SCC Court File No.: 35682

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHEVRON CORPORATION and CHEVRON CANADA LIMITED

Appellants (Respondents/Appellants by Cross-Appeal)

-and-

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANDE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE

Respondents (Appellants/Respondents by Cross-Appeal)

FACTUM OF THE JOINT INTERVENER, INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW, MININGWATCH CANADA and THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. In this appeal, this Honourable Court is asked to decide whether Ontario has jurisdiction to hear an action brought by Ecuadorian indigenous plaintiffs against Chevron Corporation ("Chevron") and its wholly owned subsidiary Chevron Canada Limited ("Chevron Canada")[1] to recognize and enforce a final judgment in Ecuador ordering Chevron to pay US $9.51 billion in damages for remediation and costs related to extensive pollution of the Lago Agrio region of the Amazon rainforest.[2]

2. MiningWatch Canada, the International Human Rights Program at the University of Toronto Faculty of Law, and the Canadian Centre for International Justice (the "Joint Intervener") make three submissions. First, the interpretation of Canadian common law principles regarding recognition and enforcement actions should be informed by international legal norms and values,[3] including the principles of access to justice, and the right to an effective remedy.

3. Second, in accordance with international legal norms and values, the established test regarding the recognition of foreign judgments should not be supplemented with onerous jurisdictional requirements. The jurisdictional requirements proposed by the appellants are novel and unnecessary and are tantamount to asking this court to raise additional barriers for those attempting to enforce judgments obtained against transnational corporations for environmental or human rights harms.

4. Third, again in accordance with international legal norms and values, this Honourable Court should not foreclose, on a preliminary jurisdiction motion, the possibility that the assets of a closely-held subsidiary corporation are available to satisfy a judgment obtained against its transnational parent corporation.

PART II – POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

5. The Joint Intervener's positions are:

   a. The jurisdiction *simpliciter* test for adjudicative actions should not be applied to

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[1] Factum of the Appellant Chevron Corporation, filed July 2, 2010 ("Chevron Factum") at paras 30-33; *Yaiguaje v Chevron Corporation*, 2013 ONCA 758 ("*Yaiguaje")* at para 38 [Appellants' Record, Part I, Vol I, Tab 4].
[2] *Yaiguaje, supra* note 1 at paras 8, 12 [Appellants' Record, Part I, Vol I, Tab 4].
[3] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70 [Joint Intervener's Authorities, ("JIA"), Vol I, Tab 2].

recognition and enforcement actions; rather, the four corners of the test to recognize a foreign judgment are appropriately set out in *Beals v Sandhana*;[4]

b. Any issues regarding the principles of limited liability within corporate groups should not be resolved on a preliminary jurisdiction motion because i) the law regarding piercing the corporate veil is neither clear nor settled and ii) the principle of limited liability between parent corporations and their wholly owned subsidiaries requires modification to account for the realities of modern transnational business.

PART III – STATEMENT OF ARGUMENT

A. Interpretation of common law principles should be informed by international legal norms and values regarding business and human rights

6. Interpretation of Canadian common law principles regarding both 1) the jurisdiction of a court to hear a recognition and enforcement action and 2) corporate personhood within closely-held transnational corporate groups should be interpreted in a manner that enhances and helps realize the international human right to an effective remedy. This means, at minimum, that Canadian courts not erect unnecessary barriers that effectively prevent plaintiffs from having their recognition action heard on its merits after successfully obtaining a foreign judgment granting a remedy for environmental and human rights harms.

7. Over the past decade, the international legal community has become increasingly concerned with the expanding reach of transnational business on one hand and the failures of host and home legal systems to provide adequate remedies for environmental and human rights harms caused by transnational business activity on the other.[5] This problem is described as a

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[4] *Beals v Saldanha*, 2003 SCC 72 ("*Beals*") at paras 37-40 [Joint Book of Authorities of Chevron Corp. and Chevron Canada, ("JBA") Vol I, Tab 10].

[5] See e.g. *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie: *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UNHRC, 8th Sess, UN Doc A/HRC/8/5 (2008) ("*UN Framework*") at paras 1-3, 11-16, 88-91 [JIA, Vol II, Tab 24]; International Commission of Jurists, *Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (Geneva: International Commission of Jurists, 2008) ("*Corporate Complicity & Legal Accountability*") at 43-44 [JIA, Vol I, Tab 16]; Gwynne Skinner et al, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, (International Corporate Accountability Roundtable, CORE & the European Coalition for Corporate Justice, 2013) "Skinner" at 1-2 [JIA, Vol II, Tab 29]; Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to a Remedy*, (London: 2013) at 11-13 [JIA, Vol I, Tab 1]; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive industries, human rights, and the home state advantage* (New York: Routledge, 2014) at 1-3, 7-10 [JIA, Vol II, Tab 28].

"governance gap" by Harvard Professor John Ruggie, former United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises ("UN Special Representative"):

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.[6]

8. These governance gaps are caused in part by legal and practical obstacles that victims face when attempting to pursue remedies through tort law, including rigid application of rules regarding limitations, jurisdiction, limited liability of corporations, and the difficulty of enforcing a judgment against transnational corporations once successfully obtained.[7] As a result, current and prospective plaintiffs who have suffered environmental and human rights harms caused by transnational business often have no reasonable prospect of access to justice or an effective remedy.

9. In the face of growing concern with governance gaps, the international legal community has focused on identifying and implementing existing international legal norms and values that support access to justice and the right to an effective remedy for individuals and communities impacted by transnational corporate activity. Since their endorsement by the UN Human Rights Council in 2011,[8] the UN Guiding Principles on Business and Human Rights have become the authoritative global standard for business and human rights, with wide acceptance by governments, civil society and corporations.[9] The UN Guiding Principles have three pillars: (a) the state duty to protect human rights; (b) the corporate responsibility to respect human rights; and, crucially, (c) access to remedy.[10] Importantly, the UN Guiding Principles do not create new

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[6] *UN Framework*, *supra* note 5 at para 3 [JIA, Vol II, Tab 24].
[7] *UN Framework*, *supra* note 5 at paras 88-91 [JIA, Vol II, Tab 24]; *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises,* John Ruggie: *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011) ("*UN Guiding Principles*") at 22-24 [JIA, Vol II, Tab 23].
[8] *Human rights and transnational corporations and other business enterprises*, UNHRC Res, 17th Sess, UN Doc A/HRC/RES/17/4 (2011) at para 1 [JIA, Vol I, Tab 15].
[9] *Report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises*, UNHRC, 20th Sess, UN Doc A/HRC/20/29 (2012) at paras 10, 22-39 [JIA, Vol II, Tab 25].
[10] *UN Guiding Principles*, *supra* note 7 at 6 [JIA, Vol II, Tab 23].

norms or standards, but rather elaborate and clarify widely accepted existing standards, norms and legal principles.[11]

10. The right to an effective remedy is a cornerstone of both international human rights[12] and Canadian law. As stated by McLachlin CJ in *Hill v Hamilton-Wentworth Regional Police Services Board*: "To deny a remedy in tort is, quite literally, to deny justice."[13] Similarly, both the UN Guiding Principles and the UN Framework for Business and Human Rights note the importance of access to justice and access to an effective remedy, urging states to "strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territories", to "address obstacles to access to justice, including for foreign plaintiffs"[14] and to "ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts."[15] As noted in principles adopted by the UN General Assembly, states' duty to provide effective remedies extends to ensuring that their legal systems provide "effective mechanisms for the enforcement of [foreign] reparation judgments."[16]

B. The proper test for the recognition of foreign judgments

11. The issue of recognition of foreign judgments is a distinct category within private international law with its own test and requirements. While related, each area of private international law is directed at a discrete legal issue, and care must be taken not to impose the requirements of one area of private international law on another. Simply put, jurisdiction *simipliciter* requirements should not be imposed on recognition and enforcement actions.

12. Key to the distinction between the concept of recognition of foreign judgments and the concept of jurisdiction *simpliciter* is that jurisdiction *simpliciter* is focused on when a court can exercise its *adjudicative* jurisdiction to determine the merits of a substantive legal claim.[17]

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[11] *Ibid* at 6 [JIA, Vol II, Tab 23].
[12] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 2 [JIA, Vol I, Tab 17]; *General Comment No. 31 [80]* HRCOR 80th Sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004) at paras 2, 5, 8 [JIA, Vol I, Tab 10].
[13] *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 35 [2007] 3 SCR 129 [JIA, Vol I, Tab 14].
[14] *UN Framework*, *supra* note 5 at para 91 [JIA, Vol II, Tab 24].
[15] *UN Guiding Principles*, *supra* note 7 at 23 [JIA, Vol II, Tab 23].
[16] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res, UNGAOR, 60th Sess, UN Doc A/RES/60/147 (2006) at art 17 [JIA, Vol I, Tab 3].
[17] *Nagra v Malhotra*, 2012 ONSC 4497 at paras 8-9 [JIA, Vol II, Tab 20].

Adjudicative jurisdiction represents a significant exercise of the court's power over both the dispute and the parties; as a result, the rules of jurisdiction *simipliciter* provide territorial limits to the court's reach to guard against the illegitimate exercise of the court's adjudicative power, primarily through the application of the real and substantial connection test.[18]

13. Recognition of foreign judgments, on the other hand, is focused on an entirely different issue, namely the circumstances in which a court should recognize a final judgment where a foreign court has already exercised its adjudicative jurisdiction over a dispute.[19] At root, a recognition action is simply a request for a Canadian court to recognize that a debt is owed by one party to another.[20] Accordingly, the four corners of the test for whether a foreign judgment should be recognized were set out in *Beals v Saldanha*, and are limited to determining: first, whether the foreign court properly exercised adjudicative jurisdiction over the parties and the dispute, and second, whether the defenses of fraud, public policy or lack of natural justice apply.[21] In other words, because a Canadian court is not asked to exercise its adjudicative jurisdiction in a recognition action, the Canadian court need not concern itself with territorial overreach. As a result, there are no jurisdictional requirements *per se* for actions seeking to recognize a foreign judgment (as distinct from adjudicative actions).

14. Indeed, the addition of any jurisdictional requirements to recognition actions would be a radical and unwarranted departure from established law and run counter to the principles underlying private international law. Imposing additional jurisdictional requirements for recognizing foreign judgments will make it more difficult as both a practical and legal matter for communities and individuals who have suffered human rights and environmental harms to gain access to effective remedies.[22] Such additional jurisdictional requirements should not be imposed.

C. The Court should not foreclose the possibility that the assets of a wholly owned subsidiary corporation are available to satisfy a judgment obtained against a parent corporation

15. This Honourable Court should not foreclose, on a preliminary jurisdiction motion, the

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[18] *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 32 [JBA, Vol I, Tab 23].
[19] *Ibid* at para 33 [JBA, Vol I, Tab 23].
[20] *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 11 [Respondent's Authorities, Vol I, Tab 30].
[21] *Beals, supra* note 4 at paras 37-40 [JBA, Vol I, Tab 10].
[22] *UN Framework*, *supra* note 5 at para 91 [JIA, Vol II, Tab 24]; *UN Guiding Principles*, *supra* note 7 at 23 [JIA, Vol II, Tab 23].

possibility that the assets of a wholly owned and controlled subsidiary corporation are available to satisfy a judgment obtained against a transnational parent corporation for two reasons. First, the law regarding piercing the corporate veil is neither clear nor settled. Second, there are compelling reasons for Canadian courts to re-consider the concept of limited liability as it operates between parent corporations and wholly owned and controlled subsidiaries to deprive victims of environmental and human rights harms of an effective remedy.

The legal test for "piercing the corporate veil" is not clear, settled, or consistently applied

16. There is no consistent common law principle governing when Canadian courts will "pierce the corporate veil". In reality, this area of law has been poorly defined and inconsistently applied in Canada and similar jurisdictions, and offers little reliable guidance to claimants or defendant corporations. Legal scholars have noted the confusion within the jurisprudence on the issue of piercing the corporate veil for several decades, frequently criticizing it as incoherent and inconsistent.[23] Similarly, courts have lamented the lack of consistent principles governing piercing the corporate veil.[24] In an oft-quoted judgment of this Honourable Court, Wilson J. summed up the state of the law regarding the corporate veil: "[t]he law on when a court may disregard this principle by 'lifting the corporate veil' and regarding the corporation as a mere 'agent' or 'puppet' of its controlling shareholder or parent *follows no consistent principle*" [emphasis added].[25]

17. Everyone – tort victims, businesses, and courts – would benefit from clarity and a more principled approach to the law in this area. Given the current uncertainty, however, a preliminary jurisdiction motion is not the appropriate point for this Honourable Court to determine finally on

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[23] See e.g. Anthony J VanDuzer, *The Law of Partnerships and Corporations*, 3d ed. (Toronto: Irwin Law, 2009) at 130, 138 [JIA, Vol II, Tab 31]; Gordon Phillips, *Personal Remedies for Corporate Injuries*, (Toronto: Carswell, 1992) at 133 [JIA, Vol II, Tab 22]; Christopher Nicholls, "Piercing the Corporate Veil and the 'Pure Form' of the Corporation as Financial Innovation" (2008) 46 Can Bus LJ 233 at 236 [JIA, Vol II, Tab 21]; Anil Hargovan & Jason Harris, "Piercing the Corporate Veil in Canada: A Comparative Analysis" (2007) 28:2 Company Lawyer 58 at 58 [JIA, Vol I, Tab 13]; William P Friedman, "The Limits of Limited Liability" in *The Future of Corporation Law - Issues and Perspectives: Papers Presented at the Queen's Annual Business Law Symposium 1997* (Toronto: Carswell, 1999) 1 at 2-4 [JIA, Vol 1, Tab 9]; Neil C Sargent, "Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise" (1987)17 Man LJ 155 ("Sargent")] at 156 [JIA, Vol II, Tab 27].

[24] See e.g. *Clarkson Co Ltd v Zhelka et al* [1967] 2 OR 565, 64 DLR (2d) 457 (HC) at para 77 [JBA Vol I, Tab 22]; see also *642947 Ontario Ltd v Fleischer* (2001), 56 OR (3d) 417 (CA) at para 67 [JBA, Vol I, Tab 1]; *Canada Life Assurance Co v Canadian Imperial Bank of Commerce* (1974), 3 OR (2d) 70 at para 43, 44 DLR (3d) 486 [JIA, Vol I, Tab 6]; *Transamerica Life Insurance Company of Canada v Canada Life Assurance Compan*y (1996), 28 OR (3d) 423 at 16, 6 ACWS (3d) 891 (Gen Div) [JBA, Vol II, Tab 73].

[25] *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2 at para 12 [Respondent's Authorities, Vol I, Tab 23].

the merits of possible veil-piercing arguments in this case.

Public policy reasons for examining the application of limited liability between parent corporations and their wholly owned and controlled subsidiary

18. In addition to the need for legal clarity, limited liability between parent corporations and their wholly owned and controlled subsidiaries requires closer examination for policy reasons. The corporate world has changed substantially since the House of Lords' decision in *Salomon v Salomon & Co Ltd*[26] in 1897. In particular, the intervening century has seen the emergence of increasingly complex and powerful corporate groups consisting of several layers of wholly owned and controlled subsidiaries that operate worldwide. These corporate structures are designed to maximize profit and minimize liabilities, while allowing the parent corporation to maintain overall control of its subsidiaries.[27] Chevron Corporation is a case in point – in 2011, it conducted its business in 25 countries through 73 "major subsidiaries" incorporated in 24 different jurisdictions.[28] From its worldwide operations, Chevron Corporation had an annual operating revenue of $244.4 billion and a total net income of $26.9 billion.[29]

19. It is worth asking, as both former Supreme Court Justice Ian Binnie and vice-chair of the Ontario Securities Commission, Professor Mary Condon, did recently, if a principle that was established at the dawn of the corporate age should continue to hold sway in the 21st century without appropriate modifications:

> However useful it is as a doctrine of corporate law, is it right that the idea of a "corporate veil" be used in 2012 to block the claims, for example, of Latin American villagers seeking compensation for the destruction of their environment by tailings from a Canadian owned mine? Why should the cost of the environmental devastation fall entirely on the heads of its victims? Why shouldn't legal responsibility follow the money up the corporate food chain?[30]
>
> In so far as limited liability for individuals investing in 'public' companies was the raison d'etre of recognizing the corporation historically, this is no longer that significant a concern. […] So one provocative possibility is that we are

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[26] *Salomon v Salomon & Co Ltd* [1897] AC 22 HL (Eng) [JBA, Vol II, Tab 63].

[27] Sargent, *supra* note 23 at 158-161 [JIA, Vol II, Tab 27].

[28] *Chevron Corporation Annual 10K for 2011* at 5, E-7, E-8 [Respondents' Record, Tab 8 at 78 & 111-112].

[29] *Chevron Annual Report 2011*, 2-3 [Respondents' Record, Tab 7 at 62-63].

[30] Ian Binnie, "Judging the Judges: 'May they boldly go where Ivan Rand went before'" (2013) 26:1 Can JL & Jur 5 at 20-21 [Joint JIA, Vol I, Tab 4].

> seeing the decline of the corporate legal form because it is no longer congruent with the economic form of the corporation.[31]

20. When considering the policy implications of limited liability, two situations need to be distinguished: the first is the traditional legal model of the corporation where limited liability is provided to individual shareholders who are generally natural persons. For many corporate scholars, the separate legal personality of corporations and the limited liability of individual shareholders is an integral feature of the business landscape, and a condition precedent to the functioning of the capital markets that are at the core of the market economy.[32] Corporate scholars identify various policy arguments in support of the limited liability of individual shareholders including that it: (a) encourages individuals to invest in corporations without fear of indeterminate and potentially devastating personal liability; (b) allows shareholders to hold diverse share portfolios, which improves their economic security; (c) reduces the need for shareholders to monitor the actions of managers; (d) increases the efficiency of the stock market by tying the value of shares to companies rather than to the individual wealth of shareholders; and (e) ultimately makes it easier for companies to raise capital and take strategic risks.[33]

21. The situation is very different, however, in closely-held corporate groups (such as Chevron) where the sole shareholder is itself a corporation that retains total ownership and ultimate control over the subsidiary corporation. In such cases, *none of the various policy arguments marshalled to justify limited liability are applicable*. Corporate scholars point out that

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[31] Mary Condon, "Of Butterflies and Bitterness?: Legal Fictions in Corporate and Securities Law" in Ysolde Gendreau, ed, *Les fiction du droit = Fiction in the law* (Montreal: Éditions Thémis, 2001) at 144-145 [JIA, Vol I, Tab 7].

[32] See e.g. Paul Halpern, Michael Trebilcock & Stuart Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 UTLJ 117 ("Halpern, Trebilcock & Turnbull") at 123-124, 147 [JIA, Vol I, Tab 11]; Frank H Easterbrook & Daniel R Fischel, "Limited Liability and the Corporation" (1985) 52 U Chicago L Rev 89 ("Easterbrook and Fischel") at 90, 92 [JIA, Vol I, Tab 8].

[33] See e.g. Halpern, Trebilcock & Turnbull, *supra* note 32 at 123-124 [JIA, Vol I, Tab 11]; Easterbrook & Fischel, *supra* note 32 at 93-97 [JIA, Vol I, Tab 8]; Sandra K Miller, "Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the US: A Comparative Piercing Approach" (1998) 36:1 Am Bus LJ 73 ("Miller") at 131 [JIA, Vol I, Tab 19]; Kurt Strasser, "Piercing the Veil in Corporate Groups" (2004) 37 Conn L Rev 637 ("Strasser") at 637-638 [JIA, Vol II, Tab 30]; *Report on the Special Commission of Inquiry into the Medical Research and Compensation Foundation*, "Annexure T" in *The Concept of Limited Liability – Existing Law and Rationale*, Commissioner DF Jackson QC, New South Wales Department of Premier and Cabinet (Sydney, 2004) ("Annexure T") at 416 [JIA, Vol II, Tab 26].

societal benefits derived from limited liability between parent corporations and their wholly owned subsidiaries are minimal or non-existent.[34]

22. On the contrary, there are substantial risks and costs to upholding limited liability between parent corporations and their wholly owned and controlled subsidiaries. Law and economics scholars such as Professors Easterbrook and Fischel, for example, argue that limited liability between parent corporations and their wholly owned subsidiaries creates perverse incentives, economic inefficiencies and unjust results:

> If limited liability is absolute, a parent can form a subsidiary with minimal capitalization for the purpose of engaging in risky activities. If things go well, the parent captures the benefits. If things go poorly, the subsidiary declares bankruptcy, and the parent creates another with the same managers to engage in the same activities. This asymmetry between benefits and costs, if limited liability were absolute, would create incentives to engage in a socially excessive amount of risky activities.[35]

23. Whether there are policy reasons justifying limited liability between parent corporations and their wholly owned and controlled subsidiaries appears not to have been squarely considered in any judicial decision. Legal scholars who have examined the history of limited liability closely have concluded that the uncritical extension of the doctrine of limited liability to corporate groups was not grounded in principle, but was in fact an "historical accident"[36] that occurred as "the corporation evolved [and] law in a sense 'looked the other way.'"[37] Rather than creating a socially useful parallel to limited liability for individual human shareholders, it has created the unjustified possibility of limited liability within limited liability.

24. The danger of limited liability parent corporations and their subsidiaries is particularly stark in the context of tort law, where a clear injustice results. Unlike those in contractual relationships with a corporation, tort victims do not voluntarily assume risk, nor can they easily protect themselves against it. The parent corporation, on the other hand, is well placed to either

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[34] Easterbrook & Fischel, *supra* note 32 at 110-111 [JIA, Vol I, Tab 8]; Strasser, *supra* note 33 at 638-639 [JIA, Vol II, Tab 30]; Miller, *supra* note 33 at 131 [JIA, Vol I, Tab 19]; Henry Hansmann & Reinier Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) 100:7 Yale LJ 1879 at 1880 [JIA, Vol I, Tab 12].
[35] Easterbrook & Fischel, *supra* note 32 at 111 [JIA, Vol I, Tab 8].
[36] Phillip I Blumberg, "Limited Liability and Corporate Groups" (1986) J Corp L 573 at 605 [JIA, Vol I, Tab 5].
[37] Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont: LexisNexis Canada Inc, 2009) at 537 [JIA, Vol I, Tab 18].

prevent the harm or insure against it, but has little incentive to do so if the liabilities of its subsidiary corporation do not fall on the parent corporation.[38]

25. This problem – and its potentially serious implications regarding accountability for environmental and human rights harms – has attracted criticism and urgent calls for reform from the international legal community. The rigid application of common law principles regarding the strict separation of parent corporations from their wholly owned and controlled subsidiaries has been repeatedly cited as an unjustified and unjustifiable barrier to justice and remedy that is outmoded in our current globalized world.[39] In particular, the UN Guiding Principles state: "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", and recommends that states take steps to reduce these legal barriers that can lead to a denial of access to remedy.[40]

26. The Joint Intervener respectfully submits that there is a need for this Honourable Court's guidance regarding a) the principles by which the doctrine of limited liability should operate in a globalized economy with unprecedented levels of corporate complexity, and b) the circumstances in which limited liability between a parent corporation and its wholly owned and controlled subsidiary is appropriate. As a result, this Honourable Court should not foreclose, on a preliminary jurisdiction motion, the possibility that the assets of a wholly owned and controlled subsidiary corporation are available to satisfy a judgment obtained against a transnational parent corporation.

PART IV– SUBMISSIONS ON COSTS AND ORDERS REQUESTED

27. The Joint Interveners seek no costs and respectfully request that none be awarded against it. The Joint Intervener requests that it be allowed 10 minutes to provide oral argument at the hearing of the appeal. The Joint Intervener takes no position on the outcome of the appeal but asks that it be determined in accordance with the foregoing submissions.

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[38] Halpern, Trebilcock & Turnbull *supra* note 32 at 145-147, 149 [JIA, Tab 11]; Annexure T, *supra* note 33 at 419 [JIA, Vol II, Tab 26].
[39] *UN Guiding Principles*, *supra* note 7 at 23 [JIA, Vol II, Tab 23]; *UN Framework*, *supra* note 5 at paras 11-13, 88-89 [JIA, Tab 24]; *Corporate Complicity & Legal Accountability*, *supra* note 5 at 43-46 [JIA, Vol I, Tab 16]; and Skinner, *supra* note 5 at 11, 73, 75 [JIA, Vol II, Tab 29].
[40] *UN Guiding Principles supra* note 7 at 23 [JIA, Vol II, Tab 23].

All of which is respectfully submitted this 17th day of October, 2014.

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Murray Klippenstein	Renu Mandhane

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PART V – TABLE OF AUTHORITIES

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Tab 7	Condon, Mary. "Of Butterflies and Bitterness?: Legal Fictions in Corporate and Securities Law" in Ysolde Gendreau, ed, *Les fiction du droit = Fiction in the law* (Montreal: Éditions Thémis, 2001).	19