With Power Comes Responsibility: Incremental Progress in Canada on Parent Company Human Rights Liability

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Barriers in host countries lead human rights claimants to seek redress against multinational corporations in their home countries. However, barriers exist for these claimants in Canada too. This article focuses primarily on substantive barriers and responses, finding that we may be making progress in these cases in Canada, particularly with respect to direct duty arguments for parent companies. Specifically, this article reviews scholarly literature, Canadian cases, and other international cases to analyze litigation in Canada seeking to hold Canadian parent companies accountable for the actions of their subsidiaries or suppliers in host countries with underdeveloped legal systems.

Keywords: business and human rights; parent company liability; business and human rights litigation; supply chain transparency

INTRODUCTION

Society as a whole is becoming quite conversant with the concept of modern slavery. Businesses are talking about, and in many cases addressing, instances of modern slavery and other human rights abuses in their supply chains. With respect to slavery, estimates and methodologies vary, but the Global Slavery Index estimated in 2016 that there were 40.3 million slaves worldwide, with 24.9 million slaves in forced labour. In 2018, it estimated that G20 countries imported $354 billion in at-risk products (Walk Free Foundation, 2018). World Vision Canada (2016) studied 50 common goods from a similar product list, cross-referenced them against publicly available import databases, and found that over 1,200 companies operating in Canada imported goods at risk of being produced by child labour or forced labour in 2015, representing approximately $34 billion in imported goods. The International Labour Organization ("ILO") and others (2017) further estimate that an average of about 152 million children are subject to child labour. It is estimated that at least 80% of forced labour occurs in the private economy and involves business in some way. However, with the onset of global production and global markets, and outsourcing specifically, Canadian companies are often unaware of the human rights violations taking place at their second or third-tier, or even further removed, suppliers or subcontractors (LeBaron, 2014). As well as forced labour or slavery, business and human rights ("BHR") issues typically include labour-related issues pertaining to wages, hours, health, safety, and discrimination. They also include issues like land rights and environmental concerns, which typically infringe on the rights of other stakeholders (Yawar & Seuring, 2017).[1] Though companies may not always be aware of the violations taking place up their supply chains, "corporations themselves have given rise to complexity and very high levels of subcontracting within both labor and product supply chains, as they have continually restricted production

in recent decades to cut costs and reduce legal ownership to curtail liability" (LeBaron, 2014, p. 238). In a lecture following his time on the Supreme Court of Canada, former justice Ian Binnie considers the challenge posed to the courts by globalization and states that "ordinary tort doctrine would call for the losses to be allocated to the ultimate cost of the products and borne by the consumers who benefit from them, not disproportionately by the farmers and peasants of the Third World" (2013, p. 5).

Parent companies typically reap economic benefits from their foreign subsidies (or suppliers). However, in an effort to attract capital and business, corporate regulation in developing nations may be lacking and human rights norms weak (Curran, 2016). Globally, international conventions and commitments abound.[2] The UN Guiding Principles on Business and Human Rights ("UNGPs") #25 sets out the foundational principle that states are to ensure access to remedy through judicial, administrative, legislative, and other means. UNGP #26 specifically provides for state-based judicial mechanisms, declaring that:

> States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical, and other relevant barriers that could lead to a denial of access to remedy (Ruggie, 2011, p. 28).[3]

Canada has also taken steps to address the imbalance between countries on corporate regulation and human rights norms. Examples include a corporate social responsibility ("CSR") strategy in the extractives sector abroad announced in 2011 and updated in 2014,[4] and more recently the appointment of the Canadian Ombudsperson for Responsible Enterprise in April 2019 (Global Affairs Canada, 2019). Many tools are needed to encourage companies to increase their due diligence when it comes to human rights. While CSR strategies and non-judicial dispute mechanisms have their place, civil remedies for victims are also part of the toolbox. Though litigation success has been limited in most regions, one study finds that the vast majority of companies that have been sued for BHR breaches improve their human rights reporting and policies (Schrempf-Stirling & Wettstein, 2017). Though not covered in that study, one might surmise that the threat of litigation may lead others in the industry to improve their practices as well. In an analysis of the challenges and risks for oil and gas companies seeking opportunities in emerging markets, a group of Canadian lawyers identifies extraterritorial litigation as a key risk area (Stimpson et al., 2015). In spite of the attention to BHR internationally and in many specific countries, many states still do not have strong enough legal systems to hold multi-national corporations ("MNCs") accountable (Skinner, 2015).[5]

Lack of recourse in host countries lead to claimants seeking redress in the home countries of the MNCs. Barriers are present across the world though.[6] So far as Canada is concerned, Ian Binnie (2013) identifies three issues the Supreme Court will have to address for this type of litigation to progress: jurisdiction of necessity, application in Canada of the compulsory norms of international law, and updating the corporate veil doctrine. This article focuses primarily on substantive barriers and responses, which are just beginning to make their way into Canadian courts. BHR litigation in Canada, seeking to hold Canadian parent companies accountable for the actions of their subsidiaries or suppliers in host countries in other parts of the world, is analyzed. This article also reviews certain cases from other jurisdictions, some of which may serve as precedents in Canada, and some of which simply provide perspective for policy arguments or possible future substantive arguments. Part II will identify arguments based on classic veil piercing and enterprise theory. Part III focuses on direct parent liability through a general duty of care and company CSR policies. Part IV will look at the development of customary international law as the basis for a tort claim. In each section, tentative conclusions are offered as to the effectiveness and potential of each of these substantive areas. The article finishes by briefly considering both procedural steps and potential legislative avenues to buttress substantive civil remedies.

PIERCING THE CORPORATE VEIL

Most Canadian court proceedings involving BHR litigation to date have been focused on procedural issues, jurisdiction in particular. As precedent on these procedural issues is settled, some of which is referenced briefly in Part V, Canadian courts will need to directly address the substantive arguments surrounding the liability of parent companies, whether in first instance cases or via the enforcement of foreign judgements against Canadian parents. In this section, classic piercing the veil arguments will be considered, and then enterprise theory will be explored. Tentative conclusions will be offered at the end of the section.

Classic Veil Piercing

The doctrine of separate corporate personality is one of the foundations of corporate law in Canada and across the world. This subsection will consider the piercing the veil doctrine in Canada, internationally, and in other areas of the law. In Canada, as in many jurisdictions, the leading case on separate corporate personality is *Salomon v Salomon & Co Ltd* (1897), where the court refused to pierce the corporate veil so as to allow the insolvent company's shareholders to be sued by unpaid creditors. *Salomon v Salomon & Co Ltd* (1897) is still referred to regularly in Canadian cases and in business law textbooks, along with the various limited exceptions to separate corporate personality that have developed over time.

Canada

One of the more recent frequently referenced cases on piercing the veil in Canada is *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co* (1996).[7] Referring to earlier Supreme Court authorities, the court found that the separate legal personality of a corporation is only to be disregarded when it is completely controlled by another and being used as a shield for fraud or improper conduct. These tests for piercing pierce the veil have been the subject of two Canadian BHR cases. The first is *Choc v Hudbay Minerals Inc.* (2013)[8] which involved three related actions alleging gang-rape, physical assault, and murder on the part of mine security personnel, following disputes over land. Guatemalan plaintiffs brought a direct action in Ontario against HudBay, headquartered in Ontario and incorporated under the *Canadian Business Corporations Act, 1982*. Hudbay operated the mine in question through a 98.2% owned Guatemalan subsidiary. In all three actions, the plaintiffs argued that Hudbay owed them a direct duty of care, which will be discussed in Part III. In one of the actions, they also argued that Hudbay was vicariously liable for the torts of its subsidiary's employees (*Choc v Hudbay Minerals Inc*., 2013).[9] Hudbay brought a motion to strike the actions, in part on the ground of no reasonable cause of action. The motion to strike failed in the Ontario lower court on the basis that it was not plain and obvious that either the action for direct liability or the action for vicarious liability would fail (*Choc v Hudbay Minerals Inc.*, 2013).[10] With respect to the one action where vicarious liability was also pleaded, the court equated the pleading with an attempt to pierce the corporate veil. It set out the three circumstances in Ontario where separate legal personality could be disregarded and the corporate veil pierced:

> where the corporation is 'completely dominated and controlled and being used as a shield for fraudulent or improper conduct' [like *Transamerica*]…, where the corporation has acted as the authorized agent of its controllers, …and where a statute or contract requires it (*Choc v Hudbay Minerals Inc.*, 2013, para. 45).

The court found that the alleged wrongdoing was not enough to justify piercing the corporate veil on the first ground (fraud or improper conduct), as it was not argued that the subsidiary was created to avoid liability for wrongful conduct. However, it upheld the pleading on the second ground of agency, which does not require proof of wrongdoing (*Choc v Hudbay Minerals Inc.*, 2013).

A very different result was reached in *Chevron Corp v Yaiguaje* (2015). The case originated with claims brought in Ecuador against a United States parent corporation and its Ecuadorian subsidiary with

respect to financial and environmental reparation for harms. The court found against the United States parent corporation and awarded damages of US$9.51 billion. Then, the plaintiffs brought an enforcement of foreign judgment action against Chevron Canada Limited, a Canadian subsidiary headquartered in Alberta and incorporated under the *CBCA*. The case eventually made its way to the Supreme Court of Canada ("SCC"). At issue before the SCC was the jurisdiction of the Canadian courts to recognize and enforce the Ecuadorian judgment, which the SCC upheld (*Chevron Corp v Yaiguaje*, 2015).[11] With jurisdiction established, the case moved back to the Ontario lower court and then the Ontario Court of Appeal ("ONCA") in 2018 on a motion for summary judgement. The ONCA rejected arguments to realize against the shares and assets of Chevron Canada directly under the Ontario *Execution Act, 1980*, or alternatively on the basis that the corporate veil should be pierced, either using a just and equitable exception or enterprise theory (*Yaiguaje v Chevron Corporation*, 2018).[12] Enterprise theory will be addressed in the next section.

With respect to the just and equitable exception, the plaintiffs argued that "the court has the ability to pierce the corporate veil when the interests of justice demand it" (*Chevron Corp. v Yaiguaje*, 2015, para. 64), relying on the SCC case, *Kosmopolous v Constitution Insurance Co.* (1987). The ONCA referred to various ONCA and SCC cases, including *Transamerica* (1996), where the principle of corporate separateness had been protected without suggesting a standalone just and equitable exception. The ONCA rejected this exception in Chevron, and further determined that the complete control and fraud required in the *Transamerica* test were not present (*Chevron Corp. v Yaiguaje*, 2015). The ONCA emphasized the importance of *Transamerica* in bringing "clarity and certainty to our law by providing a framework for determining when it is appropriate to ignore the principle of corporate separateness" in contrast to the "unpredictable application of the remedy" in the United States (*Chevron Corp. v Yaiguaje*, 2015, para. 71). The court did acknowledge that the rules for piercing the corporate veil likely will evolve, which was also recognized in the intervening review of the security for costs order, but that it must evolve on "a principled basis and in a manner that brings certainty and clarity, not in a way that sows confusion and is devoid of principle" (*Chevron Corp. v Yaiguaje*, 2015, para. 83). Of further interest are statements made by Nordheimer J.A., in his separate concurring judgment (*Chevron Corp. v Yaiguaje*, 2015). He differentiated between lifting the corporate veil to impose liability as in the case of the precedents relied on by the majority of the court, and the enforcement of a judgement where liability had already been established. Nordheimer J.A. further disagreed with the finding that the court always rejects an independent just and equitable ground for piercing the corporate veil, giving a different interpretation to some of the precedents cited. Ultimately he answered the following question affirmatively: "is this court prepared to recognize that there may be situations where equity would demand a departure from the strict application of the corporate separateness principle in the context of the enforceability of a valid judgment, whether foreign or domestic?" (*Chevron Corp. v Yaiguaje*, 2015, para. 116). However, he noted that the situations where such a remedy would be appropriate would be rare, and found that in this case it would not be appropriate given the finding of a United States court that the Ecuadorian judgement was obtained by fraud.

International

United States courts have found similar ways around the separate corporate personality doctrine. Nadia Bernaz suggests that, following the *Bowoto v Chevron* (2004) summary judgement, there are three possible arguments: piercing the corporate veil, which requires extremely high control over the subsidiary and is rarely used, the agency theory of liability for the actions of a subsidiary, which was allowed in *Bowoto*, and enterprise theory which was dismissed (Bernaz, 2017). Phillip Blumberg (2005) describes traditional veil piercing in the United States as requiring three elements: parent control such that there is a lack of independent existence, fraudulent, inequitable, or wrongful use of the corporate form, and a causal relation to the plaintiff's loss. Upon a review of case law though, he concludes that the doctrine is far from settled, with some courts loosely applying the factors, applying only one factor, or including other factors (Knight, 2016). Some cases in the United States suggest that there are additional factors that indicate injustices and inequitable consequences that allow for veil piercing: fraud,

undercapitalization, failure to observe corporate formalities, absence of corporate records, payment by the corporation of individual obligations, and use of the corporation to promote fraud, injustice, or illegalities.[13] Of particular interest is the undercapitalization factor, which one commentator suggests should be an independent consideration for veil piercing (Stubbs, 2016), but there is no authority for this in Canada.

Some global progress has been made overall in the area of parent company accountability, though whether these slow-moving trends will find their way into the Canadian courts is unknown. Looking back to the 1980's, an action in the United States failed against Union Carbide Corporation, an American parent of the Indian plant operator in the well-known gas plant disaster in Bhopal, India, even though the parent had extensive control over the subsidiary and there was arguably significant wrong-doing (*Re Union Carbide Corporation Gas Plan Disaster at Bhopal, India*, 1986).[14] Fast forward thirty years and contrast this with *Chandler v Cape* (2012), a recent landmark British case establishing that under certain conditions, a parent can be liable for the safety of the employees of its subsidiary. Going a step further, a Dutch appeals court ruled in 2015 that Royal Dutch Shell could be held liable for oil spills at its subsidiary in Nigeria. This raises the possibility of a duty of care to victims who are not employees, but are affected by a subsidiary's actions (The Guardian, 2015). We find a similar result with respect to third parties in France, but not under tort law. In 2012, the French Supreme Court found French oil company Total criminally liable for the acts of one of its subsidiaries, after the parent company had voluntarily taken responsibility for the oversight of ship safety (Bernaz, 2017). In Belgium, shareholder liability is typically established by proving the abuse of the limited liability. In France, fraud, concealment, and the creation of false appearances are all relevant factors (Demeyere, 2015). Under Swiss civil law, parent companies can be found liable on the basis of the following factors: the parent disregards the subsidiary's independence, directors and executives of the parent company are managing the subsidiary, insufficient capitalization limits the independent viability of the subsidiary, the parent company or group is promoted giving third parties at a reasonable expectation that the parent will assist the subsidiary with its obligations, and the parent company or group publicly expresses commitments with respect to the protection of human rights (Weber & Baisch, 2016).[15]

Other Areas of Law

To complete this section, piercing the corporate veil in other select areas of the law will be briefly considered. UK researchers propose a model of treaty-based veil piercing for human rights claims, inspired by investment treaty provisions dealing with corporate investors (Vastardis & Chambers, 2018). They focus on bilateral treaties between corporations and states, which deal with the rights of foreign investors. The interpretation of these treaties through relevant conventions often allow direct or indirect shareholders of host state subsidiaries to bring claims against the host state for harm caused to the subsidiary's business. The researchers argue for a similar exception to the separate personality rule for BHR claimants under international human rights law. This is on the basis that the investment protections have been developed on the assumption that foreign investors are in a position of vulnerability, similar to BHR claimants (Vastardis & Chambers, 2018). This would require changes to international human rights law and it is not binding on Canadian courts. However, it might serve as a policy argument, particularly as the very company receiving protection under investment treaties could be the company avoiding liability for foreign plaintiffs under the separate corporate personality doctrine. Finally, family law in Canada provides examples of limited veil piercing[16] and tax law globally tends to hold parent companies and other group members liable for the debts of subsidiaries (Leikvang, 2012).

Enterprise Theory

Enterprise theory is relatively new in Canadian law on corporate separateness, and not very advanced beyond academic theory generally. It is typically treated in the case law as an alternative exception to the separate corporate personality doctrine while treated more generally in academic theory. This subsection first considers enterprise theory broadly, then in the Canadian courts, and then in in select cases from other jurisdictions.

Theory

The doctrine of separate corporate personality was originally intended to protect individual investors so that they would not be liable for the debts of the corporation beyond their own investments. A corporate majority shareholder is in a very different position from an individual shareholder, particularly a minority individual shareholder (Strasser, 2004). Parent companies have real control over the subsidiary and the structure is based on business strategy. Human rights victims, or tort victims in general, are distinct from the typical voluntary creditor, who was arguably the intended focus of corporate limited liability (Curran, 2016). Skinner (2015) suggests two normative arguments for why parent companies that benefit from their subsidiaries' activities should not escape tort liability for these activities. First, she argues that parents should have liability where subsidiaries operate in high-risk countries and shift costs and risks to non-consenting individuals and communities. Second, she asserts that liability should be extended where harmed individuals and communities have no recourse against the subsidiary.

Strasser (2004) uses contract cases to identify two fact patterns that could result in the application of enterprise theory (or veil piercing): when the corporate group misleads the other party into thinking it is dealing with the parent, or where the corporate group depletes the assets of the subsidiary. He suggests that courts should move beyond generalized questions of corporate separateness and wrongful conduct, and look at the core concerns of tort policy, compensation for victims and discouraging negligent or harmful conduct. Further, he says that the courts should focus on "whether this corporate group is appropriately seen as conducting one business enterprise. If so, as is typically the case, then that the whole enterprise should bear the costs it generates, including paying for the injured tort claimants" (2004, p. 661). Blumberg, who has researched and written on corporate groups extensively in the United States, suggests that while most jurisdictions focus primarily on control (akin to single-factor veil-piercing, according to Blumberg), collective conduct and intertwining of activities is also a major element supporting reliance on enterprise law (2005). He also points to other factors that support the application of enterprise principles: common public persona, financial interdependence, administrative interdependence, and group identification of employees. Finally, based on academic literature and the limited enterprise liability precedent, Dearborn (2009, p. 252) proposes a two-prong test for the application of enterprise liability: an economically integrated enterprise and a mass tort, human rights violation, or environmental harm – narrowing the liability exception to "tort creditors".

Canada Generally

Though academics may have lofty ambitions for enterprise theory, its application in Canada has been limited, with most cases being litigated in Ontario. A recent Ontario case is *Teti and ITET Corp. v Mueller Water Products* (2015), where the court found both a legal and factual basis for group enterprise in a misappropriation of confidential information, with the result that a motion to strike the claim failed. The court reviewed two other Ontario cases and found that "the 'group enterprise' or 'single business entity' theory *does* exist in Canadian law but only as a carefully limited exception to the well-established proposition set out in *Salomon*" (*Teti and ITET Corp. v Mueller Water Products*, 2015, para 21).The argument in *Teti and ITET Corp. v Mueller Water Products* (2015) rested on the corporate defendants conducting themselves as a group enterprise. There were few, if any, walls separating the subject corporation and the defendants from working in common as a group enterprise when dealing with the plaintiff and the matter at hand. In *Teti and ITET Corp. v Mueller Water Products* (2015), the court relied on an analysis from an older case, *801962 Ontario Inc. v MacKenzie Trust Co* (1994),[17] which found that in particular fact situations that make it appropriate to have regard to the larger business entity, the court is not precluded by *Salomon* from doing so. One other Ontario lower court struck a similar motion on a similar basis in reliance on *Teti*, finding that group enterprise exposure cannot efficiently be determined on summary motion (*York Regional Standard Condominium Corporation No. 1206 v 520 Steeles Developments Inc*., 2018). Finally, a federal court case referred to the *Teti* finding positively, commenting that "there might also be circumstances where, applying a theory of 'group enterprise,' a corporation may be held jointly liable for the actions of another," though the theory was not specifically advanced in that case (*Collett v Northland Art Company Canada Inc*., 2018, para. 17).

In another Ontario case, *Martin v Astrazeneca Pharmaceuticals Plc* (2012), the court rejected claims of enterprise liability, holding that it was inappropriate to "lump together" the three defendants, and as a matter of substantive law, a parent company is not interchangeable with its subsidiary. As well, the court found that justifying enterprise liability on the basis that each defendant was the agent of the other, was unsupported by material facts. Following *Martin v Astrazeneca Pharmaceuticals Plc* (2012) in 2017 in another certification motion, the plaintiffs stated that they were relying on direct duties for the various corporate entities and not enterprise liability. However, the court found that the claims against most of the entities could not be justified on the basis of enterprise liability or duty of care (*Batten v Boehringer Ingelheim (Canada) Ltd.*, 2017). Similarly in *Heyde v Theberge Developments Limited* (2017), the court found against the plaintiffs on the basis of enterprise liability, following *Martin* and applying the standard tests for piercing the corporate veil. In contrast, in *O'Brien v Bard Canada Inc.* (2015), the court applied *Martin v Astrazeneca Pharmaceuticals Plc* (2012), but found for the plaintiffs on enterprise liability (though against the plaintiff overall) in the certification proceeding. The court found that the medical division of a United States entity is "as much a part of Bard [the collective which includes Bard Canada] as an arm is a body part not a separate body. From a legal perspective, Bard Canada, as a subsidiary is indeed a separate legal entity, but Bard is just feigning ignorance in submitting that it does not understand why Bard Canada is being sued" (*O'Brien v Bard Canada Inc.*, 2015, para 155). In *The Catalyst Capital Group Inc v West Face Capital Inc*, on a motion to strike a claim, the plaintiffs pleaded that the corporate defendants "at all material times operated, acted, and marketed themselves as a single entity" (2019, para. 118). The court differentiated *Martin v Astrazeneca Pharmaceuticals Plc* (2012) and other cases on their facts, and did not accept the defendant's argument that the enterprise liability pleading should be struck. Enterprise theory has not been dealt with significantly in Canadian jurisdictions outside Ontario, but was rejected by a Saskatchewan lower court ten years ago (*Frey v Bell Mobility Inc,* 2009) and accepted in a certification case in Nova Scotia three years ago (*Sweetland v GlaxoSmithKline Inc*., 2016).

Canada BHR Cases

We now look to Canadian BHR cases where enterprise liability has been argued. First, Nordheimer J.A.'s judgment in *Yaiguaje v Chevron Corporation* (2018) may provide some basis for the advancement of enterprise theory, though, as discussed in Part II, above, the findings at both the lower court and appeal court levels were ultimately negative in this regard. The plaintiffs in *Yaiguaje v Chevron Corporation* relied on *Teti and ITET Corp. v Mueller Water Products* (2015) and asserted that the court should not "apply corporate separateness where the nature of the relationship is a group enterprise," (2018, para. 55) but the lower court referred back to *Salomon v Salomon & Co Ltd*. (1897) and later cases relying on the standard tests for veil-piecing (complete control and fraudulent or improper conduct). The lower court distinguished *Teti and ITET Corp. v Mueller Water Products* (2015) on the basis that in that case, the defendants worked in concert to the plaintiff's detriment, whereas in *Yaiguaje v Chevron Corporation* (2018), Chevron Canada had no involvement in the activities in Ecuador. At the ONCA, the majority opinion dealt with enterprise theory in the context of veil piercing, and it found that enterprise theory had been consistently rejected by the courts, relying in part on *Downtown Eatery (1993) Ltd. v Ontario* (2001).[18] The majority remarked that "there is a difference between economic reality and legal reality," and they found that in the legal reality, the creation of uncertainty was a policy reason for rejecting enterprise liability (*Yaiguaje v Chevron Corporation,* 2018, paras. 64-83). However, Nordheimer J.A. disagreed with the majority findings on enterprise liability, interpreting *Downtown Eatery (1993) Ltd. v Ontario* (2001) differently, noting that courts in other cases have invoked equity to make exceptions, and dismissing the concern about creating uncertainty given that in the present case the parent company owned 100% of the subsidiary. Nordheimer J.A. also stated, disagreeing with the motions judge on this point, that "it is crystal clear that Chevron Canada is an asset of Chevron Corporation, as that term is understood in common business parlance" (*Yaiguaje v Chevron Corporation,* 2018, paras. 110-112). In a comment on the original Ontario lower court action against Chevron and Chevron Canada, MacLean calls for "thinking anew about what corporate enterprises *really* are and for regulating them accordingly (2014, p. 294)".[19]

Araya v Nevsun Resources Ltd. (2017)[20] was an action against British Columbia incorporated Nevsun, which indirectly owned 60% of the subject gold mine in Eritrea. Claims involved complicity in the Eritrean military's use of forced labour, slavery, and torture. The BCCA rejected Nevsun's application for a stay on the basis of *forum non conveniens*. In the substance of the claim, the Eritrean plaintiffs argued direct liability, breaches of international norms, enterprise theory, and liability on the basis of vicarious liability, with only the customary international law ("CIL") argument being addressed by the courts at this stage (*Araya v Nevsun Resources Ltd.*, 2017, paras. 4-7). The plaintiffs asserted as part of the basis for Neysun's liability for the conduct of Bisha Mine Share Company ("BMSC"), its 60% Eritrean subsidiary, that the conduct was "an 'extension of the business enterprise of Nevsun and that the corporate structure separating Nevsun from BMSC is 'artificial and should be disregarded in the interest of justice'" (*Araya v Nevsun Resources Ltd.*, 2017, para. 5). The defendant responded that "the several corporations in the corporate ladder between itself and BMSC are entitled to the protection of limited liability" (*Araya v Nevsun Resources Ltd.*, 2017, para. 13). The British Columbia courts have not yet ruled on the application of enterprise theory in *Araya v Nevsun Resources Ltd.* (2017), but one Canadian legal practitioner describes the ownership of the mine in question and the involvement of Nevsun in the activities and asserts that:

> In the end, a Canadian corporation that enjoys the benefits of operating at a global scale across jurisdictions, with a documented history of human rights abuses, as alleged in Nevsun, must be able to live up to the Canadian standard of operating in or outside of Canada. Unless of course, we are prepared to accept the exploitation of non-Canadians overseas as the Canadian standard (Sayers, 2019).

International

There are limited examples of reliance on enterprise theory in other jurisdictions. In the United States, both Texas and Louisiana courts have applied enterprise theory, being careful to distinguish it from piercing the veil (Strasser, 2004). The United States Supreme Court found in an anti-trust case that a parent and subsidiary could not have conspired as they were part of a single economic enterprise (*Copperweld v Independence Tube*, 1984). Another line of cases found the coverage of product liability to include entities making up the corporate group as well in addition to the companies actually involved in the manufacturing or distribution of unsafe products (Strasser, 2004), while other cases have applied enterprise liability theory in the tax context (MacLean, 2014).

In *Adams v Cape Industries plc* (1990), an English case referred to in *Yaiguaje v Chevron Corporation* (2018), the court stated that there is no principle that all companies in a group of companies are to be treated as one and emphasized the need for parents and their subsidiaries to be treated separately. Contrast this with the UK Supreme Court decision in *Petrodel Resources Ltd. v Prest* (2013), which commented on the challenge of identifying relevant wrongdoing when looking to pierce the veil, specifically referring to the situation where a company is interposed so as to frustrate legal enforcement. In *Lungowe v Vedanta Resources Plc* (2016), another English case, the court extended liability to the parent of a subsidiary, drawing on enterprise theory in its findings, specifically emphasizing that the parent company had superior assets and had profited from the subsidiary's activities. The court acknowledged the plaintiff's argument that "since it is Vedanta who are making millions of pounds out of the mine, it is Vedanta who should be called to account" (*Lungowe v Vedanta Resources Plc*, 2016, para. 78). Looking at other European examples, one researcher refers to a European Court of Justice finding in the antitrust and competition law context that "the corporate veil can be pierced whenever companies form a single economic unit" (Demeyere, 2015, p. 410). Germany has created a statutory framework providing that parents and subsidiaries are to be treated as singular economic units in certain cases and it is proposed to extend this model across the EU (MacLean, 2014). Finally, enterprise theory has also made some headway in international arbitration (Curran, 2016).

Conclusions

The exceptions to the separate corporate personality doctrine in Canada are very narrow. There is little to suggest that the stringent test in *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co* (1996) has been modified, whether on the basis of a just and equitable exception or otherwise. Nordheimer J.A.'s judgment in *Yaiguaje v Chevron Corporation* (2018) provides an opening for a just and equitable exception to the corporate veil doctrine, but the courts have yet to follow this lead. There has been some movement at the international level and the Ontario court's decision in allowing the case to move forward on the basis of agency and vicarious liability is promising but, by and large, traditional views prevail in Canada and elsewhere.

As recognized in the academic literature, corporate groups do indeed act as enterprises. However, it seems that in Canada, enterprise liability arguments have mostly been addressed at the certification or motions stage only, and typically the courts find against the arguments. There may be enough jurisprudence to suggest that enterprise *theory* exists, but it appears to be far from being accepted *law* in Canada. The *Lungowe v Vedanta Resources Plc* (2016) case in the UK may be a step towards acceptance of the theory, but this development has not yet occurred in Canada. In summary, enterprise theory is alive and well in academia and present in very specific areas of the law, but there is only a sprinkling of enterprise theory found in BHR corporate jurisprudence in Canada and abroad, leading to the conclusion that enterprise theory is far from being accepted corporate law.[21]

DIRECT DUTY OF CARE

Stepping away from piercing the veil arguments and shifting to the case for direct parent liability, we find more potential. One commentator, in discussing what has changed since *Re Union Carbide Corporation Gas Plan Disaster at Bhopal, India* (1984), observes both an increase (in the United States specifically) of reliance on the courts to hold MNCs accountable for labour-related human rights and environmental violations and a move to rely on "the parent company's direct duty of care to bypass the need to pierce the corporate veil" (Deva, 2016, p. 25). This section analyzes duty of care in the BHR context, sometimes posed as a general duty of care and sometimes as a novel duty of care, and then looks more closely at CSR policies as the basis of a direct duty of care. Tentative conclusions are then offered.

Establishing a Duty of Care

The common law in Canada rests on the foundational English case *Donoghue v Stevenson* (1932), which establishes that a person owes a duty of care to anyone that they can reasonably foresee might be harmed by their conduct. When a novel problem exists, the SCC applies the *Anns* test, from *Anns v Merton, London Borough Council* (1977).[22] This requires looking for a degree of proximity, or reasonable foreseeability, and then asking whether there is a good reason not to impose the duty. The following discussion looks to Canadian BHR cases, UK BHR cases, and then key cases from other jurisdictions on establishing a direct duty of care for parent companies.

Canada BHR Cases

In response to a pleading of direct negligence in *Choc v Hudbay Minerals Inc.* (2013), the Ontario lower court used the test for novel duty of care affirmed in *Odhavji Estate v Woodhouse* (2003), at this stage to establish that it was not plain and obvious that no duty of care could be recognized (*Choc v Hudbay Minerals Inc.*, 2013). The court in *Choc v Hudbay Minerals Inc.* (2013) looked for foreseeability of the harm, proximity of the parties, and absence of policy reason to restrict a duty. In terms of foreseeability, only general harm must be reasonably foreseeable and the court found that this test was met based on the pleadings of frequent violence employed by security personnel and high tensions surrounding land conflict. For proximity, the plaintiffs pled, and the court accepted that "the public statements alleged to have been made by the parent company [on various principles and standards employed and commitments to the local community in question] are one factor among others to be considered and are indicative of a relationship of proximity" (*Choc v Hudbay Minerals Inc.*, 2013, para.

68). With respect to policy, there were competing considerations, including government goals of corporate social responsibility and human rights in relation to private security on the part of the plaintiff, and the lack of legislation on the matter and the separate corporate personality doctrine asserted as policy arguments by the defendants. Balancing these, the court found that it was not plain and obvious that this part of the test would fail. Amnesty International Canada, as intervenor, argued that international norms and standards supported a duty of care for a parent company, particularly where the business of a subsidiary was in conflict-afflicted or high-risk areas (*Choc v Hudbay Minerals Inc.*, 2013).

In *Garcia v Tahoe Resources Inc.* (2017),[23] Tahoe, a British Columbia company, conducted mining activities through a subsidiary in Guatemala. Guatemalan plaintiffs alleged they were shot by security personnel during a protest at a mine owned by the subsidiary. At the lower British Columbia court, Tahoe was successful on an application for a stay based on *forum non conveniens,* which was overturned by the British Columbia Court of Appeal ("BCCA"). The plaintiffs argued both direct liability for the parent for either battery or negligence, and alternatively vicarious liability for Tahoe for the security personnel of its subsidiary, neither of which have yet been directly addressed by the courts in this case. In both *Garcia v Tahoe Resources Inc.* (2017) and *Araya v Nevsun Resources Ltd.* (2017), direct liability of the parent was asserted, though the BCCA has not yet directly addressed this argument beyond letting it stand in the unsuccessful motions to strike. The *Garcia v Tahoe Resources Inc.* (2017) case was later settled, with a confidential settlement and a public apology (AFP, 2019).

In *Das v George Weston Limited* (2017) Bangladeshian citizens sued Weston and related companies (collectively Loblaws) and its social auditor, for the negligence of its suppliers and sub-suppliers in the well-known Rana Plaza factory collapse which resulted in both death and injury. The Ontario lower court found jurisdiction, but dismissed the proposed class action primarily on the basis that the tests for direct duty of care, vicarious liability, and fiduciary duty to the victims were not met (*Das v George Weston Limited*, 2017, paras. 458, 559, 498 & 589). *Das v George Weston Limited* (2017) contains an extensive discourse on holding a company responsible for the actions of its sub-supplier, vis a vis a direct duty of care, as well as via vicarious liability and a fiduciary duty to the victims. In considering all of the tort claims, the Ontario lower court first identified themes it later built on: who *is* my neighbour (under law) versus who ought to be my neighbour, the inappropriateness of working work backwards from an alleged breach of a standard of care or harm suffered by an innocent party to find a duty of care, the disinclination of the common law to impose positive duties to protect others, and the incremental growth of the common law (*Das v George Weston Limited*, 2017). Looking first at Bangladesh law as influenced by English law, the lower court found that the vulnerability of the plaintiffs did not lead to a duty owing by the defendants, and that neither the foreseeability nor proximity requirements were satisfied. The court further noted that using CSR policies as a basis for liability would encourage others to adopt socially detrimental defensive practices, the defendants did not create the dangerous workplace, and they did not have control over the circumstances or the employees. Then considering Ontario law with respect to direct duty, the court made a similar finding, again ruling that neither the foreseeability nor proximity requirements was satisfied, and again pointing to Loblaw's lack of control and lack of direct involvement in creating the situation in question, even though it was aware of dangerous workplaces in Bangladesh and was promoting CSR standards. The ONCA affirmed the lower judgement, agreeing with the reasons with respect to direct duty, and further exploring both *Cape*, which it differentiated, and intervening English cases, some of which will be discussed below (*Das v George Weston Limited*, 2017). Similarly, in the earlier case of *Piedra v Copper Mining Corporation* (2011) the court refused to find the Toronto Stock Exchange and the directors of Copper Mining directly liable for assault at the hand of security forces in Ecuador, relying primarily on lack of proximity.

UK BHR Cases

There has been a considerable amount of BHR litigation in the UK recently dealing with the direct liability of parent companies. *Adams v Cape Industries plc* (1990) was briefly referenced in Part II, in the context of veil piercing, but it is often also discussed in the context of direct duty. The case found a direct duty owing by the parent company to the subsidiary's employees on the basis that the businesses were

essentially the same, the parent had knowledge of health and safety concerns in the industry and the lack of safety in the subsidiary's work environment, and it was foreseeable that the employees would rely on this knowledge. Two years later, the English appeal court applied the test in *Adams v Cape Industries plc* (1990) to a similar claim in *Thompson v Renwick Group Plc* (2014), but found in favour of the parent company on the ground that the parent was not in the same business as the subsidiary, and it did not have superior knowledge of the issues in question.

More recently, there have been three notable cases involving English parent companies and foreign subsidiaries. In *Okpabi v Royal Dutch Shell Plc* (2018), compensation was sought for environmental damages. The court relied on *Caparo Industries Plc v Dickman*, (1990), a leading case on the duty of care, which sets out a test including proximity, foreseeability, and reasonableness,[24] and found insufficient control to establish proximity, specifically comparing to the policies, training, and other services in *Lungowe v Vedanta Resources Plc* (2016), which will be discussed below. Later in 2018 is *AAA & Ors v Unilever Plc & Anor*,[25] which involves Kenyan employees and other residents of a tea plantation operated by the Kenyan subsidiary of Unilever Plc. The plaintiffs argued that Unilever and its subsidiary owed them a duty of care to protect them from political violence allegedly involving assault, murder, and rape. The English appeal court limited its application of *Caparo Industries Plc v Dickman*, (1990) on the basis that this was not a novel liability claim. Instead, the court finds that there are two types of cases where a parent may have liability to a third party for the activities of its subsidiary: where the parent in substance takes over management of the relevant activity of the subsidiary, or where the parent gives advice to the subsidiary on managing the risk in question. In *AAA & Ors v Unilever Plc & Anor* (2018), the focus was on the second type of case, and the court found that the subsidiary was managing its own risk management policy, hence no obvious direct liability for the parent. As a result, the UK appeal court declined jurisdiction on the lack of triable issue. In 2019, the UK Supreme Court used the *AAA & Ors v Unilever Plc & Anor* (2018) classification in *Lungowe v Vedanta Resources Plc* (2016) to a different end. Vedanta Resources Plc was the parent of a Zambian subsidiary which owned and operated copper mines in Zambia. The claim made by Zambian citizens was on the pollution of waterways. The UK Supreme Court agreed with the lower courts that it was arguable that Vedanta sufficiently intervened in the management of the mine, such that it assumed a duty of care to the claimants.

Other International

Considering the United States briefly with respect to the Rana Plaza incident that forms the basis of the claims in *Das v George Weston Limited* (2017), a lower court dismissed claims against three United States retailers. This was primarily based on a limitations issue, but also on the basis that a company could not owe a duty of care to workers it did not employ (*Abdur Rahaman et al v J.C. Penney Corporation, Inc., The Children's Place, and Wal-Mart Stores, Inc.*, 2013). Looking elsewhere, in another study on supply chain liability, three legal trends in the European Union ("EU") are identified using a case against German retailer KiK for injuries and deaths resulting from a fire at a jean-making factory in Pakistan, with facts similar to *Das v George Weston Limited* (2017). The trends include vicarious liability, enterprise theory, and direct duty based on due diligence commitments (Terwindt, et al., 2018). In *Jabir v KiK* (2015), the relationship of influence between KiK and its supplier was supported based on KiK's code of conduct, its supplier compliance program, and the dependence of the supplier on KiK for its survival as a business. Terwindt and her co-authors advocate for such an assumption of responsibility. They argue an analogous position to *Cape*, in that KiK had made a commitment to the health and safety policy to be followed by the supplier (Terwindt, et al., 2018). *Jabir v KiK* was dismissed by a German lower court based on the statute of limitations, so the substantive issues were not addressed (Poell, et al., 2019).

CSR Statements as the Basis for a Duty

Perhaps the most promising argument for direct parent liability is found in the CSR and human rights due diligence commitments ("HRDD") made by parent companies. This is argued in several cases, and the position is advocated by several researchers.

Cases

Though legal reasoning on the use of CSR and related commitments varies within and between jurisdictions, this is a concept that has been considered for more than a decade. As an example, a United States appeal court found against the employees of a supplier in *Jane Doe, et al. v Wal-Mart Stores* (2009) on their claim that Wal-Mart's supplier standards created on obligation for Wal-Mart to ensure labour laws were being complied with at the supplier company (Doorey, 2009).[26] Looking at Canada's recent BHR cases, in *Choc v Hudbay Minerals Inc.* (2013), the Ontario court accepted the public statements on due diligence standards and principles as a factor that may support proximity. In *Lungowe v Vedanta Resources Plc* (2016), the UK court favourably considered several of the parent company's responsibility initiatives in support of a potential duty: sustainability report, training on health, safety, and environment across all companies, and public statements emphasizing the parent company's commitment to address environment risks and technical shortcomings (Norton Rose Fulbright, 2019). Though not finding for the plaintiffs, the court in *AAA & Ors v Unilever Plc & Anor* (2018) rejected the submission that there is any general limiting principle that a parent company could never incur a duty of care merely by issuing group-wide policies and guidelines and expecting the subsidiary to comply (Norton Rose Fulbright, 2019). Though this issue has not been considered by the British Columbia courts yet, *Garcia v Tahoe Resources Inc.* (2017) had the plaintiff arguing direct liability in tort on the basis of the public company's public statements of oversight and maintenance of standards at the mine in question and adoption of various international standards. Finally, another representative example is found in a report on the Dutch proceedings against Royal Dutch Shell. Shell asserted that it had no direct legal responsibility to implement its many publicized standards for environmental safety, though it admitted that it has set worldwide standards and expects these standards to be followed by all subsidiaries (Leader, et al., 2011).

Theory

Cassel (2016) outlines the case for a business duty of care to exercise HRDD, such that a parent's duty of care would extend to the human rights impacts of all entities in the enterprise, defendable if reasonable due diligence was exercised. Cassel compares general principle and situational approaches to recognizing new duties of care found in different jurisdictions, making the case for this new business duty with either approach. The general approach is reflected in the *Anns* test used in Canada, and foreseeability is the first consideration. Cassel asserts that finding "a common law duty of care based on this exercise of due diligence would thus be owed by definition, to reasonably foreseeable classes of victims, for reasonably foreseeable classes of injuries (2016, p. 179)." Moving to proximity, due diligence identifies those classes of persons likely to be at risk, meaning they should be in contemplation as being affected by the business activities. Accordingly, the due diligence efforts themselves provide some certainty as to who a duty would be owed to. International norms, canvassed in this article's introduction as well as in Cassel's article, serve to make the policy argument. After carrying out a similar analysis to Cassel, Conway (2015) also proposes that the relationship between a Canadian corporation and workers in its supply chain could satisfy a duty to protect. It would need to be established that "the defendant had sufficient control of the risk of human rights abuses in the plaintiff's workplace, that imposing a duty would not unreasonably interfere with the defendant's autonomy, and the plaintiff had reasonably relied on the defendant's representations to carry out HRDD in his workplace," and that this would only be negated by policy concerns that were compelling and with a real potential for negative consequences (Conway, 2015, pp. 778-779).[27]

The due diligence approach, or certain elements of it, also has its detractors. Skinner (2015) identifies limitation with due diligence efforts setting the actual tort standard: lack of clarity on what the applicable due diligence standards would be, concern that parent companies would just "go through the motions", and perhaps most importantly the ethical concern that harm might still occur. Focusing on due diligence as a factor in the creation of a duty for parent companies could also lead to companies viewing disclosure and positive efforts in their supply chain as a risk, which they might mitigate through reduced efforts (Turner, 2016). Permitting reasonable due diligence to be used as a defence may counteract this (Dhooge, 2008).[28]

Conclusions

To summarize, the door has been opened in Ontario and British Columbia on direct liability for parent companies in BHR cases. This is more promising than the piercing the veil cases, both because of advancements on directly parent liability in the UK, and because policy arguments are specifically a part of creating novel duties of care. It will be interesting to see how the Canadian courts respond to the position in *AAA & Ors v Unilever Plc & Anor* (2018) and *Lungowe v Vedanta Resources Plc* (2016) that direct liability for the parent is not a novel claim. With respect to policy, while arguing direct liability for the parent company may be more promising than either piercing the veil generally or enterprise theory specifically, policy reasoning from the latter can be drawn upon for arguments on a direct duty of care for parent companies. CSR and HRDD statements of companies are being used at both the foreseeability and policy stages of duty of care arguments. On balance, one can expect more discourse both in the courts and in scholarly work on the direct duty of parent companies generally for human rights violations of their subsidiaries (or perhaps even suppliers), and CSR and HRDD statements as they relate to this direct duty specifically.

CUSTOMARY INTERNATIONAL LAW

Tort claims against parent companies, based on what is referred to in the cases and literature reviewed below as "customary international law" or "CIL", is much less developed in corporate law than the substantive arguments considered to this point. This section looks at cases in Canada and the UK, and then considers select literature on the application of CIL. We bring together the various substantive arguments considered in conclusions offered at the end of the section.

Cases and Theory

Three cases will be considered for their general principles, in part to prepare us for their application in *Araya v Nevsun Resources Ltd.* (2017). First, *R v Hape* (2007) was before the SCC on the issue of whether a search of the foreign property of a Canadian investment banker (convicted of money laundering) violated his constitutional rights, which led the SCC to approve the proposition that CIL norms can form a part of the common law of Canada. The SCC found that the doctrine of adoption had never been rejected in Canada. It stated that:

> It appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. …Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law (*R. v Hape*, 2007).

Kazemi Estate v Islamic Republic of Iran, (2014) is a later SCC case involving a Canadian civil action against the government of Iran for the torture, rape, and murder of a Canadian-Iranian photojournalist. Here, the SCC found that the peremptory norm prohibiting torture (akin to CIL) had not yet created an exception to state immunity. In addressing the concept of a universal civil jurisdiction, the SCC in *Kazemi Estate v Islamic Republic of Iran*, commented on the development of the common law vis a vis international law generally, stating that:

> The development of the common law should be gradual and that it should develop in line with norms accepted throughout the international community. ... Particularly, in cases of international law, it is appropriate for Canadian courts only to follow the 'bulk of the authority' and not change the law drastically based on an emerging idea that is in its conceptual infancy" (2014, para. 108).

The dissenting judge found, after reviewing various conventions, that "an individual's right to a remedy for violations of his or her human rights is now a recognized principle of international law" (*Kazemi Estate v Islamic Republic of Iran*, 2014, para. 199). Finally, in the UK's *Belhaj v Straw* (2014), allegations of complicity by UK officials in Libya were considered by the UK appeal court. The court observed that:

> A fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded…These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate (*Belhaj v Straw*, 2014, para. 115).

So in Canada, CIL can be incorporated generally, with clear immunity for states, and in the UK, based on the case cited, there is a growing willingness to consider the conduct of foreign states and issues of CIL. *Araya v Nevsun Resources Ltd.* (2017) is perhaps the only Canadian business and human rights case to date to directly use CIL as the basis of a civil claim. The BCCA rejected the motion to strike the portions of the claim related to CIL, and this issue is now before the SCC (Howie, 2019). In their claims against Nevsun of complicity in the Eritrean military's use of forced labour, slavery, and torture, the plaintiffs alleged "breaches of peremptory principles of international law in the form of forced labour, slavery, torture, inhuman or degrading treatment, and crimes against humanity" and they sought damages with respect to CIL as incorporated into the law of Canada (*Araya v Nevsun Resources Ltd.,* 2017, para. 7). The defendants argued that CIL does not apply to corporations, CIL does not create a private law cause of action for which damages can be claimed, that British Columbia law does not recognize such a private law cause of action in any case, and that these breaches are not in fact CIL (*Araya v Nevsun Resources Ltd.,* 2017). First, the BCCA canvassed Canadian and UK law, finding that most cases have been against states, which in Canada at least, are shielded by immunity. Looking at corporations, the court found that the plaintiffs' claims were not bound to fail, stating that:

> There is no doubt that in pursuing claims under CIL, the plaintiffs face significant legal obstacles, including states' legitimate concerns about comity and equality and the role of the judiciary as opposed to that of the legislature. It is not necessarily the case, however, that the recognition of a CIL norm against torture as the basis for some type of private law remedy in this instance would bring the entire system of international law crashing down… If, as the Court suggested, the development of the law in this area should be gradual, it may be that an incremental first step would be appropriate in this instance (*Araya v Nevsun Resources Ltd.,* 2017, para. 196).

We turn to the literature on *Araya v Nevsun Resources Ltd.* (2017). While legislation is required to create criminal offences, the power to recognize novel torts is within the jurisdiction of the judiciary. Farkas laments that "the globalization of Canada's mining sector and the destructive impacts this has had on foreign, less developed states, is the type of societal change that demands the attention of the Canadian judiciary" (Farkas, 2018).[29] In considering whether Canadian courts will allow judicial remedies for victims of a corporation's CIL violations in light of *Araya v Nevsun Resources Ltd.* (2017), Hansell considers both whether CIL norms provide an independent cause of action in Canadian domestic law, and whether CIL binds corporations (Hansell, 2018). She finds that Canadian courts usually use CIL to inform domestic law, but provides examples of other private law obligations developed from CIL. She points to both the power of corporations and their very existence coming from the sovereignty that creates it, with respect to the second question. From the cases referenced earlier, domestic law should be read, where possible, to comply with Canada's international legal obligations. For this to be helpful, domestic legislation to be so interpreted would be necessary.

Conclusions

CIL as it relates to BHR litigation appears to be in its infancy, but there is some precedent for its application. The SCC ruling on CIL in *Araya v Nevsun Resources Ltd.* (2017) will be key.

Looking at the analysis in this article on the various substantive arguments, we can conclude as follows. Corporate separateness is one of the bedrocks of corporate law and veil piercing exceptions are very narrow, though they exist. Enterprise theory is very principled and continues to emerge in academia, but its actual treatment in corporate jurisprudence is rare, typically as a veil piercing exception which requires further development. Jurisprudence in Canada and the UK suggest that arguing direct liability for the parent company may be more promising than either piercing the veil generally or enterprise theory specifically, with the presence of CSR and HRDD statements potentially serving as the basis for such a duty. CIL as a substantive argument in BHR litigation is at an early stage and is likely not an immediate way forward. In arguing direct duty, if considered as a novel duty, it may be that the discourse on enterprise theory and CIL can serve a part of the policy argument. On balance, we can conclude that at most, incremental progress on the substantive elements is being made in Canadian BHR common law, particularly with respect to arguing directly liability for parent companies.

GETTING TO THE MERITS

Most Canadian BHR jurisprudence to date in Canada has taken place at the procedural stages. While we have come to tentative conclusions on what may happen as substantive arguments move forward, jurisdiction and other procedural elements must first be established. In addition, if more than incremental jurisprudence is desired, Canada may need to further consider its duty to protect, perhaps through legislative avenues to buttress civil remedies. Both procedure and legislative alternatives will be discussed in this final section. This article then concludes with final comments on the continued importance of BHR litigation.

Establishing Jurisdiction

The law in Canada has progressed significantly on establishing jurisdiction. First, when determining whether or not to take jurisdiction, the real and substantial connection test is typically considered, with distinctions drawn between cases of first instance and those enforcing foreign judgements. In *Yaiguaje v Chevron Corporation* (2018), in finding jurisdiction for recognition and enforcement of a foreign judgement, the SCC relies in part on the principles of comity and reciprocity, which underlie such actions and favour generous enforcement rules. Second, *forum non conveniens* claims can be made, as in the two BCCA cases where this claim was rejected and the BC court indeed found jurisdiction. In *Garcia v Tahoe Resources Inc.* (2017), it was rejected primarily because of the risk of unfairness in the Guatemalan justice system, and in *Araya v Nevsun Resources Ltd.* (2017) because of the possibility of no real trial in Eritrea. British Columbia now has the *Court Jurisdiction and Proceedings Transfer Act* (2003), as do most other jurisdictions (generally "CJPTA legislation"), which codifies *forum non conveniens* steps.[30] Third, forum of necessity offers plaintiffs another alternative when there is not a real and substantial connection, related to their inability to acquire jurisdiction over the defendant elsewhere. This has been formally adopted in CJPTA legislation in several provinces (Peari, 2018). Nwapi (2014) argues that jurisdiction by necessity doctrine may offer plaintiffs a way to address jurisdictional difficulties in cases against MNCs, but emphasizes the difficulty of the required element of 'impossibility of bringing proceeding abroad' in reference to *Anvil Mining Ltd v Canadian Association Against Impunity* (2012). In this case, a jurisdiction by necessity claim was made by plaintiffs who were alleging human rights abuses in the Democratic Republic of Congo, against a company incorporated in the Northwest Territories and headquartered in Australia. The claim was rejected by the Quebec Court of Appeal. The ONCA, however, recognized forum of necessity as a matter of common law in *Van Breda v Village Resorts* (2010). Forum and other procedural issues are significant with respect to BHR litigation in other jurisdictions as well, with Meeran, a well-known UK litigator responsible for some of the UK cases discussed, reflecting that "experience of MNC litigation indicates that procedural issues and factors that may only be peripherally

related to the merits of the cases often dominated the litigation" (2011, p. 16). In Canada, jurisdictional and procedural challenges beyond forum exist, such as determining whose laws apply, and other concepts are being brought to the courts, such as the concept of universal jurisdiction. Suffice it to say for the purposes of this article, that progress is being made in the area of jurisdiction in Canadian BHR cases.[31]

Legislative Alternatives and Beyond

The Canadian courts may be moving in the direction of improved remedies for BHR, but is there more that the Canadian government can do? The commentary to UNGP #26 provides that states are to ensure that they do not erect barriers to cases (though no positive duty is suggested), with several procedural and legal barriers listed. One of the legal barriers delineated is when, "the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability" (Ruggie, 2011, p. 29).[32] Many countries are now looking at domestic legislation to address some of these barriers.

Civil remedies are being included or proposed in the increasing array of state-based supply chain legislation. To provide context, supply chain legislation tends to be divided into transparency (or disclosure) and due diligence legislation, with certain legislation, typically in the latter category, also addressing civil remedies. The state of California in the United States and the UK led the way with legislation requiring companies to disclose their efforts to eliminate slavery and human trafficking from their global supply chains. Australia has adopted similar legislation. France has adopted legislation requiring companies to develop due diligence plans, and the Netherlands and Switzerland have similar pending legislation.[33] With respect to civil remedies, France took on a stringent approach with their corporate duty laws, requiring annual due diligence plans, and the ability for individuals harmed by a company's failure to establish and implement a plan to bring about civil action against that company (French Corporate Duty of Vigilance Law, 2017).[34] France also led an enhanced political dialogue or a 'green card' initiative brought to the EU in 2016 with eight national parliaments, calling for a duty of care for EU-based companies towards individuals and communities whose human rights and local environment are affected by their activities (European Coalition of Corporate Justice, 2017). Hong Kong's Draft Modern Slavery Bill 2017 was sent to Hong Kong's Chief Executive by a member of the Legislative Council in 2017, and along with disclosure requirements, it sets out improvements on the criminal code offences for trafficking (akin to money laundering charges), and the creation of a civil cause of action for domestic victims against individuals or companies benefiting from offences (Smith Freehills, 2018). In June 2018, the National Council of Switzerland approved a counter-proposal to a citizen Responsible Business Initiative, with the counter-proposal calling for mandatory HRDD and parent liability for subsidiaries (which can be mitigated through due diligence) (European Coalition of Corporate Justice, 2018).[35]

Canada is at the very early stages of transparency legislation, with minimal reference to due diligence or civil remedy provisions. An all-party working group was formed in 2018, a bill was proposed in 2018, and the work of a related subcommittee is ongoing (Government of Canada, 2019). Prior attempts have been made in the Canadian legislature with respect to legislation directed specifically at civil remedies as well. Bill C300, 'an act respecting corporate accountability for activities of mining, oil or gas in developing countries' was brought before the federal legislature in 2009 and made it to second reading though it did not become law (Parliament of Canada, 2011). Bill C-323, 'An Act to amend the Federal Courts Act (international promotion and protection of human rights)' specifically addressed litigation barriers by seeking to give federal courts universal jurisdiction over claims of violations of international human rights laws, but stalled at first reading (Parliament of Canada, 2013).[36] Though not imminent in Canada, legislative efforts could eventually help advance BHR litigation. Several scholars advocate for legislation in Canada and elsewhere. Skinner (2015) advocates for legislation creating an exception to limited liability of parent companies, where CIL violations or serious environmental harms are found and the parent corporation is doing business in 'high-risk' countries. Simons and Macklin (2013), Canadian researchers, also advocate for a statutory cause of action, providing conditions for individuals to sue corporations that engage in actions, whether directly or indirectly, that cause serious human rights-related

harms. They propose this as part of an integrated regulatory framework for home states. This framework also has government establishing agencies to conduct and disseminate human rights impact assessments, and holding back funding and political support for companies engaging in actions causing serious human-rights related harms. Extra-territorial legislation in Canada is not new, with the *Corruption of Foreign Public Officials Act*, *1998*, which applies to Canadian individuals and entities and their activities inside or outside of Canada, as a prime example.

Finally, other suggestions have been made to advance BHR litigation in Canada and elsewhere, both with respect to alternate forums, and other types of law as precedent. Many of these suggestions are worthy of further research in the Canadian setting. In a symposium on international human rights litigation post-*Kiobel* in the United States in 2014, international lawyers and human rights activists proposed an international arbitration tribunal on BHR as a forum for international human rights litigation (Childress III, 2015). Looking to criminal law, Binnie (2008), referenced in the introduction, has also suggested extending the International Criminal Court's jurisdiction to include corporations. Another scholar suggests using the criminal law concepts of complicity, aiding, and abetting where the circumstances merit such claims, in order to attach indirect liability (Bernaz, 2017).[37] Another researcher looks to the *Trafficking Victims Protection Reauthorization Act of 2017* for possible recourse, analyzing both the civil provisions added in 2003 and the criminal provisions added in 2008, targeting United States corporations that benefit financially from labour trafficking in their supply chains. She suggests that recourse could include criminal prosecution and civil suits, as well as potential shareholder derivative suits against directors (Ezell, 2016). Cases pursuing this avenue do not appear to be flooding the American courts, but it may be another area worth exploring.

Continued Importance of BHR Litigation

Jurisdiction and other procedural elements need to be established before the merits of BHR cases can be addressed by Canadian courts. Legislation supporting BHR litigation and other forums or legal avenues are also worthy aspirations. However, developing the substantive law in this area continues to be important, and we may be on the cusp of incremental progress in this area in Canada. In a review of Canada's non-judicial grievance mechanisms, considering both our CSR Counsellor and National Contact Points under the OECD Guidelines for Multinational Corporations 2017, a Canadian researcher finds weaknesses and specifically concludes that strengthening such non-judicial mechanisms is dependent on more effective access thorough regulatory and judicial mechanisms. She finds that non-judicial mechanisms, primarily voluntary in nature, are minimized and avoided by corporations in the absence of effective judicial remedies (Coumans, 2012). As set out in the introduction, companies that are litigated against tend to improve their policies and practices (Schrempf-Stirling & Wettstein, 2017), which can be extended across industries. Effective judicial remedies is further reaching than just the cases themselves, making incremental process in substantive BHR litigation all the more necessary.

ENDNOTES

1. This study is an extensive literature review that identifies a set of social issues that firms are confronted with in their supply chain. See also World Business Council for Sustainable Development (2018) for a list of issues generated by an advocacy organization.
2. The most well-known may be the United Nations (UN) Guiding Principles, discussed later in this section of the article, ILO Convention No. 182 (1999) on the Worst Forms of Child Labour in 1999 and the Protocol of 2014 to the Forced Labour Convention, 1930, Organization for Economic Co-operation and Development's Guidelines for Multinational Enterprises 2011, and more recently the United Nation's Sustainable Development Goals.
3. See also Davitti (2016) for a discussion of gaps in the UNGPs as it pertains to home states and their regulation of MNCs, and recommendations for refining the UNGPs and Bonfanti (2012) for a comparison of judicial and non-judicial remedies in the EU and the United States, from the perspective of the UNGPs.
4. See Simons (2014).
5. See also Chambers, R. (2009).

6. See Dodge (2016) for a survey of cases and barriers in the United States and Kaufmann, C. (2016) for a survey of cases and barriers faced outside of the United States. See also Sanders (2014) for additional analysis of litigation in the United States following *Kiobel*.
7. See also Hargovan & Harris (2007) for a brief general overview of Canadian and international piercing the veil cases.
8. Activity since the Ontario Superior Court judgement includes a case conference on scheduling in July 2018, and an attempt by the plaintiffs to amend the complaint, (Friedman, 2019).Various court activity is taking place in Guatemala as well, which will not be detailed here, see Klippensteins Barristers & Solicitors (2019).
9. The court and this article primarily follows the Choc action (though the Chub and Caal actions are similar with respect to the direct liability claim).
10. Jurisdiction was not in issue, as the Guatemalan subsidiary only brought this forward in the event that the motion to strike was successful, paras 85-86.
11. The SCC emphasizes that the finding is only for jurisdiction, and should not be understood to prejudice any of the other arguments on whether Chevron Canada can be found to be a judgement-debtor or alternatively whether Chevron Canada's shares or assets are available to satisfy the debt of the United States parent company.
12. Between the lower court and ONCA rulings, in 2017, the case also reached the ONCA on a lower court motion requiring the Ecuadorian appellants to post almost US$1 million in security, which motion was vacated by the ONCA, (*Yaiguaje v Chevron Corporation*, 2017).
13. See *Baatz v. Arrow Bar* (1990) as an example. See also Macey and Mitts (2014).
14. See for a review of the *Bhopal* actions, Baxi (2015).
15. Weber and Baisch also discuss direct liability and forum doctrines.
16. See *Wildman v Wildman* (2006) where the court pierces the corporate veil on the basis that one spouse controlled and concealed personal funds and assets within the corporation.
17. This case was cited with approval in the more recent cases of *Fairview Donut Inc. v The TDL Group Corp.*, (2012) and *Durling v. Sunrise Propane Energy Group Inc.* (2012). In both of these cases though, the emphasis is on enterprise theory not being accepted in the Canadian courts as a separate theory – i.e. it is very narrow and very fact dependent.
18. *Downtown Eatery* turns on the issue of a common employer, with the court finding that the employer in that case was a consortium of companies.
19. MacLean also provides another overview of early enterprise theory and its various commentators.
20. Leave to appeal to the SCC granted in June 2018 and arguments heard before the SCC in January 2019.
21. See though Sherman (2018) which considers enterprise theory from the perspective of corporate counsel and suggests strategies to mitigate against liability that may arise.
22. See *Kamloops (City of) v Neilson* (1984) and *Odhavji Estate v Woodhouse* (2003) for the affirmation of the *Anns* test.
23. Leave to appeal to the SCC refused.
24. This test is similar to the *Ans* test though expressed differently on the policy element. *Caparo* was also used in *Cape* and other BHR cases.
25. Over 200 Kenyan claimants are seeking leave to appeal to the UK Supreme Court. See CORRESPONDENT (2019).
26. See also Haley Revak (2011), which uses *Jane Doe, et al. v Wal-Mart Stores* (2009) to analyze whether corporate codes of conduct are legally binding with regard to human rights violations at foreign supplier factories.
27. Another example is found in environmental law, where it is argued that the norms in the UNGPs could help plaintiffs to establish a duty of care on the part of heavy carbon producers, specifically where they claim to uphold environmental standards in their CSR reports and statements (Higham, 2018).
28. See also Aiken, Trevey and McHugh (2017) on unsuccessfully using compliance with the California Act to defeat claims under other legislation.
29. In Part X of his article, Farkas goes on to detail several other examples of new causes of action established in Canada, and then focuses on adoption through a detailed analysis of *Hape* and *Kazemi*, making a distinction between prohibitive and permissive norms.
30. See Walker (2018) as well as other articles in this special issue. See also Black, Pital, and Sobkin (2012).
31. See also Duffy (2015) for a commentary on *Choc v Hudbay Minerals Inc.* (2013) and progress with respect to procedural barriers generally.

32. Of note, the United Nations may take the state duty to protect and the corporate duty to respect set out in the UNGPs further as it continues to draft and international BHR treaty. Draft principle 11 invites "states to take measures aimed at ensuring that businesses can be held liable for harm caused by their subsidiaries acting under their *de facto* control", as discussed in Bernaz (2019).
33. See for a summary of existing supply chain legislation, Allard International Justice and Human Rights Clinic (2017).
34. See also European Coalition for Corporate Justice (2017).
35. See also Weller and Pato (2018), for an examination of legislative developments in France, Switzerland, and Germany with respect to establishing or reinforcing the duty of care or vigilance of parent companies directly towards victims.
36. See also Fairhurst and Thoms (2015) for a brief discussion of this bill. See also Gerrity (2016) for a brief discussion of the bill and other attempts at law in Canada with respect to extraterritorial law and recourse to home state courts.
37. See also Stewart (2014).

CASES & LEGISLATION

AAA & Ors v Unilever Plc & Anor, [2018] EWCA Civ 1532.

Abdur Rahaman et al v J.C. Penney Corporation, Inc., The Children's Place, and Wal-Mart Stores, Inc., [2013] S.C. Del. No. N15C-07-174.

Adams v Cape Industries plc [1990] Ch 433.

Anns v Merton, London Borough Council [1977] 2 All E.R. 492 (H.L.).

Anvil Mining Ltd v Canadian Association Against Impunity 2012 QCCA 117.

Araya v Nevsun Resources Ltd., 2017 BCCA 401, aff'd at 2020 SCC 5.

Baatz v. Arrow Bar, [1990] 452 N.W (2d) 138 (S.C. of S. Dak.).

Batten v Boehringer Ingelheim (Canada) Ltd., 2017 ONSC 53.

Belhaj v Straw [2014] EWCA Civ 1394, aff'd [2017] UKSC 3.

Bowoto v Chevron [2004] 312 F. Supp. (2d) 1229 (N.D. Cal.).

Canadian Business Corporations Act RSC 1985, c C-44.

Caparo Industries Plc v Dickman, [1990] UKHL 2, 2 AC 605.

Chandler v Cape [2012] EWCA Civ 525.

Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Chevron Corp. v Yaiguaje, 2015 SCC 42, wherein the SCC affirms the Ontario Court of Appeal (ONCA) finding on jurisdiction.

Choc v Hudbay Minerals Inc. 2013 ONSC 1414.

Collett v Northland Art Company Canada Inc., 2018 FC 269.

Copperweld v Independence Tube [1984] 467 U.S. 752 (USSC).

Corruption of Foreign Public Officials Act SC 1998, c 34.

Court Jurisdiction and Proceedings Transfer Act SBC 2003, c 28.

Das v George Weston Limited 2017 ONSC 4129, aff'd at 2018 ONCA 1053.

Donoghue v Stevenson [1932] A.C. 562 (H.L.).

Downtown Eatery (1993) Ltd. v Ontario [2001] 54 OR (3d) 161, 200 DLR (4th) 289 (ON CA).

Durling v. Sunrise Propane Energy Group Inc., 2012 ONSC 4196.

Execution Act RSO 1980, c E-24.

Fairview Donut Inc. v The TDL Group Corp., 2012 ONSC 1252, aff'd 2012 ONCA 867.

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Frey v Bell Mobility Inc, 2009 SKQB 165.

Garcia v Tahoe Resources Inc., 2017 BCCA 39, leave to appeal to the SCC refused, 2017 CanLII 35114.

Heyde v Theberge Developments Limited 2017 ONSC 1574.
Jane Doe I, *et al v. Wal-Mart Stores*, Inc, No. 08-55706 (9th Cir. 2009).
Kamloops (City of) v Neilson, [1984] 2 SCR 2, 10 DLR (4th) 641.
Kazemi Estate v Islamic Republic of Iran, 2014 SCC 62.
Kosmopolous v Constitution Insurance Co. [1987] 1 SCR 2, 34 DLR (4th) 208.
Lungowe v Vedanta Resources Plc [2016] EWHC (TCC) 975, aff'd at [2019] UKSC 20.
Martin v Astrazeneca Pharmaceuticals Plc 2012 ONSC 2744.
O'Brien v Bard Canada Inc. 2015 ONSC 2470.
Odhavji Estate v Woodhouse, 2003 SCC 69.
Okpabi v Royal Dutch Shell Plc [2018] EWCA Civ. 191.
Ontario Inc. v MacKenzie Trust Co [1994] O.J. No. 2105 (Gen. Div.).
Petrodel Resources Ltd. v Prest [2013] UKSC 34.
Piedra v Copper Mining Corporation 2011 ONCA 191, rev'g 2010 ONSC 2421.
R v Hape, 2007 SCC 26.
Re Union Carbide Corporation Gas Plan Disaster at Bhopal, India in December, 1984, [1986] 634 F. Supp. 842 (S.D.N.Y.).
Salomon v Salomon & Co Ltd. [1896] UKHL 1, [1897] AC 22.
Sweetland v GlaxoSmithKline Inc., 2016 NSSC 18.
Teti and ITET Corp. v Mueller Water Products 2015 ONSC 4434.
The Catalyst Capital Group Inc v West Face Capital Inc, 2019 ONSC 128.
Thompson v Renwick Group Plc [2014] EWCA Civ. 635.
Trafficking Victims Protection Reauthorization Act of 2017 United States, s 1862 (115th)
Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co. (1996), 28 OR (3d) 423, [1996] OJ No 1568 (QL) (Gen Div), aff'd (1997), 74 ACWS (3d) 207 (Ont CA).
Van Breda v Village Resorts 2010 ONCA 84.
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Yaiguaje v Chevron Corporation, 2017 ONCA 827.
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