

Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study

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The legal principles developed and applied in common law courts in claims to pierce the corporate veil consist of a mishmash of indeterminate expressions that have been in a state of confusion since their inception. This article presents the results of the first empirical study of Canadian common law veil piercing cases. The study is modeled on similar studies undertaken in other major common law jurisdictions including the US, the UK and Australia. The findings are not necessarily consistent with prior descriptive and normative claims about veil piercing. While veil piercing claims are most successful in the context of sole shareholder corporations, claims by third party government entities and family law, courts were not found to pierce the corporate veil more often in tort cases than in contract cases and the relationship between the jurisdiction of the court and the outcome of veil piercing cases was found to be statistically significant. Factors that did not have a statistically significant relationship with veil piercing rates include the decade in which the case was decided and the level of court.

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Introduction

When do Canadian courts “pierce the corporate veil”?¹ Does the approach of Canadian courts differ on this point from that of the United Kingdom, United States and Australian courts? While there has been a growing body of doctrinal, qualitative and theoretical literature related

1. The origin of the corporate veil metaphor is often attributed to Professor Maurice Wormser’s 1912 article. See Maurice Wormser, “Piercing the Veil of Corporate Entity” (1912) 12:6 Colum L Rev 496. However, in that article, Wormser quotes a passage from an American decision from 1839—*The Fairfield County Turnpike Co v Thorp*, 13 Conn 173 at 179 (Sup Ct Err) [*Fairfield*—in which the judge referred to the fact that courts had, on occasion, “drawn aside the veil and looked at the character of the individual corporators”. See Wormser *supra* at 498. The judge in *Fairfield*, Williams CJ, was referring in particular, as Wormser points out, to the effect of the United States Supreme Court’s decision in *The Bank of the United States v Deveaux*, 9 US 61 (1809). What Wormser does not mention, however, is that Williams CJ’s veil comment occurs in a context in which he seeks to confine the veil piercing exercise to constitutional cases: “But this is confined to the question of jurisdiction, and has never been extended further. . . [t]hese cases, however, rather form exceptions to the rule than create a new one. We see nothing in the case before us, which ought to induce the court to extend the rule of law beyond its letter.” *Fairfield*, *supra* at 179.

to judicial veil piercing in Canada,² no empirical study of Canadian common law cases relating to piercing the corporate veil has previously been completed.³ Such empirical studies have been undertaken in other

2. See e.g. CA Masten, “‘One Man Companies’ and Their Controlling Shareholders” (1936) 14:8 Can Bar Rev 663; Mervyn Woods, “Lifting the Corporate Veil in Canada” (1957) 35:10 Can Bar Rev 1176; GT Tamaki, “Lifting the Corporate Veil in Canadian Income Tax Law” (1962) 8:3 McGill LJ 159; WJA Mitchell, “Taxation and the Corporate Veil” (1966) 14:6 Can Tax J 534 [WJA Mitchell, “Taxation”]; DH Bonham, “Judicial Treatment of the Corporate Entity Concept in Canadian Tax Law” (1967) 6 West Ont L Rev 39; David H Bonham & Daniel A Soberman, “The Nature of Corporate Personality” in Jacob S Ziegel, ed, *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) 3 at 3; James S Hausman, “The One Man Company: Some Principles of Taxation” (1967) 13:2 McGill LJ 265; Ivan Feltham, “Lifting the Corporate Veil” in *Special Lectures of the Law Society of Upper Canada 1968: Developments in Company Law* (Toronto: Richard De Boo, 1968) 305; John W Durnford, “The Corporate Veil in Tax Law” (1979) 27:3 Can Tax J 282; Robert Flannigan, “Corporations Controlled by Shareholders: Principals, Agents or Servants” (1986–87) 51:1 Sask L Rev 23; NC Sargent, “Through the Looking Glass: A Look at Parent-Subsidiary Relations in the Modern Corporation” in *Today’s Challenge to Law: Proceedings of Conference Held at Carleton University, February 2 & 3, 1983* (Ottawa: Institute for Studies in Policy, Ethics and Law, 1983) 48; NC Sargent, “Beyond the Legal Entity Doctrine: Parent-Subsidiary Relations Under the West German Konzernrecht” (1985) 10:3 Can Bus LJ 327; Neil C Sargent, “Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise” (1987–88) 17:2 Man LJ 155; Jacob S Ziegel, “Is Incorporation (With Limited Liability) Too Easily Available?” (1990) 31:4 C de D 1075; Jason W Neyers, “Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation” (2000) 50:2 UTLJ 173; Christopher C Nicholls, “Beyond the Veil: *Wildman v. Wildman*” (2006–2007) 44:3 Can Bus LJ 448 [Nicholls, “Beyond the Veil”]; Christopher C Nicholls, “Piercing the Corporate Veil and the ‘Pure Form’ of the Corporation as Financial Innovation” (2008) 46:2 Can Bus LJ 233 [Nicholls, “Pure Form”]; Mohamed F Khimji & Christopher C Nicholls, “Corporate Veil Piercing and Allocation of Liability: Diagnosis and Prognosis” (2015) 30 BFLR 211; Christopher C Nicholls, *Corporate Law* (Toronto: Emond Montgomery, 2005) at 185–214 [Nicholls, *Corporate Law*]; Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed (Mudgeeraba, Qld: Scribblers, 2006) at 114–20; Robert Yalden et al, *Business Organizations: Principles, Policies and Practice* (Toronto: Emond Montgomery, 2008) at 167–216; Poonam Puri et al, *Cases, Materials and Notes on Partnerships and Canadian Business Corporations*, 5th ed (Toronto: Carswell, 2011) at 110–33.

3. An empirical study of veil piercing by the courts of Quebec has been undertaken. See Stéphane Rousseau & Nadia Smali, «La ‘levée du voile corporatif’ en vertu du Code civil du Québec: des perspectives théoriques et empiriques à la lumière de dix années de jurisprudence» (2006) 47:4 C de D 815.

major common law jurisdictions, including the UK,⁴ Australia⁵ and the US.⁶ Despite their obvious and unavoidable limitations, these studies nevertheless add an important dimension to the body of veil piercing scholarship in these jurisdictions, which includes doctrinal analyses of how courts approach veil piercing,⁷ attempts to classify veil piercing cases⁸ and policy analyses of particular contexts where disregarding separate

4. Charles Mitchell, "Lifting the Corporate Veil in the English Courts: An Empirical Study" (1999) 3 *Company Finance & Insolvency L Rev* 15 [Mitchell, "Empirical Study"].

5. Ian M Ramsay & David B Noakes, "Piercing the Corporate Veil in Australia" (2001) 19 *Company & Securities LJ* 250.

6. Robert B Thompson, "Piercing the Corporate Veil: An Empirical Study" (1991) 76:5 *Cornell L Rev* 1036 [Thompson, "Empirical Study"]; Peter B Oh, "Veil-Piercing" (2010) 89:1 *Tex L Rev* 81.

7. See e.g. Wormser, *supra* note 1; Harvey Gelb, "CERCLA Versus Corporate Limited Liability" (1999) 48:1 *U Kan L Rev* 111; Harvey Gelb, "Piercing the Corporate Veil: The Undercapitalization Factor" (1982) 59:1 *Chicago-Kent L Rev* 1; Jennifer Payne, "Lifting the Corporate Veil: A Reassessment of the Fraud Exception" (1997) 56:2 *Cambridge LJ* 284; Stephen M Bainbridge, "Abolishing Veil Piercing" (2001) 26:3 *J Corp L* 479 at 481, n 13, 535; Robert B Thompson, "Piercing the Veil: Is the Common Law the Problem?" (2005) 37:3 *Conn L Rev* 619; Franklin A Gevurtz, "Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil" (1997) 76:4 *Or L Rev* 853; Peter B Oh, "Veil-Piercing Unbound" (2013) 93:1 *BUL Rev* 89; MT Moore, "A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*" [2006] *J Bus L* 180. Corporate law treatises in these jurisdictions also provide doctrinal analyses of veil piercing. See e.g. Len Sealy & Sarah Worthington, *Cases and Materials in Company Law*, 9th ed (Oxford: Oxford University Press, 2010) at 5273; Alan Dignam & John Lowry, *Company Law*, 7th ed (Oxford: Oxford University Press, 2012) at 31–51; Jesse H Choper, John C Coffee Jr & Ronald J Gilson, *Cases and Materials on Corporations*, 7th ed (New York: Aspen, 2008) at 717–846; Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd ed (New York: Oxford University Press, 2009) at 138–41.

8. See e.g. S Otolenghi, "From Peeping Behind the Corporate Veil, to Ignoring It Completely" (1990) 53:3 *Mod L Rev* 338.

legal personality and limited liability is most compelling such as with tort creditors⁹ and with corporate groups.¹⁰

There can be little serious doubt that the principled basis upon which courts have pierced and should pierce the corporate veil is disputed, poorly-defined and protean. Recently, Lord Neuberger of the Supreme Court of the United Kingdom referred to the fact that “[t]he lack of any coherent principle in the application of the doctrine [of corporate veil piercing] has been commented on judicially in many of the major common law jurisdictions.”¹¹ In Canada, the Supreme Court stated that the cases of supposed veil piercing have “no consistent principle” in common.¹² Scholars have similarly noted that cases are impossible to rationalize and that this area of law suffers from a potentially costly lack of predictability.¹³

This article will present the descriptive statistics from the first empirical study of Canadian common law veil piercing cases in an attempt

9. See e.g. Henry Hansmann & Reinier Kraakman, “Toward Unlimited Shareholder Liability for Corporate Torts” (1991) 100:7 Yale LJ 1879 [Hansmann & Kraakman, “Corporate Torts”]; Robert B Thompson, “Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise” (1994) 47:1 Vand L Rev 1; David W Leebron, “Limited Liability, Tort Victims, and Creditors” (1991) 91:6 Colum L Rev 1565.

10. See e.g. Robert B Thompson, “Piercing the Veil within Corporate Groups: Corporate Shareholders as Mere Investors” (1999) 13:2 Conn J Intl L 379 [Thompson, “Corporate Groups”]; Kurt A Strasser, “Piercing the Veil in Corporate Groups” (2005) 37:3 Conn L Rev 637; Phillip I Blumberg, “Limited Liability and Corporate Groups” (1986) 11:4 J Corp L 573; Phillip I Blumberg, “The Transformation of Modern Corporation Law: The Law of Corporate Groups” (2005) 37:3 Conn L Rev 605; Richard A Posner, “The Rights of Creditors of Affiliated Corporations” (1976) 43:3 U Chicago L Rev 499 [Posner, “Rights of Creditors”]; Helen Anderson, “Piercing the Veil on Corporate Groups in Australia: The Case for Reform” (2009) 33:2 Melbourne UL Rev 333.

11. *Prest v Petrodel Resources Ltd*, [2013] UKSC 34 at para 75, Neuberger LJ [*Prest*]. For commentary on *Prest*, see Thomas G Heintzman & Brandon Kain, “Through the Looking Glass: Recent Developments in Piercing the Corporate Veil” (2013) 28:3 BFLR 525; Mohamed F Khimji & Christopher C Nicholls, “Piercing the Corporate Veil Reframed as Evasion and Concealment” (2015) 48:2 UBC L Rev 401.

12. *Kosmopoulos v Constitution Insurance Co of Canada*, [1987] 1 SCR 2 at 10, 63 OR (2d) 731 [*Kosmopoulos*].

13. 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; Bainbridge, *supra* note 7.

to provide some empirical data on the factors that affect the outcome of veil piercing decisions by courts in Canadian common law jurisdictions. As in the empirical veil piercing studies undertaken in the US, the UK and Australia referred to above, only bivariate descriptive statistics from the data set are presented in this article to examine whether the outcome in veil piercing cases is statistically associated with individual contextual factors.¹⁴ The purpose of this preliminary study is to evaluate prior descriptive and normative claims about the factors that affect the outcome of Canadian common law veil piercing cases. The results presented set out the statistical relationship between the outcome of veil piercing cases and other individual variables, such as: the time period; the jurisdiction of the court; the level of court; the nature of the shareholder; the number of shareholders; the nature of the claimant and the substantive nature of the claim.

The article is organized as follows. Part I contextualizes the study by reviewing the development of, and the key descriptive and normative claims related to, corporate veil piercing. Part II sets out the methodology of this study, and Part III presents the findings of the study and considers any trends suggested by the data. This study, including the methodology used, was inspired by the US, UK and Australian empirical studies referred to above. Accordingly, Part III will also include comparisons of the Canadian results with the results found in the studies conducted in these other jurisdictions. The results of this study suggest that, as in other major common law jurisdictions, veil piercing in Canadian common law courts is highly contextual. The factors that were found to have a statistically significant relationship with veil piercing rates include the jurisdiction of the court, the number of shareholders, the identity of the claimant and the substantive nature of the claim.

14. As in Thompson's US study and the Ramsay & Noakes Australian study, basic inferential statistical analysis has been undertaken to test which individual contextual factors have a relationship with the outcomes of veil piercing decisions. However, more sophisticated inferential statistical analysis examining simultaneously the relationship between multiple contextual factors has been undertaken on veil piercing cases in the US. See John H Matheson, "Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil" (2010) 7:1 Berkeley Business LJ 1; John H Matheson, "The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context" (2009) 87:4 NCL Rev 1091. See also Christina L Boyd & David A Hoffman, "Disputing Limited Liability" (2010) 104:3 Nw UL Rev 853.

Furthermore, the study revealed that the factors found to affect the outcome of cases were not necessarily consistent with prior descriptive and normative claims. For example, the data suggests that courts have pierced the veil more often when the substantive nature of the claim is in contract as opposed to in tort, despite the almost universal scholarly claim that veil piercing is more justified in the latter context.

I. Veil Piercing in Canada

Courts in common law jurisdictions are frequently asked to pierce the corporate veil, essentially requesting them to disregard either the separate legal personality of corporations or the limited liability of shareholders for a variety of purposes, including the reallocation of liability or benefits as between shareholders and corporations. However, the precise legal basis upon which courts are entitled to disregard these two fundamental corporate characteristics has always been far from clear. Indeed, although the term “veil piercing” has been in use for over 100 years,¹⁵ as recently as 2013, members of the UK’s highest court were prepared to entertain the possibility that courts in the UK might not in fact have the power to pierce the corporate veil.¹⁶ However, in a judgment later in the same year, that intriguing possibility seemed to be set aside.¹⁷

Most discussions on veil piercing by the Canadian courts begin with reference to the seminal 1896 decision of the House of Lords in *Salomon v Salomon & Co Ltd*,¹⁸ a decision quickly adopted by Canadian courts as

15. See Wormser, *supra* note 1.

16. See *VTB Capital Plc v Nutritek International Corp*, [2013] UKSC 5 [*VTB Capital*].

17. See *Prest*, *supra* note 11.

18. [1896] UKHL 1 [*Salomon*].

authority for the corporate separate legal entity principle.¹⁹ It is frequently assumed or asserted that the separate legal entity principle is the basis for, or at least necessarily implies, limited liability for a corporation's shareholders as well. However, separate legal personality and limited liability are distinct concepts that historically evolved differently and are now mandated for separately in Canadian legislation.²⁰ The concept of separate legal personality means that the corporation is a person in law, distinct from its shareholders and from anyone else purporting to act for or on behalf of the corporation, such as its directors, officers, employees and other agents.²¹ One of the key economic purposes of this legal fiction, as Hansmann and Kraakman have observed, is to partition the assets owned by the business entity so that they are not available to the creditors

19. See *Rielle v Reid* (1899), 26 OAR 54, [1899] OJ No 9 (QL). While *Salomon* may be thought of as the original veil piercing claim in England, *Rielle v Reid* may be considered the Canadian equivalent. However, arguments were based on the company being an alias, agent, or trustee for the shareholder so as to effectively make corporate assets available to satisfy the shareholder's debts. It might be noted that the principle that general business corporations benefited from having a separate legal personality was established long before *Salomon*. The earliest UK general incorporation statute providing for the right to organize business activity through a separate legal entity was *An Act for the Registration, Incorporation and Regulation of Joint Stock Companies Act, 1844* (UK), 7 & 8 Vict, c 110 [1844 Act]. Prior to the 1844 Act, the only incorporated entities were those chartered by the Crown or a special act of Parliament. See Bishop Carleton Hunt, *The Development of the Business Corporation in England 1800-1867* (Cambridge, Mass: Harvard University Press, 1936) at 89. However, the 1844 Act did not provide for limited liability for its members. See 1844 Act, s 25. Limited liability in the context of business corporations was introduced in the UK in 1855 through *An Act for Limiting the Liability of Members of Certain Joint Stock Companies, 1855* (UK), 18 & 18 Vict, c 133. The true significance of *Salomon* was that, even in the case of a company where one person effectively owned all of the share capital and controlled the business, that company would not be held to be an alias or agent or trustee for that person.

20. As it has been noted elsewhere, although such a link between separate legal personality and limited liability is logically sound, historically the two concepts were distinct. Even today, one notes that modern corporate statutes typically include a provision explicitly limiting the liability of shareholders. See e.g. *Canada Business Corporations Act, RSC 1985, c C-44, s 45(1)* [CBCA]. Such a provision would, presumably, be unnecessary or redundant if such a limitation were regarded as a necessary consequence of a corporation's separate legal personality. See Nicholls, "Pure Form", *supra* note 2 at 250-58.

21. The principle that a corporation is a separate legal person has statutory support. See e.g. CBCA, *supra* note 20, s 15(1); *Interpretation Act, RSC 1985, c I-21, s 35(1)*.

of the entity's shareholders.²² Limited liability signifies that the liability of shareholders for the debts and other obligations of the corporation is limited to the amount remaining unpaid on their shares.²³ It is popularly supposed that limited liability is the chief benefit of incorporation. Although that may be true today, it does not appear to have been the most significant benefit of incorporation historically.²⁴ Economic justifications for limited liability include lowering monitoring costs for shareholders, facilitating the free transferability of shares, allowing for portfolio diversification, and setting appropriate managerial incentives.²⁵ Also, like separate legal personality, limited liability serves the economic purpose of partitioning assets, but in this case for the purpose of ensuring that assets owned by shareholders are not available to the corporation's creditors.²⁶

Despite the apparent robustness of the *Salomon* decision, Canadian courts, like courts in other common law jurisdictions, began developing principles upon which it was presumed that judges could lift or pierce the corporate veil.²⁷ Early Canadian decisions drew from UK cases. The early recognized grounds for piercing the corporate veil were agency²⁸ and use of the corporate structure for an improper purpose.²⁹ In addition to this, courts would also condemn those corporations deemed unworthy of

22. Henry Hansmann & Reinier Kraakman, "Organizational Law as Asset Partitioning" (2000) 44:4-6 *European Economic Rev* 807 at 813-15 [Hansmann & Kraakman, "Organizational Law"]. See also LCB Gower, DD Prentice & BG Pettet, *Gower's Principles of Modern Company Law*, 5th ed (London, UK: Sweet & Maxwell, 1992) at 23. In a later paper by Hansmann, Kraakman & Squire, this important function was also described as "entity shielding". Henry Hansmann, Reinier Kraakman & Richard Squire, "Law and the Rise of the Firm" (2006) 119:5 *Harv L Rev* 1333.

23. See *CBCA*, *supra* note 20 at s 45(1).

24. See generally Hunt, *supra* note 19.

25. See Easterbrook & Fischel, *supra* note 13 at 94-95; Paul Halpern, Michael Trebilcock & Stuart Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30:2 *UTLJ* 117.

26. Hansmann & Kraakman, "Organizational Law", *supra* note 22 at 813.

27. See *Fairfield*, *supra* note 1 at 179.

28. See *Palmolive Manufacturing Co (Ontario) v R*, [1933] SCR 131 at 140, [1933] 2 DLR 81 [*Palmolive Manufacturing*].

29. See *Patton v Yukon Consolidated Gold Corp Ltd*, [1934] 3 DLR 400 at 403, [1934] OWN 321 (YCA).

enjoying the rights and privileges of incorporation with vague, pejorative labels such as alias, alter ego, simulacrum and cloak.³⁰

In fact, vagueness characterizes much of veil piercing law. Even when the term “agent” is used in veil piercing cases, 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,³¹ 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.³²

Justice Masten cautioned against this careless use of the term agency in what appears to be the first scholarly work on Canadian veil piercing. He argued that, only if the facts demonstrated that the corporation was genuinely an agent of the shareholder (under conventional principles of agency law) would it be appropriate to describe the corporation using

30. See *The Export Brewing and Malting Co Ltd v The Dominion Bank*, [1934] OR 560 at 578, [1934] 4 DLR 204 (CA).

31. In the context of parent-subsidiary relationships, courts in England have set out a list of six criteria to determine if the subsidiary is an agent of the parent. The six criteria are: whether the profits of the subsidiary are treated as the profits of the parent; whether the persons controlling the subsidiary were appointed by the parent; whether the parent was the “head and brains of the subsidiary”; whether the parent governed the operations of the subsidiary; whether the subsidiary made its profits by virtue of its own skill and direction; and whether the parent had effectual and constant control over the subsidiary. See *Smith, Stone & Knight Ltd v Birmingham Corp*, [1939] 4 All ER 116 (KB) at 121. However, courts in Canada, like the courts in England, have not adopted these factors as being definitive in all cases. See *Alberta Gas Ethylene Co Ltd v Minister of National Revenue* (1988), 24 FTR 309 at para 15, (*sub nom Alberta Ethylene Co v R*) 41 BLR 117.

32. See *Commissioners of Inland Revenue v Sansom*, [1921] 2 KB 492 (CA) (“[t]here may, as has been said by Lord Cozens-Hardy, MR, be a position such that although there is a legal entity within the principle of *Salomon v Salomon & Co*, that legal entity may be acting as the agent of an individual and may really be doing his business and not its own at all” at 503). Of course, as Lord Neuberger notes in *Prest*, it is quite possible that, conversely, use of the non-legal terms “cloak or sham” may actually be intended by courts to suggest the existence of a legal agency relationship. *Supra* note 11 at para 72. Why courts, as opposed to lay commentators, should resort in such cases to the use of ambiguous colloquial terms rather than invoke the well-established legal doctrine of agency is, however, somewhat puzzling.

colourful terms such as alias, alter ego, simulacrum and cloak.³³ It is important, in other words, that such terms do not become independent grounds for veil piercing because of their lack of analytic content. Despite Masten J's sensible warnings, provocative but analytically vacuous terms such as alias, alter ego and cloak have become a permanent part of the judicial veil piercing lexicon; "agency", in a number of cases, is identified as a ground for piercing the veil that is somehow distinct and independent from amorphous concepts such as alias or alter ego.³⁴

The standard for finding that the corporate form is being used for an improper purpose suffers from equal imprecision. Here too, courts resort to the use of vague pejorative terms such as "sham", "facade concealing the true facts" and "conduct akin to fraud" to denote corporations not deemed worthy of enjoying the full benefits of incorporation.³⁵ In addition, several specific forms of impropriety have sometimes been identified in veil piercing cases, including use of the corporation to avoid a pre-existing legal obligation;³⁶ thin or inadequate corporate capitalization;³⁷ and failure to observe proper corporate formalities.³⁸

33. Masten, *supra* note 2 at 671. Justice Masten was concerned that the indiscriminate use of such pejorative terms would lead to confusion and injustice in veil piercing cases. Such sentiments were echoed recently by the Supreme Court of the United Kingdom in *Prest*, *supra* note 11 at para 28. However, subsequent scholarly commentary in Canada suggested that agency did not involve piercing the corporate veil at all:

It should be noted that to advance the proposition that a corporation is an agent for a shareholder is to affirm the existence of the corporation as a separate entity. It seems to me that the reasoning in some cases is defective in that it fails to recognize this fact. One cannot logically treat a corporation as a sham or cloak or alter ego for the shareholder so as to deny its existence and, at the same time, argue that it is an agent.

Feltham, *supra* note 2 at 319.

34. *Ibid* at 319.

35. *Clarkson Co Ltd v Zhelka*, [1967] 2 OR 565 at 577, 64 DLR (2d) 457 (H Ct J) [*Zhelka*].

36. See e.g. *i-Trade Finance Holdings Inc v Webworx Inc* (2007), 41 BLR (4th) 277 at paras 39–40, 160 ACWS (3d) 465 (Ont Sup Ct J). Lord Sumption of the Supreme Court of the United Kingdom recently suggested that piercing the corporate veil was limited exclusively to cases involving the use of the corporate form to avoid pre-existing obligations. See *Prest*, *supra* note 11 at para 35.

37. See e.g. *Shillingford v Dalbridge Group Inc* (1996), 197 AR 56 at para 27, 47 Alta LR (3d) 154 (QB).

38. See e.g. *1005633 Ontario Inc v Winchester Arms Ltd* (2000) 8 BLR (3d) 176 at para 92, [2000] OTC 432 (Sup Ct).

Scholars have criticized piercing the veil based on each of these supposed “improprieties”. Thin capitalization, as a ground for veil piercing, for example, assumes that it is appropriate for courts to effectively impose *ad hoc* initial or ongoing capital requirements upon corporations, even when the legislature has decided that such requirements are neither necessary nor desirable.³⁹ Failure to observe corporate formalities, unless it constitutes or contributes to a misrepresentation, has been harshly criticized by commentators as a grounds for veil piercing because it is either simply irrelevant to the veil piercing question⁴⁰ or, as Posner has tersely put it, merely “a nitpicking consideration”.⁴¹ Use of the corporate form to avoid pre-existing obligations is clearly the most egregious of the specifically identified abuses of the corporate form and has thus been regarded by some as the primary or even sole justification for piercing the corporate veil.⁴² However, even this putative justification for veil piercing has been criticized. Genuine concerns relating to the improper use of incorporation, it has been argued, could be dealt with adequately and more coherently through other specific legal rules—such as those governing fraudulent conveyances—rather than through vague veil piercing standards.⁴³

Further adding to the lack of clarity, courts have never adopted a uniform or clear statement on the precise relevance or content of the standards to be applied in determining the requisite degree of control and

39. See e.g. Nicholls, “Pure Form”, *supra* note 2 at 240–41. However, other commentators have argued that thin capitalization normatively is an important factor when deciding to pierce the corporate veil. See Rutherford B Campbell, “Limited Liability for Corporate Shareholders: Myth or Matter-of-Fact” (1974–75) 63:1 Ky LJ 23 at 53.

40. See Bainbridge, *supra* note 7 at 517–19.

41. Richard A Posner, *Economic Analysis of Law*, 8th ed (New York: Aspen, 2011) at 554.

42. See e.g. *Prest*, *supra* note 11 at para 35 Sumption L,

I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality.

Ibid.

43. See Larry E Ribstein, “Limited Liability and Theories of the Corporation” (1991) 50:1 Md L Rev 80 at 109–10.

impropriety to justify veil piercing.⁴⁴ A number of recent judgements have attempted to articulate a veil piercing principle that appears to require both elements. For example, it has been stated that “courts 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”.⁴⁵

The problem for British and Canadian courts is that the vague standards for both control and impropriety said to justify veil piercing would appear to have been satisfied by the facts in *Salomon* itself. It is reasonable to suggest that, in the vast majority of private corporations, a small number of shareholders will exercise a high degree of control and their interests will coincide with those of the corporation.⁴⁶ Yet *Salomon*, a case regularly and unanimously endorsed by British and Canadian courts, appears to condone precisely that sort of arrangement. Moreover, while reasonable people may differ on whether the arrangements undertaken by Mr. Salomon were improper, it is worth repeating that Lord Lindley of the English Court of Appeal did condemn Mr. Salomon’s actions as “a device to defraud creditors”.⁴⁷ Accordingly, as Seaton JA aptly observed: “If it were possible to ignore the principles of corporate entity

44. See Woods, *supra* note 2 at 1193:

Where there is marked fraud or criminal activity, the courts readily disregard the corporate form and in cases where it is clear that the company is simply an agent or tool of a shareholder they sometimes look behind the façade. But in fact the courts have lifted the veil often enough to make the whole matter unpredictable. It is not, however, possible to form a rational pattern out of the courts’ handling of the various situations.

Ibid.

45. *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423 at 433–34, 2 OTC 146 (Gen Div Ct) [*Transamerica*]. See also *Gregorio v Intrans-Corp* (1994), 18 OR (3d) 527 at 536, 115 DLR (4th) 200 (CA).

Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

Ibid.

46. Bainbridge, *supra* note 7 at 507.

47. *Broderip v Salomon*, [1895] 2 Ch 323 at 339 (CA).

when a judge thought it unfair not to do so, *Salomon's* case would have afforded a good example for the application of that approach.”⁴⁸ In any event, a vague standard for fraud or improper conduct allows courts to subjectively determine proper and improper uses of the corporate form on an unpredictable case by case basis.⁴⁹

In addition to various references to control and impropriety, two other expressions have crept their way into veil piercing judicial rhetoric over the years: “interests of justice” and “single economic unit”. Courts have suggested that, even in the absence of any of the “specific” bases for veil piercing referred to above, they will pierce the veil when failing to do so would be “flagrantly opposed to justice”⁵⁰ or when it is appropriate to treat a group of companies as a single economic unit.⁵¹ However, as these purported “interests of justice” and “single economic unit” grounds appear to have even less analytical content than the vague control and

48. *BG Preeco I (Pacific Coast) Ltd v Bon Street Holdings Ltd* (1989), 60 DLR (4th) 30 at 37, 37 BCLR (2d) 258 (CA).

49. See Nicholls, “Pure Form”, *supra* note 2 at 244. What adds to the confusion is that courts have also stated that there is nothing improper about using the corporate form to allocate liability. See *Zbelka*, *supra* note 35 where the court states:

No doubt his creditors are disappointed at their inability to have access to his corporate assets and particularly where he himself is reaping some financial benefit therefrom. But that must of necessity be, so long as the Legislature provides for and encourages the formation of private corporations. Without such, of course, enterprise and business adventure would be stifled. Limited liability is one of the landmarks of incorporation.

Ibid at 577.

50. *Ibid* at 578. More recently, the Supreme Court of Canada has suggested that

[t]he 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” . . . I have no doubt that theoretically the veil could be lifted in this case to do justice . . . But a number of factors lead me to think it would be unwise to do so.

Kosmopoulos, *supra* note 12 at 10–11 [citation omitted]. See also *Le Car GmbH v Dusty Roads Holdings Ltd*, 2004 NSSC 75 at para 36, 222 NSR (2d) 279.

51. See *DHN Food Distributors Ltd and others v London Borough of Tower Hamlets*, [1976] 3 All ER 462 (Eng CA) [*DHN Food*]. See also *Manley Inc v Fallis* (1977), 2 BLR 277 at 279, 38 CPR (2d) 74 (Ont CA).

impropriety terms, their validity has been doubted by both the courts⁵² and commentators.⁵³ While some of the empirical studies in other common law jurisdictions have suggested that “interests of justice” and “single economic unit” considerations can have an impact on the outcome

52. For criticisms of the interests of justice line of reasoning, see *Transamerica*, *supra* note 45: “There are undoubtedly situations where justice requires that the corporate veil be lifted . . . it will be difficult to define precisely when the corporate veil is to be lifted, but the lack of a precise test does not mean that a court is free to act as it pleases on some loosely defined ‘just and equitable’ standard.” *Ibid* at 433. For criticisms of the single economic entity line of reasoning, see *801962 Ontario Inc v MacKenzie Trust* (1994), 48 ACWS (3d) 324, 1994 CarswellOnt 6168 (Ct J (Gen Div)) (WL Can) [*801962 Ontario Inc* cited to WL Can]:

These decisions do not support a claim that the test in *Salomon v Salomon* has been superseded by a new “business entity” or “single business entity” test. They merely illustrate the principle that, in particular fact situations, where the nature of the legal issue in dispute makes it appropriate to have regard to the larger business entity, the court is not precluded by *Salomon* from doing so.

Ibid at para 37. See also *Durling v Sunrise Propane Energy Group Inc*, 2012 ONSC 4196, 68 CELR (3d) 231, “It is important to note that the plaintiffs allege that the . . . defendants ‘operated as one economic unit or a single group enterprise.’ As explained, these are labels for piercing the corporate veil and do not relieve the plaintiffs from pleading facts that support the veils being pierced.” *Ibid* at para 135 [emphasis in original].

53. For criticisms against the idea of piercing the veil in the interests of justice, see Nicholls, *Corporate Law*, *supra* note 2 at 198–201; Payne, *supra* note 7 at 290. See also Welling, *supra* note 2 (“[I]ittle need be said about this rationale, other than that it simply will not do. There are, so far as we know, no such broadly enforceable standards of ‘fair play and good conscience’, at least in Canadian corporate law” at 117). With respect to cases involving groups of companies, commentators have been less hostile to the idea of treating a group of companies as a single economic unit but have generally attempted to set out more specific grounds when this should occur. See Adolf A Berle Jr, “The Theory of Enterprise Entity” (1947) 47:3 Colum L Rev 343 at 352–54; Bainbridge, *supra* note 7 at 526–28, 534.

of veil piercing cases,⁵⁴ it appears that judicial reference to either of these grounds typically serve merely as shorthand for a combination of more specific justificatory factors (i.e., factors relating to significant control and/or impropriety).⁵⁵

In terms of analytical content, the grounds given by courts for *refusing* to pierce the corporate veil seem even more elusive. Typically, a court's refusal to pierce the veil is explained simply as an expression

54. See e.g. Ramsay & Noakes, *supra* note 5 at 269, Table 7 (in Australia, it was found that the veil is pierced in 60% of cases where an unfairness or justice is argued, although the numbers of cases for this category was small). See also Thompson, "Empirical Study", *supra* note 6 at 1045. Thompson's US study revealed that "equity, fairness, or justice" was cited as a ground for piercing the veil in 135 cases from a total of 1583 (8.5%), although it is not clear from this statistic if justice was the primary reason for the decision or if it was argued in combination with other reasons. Thompson also found that when the court cited "intertwining or lack of substantive separation" between a corporate group, it pierced the veil more than 85% of the time. *Ibid* at 1064. See Ramsay & Noakes, *supra* note 5 (in Australia, the court pierced the corporate veil in the context of group enterprises 24% of the time at 269, Table 7).

55. While references to justice have appeared in veil piercing decisions for decades, more recent support for it as an independent ground for veil piercing is often found in the Supreme Court of Canada decision of *Kosmopoulos*, *supra* note 12. Even in this case, the idea is articulated more as a conclusion than as a ground around which to build an argument:

As a general rule a corporation is a legal entity distinct from its shareholders. The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. 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" . . . I have no doubt that theoretically the veil could be lifted in this case to do justice . . . But a number of factors lead me to think it would be unwise to do so.

Ibid at 10–11 [citation omitted]. Likewise, for single economic entity, arguably the strongest proponent for such a line of reasoning was Lord Denning and even he, when setting it out for the first time, supported it with the argument that the parent in that case could "control every movement of the subsidiaries". See *DHN Food*, *supra* note 51 at 467.

of respect for the *Salomon* principle.⁵⁶ Sometimes, however, courts note the legitimacy of organizing economic activity through the use of a corporate structure, specifically for the purpose of allocating liability.⁵⁷ There are three other common examples of when courts will refuse to pierce the corporate veil. First, the veil is not typically pierced in actions brought by voluntary creditors on the basis that the claimants chose to deal with an incorporated entity and, therefore, assumed the risk of the corporation not being able to satisfy its debts.⁵⁸ Second, in cases where the veil piercing claim is brought by the shareholder or corporation itself (seeking to share a benefit, rather than a liability), courts frequently deny the claim on the basis that incorporators must accept the burden of incorporation as a *quid pro quo* for enjoying its various benefits.⁵⁹ Finally, in denying claims, courts also sometimes cite the absence of compelling control or impropriety, factors that are said to be recognized, and perhaps necessary, grounds for piercing the veil.

In sum, the veil piercing principles developed and applied in Canadian common law courts consist of a mishmash of indeterminate expressions that have been in a state of confusion since their inception. Indeed, similar criticism has been leveled at veil piercing principles in

56. See e.g. *Zhelka*, *supra* note 35 at 577; *801962 Ontario Inc*, *supra* note 52; *Rockwell Developments Ltd v Newtonbrook Plaza Ltd*, [1972] 3 OR 199 at 212–13, 27 DLR (3d) 651 (CA); *Saskatoon Real Estate Board v Saskatoon (City)* (1988), 61 Sask R 215, 8 ACWS (3d) 399 (CA) [cited to Sask R], which states, “the appellant must be treated as a separate corporate personality from that of the legal entities which are its members, and one cannot look beyond the corporation itself to determine whether the purpose of the activity is the making of profit. Any other conclusion breaches the *Salomon* principle.” *Ibid* at para 22.

57. *Adams v Cape Industries PLC* (1989), [1991] 1 All ER 929 (UKCA) [*Adams v Cape*]:

[W]e do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.

Ibid at 1026.

58. *Henry Browne & Sons Ltd v Smith*, [1964] 2 Lloyd’s Rep 476 (Eng QB).

59. *Kosmopoulos*, *supra* note 12 at 11–12.

the US,⁶⁰ UK⁶¹ and Australia,⁶² leading some commentators to call for the doctrine to be abolished.⁶³ Other commentators have challenged whether, in the face of the unqualified statutory provisions providing for the separate legal personality of corporations and the limited liability of shareholders, Canadian courts even have the jurisdiction to pierce the corporate veil.⁶⁴ However, although the questionable analytical bases upon which veil piercing occurs has been widely criticized, the view has also been expressed that the actual outcome of veil piercing cases may be explained descriptively as attempts by courts—perhaps unconsciously—to engage in a cost-benefit analysis that seeks to preserve separate legal personality and/or limited liability in those situations where the benefits outweigh the costs and to disregard them when they do not.⁶⁵ Yet, the uncertainty with which the judicial standards are applied results in costs. Parties using the corporate form to organize commercial activity value predictability in the contexts of both transaction planning and litigation. To this end, this study provides some empirical data on the contextual factors that have a statistically significant relationship with the outcome of Canadian common law veil piercing cases.

60. See Easterbrook & Fischel, *supra* note 13, “‘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.” *Ibid* at 89.

61. See Mitchell, “Empirical Study”, *supra* note 4, which stated, “courts have often used conclusory terms to express their decisions on the point, which for all their vividness tell us nothing about the reasoning which underpins these decisions”. *Ibid* at 16.

62. See HAJ Ford, RP Austin & IM Ramsay, *Ford’s Principles of Corporations Law*, 9th ed (Sydney: Butterworths, 1999) at 126, 128–29 (“in Australia it is still impossible to discern any broad principle of company law indicating the circumstances in which a court should lift the corporate veil” at para 4.400).

63. See generally Bainbridge, *supra* note 7.

64. See e.g. Welling, *supra* note 2 at 121; Nicholls, “Pure Form”, *supra* note 2 at 257. The authority of the courts to pierce the corporate veil appears never to have been challenged at the judicial level in Canada. However, in response to such a challenge by litigants, the Supreme Court of the United Kingdom recently justified the power of the courts to pierce the veil for reasons akin to that which exist in other contexts, such as the court’s power to render contracts voidable or to abrogate a right from a legal status such as marriage. In other words, courts can ignore the benefits that arise from legal rights, such as incorporation, on the basis of a long-standing principle that legal advantages obtained by fraud or dishonesty will not be enforced. See *Prest*, *supra* note 11 at para 18.

65. Easterbrook & Fischel, *supra* note 13 at 109.

II. The Methodology of this Study

The data set for this study includes all Canadian LexisNexis Quicklaw cases where the court made an explicit decision on whether or not to pierce the corporate veil through November 2008. The data set was compiled by abstracting relevant cases from three keyword searches in the “All Canadian Court Cases” source directory.⁶⁶ The three keyword searches used were:

- “corporate /5 veil” which identifies all court cases at any level in the database where the word “corporate” is found within 5 words of the word “veil”;
- “salomon /5 salomon”, following the same search method as above; and
- “separate legal /2 person or entity”.

The cases were subsequently cross-referenced to eliminate duplicate cases, leaving an initial pool of 2697 cases.⁶⁷ The keyword searches confirmed that courts use veil piercing terminology to describe a highly diverse set of claims. Therefore, in determining which cases to include in the data set as being relevant, a conceptual classification scheme was developed for different types of cases. This classification scheme helped organize the different types of cases in which the court was asked to disregard the separate legal personality of a corporation⁶⁸ or the limited liability of a shareholder with no statutory authority to do so (i.e., where judges would have to rely purely on a common law discretion).

In this classification scheme, there are six types of veil piercing cases. These six types of veil piercing cases involve:

- the liability of a shareholder for corporate obligations;
- the liability of a corporation for shareholder obligations;
- the liability of one corporation for the obligations of a related corporation;

66. Cases were compiled according to their jurisdiction and court levels. All searches were conducted between November 6, 2008 and November 30, 2008.

67. Naturally, the searches under “salomon /5 salomon” and “separate legal /2 person or entity” retrieved many cases that had nothing to do with piercing the corporate veil and these were removed from the sample.

68. Only cases involving general business corporations incorporated under the *CBCA*, *supra* note 20 or one of the provincial general incorporation statutes were included in the data set.

- corporate benefits being attributed to a shareholder;
- shareholder benefits being attributed to a corporation; and
- corporate benefits of one corporation being attributed to a related corporation.

Cases dealing with the liability of a shareholder for corporate obligations refer to circumstances where a third party seeks to compel the shareholder to satisfy a debt or other obligation that, strictly speaking, is an obligation of the corporation. The shareholder may be an individual or a parent corporation.⁶⁹ In this type of case, the asset partitioning function provided by limited liability is at stake. As a result of limited liability, the shareholder is not liable for the obligations of the corporation unless the veil is pierced.⁷⁰ Conversely, cases dealing with the liability of a corporation for shareholder obligations refer to circumstances where a third party seeks to compel a corporation to satisfy a debt or obligation that is, strictly speaking, an obligation of one or more of its shareholders. In these cases, it is the asset partitioning function of separate legal personality, as opposed to limited liability, that is at stake. Benefiting from its separate legal personality, the corporation would not be liable for debts and obligations owed by a shareholder in his or her personal capacity unless the veil is pierced.

Cases of liability of a related corporation refer to circumstances where a third party seeks to compel one corporation to satisfy a debt or some other obligation that is of another related corporation. Typically, the related corporations in such cases share one or more mutual shareholders. In this type of case, as in those involving the liability of a corporation for shareholder obligations, the asset partitioning function of separate legal personality is at stake. The related corporation, by virtue of having a separate legal personality, would not be liable for the debts or obligations of a sibling corporation under common control unless the veil is pierced.

The other three types of cases left to discuss can collectively be referred to as “shareholder or enterprise benefit” cases⁷¹ (cases in which the court

69. For the purposes of this study, shareholders include de facto controlling shareholders that control a corporation indirectly through shareholding in another company or through having shares held by family members or other personal relations.

70. In jurisdictions where shares may be issued on an unpaid or partly paid basis, the shareholder could, of course, be liable for any amounts remaining unpaid on his, her or its shares.

71. Nicholls, *Corporate Law*, *supra* note 2 at 209.

is asked to disregard the corporation's separate legal identity to bestow a benefit rather than to impose a liability). Cases involving *corporate benefits* being attributed to a shareholder refer to those circumstances where either a third party⁷² or a party related to the corporation—such as a shareholder or related corporation⁷³—seeks to attribute some corporate right or claim to a person other than the corporation that is the nominal holder of that right or claim. Cases involving a *shareholder benefit* attributed to a corporation refer to those circumstances where either a third party or a party related to the corporation seeks to have a right or claim held by a shareholder attributed instead to a corporation in which he or she has an interest. Finally, cases involving a *benefit attributed to a related corporation* refer to circumstances where either a third party or another party related to the corporation seeks to have a right or claim held by a corporation attributed instead to a related corporation. Typically, the corporation holding the right or claim and the second corporation seeking the benefit of the right or claim are connected by a common shareholder. Litigation in which such a claim is brought by a party related to the corporation or by the corporation itself, instead of by a third party, has been described as “reverse piercing” cases.⁷⁴

Cases where veil piercing terminology was employed by the court but did not fall within the six-part classification scheme described above were excluded from the data set. These cases involved a wide variety of claims, ranging from cases concerning the direct liability of directors and officers

72. See e.g. *Covert et al v Nova Scotia (Minister of Finance)* [1980] 2 SCR 774, 41 NSR (2d) 181 [*Covert* cited to SCR] (where a taxation authority claimed that the benefit of asset ownership by a subsidiary ought to be attributed to the parent corporation for the purposes of imposing tax liability).

73. See *Kosmopoulos*, *supra* note 12 at 8 (where a shareholder claimed to have an insurable interest in corporate assets for the purposes of an insurance claim under a personal policy).

74. Michael J Gaertner, “Reverse Piercing the Corporate Veil: Should Corporation Owners Have it Both Ways?” (1989) 30:3 Wm & Mary L Rev 667. See also *Yaiquaje v Chevron Corp*, 2013 ONSC 2527 at para 23, 361 DLR (4th) 489. It should be noted that Canadian courts have used the expression “reverse veil piercing” to refer to cases that would fall under the liability of corporation for shareholder obligations classification in this study. In this article, the expression is used to signify the subset of shareholder or enterprise benefit cases where the veil piercing claim is brought by the corporation itself or a party related to the corporation.

to third parties;⁷⁵ secondary picketing with respect to parent, subsidiary and related corporations;⁷⁶ family law cases where shareholdings in corporations were factored into the calculation of income for support purposes or the calculation of assets owned by a spouse for the purposes of division following a matrimonial breakdown;⁷⁷ conflict of laws and jurisdiction cases involving parent, subsidiary and related corporations in different jurisdictions;⁷⁸ and finally cases dealing with the scope of discovery with respect to shareholders and the extent to which corporations may

75. See e.g. *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57, 542 AR 289. The idea that directors and officers may be liable for fraud or tort in their capacity as agents has long been recognized by the law, involving no disregard of either separate legal personality or of limited liability. See also *Cullen v Thompson's Trustees* (1862), 4 Macq 424 at 432 (HL Scot). For analyses of this issue, see Christopher C Nicholls, "Liability of Corporate Officers and Directors to Third Parties" (2001) 35:1 Can Bus LJ 1; Janis Sarra, "The Corporate Veil Lifted: Director and Officer Liability to Third Parties" (2001) 35:1 Can Bus LJ 55; Neil Campbell & John Armour, "Demystifying the Civil Liability of Corporate Agents" (2003) 62:2 Cambridge LJ 290.

76. See *Nedco Ltd v Clark* (1973), 43 DLR (3d) 714 at 720, [1973] 6 WWR 425 (Sask CA). Such cases were excluded on the basis that they raise different concerns than those of the more conventional veil piercing cases. For an analysis of this issue, see Peter T Bergbusch, "Secondary Picketing in Saskatchewan: A Functional Analysis of *O.K. Economy v. R.W.D.S.U., Local 454*" (1995) 59:1 Sask L Rev 141.

77. See e.g. *Ahpin v Ahpin*, 2004 ABQB 492, [2004] AJ No 816 (QL). Family law cases that involve only the assessment of the shareholders assets or income for the purposes of calculating support involve no disregard of separate legal personality. Family law cases that involve a corporation having to pay support or transfer assets to a spouse do involve the disregard of separate legal personality and were included in the data set.

78. See e.g. *Gerling Global General Insurance Co v Canadian Occidental Petroleum Ltd*, 1998 ABQB 714, 230 AR 39. Such cases were excluded on the basis that, like the secondary picketing cases, they raise different concerns from the more conventional veil piercing cases. For an analysis of these issues, see Charles I Wellborn, "Subsidiary Corporations in New York: When is Mere Ownership Enough to Establish Jurisdiction over the Parent" (1973) 22:3 Buff L Rev 681. In a recent decision, when considering the issue of whether an Ontario court had jurisdiction to hear a claim alleging that a Canadian subsidiary was liable for the obligations of its US parent, the Ontario Court of Appeal surprisingly pierced the corporate veil on the basis that the "usual concerns regarding the piercing of the corporate veil—unanticipated personal liability by a shareholder, or unanticipated liability of a shareholder being imputed to a corporation—are not present at the stage of this preliminary jurisdictional determination". See *Yaiguaje v Chevron Corp*, 2013 ONCA 758 at para 39, 118 OR (3d) 1. The SCC decided the jurisdiction question on the basis of presence as opposed to veil piercing. See *Chevron Corp v Yaiguaje*, 2015 SCC 42 at paras 86–87, 388 DLR (4th) 253.

be examinable or required to produce documents.⁷⁹ After the exclusion of these cases, the data set consisted of 619 observations that fell within the six-part classification scheme used to define veil piercing cases for the purposes of this study.⁸⁰

These observations were coded for both factual and analytical data.⁸¹ For the factual data, where appropriate, statistical significance tests were run to assess the relationship between different variables to veil piercing rates.⁸² The null hypotheses being tested were:

- that the classification of a veil piercing case has no impact on whether the veil will be pierced;
- that the decade in which a veil piercing case was decided has no impact on whether the veil will be pierced;
- that the jurisdiction of the court hearing the case has no impact on whether the veil will be pierced;
- that the level of the court hearing the case has no impact on whether the veil will be pierced;
- that the identity of the party seeking to pierce the corporate veil has no impact on whether the veil will be pierced;
- that the number of shareholders or whether the shareholders were individuals or parent corporations has no impact on whether the veil will be pierced; and

79. See e.g. *Riviera Farms Ltd v Paegus Financial*, [1988] 29 CPC (2d) 217, 11 ACWS (3d) 366, (H Ct J). Similar to the cases mentioned above, such cases were excluded on the basis that they raise different concerns than those of the more conventional veil piercing cases.

80. By contrast, Thompson's original empirical study of American cases consisted of a data set of 1,583 cases. "Empirical Study", *supra* note 6 at 1048. Oh's more recent study of veil piercing in the US consisted of a data set of 2,929 cases. *Supra* note 6 at 103. Mitchell's study analyzed 290 British veil piercing cases. "Empirical Study", *supra* note 4. Ramsay & Noakes' study analyzed a data set of 104 Australian cases. *Supra* note 5

81. The data was coded by Robert Dumerton, Andrew Ellis, Lindsay Gwyer, Ben Heller, Jennifer Hodgins, Breann Kirincich, John Mather and Erin Tolfo. All are now graduates of the Schulich School of Law at Dalhousie University or Western Law School. Throughout the data collection process, intercoder reliability tests of random samples were periodically conducted.

82. Chi-square tests were run in STATA 12 to test for statistical significance.

- that the substantive legal context under which the veil piercing claim arose has no impact on whether the veil will be pierced.⁸³

The analytical data coded involved collecting the reasons for which the court either pierced or did not pierce the corporate veil. Where the court did pierce the corporate veil, the observations were coded with respect to the courts' expressed reliance on recognised grounds of control (i.e., agency, alter ego, etc.) and impropriety (i.e., sham, facade concealing the true facts, etc.) as well as the more general grounds of justice and single economic entity.

In cases where the court did not pierce the corporate veil, the observations were coded with reference to recognized grounds, such as the voluntary assumption of risk by a third party, the acceptance of using the corporate form to allocate liability and the absence of recognized factors needed to pierce the corporate veil. Because courts frequently cite multiple factors to justify their decisions in this area, multiple reasons were coded for observations where appropriate. Though, as noted above, the courts themselves often observe that the law of piercing the corporate veil follows no consistent principle, the aim of collecting this analytical data was to test whether there was indeed an observable trend with respect to reasons invoked by the courts to justify their decisions.

Finally, it is important to note one general limitation and two specific limitations concerning the data set used for this study. First, the sample consists only of cases available in a particular LexisNexis Quicklaw database. In other words, the representativeness of the sample is dependent

83. To determine the acceptable probability of rejecting a null hypothesis, the commonly used probability error level of at least 0.05 or 5% was employed in this study. Of course, there are limits to what statistical significance is able to reveal. Such tests suggest only that relationships between particular variables exist. The chi-square test does not explain the magnitude of the impact of any particular variable or the main determinants of the likelihood of the corporate veil being pierced. The application of this test to this study examines only the relationship between veil piercing and particular variables as opposed to examining simultaneously the relationships between different variables relevant to the outcome of veil piercing decisions. To be able to predict the likelihood of piercing based on the presence of multiple variables requires regression analysis. See Alan Agresti & Christine A Franklin, *Statistics: The Art and Science of Learning from Data* (Upper Saddle River, NJ: Pearson Prentice Hall, 2007) at 525. Regression analysis has not been undertaken in this article, as the aim is to present purely descriptive statistics on Canadian common law veil piercing cases.

on the depth of this database across the various common law jurisdictions in Canada.⁸⁴ Second, the data set does not have the capacity to provide information about unreported cases and settled disputes, in which the outcomes may have reflected an implicit application or denial of a veil piercing claim.

However, even in the case of settlements of “straightforward” or “easy” cases, it is important to consider that settlement occurs in the shadow of judicial decision making and that it is the record of actual judicial decision making that determines whether cases are, or are not, straightforward. Accordingly, if the outcome of actual judicial decisions differs from the received wisdom of practitioners (based on either intuition or an exaggerated emphasis on the outcomes of a very small number of salient cases), it is, at least, theoretically possible that settlements have been negotiated against a background of mistaken assumptions.

Even more fundamentally, however, some have argued that litigated disputes are capable of forming neither a random nor representative sample with respect to the universe of all like disputes.⁸⁵ Nevertheless, as Thompson pointed out in his study of veil piercing in US courts, these limitations do not wholly prevent meaningful analysis of descriptive statistics such as those presented in this article.⁸⁶ At present, practitioners and scholars both rely on selected and purportedly representative court decisions on the veil piercing issue when attempting to define the prevailing legal position. Notably, the descriptive statistics presented in this article are based on a data set far larger than any prior sample of cases, so as to be able to provide a more comprehensive picture of judicial decision making on this issue. In other words, while the limitations of such a statistical analysis are well understood and acknowledged, to use them as a basis to ignore or dismiss these findings in favour, presumably, of a view of the law gleaned from significantly more limited (and far more selective) samples of representative cases appears to us to be illogical and imprudent.

84. The oldest case retrieved was *Rielle v Reid*, *supra* note 19, an Ontario Court of Appeal case dating from 1899.

85. See George L Priest & Benjamin Klein, “The Selection of Disputes for Litigation” (1984) 13:1 J Leg Stud 1 at 4.

86. Thompson, “Empirical Study”, *supra* note 6 at 1045–047.

III. Results

The results of this study are presented below.

Table 1: Frequency with which Canadian common law courts have pierced the corporate veil

Category	Number of Observations	Pierced	Not Pierced	% Pierced
All cases	619	223	396	36.03%

In the sample, Canadian courts have pierced the corporate veil in approximately 36% of the cases where the issue was explicitly addressed. By comparison, based on the similar studies in other jurisdictions, courts chose to pierce the veil 40% of the time in the US,⁸⁷ 47% of the time in England⁸⁸ and 38% of the time in Australia.⁸⁹ As Mitchell pointed out in his study of the UK courts, it may be unwise to read too much into these differences due to the different sample sizes of the various studies.⁹⁰ However, it is interesting to note that Canadian courts have occasionally expressed the assumption that veil piercing occurs more frequently in the US, and used this assumption to justify their consideration of UK cases as more persuasive than US cases.⁹¹ The comparative results of these various studies do not appear to support the assumption that successful veil piercing is more common in the US than in the UK.

In addition, none of the cases in the data set involve piercing the corporate veil of a public corporation. In other words, the application of the doctrine by Canadian courts has been limited to private corporations controlled by individual shareholders or parent corporations. This aspect

87. *Ibid* at 1048. However, Oh's study of the US courts, based on a larger data set, suggested that courts pierce the veil in approximately 49% of cases. *Supra* note 6 at 107.

88. Mitchell, "Empirical Study", *supra* note 4 at 20.

89. Ramsay & Noakes, *supra* note 5 at 268, Table 1.

90. Mitchell, "Empirical Study", *supra* note 4 at 20.

91. See *Nakonechny v RMJ Contracting Ltd*, 2006 ABPC 27 at para 26, 394 AR 236 [*Nakonechny*]. Scholars have also expressed the view that veil piercing occurs more readily in the US courts as compared to the UK courts. See LCB Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69:8 Harv L Rev 1369 at 1379.

of the results is broadly consistent with findings in other jurisdictions⁹² and with the near universal theoretical view that a limited liability rule is more compelling in the context of public corporations.⁹³ As explained above, limited liability serves a number of economic purposes including lowering monitoring costs for shareholders, allowing for portfolio diversification, and facilitating the creation of anonymous exchanges for the trading of shares. These specific benefits are not applicable to private corporations.

Of course, separate legal personality and limited liability do provide certain economic benefits for private corporations as well, the most important of which is asset partitioning or “entity shielding”. As a separate legal entity, a corporation’s assets are shielded from the creditors of its shareholders, thereby eliminating the need for the corporation’s creditors to monitor the creditworthiness of those shareholders and accordingly make credit decisions exclusively on the basis of the corporation’s own assets. Limited liability similarly reduces costs for the shareholders’ own creditors by eliminating the need for them to monitor the creditworthiness of the corporate entity. Finally, the combined effect of separate legal personality and limited liability allows entrepreneurs to isolate business assets and expose only those chosen assets to the risks of the corporation’s business.⁹⁴

92. Surprisingly, however, the Australian study did find that courts had pierced the veil of a public corporation in four cases. See Ramsay & Noakes, *supra* note 5 at 273, Table 3.

93. See Halpern, Trebilcock & Turnbull, *supra* note 25 at 148. It should be noted that some have argued that limited liability is not justified in the context of public corporations when it comes to tort creditors. See generally Hansmann & Kraakman, “Corporate Torts”, *supra* note 9. However, various commentators have criticized the notion of an unlimited liability regime with respect to tort claimants of public corporations. See Michael P Coffey, “In Defense of Limited Liability: A Reply to Hansmann and Kraakman” (1994) 1 *Geo Mason L Rev* 59; Bainbridge, *supra* note 7 at 494–500; Nicholls, *Corporate Law*, *supra* note 2 at 82.

94. See *ibid* at 202.

Table 2: Frequency of veil piercing with respect to the classification of the case

Category	Number of observations	Pierced	Not Pierced	% Pierced
Liability of Shareholder for Corporate Obligations	274	97	177	35.40%
Liability of Corporation for Shareholder Obligations	71	37	34	52.11%
Liability of Related Corporation	77	32	45	41.56%
Corporate Benefit Attributed to Shareholder	135	39	96	28.89%
Shareholder Benefit Attributed to Corporation	37	8	29	21.62%
Benefit Attributed to Related Corporation	25	10	15	40.00%

Table 2 presents the overall rate of veil piercing for each of the six case classifications selected for this study. Approximately half of all the cases in the sample fell within the category of “liability of shareholder for corporate obligations”. As explained above, these cases involve a challenge to limited liability rather than to the distinct concept of separate legal personality.

In addition, this data sample shows a statistically significant relationship between the classification of a veil piercing case and whether the corporate veil was pierced.⁹⁵ With respect to the liability cases in the first three categories, the data indicates that courts have pierced the corporate veil more often when separate legal personality, as opposed to limited liability, was at stake, particularly when the matter involved the liability of a corporation for the obligations of its shareholder or shareholders. Courts have not usually drawn an explicit distinction between whether separate legal personality or limited liability is at stake in veil piercing cases.⁹⁶ Occasionally, however, they have implied that the standard for piercing the corporate veil is, and ought to be, lower where limited liability is not at stake.⁹⁷ Descriptively, the findings of this study do suggest that courts have been more willing to pierce the veil when limited liability is not threatened. As a normative matter, we note that this practice appears to ignore the fact that, historically, the corporate form was initially valued more for the function of protecting business assets from claims of individual shareholders' creditors than for the function of protecting shareholders from debts and other obligations of the corporate entity.⁹⁸ As both separate legal personality and limited liability perform equally important (though distinct) functions when it comes to asset partitioning, it seems difficult to justify differences in veil piercing rates linked to the different classifications of liability cases.

The findings also suggest that courts have pierced the veil less often in shareholder or enterprise benefit cases and align with similar findings in previous US and UK empirical studies on veil piercing.⁹⁹

95. P-value = 0.008 (i.e., there is a statistically significant relationship between classification and the outcome of a veil piercing case at 1% significance level).

96. See e.g. *Zhelka*, *supra* note 35. *Zhelka* is a "liability of corporation for shareholder obligations" case and the analysis employed by the court is frequently cited in such cases. See e.g. *Nakonechny*, *supra* note 91; *642947 Ontario Ltd v Fleischer* (2001), 56 OR (3d) 417 at para 67, 209 DLR (4th) 182 (CA).

97. See *Wildman v Wildman* (2006), 82 OR (3d) 401 at para 24, 273 DLR (4th) 37 (CA) [*Wildman*].

98. See Nicholls, "Beyond the Veil", *supra* note 2 at 452–53.

99. Thompson, "Empirical Study", *supra* note 6 at 1057, Table 8; Mitchell, "Empirical Study", *supra* note 4 at 23. Interestingly, Australian courts have not appeared to look upon veil piercing claims in reverse piercing cases less favourably based on a similar Australian study presenting descriptive statistics in veil piercing cases. See Ramsay & Noakes, *supra* note 5 at 36, Table 12.

These results are, to some degree, consistent with views expressed by both courts and commentators concerning reverse piercing cases. Reverse piercing cases arise where the party seeking to have the court disregard the corporation's separate legal personality is not an arm's length third party but is either the corporation itself, a shareholder or related corporation.¹⁰⁰ Courts frequently reject such attempts and assert that one must accept the burdens of incorporation in exchange for enjoying its benefits.¹⁰¹ Some commentators have argued that veil piercing claims in such cases always ought to be rejected, since successful outcomes seem to reflect the judge's personal perception of sympathetic claimants.¹⁰² In the sample for this study, courts pierced the corporate veil in approximately one out of every five reverse piercing cases.

100. Such reverse piercing cases accounted for 120 out of the 197 shareholder or enterprise benefit cases and the veil was pierced approximately 22% of the time.

101. See *Kosmopoulos*, *supra* note 12, "Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to 'blow hot and cold' at the same time". *Ibid* at 11.

102. See Bainbridge, *supra* note 7 at 514–15. Others, however, have expressed a more sympathetic view towards veil piercing in this context. See Gaertner, *supra* note 74; Nicholas B Allen, "Reverse Piercing of the Corporate Veil: A Straightforward Path of Justice" (2011) 85:3 St John's L Rev 1147.

Table 3: Frequency of veil piercing with respect to time period

Category	Number of Observations	Pierced	Not Pierced	% Pierced
pre-1960's	16	9	7	56.25%
1960's	8	1	7	12.50%
1970's	31	12	19	38.71%
1980's	106	31	75	29.25%
1990's	250	90	160	36.00%
2000's	208	80	128	38.46%

While there are clearly variations in piercing rates with respect to the time period in which a case was decided, there is no statistically significant relationship between the time period and the outcome of a decision.¹⁰³ As in the US,¹⁰⁴ the UK¹⁰⁵ and Australia,¹⁰⁶ empirical data does not suggest that veil piercing rates have increased or decreased over time.¹⁰⁷ While there may have been an expectation that veil piercing rates would increase following the Supreme Court of Canada's suggestion in 1987 that courts may pierce the veil in the interests of justice,¹⁰⁸ the data does not illustrate or confirm such a trend. While there has been no significant change in veil piercing rates in relation to the time period, the data does suggest that, as in other jurisdictions, the number of veil piercing claims brought has increased over time.¹⁰⁹

103. P-value = 0.186 (i.e., there is no statistically significant relationship between time period and the outcome of a veil piercing case).

104. See Thompson, "Empirical Study", *supra* note 6 at 1049, Table 2.

105. See Mitchell, "Empirical Study", *supra* note 4 at 21.

106. See Ramsay & Noakes, *supra* note 5 at 268, Table 2.

107. Some commentators have suggested that veil piercing rates have increased over time in the US. See e.g. David H Barber, "Piercing the Corporate Veil" (1981) 17:2 Willamette L Rev 371 at 404. With respect to England, some commentators have suggested that veil piercing rates declined after the Court of Appeal's decision in *Adams v Cape*, *supra* note 57. See Thomas K Cheng, "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines" (2011) 34:2 BC Intl & Comp L Rev 329 at 340.

108. *Kosmopoulos*, *supra* note 12 at 10–11.

109. See Thompson, "Empirical Study", *supra* note 6 at 1049, Table 2; Mitchell, "Empirical Study", *supra* note 4 at 21; Ramsay & Noakes, *supra* note 5 at 268, Table 2.

Table 4: Frequency of veil piercing with respect to the jurisdiction of the court

Category	Number of Observations	Pierced	Not Pierced	% Pierced
British Columbia	84	27	57	32.14%
Alberta	85	37	48	43.53%
Saskatchewan	27	12	15	44.44%
Manitoba	16	3	13	18.75%
Ontario	221	94	127	42.53%
New Brunswick	14	1	13	7.14%
Nova Scotia	22	9	13	40.91%
Prince Edward Island	4	0	4	0.00%
Newfoundland and Labrador	12	4	8	33.33%
Northwest Territories	3	1	2	33.33%
Yukon	1	0	1	0.00%
Federal Courts	130	35	95	26.92%

When coding the data, it was observed that courts rarely indicate whether a corporation was incorporated under the *CBCA* or, alternatively, under one of the provincial or territorial general business corporation statutes. As a result, it is not possible to draw conclusions on whether the choice of incorporating statute has any impact on veil piercing rates. However, variations in veil piercing rates depending on the jurisdiction of the court and the relationship between jurisdiction and outcome is still statistically significant.¹¹⁰ Ontario produced more than a third of the total number of cases in which a veil piercing claim was made, with British Columbia and Alberta each producing approximately 14% of all the observations in the data set. These differences are unsurprising and are roughly reflective of the relative size of the jurisdictions. For example, the population and gross domestic product (GDP) of Ontario are, by far, the

110. P-value = 0.008 (i.e., there is a statistically significant relationship between the court's jurisdiction and the outcome of a veil piercing case at 1% significance level).

highest of all the provinces.¹¹¹ Similarly, the population and GDP of each of Alberta and British Columbia, while less than half that of Ontario, are still significantly higher than that of any other common law province or territory.¹¹²

In addition, federal courts were found to have pierced the veil less often than provincial or territorial courts,¹¹³ a result that might simply reflect the narrower jurisdiction of federal courts in corporate and commercial matters. Indeed, all of these variations may well simply be explained by more specific contextual factors.¹¹⁴ However, they are worth noting in light of the fact that the assumption appears to have always been that Canadian law on veil piercing is applied uniformly by common law courts across the country.¹¹⁵

111. See Statistics Canada, “Population and Dwelling Counts for Canada, Provinces and Territories, 2011 and 2006 censuses”, online: <www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=101&S=50&O=A> [Statistics Canada, “Population and Dwelling Counts”] (Ontario’s population, according to the 2011 census, was 12,851,821 or almost 38% of the total Canadian population of 33,476,688). Statistics Canada, “Gross domestic product, expenditure-based, by province and territory” CANSIM Table 384–0038, online: Statistics Canada <www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ15-eng.htm> [Statistics Canada, “GDP”] (Ontario generated GDP of \$679,616 million in 2012).

112. See Statistics Canada, “Population and Dwelling Counts”, *supra* note 111 (Alberta’s population, according to the 2011 census, was 3,645,257 while British Columbia’s population was 4,400,057). See also Statistics Canada, “GDP”, *supra* note 111. In 2012, Alberta generated GDP of \$315,803 million. British Columbia’s GDP for 2012 was \$222,565 million. By contrast, no other common law province or territory had a population greater than 1,208,268 or GDP greater than \$80,000 million. *Ibid.*

113. By contrast, it seems that there is no difference in piercing rates as between federal and state courts in the US. See Thompson, “Empirical Study”, *supra* note 6 at 1049, Table 3.

114. For example, federal courts hear a significant number of tax cases where veil piercing claims are made. See Table 9, *below*.

115. Neither Canadian corporate law treatises nor courts, when addressing the issue of veil piercing, make specific reference to rules in particular Canadian jurisdictions.

Table 5: Frequency of veil piercing with respect to the level of court

Category	Number of Observations	Pierced	Not Pierced	% Pierced
Lower Court	535	195	340	36.45%
Appellate Court	81	26	55	32.10%
Supreme Court of Canada	3	2	1	66.67%

In this data set, there is no statistically significant relationship between the level of court and the outcome of a veil piercing case.¹¹⁶ While the veil piercing rates for the SCC seem high, the number of observations is far too small to draw any meaningful conclusion.¹¹⁷

116. P-value = 0.405 (i.e., there is no statistically significant relationship between the level of court and the outcome of a veil piercing case).

117. The three SCC cases in the data set are *Palmolive Manufacturing*, *supra* note 28, *Covert*, *supra* note 72 and *Kosmopoulos*, *supra* note 12. The first two arose in the tax context and the veil was pierced on both occasions largely on control grounds. In *Palmolive Manufacturing*, the issue involved the calculation of sales tax and two related companies. One company engaged in manufacturing and supplied products to the other, which then engaged in selling them. The tax authority argued that sales tax should be calculated solely on what was received by the selling company from the general public. The court held in favour of the tax authority on the basis of agency. While recognizing the separate legal entity principle as between the two corporations, the court stated that “for all practical purposes, they are merged, the Ontario company being but a part of the Dominion company, acting merely as its agent and subject in all things to its proper direction and control”. *Supra* note 28 at 240. In *Covert*, the tax authority had argued that a corporation could be said to own certain assets bequeathed to a subsidiary for the purposes of tax obligations. The court held in favour of the tax authority again, concluding the subsidiary was “bound hand and foot to the parent company and had to do whatever its parent said” and “a mere conduit pipe linking the parent company to the estate”. *Supra* note 72 at 776. Finally, *Kosmopoulos* considered whether a shareholder had an insurable interest in a corporation’s assets and, while it was held that he did, the decision was based on insurance law and ultimately, the corporate veil was not pierced. *Supra* note 12. As has been suggested before, despite the decision not being based on veil piercing, this case might well be characterized as veil piercing in disguise. See Nicholls, *Corporate Law*, *supra* note 2 at 190–92.

With respect to this aspect of the factual data, the findings of corporate veil piercing in other jurisdictions are largely similar.¹¹⁸

Table 6: Frequency of veil piercing with respect to the nature of shareholder

Category	Number of Observations	Pierced	Not Pierced	% Pierced
Individual (Human) Shareholder	458	171	287	37.34%
Parent Corporation	161	52	109	32.30%

The above table displays the veil piercing rates dependent upon whether the shares in the relevant corporation were held by individuals (human shareholders) or by parent corporations. The data suggests that veil piercing outcomes have not been affected by whether a shareholder is an individual or another corporation.¹¹⁹ Interestingly, this finding is contrary to the intuition of some practitioners who suggest that courts are more willing to pierce the veil in the case of corporate shareholders. Moreover, various commentators have suggested that the justifications for separate legal personality and limited liability are less compelling within the context of corporate groups.¹²⁰ One of the key concerns with respect to use of the corporate group structure expressed by commentators is that

118. See Thompson, “Empirical Study”, *supra* note 6 at 1050, Table 4 (in the US, the level of court seems to have no impact on the outcome of a veil piercing case); Mitchell, “Empirical Study”, *supra* note 4 at 21 (in the UK, it seems that lower courts have pierced only slightly more often); Ramsay & Noakes, *supra* note 5 at 269, Table 8 (in Australia, it was found that there is no statistically significant relationship between the level of court and outcome).

119. P-value = 0.252 (i.e., there is no statistically significant relationship between the nature of the shareholder and the outcome of a veil piercing case).

120. See Bainbridge, *supra* note 7 at 528; Landers, *supra* note 13 at 599; Leebron, *supra* note 9 at 1619; Easterbrook & Fischel, *supra* note 13 at 111. For a defence of limited liability within the context of corporate groups, see Posner, “Rights of Creditors”, *supra* note 10; Thompson, “Corporate Groups”, *supra* note 10 at 388–89.

it facilitates inappropriate judgment proofing.¹²¹ However, while there is no statistically significant relationship between the two variables, the rate of veil piercing in this study was actually found to be slightly higher with respect to corporations with human shareholders. Veil piercing studies in other common law jurisdictions had similar findings on this point.¹²² However, we should again note that it is very possible this counter-intuitive finding may just reflect the fact that settlement is more frequent in cases involving parent corporations.

Table 7: Frequency of veil piercing with respect to the number of shareholders

Number of Shareholders	Number of Observations	Pierced	Not Pierced	% Pierced
One	310	130	180	41.94%
Two or Three	127	41	86	32.28%
More than Three	182	52	130	28.57%

As the above table indicates, the outcome of veil piercing decisions does vary depending on the number of shareholders in the relevant corporation.¹²³ The data suggests that veil piercing rates have been highest in the context of sole shareholder corporations.¹²⁴ Cases involving just one shareholder constituted approximately half of all the observations in the data set, with the veil pierced approximately 42% of the time. While the House of Lords decision in *Salomon* sought to legitimize one-person corporations, it seems that courts are still most likely to disregard the implications of the corporate form when it

121. See Lynn M LoPucki, “The Death of Liability” (1996) 106:1 Yale LJ 1. For criticisms against the idea that use of the corporate group structure facilitates judgment proofing, see James J White, “Corporate Judgment Proofing: A Response to Lynn LoPucki’s *The Death of Liability*” (1998) 107:5 Yale LJ 1363; Steven L Schwarcz, “The Inherent Irrationality of Judgment Proofing” (1999) 52:1 Stan L Rev 1.

122. See Thompson, “Empirical Study”, *supra* note 6 at 1055; Mitchell, “Empirical Study”, *supra* note 4 at 22; Ramsay & Noakes, *supra* note 5 at 262.

123. P-value = 0.007 (i.e., there is a statistically significant relationship between the number of shareholders and the outcome of a veil piercing case at 1% significance level).

124. The studies in the US, the UK and Australia made similar findings. See Thompson, “Empirical Study”, *supra* note 6 at 1055; Mitchell, “Empirical Study”, *supra* note 4 at 22; Ramsay & Noakes, *supra* note 5 at 262.

comes to this type of business organization.¹²⁵ However, even in cases involving one-person companies, the corporate form is preserved in well over half of the cases despite the fact that a sole shareholder inevitably enjoys a high degree of control over the relevant corporation.

Table 8: Frequency of veil piercing with respect to the identity of the claimant

Category	Number of Observations	Pierced	Not Pierced	% Pierced
Third Party—Private	381	143	238	37.53%
Third Party—Government	118	54	64	45.76%
Corporation, Shareholder or Related Corporation	120	26	94	21.67%

The cases in the data set were coded with reference to the identity of the party seeking to pierce the corporate veil. With this variable, veil piercing cases were classified into three categories:

- claims made by private third parties;
- claims brought by government third parties; and
- reverse piercing cases (i.e., where the claim is brought by the corporation itself, a shareholder or a related corporation).

There was found to be a statistically significant relationship between the identity of the party seeking to pierce the corporate veil and whether the veil was pierced.¹²⁶ Government entities were the most successful with

125. A significant amount of early literature on this issue concerned the legitimacy of separate legal personality and limited liability in the context of one-person companies. See e.g. Masten, *supra* note 2; Warner Fuller, “The Incorporated Individual: A Study of the One-Man Company” (1938) 51:7 Harv L Rev 1373; Bernard F Cataldo, “Limited Liability with One-Man Companies and Subsidiary Corporations” (1953) 18:4 Law & Contemp Probs 473. Also, the *Salomon* decision was famously referred to as “calamitous” by Professor Sir Kahn-Freund who advocated for the abolition of private companies. See Otto Kahn-Freund, “Some Reflections on Company Law Reform” (1944) 7:1-2 Mod L Rev 54 at 54–59.

126. P-value = 0.001 (i.e., there is a statistically significant relationship between the identity of the party seeking to pierce the corporate veil and the outcome of a veil piercing case at 1% significance level).

their claims¹²⁷ whereas shareholder, corporation and related corporation reverse piercing claims were least successful.¹²⁸

Table 9: Frequency of veil piercing with respect to the substantive nature of the claim¹²⁹

Category	Number of Observations	Pierced	Not Pierced	% Pierced
Contract	378	141	237	37.30%
Tort	39	13	26	33.33%
Statute/Regulation	202	69	133	34.16%

While veil piercing rates appeared to be relatively similar regardless of the substantive nature of the claim, the results varied significantly depending on the particular statutory context.¹³⁰ Scholars have focused particular attention on two prominent statutory contexts in which veil piercing occurs: *Income Tax Act*¹³¹ obligations¹³² and obligations arising from family law legislation.¹³³ Specifically, it has been suggested that the corporate veil will be pierced more liberally in both tax¹³⁴ and family law cases.¹³⁵ Interestingly, when the tax cases were separated out from the statute/regulation category in this data set, it was found that the success

127. Similar conclusions were drawn in the studies from the US and the UK. See Thompson, “Empirical Study”, *supra* note 6 at 1057; Mitchell, “Empirical Study”, *supra* note 4 at 22. In the Australian study, however, shareholders making reverse piercing claims were the most successful. See Ramsay & Noakes, *supra* note 5 at 271, Table 12. With respect to the specific category of tax cases, see text accompanying notes 136–38.

128. Most shareholder or enterprise benefit cases were also reverse piercing cases. See Table 2 *above*.

129. For a discussion of veil piercing in the family law context, see text accompanying notes 140–42.

130. P-value = 0.019 (i.e., there is a statistically significant relationship between the substantive nature of the claim and the outcome of a veil piercing case at 5% significance level).

131. RSC 1985, c 1 (5th Supp).

132. See Tamaki, *supra* note 2; WJA Mitchell, “Taxation”, *supra* note 2; Hausman, *supra* note 2; Durnford, *supra* note 2.

133. See Nicholls, “Beyond the Veil”, *supra* note 2.

134. See Tamaki, *supra* note 2 at 160–62.

135. See *Wildman*, *supra* note 97 at para 31.

rate for veil piercing in such cases was 29.25%,¹³⁶ which is lower than the overall 36.03% rate for the study. However, when the tax cases were further divided up based on the identity of the party making the claim, government entities were successful in 48.15% of the cases¹³⁷ while reverse piercing claims were successful in only 9.62% of the cases.¹³⁸ Therefore, the descriptive claim that courts pierce the veil more often in tax cases is instead more accurately characterized as courts piercing the veil more often in tax cases when it benefits the interest of the tax authority.¹³⁹

The descriptive claim that courts pierce the veil more often in family law cases is also supported by the data, which shows that the veil piercing rate in family law cases was 60.71%.¹⁴⁰ Along with the usual control and impropriety veil piercing standards, courts also tend to rely on support payment guidelines that allow them to consider a spouse's shareholdings in corporations for the purposes of calculating income to justify veil piercing in this context.¹⁴¹ This justification for piercing the veil is questionable and was recently rejected by Lord Sumption of the Supreme Court of the United Kingdom, who reasoned that "[c]ourts exercising family jurisdiction do not occupy a desert island in which general legal concepts

136. Courts pierced the corporate veil in 31 out of 106 such cases. In Thompson's US study, it was similarly found that courts pierced the veil less often in tax cases. *Supra* note 6 at 1060–061. The UK and Australian studies display statistics for statutory claims generally but not tax claims specifically. See Mitchell, "Empirical Study", *supra* note 4 at 24; Ramsay & Noakes, *supra* note 5 at 269, Table 6.

137. Courts pierced the corporate veil in 26 out of 54 such cases.

138. Courts pierced the corporate veil in 5 out of 52 such cases.

139. Indeed, this empirical observation accords with the assertion of Gower that veil piercing could be viewed as "a refusal by the legislature and the judiciary to apply the logic of the principle laid down in *Salomon's* case where it is too flagrantly opposed to justice, convenience or the interests of the Revenue." LCB Gower et al, *Gower's Principles of Modern Company Law*, 4th ed (London: Stevens & Sons, 1979) at 112 [emphasis added].

140. Courts pierced the corporate veil in 17 out of 28 such cases.

141. See *Federal Child Support Guidelines*, SOR/97-175 s 18. See e.g. *Wildman*, *supra* note 97 at para 26.

are suspended or mean something different.”¹⁴² After all, corporate shares are like any other type of asset, and factoring share ownership into the calculation of a spouse’s income is no different from factoring in the ownership of any other type of income generating asset.

Therefore, as observed by Lord Sumption, the argument that because support guidelines allow courts to consider income generated by shares, courts are somehow also implicitly allowed or invited to pierce the corporate veil and make corporations directly liable for family obligations has no logical basis.¹⁴³ Normatively, it is not evident that family claimants should hold a more privileged status than other types of third party claimants when it comes to these types of claims.¹⁴⁴

The comparative veil piercing rates for contract and tort are also worthy of comment. Commentators have argued that limited liability is less justified in relation to tort creditors due to the inability of said creditors to bargain before the fact.¹⁴⁵ However, similar empirical studies conducted in other jurisdictions have suggested that courts have actually pierced the corporate veil in cases involving tort claimants less often than

142. *Prest*, *supra* note 11 at para 37. With respect to the specific remedy sought in the case, Lord Sumption stated,

There is nothing in the Matrimonial Causes Act and nothing in its purpose or broader social context to indicate that the legislature intended to authorise the transfer by one party to the marriage to the other of property which was not his to transfer. Secondly, a transfer of this kind will ordinarily be unnecessary for the purpose of achieving a fair distribution of the assets of the marriage. Where assets belong to a company owned by one party to the marriage, the proper claims of the other can ordinarily be satisfied by directing the transfer of the shares.

Ibid at para 40.

143. *Ibid* (“[i]t does not follow from the fact that one spouse’s worth may be boosted by his access to the company’s assets that those assets are specifically transferrable to the other” at para 38).

144. See Nicholls, “Beyond the Veil”, *supra* note 2 at 453–55.

145. See Leebron, *supra* note 9 at 1584; Hansmann & Kraakman, “Corporate Torts”, *supra* note 9; Nina A Mendelson, “A Control-Based Approach of Shareholder Liability for Corporate Torts” (2002) 102:5 Colum L Rev 1203; Bainbridge, *supra* note 7 at 503; Easterbrook & Fischel, *supra* note 13 at 112; Halpern, Trebilcock & Turnbull, *supra* note 25 at 145–47.

in cases involving contract creditors.¹⁴⁶ Not surprisingly, these counter-intuitive findings have attracted criticism.¹⁴⁷

It does appear that the common law courts in Canada have similarly pierced the veil less frequently in tort cases than in contract cases. However, these results might not be as surprising or as counterintuitive as they first appear. As noted earlier, shareholders often exercise a high degree of control in private companies and, by virtue of this effective operating control, may face direct liability for any torts they commit in the course of their business activity.

Thus, though one may observe cases in which such corporate shareholders are exposed to personal tort liability, these cases need not involve any judicial piercing of the corporate veil¹⁴⁸ and so do not appear in the data as incidents of veil piercing. The practical outcome in such cases, however, is the same: An individual shareholder is found personally liable for a tort for which the corporation is also liable (albeit in his or her capacity as officer, employee, or agent). Also of note, the tort cases in this study, as well as in those studies from other jurisdictions, constituted a relatively small proportion of the total number of cases.¹⁴⁹ Possible explanations for this include the availability of liability insurance, the possibility that tort actions are settled more frequently than other claims and that, in general, corporations enter into contractual relationships more often than they commit torts.¹⁵⁰

146. See Thompson, “Empirical Study”, *supra* note 6 at 1059; Mitchell, “Empirical Study”, *supra* note 4 at 23–24; Ramsay & Noakes, *supra* note 5 at 265. Even studies that have made findings consistent with the view of most commentators with respect to tort creditors have not been able to suggest that courts are significantly more likely to pierce in the tort context. See Oh, “Veil Piercing”, *supra* note 6 at 131 (finding a veil-piercing rate of 46.24% for contracts, as compared to 47.75% for torts).

147. See Gevurtz, *supra* note 7 at 859; Bainbridge, *supra* note 7 at 512.

148. See e.g. *Sullivan and Sullivan Farms v Desrosiers* (1986), 76 NBR (2d) 271, 40 CCLT 66 (CA), leave to appeal to SCC refused [1990] 1 SCR xiv.

149. See Thompson, “Empirical Study”, *supra* note 6 at 1059; Mitchell, “Empirical Study” *supra* note 4 at 23–24; Ramsay & Noakes, *supra* note 5 at 269, Table 6.

150. See David Millon, “Response: The Still-Elusive Quest to Make Sense of Veil-Piercing” (2010) 89 *Tex L Rev* 15 at 25–27.

Table 10: Reasons given by the courts for piercing the corporate veil

Reasons	Number of Observations	% Pierced Cases
Agent	31	13.90%
Alter Ego	35	15.70%
Puppet	13	5.83%
Conduit	3	1.35%
Instrument	4	1.79%
Shareholder Domination or Complete Control	102	45.74%
Overlap of Corporate Function	21	9.42%
Overlap of Corporate Personnel	17	7.62%
Improper Use or Purpose	35	15.70%
Sham	20	8.97%
Facade Concealing the True Facts	12	5.38%
Conduct Akin to Fraud	40	17.94%
Misrepresentation	12	5.38%
Avoiding Pre-existing Legal Obligations	20	8.97%
Thin Capitalization	15	6.73%
Corporate Formalities	8	3.59%
Justice	36	16.14%
Single Economic Entity	28	12.56%

The above table displays the frequency of the specifically invoked bases or rationales that are relied upon by the courts in the 223 cases in which the corporate veil was pierced. As explained above, courts have recited a litany of non-disaggregated grounds when deciding to pierce the veil and so, where relevant, multiple reasons were coded. This means that the reasons set out in the above table are not mutually exclusive.

In this study, the most frequently cited basis for piercing the veil was shareholder domination or complete control. This ground was used by judges to justify, at least in part, the outcome in almost half (45.74%) of the cases analysed. These results suggest that, in addition to following no consistent principle, the Canadian law on veil piercing has no settled terminology.

These results also offer no evidence to challenge the often-heard assertion that the analytical basis in this area amounts to little more than “tossing in many possible justifications for piercing the veil in any particular case without detailed explanation of which factor or factors are determinative”.¹⁵¹

Comparing these results to the reasons offered by judges in veil piercing cases in other common law jurisdictions is difficult because either no data is available or a different methodology was employed in the foreign studies. For example, Thompson’s study in the US coded all factors mentioned in cases, regardless of whether or not they were held to have influenced the outcome.¹⁵² The study of the UK decisions provides no data on the reasons employed by the courts when piercing the corporate veil. The Australian study provides data only on arguments made by the parties when requesting the court to pierce the corporate veil.¹⁵³ However, one commonality between those studies and this study is that none suggest it is possible to understand veil piercing by examining the express grounds invoked by the courts.

151. Nicholls, “Pure Form”, *supra* note 2 at 240.

152. *Supra* note 6 at 1063. By contrast, Oh’s study of veil piercing in the US courts measured the relative value of a reason with reference to its impact on the outcome either by its presence or absence. *Supra* note 6 at 133–34

153. Ramsay & Noakes, *supra* note 5 at 269, Table 7.

Table 11: Reasons given by the courts for not piercing the corporate veil

Reason	Number of Observations	% Not Pierced Cases
No Agency	55	13.89%
No Shareholder Domination or Complete Control	28	7.07%
No Improper Use or Purpose	131	33.08%
No Conduct Akin to Fraud	109	27.53%
Rejection of Justice as a Ground	24	6.06%
Rejection of Single Economic Entity as a Ground	65	16.41%
Acceptance of Using the Corporate Form to Allocate Liability	22	5.56%
Voluntary Assumption of Risk	30	7.58%
Burdens of Incorporation Having to be Accepted with its Benefits	48	12.12%

Lastly, the above table displays the frequency of justificatory grounds or bases relied upon by the courts in the 396 cases where the corporate veil was not pierced. Since separate legal personality and limited liability are the default positions, the significance of judicial reference to these specific bases for not piercing the corporate veil should not be over interpreted. In each case, the party seeking to have the court pierce the veil simply failed to overcome the considerable hurdles facing any party seeking to advance such a claim and the court’s decision to identify a particular weakness or shortcoming in the claimant’s case should hardly be regarded as determinative. The House of Lords decision in *Salomon* may, after all, legitimately be understood as setting out, as a matter of principle, that the corporate veil may never be pierced.¹⁵⁴

154. See *VTB Capital*, *supra* note 16 (“[t]here is great force in the argument that that case represented an early attempt to pierce the veil of incorporation, and it failed, pursuant to a unanimous decision of the House of Lords, not on the facts, but as a matter of principle” at para 122). However, Lord Halsbury’s judgement in *Salomon* arguably appeared to contemplate exceptions in the form of fraud, agency, or if the company was a fiction or myth. *Supra* note 18 at 32.

In effect, a decision to deny a veil piercing claim could simply be based on an endorsement of the holding in *Salomon*.¹⁵⁵ However, it is still noteworthy that a third of the cases where the veil was not pierced relied upon an express finding of an absence of an improper use of the corporate form. The absence of an impropriety ground, based on the empirical studies in the US and Australia, was also shown to be influential in those jurisdictions.¹⁵⁶

Conclusion

This study attempted to test a number of theoretical, descriptive and normative claims about corporate veil piercing using a data set of Canadian common law cases. Successful veil piercing claims have thus far exclusively involved private corporations. Therefore, the theoretical justifications of limited liability and separate legal personality related to lowering the overall cost of capital for public corporations appear to be compelling enough to prevent the doctrine's application in that context. Such a distinction drawn by courts in this context between public and private corporations has no statutory basis since the statutory basis for separate legal personality and limited liability is identical for all corporations—both public and private.¹⁵⁷

However, the number of observed attempts by plaintiffs to pierce the corporate veil in the case of public corporations is so small that it is possible that this public-private distinction may either be deterring plaintiff's counsel from the outset or, equally possibly, may be the result of greater rates of pre-trial settlement in cases involving public corporations. Also, these two fundamental corporate characteristics provide important economic benefits to private corporations as well as public corporations

155. Some have argued that the concept of separate legal personality being used to prove that a private corporation with a controlling shareholder has interests separate and apart from the shareholder is mindless formalism. See Stephen M Bainbridge, "Abolishing LLC Veil Piercing" (2005) U Ill L Rev 77 at 94.

156. In Thompson's US study, the absence of misrepresentation was noted by the courts most often. *Supra* note 6 at 1064–065. In the Australian study, the absence of sham, facade concealing the true facts, or fraud resulted in very low piercing rates. See Ramsay & Noakes, *supra* note 5 at 271, Table 14.

157. See Nicholls, "Pure Form", *supra* note 2 at 249–50.

by facilitating asset partitioning and these legitimate and important economic benefits are threatened in veil piercing cases.

Different descriptive and normative claims about the contextual factors that influence veil piercing were also tested in this study. While asset partitioning functions are performed by both separate legal personality and limited liability, Canadian courts have been more willing to preserve the latter than the former. That is, courts have been more willing to pierce the corporate veil to find a corporation liable for shareholder or sibling corporation obligations, but less willing to do so where it would mean holding a shareholder liable for corporate obligations. The classification of a veil piercing claim is relevant to the outcome as piercing rates have been higher in liability cases than they have been in shareholder or enterprise benefit cases.¹⁵⁸ Other factors that were found to have a statistically significant relationship to veil piercing rates were: the jurisdiction of the court, the number of shareholders, the identity of the claimant and the substantive nature of the claim.

The Canadian federal courts have pierced the veil least often while Alberta and Ontario courts have pierced the veil most often. Veil piercing rates were highest in the case of sole shareholder corporations. Third party government entity claims have been the most successful, while attempts by the corporation itself or parties related to the corporation have been the least successful.

With respect to the substantive nature of the claim, contrary to the view of a number of commentators, courts were not found to pierce the veil more often in tort cases than in contract cases.¹⁵⁹ Although we are,

158. It is recognized that a study necessarily limited to decided cases obviously excludes all settled cases and, of course, there is no way to determine the extent to which the outcome of these unobservable cases, had they proceeded to trial, may have affected the results in any or all of the categories discussed here. At the same time, however, it must be recognized that there is simply no basis upon which it can be assumed that the outcomes of these unobserved cases would necessarily have been any more (or, for that matter, any less) consistent with the “received wisdom” or general perceptions of practitioners and commentators. It is emphasized that this first study is, necessarily, preliminary. Additional analysis of the data set is needed to test the impact of the six part classification scheme set out in this study given other contextual factors.

159. In fact, in the sample for this study, courts actually pierced the corporate veil at a slightly higher percentage in contract cases (37.27%) than in tort cases (33.33%) and statistical significance testing indicates that the effect of the substantive nature of the claim on outcome is not likely due to chance alone. See Table 9 and accompanying text.

of course, mindful of the possibility that this outcome may reflect the fact that most “straightforward” claims would likely be settled without a trial, meaning those cases that result in a judicial decision are likely to have the most contestable facts or lie at the outer boundaries of doctrinal precedent.

The highest veil piercing rate was found to occur in the family law context. Furthermore, the rate of veil piercing in tax cases where the claimant was a third party government entity was also higher than the overall rate of veil piercing found in the study.

Factors that did not have a statistically significant relationship with veil piercing rates include the decade in which the case was decided and the level of court. No evidence was found to suggest that veil piercing rates have increased or decreased over time. Similarly, veil piercing rates did not differ significantly between trial and appellate courts. While the results from the study do suggest contextual factors can affect the outcome of veil piercing cases, regression analysis of the data is needed to examine simultaneously the relationships between the different contextual factors to the outcome of veil piercing decisions. Notably, the data provided in this study on the analytical factors upon which courts rely when making a veil piercing decision provide the least insight into what actually influences veil piercing rates.¹⁶⁰

As many commentators have noted in the past, the doctrinal basis for piercing the corporate veil leaves much to be desired. Not only are there too many vague verbal formulations intended to denote a finding of sufficient control or impropriety to justify veil piercing, but these terms are also largely devoid of analytical content. While a finding of significant shareholder (or other) control is significantly correlated with judicial decisions to pierce the veil, private corporations will frequently—even necessarily—be characterized by a high degree of control by shareholders. The fact that the use of such corporations is permitted by statute and further has been facilitated by the courts for well over a hundred years surely indicates the legitimacy of such enterprises. While no one would advocate for impropriety in the use of the corporate form or the perpetuation of injustice by corporations or their shareholders, these general concerns are not a sufficient basis upon which to justify vague and

160. A similar point has been made with respect to equivalent data from US cases. See e.g. Millon, *supra* note 150 at 17–23.

unpredictable veil piercing decisions. Thus, the challenge here is to define, in a principled and specific way, when the otherwise important asset partitioning functions of separate legal personality and limited liability should and will be disregarded by the courts.