



>> Trudeau Project: Piercing the Corporate Veil

An expert in corporate governance, Professor Poonam Puri's research will develop pragmatic policy and legal solutions to hold multinational corporations more accountable when they harm individuals and communities.

Project objectives:

1. To analyze the structures and strategies used by some multinational corporations to limit their liability and avoid accountability on human rights and environmental abuses.
 2. To document the barriers which often prevent those who have been harmed by multinational corporations from bringing successful claims and enforcing judgments.
 3. To create concrete governance guidance for multinationals to more responsibly manage their global operations, and make legal and practical recommendations for reform.
 4. To empirically evaluate the likely impact of proposed reforms on the Canadian national economy and patterns of global commerce.
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Expertise:

#CorporateGovernance
#CapitalMarkets
#SecuritiesLaw
#CorporateLaw

Introduction

In September 2015, the Supreme Court of Canada's decision in *Chevron Corp v Yaiguaje* ("*Chevron*") granted permission to Ecuadorian plaintiffs seeking enforcement of a US\$9.51 billion Ecuadorian judgment against Chevron to proceed in Ontario, a jurisdiction where Chevron may actually have assets which might allow the judgment to be satisfied. The decision comes over 20 years after it was alleged that Texaco, since acquired by Chevron, left large tracts of the Amazonian jungle in the oil-rich Lago Agrio region soaked in oil and toxic wastewater. The pollution contaminated food and water sources relied on by the 30,000 indigenous Ecuadorian villagers that the plaintiffs represent, causing rates of pollutant-related disease in the area to skyrocket.

The plaintiffs' decades long legal battle to force the oil companies to clean up and provide care for the ailing villagers illustrates some of the difficulties faced by those wronged by multinational corporations. The devastating reality is that even if the Canadian lawsuit to enforce the judgment is successful, remediation will come too late for the thousands of villagers already dying of cancer linked to the pollution.

Chevron is not an isolated incident. The international legal system is failing those wronged by multinational corporations. In countless cases like *Chevron*, plaintiffs are **unable to attain judgment in the first place** or are **left with judgments that ultimately prove to be unenforceable** after decades and millions of dollars of wasted effort.

Canadian courts appear to be groping their way towards equitable solutions to this problem. *Chevron* is the latest in a series of progressive decisions that may make it easier for the victims of multinational corporations to **access and enforce judgments** in Canada. *Chevron* unequivocally confirmed Canada's liberal approach to jurisdiction over enforcement actions, which requires only that the judgment in question be rendered by a court that properly asserted jurisdiction over the dispute. In the case of *Chevron*, as long as the Ecuadorian courts properly took jurisdiction over the case in Ecuador, the Canadian courts can consider enforcing the Ecuadorian judgment in Canada.

The *Chevron* decision may also have profound implications for corporate law. It goes to the heart of the law's treatment of corporations as persons in law. A fundamental principle of corporate law is that a corporation has a **separate legal personality** from its shareholders so that shareholders (even if the sole shareholder is another corporation) are not responsible for the corporation's actions. In order to access the assets of a parent corporation or another subsidiary corporation under corporate law, plaintiffs have to convince a court to **"pierce the corporate veil"** as between the corporations. Courts rarely pierce the corporate veil and have historically done so only in cases of fraud.

While the Supreme Court has confirmed the power of the Ontario courts over both the American "parent" company, *Chevron US*, and its distantly related Canadian subsidiary, *Chevron Canada*, which was not even named as a defendant to the Ecuadorian claim or judgment, it is still not certain that the Ecuadorian plaintiffs will be able to recover in Canada because *Chevron US* and *Chevron Canada* may raise a number of defences to prevent the plaintiffs from finally obtaining justice.¹

Against this backdrop, this project seeks to answer the following questions:

- Under what circumstances should Canadian courts be willing to **"pierce the corporate veil"** to allow victims of a multinational corporation to recover against a Canadian company for the actions of its foreign parent, subsidiary, or sister company?
- When should the **assets of the shareholders** (and directors) of a corporation, traditionally protected by corporate law, be made available to satisfy a claim or a judgment against a corporation?
- What **other legal and practical tools and strategies** should be considered by those who have been harmed by corporate misconduct? Is **tort law** more promising? Is **legislation** rather than court based intervention more suitable?
- Will the Supreme Court's leadership on this pressing issue encourage **forum shopping** and make Canadian corporations targets for the satisfaction of foreign judgments, damaging Canadian industry and causing an **exodus** of multinational corporations from the country?

This project will attempt to answer these vital questions and provide guidance to the Canadian government, provincial/territorial governments, regulators, policymakers, multinational corporations, corporate leaders, injured persons and their legal counsel in efforts to address these pressing issues.

¹ Among the difficulties the Ecuadorian plaintiffs in *Chevron* may face are allegations, already heard by American courts, that the decision of the High Court of Ecuador was fraudulently ghost-written by the plaintiffs' American lawyer. Though this aspect of the case is certainly interesting, it should not be allowed to detract from the all-too-real harms suffered by the plaintiffs.

Trudeau Foundation Themes

This project will address all four of the Trudeau Foundation's core themes.

- **Human Rights and Dignity:** Multinational corporations operating in developing countries, specifically those in the extractive industries, are at high risk of involvement in or association with human rights abuses. Though the United Nations' *Respect, Protect and Remedy: Framework for Business and Human Rights* and other international frameworks provide guidance for multinationals on avoiding and remedying human rights violations, adoption is entirely voluntary. When violations do occur, the absence of an effective legal system where the harm occurred or sufficient corporate assets against which to execute a judgment in the victims' home country often leave victims with a right but without a remedy. One of the objectives of this project is to improve the ability of victims of human rights abuses to access and enforce judgments against multinational perpetrators.
- **People and their Natural Environment:** Resource extraction and manufacturing are high pollution industries. Multinational corporations in these sectors often operate in countries with less sophisticated environmental regulation and oversight, reducing their costs and often leaving contaminated sites behind them. Multinationals have also been known to shirk their environmental obligations in countries with more sophisticated regulation like Canada, sometimes hiding behind complex corporate structures to insulate themselves from liability. This project will compare various mechanisms for ensuring that companies bear the cost of their environmental impact.
- **Canada in the World:** The Supreme Court's decision in *Chevron* and the Ontario Superior Court of Justice's decision *Choc v Hudbay* as well as other recent cases on the liability of multinationals present an opportunity for Canada to step up and become an international leader in addressing this issue. Yet altering principles of liability within the increasingly complex international economic order is certain to have consequences. This project aims to explore the options available to Canadian courts, governments, regulators, policymakers and corporations in addressing this issue and provide a data-driven, research-based analysis of their likely implications. Canada's leadership on this complex international problem must be supported by comprehensive research, evidence and analysis to ensure that Canada leads the international community in the right direction without unnecessarily prejudicing Canadian interests.
- **Responsible Citizenship:** The ability of multinational corporations to improve, worsen or even extinguish the lives of people living on the other parts of our earth illustrates the fact that citizenship can no longer be seen as a solely national concept. Holding multinationals to account will likely require thinking outside of the conventional state-based understanding of citizenship. Yet we must not lose sight of the reality that Canadians' prosperity and financial wellbeing is primarily dependent on Canada's national economy. This project aims to develop solutions to the problem of wrongdoing by multinational corporations founded on a theory of responsible global citizenship that balances national belonging with international responsibility.

Detailed Project Proposal

Project Summary

Our modern, globalized marketplace requires a global system for hearing and enforcing claims against multinational corporations. This project will identify, study and formulate legal tools available to Canadian legislators, policymakers and courts to improve the ability of victims of multinational corporations to have their claims heard, decided and enforced. It will provide the legal analysis and empirical research necessary to respond to this pressing issue strategically, with a sound grasp of the potential legal, economic and political implications.

Objectives

1. Collect data and document the scope and complexity of select multinational corporations that have Canadian and foreign operations. Better understand and document the business and economic reasons that multinational corporations create these complex structures and analyze the legitimate and illegitimate ways in which they attempt to mitigate risks associated with operating in multiple jurisdictions.
2. Investigate, document and analyze the legal and practical barriers faced by those who have been harmed by multinational corporations in making a successful claim against a corporation and its parent or subsidiary corporations under Canadian corporate law and in other key jurisdictions including the U.S. and the U.K.
3. Investigate, document and analyze the legal and practical challenges and obstacles in obtaining recognition and enforcement of a judgment faced by those who have been harmed by multinational corporations in Canadian courts and through courts of other key jurisdictions.
4. Formulate legal tools and strategies for increasing access to making successful claims and obtaining recognition and enforcement of judgments for those who have been harmed by multinational corporations based on Canadian and international corporate law and judicial decisions.
5. Analyze and empirically evaluate the likely impact of suggested legal reforms on the Canadian national economy and patterns of global commerce.

Background

This project represents the natural progression of a number of themes running through my past and ongoing research.

One branch of my research has explored responsible corporate governance within Canada's unique corporate landscape. Through a series of conferences, workshops and roundtables involving academics, businesspeople, legal practitioners and students, I have investigated methods of ensuring that the interests of shareholders and stakeholders, including employees, customers, and surrounding communities, are represented within the governance and decision-making structures of corporations. This research has led to the publication of a series of articles on diversity and stakeholder interests in corporate governance; dozens of research reports for the national and provincial governments, Industry Canada, and the Canadian Senate; a book, co-authored with Jeffrey Larsen and published by Butterworths in 2004, called *Corporate Governance and Securities Regulation in the 21st Century*; and another co-authored book published by University of Toronto Press in 2016, called *Back from the Brink* which explores the causes and effects of the most recent financial crisis from a Canadian perspective. This research expertise will be invaluable in laying out the groundwork for the first objective of this project, namely documenting and mapping out the

complex corporate structures of select multinational corporations and understanding their approaches to organizational structure and decision-making internally.

Another theme in my research involves the delicate policy balance between protecting investors and promoting profitable capital markets within Canadian securities regulation. In my role as co-research director for the Task Force to Modernize Securities Legislation, I coordinated innovative research, founded on broad community outreach, that emphasized the need to adequately protect the rights and expectations of Canadian investors while ensuring that Canadian companies remain competitive. Regulatory and legislative changes in response to the Task Force's recommendations shape the way this policy balance is struck today. I am currently investigating the fulfillment of investor rights through enforcement of securities laws. I have organized an international conference on the topic and am coordinating with a research team composed of scholars from NYU Law School, Michigan Law, and the University of Toronto Faculty of Law, along with a number of JD students, to empirically analyze and compare enforcement of securities legislation in Canada and the United States. This research expertise will assist in achieving the third, fourth and fifth objectives of this proposal by informing a nuanced analysis of the existing barriers to making claims and recognizing judgments against multinational corporations and solutions which balance achieving justice for the victims of corporate malfeasance with ensuring that the Canadian economy remains competitive.

In a third branch of my research, I have recently begun to explore the difficulties of disciplining corporate behaviour abroad. While researching the effectiveness of Canada's foreign corrupt practices legislation for my article forthcoming in the Osgoode Hall Law Journal, *The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices*, I began to uncover the extent to which laws and enforcement mechanisms that effectively discipline corporate behaviour domestically fail on the international level. Canadian multinational corporations operating abroad are often beyond the reach of Canadian oversight and enforcement. As a result, the costs of business, whether financial, environmental or human, are disproportionately imposed on developing countries that lack the resources to monitor and address corporate activity themselves. This research expertise will also assist in achieving the fourth and fifth objectives this project in identifying pragmatic and practical solutions to make multinational corporations more responsible when they harm individuals and communities abroad.

Something must be done to encourage multinational corporations to internalize the risk of their international operations and provide access to effective remedies for victims. **The solution lies at the intersection of my research specializations.** The corporate form, with all the legal fictions it entails, is a privilege bestowed by statute that can and should be disregarded when it is abused. Securities laws, which require that public corporations engage in periodic mandatory disclosure, compliment corporate law by harnessing market forces to subtly influence behaviour and by providing a factual record to ground liability. **This project will leverage my past research and expertise to provide innovative solutions to the problem of wrongdoing by multinational corporations.**

Timeline and Methodology

Phase 1: Mapping Multinational Corporations

Year 1: 2016-2017

The first phase will explore the complex corporate structures employed by multinational corporations. In order to provide practical recommendations to promote responsible corporate behaviour and empower victims of corporate crime to recover, the study must first understand why multinational corporations resort to complex corporate structures and the legitimate and illegitimate tools they use to mitigate risks associated with operating in multiple jurisdictions.

Methods

1. Identify a representative sampling of multinational corporations from key jurisdictions in which multinational corporations are often headquartered, including Canada, the US and the UK, operating in industries that are known to have repeated and long---lasting economic, environmental and human rights impacts on developing countries including mining, resource extraction and manufacturing. Study their corporate structures through publically available disclosure documents. Consider corporate architectural features including parent and subsidiary relationships, share structures and independent or related management and directorships to trace the lines of control, accountability and liability throughout the organizations. Collaborate with data visualization specialist(s) and cartographer(s) to visually represent these complex corporate structures.
2. Interview directors, executives and legal counsel of selected multinational corporations and their subsidiaries to better understand the rationales for their complex corporate structures, how subsidiaries are managed, the key risks in managing global operations and the internal controls implemented to mitigate those risks.

Outcomes

1. **Maps** which visually represent the complex corporate structures of subject corporations and allow viewers to easily identify the source(s) of direction and control within the corporation and the ways in which corporate structure is used to limit liability.
2. Plain---language explanations and illustrations of **common patterns** within corporate architecture and their perceived advantages. These maps, explanations and illustrations would be made available on the project's website for access by governments, regulators, corporations and members of the public including communities which are impacted by the multinationals' activities.
3. Through the interviews, practical insight into the **unique vulnerabilities** of multinational corporations and their **strategic aims** in developing complex corporate structures.
4. A Trudeau Lecture on *Complex Corporate Structures: Hows & Whys, and Why It Should Not Be*, highlighting the findings of the mapping exercise and interviews.
5. A **scholarly publication** in a respected legal journal on the topic of complex corporate structures and parent---subsidiary liability and **op---eds** in popular news media which provide plain---language explanations of how corporations use parent and subsidiary structures to limit their liability.

Phase 2: Barriers to Recovery

Year 2: 2017---2018

The second phase will critically analyze the legal and practical barriers faced by t h o s e w h o h a v e b e e n h a r m e d by multinational corporations (MNCs) while trying to obtain and enforce a judgment.

Methods

1. Interview representatives of select plaintiff groups and their counsel to document their stories, the barriers they have faced and the avenues they have pursued in search of redress. Plaintiff groups will be identified from ongoing and previously decided cases relating to multinational corporations based in the focus countries – Canada, the US and the UK.
2. Public interaction events, involving broad---based stakeholder consultation with multinational corporations based in Canada, policymakers, legal practitioners and a representative sampling of the general Canadian population to gain input and assess prevailing views on the rights and responsibilities that ought to accompany use of the corporate form, including responsible corporate economic activity, the cost of externalities, gaps in legal process and access to justice.
3. Study the legal climate within the home countries of selected plaintiff groups to assess the access of corporate victims to courts, legal information and advice and to a fair and unbiased hearing. Do so by connecting with legal scholars that have regional expertise.

4. Analyze Canadian, American and British case law to identify legal doctrines, policy considerations and other circumstances that frequently prevent foreign plaintiffs from obtaining judgment or enforcing foreign judgments against multinational corporations.

Outcomes

1. **Audiovisual** documentation of the **stories** of plaintiff groups seeking justice for wrongs committed by MNCs. In producing this audiovisual component, guidance from alumni Trudeau Mentors and Fellows **Sylvia Hamilton** and **Alanis Obomsawin**, award---winning Canadian documentary film makers, would be invaluable.
2. A **Trudeau Lecture** on The Implications of **Corporations as Legal Persons** resulting from findings from interviews, focus groups and legal and policy analysis discussed above; A publication of the paper through the Trudeau Foundation Papers.
3. A **conference** on the topic of **Globalization and Corporate Responsibility** which will bring together experts on international business, the legal issues of forum, jurisdiction and comity that govern courts' treatment of foreign plaintiffs and judgments, and scholars and practitioners with regional expertise related to the different groups of plaintiffs and corporations interviewed. Participants will be drawn from within the Trudeau community, Canadian society and abroad.
4. A special **conference edition** of the Osgoode Hall Law Journal or another prestigious publication to **publicize** the outcomes of the conference and my research with respect to the major barriers faced by victims of multinational corporations.
5. A **website** and associated **twitter feed** to engage with a broader audience about the content of the conference in real---time, tell plaintiff stories and provide commentary on evolving cases that address wrongdoing by multinational corporations.

Phase 3: Canada and Corporate Wrongdoing

Year 3: 2018---2019

This phase will focus on generating practical and comprehensive recommendations for reform to Canadian legal institutions and corporate best practices to prevent wrongdoing by multinational corporations and improve the ability of those who have been harmed by multinationals to receive and enforce judgment. The proposed reforms must be based not only on systematic and broad---ranging scholarship, but also on consultation with all concerned stakeholders to ensure that they will not have an unexpected impact on the delicate international economic order.

Methods

1. Focused analysis of Canadian legal doctrines governing the accessibility of Canadian courts by foreign plaintiffs both for pursuing claims against multinational corporations and enforcing foreign judgments and the policy considerations that permit corporate misconduct abroad to remain unaddressed. Comparative analysis of Canadian jurisprudence to that in the US and the UK so as to better appreciate differences.
2. Further public interaction events, involving broad---based stakeholder consultation with policymakers, legal practitioners and a representative sampling of the general Canadian population to obtain input, feedback and response on my proposed recommendations and suggested reforms relating to the rights and responsibilities of corporations and better access to justice.

3. Targeted interviews with directors and executives of Canadian multinational corporations to assess their likely responses to proposed changes in the Canadian legal landscape. Empirical research and data--- based predictions to determine the likely impact of possible reforms on the Canadian economy.

Outcomes

1. **Recommendations** for **reform** to Canadian corporate law to improve the ability of victims of corporate wrongdoing to recover. These recommendations will be presented as short **policy papers** targeting Canadian governments, legislators, policymakers, regulators and corporate boards and will be well grounded in a consultation---based understanding of the barriers faced by plaintiffs and the commercial reality of multinational corporations.
2. **Recommendations** for **best practices** within Canadian multinational corporations to promote responsible business practices at home and abroad and prevent wrongdoing through internal controls. These recommendations will be presented in the form of short and **accessible guides** and policy papers.
3. A **toolkit** for victims of wrongdoing by MNCs, translated into a number of different languages, that provides visual representations and plain language explanations to demystify complex corporate structures and gives practical advice for framing a claim, locating legal counsel and launching an action. .
4. A single---authored **book** chronicling the rise of multinational corporations and their increasing corporate complexity, summarizing the findings of the project and explaining **how Canada can play a leading role** in shifting international norms to **reduce corporate wrongdoing** and provide avenues of redress.
5. A series of **short policy papers** suitable for governments, regulators and industry and community leaders, op---eds in national and international newspapers that explore specific technical and policy issues at play and academic articles that **make the project findings broadly available** to an academic audience.

Conclusion

This project is ambitious, multidisciplinary and draws on a range of research methodologies and knowledge dissemination techniques. It aims to reveal common corporate strategies for avoiding liability and accountability, give those harmed by these strategies a platform and a voice, and bring the international legal order into the twenty-first century to ensure that multinational corporations can be held responsible for their actions. The knowledge, insight, and expertise developed along the way will enrich York University, the Trudeau Foundation and Canadian society.

To successfully complete this project, I will need to draw on the generosity, talent and support of members of both the York University and Trudeau communities. There are countless Trudeau Fellows, Scholars and Mentors with relevant expertise who I hope to engage in informal dialogue and direct collaboration. For instance, the project would benefit greatly from the insight of Trudeau Mentors **Gordon Smith** and **Jillian Stirk**, former Assistant Deputy Minister and Deputy Ministers of Foreign Affairs, into the barriers to development of politico-legal structures to manage increasing global interdependency. I hope to draw on **Jennifer Clapp's** politico-economic expertise while exploring the impact of multinational corporations on the environment and food security in the communities in which they operate. Both **Tahnee Prior** and **Erika Bockstael** are already studying the legal governance of pollution and resource management within remote and complex communities. I hope to consult and perhaps collaborate with them to gain insight into the challenges that local communities face when interacting with large global corporations. The Trudeau community also offers a wealth of knowledge on the protection of human rights, brought by Mentors, Fellows and Scholars **René Provost**, **Alex Neve**, **Kent Roach**, **Marina Sharpe** and others. Dialogue with these scholars would undoubtedly enrich the project's approach to developing avenues of redress for victims of human rights abuses at the hands of multinational corporations. Finally, consultation with Trudeau Mentor **Marie Deschamps** would provide invaluable insight into the trajectory of Canadian law and the scope for reform to address the legal void in which multinational corporations operate. By drawing on the scholarship, insight and expertise of Trudeau Mentors, Fellows and Scholars and illuminating the connections between ongoing research initiatives, the proposed project will benefit from and enrich the Trudeau research community.

The proposed project advances York University's strategic research plan, which counts "Public Engagement for a Just and Sustainable World" as one of its top priorities for the 2013-2018 planning period. With the first Environmental Studies faculty in the province, York has an unmatched depth of expertise on the affects of global commerce on the environment. The Schulich School of Business was one of the first business schools to adopt a Business and Sustainability specialization, backed by a strong faculty focus on sustainability and social responsibility in business. Osgoode Hall Law School has long been known for its strong social justice focus and is a community rich with legal knowledge surrounding human rights and environmental law. While planning and executing this project, I will draw on the wealth of expertise at York University through both formal collaboration and informal consultations with relevant research centres and networks.

This project will engage the Trudeau community and benefit greatly from the insight and experience of its members. There will be many opportunities for interested Trudeau Fellows, Mentors and Scholars to become involved, including: opportunities to speak at, attend, and help organize the Globalization and Corporate Responsibility conference; opportunities to participate in focus groups directed at gauging the expectations of Canadians within different spheres of our society with respect to the behaviour, responsibilities and accountability of Canadian corporations operating abroad; opportunities to help plan, conduct, record and edit audiovisual engagement with plaintiffs harmed by multinationals; and opportunities to contribute to the website and scholarly publications stemming from this project.

There is a pressing need to ensure that **multinational corporations** act as **responsible citizens**, both in **Canada and the world** around us. Multinationals cannot be permitted to hide behind complex corporate structures to

inappropriately insulate themselves from liability.

This proposed project will directly increase the breadth, the depth and the quality of public debate in Canada and around the world on the rights and responsibilities of multinational corporations. This project will facilitate engagement through public events and consultations, a project website, print media op---eds, radio interviews, scholarly publications, and a stakeholder friendly toolkit. The project's outcomes will provide guidance to Canadian governments, regulators, policymakers and corporate leaders in making informed decisions over policy and legislation that both protect Canadian economic interests, and better establish Canada's leadership in increasing access to justice for those harmed by multinational corporate activity.