Through the Looking Glass: Recent Developments in Piercing the Corporate Veil

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1. INTRODUCTION

The question of when a court should “pierce the corporate veil” and disregard a company’s separate legal personality has been a frequent source of debate among Canadian litigants. Nevertheless, while general principles have emerged from the case law, the courts have yet to provide a clear justification for their power to veil-pierce. Nor has a single test for doing so been consistently applied across the country or in all contexts.

Even more uncertain are the precise legal consequences of piercing the veil. Is the effect simply to enable the granting of discretionary remedies against the company and its controlling mind? Or does it place the controlling mind in the actual shoes of the company for all intents and purposes? And what law should govern these matters if the company in question and the underlying cause of action are subject to different legal regimes?

The recent decisions of the United Kingdom Supreme Court in VTB Capital Inc. v. Nutritek International Corp.¹ and Prest v. Petrodel Resources Limited² address these issues. In the much-anticipated VTB judgment, Lord Neuberger for the Court traces the development of the corporate veil in English law, and concludes that even where the veil is pierced, the legal consequence does not constitute the company’s controlling mind as an actual party to its agreements in derogation from the privy of contract doctrine. At the same time, Lord Neuberger questions whether courts possess the jurisdiction to pierce the corporate veil at all, at least absent a statute which expressly or implicitly permits it. Additionally, Lord Neuberger does not offer a clear test for piercing the corporate veil, and suggests that it may be an issue which is subject to multiple competing choice of law rules.

In Prest, decided only four months after VTB: the Court resolves some of the questions it left open in VTB. The leading judgment of Lord Sumption holds that courts do possess a common law jurisdiction to pierce the veil, at least where exceptional circumstances warrant it. As well, Lord Sumption offers a relatively clear

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² [2013] UKSC 3 [VTB].
³ [2013] UKSC 34 [Prest].
test for this. In essence, the test is whether piercing the veil is the only way to deprive a company or its controlling mind of an advantage they would otherwise obtain from the controlling mind’s use of the company’s legal personality to deliberately evade or frustrate enforcement of the controlling mind’s existing legal obligations, liabilities or restrictions.

Given the many contexts in which veil-piercing is relevant, and the lack of definitive guidance about it from the Canadian Supreme Court, VTB and Prest should have great significance in this country in addition to the United Kingdom itself. In the discussion that follows, we explore the rulings in these cases, and evaluate their potential impact upon four legal issues: (a) the jurisdiction to pierce the corporate veil; (b) the test for veil-piercing; (c) the legal consequences of veil-piercing; and (d) the choice of law rule to apply where the veil-piercing involves a foreign element.

2. THE DECISIONS IN VTB AND PREST

(a) VTB

VTB arose from a dispute over a failed loan made by VTB Capital, PLC (“VTB”) to Russagroprom LLC (“RAP”), in order to fund the acquisition by RAP of six Russian dairy companies from the defendant, Nutritek International Corp. (“Nutritek”). VTB was an English-incorporated company owned by a Russian state-bank, JSC VTB Bank (“VTB Moscow”). With financial assistance from VTB Moscow, VTB made the loan to RAP, a Russian-incorporated company, by entering into a “Facility Agreement” with it, and by executing several other related agreements, including an interest rate swap agreement (“ISA”) with RAP. When RAP defaulted on the loan, VTB sued Nutritek, a company incorporated in the British Virgin Islands, and two of Nutritek’s foreign affiliates (the “Marcap Affiliates”), along with a Russian individual, Malofeev, who was alleged to be the principal beneficial owner and controller of Nutritek, the Marcap Affiliates and of RAP itself.

VTB’s claim was initially framed in tort, and asserted that the defendants were liable for deceit and unlawful means conspiracy. At the heart of the action was the allegation that Nutritek, as part of a conspiracy with the remaining defendants, made two fraudulent misrepresentations that induced VTB’s entry into the transaction:

(1) it misrepresented that Nutritek and RAP were independent arm’s length entities who were not under common control; and

(2) it misrepresented the value of Nutritek’s dairy companies to Ernst & Young Valuation LLC, which prepared a valuation report for VTB and VTB Moscow.

In 2011, VTB obtained an ex parte order permitting it to serve the defendants ex juris, as well as a worldwide freezing order over US$200 million of Malofeev’s assets. The defendants moved to set these orders aside.3 In response, VTB moved to amend its claim to assert that Malofeev and the Marcap Affiliates were jointly

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3 One of the Marcap Affiliates was not served, and so did not move to set the order aside.
and severally liable with RAP in contract for breach of the Facility Agreement and ISA, on the theory that the court should pierce RAP's corporate veil. According to VTB, the defendants used RAP as a façade to enter into the two contracts for the purposes of defrauding it.

VTB's primary motivation in making this allegation was that the Facility Agreement contained forum-selection and choice-of-law clauses in favour of England. It sought to argue that, insofar as these defendants could be viewed as deemed parties to the Facility Agreement, then service ex juris could be validated against them based on the English forum-selection clause\(^4\) (or, failing that, based on an English practice direction which permitted service ex juris in relation to claims under contracts containing English forum-selection clauses or governed by English law).\(^5\)

The motions were initially heard together in November of 2011 by Arnold J. In a lengthy set of reasons,\(^6\) he dismissed VTB's motion to amend its claim, and granted the defendants' motion to set aside the service ex juris order — and by extension the worldwide freezing order — since VTB had not demonstrated that England was clearly the appropriate forum in which to try the action. In rejecting VTB's proposed amendment, Arnold J. concluded that even if RAP's corporate veil were to be pierced, the legal consequence of that could not be to render the provisions of the Facility Agreement and ISA enforceable against the defendants.

On June 20, 2012, Arnold J.'s judgment was affirmed by the English Court of Appeal.\(^7\) Lloyd L.J., who delivered the unanimous judgment, held that a court which pierces the corporate veil cannot go beyond granting discretionary equitable relief against the company or its controlling mind, and cannot deem the controlling mind to be an actual party to the company's contracts. In other words, he held, there is in law no such device as a "remedial constructive contract".\(^8\) Attempts to merge the legal identities of a company and its controlling mind for the purpose of fixing one with the other's contractual obligations were viewed as inconsistent with both the privity of contract doctrine, and the principle of separate personality articulated in *Salomon v. A. Salomon and Co.*\(^9\)

The U.K. Supreme Court dismissed VTB's further appeal on February 6, 2013. Separate reasons were given by the five members of the Court, most of whom focused upon whether service ex juris should be set aside on the ground that England was not the appropriate forum. However, Lord Neuberger also addressed VTB's efforts to amend its claim through reliance on the veil-piercing doctrine, and the other Justices largely agreed with his reasons on this point.\(^10\)

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4. This was pursuant to art. 23(1) of Council Regulation 44/2001/EC (the *Brussels Regulation*).
5. This was pursuant to gateway (6) of para. 3.1 of Practice Direction 6B of Part 6 of the *Civil Procedure Rules*.
8. *VTB, supra.*, n. 1 at para. 45.
9. [1897] AC 22 (HL) [*Salomon*].
10. *VTB, supra.*, n. 1 at paras. 72, 158, 238 and 243.
Lord Neuberger began by acknowledging that there is doubt as to whether a common law jurisdiction to pierce the corporate veil exists at all. He noted that the only case in which the United Kingdom’s highest Court appeared to countenance the doctrine — Woolfson v. Strathclyde Regional Council — involved a situation where the Law Lords were merely prepared to assume that the power exists. Further, Lord Neuberger found there was “great force” to the argument that the seminal judgment in Salomon was actually a case where the Court rejected the ability to pierce the veil as a matter of principle, not merely on its facts. Adding to the difficulty was that in many of the leading cases where a court supposedly “pierced” the corporate veil, it was either common ground that the jurisdiction existed, or the result could have been explained by another legal doctrine (e.g., agency). As well, the obscure nature of veil-piercing (with its imprecise terminology of “sham”, “mask” and “puppet”) suggested that it lacked a principled basis.

Nonetheless, Lord Neuberger also found that “there are points the other way”. These included the facts that some of the cases where the veil was pierced were difficult to explain on another legal basis, and that piercing the veil in certain situations may be necessary “in order to defeat injustice”. In the end, Lord Neuberger declined to definitively resolve whether “unless any statute relied on in the particular case expressly or impliedly provides otherwise, the court cannot pierce the veil of incorporation”, because as discussed below, VTB could not succeed even if the veil was capable of being pierced, and it was inappropriate to decide an issue of such general importance on an interlocutory appeal. However, in a noteworthy concurrence, Lord Wilson cast doubt upon the submission “that English law recognises no principle that the corporate veil may ever be lifted”, calling that submission “highly ambitious” (despite also declining to resolve the issue).

Turning to the facts of the appeal, Lord Neuberger recognized that there was a threshold choice of law issue surrounding the veil-piercing claim, since RAP was incorporated in Russia but the Facility Agreement and ISA were both governed by

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11 At paras. 118-119 of VTB, Lord Neuberger observed that some cases had drawn a distinction between “piercing” and merely “lifting” the corporate veil, but declined to decide whether such a distinction was valid, and used the term “piercing” for the balance of his reasons. In Prest, this distinction appears to have been taken up by Lord Sumption under the rubric of the “evasion” and “concealment” principles, discussed further below.
12 1978 SLT 159 (HL).
13 VTB, supra, n. 1 at paras. 120-121.
14 Ibid., at para. 122.
15 Ibid., at paras. 123-125.
16 Ibid.
17 Ibid., at para. 127.
18 Ibid.
19 Ibid., at para. 130.
20 Ibid., at para. 158.
the laws of England. Nonetheless, he declined to resolve this issue as well, since both parties had proceeded on the basis that English law applied:

... [T]here may be a choice of law question to be addressed in cases which concern the piercing of the veil of a foreign incorporated company. That question is whether the proper law governing the piercing of the corporate veil is the lex incorporationis, the lex fori, or some other law (for example, the lex contractus, where the issue concerns who is considered to be party to a contract entered into by the company in question). The ultimate conclusion may be that there is no room for a single choice of law rule to govern the issue: see Tham “Piercing the corporate veil: searching for appropriate choice of law rules” [2007] LMCLQ 22, 27. However, given that it has been common ground throughout these proceedings that the issue is to be resolved pursuant to English law, it is inappropriate to say more about this issue.21

Lord Neuberger then made two critical findings. First, he held that even assuming RAP’s veil were to be pierced, the result could not be to convert Malofeev and the Marcap Affiliates into actual parties to the Facility Agreement and ISA. This would be contrary to the rule in Salomon as well as the privity of contract doctrine, and was unnecessary since the law already gave VTB a cause of action against Malofeev for the tort of deceit:

... Even accepting that the court can pierce the corporate veil in some circumstances, the notion of such joint and several liability is inconsistent with the reasoning and decision in Salomon. A company should be treated as being a person by the law in the same way as a human being. The fact that a company can only act or think through humans does not call that point into question: it just means that the law of agency will always potentially be in play, but, it will, at least normally, be the company which is the principal, not an agent. On VTB’s case, if the agency analogy is relevant, the company, as the contracting party, is the quasi-agent, not the quasi-principal. Subject to some other rule (such as that of undisclosed principal), where B and C are the contracting parties and A is not, there is simply no justification for holding A responsible for B’s contractual liabilities to C simply because A controls B and has made misrepresentations about B to induce C to enter into the contract. This could not be said to result in unfairness to C: the law provides redress for C against A, in the form of a cause of action in negligent or fraudulent misrepresentation.22

Lord Neuberger thus found that the first instance ruling in Antonio Gramsci Shipping Corp. v. Stepanovs,23 which had held to the contrary, was wrongly decided.24 Lord Clarke, writing in dissent on the broader jurisdictional appeal, would

21 Ibid., at para. 131.
22 Ibid., at paras. 138-139. At para. 141, Lord Neuberger also rejected VTB’s attempt to draw an analogy to the liability of an undisclosed principal for contractual obligations entered into by its agent. Indeed, he found that “the analogy tells against VTB’s argument”, since the undisclosed principal doctrine was itself “an anomaly”.
24 VTB, supra., n. 1 at paras. 133, 137 and 147.
have left this question open,\textsuperscript{25} but none of the other Justices concurred with him on this point.

Second, Lord Neuberger held that “[q]uite apart from this”, there was simply no factual basis on which to justify the Court in piercing RAP’s corporate veil:

\textldots[T]he facts relied on by VTB to justify piercing the veil of incorporation in this case do not involve RAP being used as “a façade concealing the true facts”. In my view, if the corporate veil is to be pierced, “the true facts” must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). Here, on VTB’s case, “the true facts” relate to the control, trading performance, and value of the Dairy Companies (if one considers the specific allegations against Mr Malofeev), or to the genuineness of the nature of the underlying arrangement (which involves a transfer of assets between companies in common ownership). Neither of these features can be said to involve RAP being used as a “façade to conceal the true facts”.\textsuperscript{26}

Accordingly, while Lord Neuberger did not articulate a clear test for when courts may pierce the corporate veil (assuming such a jurisdiction exists), his reasons suggest that one element which must be present is the use of the company by the controlling mind as a way to disguise its true involvement in the transaction. In other words, mere wrongdoing by the defendant, and mere control by it of the company, will not suffice if the control is not also exercised for the purpose of concealing the defendant’s involvement in the transaction and associated wrongdoing. This was the approach taken by Lloyd L.J. in the Court of Appeal below.\textsuperscript{27} It also finds support in another comment by Lord Neuberger, which was made in response to the argument that the unprincipled nature of the veil-piercing doctrine detracts from the existence of such a power:

\textldots In answer to the contention that the approach of the courts to the issue of piercing the veil is unprincipled, there is real force, at least on the face of it, in the fact that it cannot be invoked merely where there has been impropriety. As Munby J put it in \textit{Ben Hashem}, paras 163-164, “it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing \ldots at the time of the relevant transaction(s)”.\textsuperscript{28}

(b) Prest

Unlike \textit{VTB}, the \textit{Prest} decision did not arise in a commercial context, but rather in proceedings for ancillary relief following a divorce. The appellant Prest was the ex-wife of a man who owned and controlled a number of related companies, including the respondents. During the divorce proceedings, her ex-husband repeatedly failed to comply with the duty to make full disclosure of his finances,
through a course of conduct which the Supreme Court "characterised by persistent obstruction, obfuscation and deceit, and a contumelious refusal to comply with rules of court and specific orders".29

At first instance on October 4, 2011,30 Moylan J. made a significant award in favour of the appellant, including a £17.5 million lump sum payment and the £4 million matrimonial home. He also ordered that three of the respondent companies controlled by the ex-husband convey various assets to her in satisfaction of the judgment. In doing so, Moylan J. recognized that he would not ordinarily be permitted to pierce the respondents' corporate veils, since this may only be done where the legal personality of a company has been abused for an improper purpose, which was not the case here. Nonetheless, Moylan J. found that a wider jurisdiction to pierce the corporate veil existed under the Matrimonial Causes Act 1973 (U.K.) than was available at common law.

On October 26, 2012, Moylan J.'s ruling was set aside by the English Court of Appeal.31 The majority held that there was no greater ability to pierce the corporate veil in family law cases than in any other context. Since there was no evidence that the legal personalities of the respondents had been abused for an improper purpose, nor a finding that they held the relevant properties on trust for the ex-husband, the respondents could not be ordered to convey the properties to the appellant.

A seven-member panel of the UK Supreme Court unanimously overturned the Court of Appeal's judgment. The Supreme Court agreed that the corporate veils of the respondents should not be pierced at common law, and that there was no wider jurisdiction to do so under the Matrimonial Causes Act 1973.32 However, it ultimately found the respondents could be ordered to convey the properties to the appellant since they held them on a resulting trust for the ex-husband. In the course of its decision, the Court devoted considerable attention to the issue of piercing the corporate veil.

The leading judgment was delivered by Lord Sumption. He began by observing that while "[t]he separate personality and property of a company is sometimes described as a fiction . . . the fiction is the whole foundation of English company and insolvency law".33 Further, he noted that the expression "piercing the corporate veil" is often indiscriminately applied to a range of situations in which the law attributes the acts or property of a corporation to those who control it, but without disregarding its separate legal personality (e.g., joint liability, trust law, equitable remedies or in certain statutory contexts). According to Lord Sumption, "when we

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29 Prest, supra, n. 2 at para. 4.
31 Petrodel Resources Ltd. v. Prest, [2012] 3 FCR 588 (Eng CA).
32 On the latter point, see Prest, supra, n. 2 at para. 37, where Lord Sumption observed that "[c]ourts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different". This approach may be contrasted with that taken by some Canadian courts, who have suggested that the rules for piercing the corporate veil are more "relaxed" or "not applied as stringently" in the family law context: Wildman v. Wildman (2006), 82 OR (3d) 401 (CA) at paras. 30 and 49; Goett v. Goett, 2013 ABCA 216 at para. 13.
33 Prest, supra, n. 2 at para. 8.
speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in *Salomon* . . . i.e., where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.\(^{34}\)

In an important doctrinal development, Lord Sumption founded this jurisdiction to pierce the corporate veil upon the general judicial aversion to fraudulent conduct.\(^{35}\) He gave several examples of this basic tendency, such as the vitiation of contracts or judgments founded on fraud, and the refusal of courts to permit reliance on statutory rights where they would be used to deliberately facilitate an illegal purpose.\(^{36}\) He then reviewed the English jurisprudence, including *VTB*, and concluded that a narrow jurisdiction to pierce the corporate veil did indeed exist:

... [T]he principle that the court may be justified in piercing the corporate veil if a company’s separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.\(^{37}\)

Turning to the question of what “wrongdoing” must exist for a court to exercise this extraordinary jurisdiction, Lord Sumption found that the frequent references to a company being used as a “façade” or “sham” were unsatisfactory, and involved two distinct principles that had come to be confused: (1) the “concealment” principle; and (2) the “evasion” principle. He stated:

... The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally

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\(^{34}\) *Ibid.*, at para. 16.

\(^{35}\) Citing Lord Denning’s famous observation that “fraud unravels everything” in *Lazarus Estates Ltd. v. Beasley*, [1956] 1 QB 702 (CA) (see also *May v. Platt*, [1900] 1 Ch 616 at 623 and *Farah v. Barki*, [1955] SCR 107 at 115. Lord Sumption stated at para. 18 of *Prest*: “the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not”.

\(^{36}\) *Prest*, supra. n. 2 at para. 18. Lord Sumption went on to note that: “[T]hese decisions (and there are others) illustrate a broader principle governing cases in which the benefit of some apparently absolute legal principle has been obtained by dishonesty”.

\(^{37}\) *Ibid.*, at para. 27.
relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. ... 38

To illustrate this distinction, Lord Sumption considered four cases where the courts have been thought to pierce the corporate veil.

In the first two cases — Gilford Motor Co Ltd v. Horne39 and Jones v. Lipman40 — he found that the courts had in fact pierced the veil based on the evasion principle. The facts in both cases were similar. The controlling mind was under a pre-existing contractual obligation to the plaintiff (in Gilford, a non-competition covenant, and in Jones, an agreement to convey property), which he sought to evade through a company he controlled (in Gilford, by using the company to compete with the plaintiff, and in Jones, by transferring the property to the company to defeat the plaintiff's right to specific performance). The Court in Gilford granted an injunction, and in Jones specific performance, against both the company and the controlling mind. Lord Sumption found that, as against the controlling minds, the orders were granted on the concealment principle, but as against the companies, they were granted on the evasion principle.41

In the other two cases — Gencor ACP Ltd v. Dalby42 and Trustor AB v. Smallbone (No 2)43 — Lord Sumption found the courts did not apply the evasion principle. The facts of both involved a company who received payments as agent or nominee for its controlling mind, which the controlling mind procured to be paid to the company in breach of his fiduciary duty to the plaintiff. The courts in each case

38 Ibid., at para. 28.
39 [1933] Ch 935 (CA) [Gilford].
40 [1962] 1 WLR 832 (Ch D) [Jones].
41 Prest, supra, n. 2 at paras. 29-30. It is interesting that the evasion principle was only found to operate in Gilford and Jones with respect to the granting of the injunction against the company, not the controlling mind. At para. 92 of Prest, Lady Hale suggested that this scenario did not involve veil-piercing, stating that: "what the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (if it existed at all). In the converse case, where it is sought to convert the personal liability of the owner or controller into a liability of the company, it is usually more appropriate to rely upon the concepts of agency and of the 'directing mind'". Lord Sumption's judgment inverts this traditional paradigm, and holds that the corporate veil is only pierced where the company's personality is disregarded to obtain a remedy against the company (or perhaps the controlling mind) in respect of a liability that would otherwise be that of the controlling mind alone.
42 [2000] 2 BCLC 734 (Ch D).
43 [2001] 1 WLR 1177 (Ch D).
ordered an accounting against the company and the controlling mind, ostensibly by piercing the corporate veil. However, Lord Sumption held this only involved an application of the concealment principle, pursuant to rules of corporate attribution or agency law. In both cases the company was independently liable to account the plaintiff based on knowing receipt, and the controlling mind was only liable because, on the "true facts", the company received the funds as his agent or nominee. Therefore, the controlling mind had not "used the company's separate legal personality to evade a liability that [he] would otherwise have had", since he only became liable to account after the company was found to have received the monies on his behalf. In other words, the controlling mind was not seeking to use the company to evade an obligation that he owed independently of the company's involvement.

Lord Sumption contrasted this with the situation in Gilford and Jones, where the controlling mind "had a liability which arose independently of the involvement of the company". In his view, this distinction also explained the basis for the decision in VTB:

These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about. Thus in a case like VTB Capital, where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract, the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist. The objection to that argument is obvious in the case of a consensual liability under a contract, where the ostensible contracting parties never intended that any one else should be party to it. But the objection would have been just as strong if the liability in question had not been consensual.

In the end, Lord Sumption proposed the following test for when the corporate veil could be pierced:

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 corporate 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

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44 Prest., supra., n. 2 at paras. 31–33.
45 Ibid. See also para. 28: "[t]he evasion principle . . . is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement. and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement".
46 Ibid., at para. 34, emphasis added.
personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. . . . I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. . . .

Turning to the facts of Prest itself, Lord Sumption held this test was not met by the appellant. Although the ex-husband had behaved improperly by misapplying the respondents’ assets for his own benefit, “he was neither concealing nor evading any legal obligation owed to his wife” nor “concealing or evading the law relating to the distribution of assets of a marriage upon its dissolution”. 48 Further, while he used the respondents’ corporate structure to deny being an owner of the properties, that merely required the Court to ascertain the true facts pursuant to the concealment principle (which were that the legal interest in the properties had been vested in the respondents for wealth protection and tax planning purposes long before the marriage dissolved, not to defeat the appellant’s claim). In the result, Lord Sumption held that “the piercing of the corporate veil cannot be justified in this case by reference to any general principle of law”.

The remaining six members of the Court generally agreed with Lord Sumption’s treatment of the corporate veil, albeit with some important qualifications. 50 Of particular note is the lengthy concurrence of Lord Neuberger, who authored the corporate veil reasons in VTB. Three aspects of his judgment are important.

First, despite declining to resolve in VTB whether the veil can be pierced at common law at all, he concluded in Prest “that it would be wrong to discard” the doctrine. 51 Lord Neuberger did so even though he disagreed with Lord Sumption that Gilford and Jones were true veil-piercing cases (a point he had earlier made in VTB), 52 and found that there were no other cases in which the doctrine was rightly applied on the facts where the result could not have been achieved through some other, conventional legal basis. 53

Second, as discussed above, Lord Neuberger in VTB had appeared content with a test for piercing the corporate veil that asked, inter alia, whether the controlling mind used the company as a “façade to conceal the true facts” of its involvement in the transaction and associated wrongdoing. This is similar to the concealment principle which Lord Sumption rejected as a form of piercing the corporate

47 Ibid., at para. 35.
48 Ibid., at para. 36.
49 Ibid.
50 See, e.g., Lord Walker’s suggestion at para. 106 that “piercing the corporate veil’ is not a doctrine at all, in the sense of a coherent principle or rule of law”.
51 Prest, supra, n. 2 at para. 80.
52 VTB, supra, n. 1 at paras. 134-135.
53 Prest, supra, n. 2 at paras. 68-74. See, however, paras. 95 and 106 of Prest, where Lady Hale (Lord Wilson concurring) and Lord Walker suggested that Stone & Rolls Ltd v. Moore Stephens (a Firm), [2009] 1 AC 1391 (HL) was an example of the Court piercing the corporate veil.
veil in *Prest*. In his reasons in *Prest*, Lord Neuberger appeared to abandon any such independent test to the extent he may have proposed one in *VTB*:

I also agree that cases concerned with concealment do not involve piercing the corporate veil at all. They simply involve the application of conventional legal principles to an arrangement which happens to include a company being interposed to disguise the true nature of that arrangement. Accordingly, if piercing the corporate veil has any role to play, it is in connection with evasion.

... Having read what Lord Sumption says in his judgment, especially in paras 17, 18, 27, 28, 34 and 35, I am persuaded by his formulation in para 35, namely that the doctrine should only be invoked where "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".54

Third, however, Lord Neuberger went on to suggest that the evasion test proposed by Lord Sumption may not be limited to cases involving corporations, but encompasses a broader jurisdiction to set aside many kinds of fraudulent transactions:

... in so far as it is based on “fraud unravels everything”, as discussed by Lord Sumption in para 18, the formulation simply involves the invocation of a well-established principle, which exists independently of the doctrine. In any event, the formulation is not, on analysis, a statement about piercing the corporate veil at all. Thus, *it would presumably apply equally to a person who transfers assets to a spouse or civil partner, rather than to a company*. Further, at least in some cases where it may be relied on, it could probably be analysed as being based on agency or trusteeship especially in the light of the words “under his control”. However, if either or both those points were correct, it would not undermine Lord Sumption’s characterisation of the doctrine: it would, if anything, serve to confirm the existence of the doctrine, albeit as an aspect of a more conventional principle...55

As for the remaining judgments, they appear to cast some doubt upon the integrity of the evasion/concealment distinction drawn by Lord Sumption and accepted by Lord Neuberger. Lady Hale (with whom Lord Wilson agreed) questioned “whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion”.56 In her view, “[t]hey may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business”.57 Lord Mance went further, stating that it is “dangerous to seek

54 *Ibid.* at paras. 61 and 81.
to foreclose all possible future situations which may arise and I would not wish to do so”.58 His reasons were agreed with by Lord Clarke, who said:

... Lord Sumption may be right to say that it will only be done in a case of evasion, as opposed to concealment, where it is not necessary. However, this was not a distinction that was discussed in the course of the argument and, to my mind, should not be definitively adopted unless and until the court has heard detailed submissions upon it. I agree with Lord Mance that it is often dangerous to seek to foreclose all possible future situations which may arise and, like him, I would not wish to do so. ...59

While these observations leave open the possibility for additional exceptions to be engrafted onto the principle of separate corporate personality in the future, both Lord Clarke and Lord Mance noted that “if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare”.60 As such, “no-one should be encouraged to think that any further exception, in addition to the evasion principle, will be easy to establish. It will not”.61

3. ANALYSIS

(a) The Jurisdiction to Pierce the Corporate Veil

The question of whether courts actually possess the common law jurisdiction to pierce the corporate veil does not appear to have attracted a great deal of attention from the Canadian judiciary. Most judges, citing the Supreme Court of Canada’s ruling in Kosmopoulos v. Constitution Insurance Co.,62 take it as a given that the veil may be pierced in exceptional circumstances, and focus instead upon defining what those circumstances are. However, the Supreme Court in Kosmopoulos did not explore why the jurisdiction to pierce the corporate veil should exist. Instead, Wilson J. stated that “I have no doubt that theoretically the veil could be lifted in this case to do justice”, citing only an English textbook and a single American case for support.63

As some commentators have noted,64 a common law power to pierce the corporate veil sits uneasily alongside statutory provisions such as s. 45 of the Canada Business Corporations Act,65 first introduced in 1975, which provides that “[t]he shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation except under subsection 38(4), 118(4) or (5), 146(5) or 226(4) or (5)”. Veil-piercing will thus in many cases be inconsistent with the will of Parliament, not merely the common law rule in Salomon. In these circumstances, a clear justification for Canadian courts to pierce the corporate veil must be found.

58 Ibid., at para. 100.
59 Ibid., at para. 103.
60 Ibid., at para. 100 (and 103).
61 Ibid., at para. 103 (and 102).
62 [1987] 1 SCR 2 [Kosmopoulos].
63 Ibid., at 10-11.
65 RSC 1985, c C-44.
This is evident from Lord Neuberger's refusal to decide whether veil-piercing is possible at all in *VTB*.

The decision in *Prest* provides such a justification. As Lord Sumption observed, the courts have long exercised a general power to preclude the use of a legal institution, such as a contract, judgment, legal status or statutory right, to effect a fraudulent or dishonest evasion of the law. This is reflected in the maxim that parties "cannot do indirectly what they cannot do directly"; 66 which courts have applied in various forms to restrain the unqualified use of legal rights. 67 It is also reflected in the principles that a statute should be construed in good faith and that parties should not be allowed to profit from their own wrongs. 68 These principles have been used to construe unqualified statutory grants so as not to involve, require or confer something that is illegal. 69 Finally, the evasion principle is seen in the ancient concept of fraud upon the law, whereby courts will construe a statute so as to preclude a scheme undertaken to evade the policy of the Act even though it does not contravene the Act's express terms. 70 While this concept has not always been rigorously observed, 71 there are many decisions which recognize or apply it, 72 and the basic principle may be traced to *Heydon's Case*:

...the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle in-

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67 For instance, in the context of contract law, courts have held there may be a duty of good faith that prohibits a party from evading its obligations through conduct that is not strictly prohibited by the letter of the agreement, but that nevertheless has the effect of defeating rights under the agreement: *CivicLife.Com Inc. v. Canada (A.G.)* (2006), 215 OAC 43 (CA) at paras. 49 and 51; *Doucet v. Spielo Manufacturing Inc.* (2011), 332 DLR (4th) 407 (NBCA) at para. 54; leave to appeal refused [2011] SCCA No. 317.

68 See *Secretary of State for Communities and Local Government v. Welwyn Hatfield Borough Council*, [2011] 2 AC 304 at para. 46: "construction in bonam partem is related to three specific legal principles. The first is that a person should not benefit from his own wrong’. The second principle precludes a person from succeeding if he has to prove an unlawful act to claim the statutory benefit, and the third is that ‘where a grant is in general terms there is always an implied provision that it shall not include anything which is unlawful or immoral’.


70 *R v. J.*, [2005] 1 AC 562 (HL) at paras. 37 and 64.


ventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico. ... 73

The jurisdiction to pierce the corporate veil can be rationalized as a particular application of these fundamental concepts, in which the courts will construe a statute that grants the right of separate corporality personality so as to preclude the abuse of that right by the controlling mind in furtherance of a fraudulent scheme to evade the law. As Lady Hale said in Prest:

... The question nevertheless arises as to whether, in a case such as this, the courts have power to prevent the statutes under which limited liability companies may be established as separate legal persons, whether in this or some other jurisdiction, being used as an engine of fraud. I agree with Lord Sumption that “piercing the corporate veil” is an example of that general principle... 74

(b) The Test for Piercing the Corporate Veil

Apart from the situation where a statute permits the Court to pierce the corporate veil, 75 or where a principal-agency relationship exists, 76 Canadian courts have taken two main approaches in deciding whether to impose liability upon a controlling shareholder for the conduct of its company. 77

The first approach, which is also the predominant one, states a two pronged test requiring both domination of the subsidiary and the use of that domination to

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Continental Bank Leasing Corp. v. Canada. [1998] 2 SCR 298 at paras. 87–89, per Bastarache J. (dissenting on other grounds).

73 Prest, supra, n. 2 at para. 89.

74 Prest, supra, 3 Co. Rep. 7a, 76 E.R. 637 at 638, emphasis added.

75 Many of the cases where a court has pierced the veil on the basis of a statute arise in the tax context; see the discussion in Buanderie centrale de Montréal Inc. v. Montreal (city), [1994] 3 SCR 29.

76 The agency basis for imposing liability is distinct from piercing the corporate veil, since the former assumes that the corporation and controlling mind are distinct, whereas the latter ignores the legal persona of the corporation: Dumbrell v. Regional Group of Companies Inc. (2007), 85 OR (3d) 616 (CA) at para. 80. Nonetheless, the two concepts are frequently conflated by the courts; see Globex Foreign Exchange Corp. v. Launt (2011), 335 DLR (4th) 257 (NSCA) at paras. 21–22.

77 Other, more exotic situations where courts have allegedly pierced the corporate veil to the detriment of the controlling mind (e.g., where there is a trust relationship or a threat to national security) are discussed by K.P. McGuinness, Canadian Business Corporations Law, 2nd ed. (Markham, Ont.: LexisNexis Canada Inc., 2007), Ch. 2. Cases where the controlling mind or company themselves seek to pierce the corporate veil to claim the benefit of a right accruing to the other (or some conduct engaged in by the other) raise different considerations, and are not addressed in detail in this paper; see C.C. Nicholls, Corporate Law (Toronto: Emond Montgomery Publications Ltd., 2005) at 209–213. Courts are usually reluctant to pierce the veil in this situation, on the theory that a shareholder must accept the burdens of incorporation if it is to enjoy the benefits: Houle v. Canadian National Bank, [1990] 3 SCR 122 at 178–180; Southcott Estates Inc. v. Toronto Catholic District School Board, 2012 SCC 51 at para. 30.
conceal egregious wrongdoing. Under this view, the courts should only "disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct".78 This approach does not permit the corporate veil corporate veil to be pierced simply based on the shareholder's control of the company alone (e.g., pursuant to the economic theory that a parent and its subsidiaries constitute a "group enterprise" in which their distinct legal personalities can be overlooked).79 The test is thus similar to the one that Lord Neuberger appeared to contemplate in VTB, and generally requires improper conduct "akin to fraud, deceit, dishonesty or want of authority and [that] constituted a tort in itself",80 which the controlling mind seeks to conceal by using the company as a façade.81

A handful of courts have taken a different approach, and held that the veil may be pierced even where there is no allegation that the controlling mind used the company to conceal its involvement in fraudulent or improper conduct.82 Accord-

78 642947 Ontario Ltd. v. Fleischer (2001), 56 OR(3d) 417 (CA) at para. 68. The Court in Fleischer called this the "guiding principle", and suggested it could be met where either "the company is incorporated for an illegal, fraudulent or improper purpose" or where "those in control expressly direct a wrongful thing to be done". See also: Haskett v. Equifax Canada Inc. (2003), 63 OR (3d) 577 (CA) at para. 61; leave to appeal to S.C.C. refused [2003] SCCA No. 208; Burke Estate v. Royal & Sun Alliance Insurance Co. of Canada (2011), 381 N.B.R. (2d) 81 (CA) at paras. 60–64; leave to appeal to S.C.C. refused [2011] SCCA No. 553; and Elbow River Marketing Limited Partnership v. Canada Clean Fuels Inc. (2012), 1 BLR (5th) 292 (Alta CA) at para. 16. For an extensive discussion of this approach, see Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 OR (3d) 423 (Gen Div); aff’d [1997] O.J. No. 3754 (CA).


80 A-C-H International Inc. v. Royal Bank of Canada (2005), 254 D.L.R. (4th) 327 (Ont. CA) at para. 29. However, not all Canadian cases have required the improper conduct to take the form of fraud, particularly where rights and obligations under a statute are at issue. For instance, courts have been willing to pierce the corporate veil where the controlling mind uses the company as a cloak to breach its own contractual obligations, or where it acts in a commercially unreasonable fashion through it so as to willingly compromise the plaintiff's interests: see Saskatchewan Economic Development Corp. v. Patterson-Boyd Manufacturing Corp., [1981] 2 WWR 40, [1981] SJ No 1417 (CA) at paras. 28–29 (QL); leave to appeal to SCC refused [1981] SCCA No. 267; and Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc. (2009), 305 DLR (4th) 577 (Ont CA) at paras. 52–55.

81 BG Preco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. (1989), 60 DLR (4th) 30, 1989 CarswellBC 104 (CA) at paras. 41 and 49 (WLeC).

82 See, e.g.: Nedco Ltd. v. Clark (1973), 43 DLR (3d) 714, [1973] SJ No 409 (CA) at paras. 19–27 (QL); Northeast Marine Services Ltd. v. Atlantic Pilotage Authority.
ing to these cases, “a party’s conduct does not have to rise to the level of fraud or criminal wrongdoing before the courts will pierce the corporate veil”\textsuperscript{83} This approach is frequently linked to Kosmopoulos, where Wilson J. observed that “[t]he law on when a court may . . . ‘lift[t] the corporate veil’ . . . follows no consistent principle”;\textsuperscript{84} and went on to suggest that the veil could be pierced where to do otherwise “would yield a result ‘too flagrantly opposed to justice, convenience or the interests of the Revenue’”\textsuperscript{85}

However, the notion that it may be appropriate to pierce the corporate veil based on considerations of “justice” alone has been heavily criticized by other courts. As some have observed,\textsuperscript{86} the main authority the Supreme Court cited for this proposition was the 1979 edition of Gower on Modern Company Law, and later editions of Gower repudiate the “interests of justice” as a free-standing basis for piercing the corporate veil.\textsuperscript{87} Further, the facts in Kosmopoulos did not involve an attempt by a plaintiff to pierce the corporate veil in order to impose liability against the company’s controlling mind, but rather an attempt by the controlling mind himself to pierce the corporate veil (in order to assert an ownership interest in the company’s damaged assets for the purposes of recovering under his insurance policy), which was unsuccessful.\textsuperscript{88} Given these features of Kosmopoulos, most Canadian courts have refused to treat it as establishing a free-standing ability to pierce the corporate veil simply because it would be in the interests of justice to do so.\textsuperscript{89}

\textsuperscript{83} Globex Foreign Exchange Corp. v. Launt (2011), 335 DLR (4th) 257 (NSCA) at para. 24.

\textsuperscript{84} Kosmopoulos, supra, n. 62 at 10.

\textsuperscript{85} Ibid.


\textsuperscript{87} According to the most recent edition, P.L. Davies & S. Worthington, Gower & Davies Principles of Modern Company Law, 9th ed. (London: Sweet & Maxwell, 2012) at 221, “as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance”. The authors refer in this regard to Adams v. Cape Industries Plc, [1990] Ch 433 (CA), a case decided after Kosmopoulos, where Slade L.J. stated at 536 that “the court is not free to disregard the principle of Salomon . . . merely because it considers that justice so requires”.

\textsuperscript{88} The end result in Kosmopoulos however was to attribute an insurable interest in the company’s property to the controlling mind, which some commentators have characterized as veil-piercing in disguise: see C.C. Nicholls, Corporate Law (Toronto: Emond Montgomery Publications Ltd., 2005) at 190–192.

\textsuperscript{89} BG Preco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. (1989), 60 DLR (4th) 30, 1989 CarswellIBC 104 (CA) at paras. 37–39 (WLeC); Boyd v. Wright Environmental Management Inc. (2008), 303 DLR (4th) 747 (Ont. CA) at paras. 44–46; Yaliguaje v. Chevron Corporation, 2013 ONSC 2527 at paras. 97-98. For an extensive discussion of Kosmopoulos, see Transamerica Life Insurance Co. of Canada v. Canada Life
In the wake of *Prest*, it is clear that this second approach has also been rejected by the English courts. Piercing the corporate veil merely where it would be in the interests of justice is at odds with the “fraudulent evasion” justification for the doctrine articulated by Lord Sumption. As Lord Neuberger stated in *Prest:*

... [If the formulation is intended to go wider than the application of “fraud unravels everything”, it seems to me questionable whether it would be right for the court to take the course of arrogating to itself the right to step in and undo transactions, save where there is a well-established and principled ground for doing so. Such a course is, I would have thought, at least normally, a matter for the legislature. ...]

It is submitted that the result should be the same in Canada. Absent the fraudulent or dishonest use of the corporate form to evade the law, and the special principles of statutory interpretation that this engages,* see the text accompanying footnotes 66–74 above. the court’s ability to disregard provisions like s. 45 of the *CBCA* loses its rationale.

As to the first approach, it is consistent with *Prest* in part, since it only permits a court to ignore the company’s separate personality where it is “being used as a shield for fraudulent or improper conduct” by its controlling mind. However, to the extent that this reference to a “shield” means that the company is only being used to conceal the controlling mind’s wrongdoing, and not to evade the controlling mind’s legal obligations,* see *Yaiguaje v. Chevron Corporation*, 2013 ONSC 2527 at para. 95: “[t]he impropriety must be linked to the use of the corporate structure to avoid or conceal liability for that impropriety”. *Prest*, supra, n. 2 at para. 83.

(c) The Legal Consequences of Piercing the Corporate Veil

One of the most important results of *VTB* is that it clarifies the precise legal consequences of piercing the corporate veil, particularly in the context of contrac-
tual claims. Lord Neuberger held that a court which pierces the veil cannot thereby make the controlling mind an actual party to its company’s agreements. This conclusion was confirmed by Lord Sumption in *Prest*.

The issue has yet to receive a great deal of attention in Canada. While there are some cases in which Canadian courts have assumed that a shareholder may be directly liable under the company’s contracts where the veil is pierced,\(^{94}\) there is little substantive analysis of this at the appellate level. Further, the cases which do touch upon the issue are often inconclusive.

For instance, some courts have held that parent companies can be liable for the obligations in employment contracts entered into by their subsidiaries, in part on the basis that the parent’s control of the subsidiary makes it the “true” employer.\(^{95}\) Thus, in *Downtown Eatery (1993) Ltd. v. Ontario*,\(^{96}\) the Ontario Court of Appeal found that a wrongfully dismissed employee could recover not only against the company with whom he entered into his employment contract, but also against that company’s affiliates and principals. It observe that “[t]his group of companies functioned as a single, integrated economic unit”,\(^{97}\) and held that focusing solely upon the party with whom the employee contracted would make it “too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets”.\(^{98}\) However, the Court in *Downtown Eatery* stated that this “common employer doctrine” was not related to

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\(^{94}\) *Austin v. Habitat Development Ltd.* (1992), 94 DLR (4th) 359, 1992 CarswellNS 550 (CA) at paras. 6, 14 and 28–32 (WLeC). See also: *ABN Amro Bank N.V v. BCE Inc.* (2003), 44 CBR (4th) 1 (Ont. S.C.J.) at paras. 2, 13-14, 22 and 25; leave to appeal to Ont. Div. Ct. refused (2003), 44 CBR (4th) 25 (Ont. Div. Ct.) (where the Court proceeded on the basis that such liability could exist in refusing a motion by the defendant parent company, who was sued for monies lent to its insolvent subsidiary as its alleged “alter ego”, to stay the claim against it based on the Ontario Court’s lack of jurisdiction *simpliciter* and *forum non non conveniens*); and *Northwood Mortgage Ltd. v. Genso Solutions Inc.* (2005), 3 BLR (4th) 322 (Ont CA) at para. 4 (where the Court in a brief endorsement suggested in *obiter* that shareholder-directors of a company could be found liable under the company’s agreement “if the corporate veil is pierced”). Some courts have also suggested that it may be possible to hold one company liable for the contractual obligations of another based on the doctrine of rectification, if the plaintiff mistakenly believed it was contracting with the first company rather than the second: *BG Preco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 DLR (4th) 30, 1989 CarswellBC 104 (BCCA) at paras. 51–53 (WLeC). See also: *Seip & Associates Inc. v. Emmanuel Village Management Inc.* (2009), 247 OAC 78 (CA) at paras. 34–39 (finding that a company may assume the contractual obligations of an affiliate through its conduct, without the need for the Court to pierce the affiliate’s corporate veil); and *Salah v. Timothy’s Coffees of the World Inc.* (2010), 268 OAC 279 (CA) at paras. 10–14 (finding that a controlling mind who assigned a contract to his corporation still remained a party to it given the intentions of the parties).


\(^{96}\) (2001), 54 OR (3d) 161 (CA); leave to appeal to SCC refused [2001] SCCA No. 397.


the "nebulous concept of alter ego corporations", but was rather a standalone doctrine that is well-recognized in Canadian common law and in the statutes of most Canadian jurisdictions.99

Perhaps the most notable example of a Canadian court adopting an approach different from VTB and Prest is 642947 Ontario Ltd. v. Fleischer.100 In Fleischer, the Ontario Court of Appeal suggested that, if the corporate veil were pierced, the effect would be to constitute the controlling minds of a company directly liable on an undertaking in damages which the company fraudulently gave to the court to obtain an injunction against the claimant.101 As the Court ultimately held that the company did not breach the undertaking, its analysis was obiter. Nevertheless, the Court did not suggest there was any impediment to substituting the company’s controlling minds for the company itself in relation to the undertaking.

Under VTB and Prest, an English judge who pierces the corporate veil can no longer substitute the controlling mind for the company itself in the company’s contracts and undertakings. If this principle is adopted in Canada, then cases like Fleischer could well be decided differently in the future.

Another issue which remains unresolved is the converse of the situation in VTB, i.e., whether a judge who pierces the corporate veil can substitute the company for the controlling mind in the controlling mind’s contracts and undertakings. Some confusion over this issue is created by Lord Sumption’s treatment of VTB in Prest. While Lord Sumption affirmed the result in VTB, he held that the plaintiff’s failure to pierce the corporate veil in that case could be explained on the basis that it sought "to create a new liability that would not otherwise exist" by making the controlling minds of the company liable under the company’s contract.102 This suggests that Lord Sumption may have been willing to recognize a transfer of liability in the converse situation, i.e., where the plaintiff seeks to make a company liable for the contractual obligations of its controlling mind, as arguably occurred in Jones where the Court "decreted specific performance against the company" even though "it was not a party to the contract of sale".103 In such a case, provided the controlling mind is using the company to evade the controlling mind’s existing contractual obligations, imposing the controlling mind’s contractual liability upon the company would seem consistent with approach to veil-piercing taken in Prest.

For instance, if VTB’s loan agreement had been with Malofeev rather than RAP, and Malofeev had transferred the loan monies to Nutritek in order to avoid his contractual repayment obligation to VTB, would the Court have precluded VTB from suing Nutritek in England based on its contractual forum-selection clause with Malofeev if this was necessary to prevent Malofeev’s fraudulent evasion of VTB’s contractual rights? Given that Lord Sumption did not directly address this issue, and was not a member of the Court who heard VTB, it is impossible to know what he would have decided.

99 Ibid., at paras. 2 and 18, and footnote 2.
100 (2001), 56 OR (3d) 417 (CA).
101 Ibid., at paras. 69-70.
102 Prest, supra, n. 2 at para. 34.
103 Prest, supra, n. 2 at para. 30. cf. Lord Neuberger’s treatment of Jones at para. 73 of Prest and para. 135 of VTB.
Like Lord Sumption in *Prest*, Lord Neuberger in *VTB* also did not directly address whether a company could be deemed privy to a controlling mind’s contracts by piercing the corporate veil. However, he did make the following comments which appear to be of sufficiently broad application to reject that possibility:

> In any event, it would be wrong to hold that Mr Malofeev should be treated as if he was a party to an agreement, in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them, and (ii) thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context — see e.g. *Smith v. Hughes* (1871), LR 6 QB 597, 607.104

It is worth noting that, in addition to Lord Neuberger, three of the other six Law Lords who decided *Prest* also sat on *VTB*: Lords Mance, Clarke and Wilson. In *VTB*, the latter three all agreed with Lord Neuberger’s treatment of the corporate veil issue. It is arguable, therefore, that the Court in *Prest* did not intend to carve out, by implication, an exception to the general principles which Lord Neuberger stated so recently in *VTB*. If the Court in *Prest* were truly of the view that a company could be deemed a privy to the contracts of its controlling mind through the veil-piercing principle, it stands to reason that it would have said so expressly. However, given the uncertainty over this issue caused by Lord Sumption’s remarks in *Prest*, the matter would appear to remain open.

**d) Choice of Law Issues**

A final issue that *VTB* addresses which may prove important to Canadian courts is the choice of law rule applicable to veil-piercing claims. In *VTB* itself, the UK Supreme Court declined to resolve what the appropriate choice of law rule should be in a case where an English plaintiff sought to pierce the corporate veil of a Russian company, in order to impose liability under contracts governed by English law upon Russian and British Virgin Islands principals. However, that Court did suggest that at least three different rules were possible: (a) the law of the company’s place of incorporation; (b) the law of the forum; and (c) the law of the contract giving rise to the claim against the shareholder. The very same three alternatives are proposed by the Canadian commentators Castel and Walker,105 though as with Lord Neuberger, they do not cite any authority for them.

The first approach appears to have the most judicial support. The general rule accepted by Canadian courts is that questions concerning the status of a foreign corporation — including whether it possesses legal personality and the extent of its shareholders’ rights — are determined by the law of the place where it is incorpo-

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104 *VTB*, supra. n. 1 at para. 140.

rated. Given this principle, the law of a company’s place of incorporation should govern whether a court may pierce its corporate veil. An early example of this approach can be found in *Ridon Iron and Locomotive Works v. Furness*, where the Court held that the personal liability of a shareholder in an English-incorporated company, under contracts entered into and performed in California, was governed by English rather than California law. The *Ridon* case was later cited in argument in *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, where the House of Lords accepted, in the context of a series of contract claims, that “in English private international law ... the liability of members of a foreign corporate body for the debts of the corporation is to be determined by the law of place of incorporation” (and not, e.g., the law of the place of the contracts under which the corporate body is sued). Neither decision was referred to in *VTB*.

The other two approaches suggested by Lord Neuberger are more contentious. Some Canadian support for the second approach can be found in *Everest Canadian Properties Ltd. v. Mallmann*, where the British Columbia Court of Appeal held that the question of whether a shareholder must bring a derivative action (rather than an action in the shareholder’s own name) pursuant to the rule in *Foss v. Harbottle* is a matter of procedure governed by the *lex fori*. Since the case holds that the effect of the corporate veil in actions *by* a shareholder is a matter of procedure, one could argue that a similar conclusion is appropriate in the context of actions against a shareholder. That said, this approach was rejected in *Foresight Shipping Co. v. Union of India*, where the Court held that piercing the corporate veil is an issue of substantive rather than procedural law, and is therefore governed by the “*lex loci*” (which it defined as the “law of the place where the incident oc-

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106 *International Assn. of Science and Technology for Development v. Hamza* (1995), 122 DLR (4th) 92 (Alta CA) at para. 28; *JTI-Macdonald Corp. v. British Columbia (A.G.)* (2000), 184 DLR (4th) 335 (BCSC) at paras. 173–177; *West v. Wilbur* (2002), 32 BLR (3d) 122 (NBQB) at para. 13; leave to appeal to NBCA refused (2003), 257 NBR (2d) 85 (CA (Chambers)); *Devon Canada Corp. v. PE-Pittsfield, LLC (c.o.b. Pittsfield Generating Co., LP)* (2008), 303 DLR (4th) 460 (Alta CA) at paras. 26–28. See also *Dicey, Morris & Collins on The Conflict of Laws*, 15th ed. (London: Sweet & Maxwell, 2012), vol. 2, at 1532, para. 30-010, stating that “[w]hether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed. That law will determine whether the entity has a separate legal existence”.

107 [1906] 1 KB 49 (CA).

108 [1990] 2 AC 418 (HL) at 509, per Lord Oliver. Lord Oliver went on to state that “[n]o doubt, for instance, a Jordanian company whose constitution provides for the personal liability of its general partners will, by its contracts in England, engage the liability of those persons if it chooses to trade here”.

109 cf. the leading corporate veil case of *Adams v. Cape Industries Plc.* [1990] Ch 433 (CA) at 539–544, where the Court of Appeal applied English legal principles in holding that the veil of a U.S.-incorporated company should not be pierced in order to impose liability upon a U.K. company. The choice of law issue does not appear to have been directly raised.

110 (2008), 294 DLR (4th) 622 (BCCA) at paras. 12–14.

111 (1843), 2 Hare 461.

112 (2004), 260 FTR 161 (FC) at paras. 11–13.
While the Foresight case thus provides support for the third approach suggested by Lord Neuberger, the possibility of applying the law of the place where the company was incorporated was not considered in Foresight at all.

In VTB, Lord Neuberger also leaves open the possibility that there may be no single choice of law rule for piercing the corporate veil. However, if courts decline to adopt a single choice of law rule for veil-piercing, they could substantially increase the risk of confusion and ad hoc results. If no single test is adopted, then the laws of no particular jurisdiction will clearly apply to the veil-piercing issue. The resulting confusion could only be justified if some clear procedural or substantive damage arises from applying a single test, the law of incorporation. Those advancing the use of another law than the law of incorporation will bear a heavy burden to develop another clear and principled test to govern the exercise of this extraordinary jurisdiction, and to demonstrate when and how it will be applied alongside or in place of the law of incorporation test. If no other clear and principled tests are developed, then courts should select a unified rule based on the law of incorporation. Otherwise, the goals of order, certainty and predictability at the heart of private international law will be frustrated, not merely the principle from Salomon. In the end, the appropriate choice of law rule should be determined by how best to characterize the matter at issue in cases involving attempts to pierce the corporate veil. If, for instance, the matter is characterized as one involving the legal personality of the company, then it should be governed by the place of its incorporation (which in VTB was Russia); however, if the matter is characterized as one involving the controlling mind’s liability for the company’s contracts, it may be governed by the law of the contract itself (which in VTB was England). While this “characterization” inquiry is one of most vexed questions in the conflict of laws, the most logical approach appears to be the former one.

In deciding whether to pierce a company’s veil, a court is deciding whether to disregard its separate legal personality and to thereby impose liability on the company’s shareholders for the conduct of the company or vice-versa. That decision must relate to the law pursuant to which the company is incorporated, since it is incorporation that creates its separate legal personality. While the cause of action may governed by a different body of substantive law than the law governing the company’s incorporation, no “veil-piercing” liability can be imposed unless the court first disregards the legal consequences of the company’s incorporation. For this reason, the decision to pierce the company’s veil is an issue which should be governed by the law of the place where the company was incorporated.

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113 Strangely, the Court applied the lex loci delicti rule for choice of law in tort claims from Tolofson v. Jensen, [1994] 3 SCR 1022, even though the cause of action at issue was a judgment debt that arose in relation to a dispute under a charter party. It is unclear from the Court’s judgment whether any tort was in fact alleged.


115 See the discussion of “characterisation” issues in Macmillan Inc. v. Bishopsgate Investment Trust Plc (No. 3), [1996] 1 WLR 387 (CA).
4. CONCLUSION

The influence of VTB and Prest will likely extend beyond England into Canada, and indeed throughout the Commonwealth. At the very least, the rulings should stimulate Canadian courts to consider what legal justification exists for piercing the corporate veil, and whether, if that justification is to be based on the fraudulent evasion concept identified in Prest, the Canadian test for veil-piercing should be brought into line with the more narrow one articulated by Lord Sump- tion. The rulings may also cause the Canadian courts to consider the precise legal consequences of veil-piercing, including whether it permits a controlling mind to be made a party to the company’s contracts, and vice-versa. As well, they may lead the courts to question the choice of law rules for veil-piercing claims that involve a foreign element.

Finally, it is possible that Canadian courts will begin to take a more cautious approach to the veil-piercing doctrine in the wake of these decisions. Both VTB and Prest add considerable force to the view that the “interests of justice” test associated with Kosmopoulos is unsatisfactory as a governing principle. A clearer and more narrow test is needed, which reflects the extraordinary nature of the veil-piercing jurisdiction and the difficulty of rationalizing its existence in the face of legislation that expressly immunizes shareholders from liability for corporate misconduct. In the end, while the Court did not pierce the corporate veil in VTB or Prest themselves, the decisions in these cases may prove to be penetrating ones indeed.