separate corporate personality," but neither Justice Cromwell nor Justice Hourigan tackles what these legal bases for ignoring corporate separateness may be.[74] The second cited Supreme Court case merely states that it is the "general rule that the law does not pierce the corporate veil," but it does not actively preclude exceptions to the rule.[75]

The majority decision rejected plaintiffs' argument that *Transamerica* is not applicable in the enforcement context, as the plaintiffs argued that the original case was decided at the liability stage and should be limited to such.[76] The majority rejected this argument simply by stating that it "cannot be accepted" because it would allow "a judgment against any corporation [to] be enforced against the assets of any other related corporation," which the majority admits is a policy argument.[77] The majority did not consider the possibility that a new or adapted test

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68 See *Yaiguaje*, *supra* note 2 at paras 65–66.

69 *Ibid* at para 74.

70 *Ibid*.

71 *Ibid*.

72 *Ibid* at para 67.

73 *Ibid* at paras 68, 92–118.

74 *Ibid* at para 68 (citing *Sun Indalex Finance v United Steelworkers*, 2013 SCC 6 at para 238 and citing *Continental Bank Leasing Corp v Canada*, 1998 CanLII 794 (SCC), [1998] 2 SCR 298 at paras 108–12).

75 *Continental Bank Leasing Corp v Canada*, [1998] 2 SCR 298 at paras 108–12, 1998 CanLII 794.

76 See *Yaiguaje*, *supra* note 2 at para 75.

77 *Ibid* at paras 75–76.

could be formulated for the enforcement stage, which could introduce structure and guidance, but it appeared to assume that absent *Transamerica*, limited liability would be lawlessly eviscerated.[78] Secondly, the majority argued that rejecting *Transamerica* at the enforcement stage would come "dangerously close" to the group enterprise theory of liability, whereby all related corporations in a "group" are responsible for each other's debts; the majority stated that group enterprise theory has consistently been rejected by the Court of Appeal for Ontario.[79] Here, the majority again did not distinguish between the fact that *Transamerica* delineates exceptions to a rule, and that the *Yaiguaje* plaintiffs were not attacking the rule, but were arguing for equitable exceptions similar to the structure of the *Transamerica* exceptions. This is a major point of contention between the majority and concurring judgment.

3.4. Concurring Opinion and Legal Critiques

The concurring opinion in *Yaiguaje* was written by Justice Ian V.B. Nordheimer.[80] Justice Nordheimer concurred with the result that the majority reached, agreed with the majority's analysis of the *Execution Act*, and disagreed with how the majority reached its decision on the plaintiffs' alternative argument involving corporate veil piercing doctrine.[81] Specifically, Justice Nordheimer argues that there is an equitable basis for corporate veil piercing and that the *Transamerica* test should not be applied at the enforcement stage.[82] Justice Nordheimer contends that the majority should have recognized that there are limited and rare instances in which the corporate veil should be pierced for equitable reasons at the enforcement stage, but he concurred with the result in stating that this specific case did not qualify as one of those rare situations, due to the possibility of fraud in the Ecuadorian judgment.[83]

On the enforcement argument, Justice Nordheimer states that he is "not satisfied that the Transamerica test can simply be lifted out of the liability context and then dropped into . . . the judgment enforcement context."[84] Justice Nordheimer distinguishes between the liability stage and the enforcement stage: the liability stage deals with imposing liability on a party through lifting the corporate veil, while the enforcement stage involves enforcing a judgment where liability has already been proven.[85] Further, Justice Nordheimer argues that the *Transamerica* test neither replaced the principle of corporate separateness nor foreclosed other bases upon which the corporate veil may be pierced.[86]

Next, Justice Nordheimer engages in a lengthy discussion on the role that equity plays in corporate veil piercing, as he argues that there are equitable exceptions beyond *Transamerica*.[87] Justice Nordheimer's arguments on equity are largely situated within the enforceability context.

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78 *Ibid* at para 75.

79 *Ibid* at para 76.

80 *Ibid* at para 92.

81 *Ibid*.

82 *Ibid*.

83 *Ibid* at para 117.

84 *Ibid* at para 95.

85 *Ibid* at para 94.

86 *Ibid* at para 101.

87 *Ibid* at paras 101–16.

This discussion of a separate equitable basis will be divided into four main takeaways.

Firstly, Justice Nordheimer refutes the majority's contention that the Court of Appeal for Ontario has "repeatedly" and decisively rejected an "independent just and equitable ground for piercing the corporate veil in favour of the [*Transamerica* test]."[88] The concurring judgment points out that the majority only cited three decisions in support of this broad contention, and the concurring judgment further notes that those three cases do not fully support the majority's position and are limited to the liability context, as opposed to the enforcement context.[89]

Secondly, the concurring judgment disagrees with the majority on their analysis of the plaintiffs' cases supporting corporate veil piercing, as the concurring judgment instead states that those cases successfully demonstrate that the Court of Appeal has supported the existence of an independent equitable basis for piercing the corporate veil, outside of the three circumstances identified in *Transamerica*. In particular, Justice Nordheimer emphasizes that *Downtown Eatery (1993) Ltd v Ontario* was an Court of Appeal for Ontario case where the corporate veil was pierced for equitable considerations and to prevent "manifest unfairness,"[90] despite an express finding that the corporate structure was not itself fraudulent.[91] Recall that a finding of fraudulent corporate structure is required to satisfy the second circumstance detailed in the *Transamerica* test.[92] This demonstrates that the Court of Appeal was willing to look outside of the *Transamerica* test. Furthermore, the concurring judgment points out that the Court of Appeal in *Downtown Eatery* stated that the law should "be vigilant" to scrutinize even legally permissible corporate arrangements to ensure that they do not "work an injustice,"[93] which Justice Nordheimer interprets as an "invocation of a general equitable jurisdiction" to ensure enforcement of valid judgments.[94] Additionally, the concurring judgment states that *Downtown Eatery* is more relevant than *Transamerica* as it was a case in the debt enforcement context, similar to *Yaiguaje*, and post-dates *Transamerica*.[95]

Thirdly, the concurring judgment discusses the validity and importance of courts' equitable power to pierce the corporate veil, as Justice Nordheimer notes that the prevailing role of equity is supported by both common law and statutory powers.[96] Justice Nordheimer writes that "[i]t seems clear that the genesis of the courts' corporate veil piercing power stems from its equitable jurisdiction," with support from Court of Appeal for Ontario cases.[97] The concurring judgment also elaborates on the policy-based importance of equity as an integral part of the legal system, as it notes that commentators have described it as the "conscience of law," as "[flowing] from

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88 *Ibid* at para 100.

89 *Ibid* at paras 100–01.

90 *Ibid* at para 102.

91 *Ibid* at para 106.

92 See *Transamerica*, *supra* note 67.

93 *Downtown Eatery*, *supra* note 23.

94 *Yaiguaje*, *supra* note 2 at para 107.

95 *Ibid* at para 108.

96 *Ibid* at paras 113–14.

97 *Ibid* at para 113 (citing *A-C-H International Inc. v Royal Bank* (2005), 2005 CanLII 17769 (ON CA), 254 DLR (4th) 327 (Ont CA) at para 29 and *Burke Estate v Royal & Sun Alliance Insurance Co. of Canada*, 2011 NBCA 98, 381 NBR (2d) 81 at paras 54, 58).

the need to ameliorate the harshness of positive law in principled circumstances," and as a way to "harmoniz[e] law with the needs . . . of evolving social structures."[98] Justice Nordheimer also points out that equity takes precedence over the common law, and that this is not a contested point in law; Justice Nordheimer quotes *Bathgate v National Hockey League Pension Society*, which stated that it is "[trite] law that where common law and equity conflict, equity is to prevail."[99] In addition to the common law, the concurring judgment points out that the *Courts of Justice Act* expressly entrusts equitable powers to both the Court of Appeal for Ontario and the Superior Court of Justice.[100]

Fourthly, having established Canadian courts' power to pierce the corporate veil, Justice Nordheimer next argues that there must be stronger language in the common law or a statute to displace or limit this equitable power.[101] As part of this analysis, Justice Nordheimer refers to two Supreme Court of Canada cases. The concurring judgment emphasizes that Justice Wilson in *Kosmopoulos v Constitution Insurance Co* stated that she "[had] no doubt that theoretically the veil could be lifted in this case to do justice."[102] Justice Nordheimer disagrees with the majority's interpretation of Justice Wilson's statements. While both the majority and concurring judgment agree that Justice Wilson was expressing concern about the lack of consistent corporate veil piercing principles, the majority had additionally implied that *Transamerica*, when it later came down, should be assumed to both fill this gap and overrule the previous state of the doctrine, wherein the corporate veil was lifted when it was "too flagrantly opposed to justice."[103] The majority arguably does not provide enough support for its assumption that *Transamerica*, which is an Ontario Superior Court of Justice case, precludes all other equitable bases for corporate veil piercing;[104] this is the position that Justice Nordheimer takes as he states that he would require "much stronger language in the jurisprudence" than that offered up in *Transamerica* to displace the courts' equitable power to pierce the corporate veil.[105] To support his argument, Justice Nordheimer also referred to the Supreme Court of Canada's judgment in *Bazley v Curry*, written by Justice Beverley McLachlin, where the majority imposed vicarious liability to override the principle of corporate separateness, and based this decision on policy considerations including the need for "a just and practical remedy to people who suffer as a

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98 *Ibid* (citing Leonard I. Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016) 2:2 Can J Comp Cont L 497 at 503–04).

99 *Ibid* at para 114 (quoting *Bathgate v National Hockey League Pension Society*, 1992 CanLII 7525 (ON SC), 11 OR (3d) 449 (Gen Div) and noting that it was cited with approval by the Supreme Court of Canada in *Schmidt v Air Products of Canada Ltd*, 1994 CanLII 104 (SCC), [1994] 2 SCR 611 at 641.

100 *Ibid*. See also *Courts of Justice Act*, RSO 1990, c C-43.

101 See *Yaiguaje*, *supra* note 2 at para 115.

102 *Kosmopoulos*, *supra* note 23 at para 12.

103 *Ibid*.

104 The support provided by the majority for this assumption is that certain Court of Appeal for Ontario decisions have used Transamerica over an independent equitable test, that the Supreme Court of Canada has been silent, and that the Transamerica decision should not be taken lightly because it offers clarity and synthesis. While valid points, this is not the be-all-end-all for the precedential value of a single case. See *Yaiguaje*, *supra* note 2 at paras 67–71.

105 *Ibid* at para 115.

consequence of wrongs perpetrated."[106]

3.5. Analysis and Potential for Modernization

This section will discuss the relevance of the concurring opinion's critique of *Yaiguaje* and provide analyses of the case's position within broader Canadian jurisprudence, with a focus on how the opinion does not shut the door on corporate veil piercing but instead reveals cracks in the doctrine.

Overall, the concurring opinion presents a thorough legal critique of the majority's interpretation of corporate veil piercing, and it leaves the door open for future Canadian courts to modernize the corporate veil piercing doctrine. As a starting point for reforming corporate veil piercing, it is notable that the concurring opinion used arguments grounded in both common law and statutory authority to disagree with how the majority limited corporate veil piercing to the three *Transamerica* circumstances, including differing interpretations of Court of Appeal for Ontario and Supreme Court of Canada cases relied on by the majority.[107] In combination with the debate between the justices, the majority's admission that the doctrine may evolve, and the favourable attention that the concurring judgment has generated from legal commentators,[108] this creates space in the law for the majority's interpretation of the *Transamerica* test to be overruled by future Canadian courts. At the very least, these factors combine to demonstrate that the law should not be viewed as completely settled.

Furthermore, the concurring judgment argues that the majority overstates the applicability of Transamerica. For example, the concurring judge points out that the majority goes too far in their "broad proposition" that *Transamerica* completely replaces an independent just and equitable ground, and instead proposes that *Transamerica* does not foreclose other bases for corporate veil piercing.[109] Extending the concurring judge's argument, this shows that the majority should have instead construed *Transamerica* as a delineation of certain exceptions to the principle of corporate separateness, as opposed to rewriting the rule. Under this construal,

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106 See *Bazley v Curry*, [1999] 2 SCR 534 at para 30, 1999 CanLII 692.

107 See *Yaiguaje*, *supra* note 2 at paras 92–117.

108 Peter S Spiro, "Piercing the Corporate Veil in Reverse: Comment on Yaiguaje v. Chevron Corporation" (2019) 62 Can Bus LJ 231 at 246 (Arguing that the dissenting judge correctly noted that the precedents relied on by the majority were "decisions respecting liability, not judgment enforcement decisions."); Jason MacLean, "The Political Reality of Corporate Law: Yaiguaje v Chevron Corporation" (2020) 62:3 Can Bus LJ 351 at 358 ("In a clear and compelling dissent, Nordheimer J.A. rejects the majority's legal formalism.") [Maclean, "Political Reality"]; Andrew Kalamut & Pippa Leslie, "Yaiguaje v. Chevron Corporation - The Ontario Court of Appeal Does Not Pierce the Corporate Veil, but the Concurring Minority Questions the Principle of Corporate Separat" (31 May 2018), online: *McCarthy Tetrault* <mccarthy.ca/en/insights/blogs/mining-prospects/yaiguaje-v-chevron-corporation-ontario-court-appeal-does-not-pierce-corporate-veil-concurring-minority-questions-principle-corporate-separat> (Stating that the dissent "leave[s] the door open for future debate as to whether an independent 'just and equitable ground' for piercing the corporate veil is available to parties looking to enforce both foreign and domestic judgments against related corporations."); Chloe A Snider, "The latest development in *Yaiguaje v. Chevron Corporation* – The Court of Appeal for Ontario refuses to pierce the corporate veil" (29 June 2018), online: *Dentons* <dentons.com/en/insights/alerts/2018/june/27/the-latest-development-in-yaiguaje-v-chevron-corporation> ("the concurring judgment by Justice Nordheimer may someday provide a springboard for expanding the role of equity in the test for lifting the corporate veil").

109 See *Yaiguaje*, *supra* note 2 at paras 100–101.

the absence of *Transamerica* would not be the absence of any rule at all, as the majority had warned against; instead, this absence would return the doctrine to a state where limited liability is a default rule with equitable exceptions. This helps refute the majority's underlying assumption that any equity-based exception outside of *Transamerica* would completely destroy the rule of corporate separateness, when in fact equity should be seen as a way to create just and fair exceptions to that rule, as has always been its place in the law.

Another important distinction is the majority opinion's selection of the *Transamerica* test as the rule for corporate veil piercing, as opposed to another strain of thought in the Supreme Court of Canada's *Kosmopoulos* judgment. The *Kosmopoulos* judgment supports the existence of a standalone equitable basis for corporate veil piercing, especially for "third parties who would otherwise suffer as a result of the choice" of corporations to incorporate, with room for these specific instances justifying veil piercing to be built out in the future.[110] This remains a route that future Canadian courts may take in delineating instances where corporate veil piercing may justifiably be applied, and exceptions to limited liability may be read into corporate veil piercing doctrine through reference to the *Kosmopoulos* line of thought of lifting the veil to "do justice."[111]

Stepping away from the details of the judgment, another important note is that the justices may have been more reticent to address this issue in *Yaiguaje* since the Canadian entity in that case, Chevron Canada, was not the parent company of the original offending organization. Instead, the Texaco subsidiary that caused environmental damage in Ecuador later merged into Chevron Corporation, which is the parent company of Chevron Canada; in effect, Chevron Canada and the Texaco subsidiary were sister companies, as opposed to a parent-subsidiary relationship. Accordingly, it may be easier for a future court to recognize an equitable exception for corporate veil piercing when the Canadian entity at issue is the parent company, instead of a sister company, as parent companies are likely to have more control over operations and decisions for undercapitalization, and parent companies may be more reasonably attributed moral blame and normative obligations for accountability, as discussed in Section 4. Thus, courts faced with the question of whether corporate veil piercing should be applied against a specific multinational corporate group should consider whether it is appropriate to lift Justice Hourigan's construction of corporate veil piercing doctrine from the sister company context of *Yaiguaje* to a parent-subsidiary context. For example, Justice Carole J. Brown in *Choc v Hudbay*, while not explicitly citing *Yaiguaje*, stated a similar construction of the basic corporate veil piercing test in her 2013 Superior Court of Justice opinion.[112] The case has not yet been adjudicated on the merits, but an eventual consideration of the *Choc* plaintiffs' corporate veil piercing claim should arguably limit its reliance on *Yaiguaje*, due to the differences between a sister company context and a parent-subsidiary context.

In discussing veil piercing in the Canadian MNC accountability context, a relevant

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110 *Kosmopoulos*, *supra* note 23 at headnote ("The corporate veil should not be lifted here, even though *it theoretically could be lifted to do justice*. Those who have chosen the benefits of incorporation must bear the corresponding burdens, and if the veil is to be lifted, it should only be done *in the interests of third parties who would otherwise suffer* as a result of the choice" [emphasis added]). See also MacLean, "Political Reality", *supra* note 108 at 356.

111 See *Kosmopoulos*, *supra* note 23 at para 12.

112 See *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 at paras 45–49 [*Choc*].

analytical comparison should be made between piercing of the corporate veil and direct negligence claims. Generally, Canadian MNC accountability cases involve either direct negligence, corporate veil piercing, or both. While direct negligence claims have received increasing attention in recent Canadian cases, its place in Canadian doctrine remains unclear, as one high-profile direct liability case was settled out of court without reaching a decision on the merits, and another is still on-going.[113] Canadian courts have made solid progress in allowing direct negligence claims to proceed against parent companies, as lower courts and courts of appeal have dismissed motions to strike direct negligence claims in cases against Canadian multinationals.[114] However, it remains to be seen what the scope of success of these direct negligence claims would be in a case that reaches a decision on the merits. Even if direct negligence claims end up providing a path for remedy for plaintiffs, corporate veil piercing will be an important alternative for enforcing judgments that have been set out by foreign courts against subsidiaries of Canadian multinationals, such as the Ecuadorian court judgment in *Yaiguaje*, and in order to leave room for the development of comity and respect for foreign courts.[115] For now, corporate veil piercing should be considered alongside direct negligence claims, and many of the policy considerations set out in this article support both legal tools. As both legal theories are often pled in addition or in the alternative, corporate veil piercing remains a valuable option and method for strengthening Canadian courts' oversight over multinationals abroad.

In conclusion, the legal debate between the *Yaiguaje* majority and concurring judgment demonstrates that the state of corporate veil piercing doctrine is far from settled, and the accompanying public discourse and academic debate shows that there is room for the doctrine to be reformed.

4. THE CASE FOR MODERNIZATION

A threshold question is whether there is an impetus for a modernization and reformulation of corporate veil piercing, even if there exists a governance gap and room in Canadian doctrine. This section first argues that there is a strong socio-political impetus for reforming corporate accountability in Canada in its judicial mechanisms. Next, this section will demonstrate the viability of a court-based judicial remedy through corporate veil piercing, with guidance for an

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113 *Garcia* was settled outside of court (*supra* note 7), and *Choc* is ongoing (*supra* note 112). A similar argument applies to intentional tort claims framed in customary international law, which are now allowed in Canada due to the Supreme Court of Canada judgment in *Nevsun* (*supra* note 11); legal observers should keep an eye on how expansive CIL intentional torts against multinationals will be in an eventual decision on the merits, as *Araya v Nevsun* was settled out of court. "Amnesty International Applauds Settlement in Landmark Nevsun Resources Mining Case" (25 October 2020), online: *Human Rights Conern Eritrea* <hrc-eritrea.org/amnesty-international-applauds-settlement-in-landmark-nevsun-resources-mining-case/>.

114 See *Choc*, *supra* note 112; *Garcia*, *supra* note 7. See also *Nestlé USA Inc v Doe*, 416 US 19 (2021) (Brief of International Law Scholars, Former Diplomats, and Practitioners as *Amici Curiae* in Support of Respondents at 15–16).

115 See MacLean, "Political Reality", *supra* note 108 at 365, for a critique of the *Yaiguaje v Chevron* judgment as reflecting an underlying political reality of placing greater weight on a U.S. lower court's decision compared to the highest court of Ecuador. The article argues that the Court of Appeal for Ontario skews its legal arguments with bias by focusing on the U.S. courts' controversial determination of alleged fraud and ignoring the determination of multiple Ecuadorian court judgments against Chevron, including the Ecuadorian Constitutional Court.

economically balanced exception for veil piercing.

4.1. Socio-Political Impetus for Improving Access to Remedy

Canada's endorsement of international initiatives that promote access to remedy and corporate accountability provide an initial impetus for Canadian institutions to put their weight behind such rhetoric by taking action on effective corporate accountability. In addition, this section will discuss calls from legal scholars for improving access to remedy.

Within Canada, the debate over transnational corporate accountability gathered steam in 2005 with the publication of the Canadian Parliament's Standing Committee on Foreign Affairs and International Trade's adoption of a report entitled *Mining in Developing Countries – Corporate Social Responsibility* (SCFAIT Report), which was produced by its Subcommittee on Human Rights and International Development. [116] The Subcommittee considered evidence related to the activities of the Canadian extractive sector abroad, including in Africa, Asia, and Latin America, and concluded that it was "[c]oncerned that Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples."[117] The Subcommittee urged Canada to develop "clear legal norms" to ensure that Canadian multinationals are held accountable when there is evidence of environmental or human rights violations.[118] While the Paul Martin government ultimately rejected most of the SCFAIT Report's recommendations, the government's response also stated that "Canadian corporations or their directors and employees *may* be pursued in Canada for their wrongdoing in foreign countries," though this appears to have been more of a statement of rhetoric than a promise of reform.[119] However, much has changed since the Martin government's response in 2005, in the direction of increasing Canadian support for the United Nations' Guiding Principles on Business and Human Rights ("UNGPs").

The UNGPs are a key international initiative promoting corporate accountability and access to remedy for business-related human rights abuses. The UNGPs were unanimously endorsed by the United Nations Human Rights Council in 2011.[120] Canada has been generally supportive of the UNGPs, with increased support in recent years. Canada was an initial co-sponsor of the resolution of the United Nations Commission on Human Rights that appointed John G. Ruggie to his mandate as the UN Special Representative for Business and

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116 See House of Commons, *Fourteenth Report: Mining in Developing Countries - Corporate Social Responsibility* (June 2005) (Chair: Bernard Patry) ["*SCFAIT Report*"]; Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 Can YB Intl Law 51 at 51.

117 *SCFAIT Report*, *supra* note 116.

118 *Ibid* at 3.

119 Canada, Department of Foreign Affairs and International Trade, *Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade: Mining in Developing Countries - Corporate Social Responsibility*, 8512-381-179 (Ottawa: October 2005) at 10, online (pdf): <https://miningwatch.ca/sites/default/files/scfait_response_en.pdf>.

120 See Beata Faracik, "Implementation of the UN Guiding Principles on Business and Human Rights" (2017) at 8, online (pdf): *European Parliament* <europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf>.

Human Rights, who then drafted the UNGPs as part of this mandate.[121] In November 2014, Canada announced an updated corporate social responsibility strategy, entitled *Doing Business the Canadian Way: A Strategy to Advance CSR*[122] *in Canada's Extractive Sector Abroad* (2014 CSR Strategy).[123] In its 2014 CSR Strategy, the Canadian government explicitly integrated the UNGPs, and the strategy stated that "Canada has supported work to develop the [UNGPs] since 2005 and continues to promote and align its efforts with them."[124] The strategy and its references to the UNGPs have been integrated into official Final Statements issued by Canada's National Contact Point, Export Development Canada's 2019 human rights policy, and the Canadian Ombudsperson for Responsible Enterprise's central mandate, which together lend strong credibility to the initiatives.[125]

A closer look at the UNGPs is thus warranted, to investigate its recommendations on MNC accountability. The principles are divided into three main sections, addressing: (i) state duty to protect human rights, (ii) corporate responsibility to respect human rights, and (iii) access to remedy, thereby earning its name as the "Protect, Respect and Remedy" framework.[126] In the first foundational principle under the State duty to protect human rights is the obligation to take "appropriate steps to prevent, investigate, punish and redress" human rights abuse within their jurisdiction through "effective policies, legislation, regulations and adjudication."[127] Next, in the substantial section on access to remedy, States are called on to take appropriate steps, including judicial measures, to ensure that individuals have access to effective remedy when violations occur within a State's jurisdiction. Jurisdiction is a more expansive concept than land boundaries; for example, it would include Canadian multinational corporations that are subject to Canadian regulation and oversight even while abuses occur abroad, as seen in *Nevsun*.[128] The role of courts and judicial mechanisms is a key operational branch for implementing the principles, as the UNGPs state that "[e]ffective judicial mechanisms are at the core of ensuring access to remedy," including imbuing judicial mechanisms with the "integrity and ability to

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121 See Seck, *supra* note 116 at 52.

122 CSR is the abbreviation for Corporate Social Responsibility.

123 See Government of Canada, News Release, "Canada's Renewed CSR Strategy: Doing Business the Canadian Way: A Strategy to Advance CSR in Canada's Extractive Sector Abroad" (14 November 2014), online: *Government of Canada* <canada.ca/en/news/archive/2014/11/canada-renewed-csr-strategy-doing-business-canadian-way-strategy-advance-csr-canada-extractive-sector-abroad.html>.

124 Canada, Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance CSR in Canada's Extractive Sector Abroad* (Ottawa: Global Affairs Canada, 2014) at 6, online (pdf): <international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf>.

125 See e.g. "Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region" (last modified 13 May 2021), online: *Global Affairs Canada* <international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>; , "Final Statement of the Canadian National Contact Point on the Notification dated March 1, 2011, concerning the Porgera Joint Venture Mine in Papua New Guinea, pursuant to the OECD Guidelines for Multinational Enterprises" (last modified 16 January 2014), online: *Global Affairs Canada* <international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-declaration.aspx?lang=eng>.

126 See UNGP, *supra* note 10 at 1.

127 *Ibid* at 3.

128 See *Nevsun*, *supra* note 12.

accord due process."[129] Even more clearly, the UNGPs single out inappropriate use of corporate groups as a legal barrier to justice, including where distribution of legal responsibility "among members of a corporate group… facilitates the avoidance of appropriate accountability."[130] In addition, the principles note the risk of host State courts being inaccessible to claimants, which again lends weight to addressing the legal barriers of claimants seeking justice in the home States of large multinational corporations.[131]

Thus, the UNGPs provide strong policy reasons for home States to take on responsibility for strengthening corporate accountability frameworks.[132] As the UNGPs center around the strength of domestic courts, these principles support the argument that Canadian courts are a suitable avenue for reform. Justice Ian Binnie has interpreted the UNGPs' "state duty to protect" to mean that "a concerted effort be made to eliminate [arbitrary] barriers to recovery" within civil litigation, while pointing out that common-law obstacles to corporate veil piercing "may inappropriately shield companies from liability in respect of subsidiaries."[133]

Another international initiative endorsed by Canada is the United Nations' Sustainable Development Goals ("SDGs") and 2030 Agenda for Sustainable Development, which contain themes of inclusive development and access to remedy.[134] The Government of Canada has issued multiple publications tracking its adoption and implementation of the SDGs.[135] This includes the Voluntary National Review of 2018, where the Government of Canada placed a strong emphasis on "leaving no one behind," in order to build a "more inclusive… world," promote sustained and inclusive development, support human rights around the world, and foster inclusive industrialization.[136] Canada's review touches on accountability for large multinationals to the extent of discussing their corporate tax avoidance strategies, and a requirement for multinationals in Canada to file country reports on global allocation of income.[137] However, inclusive development while "leaving no one behind" cannot occur if local communities such as those in the *Yaiguaje* case are left behind. In addition, the text of SDG 16 includes promoting "access to justice for all" and "effective, accountable and inclusive

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129 UNGP, *supra* note 10 at 28.

130 *Ibid* at 29. Other relevant sections of the UNGPs include section II.13 stating that business enterprises have a "responsibility to… respect human rights… regardless of their size, sector, operational context, ownership and structure", and section II.23 stating that "[i]n all contexts, business enterprises should… seek ways to honour the principles of internationally recognized human rights."

131 *Ibid* at 28–29.

132 *Ibid* at 3, 28.

133 See Justice Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report", *The Brief* 38:4 (2009) 44 at 50.

134 "The 2030 Agenda for Sustainable Development, Government of Canada" (20 December 2018), online: *Government of Canada* <international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/agenda-programme.aspx?lang=eng>.

135 See e.g. "Towards Canada's 2030 Agenda National Strategy", *supra* note 9; "Canada's Implementation of the 2030 Agenda for Sustainable Development: Voluntary National Review" (2018) at 1, 4, 51, 70, 75, 81, online (pdf): *Government of Canada* <sustainabledevelopment.un.org/content/documents/20312Canada_ENGLISH_18122_Canadas_Voluntary_National_ReviewENv7.pdf>, [Canada's Voluntary National Review].

136 Canada's Voluntary National Review, *supra* note 135 at 4.

137 *Ibid* at 121.

institutions at all levels" through the rule of law, reducing illicit financial flows, and increasing transparency.[138]

However, legal scholars have pointed out that Canada often falls short of its lofty international promises of justice for all and access to remedy, which includes criticisms of unlimited limited liability for corporate groups.[139] Former Supreme Court of Canada Justice Ian Binnie has advocated for closing the governance gap for multinational companies, stating that "courts [in common law countries] could do much more to address this problem of the corporate veil and the corporate pyramid."[140] Relatedly, the use of court-based remedies to increase MNC accountability is of increasing importance due to the recent Supreme Court of Canada judgment in *Nevsun*, where the Court recognized a cause of action in Canadian law for CIL breaches and repeatedly emphasized, in *obiter dicta*, the importance of applying international human rights norms to private actors.[141]

In conclusion, improvement of corporate veil piercing doctrine to remove access barriers in the judicial system would be in line with Canada's international endorsements of the UNGPs and its planned implementation of all seventeen SDGs while "leaving no one behind." The Canadian judicial system is faced with the question of how to improve oversight over multinationals abroad, and corporate veil piercing provides one such solution.

4.2. Economic Case for Corporate Veil Piercing

Upon recognition of a governance gap and an impetus for Canada to improve its corporate accountability framework, as demonstrated in *Yaiguaje* and in Canada's international endorsements, the next step will be to choose a remedial measure for this gap. This article recognizes that there are multifold legal options for mending the gap, including but not limited to legislation to expand extraterritorial liability over subsidiaries, legislation to create an explicit duty for parent companies, and judicial expansion of theories of direct negligence. This section will focus on guiding theories for modernizing corporate veil piercing, but many of the policy considerations are equally valid for other mechanisms.

4.2.1. Evolving Reality of Multinational Corporation Structures

The global economy has experienced dramatic shifts since the advent of limited liability and a limited interpretation of corporate veil piercing. Instead, the current economic reality features the proliferation of MNCs and complicated parent-subsidiary structures, which were not the original target of protection for corporate veil piercing. Thus, the rules associated with limited liability must be modernized in accordance with these market changes.

Limited liability was generally available in English law beginning in the mid-1800s and

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138 Transforming our world, *supra* note 10 at 25.

139 "Unlimited limited liability" shall be defined for the purposes of this article as the situation where limited liability is afforded to corporate groups without any or near zero appropriate safeguards.

140 "Ian Binnie on the Corporate Crimes Principles and Bridging the Impunity Gap" (4 October 2017), online: *Corporate Crime Reporter* <corporatecrimereporter.com/news/200/ian-binnie-corporate-crimes-principles-bridging-impunity-gap/>.

141 See *Nevsun*, *supra* note 12.

early law provided limited liability for companies of not less than 25 shareholders.[142] In Canada, limited liability was formally adopted by acts in 1970 and 1975.[143] The *Transamerica* corporate veil test that the *Yaiguaje* majority relies on was created in 1996.[144] In contrast, the proliferation of MNCs and their multilayered subsidiary structures occurred more recently. In 1990, there were about 30,000 MNCs in the whole world.[145] This number expanded to 63,000 by 2000 and 82,000 by 2009.[146] In 2016, there were more than 100,000 multinationals, which collectively had over 900,000 subsidiaries or other affiliated companies.[147] The growth of MNCs over the past three decades has transformed the global economy, international relations, and corporate structures.[148]

Leading scholars have repeatedly pointed out that limited liability originates from a different time, when corporations were not allowed to hold shares in other corporations.[149] Limited liability was originally used to protect individual shareholders from paying for the debts of the entire corporation in which they invested; for example, an investor who buys $100 worth of stock would not be liable for more than that $100.[150] This rationale fails in the context of corporate groups with majority owned entities,[151] where a parent shareholder has control over subsidiaries. Limited liability was arguably justified as a tool for creating economic efficiency through encouraging individual to participate and invest in the economy,[152] but this does not necessarily apply to corporate shareholders within the same corporate group,[153] as they do not own stock under the same calculus. Parent entities own shares in a subsidiary with a wider conception of potential successes and business rewards, beyond share value. Subsidiaries may be created to advance a regional or transactional interest of a corporation, such as shelf entities or special purpose vehicles that are used as temporary legal structures, with control remaining in a parent entity. In addition, sister companies may own minority percentages in other entities within the same corporate group for tax, regulatory, or other structuring purposes. However,

142 See *The Limited Liability Act 1855* (UK), 18 & 19 Vict, c 133, s I.

143 See *The Business Corporations Act*, SO 1970, c 25; *Canada Business Corporations Act*, RSC 1985, c C-44.

144 See *Transamerica*, *supra* note 67.

145 See Vivian Grosswald Curran, "Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations" (2016) 17:2 Chicago J Intl L 403 at 407.

146 *Ibid.*

147 *Ibid*.

148 See e.g. In Song Kim & Helen V Milner, "Multinational Corporations and their Influence Through Lobbying on Foreign Policy" in C Fritz Foley et al, eds, *Global Goliaths: Multinational Corporations in a Changing Global Economy* (Washington, DC: The Brookings Institution, 2021); RB Cohen, "The New International Division of Labor, Multinational Corporations and Urban Hierarchy" in Michael Dear & Allen J Scott, eds, *Urbanization and Urban Planning in Capitalist Society* (New York: Routledge, 2018); Marcos Vinícius Isaias Mendes, "The Limitations of International Relations Regarding MNCs and the Digital Economy: Evidence from Brazil" (2020) 33:1 Rev Political Economy 67.

149 See Anil Yilmaz Vastardis & Rachel Chambers, "Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?" (2018) 67:2 Intl & Comp L Q 389 at 394. See also Blumberg, *supra* note 15 at 575.

150 See Easterbrook & Fischel, *supra* note 13 at 90.

151 See Blumberg, *supra* note 15 at 576.

152 See Leebron, *supra* note 14 at 1572–74. See also Easterbrook & Fischel, *supra* note 12 at 97.

153 See Blumberg, *supra* note 15 at 576.

when corporate shareholders began to be allowed, limited liability was automatically shifted to this new context without adjustment or critical analysis of justifications for the shift.[154]

Relatedly, unlimited limited liability for wholly owned subsidiaries or entities with a significant controlling corporate shareholder may present unjustified barriers to justice. This was seen in the 2017 *Yaiguaje* judgment at the Ontario Superior Court of Justice, where Judge Hainey did not consider Chevron Corporation an owner of Chevron Canada due to it being a seventh-level subsidiary, even though Chevron Corporation retained control and owned 100 percent of the shares in each descending subsidiary.[155] Professor Philip Blumberg argued that "[l]imited liability for corporate groups thus opens the door to multiple layers of insulation, a consequence unforeseen when limited liability was adopted long before the emergence of corporate groups."[156] In a sense, wholly owned subsidiaries do not truly have separate identity even if they hold the legal fiction of separate personhood.[157] Even foreign subsidiaries with substantive operations can be sufficiently ancillary that a parent company may liquidate the subsidiary instead of being taken to court in a foreign country. For example, in the high-profile U.K. High Court of Justice opinion in *Lungowe v Vedanta*, the court noted that if the parent U.K. corporation were brought to court in Zambia, Vedanta could seek to put the subsidiary into liquidation "in order to avoid paying out to the claimants," and that due to undercapitalization of the Zambian subsidiary "these are possibilities which cannot be ignored."[158] This liquidation risk supported the court's decision that plaintiffs' claims against Vedanta should proceed in the U.K., which was upheld by the U.K. Supreme Court.[159] The use of subsidiary structures to insulate a parent company from liability presents outdated barriers to accountability, but this can be remedied through corporate veil piercing.

4.2.2. Involuntary Victims Distinguished from Corporate Creditors

Legal claims against MNCs for domestic torts or CIL violations involve a specific type of creditor, involuntary victims, which strengthens the justification for setting aside limited liability and piercing the corporate veil, as compared to contract cases that deal with veil piercing. The majority opinion in *Yaiguaje* relied heavily on *Transamerica*, which is a breach of contract case. This article argues that tort and CIL litigation involving involuntary victims can be distinguished from corporate creditors as seen in *Transamerica*, thus supporting modernization.

Both courts and scholars have treated tort, or involuntary, victims as a unique type of

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154 *Ibid*.

155 See *Yaiguaje ONSC 2017*, *supra* note 6 at paras 34–36.

156 Professor Blumberg is a leading scholar on corporate forms. Philip I Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Identity* (Oxford, UK: Oxford University Press, 1993) at 139. See also Brent B Allred et al, "Anonymous Shell Companies: A Global Audit Study and Field Experiment in 176 Countries" (2017) 48 J Intl Bus Studies 596 at 596–597 (in the extreme, the corporate form and shell entities have been used for international tax fraud).

157 Subsidiary vehicles are often created as holding companies, as a temporary stop for money streams, or as a convenient way to operate in a foreign jurisdiction.

158 *Lungowe v Vedanta Resources Plc*, [2016] EWHC 975 (TCC) at para 79.

159 See *Vedanta Resources Plc v Lungowe and Ors*, [2019] UKSC 20.

creditor, when compared to contract creditors.[160] Examples of tort creditors include the victim of a toxic waste spill or an injured passerby at a negligently managed worksite. Tort cases have been described as a transaction where the victim is forced to participate in an interaction with the tortfeasor.[161] Such creditors are "involuntary" because they have not consented to enter into any relationship with a corporation and did not have the ability to withdraw.[162] This is distinguished from contract creditors, who have consented to a bilateral relationship with a corporation and had *ex ante* opportunities to negotiate risks and safeguards, thus requiring less equitable intervention from courts.[163]

Underlying policy and economic efficiency analyses support the argument that this distinction should be made between involuntary victims and contract creditors, as it would help solve a moral hazard problem. Moral hazard problems are created when companies are not required to pay for the risks created by their actions, which incentivizes activities with social costs that exceed social benefits.[164] Without corporate veil piercing, corporations would be allowed to shift social costs onto involuntary victims who do not receive any *ex ante* or *ex poste* compensation, which leads to a moral hazard problem.[165] Instead, piercing the corporate veil and shifting costs back to the risk-creator would disincentivize reckless investing.[166]

Due to these differences, a substantial number of court decisions and legal scholars have recognized that involuntary, or tort, victims have a strengthened claim for piercing the corporate veil.[167] This has been accepted since at least the 1980s, as Frank H. Easterbrook and Daniel R. Fischel wrote in their seminal work that "[c]ourts are more willing to disregard the corporate veil in tort than in contract cases."[168] More recently, one commentator noted that many American courts have acknowledged the difference between contract and tort

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160 See Peterson, *supra* note 24 at 66; David Millon, "Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability" (2007) 56 Emory LJ 1305 at 1316; Stefan HC Lo, "Piercing of the Corporate Veil for Evasion of Tort Obligations" (2017) 46 CL World Rev 42; Wouter HFM Cortenraad, *The Corporate Paradox: Economic Realities of the Corporate Form of Organization* (New York: Springer, 2000); Thomas K Cheng, "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines" (2011) 34:2 Boston College Intl & Comp L Rev 329 at 398; *Theberge v Darbro Inc*, 684 A (2d) 1298 at 1303 (Me 1996), Lipez J dissenting ("The notion of a tort/contract dichotomy in this area of the law is nothing new").

161 See Wouter, *supra* note 160 at 268.

162 See Curran, *supra* note 145 at 409.

163 See Peterson, *supra* note 24 at 79–80.

164 *Ibid* at 65.

165 See Millon, *supra* note 160 at 1316–17.

166 See Cheng-Han et al, *supra* note 33 at 169.

167 See e.g. Easterbrook & Fischel, *supra* note 12; Peterson, *supra* note 24 at 66 ("courts are increasingly granting one group of creditors an easier path to the assets of investors and affiliates [through corporate veil piercing]—involuntary tort creditors"); Vastardis & Chambers, *supra* note 141 (limited liability is hard to justify for shielding parent companies from debts of their subsidiaries, "particularly in tort cases [with] an involuntary creditor" at 394). See also Stefan HC Lo, "Piercing of the Corporate Veil for Evasion of Tort Obligations" (3 July 2017), online (blog): *Oxford Business Law Blog* <www.law.ox.ac.uk/business-law-blog/blog/2017/07/piercing-corporate-veil-evasion-tort-obligations> ("from the perspective of economic analysis, it is widely accepted that limited liability for tort or involuntary creditors is inefficient").

168 Easterbrook & Fischel, *supra* note 13 at 112.

creditors, and that "[n]early all such courts… have concluded that tort creditors should have an easier path to piercing the corporation's veil of limited liability."[169] In Canada, Professor Jason Maclean has also noted that the "original intent of separate legal personality… was not to shield shareholders from the claims of involuntary victims of corporate misconduct."[170]

When plaintiffs bring tort or CIL claims for environmental or human rights disasters committed by Canadian corporations abroad, this features the factor discussed above, where involuntary victims are seeking to shift costs back to the party that created the associated risks. Thus, future Canadian courts dealing with corporate veil piercing should recognize that involuntary victims have well-reasoned policy and economic justifications on their side for the recognition of an equitable exception to limited liability.

4.2.3. Law and Economics Perspectives

When limited liability prevents compensation of involuntary victims of a MNC's harms, this presents multifold risks of economic inefficiency, purposeful or negligent undercapitalization for foreseeable legal risks, and unjust enrichment.

Economic inefficiency is created when victims have not had the opportunity to acquire *ex ante* information or diversify costs, and when companies are allowed to externalize risks without internalizing costs.[171] As touched on above, legal scholars have also commented that lifting the veil of limited liability can induce a "socially efficient level of expenditure on precautions" by making the corporate shareholder or parent company liable for tort damages that the underlying corporation cannot pay.[172] For the purposes of this article, this theory portends that parent companies are best able to anticipate litigation risks related to human rights and CIL violations, and thus it makes sense for economic and legal systems to place the duty to pay on the most informed party, who is most able to anticipate risks and promulgate prevention policies. Importantly, in recent years there has been continually increasing litigation risk based on environment, social and governance ("ESG") violations and human rights misconduct in the supply chain,[173] to the extent that MNCs must be willfully blind to ignore the ESG and human rights risk that come with operating subsidiaries in foreign jurisdictions, particularly in risky industries that implicate climate change, such as the sprawling Canadian mining sector. The United Nations Working Group on Business and Human Rights has noted that the Canadian extractive sector is key to the global industry, highlighting Canada's position as home to more than half of the world's mining companies and as a center for mining sector finance.[174] As a home state for such companies, Canada is an

169 Peterson, *supra* note 24 at 63.

170 See Jason MacLean, "The Cult of Corporate Personality: Yaiguaje v. Chevron Corporation" (2014) 55 Can Bus LJ 281 at 294.

171 See Helen Anderson, "Creditors' Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness" (2006) 30:1 Melbourne UL Rev 1 at 9–10.

172 Henry Hansmann & Reinier Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) 100:7 Yale LJ 1879 at 1882–83.

173 See David Hackett et al, "Growing ESG Risks: The Rise of Litigation" (2020) 50 Environmental L Reporter 10849 at 10849.

174 See United Nations Working Group on Business and Human Rights, "Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights" (1 June 2017), online:

adherent to the OECD Guidelines for Multinational Enterprises and the UNGPs, and it has issued specific guidance to the private sector on supporting human rights and managing social and environmental risks.[175] One such instruction states that extractive sector companies should be particularly cognizant of corporate social responsibility, and urges these companies to "go above and beyond basic legal requirements to adapt their planning and operations along CSR lines . . . as early as possible."[176] With notice coming from intergovernmental bodies, Canadian governmental guidance, academic literature, and increasing media attention, MNCs cannot be unaware of these environmental and social risks associated with its activities, particularly in the Canadian extractive sector. MNCs are best placed to create policies that avert such risks, as opposed to external human rights victims who have no control over MNC internal policies or precautions. Thus, the duty to pay should be placed on controlling corporations, which would shift costs to the party who is most able to pay and anticipate risks, thereby producing an economically efficient result. Further, while limited liability is generally assumed to promote efficiency and flow of capital, powerful multinationals may actually be "detrimental to the very national economies which often are believed to profit from corporate success."[177] Economist James Bessen has correlated bargaining power of multinationals with the reduction of overall economic dynamism, through loss of competition and loss of overall economic productivity;[178] this is antithetical to an assumption that limited liability is in itself an economic good, especially when it is not properly limited.

As was present in *Yaiguaje*, a highly related policy factor is when a MNC or parent company chooses to undercapitalize its subsidiaries. Inadequacy of assets has been advanced as a reason for piercing the corporate veil, and it has been accepted on occasion since the 1940s, with some scholars positing that it is a factor in every veil piercing case.[179] Relatedly, Professor Henry Winthrop Ballantine, who taught at the University of California Berkeley, noted that it is "coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business [unencumbered] capital reasonably adequate for its prospective liabilities."[180] In cases where undercapitalization is present, U.S. courts have pierced the corporate veil more often than when undercapitalization is not present.[181] As applied to MNCs, this theory contends that parent corporations should sufficiently capitalize their subsidiaries in jurisdictions where there is anticipated liability; in the *Yaiguaje* case, it is hard

OHCHR <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680>.

175 See Faracik, *supra* note 120.

176 *Ibid.*

177 Curran, *supra* note 145 at 413.

178 *Ibid*.

179 "Inadequacy of assets" covers a wider scope than "undercapitalization", as capital is a more limited definition than all assets. For the purposes of this section, the terms will be used interchangeably, as the policy implications are identical for the arguments advanced here. See Robert B Thompson, "Piercing the Corporate Veil: An Empirical Study" (1991) 76:5 Cornell L Rev 1036 at 1065. See also Henry Winthrop Ballantine, *Ballantine on Corporations*, revised ed (Chicago: Callaghan, 1946).

180 Ballantine, *supra* note 179 at 303.

181 See Thompson, *supra* note 179 at 1066 (documenting at least 70 separate cases in which undercapitalization was a factor, and where the corporate veil was then pierced; also documenting that when undercapitalization was present, about or over 70 percent of courts agreed to pierce the corporate veil); See also Ballantine, *supra* note 179 at 303.

to argue that the extensive environmental pollution was not an anticipated liability. Therefore, expanding corporate veil piercing for MNCs in order to execute awards on a parent company where their subsidiary may be undercapitalized for foreseeable risks is a method for combatting inappropriate undercapitalization.

Another relevant policy consideration that frequently arises in the context of MNCs is that of unjust enrichment. Unjust enrichment has been referenced as a policy basis by American courts that discuss corporate veil piercing. For example, a Pennsylvania district court noted that "carrying out legal maneuvers aimed at maximizing the limitation of liability to a point of near invulnerability to responsibility for injury to the public" should be frowned upon and constitutes an abuse of the privilege of limited liability.[182] Canadian courts have also held that unjust enrichment is a basis for corporate veil piercing, including the Court of Appeal for Ontario decision in *Shoppers Drug Mart Inc v 6470360 Canada Inc.*[183] As applied to the parent-subsidiary context of MNCs, the corporate veil could be used to address circumstances where a subsidiary has conducted operations in a foreign country, reaped the economic benefits of activities such as an oil project or open-pit mining, but exited the country while leaving behind a trail of environmental harms such as toxic waste dumping in local lakes. Courts that would consider this unjust enrichment of the subsidiary can consider this factor in its decision on exercising corporate veil piercing powers.

Within the law and economics context, opponents of corporate veil piercing will likely frame a counter-argument to corporate veil piercing as follows: if Canada updates its corporate veil piercing doctrine, multinationals will simply depart and take their business to "friendlier" jurisdictions. However, this article argues not for the evisceration of limited liability, but instead the creation of balanced and limited tests for justifying corporate veil piercing where there is inappropriate action on the part of parent entities in undercapitalizing its subsidiaries or purposely removing subsidiary assets from jurisdictions in which it fears liability, as outlined in Section 4.3. Furthermore, an underlying question is whether this fear of losing business outweighs all of the policy justifications for long-term, sustainable development that "leaves no one behind," a proposition for which the Canadian government has repeatedly stated support.[184] While this may present a tragedy of the commons problem, international treaties and agreements are vehicles for promoting corporate accountability simultaneously across the globe. As a starting point, one could reasonably envision regional agreements to hold parent corporations liable for subsidiary violations in reciprocal territories, with a circle of trust through bilateral or regional commitments to simultaneously develop cross-border accountability.

Accordingly, legal structures should be updated to reflect modern economic realities, and unlimited limited liability for multinational corporate groups should not be automatically transferred to the international human rights and CIL context. The time is ripe for corporate veil piercing doctrine to be updated to effectively match powerful MNCs and their cross-border economic activities, as well as their complicated corporate structures that can be used as

182 *Parker v Bell Asbestos Mines, Ltd*, 607 F Supp 1397 (ED Pa 1985) at 1403.

183 See *Shoppers Drug Mart Inc v 6470360 Canada Inc (Energyshop Consulting Inc/Powerhouse Energy Management Inc)*, 2014 ONCA 85.

184 See "Towards Canada's 2030 Agenda National Strategy", *supra* note 9; "Sustainable Development Goal fact sheets: The 2030 Agenda for Sustainable Development", *supra* note 9.

a method for avoiding accountability. By creating legal accountability for parent corporations, courts will incentivize the implementation of precautions and adequate ESG policies by the party that is most able to pay and best placed to address risks, and Canadian courts will have more effective oversight over Canadian multinationals. In light of this myriad of policy justifications, combined with the controversy and "cracks" in the *Yaiguaje* decision, Canadian courts should not be so quick to set aside corporate veil piercing doctrine as a viable equitable tool when dealing with parent-subsidiary MNC accountability.

4.3. Recommendations

Building on these analyses, this article proposes that there are multiple options for carving out a corporate veil piercing exception to limited liability in select circumstances, in line with Canada's stated support for increasing access to remedy and to mend the governance gap in corporate accountability. Options for creating or expanding corporate veil piercing include:

Utilizing the Kosmopoulos logic of lifting the corporate veil to do justice to allow corporate veil piercing based on cases of undercapitalization of subsidiaries or purposeful removal of subsidiary assets from host states. This is supported by policy considerations such as the increase in environmental and human rights litigation against multinationals across the world contributing to the foreseeability of liability and the need for corresponding capitalization, as well as governance-based best practices for capitalizing entities to the full extent of possible liabilities. This is also supported by policy bases of *ex ante* allocation of risk and preventing unjust enrichment, as discussed in Section 4.2.3.

Utilizing the Kosmopoulos line of logic to lift the corporate veil to do justice in cases where remedy is not available in host states and there is a tort or CIL claim being advanced, which involves involuntary victims. This is supported by policy considerations including those in Section 4.2.2.

Interpreting the second prong of the Transamerica test as being fulfilled by the purposeful liquidation or removal of subsidiary assets from a host state jurisdiction to avoid liability. Such instances of liquidation to avoid liability can be directly read into the second prong, as fulfilling the test for the subsidiary being a 'mere façade' for protecting its parent corporation. For example, the second prong's two-factor sub-test, as framed in *Transamerica*, can be expanded to include such instances as a third and alternative factor. Another option is stick with the two-factor sub-test but interpret it to include cases of improper liquidation, by considering improper liquidation as evidence of the subsidiary being used as a "mere puppet" incorporated for an improper purpose or used for improper activity. Justifications for reading cases of purposeful liquidation into the prong include the foreseeability of use of the subsidiary form for improper purposes, removal of assets speaking to parent control of the subsidiary, and impropriety of the parent corporation in attempting to take advantage of the shielding function of subsidiaries.

Interpreting the second prong of the Transamerica test as being fulfilled by unjustified undercapitalization of subsidiaries. This can involve interpretation of undercapitalization of subsidiaries as demonstrating that the subsidiary is a "mere façade" for protecting its parent corporation. Relevant policy considerations include foreseeability of litigation risk when functioning in the extractive sector, especially where a parent corporation has been on notice about community dissent and opposition before or during the operation of the subsidiary.

This is not meant to be an exhaustive list, but instead sample constructions of a corporate veil piercing doctrine that is in line with Canadian jurisprudence, to start mending the governance gap and fostering inclusive sustainable development. Such a construction would work towards fulfilling the Canadian government's stated goals of "leaving no one behind" under the SDGs and providing access to remedy in line with the UNGPs.

5. CONCLUSION

In conclusion, Canadian courts have a key opportunity to clarify the doctrine surrounding corporate veil piercing and modernize it in accordance with current economic realities. This article argues that *Yaiguaje* and the surrounding legal debate has demonstrated a crack in the principle of limited liability, which leaves room for future courts to clarify the doctrine. When such a clarification is undertaken, it should account for the access to justice barriers faced by involuntary victims of Canadian MNCs' subsidiaries' violations around the globe, including environmental pollution and human rights harms. As former Supreme Court of Canada Justice Ian Binnie has commented, there is a role for Canadian courts to play and there are "all sorts of legal doctrines available to enable [Canadian] courts" to evolve and adapt the law "to help victims of human rights abuse" by MNCs.[185]

This article calls on future Canadian courts and policymakers to consider the legal theories regarding involuntary victims and the changed economic conditions caused by the proliferation of multinational corporations, to find a transnational solution for a transnational problem. In particular, this article seeks to present decisionmakers with arguments demonstrating support for an increased justification for corporate veil piercing for involuntary victims of MNCs. As the conversation around inclusive development and business and human rights continues, corporate veil piercing constitutes a viable tool for increasing Canadian courts' oversight over subsidiaries abroad. This article presents recommendations on utilizing the doctrine's equitable role in ameliorating harshness, in order to advance fairness and create a system of legal accountability for Canadian multinational operations abroad.

185 Cristin Schmitz, "Binnie says judges should lead by crafting new remedies for corporate abuses abroad" (2 October 2017), online: *The Lawyer's Daily* <thelawyersdaily.ca/articles/4781> (reporting on Binnie's comments at a symposium held in Ottawa on corporate accountability for human rights abuses).