THE DOCTRINE OF PIERCING THE CORPORATE VEIL IN SOUTH AFRICA:

AN ANALYSIS OF THE SOUTH AFRICAN APPROACH WITH LESSONS FROM THE CANADIAN JURISPRUDENCE

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CHAPTER ONE: INTRODUCTION

1.1 VEIL-PIERCING

> 'Limited liability is a fundamental principle of corporate law. Yet liability has never been absolutely limited. Courts occasionally allow creditors to "pierce the corporate veil," which means that shareholders must satisfy creditors' claims. "Piercing" seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.'[1]

The first principle of a corporation is the right to have separate legal personality independent from the directors and shareholders.[2] The entity becomes distinct from those who incorporate it and those who participate in the active management of the corporation's business. The corporation is owned by shareholders. The shareholders, as the natural persons with ownership rights in the artificial entity, retain obligations distinct from those of the corporation. The shareholders thus cannot be held liable for obligations that the corporations may be required to fulfil, be it primary or collateral, in its business dealings. There is a separation between the company, as a separate juristic person, and its shareholder.[3] The distinction between the company and its shareholders and directors is described as the infamous 'veil' to separate the corporation from the owners themselves. The benefit of separate legal personality is the second principle afforded to a corporation - limited liability of shareholders. As a general principle shareholders are not liable for the debts of the company.[4] As a separate legal person the company exists in perpetuity despite changes in ownership structure. This makes commercial sense, because 'the primary purpose for

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[1] FH Easterbrook and DR Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89 (1985) at 89.
[2] See D Collier-Reed., and K Lehmann, eds. *Basic principles of business law*. LexisNexis, 2010 at 27 for discussion on a juristic person. Juristic persons are 'artificial' persons – entities that do not have a concrete existence in the way that human beings do, but which nevertheless exist in an artificial, legal realm. See further the case of *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550.
[3] Shareholders direct their capital into the company with ownership of shares. They own the company in proportion to the amount of total shares issued in the company. See further *London and Others v Department of Transport, Roads and Public Works, Northern Cape and Others* (1035/2018) [2019] ZASCA 144 at para 25.
[4] Cassim et al Contemporary Company Law 2 ed (2012) at 35.

the doctrine of separate legal personality is to encourage entrepreneurship, by shifting the risks of business failure away from entrepreneurs to creditors and other risk bearers'.[5] Managers of the business can take necessary commercial risks without the consequence of individual liability.[6]

The advent of the separate legal personality has brought about a revolutionary vehicle to conduct business activities. Simultaneously, it has also created the opportunity for abuse. Those who own or control the business are able to escape accountability for the actions of the company. The courts have been empowered through corporate law policy, precedent and legislation to pierce the corporate veil. Binns-Ward J in *Ex Parte Gore*[7] ('*Gore*') describes it as the process 'to disregard the distinctness provided in terms of a company's separate legal personality', and allocate obligations or liabilities away from the company towards an individual or group of individuals. The remedy to pierce the corporate veil under the common law is 'a judicial philosophy that the separate personality of juristic persons should be disregarded only in exceptional circumstances'.[8] The common law cases provided no coherent principles when this would be done, but overlapping principles have been deduced from the leading Supreme Court of Appeal ('SCA') decisions.

Section 20(9) of the Companies Act 71 of 2008 ('Companies Act 2008') was the first general statutory provision to pierce the corporate veil in South Africa. This provided the courts' with the general discretion when to pierce the corporate veil. Section 20(9) has set a lower standard than the preceding common law to disregard the separate legal personality of the corporation It has the potential to 'erode the … philosophy' the doctrine, as established by the common law, is

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[5] M Salim. "Corporate insolvency: separate legal personality and directors' duties to creditors." *UiTM Law Review* 2 (2004) at 90.

[6] Limited liability does not preclude a court allocating liability in cases such as gross negligence or fraudulent activity. These exceptions will be discussed in Chapter 4.

[7] NO and Others NNO [2013] 2 All SA 437 (WCC) at para 29.

[8] Ibid at 27. The court lists various cases of importance on the topic such as *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA), at para 23, *Airport Cold Storage (Pty) Ltd v Ebrahim and Others* [2007] ZAWCHC 25; 2008 (2) SA 303 (C), at para. 9, and *Al-Khafari & Sons v Pema and Others NNO* 2010 (2) SA 360 (W), at para. 36.

strictly used in exceptional circumstances.[9] The ramifications of a lower standard would result in the dilution of the principles of separate legal personality and limited liability – the very tenets of a corporation.[10] Further, 'by expressly establishing its availability simply when the facts of a case justify it' indicates the standard created by the legislature is lower than previously used as 'exceptional' or 'drastic'.[11] It is submitted the statute creates mandatory opportunities to pierce the corporate veil if the threshold has been met, but it will no longer be held to the common law standard of exceptional circumstances.

In the South African context separate legal personality is important for its alignment to the purposes of the Companies Act 2008 in which section 7 encourages 'entrepreneurship and enterprise efficiency'.[12] There is a need to strike a balance between separate legal personality and the high standards of governance to 'encourage the efficient and responsible management of companies'.[13] Section 20(9) of the Companies Act 2008 ensures the requisite accountability for the actions of the company in line with Section 7. Disregarding the separate legal personality has the potential to 'encourage the efficient and responsible management of companies' but also has the potential to conflict with 'encouraging entrepreneurship and enterprise efficiency'.[14]

While it is important to allow courts sufficient room to determine when to pierce the corporate veil on a case by case basis, and not according to a fixed or rigid principle, it is also important that proper guidelines be developed to provide certainty to courts and litigants about

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[9] P Levenberg, "The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions." *Penn St. JL & Int'l Aff. 7 (2019)* at 166. See further *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) at para 23.
[10] See *Saloman v Saloman and Co. Ltd* [1897] AC 22 for further discussion on the importance of the separate legal personality of a company.
[11] Ibid at 166. The article quotes *Ex Parte Gore* at para 34. Citing *Amlin (SA) (Pty) Ltd. v. Van Kooij* 2008 (2) SA 558 (C) at para. 23 (S. Afr.); *Knoop N.O. and Others v Birkenstock Properties (Pty) Ltd. And Others* [2009] ZAFSHC 67 at para. 23.
[12] Section 7(b)(i) of the Companies Act 71 of 2008.
[13] Section 7(b)(j) of the Companies Act 71 of 2008.
[14] Section 7 of the Companies Act 2008. Piercing the corporate veil more often could give effect to one purpose of the Companies Act 2008 and consequently impose on another purpose.

when the corporate veil should be pierced.[15] The idea of a case-by-case basis provides little accuracy when it *needs* to be done. It is necessary to balance the sanctity of the corporate structure and the circumstances that justify the need to disregard it. There is an understandable apprehension to frequently employ this remedy. The courts' acknowledge disregarding corporate personality negate the rights given to the corporate as a separate legal person. As Corder has often been quoted as saying, 'law cannot only be a brake; it must also be a driving force for social harmony'.[16] Piercing the corporate veil requires balancing the conflicting purposes of the Companies Act 2008, preserving the separate legal personality of the corporation and the policy considerations that inform the decision.

Section 5(2) of Companies Act 2008 provides 'a court interpreting or applying this Act may consider foreign company law'. South Africa's corporate law has borrowed extensively from the North American jurisprudence, and the Department of Trade and Industry 'contracted a largely foreign drafting team led by Phil Knight, a Canadian drafting expert'.[17] Canada has maintained a continued reluctance towards entertaining any form of veil-piercing. As it has been said: 'courts without the benefit, or the burden, of 200 years of constitutional jurisprudence' do not have the requisite case law within their own jurisdiction to solely rely upon.[18] Rather than abandoning a comparative interpretation, when 'carefully used, comparative interpretation is at least informative, is often enriching, and at best can be inspiring'.[19]

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[15] Case-by-case decision making may provide less legal certainty but, on the other hand, can provide necessary flexibility to determine whether the separate legal personality of a corporation should be disregarded.
[16] H Corder 'Crowbars and Cobwebs: Executive Autocracy and Law in South Africa' (1989) 5 *SAJHR* 1 at 22.
[17] I Rawoot, 'Companies Act Farce' *Mail & Guardian.* Available at https://mg.co.za/article/2010-04-07-companies-act-farce.
[18] S Kentridge, *Comparative Law in Constitutional Adjudication, The South African Experience in* JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? (Basil Markesinis & Jörg Fedtke eds., UCL Press 2006) at 333.
[19] Ibid.

South African and Canadian law are rooted in English law. Both jurisdictions have reserved veil-piercing to exceptional circumstances. Canadian court decisions suffer the same fate as their South African counterparts by not having consistent principles of veil-piercing, but have developed two distinct categories that justify the use of the veil-piercing doctrine. The two categories being when 'pursuant to statute' and 'fraud-based grounds'. It is submitted that the more restrictive interpretation of veil-piercing in Canada, could assist to create a more consistent framework when faced with the prospect of having the separate legal personality of a company being disregarded in South Africa. The two categories not only comply with the exceptional nature of the remedy but limit its applicability to adequately balance veil-piercing against policy considerations in favour of preserving the separate legal personality of a corporation.

1.3 RESEARCH QUESTION

This dissertation will seek to clarify with the introduction of the Companies Act 2008, does section 20(9) provide the potential for resolving the difficulties that exists when the courts will be able to pierce the corporate veil? The research will consider the necessary framework for the courts to determine when to pierce the corporate veil balanced against policy considerations to maintain the separate legal personality of the company.

The research will consider the principles that can be deduced from the Canadian jurisprudence, and whether there could be valuable lessons transplanted into the South African law in the attempt to create a working framework of when it may be possible to pierce the corporate veil. This will not be a comparative analysis of each jurisdiction to consider the similarities and differences, more to help improve South Africa's approach to piercing the corporate veil. The choice of Canadian case law should provide a better interpretation of the Companies Act 2008, and to resolve any difficulties that the South African courts have faced.

1.4 DISSERTATION OUTLINE

Chapter two of the dissertation will define corporate personality and veil-piercing. *Saloman v Saloman*[20] from the English Courts, lays the foundation for the South African and Canadian understanding of the separate legal personality of the corporation. Separate legal personality is simultaneously circumvented and consequently disregarded to pierce the corporate veil.

From the foundational understanding of the characteristics of the company as a juristic person, Chapter three will consider the jurisprudential development of the veil-piercing doctrine through the common law. The courts created different and often opposing views when to pierce the corporate veil under the common law. Although the Companies Act 2008 has codified the common law power of the courts to pierce the corporate veil, there is still uncertainty in determining which abuses would justify disregarding the separate legal personality of the corporation. The codification of the 'unconscionable abuse of the juristic personality of the company as a separate entity' would appear to broaden veil-piercing beyond the scope of the common law. The courts – in determining what abuse would be 'unconscionable' – have resorted to common law principles to interpret the Companies Act 2008.[21] The courts have continued to consider the factors present in decisions made by the courts in terms of the common law to interpret the Companies Act 2008.

Chapter four will introduce the statutes prior to the Companies Act 2008, namely the Companies Act 61 of 1973 ('Companies Act 1973') and Close Corporations Act 69 of 1984 ('Close Corporations Act'). The imposition of personal liability in the former is no form of veil-piercing, whereas the latter only applied to close corporations ('CC'). Albeit a further development by the

[20] *and Co. Ltd* [1897] AC 22.
[21] Section 20(9) of the Companies Act 71 of 2008.

courts as to when to pierce the corporate veil, there was nevertheless still no statutory provision to pierce the corporate veil of companies' prior the Companies Act 2008.

Chapter five will engage with section 20(9) of the Companies Act 2008, and determine to what extent the court has created a set of principles that are appropriate to pierce the corporate veil. The case of *Gore*[22] coupled with the preceding common-law provide the current precedent for when the courts may pierce the corporate veil.

Chapter six will highlight the decisions by the Canadian courts that contain a larger amount of jurisprudence on the topic and remain conservative in piercing the corporate veil. The Canadian courts' have limited piercing the corporate veil to two instances: 'pursuant to statute' and 'fraud-based grounds'. There is greater certainty provided through these limited instances that better consistently determine when a court may pierce the corporate veil. This dissertation submits South Africa should follow the Canadian approach to limit the veil-piercing doctrine.

Chapter seven sets out my conclusions and recommendations. I recommend a narrow interpretation of Section 20(9) of the Companies Act that veil-piercing must only be used 'pursuant to statute' and 'fraud-based grounds' but acknowledge difficulties in applying this approach rigidly. In conclusion I will argue that the Canadian concept of veil-piercing should be used to determine when the veil should be pierced in South African law under the Companies Act 2008.

[22] *Gore* supra note 7.

CHAPTER TWO: THE CONCEPT OF CORPORATE PERSONALITY AND VEIL-PIERCING

DEFINITION OF CORPRATE PERSONALITY AND VEIL-PIERCING

2.1 INTRODUCTION

Separate legal personality, the very fundamental tenet of company law, separates the shareholders and directors from any liability or responsibility that may arise through the course of a company and its actions. *Salomon v Salomon*[23], became the foundational case that confirmed the doctrine of corporate personality in terms of the Limited Liability Act that has been relied on by courts in various jurisdictions.[24] The South African courts confirmed this in *Dadoo*[25], where the court held a separate entity 'distinct from its shareholders is not merely artificial and technical thing. It is a matter of substance'. The rule remains that a company has a separate legal person distinct from its shareholders and directors, and that shareholders are in principle not liable for the debts and liabilities of the company.

2.2 SALOMON V SALOMON

Salomon was an English leather merchant who incorporated according to the *Companies Act 1862*.[26] He sold his business to the company with a 'nominal capital of 40 000 shares of £1 each' owned 20 001 of the 20 007 issued shares, the remainder owned by his wife and five children.[27] The business structure was setup where Aron Salomon became 'a secured creditor, a controlling shareholder, a director and an employee of the company'.[28] The business failed and within a year

[23] *and Co. Ltd* [1897] AC 22.
[24] Limited Liability Act 1855 (18 & 19 Vict c 133).
[25] *Dadoo* supra note 2 at 551.
[26] K Potter, V Maric & M Stephenson, 'Fraud Unravels Everything: A limited Justification for Piercing the Corporate Veil' in Annual Review of Civil Litigation at 558.
[27] Cassim et al op cit note 4 at 33.
[28] Ibid.

entered liquidation. Salomon as a secured creditor received preference at the expense of all unsecured creditors.

Salomon lost in the lower courts. On appeal the House of Lords held that 'a shareholder is not responsible for the debts of the company irrespective of the number of shareholders and that Salomon was not liable for the debts of the company irrespective of the number of shareholders, and that Salomon was not liable to the creditors as the alter ego of the corporation'.[29] The company was validly formed and registered, and in its own right a legal person.[30] Lord Macnaghten laid down the legal principle as follows;

> 'The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them'.[31]

The principles and above dictum from *Salomon* has been confirmed in South African law by *The Shipping Corporation of India Ltd v Evdomon Corporation*[32], which stated that,

> 'it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity'.

2.3 STATUTORY CONFIRMATION OF A JURISITC PERSON

The Companies Act 2008 confirms the existence of the separate legal personality of a corporation. Section 19(1)(a)[33] expressly establishes the legal status of the company from the time of its inception. The section reads as follows:

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[29] Ibid. The result for Salomon was the issued debentures by the company for the purchase price to make him a secured creditor were valid against the remaining creditors, and he was not liable for the debts of the company.
[30] Cassim et al op cit note 4 at 33.
[31] *Salomon* supra note 23 at 51.
[32] & another 1994 (1) SA 550 (A) at 566C-F.
[33] Section 19(1) of the Companies Act of 2008.

"(1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company—

(a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act;

(b) has all of the legal powers and capacity of an individual, except to the extent that—

(i) a juristic person is incapable of exercising any such power, or having any such capacity; or

(ii) the company's Memorandum of Incorporation provides otherwise;"

The express acknowledgment of juristic personality in section 19 of the Companies Act 2008 has been followed in many common-law jurisdictions. Section 15(1) of the Canada Business Corporations Act[34] states that a corporation has the capacity and, subject to the act, all the rights and duties of a natural person. Australia is another example, section 124(1) of the Corporations Act[35] states that a company has all the legal capacity and powers of a natural person despite any restrictions or prohibitions on the exercise of its powers in its memorandum of association. Within common law jurisdictions, including South Africa, the formation of the company creates a veil or curtain between the company and its shareholders and directors, this is what protects them from the liability for the debts and wrongful acts of the company.[36] To indemnify the directors and shareholders of the company from its corporate actions is what makes the creation of a company such an attractive commercial vehicle.

2.4 UNCERTAINTY WHEN TO PIERCE THE CORPORATE VEIL

Disregarding the separate legal personality is a drastic scenario; it removes the protection provided to shareholders and directors. The courts will examine the substance of the company rather than

[34] R.S.C. 1985, c. C-44.
[35] 50 of 2001.
[36] Cassim et al op cit note 4 at 45.

the form in which the company is cast.[37] The following cases all provide individual attempts to define the doctrine itself. Each provide marked differences with no consistency for such a serious departure from the rights provided to a corporation.

2.4.1 Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd[38] ('Lubner')

The notion of a variety of circumstances to invoke the doctrine of piercing the corporate veil does indicate there is an amount of flexibility of the doctrine. This can be appreciated for the wide-ranging circumstances a remedy may be provided. Consequently, the flexibility of the doctrine has also meant there has been an unpredictable application of the doctrine. The law is not merely an academic exercise within the four corners of documents. The Judiciary's duty 'is to administer justice to those who seek it, fearlessly and impartially'.[39] Piercing the corporate veil falls under a lacuna in the law when it may be invoked. In *Lubner* the court defined piercing the corporate veil as 'disregarding the dichotomy between a company and the natural person behind it or in control of its activities and attributing liability to that person where he has misused or abused the principle of corporate personality'. [40] The case went further to lay out, as best as it could, certain guidelines to follow when piercing the corporate veil.

2.4.2 Hülse-Reutter v Göddé[41] ('Hülse-Reutter')

In *Hülse-Reutter,* the application was made in terms of section 424 of the Companies Act 1973. The company was a foreign company and not within the ambit of the Companies Act 1973. The applicant was forced to rely on the common law rules to pierce the corporate veil. The court acknowledged that the circumstances 'in which a court would pierce the veil are far from settled and much depends on a close analysis of the facts of each case, considerations of policy and judicial

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[37] Ibid.
[38] 1995 (4) SA 790 (A*).*
[39] J Hlophe. "The Role of Judges in a Transformed South Africa-Problems, Challenges and Prospects." *S. African LJ* 112 (1995) at 22.
[40] (Pty) Ltd 1995 (4) SA 790 (A) at para 28.
[41] 2001 (4) SA 1336 (SCA).

judgment'.[42] The court had set no parameters to when it may be done, but rather it will be a case-by-case basis to decide when to pierce the corporate veil. It is submitted that the courts concern for a case-by-case basis requires a closer consideration of the facts of prior cases in which the court proceeded to pierce the corporate veil to reveal overlapping principles.

2.4.3 Amlin (SA) Pty Ltd v Van Kooij[43] ('Amlin')

In *Amlin* the court was faced with the question if it might be necessary to pierce the veil to allow the courts, in rare circumstances, to 'open the curtains' of the corporate entity in order to see for itself what is obtained inside. [44] Amlin (SA) Pty Ltd and Amlin Holdings BV, a corporation based in the Netherlands, were both owned and controlled by Mr. Von Waesberghe. Mr Van Kooij, the Respondent, who was employed by Amlin Holdings BV and was owed a significant amount of money by the company. R70 000 was paid to the Respondent through Amlin (SA) Pty Ltd. The court was required to rule on whether these payments were a loan from Amlin (SA) Pty Ltd, or a deduction from the amounts owed to the Respondent by Amlin Holdings BV.

These 'so-called separate legal entities were separate only in name and for the convenience' of Mr. Von Waesberghe.[45] The court went further to say veil-piercing will only be 'necessary and obligatory in circumstances where justice will not otherwise be done'.[46] Veil-piercing was used for the court to determine that,

> 'Amlin Holdings BV owed the Respondent a substantial amount of money which despite his consistent demands was never paid in full to him. Part payment was facilitated through Mr. Von Waesberghe and Amlin SA, an entity directed and controlled by Mr. Von Waesberghe'.[47]

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[42] Ibid at para 20.
[43] 2008 (2) SA 558 (C).
[44] Ibid at para 12.
[45] Ibid at para 25.
[46] Ibid.
[47] Ibid at para 29.

The profits of the company belong to the company, as well as all the debts and liabilities of the company.[48] The consequence of veil-piercing is that liability normally imposed on the company is attributable onto the shareholder(s) or director(s) in terms of personal liability.[49]

2.5 CONCLUSION

Salomon upheld the separate legal personality of the company and provided no remedy to creditors of the company. With the importance of separate legal personality established, the South African common law cases have created a working definition of veil-piercing when there is failure to observe corporate formalities, the form is used to promote fraud, injustice or the use of the company is a mere façade to hide the true facts.[50] The decision to pierce the corporate veil is a binary one, it does not allow for anything in between.

Mere guidelines and principles have been criticised for the fact that it has not brought about the necessary certainty in determining when the veil may be pierced. John Braithwaite argues that 'precise rules more consistently regulate simple phenomena than principles' but as the regulated phenomena become more complex, principles deliver more consistency than rules'.[51] Rules bring about specific prescriptions where as principles result in more unspecific prescriptions. The principled approach has become problematic with cases of similar facts having resulted in different decisions to pierce the corporate veil. Having set out the basic principles of separate legal personality and piercing the corporate veil, I will now consider the common law approach to piercing the corporate veil in the next chapter.

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[48] *Hughes v Ridley* 2010 (1) SA 381 (KZP) at paras 22–3.
[49] *Lubner* supra note 38 at para 28.
[50] J Macey., & J Mitts. (2014). 'Finding order in the morass: The three real justifications for piercing the corporate' veil. *Cornell L. Rev.*, *100*, 99 at 101.
[51] J Braithwaite. (2002). Rules and principles: A theory of legal certainty. *Austl. J. Leg. Phil.*, *27* at 47.

CHAPTER THREE: COMMON LAW APPROACH TO PIERCING THE CORPORATE VEIL

3.1 INTRODUCTION

The following chapter will examine the jurisprudence of the courts' to pierce the corporate veil with only the use of the common law available. Under the common law, the courts' reliance on principles and standards as to when it may be done was not only inconsistent but varied drastically.[52] It is submitted that the leading cases of *Hülse-Reutter* and *Lubner* provide the most consistent principles that will inform the courts' when to make use of the veil-piercing doctrine. There was partial codification of veil piercing under the Companies Act 1973 and the Close Corporations Act. The Companies Act 2008 contains the current provision for statutory veil-piercing. Section 20(9) allows for the court to declare that a company is not a juristic person, but still allows judges to substantiate through common law principles. The lack of a unified approach at common law has meant any two judges may select contradicting judgments as a justification for their interpretation of the Companies Act 2008. Veil-piercing serves an important function and provides for accountability and to ensure there is liability when there is a case of misuse or abuse of the principle of corporate personality.

The Supreme Court of Appeal ('SCA') has noted that there is no set categories of when to pierce the corporate veil.[53] The perceived consequence of categorisation is a restrictive list of instances when the corporate veil may be pierced. Cassim et al raise a valuable point that 'a danger of the categorising approach is that a situation may arise where justice or equity calls for the court to pierce the veil, but a court may refuse to do so on the ground that the facts of the situation do not fit into any of the established categories'.[54] When veil-piercing is not used the courts are

[52] The consequence of veil-piercing away from the corporation to the person(s) behind it or whoever may be in control of its activities as if there were no dichotomy between such a person and the company remains consistent. The approach used to achieve this end has been a case for concern.
[53] Ibid.
[54] Cassim op cit note 4 at 43.

choosing to uphold the separate legal personality of a corporation. In turn, a principled approach will allow the facts of each case to be considered on its individual merits. The perpetrators who have taken part in the aforementioned abuse have a greater chance to evade liability when it is clear there is a level of abuse that does not suit the pre-determined categories.[55]

3.2 COMMON LAW PRINCIPLES

The company is given the privileged state of existence as a juristic person.[56] Lord Chancellor Baron Thurlow's famous adage that, a company has 'has no soul to be damned, and no body to be kicked' best encapsulates the difficulty the courts face to best impose liability on a juristic person.[57] The corporation as a legal person is merely a legal concept and has no physical existence.[58] The common law case law of when it may be appropriate to pierce the corporate veil and seek out and hold someone accountable for the actions of the company has found no universal principles that may be relied upon. The case law reveals the emergence of a set of relevant principles and those that have become the most important to justify the use of the veil-piercing doctrine.

3.2.1 Unconscionable injustice

In the decision of *Botha v Van Niekerk*[59] *('Botha')*, the court labelled the standard of improper conduct as having to be that of 'unconscionable injustice' to pierce the corporate veil. If one were to set the standard of unconscionable injustice, liability may only be imposed when it meets this threshold. Prior to *Botha,* in *Lategan v Boyes*[60]*,* the court held that 'fraud is the essential requirement for piercing the corporate veil and that a fraud committed by the company need always be present before the

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[55] See further Chapter 6 for the success of the Canadian approach through categorization.
[56] See Chapter 1 for a full discussion of a juristic person as per section 19(1) of the Companies Act 2008.
[57] *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) 606; *Manong & Associates (Pty) Ltd v Minister of Public Works* 2010 (2) SA 167 (SCA) para 4; *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1914–15] All ER Rep 280 (HL) 283; *Re GJ Mannix Ltd* [1984] 1 NZLR 309 at 311 and *Northern Homes Ltd v Steel-Space Industries Ltd* (1976) 57 DLR (3d) 309 para 22.
[58] Cassim op cit note 4 at 31.
[59] *Botha v Van Niekerk* 1983 (3) SA 513 (W).
[60] *Lategan and Another NNO v Boyes and Another* 1980 (4) SA 191 (T).

courts can pierce the veil'. Flemming J in *Botha* disagreed with the assertion that fraud is necessary.[61] This is the first clear stand against the categorisation of a fraud category to pierce the corporate veil. Thus, Flemming J created the principled standard of 'unconscionable injustice', and rejected the need for fraud. *Lubner* accepted the premise of a non-categorisation approach but rejected the test set in *Botha* as 'too rigid and held that a more flexible approach ought to be adopted, which would allow the facts of each case ultimately to determine whether the piercing of the veil was called for or not'.[62] It is submitted that the presence of fraud as a category should not be wholly rejected. Fraud provides a clear instance of abuse, injustice or any synonymous term the courts have used. It is submitted that the presence of categories of conduct that invoke veil-piercing may provide greater consistency.[63]

3.2.2 Salutary principle

The courts have laid down a few principles of when the courts will accept the aggrieved litigant's application to pierce the corporate veil. In *Lubner,* the court determined that separate legal personality is a 'salutary principle that our courts should not lightly disregard'.[64] Thus, maintaining that only in exceptional circumstances, where the corporate veil is pierced, will the shareholders be required to pay the debts of the company.[65] The consequence of lightly disregarding the separate legal personality of the corporation would 'negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it'.[66]

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[61] *Botha* supra note 59.
[62] Cassim op cit note 4 at para 49.
[63] See Chapter 6 for the approach adopted in Canada for 'fraud'.
[64] *Lubner* supra note 38 at para 31.
[65] Cassim op cit 4 at para 39.
[66] *Lubner* supra note 38 at para 31.

3.2.3 Necessity of fraud

In *Lubner,* the court noted there must be an enquiry into whether there is 'fraud, dishonesty or other improper conduct'.[67] In the presence of such conduct, the court will follow a second enquiry of,

> 'a balancing approach … that requires the concept of separate legal personality being weighed against those principles and policies in favour of piercing the veil. In adopting such an approach, a court would be entitled to look to substance rather than form'.[68]

The court seemingly ruled that fraudulent conduct is not necessary, but its presence will be a strong consideration in favour of piercing the corporate veil.

3.2.4 Unfair advantage

Another relevant principle the common law courts deduced was that those who control the company must have gained an 'unfair advantage'.[69] In *Hülse-Reutter,* the court defined this as a party being 'unfairly prejudiced by the distinction which exists between the company and those who control it'.[70] The International Institute of the Unification of Private Law ('UNIDROIT') permits a party to 'avoid the contract or an individual term of it' in cases where 'the other party has taken unfair advantage of the first party'.[71] In veil-piercing cases, an unfair advantage has already taken place and it may not be avoided. Rather, it allows the court to assist in rectifying the consequences of this unfair advantage. The court in *Hülse-Reutter* ruled there was little evidence for 'the abuse nor the advantage' from the corporate structure, thus there was no *prima-facie* case established.[72]

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[67] *Hülse-Reutter* supra note 41 at para 20.
[68] M Henkeman, 'Piercing the Corporate Veil', *Polity,* Available at: https://www.polity.org.za/article/piercing-the-corporate-veil-2014-04-10 [Last Accessed on 9 October 2019].
[69] Ibid.
[70] *Hülse-Reutter* supra note 41 at para 21.
[71] Article 3.2.7 of the International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 2010) ('UNIDROIT Principles').
[72] *Hülse-Reutter* supra note 41 at para 24.

3.2.5 The general discretion of veil-piercing

In the later decision of *Hülse-Reutter* the court confirmed it 'has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so'.[73] Like *Lubner, Hülse-Reutter* also rejected the standard of 'unconscionable injustice' set in *Botha* to disregard the separate legal personality. The court reiterated many different factual instances that may satisfy the requirements to pierce the corporate veil:

> 'The circumstances in which a court will disregard the distinction between a corporate entity and those who control it are far from settled. Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what, I think, is clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.'[74]

Although the court acknowledged difficulty of determining when it may be appropriate, it did nevertheless highlight a need for 'misuse or abuse'. The combined of facts are measured against a matrix of interlinking principles that will decide on whether to apply the veil-piercing doctrine under the common law. The common theme remains that the decision is not one made lightly, and should first look to uphold the separate legal personality, and not disregard it merely when it feels it is just to do so.

3.2.6 Process of veil-piercing

Gower, which the court in *Lubner,* wrote with approval that 'a company can be a facade even though it was not originally incorporated with any deceptive intention; what counts is whether it is being used as a façade'.[75] Veil-piercing can used for a single action by the company and thus, 'there is no reason in principle or logic why its separate personality cannot be disregarded in

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[73] *Hülse-Reutter* supra note 41 at para 20
[74] Ibid at para 20.
[75] Gower, Principles of Modern Company Law (5th ed. 1992) at 133.

relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability)'.[76] This ensures there is a suitable remedy for the action, but also guarantees that the company retains its full rights and obligations as a separate legal person in all other instances.

3.2.7 Remedy of last resort

In *Lubner,* the court felt it is not necessary that the plaintiff exhaust all alternative remedies.[77] Alternatively, in *Hülse-Reutter,* did believe that for such a drastic remedy as piercing the corporate veil it must be a method of last resort.[78] Reliance was initially placed on Section 424 of the Companies Act 1973.[79] When the company's claim was against a foreign company that did not fit the definition of a company in terms of Section 2(2), reliance had to be placed upon the common law remedy of piercing the corporate veil.[80] The facts of the case did not provide the aggrieved litigant with any alternatives. Consequently, the court ruled it as a remedy of last resort in default for no alternative remedy available. *Hülse-Reutter* has been followed by the lower courts. In *Amlin* stated:

> 'it must be resorted to rather sparingly and indeed as the very last resort in circumstances where justice will not otherwise be done between two litigants. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same facts can successfully be employed in order to administer justice between the parties'.[81]

It is submitted that the facts before the court in *Hülse-Reutter* did not allow for another remedy which informed their decision to state the doctrine as a last resort. In *Lubner,* the court stated:

> 'If the facts of a particular case otherwise justify the piercing of the corporate veil, the existence of another remedy, or the failure to pursue what would have been an available remedy, should not in

[76] *Lubner* op cit note 38 at para 26.
[77] Ibid.
[78] *Hülse-Reutter* supra note 41 at para 23.
[79] Ibid at para 5.
[80] Ibid.
[81] *Amlin* sura note 43 at para 23.

> principle serve as an absolute bar to a court granting consequential relief. The existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy considerations come into play, but it cannot be of overriding importance.'

Thus, the decision in *Lubner* would find wider acceptance in instances where there are in fact alternative remedies available. It is submitted piercing the corporate veil is albeit one legal remedies that may be available, and the presence of alternatives should not prevent such relief.

3.3 CONCLUSION

The veil piercing at common law has resulted in uncertainty when to pierce the corporate veil. There do remain four overlapping principles from *Lubner* and *Hülse-Reutter*. First, in both cases the courts have still shown a general apprehension to pierce the corporate veil under the common law. What cannot be stated with too much degree of certainty is what would be enough for the courts to justify the need to disregard the separate legal personality of the corporation. The common theme remains that the decision is not one made lightly, and should first look to uphold the separate legal personality, and not disregard it merely when it feels it is just to do so. Secondly, *Lubner* held the presence of fraud at common law is not a necessary requirement, rather there must be some misuse or abuse of the corporation personality of the company. Thirdly, *Hülse-Reutter* held the consequence of this will be some unfair advantage to the controllers of the company. Finally, *Lubner* held the decision to pierce the corporate veil must be balanced against policy considerations in favour of preserving the separate legal personality of a corporation.[82]

Questions remain as to the impact of the availability of another remedy on the courts willingness to invoke the veil-piercing doctrine. As it has been submitted, although both judgments differed, the decision of *Lubner* finds greater acceptance for a party will not be precluded from selecting a remedy despite alternative remedies available. Having discussed the common law

[82] Ibid.

principles to piercing the corporate veil, I will now consider the veil-piercing under the statute, specifically the Companies Act 1973 and the Close Corporations Act.

CHAPTER FOUR: STATUTORY VEIL-PIERCING PRIOR TO THE COMPANIES ACT 2008

4.1 STATUTORY APPROACH TO PIERCING THE CORPORATE VEIL

The courts were given no opportunity through statute to pierce the corporate veil prior to the Companies Act 2008.[83] The Companies Act 61 of 1973 ('Companies Act 1973') allowed for the court to impose personal liability on directors, but there wasn't an overarching provision available to pierce the corporate veil. This chapter will identify that personal liability is not veil-piercing. Unlike the Companies Act 1973, the Close Corporations Act 69 of 1984 ('Close Corporations Act') provides for the court to disregard the separate legal personality, but only of a close corporation ('CC'). The Close Corporations Act assisted the courts in finding what may be appropriate standards when any conduct, not listed situations, could be sufficient to pierce the corporate veil. The different standard of 'gross abuse' coupled with applicability to close corporations alone has limited the usefulness of the provision to interpret section 20(9) of the Companies Act 2008. Each Act will be dealt with in turn. The failure of the the Companies Act 1973 to have a general provision to pierce the corporate meant reliance would have to be placed on the common law. The Close Corporations Act had a limited scope, and differed to the language used in Section 20(9) of the Companies Act 2008.

4.2 PERSONAL LIABILITY UNDER THE COMPANIES ACT 1973

4.2.1 Personal liability

The Companies Act 1973 did not give the court the power to directly pierce the corporate veil, but it provided avenues of accountability.[84] The courts were empowered to hold the controllers personally liable for the debts of the company in certain circumstances.[85] Personal liability is but

[83] The following chapter will examine how the Companies Act 1973 only provided for personal liability, that is not veil-piercing. Where as the Close Corporations Act only applied to close corporations.
[84] Cassim et al op cit note 4 at 63.
[85] Companies Act 61 of 1973. The following discussion will consider the various circumstances where personal liability may be imposed on the controllers. Although it may have provided statutory grounding for the aggrieved litigant, it

one of the remedies the courts' may use when piercing the corporate veil. While personal liability was 'always a possibility under the 1973 Act and the common law, the 2008 Act has introduced statutory remedies'.[86] The Companies Act 1973 had various instances to allow the court to impose personal liability for the debts and liabilities of the company.[87] It is submitted that personal liability under the Companies Act 1973 does not equate to veil-piercing.

4.2.2 Personal liability is not veil-piercing

The strict categories of personal liability under the Companies Act 1973 were deficient. There was no general catch-all provision to pierce the corporate veil. This meant actions that could justify imposing personal liability would fall outside the ambit of the Companies Act 1973. Examples of personal liability can be found in sections 50(3), 66, 172(5)(b), 280(5), 344(h) and 424.[88] Veil-piercing did occur when directors are held liable for the 'loss, damages or costs sustained by the company as a consequence of the actions of the director'.[89] Blackman described these instances as the process of lifting the veil. This is distinguishable from piercing, for these sections have 'rules to be applied by the court [and] is not faced with the question of whether or not to pierce the veil'.[90] Liability upon a director itself does not equate to veil-piercing.

Blackman states 'the imposition of liability on the directors of a company cannot ever constitute piercing the corporate veil'.[91] The court is empowered to impose personal liability as a remedy when veil-piercing, personal liability is not itself veil-piercing. Agents of the companies are not liable for the rights and obligations of the contracts entered into on behalf of the company.

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still remains a narrow avenue, that pertains to a more of a categorization approach than general conduct of the controllers.

[86] Cliffe Dekker Hofmeyr, *Corporate Governance – A Guide for Directors.* Available at: https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/sectors/downloads/Corporate-governance-A-directors-guide.pdf [Last Accessed 9 January 2020]

[87] P A Delport et al 'Henochsberg on the Companies Act 71 of 2008' 2ed Butterworths: Lexis Nexis, (2011) at 46[4].

[88] The provisions of personal liability are beyond the scope of this dissertation.

[89] MS Blackman op cit note # at 2 - 178.

[90] Ibid.

[91] Ibid.

The liability of directors is not by way of the contracts they may enter into on behalf of the company for they are agents of the company.[92] This will not interfere with the separate legal personality of the corporation. Agents contract on behalf of the principal, that being the corporation. Personal liability imposed through the Companies Act 1973 is rather an exception 'to the rule that agents are not liable under contracts entered into on behalf of their principals'.[93] It is submitted the application of the personal liability is not dependent on any standard of abuse required to pierce the corporate veil. Personal liability follows the law of agency, which is a completely separate set area of law.

What all the aforementioned provisions reveal is threefold. First, to rely on the personal liability provisions requires the court to apply a set of rules to the conduct of a director. Second, the remedy of personal liability is predetermined. Third, personal liability of directors is an exception to the laws of agency, and has no impact on the separate legal personality of the corporation. The Companies Act 1973 had a *numerus clausus* of when to impose personal liability. and was devoid of any provision to pierce the corporate veil. Formulating a legal argument and judgment requires the strongest claim to be based in a statutory provision, and failing this the common law. Thus, veil-piercing would only be possible under the common law. It is impractical to expect the legislature to foresee all potential abuses of the company. The Companies Act 2008, which will be discussed later, gives the court the general discretion to pierce the corporate veil to any conduct that suitably fits the definition of section 20(9).

[92] Ibid.
[93] Ibid.

4.3 PIERCING THE CORPORATE VEIL IN TERMS OF THE CLOSE CORPORATIONS ACT 69 OF 1984

Section 65 of the Close Corporations Act permitted the court to rule a close corporation is not a juristic person.[94] The statutory remedy provided the courts' with a general discretion when to pierce the corporate veil. The Close Corporations Act required 'gross abuse' to which the 'court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation'.[95] As the name suggests, this remedy only found application to a CC. The limited remedy did little to advance a statutory remedy that could be used for all corporations unless incorporated in terms of the Close Corporations Act as a CC. Below I will discuss the case law illustrates the standard if considering whether there has been an abuse and what may constitute 'gross abuse'. This has limited application to the Companies Act 2008 which has the standard of abuse as 'unconscionable'.

4.3.1 Interpretation of 'gross abuse'

Haygro Catering BK v Van der Merwe[96] *('Haygro')*

In *Haygro* the court found 'gross abuse' where the name of the close corporation had not been displayed anywhere on the corporation's business premises, documents or correspondence.[97] This was in contravention of Section 23(1)(a) of the Close Corporations Act for 'Every corporation shall display its registered full name … on the outside of its registered office'.[98] Persons conducting their business through a CC must ensure they are compliant with the Close Corporations Act. The court held a failure to display the name of the corporation 'constituted a gross abuse of the juristic personality of the corporation as a separate entity'.[99] The veil-piercing doctrine enabled the court

[94] Section 65 of the Close Corporations Act 69 of 1984.
[95] Ibid.
[96] *en Andere* 1996 (4) SA 1063 (C).
[97] Ibid.
[98] Section 23(1)(a) of the Close Corporations Act 63 of 1984.
[99] Cassim et al op cit note 4 at 60.

to determine that the members of the CC would be jointly and severally liable for the debts of the CC.

TJ Jonck BK h/a Bothaville Vleismark v Du Plessis[100] *('TJ Jonck')*

In another case of *TJ Jonck,* the member gave significant loans to the CC in full well knowing the CC had conducted business under insolvent circumstances .[101] Further, the same member had given written authorisation for the registration of a notarial bond over the movable property of the corporation as security for his loans to the corporation.[102] Unsurprisingly, within a couple of months, he was granted an order to take possession of the movables as a right from his notarial bond. For the member this meant the business was acquired in his name without any of the creditors that, if having recalled the necessary loans, would have rendered the prior CC insolvent.[103] The notarial bond created a transaction that allowed the business to transfer to the member. The business remained in the same premise, with the same equipment and stock but merely under a new name.

Consequently, the creditors were unable to realise their debts for there were not any assets in the original CC's name. The court ruled this was a form of reckless lending in contravention of Section 64 of the Close Corporations Act.[104] The court was ready to accept that for the purposes of Section 65, the member would also be held liable for the 'gross abuse'. The protection of the member's own loan, was against the interests of the CC's creditors that would give them no recourse in the case of the inevitable debt. The company structure was abused for it would remain an empty vessel. Any rightful creditor may succeed in a claim but have no assets or insufficient assets to satisfy the claim. The principle we can deduce from the case law as discussed, is if there

[100] *NO en 'n Ander* 1998 (1) SA 971.
[101] Cassim op cit note at 61.
[102] Ibid.
[103] Ibid.
[104] Ibid.

is a contravention of any provision of the Close Corporations Act, the court will determine it is a form of 'gross abuse'. The courts must determine whether any contravention of provisions of the Companies Act 2008 would meet the standard of 'unconscionable' abuse.

Airport Cold Storage (Pty) Ltd v Ebrahim[105] *('Ebrahim')*

The most relevant section 65 case, *Ebrahim* is helpful in considering various factors as to what may constitute 'gross abuse'. Even though, on appeal, the Supreme Court of Appeal ruled on the same provision as *TJ Jonck* for the contravention of Section 64 of the Close Corporations Act, the decision in the Cape High Court will provide good context for the observation of Section 20(9). The court found the CC formed 'a conglomerate of associated family businesses that were conducted with scant regard for the separate legal personalities of the entities concerned' and the CC was

> 'incorporated for the specific purpose of taking over another family's businesses so as to avoid the liquidation of the business and the personal consequences …. With the object of defrauding the businesses creditors and facilitating the continued trading of the insolvent business'.[106]

In contravention of a series of provisions in the Close Corporations Act, the CC had failed to appoint an accountant from the time it commenced business until the date of closure which was more than the six month allowance and did not keep proper accounting records.[107]

In *TJ Jonck* the member was able to remove the assets from the company by way of notarial bond, in *Ebrahim* the CC was created to assume all the debts of the family businesses to allow the business to continue and prevent the plaintiff, the creditor, to retrieve the debts owed.[108] The net result was the same for the creditors in both instances unable to exercise their rights. In both cases,

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[105] 2008 (2) SA 303 (C).
[106] K Ebner, "Close Corporations and the personal liability of members: company law." *Without Prejudice* 8.8 (2008) at 37.
[107] Ibid.
[108] Ibid.

the CC had neither assets nor the ability of 'trading profitability and meetings its financial commitments to its major supplier as and when they fell due'.[109] The conduct was running the CC as if it were their own, and when 'it suited them they chose to ignore the separate juristic identity of the corporation'.[110] The court saw fit to hold the defendants personally liable because after all their egregious actions they could not 'now choose to take refuge behind the corporate veil' to avoid liability that emerged due to the indistinguishable nature between the company and themselves.[111] A repetitive theme that emerges is the presence of fraudulent behaviour was justifiable to establish 'gross abuse'. Although fraud was not necessary for the purposes of veil-piercing at the common law, it is submitted that fraud satisfied 'gross abuse' and should satisfy the standard of 'unconscionable abuse' set by the Companies Act 2008.

4.3.2 Abuse under the Close Corporations Act

The above discussion illustrates cases where 'gross abuse' under section 65 of the Close Corporations Act was established which justified the court piercing the corporate veil and disregarding the separate legal personality of the corporation. The question for Section 20(9) of the Companies Act 2008 is whether there is a difference between 'gross abuse' from the Close Corporations Act and 'unconscionable abuse'. One must consider to what extent something will be 'unconscionable', when there is little indication whether unconscionable or gross remains a higher threshold of abuse. The court has had to consider what amounts to 'abuse' to determine when it may be appropriate to disregard separate legal personality of a juristic person. The discussion of Section 65 of Close Corporation Act and the common law will be a useful foundational premise to interpreting 'abuse' in terms of section 20(9) of the Companies Act 2008.[112]

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[109] Ibid.
[110] Ibid.
[111] *Ebrahim* supra note 104 at para 52.
[112] Cassim op cit note 41§ at 62.

4.5 CONCLUSION

The specific listed instances of personal liabilit under the Companies Act 1973 offered little opportunity to encompass the wider conduct that would justify the need to disregard the separate legal personality of a company. Criticism of the company law regime was that it was 'highly formalistic, making it burdensome and costly to form and manage an enterprise and creating artificial preferences for certain structures'.[113] The Companies Act 1973 and Close Corporations Act helped to perpetuate the conduct and listed personal liability acts meant certain activity could not justify piercing the corporate veil when it may be justifiable. The only fall-back remained the variable standards created by the common law. The more recent Close Corporations Act was more suitable to cover the range of conduct that may justify the need to disregard the separate legal personality of the company. However, the limitation to close corporations meant another inadequate legislative intervention to deal with the wider corporate structures that could have relied on Section 65 of the Close Corporation Act. I will now turn to consider piercing the corporate veil under section 20(9) of the Companies Act 2008.

[113] South African Company Law for the 21st Century: Guidelines for Corporate Law Reform, Government Gazette, 4 No 26493 23 June 2004 at 17.

CHAPTER FIVE: PIERCING THE CORPORATE VEIL IN TERMS OF THE COMPANIES ACT 2008

5.1 INTRODUCTION

The Companies Act 2008 introduced a statutory provision that embraced the common law form of piercing the corporate veil. Cassim argues this has made 'inroads' into the separate legal personality of a company because of the first general provision to disregard it in South African law.[114] As discussed, the Companies Act 1973 proceeded to hold certain parties such as directors personally liable.[115] The aggrieved litigant was unable unable to rely on statutory law unless the application was against a CC. Their claim was based solely on the common law version of veil-piercing.

The Companies Act 2008 introduced a new statutory provision that permits the court to disregard the separate juristic personality available to the company.[116] This is an explicit opportunity to pierce the corporate veil. Cassim et al explain the importance of the statutory piercing of the corporate veil under the Companies Act 2008 as follows,

> 'While previously there had been some legislative provisions in our company law that permitted a court to impose personal liability on directors and shareholders in certain instances, we have not had in our company law a statutory provision that gives a court general authority to pierce the corporate veil'.[117]

Section 20(9) of the Companies Act was influenced by the aforementioned Section 65 of the Close Corporation Act.[118] Section 65 was drafted in a manner that the courts could interpret it

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[114] R Cassim, Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction, 26 S. Afr. Mercantile L.J. 307 (2014) at 307.
[115] See Chapter 4 for discussion on personal liability.
[116] Section 20(9) of the Companies Act 2008.
[117] Cassim op cit note 4 at 57.
[118] Ibid.

to satisfactorily encompass the range of conduct not incorporated into the personal liability provisions of the Companies Act 1973. Section 20(9) of the current Companies Act reads as follows:

> "If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may—
>
> (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
>
> (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)."

This section has caused considerable controversy as to its proper application. First, this chapter will consider a sound interpretative approach required by the legislature and what has been used by the courts. Second, the following relevant subsections of Section 20(9) will be discussed: 'interested persons'; 'unconscionable abuse'; 'deemed not be a juristic person'; 'rights, obligations or liabilities'; and whether it is a remedy of last resort. Third, I will discuss whether veil-piercing is a doctrine or remedy.

5.2 INTERPRETATION OF SECTION 20(9)

5.2.1 Interpretation

The reference to interpretation methods may seem out of place, however, with an issue as unsettled as when to pierce the corporate veil there needs to a consideration of the foundational principles that will be used to examine the very text. This research is by no means an attempt to provide the perfect answer, but helps define with a greater degree of accuracy when to, and when not to, pierce

the corporate veil. Section 5 governs how the Companies Act 2008 should be interpreted, which must be 'read holistically together with the rest of the Act, but in particular with the preamble, section 6, 7, 158, and 220 and the related notes'.[119] Section 5(1) requires 'a mandatory purposive approach to the interpretation of the Act with references to the expressed purposes of the Act as set out in section 7'.[120]

5.2.2 Purposive approach to the Companies Act 2008

There remains a variety of interpretive mechanisms available but the Companies Act 2008 has, with the influence of the Supreme Court of Appeal's preference for the purposive approach, 'as advanced by the South African Law Reform Commission that reviewed the Interpretation Act 33 of 1957'.[121] Any consideration of the interpretation of the Companies Act 2008, must begin with the Constitution.[122] Section 39(2) states,

> 'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bills of Rights'.[123]

In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd*, Langa DP defined the interpretation of Section 39(2) as 'the purport and objects of the Constitution [that] finds expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve'. [124] Section 39(2) of the Constitution requires that the 'values must shine through in the interpretive process'.[125] In *S v Zuma*[126]*,* the court confirmed the new constitutional dispensation has implemented a departure from a strict rule based interpretation to

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[119] M S Blackman *Commentary on the Companies Act* (2002) Volume 1 Juta and Co. at 1-36.
[120] Ibid.
[121] Ibid at 1-38. See *Bato Star Fishing* (*Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15.
[122] Constitution of the Republic of South Africa, 1996 ('Constitution').
[123] Section 39(2) of the Constitution.
[124] *and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 22.
[125] B Maswazi, 'The doctrine of precedent and the value of s 39(2) of the Constitution', *De Rebus* April 2017.
[126] *and Others* 1995(2) SA 642 (CC).

a purposive one. This departure encompasses a value-based interpretation in line with the Bill of Rights.

The Constitutional Court have ruled the purpose of a statute 'plays an important role in establishing a context that clarifies the scope and intended effect of a law'.[127] The purposive approach embodies this consideration in its interpretation. The question for any person required to interpret the statutory piercing of the corporate veil remains what is the purpose of the legislation? Ruth Sullivan notes,

> 'to achieve a sound interpretation of a legislative text, interpreters must identify and take into account the purpose of the legislation. Once identified, the purpose is relied on to help establish the meaning of the text. It is used as a standard against which proposed interpretations are tested: an interpretation that promotes the purpose is preferred over one that does not, while interpretations that would tend to defeat the purpose are avoided.'[128]

The purposive approach is a directive that 'the interpreter not only has to read the legislative text as a whole, but must also consult all available and relevant internal and external information or aids during interpretation'.[129]

The interpretation of the statute to determine when to pierce the corporate veil further entails the consideration of proportionality. Whether the court should pierce the veil is an exercise in proportionality and policy considerations. Section 36 of the Constitution is used when the court considers when it should limit a constitutional right, in so much that it is 'reasonable and justifiable in an open and democratic society'.[130] Although this is not a constitutional right, the court must determine the rights afforded to the company versus the consequence to limit those in favour of

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[127] *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* (CCT 77/08) [2009] ZACC 11 at para 21.
[128] M S Blackman op cit note 118 at 1-38.
[129] Ibid at 1-38 and 39.
[130] Section 36 of the Constitution.

the rights of a party seeking to pierce the corporate veil. In the same vein, the court balances the right to determine if it is reasonable and justifiable to make the binary decision pierce the corporate veil or not.[131]

In *KPMG Chartered Accountants v Securefin*[132] the court established that interpretation is a matter of law, and not fact. In *Natal Pension Fund v Endumeni Municipality*[133], Wallis J deems interpretation as objective and not subjective. Interpretation is the the process of attributing meaning to the words used in a document 'having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence'.[134] Consideration must be given to the choice of language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.[135] In the case of ambiguity or more than one meaning possible each possibility must be weighed in the light of all these factors. The court must be 'alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used'.[136]

Wallis J when referring specifically to legislation argues for a sensible approach that will avoid consideration of the 'the intention of the legislature' because it is a 'misnomer' in so far as it connotes that interpretation involves an enquiry into the mind of the legislature.[137] The 'intention of the legislature' is an indication to the court of their role in the process to discern the meaning

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131 The court has never, and does need to enter into a Section 36 analysis but is a valuable consideration as to what may be appropriate consideration in the interplay of rights. Piercing the corporate veil does involve the limitation of the rights afforded to the company. The introduction of the Bill of Rights and the value-based interpretation will entail the balancing of requisite rights.
132 (644/07) [2009] ZASCA 7.
133 (920/2010) [2012] ZASCA 13 (15 March 2012) at para 18.
134 Ibid.
135 Ibid.
136 Ibid.
137 *Natal Pension Fund* supra note 131 at para 20.

of the words, and not to impose their own views on the subject matter. The courts process of interpretation must ensure the most sensible meaning is preferred so it will not lead to 'unbusinesslike results or undermines the apparent purpose of the document'.[138] This is confirmed by *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[139], in which the Constitutional Court ruled 'the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous'. Ultimately, the purpose of the provision and context it may appear are important guidance to the correct interpretation.

In *Gore*[140] the court notes Section 20(9) is 'cast in very wide terms'. The court ruled the Companies Act 2008 'enjoins that its provisions be construed with appropriate regard to subsections 5(1) and (2) read with section 7 of the Act (including, to the extent appropriate, a consideration of foreign company law)'.[141] As discussed, the interpretation of Section 20(9) requires a more value-based approach that undertakes to promote promote the spirit, purport and objects of the Bills of Rights in line with Section 39(2) of the Constitution.[142] There is value in the case law prior to the enactment of the Companies Act 2008 for the courts have had many opportunities to interpret the context to pierce the corporate veil. Having set out the applicable purposive approach to statutory interpretation, I will consider how this approach could be used to provide guidance as to the circumstances when the corporate veil should be pierced in terms of section 20(9) of the Companies Act 2008.

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[138] Ibid.
[139] 2004 (4) SA 490 (CC) at para 90.
[140] *Gore* supra note 7 at para 32. I will refer to relevant sources of foreign law at chapter 6 in advancing a theory of when the corporate veil should be pierced.
[141] Ibid.
[142] Section 39(2) of the Constitution.

5.2.3 Piercing the corporate veil in terms of section 20(9)

The Close Corporations Act gave the court discretion to pierce the corporate veil of a close corporation when there was 'gross abuse' whereas the Companies Act requires 'unconscionable abuse' to allow the courts to do so.[143] This threshold must be satisfied, at which point the court must pierce the corporate veil, but it is also the courts' role to determine as much. However, the Companies Act 2008 refers to 'unconscionable abuse', with little indication of what conduct may be deemed 'unconscionable'. Section 20(9) of the Companies Act 2008 does not override the common law remedy already available in South African Law.[144] In *Gore*[145], Binns-Ward J noted that Section 20(9) is merely supplemental to the common law, rather than substitutive. The plaintiff can choose to base their claim in statute or the common law. The statutory provision has the advantage that 'gives more certainty and visibility to the doctrine of piercing the veil, but a danger is that it may result in the doctrine becoming inflexible, particularly if the courts interpret the provision in a technical way'.[146]

The test in *Botha* requiring 'unconscionable injustice' under the common law has been rejected by various subsequent court decisions as an unacceptable criterion.[147] Section 20(9) has codified a seemingly similar requirement of 'unconscionable' for when it is appropriate to pierce the corporate veil. Unconscionable itself is a descriptive of the proceeding conduct of 'abuse' per section 20(9), whereas *Botha* referred to 'injustice'. The used of the word 'abuse' versus 'injustice' is not a trite difference. Abuse refers to the conduct of the perpetrator, whereas injustice refers to the result for the person seeking to pierce the corporate veil. The selection of 'abuse' is a very telling proposition by the legislature. The courts using the common law veil-piercing jurisprudence

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[143] Section 20(9) of the Companies Act 2008.
[144] The litigant is always given the option to base their claim in statute such as Section 20(9) of the Companies Act 2008, or may rely on the common law.
[145] *Gore* supra note 7.
[146] R Cassim '*Piercing the corporate veil: Unconscionable abuse under the Companies Act 71 of 2008*' August 2012 De Rebus 22.
[147] *Lubner* supra note 38.

as to what conduct may be deemed acceptable to pierce the corporate veil focuses more on the actions of the perpetrators rather than result on those who seek to pierce the corporate veil.[148] The court in *Hülse-Reutter* rejected 'injustice', rather that 'some misuse or abuse of the distinction between the corporate entity and those who control it' must have taken place.[149] The legislature followed with a similar selection of words used in Section 20(9) of the Companies Act 2008.

5.2.3.1 'Interested person'

Section 20(9) of the Companies Act 2008 may be relied upon by an 'interested person' or by the court's own initiative.[150] The courts have the ability of referring to prior case law relating to the Close Corporations Act in relation to the similar words used in section 65. In *TJ Jonck*[151] the court considered 'interested person' for Section 65 of the Close Corporations Act and determined it not be interpreted too restrictively, but not too widely that an 'indirect interest' would suffice. The interest would have to be a financial or monetary one.[152] There is a clear commercial value that must be placed before the court and indication of a loss. The court in *Gore* stated there should not be 'any mystique' attached to the words and not overcomplicate who or what may be deemed an 'interested person'.[153] The basis for 'standing of any person to seek a remedy in terms of section 20(9) should be determined on the basis of well-established principles and, if the facts implicate a right in the Bill of Rights, section 38 (enforcement of rights) of the Constitution'.[154] Thus, this inclusion will be for any person whose human rights, as per the Bill of Rights, may have been affected.[155]

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[148] See further chapter 3 of the case law that attempted to determine when to pierce the corporate veil.
[149] *Hülse-Reutter* supra note 41 at para 20.
[150] MS Blackman op cit note at 2-181
[151] *TJ Jonck* supra note 99 at 533 – 534.
[152] Ibid at 987.
[153] *Gore* supra note 7 at para 35.
[154] Ibid. See *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533 – 534.
[155] R Mccorquodale and L Page, S Deva, and D Bilchitz, eds. *Building a treaty on business and human rights: context and contours*. Cambridge University Press, 2017 at 230.

In *Jacobs v Waks*[156] the court ruled legal standing will be granted for a person with a direct interest in that matter to acquire the necessary *locus standi*. In *Four Wheel Drive Accessory Distributors CC v Leshni Rattan*[157] *('Four Wheel')*, the court ruled the requirements for *locus standi* are that 'the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one'. *Four Wheel* made reference to *Dalrymple v Colonial Treasurer*[158] in which the court noted that 'every individual has an interest in every suit that is pending, for he may be placed to-morrow in the position of either plaintiff or defendant in a case in which the same principle may be involved'. The court is not constituted for purely academic purposes, as such a mere interest will always be insufficient if it remains too remote.[159] Regrettably, interest has no distinct characteristics and as such, in a similar fashion to where the court may pierce the corporate veil, 'would always depend on the particular facts of each individual case, and that no definite rule can be laid down'.[160] Accordingly, the 'interested person' requirement in terms of Section 20(9) will be satisfied by well-established principles of a direct and sufficient interest that is not too remote.

The legislation does not stop at only allowing to pierce the corporate veil upon application of an 'interested person' either. The legislature has provided a level of autonomy to the court. A court is empowered to disregard the separate legal personality of the company *mero motu,* even though the 'plaintiff or applicant in the matter before it has not requested the court to do so'.[161] By way of example, the court is not obliged to come to the rescue of a litigant and act *ex mero motu* by way of raising a special plea on behalf of a party. The court has been expressly tasked with the

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156 1992 (1) SA 521 (A) at 533.
157 NO 2018 JDR 2203 (SCA) at para 7.
158 1910 TS 372 at 390.
159 Ibid.
160 *Jacobs* supra note 155 at 534.
161 R Cassim op cit note 113 at 309.

power by the legislature to use Section 20(9) on its own accord. It may not be the courts role to do so, however Section 20(9) presents a wide access point in its offering to both a litigant and the court to be able to pierce the corporate veil.[162]

5.2.3.2 'Unconscionable abuse'

Blackman in the *Commentary of the Companies Act 2008* notes that 'unconscionable abuse' in terms of Section 20(9) has not been defined by the Act.[163] There is no mention or indication anywhere in the Companies Act 2008 of what constitutes unconscionable abuse of the juristic personality of the company.[164] The wider interpretation of the Companies Act is expressly provided for, 'in interpreting this legislation, it must be interpreted and applied in a manner that gives effect to the purposes set out in section 7'.[165] Such purposes include what has been discussed, as well as the 'promotion of compliance with the Bill of Rights'.[166] According to Cassim, 'unconscionable abuse' of the juristic personality of a company will happen in three ways: (a) on the incorporation of the company; (b) as a result of any use of the company as a legal entity; and (c) as a result of any act by, or on behalf of, the company.[167]

The lack of guidance necessitates the interpretational tools discussed in *Natal Pension Fund* and the *KPMG* cases and examine the literal meaning of the words. A literal interpretation of 'unconscionable' being conduct that is unreasonably excessive.[168] Schoeman considers another definition of 'unconscionable' in the legal context as '[u]nusually harsh and shocking to the

[162] Whether it is good (or bad) to give the court to pierce the corporate veil *mero motu* is beyond the scope of the current paper.
[163] MS Blackman op cit note at 2 -182.
[164] R Cassim op cit note 113 at 316.
[165] M Gwanyanya. "The South African Companies Act and the realisation of corporate human rights responsibilities." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 18.1 (2015) at 3108.
[166] Ibid.
[167] Cassim op cit note 4 at 59.
[168] The Concise Oxford Dictionary (D Thompson (ed) 9ed (Clarendon Press 1995) at 1519.

conscience; that which is so grossly unfair that a court will proscribe it'.[169] One of the only pieces of legislation to date to define 'unconscionable' is the Consumer Protection Act.[170] Section 1 defines it as 'unethical or improper to a degree that would shock the conscience of a reasonable person'.[171] Piercing the corporate veil, despite the discretion provided to the courts, must still ensure that the standard of 'unconscionable abuse' has been satisfied before the 'interested person' or the courts of its own accord.

The court would 'only arrive at a finding of personal liability if there were at least a conviction that the other party had suffered an unconscionable injustice and that as a consequence of something which, to a right-minded person, was clearly improper conduct on the part of the person sought to be held liable - mere equity is not sufficient'.[172] Smalberger JA in *Lubner*[173] rejected 'unconscionable injustice' for the rigid nature, and 'opted for a more flexible approach—one that allows the facts of each case ultimately to determine whether the piercing of the corporate veil'.

It is submitted Smalberger JA's assertion that such a standard is rigid. In fact, there is a useful consideration in decoding Section 20(9) from *Lubner,* in which the court stated,

> 'where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present … the need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil'.[174]

The courts will always be left with a constant consideration of balancing whether the standard of 'unconscionable abuse' in section 20(9), has been achieved but that is not to say there will not be an enquiry into the policy considerations and the consequences of the remedy itself. If

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[169] N Schoeman 'Piercing the corporate veil under the New Companies Act' (2012) De Rebus June 2012.
[170] 68 of 2009.
[171] Section 1 of the Consumer Protection Act.
[172] MS Blackman op cit note 118 at 2 – 170.
[173] Ibid.
[174] *Lubner* supra note 38 at para 30.

'unconscionable abuse' is not established, then the court has no legal authority to pierce the corporate veil nor consider any policy considerations or use judicial discretion.

'Unconscionable abuse' is not a standalone requirement, for the enquiry seeks to create a threshold for the court to ensure has been met. This is not to say that a decision to pierce the corporate veil is not based solely on whether the, yet to be defined, phrase of 'unconscionable abuse' threshold is satisfied. Instead of the requirement becoming a binary question that the court must answer in the affirmative, there is a balancing requirement, to respect the sanctity of the separate legal personality afforded to the company in terms of section 19(1) against the decision to pierce the corporate veil.[175] The discretion of section 20(9) must be exercised with due regard for the consequence of frequent use of the remedy, and taking into account the apprehension to use the remedy under the common law and a variety of foreign jurisdictions.[176]

In *Gore,* the liquidators of 41 companies permit sought to receive relief 'to permit certain of the assets of those companies to be dealt with as if they were the property of the holding company'.[177] The relief sought was in line with Section 20(9) as to be deemed not a juristic person, the liquidators wanted the chance to 'selectively disregarding the separate personalities of a number of companies in a group of companies and treating their residual assets (that is the assets remaining after the payment of the secured creditors and trade creditors of each company) as the assets of the holding company for the purposes of settling … investors' claims'.[178] The court confirmed allegations that 'the improprieties had involved the controllers of the companies treating the group in a way that had not drawn any proper distinction between the separate personalities of the

[175] See Chapter 2 for discussion on Section 19(1) of the Companies Act.
[176] Chapter 6 will examine the apprehension of the Canadian courts to pierce the corporate veil.
[177] *Gore* supra note 7 at para 2.
[178] Ibid.

constituent members, and in using the investors' funds in a manner inconsistent with what had been represented'.[179]

The controllers conduct amounted to 'unconscionable abuse' of the separate legal personality by the court. The act of treating each subsidiary and holding company as a single entity instead of the due regard for each company, cannot allow for the defence of separate legal personality with all the benefits of limited liability attached. The court failed to take it further, for the establishment of the conduct as fraud or fraud-like conduct could provide greater certainty to what actions would result in the court being willing to pierce the corporate veil.

The court adopted a very wide interpretation of 'unconscionable abuse'. The court found that Section 20(9) will,

> 'inevitably operate … to erode the foundation of the philosophy that piercing the corporate veil should be approached with an a priori diffidence … its unqualified availability … militates against an approach that it should be granted only in the absence of any alternative remedy'.[180]

Like *Lubner,* the court further rejected that the common law rule of 'unconscionable injustice' from *Botha* for it did not match 'unconscionable abuse'. The difference is 'unconscionable abuse' relates to the conduct giving rise to the remedy of piercing the corporate veil, whereas 'unconscionable injustice' relates to the consequences of the conduct suffered by the plaintiff.[181] The latter refers to the requirement that there may be a consequence suffered. If it were left to only consequences of the conduct, the court would be more constrained in the amount of times it would be empowered to use Section 20(9).

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[179] Cassim op cit note 113 at 317.
[180] Ibid at para 34.
[181] Ibid at para 36.

The words 'unconscionable abuse', according to *Gore,* not only widened the scope, but created a lower 'standard of abuse than that required for the piercing of the veil of close corporations under section 65 of the Close Corporations Act'.[182] The court simultaneously rejected the stringent requirements of the Close Corporations Act, for these requirements have a much 'more extreme connotation'.[183] Consideration of the literal meaning of the words combined with *Gore*, veil-piercing has a greater likelihood of success relying on section 20(9) rather than the common law.

There can only be speculation as to the discrepancy between the choice of words in the Close Corporations Act and the Companies Act 2008. *Gore's* decreased standard has itself created a risk of a more flexible remedy. Delictual liability case law often prevents the development of liability too excessively to ensure the risk of 'opening the floodgates to litigation'.[184] Similarly, liability in the company context risks opening the doors to excessive situations of piercing the corporate veil at the expense of ensuring the sanctity of the separate legal personality. It is submitted, the courts must seek to preserve the separate legal personality through a narrow interpretation of unconscionable abuse. Cassim argues the interpretation of *Gore* could now make it possible for a widen scope of who is established as an 'interested person' and for the court to find that any abuse of the juristic personality could be deemed as unconscionable.[185]

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[182] Cassim op cit note 113 at 318.
[183] *Gore* supra note 7 at para 34.
[184] *Road Accident Fund v Sauls* [2001] ZASCA 135 at para 14. The term 'open the floodgates' has been considered widely, in South Africa and abroad for the risks it may provide to extensive litigious claims being accepted being informed by public policy and the decreased the standard for liability.
[185] Cassim op cit note 113 at 318.

5.1.3.3 'Deemed not to be a juristic person'

The essence of separate legal personality as espoused in *Salomon* to separate the shareholder or directors from that of the company remains tantamount to the corporate structure.[186] The company, that is subject to Section 20(9), will 'cease to have a separate legal personality in respect of certain rights, obligations or liabilities of the company, or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration'.[187] The consequence is of the utmost severity. The limited liability that may be afforded through having a separate legal personality is no longer available to the company. As a result, the court is tasked with being the party that will allocate the necessary liability in accordance with the actions of the company, and those that were responsible for the conduct. The courts are given little direction as to what may be appropriate when such person is deemed to not be a juristic person. However, Section 20(9) subsection (a) provides for the allocation of liability, and further subsection (b) widens the scope to allow for 'any further order the court may considers appropriate to give effect to a declaration' of subsection (a) as to the loss of company as a juristic person.[188] This is the codification of what it means to pierce the corporate veil.

5.2.3.4 'Rights, obligations or liabilities'

For the company deemed to not be a juristic person, the to-be discussed 'unconscionable abuse' must be in 'respect of particular rights, obligations or liabilities of the company, or of its members (in the case of a non-profit company) or shareholders or of another person specified in the declaration'.[189] The court is limited so as to not be able to intervene even when there may be 'unconscionable abuse' but is not regarding a right, obligation or liability. The provision is allowing

[186] *Saloman* supra note 23.
[187] Cassim et al op cit note 4 at 62.
[188] Ibid at 63.
[189] Ibid.

the court to act appropriately when there may be abuse. This refers more to a threshold requirement of abuse in relation to such 'right, obligation or liability', but is very careful not to insist on labelling or categorising the type of abuse. Cassim et al provide the example that if 'a company was incorporated for an unlawful purpose, such as lending money above the permitted rate in terms of the provisions of the Usury Act 73 of 1968', but without any loan made to someone, the court is not permitted to intervene under the auspices of Section 20(9).[190] The company structure in the aforementioned example fits the Section 20(9) definition of 'unconscionable abuse', and would require exceptional circumstances to argue otherwise. The company has yet to perform an act such as lending above the permitted rate, and thus there has been no 'right, obligation or liability' that could allow the court to accept an 'interested persons' reliance on Section 20(9), or to do so of its own accord.

5.2.3.5 No longer a remedy of last resort

Gore[191] becomes the comprehensive authority on the interpretation of yet another aspect of section 20(9), for Binns-Ward J ruled the remedy will be available despite other potential remedies still available to the 'interested person' or the court. This interpretation agrees with *Lubner,* and my own submissions that the availability of another remedy will not exclude the veil-piercing doctrine. A remedy refers to 'character and extent of relief' that may be entitled once 'appropriate court procedure has been followed'.[192] It is submitted that even though the court in *Hulse-Reutter* is correct to label it a 'drastic remedy', that does not necessitate it must also be used as a remedy of last resort. The statutory remedy has no indication it *must* be a remedy of last resort. Section 20(9) when interpreted narrowly must still be used sparingly, as long as the standard has been met, despite alternative remedies available. This is further supported by Section 7 to be used to encourage the efficient and responsible management of companies

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190 Ibid.
191 *Gore* supra note 7 at para 34.
192 Farlax, 'Remedy'. Available at https://legal-dictionary.thefreedictionary.com/remedy.

The veil-piercing doctrine should not only be relied upon once an exhaustive list of alternatives are deemed unavailable. Instead of using the precedent at common-law of veil-piercing as a last resort, it need not be. Furthermore, *Lubner's* interpretation emphasises 'the need to preserve the company's separate legal personality' that must be balanced against those policy considerations in favour of piercing the veil'.[193] The court noted the availability of another remedy, or failure to pursue one, would be a factor to consider in part of policy considerations.[194] Unlike *Amlin,* the court in *Lubner* saw the opportunity of another remedy as no overriding factor but one of a variety of factors. In *Gore*, the court has attempted to distinguish section 20(9) from the doctrinal understanding and ruling of the common law version of piercing the corporate veil.

Section 20(9) is a simultaneous opportunity to request the court to pierce the corporate veil, but the provision does not exclude the common-law opportunity of veil-piercing. As established in *Gore,* where the requirements of Section 20(9) are not met or cannot be relied upon then the common law remedy will still apply for the Act does not override the common law instances to pierce the corporate veil.[195] *Gore* remains authority for the statutory provision not being a remedy of last resort. If reliance were placed on the common law to pierce the corporate veil the court would have the discretion to choose between the contradicting decisions of *Lubner* and *Hulse-Reutter.*

Foreign law is instructive whether veil-piercing is a remedy of last resort.[196] The English Supreme Court in *Prest v Petrodel Resources Limited*[197] sought a more conservative approach similar

[193] Cassim op cit note 145.
[194] *Lubner* supra note at para 38.
[195] Cassim et al op cit note 4 at 58.
[196] In light of Section 5(2) of the Companies Act 2008, the court may consider foreign law in the application of piercing the corporate veil.
[197] [2013] 2 AC 415.

to *Hulse-Reutter* when 'all other, more conventional, remedies have proved to be of no assistance'. No express mention in the legislation may indicate otherwise, but consideration must be had for the global approach piercing the corporate veil. There will be a greater discussion of the Canadian approach to piercing the corporate veil, but *Shoppers Drug Mart v. 6470360 Canada Inc*[198] approved that to pierce the corporate veil it will have to be exceptional circumstances. It does not preclude the availability of another remedy when the court may resort to veil-piercing. Rather than approving circumstances that the veil may be pierced, the court has created specific categories to do so. Little consideration is used as to whether to pierce the corporate veil as the last resort, rather satisfying a criterion is the most important aspect to request a court to do so. Even though it may not necessarily be a remedy of last resort in other jurisdictions, there is a general trend of remaining conservative in the number of times it may be employed.

5.3 DOCTRINE OR A REMEDY

Questions remain as to whether piercing the corporate veil is a doctrine or a remedy. A doctrine is a set of fundamental characteristics that ends with specific consequences. Instead the concept of piercing the corporate veil can be argued as no doctrine at all but rather as a remedy, for it affords an opportunity to achieve discrete, specific policy objectives.[199] Piercing the corporate veil is a means to achieve a set outcome. As a doctrine it aids in allowing the courts to find an adequate remedy for conduct the justifies it being invoked.

To pierce the corporate veil is not the net-end result, rather it provides the avenue for the solution, and relates specifically to a solution involving the rights, liabilities or obligations of the corporate entity. The idea that the remedy will achieve its objectives is not assisted by the courts

198 *Energyshop Consulting Inc./Powerhouse Energy Management Inc.* (Ont CA, 2014).
199 J Macey & J Mitts op cit note 50 at 99.

inability to provide a set of uniform reasons or standards to apply the remedy of piercing the corporate veil. Piercing the corporate veil has been described by Phillip Blumberg as

> 'jurisprudence by metaphor or epithet. It does not contribute to legal understanding because it is an intellectual construct, divorced from business realities .... [C]ourts state that the corporate entity is to be disregarded because the corporation is, for example, a mere 'alter ego.' But they do not inform us why this is so, except in very broad terms that provide little general guidance. As a result, we are faced with hundreds of decisions that are irreconcilable and not entirely comprehensible. Few areas of the law have been so sharply criticized by commentators'.[200]

Lubner stated that the courts may be justified from disregarding the separate legal personality, but without any degree of certainty on which occasions that may occur.[201] The court felt it necessary to distinguish each case from another 'that allows the facts of each case ultimately to determine whether the piercing of the corporate veil is called for'.[202] There is a level of vagueness in the application of the doctrine that goes beyond the South African court system, and it has been observed in many jurisdictions.[203] Foreign jurisdictions have highlighted that the courts' need to 'avoid an over-rigid preoccupation with questions of structure... and apply the pre-existing and overarching principle that liability is imposed to reach an equitable result'.[204] The exceptional nature of the doctrine has entrenched the near undefeated proposition created from *Salomon* of the protection of the corporate entity. This sanctity has manifested in the 'exploitation of holding, shell and the multiply-layered national and transnational company structures'.[205] The doctrine of

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[200] P Blumberg, The Law of Corporate Groups: Procedural Problems In The Law Of Parent And Subsidiary Corporations 8 (1983).
[201] *Lubner* supra note 38 at para 37.
[202] Ibid.
[203] See further discussion in Chapter 6.2.
[204] *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d. 298, 312 (Conn. App. Ct. 2002) (quoting *LiButti v. United States*, 107 F.3d 110, 119 (2d Cir. 1997)).
[205] M Wan, ed. *Reading the Legal Case: Cross Currents Between Law and the Humanities*. Routledge, 2012 at 41. See further Chapter 6.9.4 for the discussion on *Yaiguaje v Chevron Corporation* 2018 ONCA 472 where the court rightly held that the sanctity of corporate separateness of holding and subsidiary companies.

piercing the corporate veil empowers the court to impose the liability and functions as the avenue use to provide a suitable remedy.

5.4 CONCLUSION

The introduction of Section 20(9) of the Companies Act enabled a statutory opportunity to pierce the corporate veil. The common law jurisprudence as to when to pierce the corporate veil was created under the auspices of an incoherent and differing standards set by the case law. There was a large variability amongst different courts as to what may constitute 'unconscionable injustice', whether a remedy of last resort or certain actions will result in invoking the remedy. The statutory provision has widened the ambit as to what conduct may result in the court deciding to disregard the separate legal personality of the company. Importantly, the courts have been granted greater power to pierce the corporate veil and *mero motu*. The general nature of the provision removes the need for the court to engage in the question if an alternative remedy may still exist. What has not changed for the courts is the decision to pierce the corporate veil is not something to frequently employ. There is juxtaposition between policy considerations to uphold the separate legal personality and those that remain in favour of piercing the corporate veil where failure to do so would prevent an equitable result.

CHAPTER SIX: LESSONS FROM CANADIAN JURISPRUDENCE

6.1 INTRODUCTION AND BACKGROUND

Both the South African and Canadian law is rooted in English law the reference to the seminal *Salomon* judgment as the basis for the separate legal personality principle of a corporation.[206] Statute and precedent very clearly 'posits that the corporate is a separate legal person'.[207] The narrative has remained the same across many jurisdictions, for the Canadian courts will only deny this to a corporation in 'exceptional' circumstances.[208] Despite their own battles with inconsistency and confusing rhetoric, it is submitted that the Canadian courts are more successful than their South African counterparts in narrowing down the instances of veil-piercing. Academics have criticised the courts handling of the case law, in which 'there is nothing exceptionally difficult about these cases - nothing, that is, besides the confusing rhetoric'.[209] The result has been decisions are 'impossible to rationalise and that this area of law suffers from a potentially costly lack of predictability'.[210]

The nature of the corporation having separate legal personality provides the mechanism in which the company's shareholders and directors are afforded limited liability. Khimji and Nicholls highlight separate legal personality and limited liability remain two distinct concepts that must not be used interchangeably.[211] Separate legal personality refers to a corporation that itself 'is a person in law, distinct from its shareholders and from anyone else purporting to act for or on

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[206] M Khimji & C. Nicholls, Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study, 41 Queen's L.J. 207 (2015) at 213-214.
[207] JW Neyers, Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation, *50 U. Toronto L.J. 173* (2000) at 182.
[208] Ibid at 183.
[209] M Khimji & C. Nicholls op cit note 205 at 215.
[210] Ibid at 211. See Jonathan M Landers, "A Unified Approach to the Parent, Subsidiary, and Affiliate Question in Bankruptcy" (1975) 42:4 U Chicago L Rev 589 at 620; Frank H Easterbrook & Daniel R Fischel, "Limited Liability and the Corporation" (1985) 52:1 U Chicago L Rev 89 at 89; S Bainbridge, "Abolishing Veil Piercing" (2001) 26:3 J Corp L 479 at 481.
[211] See discussion in M Khimji & C. Nicholls op cit note 205.

behalf of the corporation, such as its directors, officers, employees and other agents'.[212] Whereas limited liability is that the 'company and its shareholders are clearly differentiated as distinct legal personalities because the debts of the company are separate from the debts of its shareholders'.[213] The veil-piercing doctrine is used to disregard the separate legal personality of the corporation, in which the court may impose liability on the shareholders or directors.

The inconsistency of the jurisprudence to veil-piercing has wider ramifications for the certainty to the rule of law. Domanski notes the inconsistent reasoning 'cannot satisfy those who believe that a legal system should be built, as far as possible, on a foundation of principle'.[214] South African and Canadian courts have suffered from an unprincipled approach to achieve the result of when it may or may not disregard the separate legal personality of a corporation. In *Kosmopoulus v Constitution Insurance Co. Of Canada*[215] *('Kosmopoulus'),* the court confirms Domanski's statement that veil-piercing 'follows no consistent principle'. Neyers observation of the case law comes to the conclusion the courts have done so because 'the situation demands' or 'I feel like it'.[216] The courts approach has been to 'employ a kind of kitchen sink approach: citing any number of purported veil piercing grounds, with little indication of which among them are determinative'.[217] This dissertation does not look to test the credibility of this, but merely observe the successes and failures of both local and international courts to provide a single, coherent and general test to pierce the corporate veil that can be used as a blueprint for courts in other jurisdictions.

In this chapter, I will consider what the understanding of separate legal personality internationally and establish the lack of clarity is not isolated to South Africa. Following which,

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[212] Ibid at 214.
[213] P Lipton. "The Introduction of Limited Liability into the English and Australian Colonial Companies Acts: Inevitable Progression or Chaotic History." *Melb. UL Rev.* 41 (2017) at 1279.
[214] A. Domanski, 'Piercing the Corporate Veil - A New Direction?' (1986) 103 *S.A.L.J. 224* at 225.
[215] [1987] 1 S.C.R. 2 at para 12.
[216] JW Neyers op cit note 206 at 183.
[217] K Potter, V Maric & M Stephenson op cit note 26 at 560.

rather than widen the ambit of the doctrine, examine the two primary instances the Canadian court has established to pierce the corporate veil[218]: (1) to give effect to statute; and (2) the basis of fraud or fraud-like behaviour. The risk of an unprincipled approach to the doctrine has resulted in attempts to expand the remedy such as *Kosmopoulos* where the court suggested to pierce the corporate veil 'to do justice'[219] (known as the 'just and equitable' provision), enterprise liability[220] and when a corporation has acted as an agent of its controllers[221]. Finally, the remainder of the chapter will examine the aforementioned four instances that must be rejected as opportunities to pierce the corporate veil. It is further submitted the rejection by the Canadian courts must apply in South Africa.

6.2 INTERNATIONAL CORPORATE PERSONALITY

The true nature of corporate personality 'has been one of the most troublesome and time-consuming questions ever pondered by philosophers, sociologists, economists, historians, linguists, and jurists'.[222] Corporate personality, the nature of a juristic person in the Companies Act 2008, can be described 'as though it were a natural person'.[223] Corporate personality 'will have to be deconstructed so that the courts will not be misled by oversimplification and thereby corrupt Canadian corporate law doctrine'.[224] The question of when the courts should pierce the corporate veil to disregard the separate legal personality of a corporation has plagued not only local courts, but international courts.

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[218] Ibid.
[219] *Kosmopoulos* supra note 214 at para 12.
[220] *801962 Ontario Limited v. MacKenzie Trust Co.,* [1994] O.J. No. 2105 (Gen. Div.).
[221] *Kosmopoulos* supra note 214 at para 12.
[222] JW Neyers op cit note 206 at 174.
[223] Ibid at 201.
[224] Ibid.

Like South Africa, neither England nor the United States provide a 'general test … to decide when the veil of incorporation should be lifted'.[225] The absence of no general test 'can be attributed to the fact that the courts have invariably relied on certain established categories, such as fraud, agency, evasion of legal obligations and abuse of the corporate form, to decide whether the veil in a particular case should be lifted *vel non*'.[226] Canadian court jurisprudence on when to pierce the corporate veil is no different; it remains radically incoherent.[227] The Canadian Supreme Court have acknowledged there remains 'no consistent principle' in common amongst the cases when the veil has been pierced.[228]

6.3 RELEVANT CANADIAN PRINCIPLES

Whereas South Africa looks to the unfair advantage gained by the corporation or those who control it, the Canadian Law has two distinguished principles of 'improper purpose' and 'control'.

6.3.1 Improper Purpose

Despite the frequent references to *Salomon,* the Canadian courts have developed principles that could result in piercing the corporate veil at the expense of the separate legal personality of the corporation. The earlier grounds, or 'categories', to justify piercing the corporate veil were 'agency and use of the corporate structure for an improper purpose'.[229] There remains a similarity with the jurisprudence developed by the South African courts in *Botha* requiring 'unconscionable injustice'.[230] Although this standard was later rejected. A case similar to Canadian courts, the court in *Lubner* indicated presence of any 'fraud, dishonesty or other improper conduct' shows a high indication to pierce the corporate veil.[231]

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[225] LC Davids 'The lingering question: Some perspective on the lifting of the corporate veil' (1994) TSAR 155 at 155.
[226] Ibid. *Vel Non* is a Latin term that translates to 'or not'.
[227] JW Neyers op cit note 206 at 215.
[228] *Kosmopoulos v Constitution Insurance Co of Canada*, [1987] 1 SCR 2 at 10, 63 OR (2d) 731.
[229] Ibid at 215.
[230] *Botha* op cit note 59.
[231] *Lubner* supra note 38 at para 30.

The Canadian courts' determination of what may be an 'improper purpose' has no consistency as to the rhetoric used or standard. Terms such as 'sham', 'facade concealing the true facts' and 'conduct akin to fraud' have been used, and once met such standard will invoke the opportunity to disregard the separate legal personality.[232] These standards are no more than multiple attempts to find descriptive rhetoric to what may be improper purpose. This has done little to clarify when a future court may decide the necessary standard has been met. In tandem, there has been a creation of categories of 'improper purpose', including *inter alia,* 'use of the corporation to avoid a pre-existing legal obligation; thin or inadequate corporate capitalization; and failure to observe proper corporate formalities'.[233] Each of these have been criticised for each creates a sliding scale of the degree of impropriety.

6.3.2 Control

Again, as established by the South African courts, without fitting into these categories requires reverting to the broad notion of individual courts' vague definition of 'improper purpose'. This has been confirmed by the failure to have a uniform 'statement on the precise relevance or content of the standards to be applied in determining the requisite degree of control and impropriety to justify veil piercing'.[234] In *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co ('Transamerica')* [235] the court combined control and impropriety as the necessary elements to pierce the corporate veil. The court stated it 'will disregard the separate legal personality of a corporate entity where it is completely dominated, controlled, and being used as a shield for fraudulent or improper conduct'.[236] Rather than a binary requirement of having either control or improper conduct, the court suggested it necessary to have both present.

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[232] *Clarkson Co Ltd v Zhelka*, [1967] 2 OR 565 at 577.
[233] M Khimji & C. Nicholls op cit note 205 at 217.
[234] Ibid.
[235] (1996), 28 OR (3d) 423.
[236] Ibid at 433-34.

As Khimji and Nicholls note, having such vague standards of control and improper conduct would imply 'to justify veil piercing would appear to have been satisfied by the facts in *Salomon* itself'.[237] The jurisprudence has come full circle by basing the sanctity of the separate legal personality of a corporation in *Salomon*. The courts variable standard to pierce the corporate veil that if the facts of *Salomon* were presented before a Canadian court in future it *may* render a different result. It could be argued that the precedent in *Transamerica* should justify the court to pierce the corporate veil and impose liability on the shareholder or director in the similar position as Salomon.

6.4 ESTABLISHED INSTANCES TO PIERCE THE CORPORATE VEIL

Unlike in South Africa, the Canadian courts have two established categories of veil piercing: When statute gives directive to pierce the corporate veil and in the presence of fraud or fraudulent activity.

6.4.1 Statutory directive to pierce the corporate veil

Courts have pierced the corporate veil pursuant to the application of a statute.[238] Legislators have made it available to 'render persons liable for actions that under the regime of private law would be unactionable' often for public policy reasons.[239] Section 119(1) of the Canadian Business Corporation Act[240] imposes liability, jointly and severally, on directors of a corporation for up to six months to each employee for services rendered. The legislator has the requisite power 'to instruct the courts to ignore, reinterpret, or render unenforceable the legal relations and contracts (nominate or otherwise) that natural persons have in fact constructed'.[241] The legislators do not

[237] M Khimji & C. Nicholls op cit note 205 at 217.
[238] K Potter, V Maric & M Stephenson op cit note 26 at 560.
[239] JW Neyers op cit note 206 at 217.
[240] (R.S.C., 1985, c. C-44). Section 119(1) states: Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months' wages payable to each such employee for services performed for the corporation while they are such directors respectively.
[241] JW Neyers op cit note 206 at 216.

'demand that courts ignore all the conceptions and principles that are at the root of company law'.[242] Neyers notes this is an alteration of a corporate contract in pursuit of a public policy objective.[243] The ability to pierce the corporate veil pursuant to stature is not only justified, but based in statute helps to clarify a clear category to do so. The following cases illustrate the courts' use of statute to pierce the corporate veil and provide a satisfactory remedy based on a statutory provision. The Canadian courts have an incoherent approach but have developed certain rules that have also found success in South Africa.

6.4.1.1 Income Tax Act

Although not always possible, statute provides a better guideline for the conduct required of the corporation and what is deemed to be in contravention of the impugned provision. Statute is written down and clearly codified, where as the common law exists through various court decisions. [244]

For example, the *Income Tax Act (Canada)*[245] was brought before the court in *De Salaberry Realties Ltd. v. M.NR.*[246] ('*De Salaberry*') to determine if the sale of land should be regarded as a 'capital gain' or 'income'. If found to be a 'capital gain' there would be a substantial tax saving. The case involved a 'large network of parent and subsidiary corporations which were all beneficiary owned by two families'.[247] The corporations were said to be in the business of the development of shopping complexes. The evidence itself pointed to a subsidiary of the parent corporation that 'has only been incorporated to make one or a few purchases of land, and that the land was almost always sold at a profit shortly after purchase'.[248] There is nothing untoward about the sale of land,

[242] *Bank voor Handel en Scheepvaart N. V. v. Slatford*, [1953] 1 Q.B. 248 at 278.
[243] JW Neyers op cit note 206 at 216.
[244] Common law can be developed to adapt to changing circumstances.
[245] (R.S.C., 1985, c. 1 (5th Supp.)).
[246] (1974), 46 D.L.R. (3d) 100 (F.C.T.D.).
[247] K Potter, V Maric & M Stephenson op cit note 26 at 560.
[248] Ibid.

but the business of the corporations was not the sale of land, rather the development of shopping complexes. The corporation argued that because they were not in the business of the sale and purchase of land, the profits should only be taxed as 'capital gains' and not 'income'.[249]

The respondent argued that if the court considered the subsidiaries as a single economic unit, the 'aggregate of subsidiaries was in involved in the purchase and sale of property on a commercial scale'.[250] The Federal Court of Appeal disregarded the separate legal personality of each individual subsidiary, and the group of companies was treated 'as a single economic unit' for tax purposes.[251] The court found that the sale of land by the subsidiary was inventory, and fell under the auspices of 'income'.[252] Stephenson et al identify the public policy considerations of 'Parliament's intention' in the *Income Tax Act* to tax business proceeds at a higher rate than those of capital dispositions.[253] Neyers criticism of the rhetoric and reason of the courts is exemplified in this decision. The court established the course of conduct was that of the subsidiary is involved in the purchase and sale of land. However, the court 'went on for pages justifying his piercing of the corporate veil on other tax and statutory cases which spoke of the lack of separate will or agency of the subsidiary'.[254] As Stephenson et al argue the veil was pierced pursuant to the statute. Although, the court's extensive discussion on the parent-subsidiary relationship has brought the debate to whether there is principles of when to pierce the corporate veil in such relationships.[255] The choice to include statute, veil piercing and parent-subsidiary relationships makes it difficult to deduce whether the decision to pierce the corporate veil was pursuant to statute and the parent-subsidiary relationship, or just pursuant to statute.

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[249] Ibid.
[250] Ibid at 561.
[251] P Tepre, *Liability deficit problem of multinational corporate groups: a proposal for legislative and judicial reform*. Diss. University of British Columbia, (2017) at 102.
[252] JW Neyers op cit note 206 at 218.
[253] K Potter, V Maric & M Stephenson op cit note 26 at 561.
[254] JW Neyers op cit note 206 at 218.
[255] Ibid.

As established in *Gore,* the liquidators requested similar relief to 'permit certain of the assets of those companies to be dealt with as if they were the property of the holding company'.[256] Although the respondents and court in *De Salaberry* sought to create hold the subsidiaries and parent as one economic unit for the purposes of tax, the justification to pierce the corporate veil for the group of companies parallels *Gore.* The similarities do not end there, the courts in both instances referred to the foundational principles of separate legal personality in *Salomon.*[257] In fact, *Gore* and *Kosmopoulos* reiterate the importance of the principle in *Salomon* to be abided by as far as possible. However, 'the best that can be said is that the separate entities principle is not enforced when it would yield a result too flagrantly opposed to justice, convenience or the interests of the Revenue'.[258] The result is the principle of separate legal personality in *Salomon* will be abided by in the Canadian Courts as far as possible, and it is unlikely they will depart from this 'sacred doctrine' for cases of enterprise liability, except for tax cases.[259]

The apparent reluctance of the courts to pierce the corporate veil has been relaxed in relation to tax matters. Especially where there is a possibility of a tax evasion scheme.[260] There remains a thin line between tax avoidance and tax evasion. The former is legal and allows for persons or corporations to reduce tax payable, the latter is illegal. Like the structure of the corporations in *De Salaberry, '*one of the most common forms of tax evasion schemes occurs when the parties that have entered into a contract attempt to disguise the true nature of their dealings in order to claim a tax benefit'.[261] Section 80(1) of the *Income Tax Act(Canada)* permits the commissioner to consider the substance rather than the form of the transaction.[262] This is a parallel to the common law principles of the courts' decision to pierce the corporate veil in South Africa

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256 *Gore* supra note 7 at para 2.
257 K Potter, V Maric & M Stephenson op cit note 26 at 561 and *Gore* supra note 7 at para 28.
258 *Gore* supra note 7 at para 25.
259 P Tepre op cit note 250 at 103. The attempts by litigants to widen the scope of the veil piercing doctrine for 'enterprise liability' will be discussed in greater detail.
260 R Glazer. *Piercing the corporate veil of the close corporation with the Tax Administration Act*. LLM Diss (2015) at 50.
261 Ibid.
262 Ibid.

who are entitled to look to substance rather than form'.[263] As Potter et al note this is 'doctrinally satisfying because they disclose some positive, jurisdictional grounds on which to pierce the corporate veil, namely to give effect to countervailing legislative enactments'.[264] The South African Revenue Service (SARS) investigate tax returns to distinguish between tax avoidance and evasion. Various tax cases such as *ERF 3183/1 Ladysmith (Pty) and Another v CIR*[265] the application of the Income Tax Act[266] of South Africa, particularly Section 103 relating to anti-avoidance, allowed the court to disregard the separate legal personality of the subsidiary. The court ensured the Commissioner of Inland Revenue could claim the requisite tax revenue and reveal the disguised transactions of the dormant subsidiary company and parent company.[267]

6.4.1.2 Divorce Act

To give effect to statute has allowed for the courts to pierce the corporate veil in the realm of family law. In the case of *Wildman v Wildman*[268], the appellant husband and applicant wife had separated in 2003. Despite the many support orders made against the appellant, the court was of the opinion there was a continued lack of intention to oblige and evade the monetary obligations of over $800 000.[269] Rather than contest the amount owed, Macpherson JA of the court found 'the appellant challenges not one penny of this amount'.[270] The court found justification, *inter alia,* to disregard the separate legal personality where the corporation 'is completely dominated and controlled and being used as a shield for improper conduct'[271] and pursuant to statute under the *Child Support Guidelines.*[272] The *Child Support Guidelines* empower the court to 'consider the income

263 M Henkeman op cit note 68.
264 K Potter, V Maric & M Stephenson op cit note 26 at 561.
265 58 SATC 229.
266 58 of 1962.
267 R Glazer op cit note 259 at 55.
268 (2006), 273 D.L.R. (4th) 37
269 C Nicholls, Beyond the Veil: Wildman v. Wildman, 44 Can. Bus. L.J. 448 (2007) at 450.
270 *Wildman* supra note # at para 17.
271 Ibid at para 25, quoting Sharpe J. in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1986), 28 O.R. (3d) 423 (Gen. Div.), affd [1997] O.J. No. 3754 (QL), 74 A.C.W.S. (3d) 207 (C.A.)
272 Promulgated under the *Divorce Act* (R.S.C., 1985, c. 3 (2nd Supp.)).

of corporations in determining a spouse's true income'.[273] The court ruled the intention of the provision is 'to enable the courts to conduct a fair accounting of the money available for the payment of child support'.[274] The preceding paragraph stated the *Child Support Guidelines* 'contemplates piercing the corporate veil in appropriate cases'.[275] It was common cause that the appellant owed the money. The appellant was using a corporation specifically to hide their true income and avoid the payments. The court used the doctrine of veil-piercing empowered through statute to reveal the true state affairs.

6.4.1.3 Summary of the principles to veil-piercing pursuant to statute

Despite the criticism levelled at the court in *De Salaberry,* there is a distinct category deduced when to pierce the corporate veil. *De Salaberry* and *Wildman* are just two examples of the courts approval to pierce the corporate veil pursuant to an explicit statutory provision.[276] To pierce the corporate veil pursuant to statute has still resulted in the courts providing narrative and justification through a variety of vague principles such as control, parent-subsidiary relationships and impropriety. Instead of entertaining the vagueness of this rhetoric, what can be summarily noted from the case law is that this is a valid category to allow for the courts to pierce the corporate veil. Consequently, these cases must not be used as 'setting out principles of general application' to the wider veil-piercing doctrine.[277] Potter et al point to Gonthier J. in *Conseil de la Santé (Montréal) v. City of Montreal*[278] in the context of two corporations for tax purposes:

> 'giving substance precedence over form and considering two separate corporate entities as one and the same person when this is consistent with the wording and purpose of the statute in question'.

[273] C Nicholls op cit note # at 455.
[274] *Wildman* supra note 266 at para 27.
[275] Ibid at para 26.
[276] See similar case of *Debora v Debora* 2006 CanLII 40663 (ON C.A.).
[277] K Potter, V Maric & M Stephenson op cit note 26 at 561.
[278] (1994) 3 S.C.R. 29 (S.C.C.) at para 46; K Potter, V Maric & M Stephenson op cit note 26 at 561.

The decision to pierce the corporate veil is based solely on the statute and the power given to courts by the legislature. The additional discussion by the courts in their judgments of what may also be relevant considerations have blurred that to pierce the corporate veil pursuant to statute is itself a standalone category. This dissertation has highlighted the danger of categorisation, but this is an acceptable solution when there remains a statutory basis for veil-piercing. Scholars even argue that rather than citing these cases as veil-piercing, this is just a form of statutory interpretation.[279] Even if this were accepted as truth, the result is the same as implementing the doctrine to pierce the corporate veil. The biggest issue the courts have created in the jurisprudence is looking to use a variety of principles in their justification to veil-piercing pursuant to statute.[280]

6.4.2 Fraud exception

6.4.2.1 Introduction

The court will pierce the corporate veil for fraud-based grounds when 'the corporation is dominated by the shareholders and is being used as a shield for fraudulent or fraud-like conduct'.[281] The maxim 'Fraud unravels everything' has been cited in many jurisdictions.[282] The presence of fraud is not 'full-blown fraud', rather 'whether the corporation has been used in a manner that strikes the court as improper, which introduces a great deal of uncertainty into the fraud exception'.[283] The words of Cameron JA in *Absa Bank Ltd v Moore*[284] provides guidance for this maxim:

> 'The maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on the victim, not the fraudster or third parties.'

The fraud-exception must not be used beyond the scope of the fraudulent activity to disregard the entire separate legal personality of the corporation for anything that does not encompass the fraud.

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[279] JW Neyers op cit note 206 at 219.
[280] This will be discussed further under Chapter 6.8 'Floodgates to pierce the corporate veil', but this has lead to attempts by ambitious litigants to rely on enterprise liability discussed in *De Salaberry,* agency and when it is deemed 'just and equitable'.
[281] K Potter, V Maric & M Stephenson op cit note 206 at 563.
[282] Per Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 QB (CA) at 712. See further *Firstrand Bank Ltd t/a Rand Merchant Bank & another v Master of the High Court, Cape Town & others* [2013] ZAWCHC 173 (11 November 2013) paras 20-27.
[283] K Potter, V Maric & M Stephenson op cit note 26 at 564.
[284] 2017 (1) SA 255 (CC) at para 39.

This ensures the doctrine is an exceptional remedy, while still protecting the principles of separate legal personality and limited liability. The South African courts have not required the presence of fraud, rather it has been used as an indicator, for which the courts may engage in an a secondary enquiry of a balancing approach that 'requires the concept of separate legal personality being weighed against those principles and policies in favour of piercing the veil'.[285]

6.4.2.2 Dominance and fraudulent conduct

The apprehension to label the statutory veil-piercing as a category is well-founded, but there is sound logic when it does not use principles such as fraud-based grounds. In *Transamerica*, the court determined both dominance and fraud was required:

> 'The courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct'.[286]

The court went further to define what would satisfy each element: First, on the element of dominance, the court stated,

> 'complete control, requires more than ownership. It must be shown that there is a complete domination and that the subsidiary company does not, in fact, function independently'.[287]

Second, on the nature of the conduct, the question is whether there is:

> 'conduct akin to fraud that would otherwise unjustly deprive claimants on their rights?'[288]

The second enquiry of *fraud* is the umbrella term that is satisfied when 'the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated those in control expressly direct a wrongful thing to be done'.[289]

6.4.2.3 What is fraud?

For the courts to consider what constitutes fraud, the following has been determined as acceptable use of the corporate form:

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[285] M Henkeman op cit note 68.
[286] *Transamerica* supra note 234 at para 22.
[287] Ibid.
[288] Ibid at para 23.
[289] *642947 Ontario Ltd. v. Fleischer,* 2001 CanLII 8623 (ON CA) at para 68.

> '(i) taking advantage of limited shareholder liability; (ii) having only one shareholder who exercises control over the corporation, and (iii) failing to pay the corporation's debts.'[290]

The courts have been known to cite shareholder domination as 'improper conduct'. but as Potter et al establish this is merely a threshold requirement for the first enquiry.[291] The incoherence of the doctrine can be seen in the courts justification to pierce the corporate veil through the two-step enquiry. The courts have selected elements relevant only for the first-stage enquiry of control to justify the second-stage enquiry of conduct akin to fraud. It has been argued that a *numerous clausus* approach to veil-piercing sets a dangerous precedent. The risk of conduct being determined in this way has allowed judicial discretion to rule what may be improper purpose, and on the other side allowed conduct that may be 'akin to fraud' not fitting any pre-determined definition. The South African courts have fallen victim in being too determined on a case-by-case basis of veil-piercing without any direction.

Potter et al identify factors, similar to those in *Worldwide Carriers, Lt v. Aris Steamship Co.*[292] in which the courts should consider on, the second enquiry of what constitutes fraud:

> '(i) thin capitalisation; (ii) failure to observe corporate formalities; (iii) a shareholder treating the corporation's property as if it were his or her own without regard to the directors to act in his or her sole interest without regard to the interests of the corporation or its shareholders; and (v) timing incorporation to avoid pre-existing obligations'.[293]

This is not a closed list, but are the *most* likely factors to consider that may be relevant to determine what may constitute fraud. Although fraud is a category, the identity of fraud must still be established. These factors are noted as the most likely to be present in the instances of fraud. Having the rigidity of a fraud category provides a level of certainty, but the factors being flexible

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[290] K Potter, V Maric & M Stephenson op cit note 26 at 565.
[291] Ibid.
[292] 301 F.Supp. 64 (S.D.N.Y., 1968) at para 7.
[293] K Potter, V Maric & M Stephenson op cit note 26 at 565.

allows for the courts to continuously have the power to consider any factor that could be deemed fraudulent.

6.4.2.4 Application of the principles to Salomon v Salomon

To test the aforementioned two elements, it is a worthwhile exercise to see if *Salomon*, would pass muster. Judges have lined up to criticise the rhetoric of the courts who cite the *Salomon* principle but then do an about-turn and disregard the separate legal personality in the same judgment. On the first enquiry, although there was not parent-subsidiary relationship, like the appellant in *Wildman,* Aron Salomon was the sole shareholder, in which the court 'legitimated the one-man company'.[294]

It is clear that Salomon held the requisite complete control. The decision in *Salomon* legitimised 'the concept of the one person or private company' as the company was used as a conduit for his own personal business dealings.[295] On the second enquiry of fraud the company was validly formed and registered, and in its own right a legal person.[296] Thus, what Salomon did 'was perfectly justified on the basis of the law. There was no fraud or misrepresentation. Nobody was deceived'.[297] In the English Court of Appeal, the lower court, Lord Linley saw Salomon's use of incorporation as a 'device to defraud creditors'.[298] Had the House of Lord been satisfied of the presence of fraud we can only assume the decision of the English Court of Appeal would have been upheld. Having passed the muster of the two elements of the *Transamerica* case, the court would be able to pierce the corporate veil and rule accordingly against Aron Salomon. However,

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[294] Cassim et al op cit note 4 at 34.
[295] P Lipton "The mythology of Salomon's case and the law dealing with the tort liabilities of corporate groups: an historical perspective." *Monash UL Rev.* 40 (2014) at 453.
[296] Cassim et al op cit note 4 at 33. See further Chapter 2.
[297] J. H. Farrar, Fraud, Fairness and Piercing the Corporate Veil, 16 Can. Bus. L.J. 474 (1990) at 476.
[298] *Broderip v Salomon*, [1895] 2 Ch 323 at 339 (CA).

the House of Lords did not agree, and if we were to consider the factors of *Worldwide Carriers, Lt v. Aris Steamship Co,* the second-enquiry of fraud would not and cannot be met.

6.5 GROUNDS TO REJECT VEIL-PIERCING

Having established the two instances that allow for veil-piercing, there has been attempts to extend the remedy beyond this narrow scope through agency, the 'just and equitable' exception and enterprise liability. Agency will be argued as a completely different aspect of law, and the final three have been rejected by the courts' for interpreting the doctrine too broadly.

6.5.1 Agency

The earlier grounds to pierce the corporate veil were improper purpose and agency.[299] Agency refers to when the corporation 'has acted as the agent of its controllers'.[300] As established by Blackman, imposing liability on directors is not by way of the contracts they may enter into on behalf of the company for they are agents of the company.[301] Khimji and Nicholls argue 'agency' has been well documented in the case law:

> 'it is rarely clear whether courts have in mind the legally well-defined principal-agent relationship. Instead, they appear to use the word as a layperson might, adverting to some significant but ill-defined degree of control exercised by a shareholder over a corporation, prompting the court to denounce the corporate body as merely the shareholder's alias or alter ego-entirely undeserving of the status of a separate legal person'.[302]

As Potter et al note, to request for the veil to be pierced makes no sense.[303] The plaintiff 'who argues that a corporation is an agent necessarily concedes that the corporation exists at law as a

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[299] See *Palmolive Manufacturing Co (Ontario) v R*, [1933] SCR 131 at 140, [1933] 2 DLR 81
[300] K Potter, V Maric & M Stephenson op cit note 26 at 574.
[301] MS Blackman op cit note 118 at 2 – 178.
[302] M Khimji & C. Nicholls op cit note 205 at 216.
[303] K Potter, V Maric & M Stephenson op cit note 26 at 574.

separate entity which is capable of being bound in contract'.[304] The notion of contract purports that the corporation exists with the requisite rights attached to a juristic person. The agency relationship is governed by the rules of agency law, a separate and distinct area of law that has no relationship to veil-piercing.[305] Thus, if the plaintiff is able to prove via the laws of agency that the corporation is acting on behalf of another the remedies are available according to the law of agency, rather than veil piercing. The attempts to use the veil-piercing doctrine are incorrect in law. Not only does it not comply with the two-stage enquiry of the established category of fraud but have further implications of failing to develop the laws of agency.

6.5.2 'Just and equitable' exception

Plaintiffs have approached the courts to pierce the corporate veil 'when it is in the interests of justice'.[306] Some courts have obliged to reach a 'just' or 'equitable' result by using an 'amalgam of broadly worded veil-piercing, agency, and group enterprise theory to justify their more comprehensive statutory interpretations'.[307] When statute allows for veil-piercing there is no secondary enquiry whether it is just and equitable. This line of reasoning amalgamates veil-piercing pursuant to statute with an ancillary concept of 'in the interests of justice'. In *Kosmopoulos,* Wilson J opened the opportunity to the just and equitable principle to do justice, 'the separate entities principle is not enforced when it would yield a result too fragrantly opposed to justice, convenience or the interests of the Revenue'.[308] Although the courts have looked to reach a just result such as in statutory interpretation, there has been a refusal to establish a 'free-standing just and equitable exception to the twin principles' of separate legal personality and limited liability.[309] To receive a

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[304] Ibid.
[305] See further *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC); *Maye Serobe (Pty) Ltd v Lewusa Obo Members and Others* (J 2377/12) [2015] ZALCJHB 116 at para 18: 'An Agency can be defined as a consensual relationship created by contract or by law where one party, the principal, grants authority to another party, the agent, to act on his or her behalf with either curtailed or open mandate and under the control of the principal to deal with a third party. An agency relationship is fiduciary in nature resulting in the actions performed by the agent binding the principal.'
[306] K Potter, V Maric & M Stephenson op cit note 26 at 575.
[307] JW Neyers op cit note 206 at 218.
[308] *Kosmopoulus* supra note 214 at para 12.
[309] K Potter, V Maric & M Stephenson op cit note 26 at 575.

just result is a separate issue to the attempted to use the just and equitable principle to pierce the corporate veil.

In *Lynch v Segal*[310] ('*Lynch*'), in similar vein to *Transamerica,* the court proposed 'there is a line of jurisprudence establishing in very general terms that the courts will not enforce the separate entities notion where it would yield a result too flagrantly opposed to justice, convenience or the interests of the Revenue'.[311] The issue in obtaining a just result has led to the courts amalgamating various principles and creating the opportunity of veil-piercing based solely on just and equity. The operation of a 'just and equity' exception would risk inroads into the principle of separate legal personality in instances a court would look to achieve a certain result through the veil-piercing remedy. The court relied on decisions such as *Transamerica,* in which the courts refused to pierce the corporate veil when opposed to justice.[312] *Transamerica* was explicit that to disregard the separate legal personality of the corporation must not be taken lightly, and *inter alia,* there must be 'conduct akin to fraud that would otherwise unjustly deprive claimants of their rights'.[313]

In *Lynch,* the court found no instances of fraud or conduct akin to fraud, rather resorting to citing cases rejecting veil-piercing and determining a more 'flexible approach is appropriate in the family law context'.[314] The result of enforcing spousal and child support payments *may* be just and equitable, but the use of the standalone provision explicitly rejected by the Supreme Court of Canada sets the dangerous precedent of allowing litigants to use the principle. Subsequent cases have confirmed *Kosmopoulos* 'did not meant that the courts enjoy "carte blanche"' approach to veil-piercing on a just and equitable standard.[315]

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[310] [2006] O.J. No. 4810 (QL) (C.A.).
[311] Ibid at para 35.
[312] K Potter, V Maric & M Stephenson op cit note # at 576.
[313] *Transamerica* supra note # at 434.
[314] *Lynch* supra note # at para 36.
[315] *Parkland Plumbing* & *Heating* Ltd. *v. Minaki Lodge* Resort 2002 Inc. (2009) 305 D.L.R. 4th 577 (ONC.A.) at para 49.

This debate has been laid to rest in *Yaiguaje v Chevron Corporation*[316]. The majority relied on *Sun Indalex Finance v United Steelworkers*[317] for no standalone provision when it is 'just and equitable', and to advance the law 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'.[318] Despite the minority written by Nordheimer J arguing the court has the power to pierce the corporate veil based on its equitable jurisdiction, the decision remains clear no such ground exists.[319]

6.5.4 *Enterprise liability*

6.7.4.1 Introduction

As the courts have referred to corporations as a 'single economic unit', the theory proposes 'each constituent corporation is liable for the actions of each of its related corporations'.[320] In *Mull v. Colt*[321] the court held:

> 'If plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.'

The above refers to the instrumentality doctrine, with the only difference to the enterprise doctrine being on functionality and not ownership of capital.[322] The test of enterprise liability would only differ with the ownership of capital requirement met.

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316 2018 ONCA 472.
317 2013 SCC 6.
318 *Chevron* supra note 314 at para 83.
319 K Potter, V Maric & M Stephenson op cit note 26 at 578.
320 Ibid at 578.
321 31 F.R.D. 154,163 (S.D.N.Y.)
322 J Farrar op cit note # at 477.

6.5.4.2 Yaiguaje v Chevron Corporation

In *Chevron,* the plaintiffs from the Lago Agrio region in Ecuador approached the Ontario Superior Court to enforce the US$9.5 billion judgment made in the Ecuadorian.[323] The plaintiffs argued the should be able to enforce a judgment on Chevron by way of its various subsidiaries.[324] The court rejected the plaintiff's claim of imposing liability on the Canadian Chevron subsidiary on two counts: enterprise liability does not form part of Canadian law, and does not comply with 'the relevant business statutes' such as the *CBCA*.[325] The court noted that,

> 'corporate separateness is much more nuanced among a group of related corporations… The *CBCA* permits subsidiary corporations but also says that each corporation is a natural person. If Parliament wished to carve out an exception to the natural person rule of subsidiaries, it would have been very easy to do so'.[326]

The ability to allow for enterprise liability has the potential to open the floodgates to litigants to select a jurisdiction where there is a subsidiary corporation with more favourable laws. In 2011 Chevron operated in 23 countries through the incorporation of 72 subsidiaries in 24 separate jurisdictions.[327] If Canadian law were to recognise enterprise liability, any subsidiary of a corporation with a judgment in another jurisdiction could be at risk.

Rapid global development has resulted in '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'.[328] Consequently, a different country has been required to rule on actions or activities that have taken place in another. Condon questions if enterprise liability should be part of the law:

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[323] J MacLean, Chevron Corp. v. Yaiguaje: Canadian Law and the New Global Economic and Environmental Realities, 57 Can. Bus. L.J. 367 (2016) at 369-370.
[324] K Potter, V Maric & M Stephenson op cit note # at 581.
[325] Ibid.
[326] *Chevron* supra note # at para 77.
[327] J MacLean op cit note # at 377.
[328] J MacLean op cit note # at 371.

> '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?'[329]

Nordheimer JA, who purported to justify the need for a 'just and equitable' principle, held it should be possible to enforce the judgment in the Ecuadorian courts against Chevron Canada.[330] His reasoning was that 'Chevron Canada is an asset of the Chevron Corporation', and 'it is ultimately controlled, for all practical purposes, by the Chevron Corporation'.[331] Despite the noble attempts to widen the doctrine for 'enterprise liability' and 'just and equity', the majority ruled explicitly that neither forms part of Canadian jurisprudence.

6.6 CONCLUSION

The test to pierce the corporate veil has been famously described by Cardozo J as 'enveloped in the mists of metaphor'.[332] The rhetoric and overlapping of (ir)relevant principles has prevented a congruent development of veil-piercing jurisprudence. The attempts by litigants to expand the doctrine has been entertained such as Nordheimer JA in *Chevron.* The incoherence of veil-piercing has not been limited to South Africa or Canada, but poses the risk of a cross-jurisdictional nightmare. In *Amlin,* the court described the doctrine's use only in 'exceptional circumstances'.[333] The Canadian courts have made a clear distinction of relevant categories to pierce the corporate veil: it can be done when it is pursuant to statute and to prevent the corporation as a shield for fraud. Any further attempt to pierce the corporate veil outside this must continue to be rejected.

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[329] M 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, Editions Themis, 2001), at 144.
[330] K Potter, V Maric & M Stephenson op cit note # at 581.
[331] *Chevron* supra note # at para 112.
[332] *Berkley v. Third Ave. Ry. Co.*, 155 N.E. 58 (N.Y., 1926), at 61.
[333] *Amlin* supra note 43 at para 23.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

Piercing the corporate veil has been labelled as the 'veil of confusion'[334] and 'shrouded in misperception'[335]. This dissertation has examined the South African courts approach to pierce the corporate veil originating in the common law through the statutes to the current general provision of Section 20(9) of the Companies Act 2008. The courts have made considerable effort to provide a satisfactory framework for when to pierce the corporate veil. We are still left without the necessary clarity as to what may be deemed an acceptable working definition of the conduct that would justify the veil-piercing doctrine in South Africa.

The common law jurisprudence that has been examined indicates the circumstances 'in which a court would pierce the veil are far from settled and much depends on a close analysis of the facts of each case, considerations of policy and judicial judgment'.[336] The codification of the piercing the corporate veil doctrine through Section 20(9) is a welcome addition to the jurisprudence. Circumstances that would justify piercing the corporate veil in terms of Section 20(9) have lingered from the common law in which the doctrine remains a flexible and its use determined according to the facts of the case. A departure from the common law by way of section 20(9) has been that although the remedy should still be used in exceptional circumstances, there is a seemingly lower threshold of conduct required. Further, section 20(9) has established there isno restriction on the remedy being used only as a last resort. This has provided an aggrieved litigant or the court to employ the remedy despite alternative remedies being available.

South African courts are not the only ones who have failed to establish the concept of when to pierce the corporate veil with the necessary degree of certainty required. This dissertation

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334 F Gevurtz. "Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil." *Or. L. Rev.* 76 (1997) at 853.
335 Macey op cit note 50.
336 *Hülse-Reutter* supra note 41 at para 20.

has highlighted the incoherence of the Canadian jurisprudence that has also tended to amalgamate different legal concepts and not standardising a framework for veil-piercing. Despite this criticism, there has been the emergence of two distinct categories to pierce the corporate veil in Canadian courts: (1) pursuant to statute; and (2) in the presence of fraud or fraud-like conduct. Despite attempts to widen the scope beyond these two established instances, the courts have stood firm to reject inroads into the separate legal personality and limited liability of the corporation.

The court should look beyond the scope of the South African jurisprudence, as established in Chapter 5, the court in *Gore*[337] noted Section 20(9) is 'cast in very wide terms' and the Act 'enjoins that its provisions be construed with appropriate regard to subsections 5(1) and (2) read with section 7 of the Act (including, to the extent appropriate, a consideration of foreign company law)'. This is further entrenched by Section 39(1) of the Constitution that empowers the court to consider foreign law. The established clarity the Canadian courts have brought to the veil-piercing doctrine is noteworthy. It is submitted this will could be used to have two major contributions to piercing the corporate veil in South Africa.

A consequence of the flexible approach in South Africa, in some cases intentionally and others less so, has been the rejection of any form of categorisation of conduct that would automatically justify the use of the remedy. The comparison with Canadian law has revealed the South African courts have inadvertently used the two established categories of the Canadian law: (1) pursuant to statute; and (2) in the presence of fraud or fraud-like conduct. The courts have not explicitly embraced this through the judgments, rather looking to revert to the facts of the case, policy considerations and judicial discretion as justification. Rather than reject the concept of categorisation, South Africa should embrace the use of the categories used in jurisdictions such as

[337] See further Chapter 5 and *Gore* supra note 7.

Canada. Listed prohibited conduct that imposed personal liability under the Companies Act 1973 was not a form of veil-piercing, and did not cater to the two categories of veil piercing that have found success in Canada. However, what Canada has done successfully is ensure that there is not list of conduct, only established principles to determine when to pierce the corporate veil. This has positive ramifications for ensuring the tenets of separate legal personality and limited liability in accordance with Section 7 of the Companies Act 2008 by 'encouraging entrepreneurship and enterprise efficiency' remains intact. Piercing the corporate veil is, and remains, a drastic remedy that requires balancing corporate separateness against the conduct that justifies disregarding it.

This dissertation has revealed the effective use of the Canadian law categorisation in South Africa. The recommendations are as follows: Firstly, rather than the courts maintaining veil-piercing as a flexible remedy, Section 20(9) should be interpreted narrowly in accordance with the principles deduced from *Transamerica* when 'completely dominated and controlled and being used as a shield for fraudulent or improper conduct'.[338] Secondly, it is permissible to pierce the corporate veil when pursuant to statute. Instead of including rhetoric used by the courts such as in the 'interests of justice', if statute itself permits there is no need to find additional reason to do so. This risks interpreting piercing the corporate veil at both common law and the Companies Act 2008 too widely to ensure conduct covered by statute such as the Income Tax Act may be encompassed.[339] The result is two-fold for the remedy remains an exceptional departure from the very tenet of corporate personality and provides more certainty of what is required to pierce the corporate veil.

[338] See further Chapter 6.
[339] See Chapter 6.

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