# An assessment of the efficiency of the duty of care to make transnational corporations liable for harm caused by their subsidiaries

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## ABSTRACT

The fairness of globalization is called into question when subsidiaries of large transnational corporations harm local populations in countries where they have little chance of obtaining compensation, and these victims cannot turn against the parent companies that enjoy significant advantages by outsourcing their activities. Indeed, parent companies can in principle hide behind the corporate veil to avoid having to compensate the victims of their subsidiaries' activities, unless the latter establish that the parent company owed them a duty of care. By allowing the establishment of a direct liability of the parent companies, the duty of care enables the difficulties caused by the principle of separate legal personality to be overcome. This concept thus seems relevant to enable victims of acts committed by a subsidiary to obtain compensation directly from its parent company, and it turns out that Canada is one of the countries where the discussion on the duty of care of parent for the actions of their subsidiaries has been the more elaborate.

This thesis aims to evaluate the effectiveness of the use of the duty of care to engage the liability of Canadian parent companies for the negative effects of their subsidiaries' activities abroad.

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# CHAPTER 1: INTRODUCTION

## I- Context

The constant growth of international trade has resulted in the development of the international activity of companies, leading to an increase in the number of subsidiaries of multinational groups.: in 1970, there were approximately 7,000 transnational corporations in the world; today, they are more than 100,000.[1]

While Canadian statute law does not define transnational corporations, it does define affiliated corporate bodies: thus "one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person"; and "if two bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other"[2]. Transnational corporations could therefore be defined as a group of corporations, one

1. Skinner, "Parent Company Accountability Ensuring Justice for Human Rights Violations" (2015) at 1, online (pdf) *Icar*<https://icar.ngo/wp-content/uploads/2021/04/PCAPReport2015.pdf>).
2. *Canadian Business Corporations Act*, RSC 1985, c C-44, s 2(2).

of which controls another or more, provided that their registered offices are located in different countries.

Very early on, some scholars (like Adolf Berle and Gardiner Means in 1932) pointed out the division of interests of stakeholders surrounding these groups of corporations: between on the one hand, the interest of the company, which concentrates a great deal of economic power, and on the other hand, the customers and the workers[3]. It is obvious that, since the prevailing idea being that the company has for purpose the realization of profit for the benefit of its shareholders[4], the subsidiaries will be likely to cause harm in the course of their activities, their interest being *per se* neither to invest in order to protect the stakeholders, nor to compensate them in the event of damage. Since the introduction of standards to protect the environment and workers has a cost (in both time and money) for companies, they can be seen above all as a brake on their productivity. Therefore, it can be argued that corporations cannot be required to implement such processes on a purely voluntary basis[5].However, most standards aimed at limiting the negative impact of transnational corporations' activities (the most commonly cited being OECD Guidelines for Multinational Enterprises[6], United Nations Guiding Principles on Business and Human Rights[7] , ISO 26000 guidance[8], UN Global Compact[9]) operate on a voluntary basis.

Thus, very early in the phenomenon of the increase in the number of subsidiaries of transnational corporations, accidents, such as the infamous Bhopal disaster in 1984, occurred.

3. Adolph A. Berle and Gardiner C.Means, "The Modern Corporation and Private Property", Harcourt, Brace & World Inc. (1968) at 309-310.
4. *Ibid.*
5. Adeline Michoud, "Mind the (Liability) Gap: The Relevance of the Duty of Care to Hold Transnational Corporations Accountable" (2019) 40 Windsor Rev Legal & Soc Issues 141.at 174.
6. OECD, "OECD Guidelines for Multinational Enterprises" (2011) online (pdf) *OECD*<https://www.oecd.org/corporate/mne/48004323.pdf>.
7. Business and Human Rights Resource Center, "United Nations Guiding Principles on Business and Human Rights", online (pdf). <https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>
8. ISO 26 000,"Guidance on social responsibility" ISO 2010, online <https://www.iso.org/iso-26000-social-responsibility.html>.
9. United Nation Global Compact, online <https://www.unglobalcompact.org/>.

This accident is emblematic because it was the first to show the general public firstly, the extent of the damage that can be caused by a policy whose primary objective is to reduce costs carried out by a parent company with respect to its subsidiary. It is now admitted that it was these cost reductions that caused a leak of several thousand tons of deadly chemicals occurred in a Union Carbide's -an American company- pesticide factory in Bhopal, central India[10]. Nearly half a million people have been exposed to these chemicals. Between 7,000 and 10,000 people were killed instantly or within days, and another 15,000 died in the next 20 years[11]. Secondly, this event showed the difficulty for the victims to obtain compensation and globally the lack of obligation of the parent company to compensate the victims of its subsidiary (as years later, Union Carbide paid the paltry sum of 470 million US dollars in compensation. Even this inadequate sum has not been distributed in full to the victims. About 30% of claims for injuries have been rejected by the government, thousands of claims are outstanding[12]).

Canadian transnational corporations are not immune to the fact that their subsidiaries cause harm abroad: to cite an example, the Justice and Corporate Accountability project at Osgoode Hall found that the operations of Canadian mining companies in Latin America were linked to 44 deaths and 403 injuries (363 of which occurred in during protests and confrontations) between 2000 and 2015.[13] In general, the protection of human rights during the activities of Canadian mining corporations is considered an outstanding issue.[14]

10. Amnesty International", « Clouds of injustice, Bhopal Disaster 20 years on" (2004) online (pdf): *Amnesty international* <www.amnesty.ch/fr/themes/economie-et-droits-humains/exemples/justice-pour-bhopal/Clouds_of_injustice_Bericht_2004.pdf>.
11. *Ibid.*
12. *Ibid.*
13. Osgoode Justice and Accountability Project, "The "Canada Brand" Violence and Canadian Mining Companies in Latin America" (2017) at 4 online *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886584>.
14. Susana C. Mijares Pena, "Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc" (2014) 5:1 W J Legal Stud at 1.

The collapse of the Rana Plaza building, resulting in the death of at least 1127 people and over 2000 wounded[15] can also be cited. This building was the place where clothing was manufactured for many large western companies, including Canadian and French companies. This disaster gave rise to two legal responses that will be analyzed in this thesis, namely the *Das*[16] case, and the French act on the duty of care of parent companies.[17]

The occurrence of these damages raises the question of the actual responsibility of parent companies at the top of these transnational corporations and their accountability towards victims of such torts. Indeed, the fairness of globalization is often called into question in cases where a parent company has established a subsidiary in a country where the victims of damage have little chance of obtaining compensation (due to a lack of resources or appropriate legal institutions), but the parent company has not taken any measures to prevent the damage: the parent company thus benefits from the advantages and profits brought in by its subsidiary, without having any legal responsibility for the activities of its subsidiary[18]. As illustrated by the *Das*[19] case (mentioned above and developed in this thesis), the responsibility of companies linked to subcontractors via their supply chain can also be called into question, since the logic of subcontracting also allows ordering companies to pass on the risks of an activity to another entity while benefiting from its production.

This raises the question of corporate veil and separate legal personality.

15. « Arc Info » « Immeuble effondré au Bangladesh : fin des recherches » (7 August 2015) online : *Arc Info* <www.arcinfo.ch/articles/monde/immeuble-effondre-au-bangladesh-fin-des-recherches-271573>.
16. *Das v. George Weston Limited*, [2017] ONSC 4129.
17. Explicit reference is made to the Rana Plaza in the explanatory statement of the bill : "Assemblée Nationale" « Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre » (11 February 2015) online : *Assemblée Nationale* <www.assemblee-nationale.fr/14/propositions/pion2578.asp>.
18. Radu Mares, "Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights" (2012), SSRN Electronic Journal at 1.
19. *Das*, *supra* note 16.

## II- Corporate veil and separate legal personality

In addition to the fact that the damage occurred abroad, the main obstacle to hold parent corporations of transnational companies liable is the principle of separate legal personality. This principle finds its source in the *Salomon v. Salomon* decision, rendered by the House of Lords in 1896[20]. It enunciates that a company has a legal personality separate and independent from the identity of its shareholders, so that creditors of an insolvent company could not sue the company's shareholders for payment of outstanding debts[21]. The principle of separate legal personality is included in the Canadian statute law through the Section 45 of the Canadian Business Corporations Act[22]. Thus, a parent company is in principle not liable for the torts committed by its subsidiary, whether committed on national soil or anywhere else in the world, even when assuming the capacity of sole shareholder.

But as Phillip Blumberg points out, "limited liability has been carried unthinkingly beyond the original objective of insulating the ultimate investor from the debts of the enterprise. Limited liability now enables a corporate group organized in tiers of companies to insulate each corporate tier of the group, and thus, achieve layers of insulation for the parent corporation from liability for the obligations of its numerous subsidiaries[23]". This state of corporate law has led some authors to criticize the current legal concept of the corporation[24].

However, from an economic point of view, the principle of limited liability is justified. Indeed, by allowing investors not to be liable beyond the amount invested, limited liability

20. *Salomon v. Salomon & Co Ltd*., [1896] UKHL 1.
21. *Ibid.*
22. *Canadian Business Corporations Act*, *supra* note 2 s 45 (1).
23. Phillip BLUMBERG, "Limited Liability and Corporate Groups", (1986) 11 J. Corp. L.573, at 575.
24. For example, Régis Bismuth advocates the creation of a mechanism for attributing the behaviour of subsidiaries to the parent company, distinct from the lifting of the corporate veil and the establishment of the duty of care; Régis Bismuth « De la nécessité de repenser l'indépendance juridique de la personne morale » [2017] *Cahiers de droit de l'entreprise* 5, September 2017, dossier 36.

facilitates the raising of the capital necessary to finance investment projects,[25] thus encouraging the shareholders to reintroduce their funds into the company. This principle is therefore essential to the operation of corporations. Some commentators have also argued that the principle of limited liability allows for the existence of an organized securities market, since by preventing certain shareholders from being asked to contribute more, limited liability allows for shares to have the same value for all.[26]

Legally, the principle of separate legal personality is also justified: the company is a separate legal person, which led some scholars to wonder, when asked about the duty of care of parent companies: "Why would one corporation be liable for damages related to the activity of another corporation?"[27]

## III- Duty of care of parent companies

Indeed, establishing a duty of care towards parent companies seems to undermine the fundamental principles mentioned above. Yet, Canada is one of the countries where the discussion on the duty of care of parent for the actions of their subsidiaries has been the more elaborate.[28]

The duty of care can be defined as the legal obligation imposed on a person to avoid acts to be likely (by a standard of reasonable care) to cause harm to others. It must be established in order to bring an action for negligence. In the specific field of parent company responsibility, this duty can be defined as an obligation on the part of the parent company to identify, prevent

25. Frank H. Easterbrook & Daniel R. Fischel, "Limited Liability and the Corporation " (1985) 52:1 U Chi L Rev 89 at 90.
26. *Ibid.* at 92 citing Halpern, Trebilcock& Turnbull, "An Economic Analysis of Limited Liability in Corporation Law", (1980).30 U. TORONTO L.J. 117.
27. Professor Philippe Stoffel-Munck, Professor of Private Law at the University of Paris 1 Panthéon-Sorbonne, member of the Paris Bar Association, quoted by Diane de Saint-Affrique « L'opportunité de légiférer sur le devoir de vigilance: choix compassionnel pertinent ou inadapté ? » [2017] Semaine juridique Entreprise et Affaires n°5, Etude 10.64.
28. Geneviève Saumier, « L'ouverture récente des tribunaux canadiens aux poursuites dirigées contre les sociétés mères pour les préjudices causés par leurs filiales à l'étranger» (2018) at 776, online (pdf) : *Dalloz* <https://www.cairn.info/revue-critique-de-droit-internationalprive-2018-4-page-775.htm>

and mitigate actual and potential adverse social, environmental and economic effects resulting from its decisions and activities, or those of its group.[29] By allowing the establishment of a direct liability of the parent companies, the duty of care enables the difficulties caused by the principle of separate legal personality to be overcome. This concept thus seems relevant to enable victims of acts committed by a subsidiary to obtain compensation directly from its parent company.

This thesis aims to evaluate the effectiveness of the use of the duty of care to engage the liability of Canadian parent companies for the negative effects of their subsidiaries' activities abroad.

To this end, Chapter 2 will analyze the Canadian jurisprudence that has dealt with the concept of duty of care of parent companies.

A comparative law perspective will be provided with Chapter 3 regarding the French Act on the duty of care of parent companies.

Finally, Chapter 4 will review the advantages and disadvantages of the duty of care, followed by proposals for reforms to address these shortcomings.

29. Alexis Langenfeld, « Devoir de vigilance des multinationales : Comparaison des choix de politique législative » Université Laval.

## CHAPTER 2

## THE DEVELOPMENT OF THE NOTION OF DUTY OF CARE IN THE CANADIAN CASE LAW

Canadian case law has been truly pioneering as it has recognized the possibility for a parent corporation to be held liable for the actions of its subsidiary, despite the corporate veil, due to the existence of a duty of care. However, its criteria remain to be clarified, as the state of the Canadian case law does not allow to know in advance who is a beneficiary of a duty of care from of a parent corporation and who is not.

### I- First recognition of a duty of care of a parent corporation, *Choc v. Hudbay Minerals Inc*

#### A- Facts and plaintiff's allegations

Q'eqchi' Mayan farmers (an Indigenous people in Guatemala) who lived in the El Estor area were initially removed from their lands pursuant to a 40-year lease granted by the Guatemalan government to Inco Limited (INCO), a Canadian mining company, in 1965.[30] When the mine was closed in 1982 due to a decline in nickel's market value, members of the community gradually returned to their ancestor's land in El Estor.[31] In 2004, the El Estor mine

30. Pena, *supra* note 14 at 9.
31. Shin Imai, Bernadette Maheandiran & Valerie Crystal, "Accountability Across Borders: Mining in Guatemala and the Canadian Justice System" (8 September 2012) 26 Osgoode CLPE Research Paper at 8.

was purchased by Skye Resource.[32] This transaction and the granting of an exploration license were done without the knowledge of the Mayan community.[33] The company that formally owned and operated the El Estor Mine (which was renamed the Fenix Mining Project) was Compañía Guatemalteca De Níquel (CGN). CGN was a "wholly-controlled and 98.2% owned subsidiary" of HMI[34]. Since the actions were filed, HMI amalgamated with Hudbay, and Skye Resources changed its name to HMI Nickel Inc. [35]

The claimants alleged that the security personnel employed by CGN, who were in charge of evicting people from the Mayan community who had returned to the El Estor mine, committed several serious abuses. Thus, three actions were brought against Hudbay Minerals and its two subsidiaries (CGN and HMI):

- *Margarita Caal v Hudbay* was brought by 11 women who claimed they were victims of rape committed by security personnel on 17 January, 2007,[36]
- *Angelica Choc v Hudbay Minerals Inc.* was brought for the killing of an outspoken critic of the mining activities on September 27, 2009 (the former chief of security had recently pleaded guilty in his criminal proceedings in Guatemala concerning criminal charges related to this homicide),[37]
- *German Chub Choc v Hudbay Minerals Inc.* was brought by the victim of a gunshot in the chest, allegedly fired by the security personnel employed by Hudbay.[38]

32. Klippensteins Barristers & Solicitors, "Lawsuits against Canadian Company HudBay Minerals Inc. over Human Rights Abuse in Guatemala: Canadian Mining in El Estor", (2021), online: Choc v HudBay Minerals Inc &Caal v HudBay Minerals Inchttp://www.chocversushudbay.com/history-of-the-mine.
33. *Ibid.*
34. Chilenye Nwapi, "Resource Extraction in the Courtroom: The Significance of *Choc v. Hudbay Minerals Inc.* for Transnational Justice in Canada" (2014) 14 Asper Rev Int'l Bus & Trade L 121, at 132.
35. *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 at para 9.
36. *Hudbay*, *supra* note 35 at para 5
37. *Ibid.* at para 6.
38. *Ibid.* at para 7.

Although in 2011 Hudbay sold CGN and the Fenix project, the purchase agreement provides that Hudbay remains responsible for any litigation against CGN in connection with the September 27, 2009 incidents.[39] The plaintiffs claimed that the Canadian parent company had failed to prevent abuses of its subsidiary's security personnel, over which it had the "management and control," while it had made public statements committing to the implementation of detailed standards,[40] as illustrated by their public commitment to apply the UN Guiding Principles and other international standards.[41]

B- Ontario Superior Court decision

The defendants filed three preliminary motions to strike the three actions against them:

- a motion to strike the three actions pursuant to Rule 21.01(1)(b) of the Ontario Rules of Civil Procedure,[42] because the plaintiffs would not disclose any reasonable cause of action in negligence;
- a motion to strike the amended statement of claim of the *Caal* action as it is statute-barred pursuant section 4 of the *Limitations Act*;[43]
- a motion challenging the jurisdiction of the court over CGN if the motion to strike is upheld in favour of Hudbay and HMT.[44]

In its decision, Ontario Superior Court dismissed the three motions. For the purposes of this thesis, I will mainly focus on the Court's response to the first motion (failure to disclose a reasonable cause of action), in which the notion of duty of care intervenes.

The defendants' motion to strike the plaintiff's claim was based on Rule 21.01(1)(b) of the Ontario Rules, that provides that a party may move before a judge to strike out a pleading

39. *Ibid.* at para 10.
40. *Hudbay, supra* note 35 at para 26.
41. *Ibid.*
42. *Rules of Civil Procedure*, RRO 1990, Reg 194.
43. *Limitations Act*, 2002, SO 2002, c 24, Schedule B.
44. *Hudbay supra* note 35 at para 15.

on the ground that it discloses no reasonable cause of action or defence. Thus, a court may strike out a statement of claim for disclosing no reasonable cause of action when it is "plain and obvious" that the action is certain to fail because the statement of claim contains a radical defect.[45] The defendants based their motion on two arguments: the impossibility of piercing the corporate veil in this case, and the absence of a duty of care.

a) Piercing the corporate veil

The court began its analysis by stating that although the defendants characterized the plaintiffs' claims as an attempt to pierce the corporate veil, the plaintiffs were (in at least some their claims) relying on direct liability rather than the vicarious liability.[46] However, it also found that the plaintiffs pleaded that CGN is "an agent of Hudbay Minerals" in the *Choc* action.[47] As the court noted, in Ontario, three circumstances justify the piercing of the corporate veil: (a) where the corporation is "completely dominated and controlled" by another entity and is merely being used as a "shield" or "facade" to conceal the true facts; (b) where the corporation has acted as "an authorized agent of its controllers or its members", whether corporate or human; and (c) where a "statute, contract or other document" is being construed.[48] Thus, the Court found that the plaintiffs pleaded the second exception to the rule of separate legal personality. As this allegation was not considered "patently ridiculous or incapable of proof" by the court, it ruled that this claim, although based on piercing the corporate veil, should be allowed to proceed to trial. Therefore, the Ontario Superior Court of Justice dismissed the defendants' challenge which had been based on alleged piercing of the corporate veil.[49]

45. *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263 ; *Hudbay supra* note 35 at para 41.
46. *Hudbay supra* note 35 at para 43.
47. *Ibid.* at para 49.
48. *Ibid.* at para 45.
49. *Ibid* at para 49.

b) Duty of care

The plaintiffs did not plead vicarious liability. Their claims were based on the direct liability of the defendants**,** as they were asserting that Hudbay was negligent in failing to prevent the harm committed by its subsidiary's employees. The central question was therefore whether Hudbay owed a duty of care to the plaintiffs.[50]

As the plaintiffs pleaded a claim of direct negligence, they had to show that Hudbay owed a duty of care to them and plead all the element that demonstrate this duty. Otherwise, it would have been "plain and obvious" that the plaintiffs disclose no reasonable cause of action, and their claim could not pass the test under Rule 21.01(1)(b). On their side, the defendants had to prove that it was impossible for Hudbay to owe such a duty.[51]

As the plaintiffs do not argue that Hudbay owe an established duty of care (a duty of care already recognized by the law), the court applied the rules governing the establishment of a novel duty of care. These rules were originally set out by the House of Lords in 1978, which instituted the *Anns* test,[52] which was opted by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*[53] in 2003. Therefore, citing this decision, the court ruled that three conditions must be met to establish the duty of care of a Canadian parent company regarding its actions and omissions in another country:

1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and,
3. that there exist no policy reasons to negative or otherwise restrict that duty.

50. *Ibid.* at para 50-53.
51. *Ibid.* at para 53
52. *Anns v. Merton London Borough Council*, [1978] UKHL A.C. 728.
53. *Odhavji, supra* note 45.

The *Anns* test has two parts: the conditions of foreseeability and proximity, determined separately, establish a *prima facie* duty of care. Then, the third condition obliges to determine if residual policy should restrict or object to that duty of care.

The court adds that the question asked here is not whether the facts are proven to be true, but whether the pleaded facts, if they were proven, would establish a duty of care.[54]

*i- Foreseeability*

The Ontario Superior Court of Justice cited the Court of Appeal in *Bingley v. Morrison Fuels, a Division of 503373 Ontario Ltd.*, which stated, in defining the scope of the foreseeability requirement, that only the general harm had to be foreseeable, regardless of its manner of incidence. [55]

The plaintiffs have pleaded that HMI and SR knew or should have known that: (i) violence had been frequently used during the previous evictions; (ii) serious criminal accusations had been made against the Chief of Security for the Fenix mining project; and (iii) the Fenix security personnel was unlicensed, inadequately trained, and in possession of illegal weapons. Moreover, the plaintiffs added that Guatemala has one of the highest murder rates in the world, and in particular, indigenous leaders such as Adolfo Ich are frequently assassinated; and that Hudbay knew that Guatemala's justice system suffers from serious problems and the vast majority of violent crime goes unpunished.[56] It should be added that, regarding mining operations, a risk of abuse is automatically foreseeable when a parent company establishes a subsidiary in a "*weakly governed host country*" and mining inevitably brings "*potentially*

54. *Hudbay supra* note 35 at para 58 and 62.
55. *Bingley v. Morrison Fuels*, a Division of 503373 Ontario Ltd., 2009 ONCA 319, at para 24.
56. *Hudbay, supra* note 35 at para 61.

*irresponsible actors, such as security personnel and corrupt officials*", into contact with local communities.[57]

Applying the *Bingley v. Morrison Fuels*[58] reasoning, the court found that the pleaded facts, if proven at trial, could establish that the harms were reasonably foreseeable. Thus, it considered that the foreseeability requirement was established.[59]

*ii- Proximity*

In addition, a proximate enough relationship between the defendants and the plaintiffs must be established, such that it would not be unjust or unfair to impose a duty of care on the defendants.[60] Such a proximity relationship emerges in the presence of different factors, including, according to the *Odhavji* case law: (a) a close causal connection, (b) the parties' expectations and (c) any assumed or imposed obligations.[61]

The Ontario Superior Court relied primarily on Hudbay/Skye public statements to establish the proximity requirement. As mentioned above, in the *Chub* and *Choc* actions, the plaintiffs claimed that Hudbay made public statements committing to the implementation of the *Voluntary Principles on Security and Human Rights*[62] and recognizing that the local farming community was part of the Fenix mining project.[63] These Voluntary Principles are a multi-stakeholder initiative dated 2000,[64] which provides voluntary principles regarding security and human rights in the extractive sector.[65] In particular, these principles have a relation with private

57. Radu Mares, "The UN Guiding Principles on Business and Human Rights-Foundation and Implementation" (2012) Leiden, NL, Boston: Martinus Nijhoff Publishers, 169 at 181 cited by Susana C Mijares Pena, *supra* note 14.
58. *Bingley, supra* note 56.
59. *Hudbay, supra* note 35 at para 65.
60. *Hudbay supra* note 35 para 70.
61. *Odhavji, supra* note 45 at para 55.
62. *Hudbay, supra* note 35 at para 26<
63. *Hudbay, sup*ra note 35 at para 67
64. "Voluntary Principles on Security and Human Rights" (2019) at 1, online (pdf): <https://www.voluntaryprinciples.org/wp-content/uploads/2019/12/TheVoluntaryPrinciples.pdf>
65. *Ibid.* at 2

and public security component: it is prescribed to review the background of private security companies intend to employ, and that private security should not employ individuals credibly implicated in human rights abuses.[66] In the *Choc* action, Hudbay is accused of knowing that the security chief had been credibly accused of previous crimes.[67] According to the *Caal* action, Skye's CEO, on the day the harm allegedly happened, stated that Skye "did everything in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights."[68] Moreover, the company would have declared that it would take measures to deal with the ongoing land conflict.[69] Thus, the Court certainly viewed these statements as a manner of "assuming obligations", one of the factors that could give rise to a proximity relationship of the *Odhavji* case law.[70] But the Court mainly emphasizes on the expectations that must have arisen on the plaintiffs' part, as a result of these statements. Finally, the Court considered that the "plaintiff's interests" were necessarily engaged when the defendants started a mining project near the plaintiffs and requested their eviction, which contributes to the proximity relationship between the two parties.[71]

The Court found that the pleadings disclosed a sufficient basis to establish a relationship of proximity between the plaintiffs and the defendants. The court concluded that a *prima facie* relationship of proximity could be found to exist. As it is not "plain and obvious" that no duty of care can be recognized, the claim could not be struck under Rule 21.01, at least at this stage of the analysis.

66. *Ibid.* at 6.
67. *Hudbay, supra* note 35 at para 61.
68. Angelica Choc Statement of Claim at para 28 [Choc Statement of Claim].
69. *Ibid.* at para 67.
70. *Odhavji supra* note 45, quoted in *Hudbay supra* note 35 at para 69.
71. *Ibid* at para 69 and 70.

*iii- Policy considerations*

The Court comes to the second stage of the *Anns* test, which requires to determine whether there are policy reasons to negative or restrict the *prima facie* duty of care. The defendants, but also the plaintiffs, asserted that public policy considerations were consistent with their respective positions.

According to the plaintiffs, recognizing a duty of care would be in alignment with the current government policy regarding the standards of corporate social responsibility expected from Canadian companies and the reduction of risks of excessive force related to the deployment of private security at Canadian enterprises abroad.[72]

Conversely, the defendants believed that recognizing a duty of care would negate the recent work done by the federal government to work to implement the principles of corporate social responsibility in the mining sector. They also recalled the defeat of Bill C-300 3 1,[73] intended to promote the meeting of human rights standards by Canadian mining companies abroad and the stagnation of Bill C-354[74] which was intended to grant jurisdiction to Canada to hear claims of environmental and human rights abuses committed abroad.[75]

It may seem surprising for the defendants to refer to the will of Parliament to legislate on the compliance of multinational companies with human rights. Presumably, the defendants wanted to express the fact that, in their view, the recognition of a duty of care of parent companies for wrongdoings committed abroad by their subsidiaries falls within the jurisdiction of Parliament. Thus, policy reasons would prevent this duty of care from passing the *Anns* test. The question of the limits of judicial power, and of what falls within the decision-making

72. *Ibid.* at para 73.
73. Chilenye Nwapi, *supra* note 34
74 *Hudbay supra* note 35 at para 72.
75.*Ibid.*

authority of Parliament, is reflected in other decisions concerning this issue, such as the *Nevsun*[76] decision of the Supreme Court of Canada discussed below. In citing the defeat of these bills, the defendants argue that the federal legislature decided not to create a duty of care of parent companies, thus preventing the courts from doing so. The federal government's willingness to work directly with the companies involved to implement corporate social responsibility principles is also mentioned: since the bills aimed at making companies responsible for human rights violations caused by their subsidiaries were not successful, the defendants certainly considered that the government wanted the protection of human rights by Canadian multinationals to be achieved exclusively through the establishment of norms and standards, particularly voluntary ones.

The court had two considerations for holding that the second step of the Anns test would not necessarily fail at trial.

- First, it noted that there existed competing policy considerations in the circumstances of this case. It drew from this fact that it was not plain and obvious that the policy consideration step would fail at trial.[77]
- Secondly, citing the Ontario Court of Appeal *Haskett* case law; the court expressed its reluctance to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage.[78] It stated that "a novel claim of negligence should only be struck at the pleadings stage where it is clearly unsustainable". Thus, it dismissed the motion to strike the plaintiffs' actions.

76. *Nevsun Resources Ltd. v. Araya*, (2020) SCC 5.
77. *Ibid.* at para 74.
78. *Haskett v. Equifax Canada Inc*. 2003, ONCA 63 at para 52.

C- Comment

The *Choc v. Hudbay* decision is the first decision where a Canadian court ruled that a parent company could be held liable for human rights violations due to the actions of its subsidiary. Therefore, it is the decision that has led the observers of the evolution of the duty of care of parent companies to consider Canada as "a scene to observe in the years to come as a likely forum for transnational human rights litigation".[79] It has been seen as a demonstration of the gradual recognition of Canadian parent corporation liability, in line with the current international standards,[80] such as the Voluntary Principles on Security and Human Rights mentioned above.[81]

This decision can also be used as a reference for future litigation regarding the liability of Canadian parent companies for wrongdoings committed abroad by their subsidiaries. This decision tends to suggest that in this matter, pleading direct liability will be more relevant for the plaintiffs than vicarious liability. As we see in this decision, pleading direct liability allows to clear up the issue of piercing the corporate veil. Indeed, the Superior Court of Justice of Ontario recalled that the principle in Canadian law remains the distinction between a parent company and its subsidiary, and that it is not permissible to lift the veil just because the parent company was involved in wrongdoings committed by its subsidiary.[82] Thus, in the case where there is a will to hold a parent company liable for the acts committed by its subsidiary, it is necessary to be within the scope of the specific exceptions to this principle,[83] which is likely to be complicated. Unless the plaintiffs argue an established duty of care, a novel duty of care that must pass the *Anns* test will have to be established. The degree of control exercised by the

79. Nwapi, *supra* note 34, at 159.
80. Pena *supra* note 14at 21.
81. Nwapi *supra* note 34.
82. *Hudbay*, *supra* note 35 at para 44 to 49.
83. Which are, in Ontario, (a) where the corporation is "completely dominated and controlled" by another entity and is merely being used as a "shield" or "facade" to conceal the true facts; (b) where the corporation has acted as "an authorized agent of its controllers or its members", whether corporate or human; and (c) where a "statute, contract or other document" is being construed, *Hudbay supra* note 35 at para 49.

parent company is a key element in this respect, particularly with regard to the criteria of proximity and foreseeability. Indeed, for the authors who commented on this decision, it was Hudbay's involvement in the activities of its subsidiary, and the public statements made on this subject, that justified the court's position.[84] This could of course have the effect of dissuading parent companies from getting involved in the activities of their subsidiaries, even if it is to limit the risks of human rights violations, or from committing to do so.

The dispute in *Hudbay* remains on-going and the plaintiffs were recently given permission to include to their claim against *Hudbay* "further particulars, additional facts and clarifications regarding the Plaintiffs' claims against *Hudbay* in negligence".[85]

Moreover, the impact of this decision must certainly be carefully considered. Not being an appellate decision, it is not legally binding on other courts, either in Ontario or in other provinces. Above all, this decision cannot be separated from the particular facts of the case: it does not therefore impose a general duty of care of parent companies for human rights violations committed by their subsidiaries, even if committed in the course of their activities.

This statement about the nuanced impact of Hudbay is confirmed by a decision rendered by the same court a few years later, *Das v. George Weston Limited*.

## II Absence of recognition of a general duty of care, *Das v. George Weston Limited*

The Ontario Superior Court of Justice, which was supported by the Court of Appeal for Ontario, dismissed a class action lawsuit against Loblaws and its auditing firm Bureau Veritas brought on behalf of several victims of the Rana Plaza disaster that occurred in Bangladesh.

84. Nwapi, *supra* note 34 at 159, Adeline Michoud, *supra* note 5 at 165.
85. *Hudbay supra* note 35 at para 33.

A- Facts

Loblaws, Canada's largest retailer, was linked to the Rana Plaza building through its supply chain.[86] Loblaws hired Pearl Global, a garment exporter, to produce one of its lines of clothing. Peal Global outsourced some of this work to New Wave Style, a company that manufactured garments in the Rana Plaza building.[87] It appears that this company was already known for its failure to comply with workplace safety standards.[88] Rana Plaza was built in 2006 as a commercial complex, on a former pond, without proper approval. As it was not designed for industrial use, it turned out that the building could not support the weight of the industrial equipment used by five different garment manufacturers.[89]

However, two additional floors were constructed in 2013.[90] The same year, the day before the building collapsed, cracks were discovered in three pillars of the structure of Rana Plaza. Employees were sent home for the day, but New Wave managers ordered them to return the following day.[91] At that time, around half of the work performed in the Rana Plaza building by New Wave was for Loblaws, and there was a large order under production for Loblaws.[92] On April 24, 2013, at approximately 9 a.m., Rana Plaza collapsed, resulting in the death of 1,130 persons while 2,520 were injured.[93]

Loblaws had previously adopted corporate social responsibility (CSR) standards,[94] with the aim of protecting the safety of employees in both Canada and globally. The Vendor Buyer

86. *Das supra* note 16 at para 1.
87. *Ibid* at para 7.
88. Rachel Cardozo, "Appeal court upholds dismissal of Bangladeshi garment workers' class action against Loblaws over deadly factory collapse" online: *Canliiconnects* <canliiconnects.org/en/summaries/65359>.
89. *Das supra* note 16 at para 82 and 84.
90. *Ibid.* at para 83.
91. *Ibid.* at para 89.
92. *Ibid.* at para 88.
93. *Ibid.* at para 93.
94. *Ibid.* at para 25 to 30.

Agreement permitted Loblaws end its contractual relationship with Pearl Global if it did not comply with the CSR standards. However, Loblaws had no contractual right to control New Wave's operations.[95] Moreover, Loblaws CSR standards did not explicitly address the integrity of the buildings in which employees were working.[96]

Furthermore, in 2011, Loblaws hired Bureau Veritas, a consulting company, to conduct "social audits",[97] to evaluate suppliers' compliance with its CSR standards, as well as a code of conduct developed by the consulting company. Bureau Veritas was not expressly required to conduct investigation on the structural integrity of the buildings' structural integrity.[98]

On April 22, 2015, three injured garment workers and the parents of two sons and a daughter-in-law killed in the collapse commenced a class action against Loblaws and Bureau Veritas.

They alleged that Bureau Veritas was liable for negligence, and that Loblaws was vicariously liable for the negligence of its suppliers, and for the breach of a fiduciary duty.

Loblaws and Bureau Veritas brought a motion to strike the actions, as in the *Hudbay* case, pursuant to Rule 21.01(1)(b) of the Ontario Rules of Civil Procedure, based on the lack of jurisdiction of the court and the fact that the pleading disclose no reasonable cause of action.

B- Ontario Superior Court of Justice and Court of Appeal for Ontario's decisions

The Ontario Superior Court of Justice and the Court of Appeal for Ontario both dismissed the actions, on July 5, 2017 and December 20, 2018 respectively.

95. *Ibid.* at para 49.
96. Cardozo, *supra* note 88.
97. *Das supra* note 16 at para 52.
98. *Ibid.* para 57.

a) Conflict of law

The first question to be addressed was whether Bangladeshi or Ontario law was to be applied. Based on the Supreme Court of Canada's decision *Tolofson v. Jensen*,[99] Justice Perell of the Ontario Superior Court found that Bangladeshi law was applicable. Indeed, the Supreme Court in *Tolofson* ruled that the law of the jurisdiction in which the wrongdoing occurred applies to tort claims. The plaintiffs argued the injustice exception, also set out in *Tolofson*,[100] that since a rigid rule at the international level could give rise to unfairness, courts should retain discretion to apply their own law to address such circumstances. The reasons supporting this exception of injustice are threefold: unsophisticated jurisprudence; discrimination against women claimants; and the absence of punitive damages. Justice Perell rejected the injustice exception invoked by the plaintiffs, considering that there was no injustice to be feared by the application of the Bangladeshi law, based mainly on the fact that it has its roots in English law, the same common-law roots as Canada.[101] He found that the actions were statute-barred under Bangladeshi law, with the exception of those who were minors at the time of the disaster. But he also found that the negligence claim would fail under Bangladesh law.

However, Justice Perell also applied Ontario law to the case, in case he were mistaken in ruling that Bangladeshi law applied (he addressed together the legal viability of the vicarious liability claim against Loblaws under the law of Bangladesh and the law of Ontario,[102] considering that the law to be examined as identical).

For the purpose of this thesis, I shall focus on the application of the Canadian law.

99. *Tolofson v. Jensen* 1994; Lucas (Litigation Guardian of) v. Gagnon, SCR 1022.
100. *Ibid*
101. *Das supra* note 16 at para 290.
102. *Ibid*. at para 459.

b) Duty of care

Stating that the case against Loblaws and Bureau Veritas was "unquestionably a claim that does not fall within the category of cases in which the law recognizes a duty of care", Justice Perell applies the *Anns* test that must be passed in order to establish a new duty of care.

*i- Foreseeability*

The Superior Court of Ontario held that the foreseeability of harm was insufficient to establish a duty of care, stating that "It certainly is not plain and obvious that a purchaser of goods does or should have a legal duty of care to the employees of the manufacturer of those goods".[103] According to Justice Perell, foreseeability cannot be inferred from the fact that Loblaws and Bureau Veritas had planned CSR standards and codes of conduct either.[104] He explained that the fact that Loblaws had promulgated CSR standards did not demonstrate how it was foreseeable that by not instituting more comprehensive standards, the damage would occur.[105] He also cites the employees of other garment businesses, whose injury the plaintiffs argue should also be redressed by the defendants, who were not affected by the CSR standards.[106]

*ii- Proximity*

Justice Perell stated that it was "plain and obvious" that the proximity criterion was not met for either Loblaws or Bureau Veritas. He qualified the relationship between New Wave's employees and Loblaws an "*association rather than a relationship*",[107] as New Wave was a subcontractor, and the relationship was indirect. Above all, it is interesting to note that the companies' commitment in terms of corporate social responsibility was not, as opposed to the

103. *Ibid.* at para 524.
104. *Ibid.* at para 430.
105. *Ibid.*
106. *Ibid.*
107. *Ibid.* at para 528.

*Hudbay* decision, perceived as a manner of "assuming obligations", one of the factors that could give rise to a proximity relationship of the *Odhavji*[108] case law, but that they simply acknowledge having a moral duty towards the plaintiffs, which does not mean that they "contemplate a legal duty".[109] Moreover, it was not the plaintiffs' active behavior that caused the damage, but rather their lack of action. For Justice Perell, it was therefore not demonstrated that the harm claimed was a foreseeable consequence of the defendants' conduct. It is assumed that Justice Perell wants to express the fact that it is quite possible to consider that the defendants had a duty to act to prevent the victims' harm, but that this duty was not legal. Likewise, Justice Perell considered that the CSR commitments and standards could not have led to expectations on the part of the plaintiffs, based in particular on their illiteracy in English.[110]

*iii- Policy considerations*

Moving on to the second analysis of the *Anns* test, the Superior Court of Ontario found three policy factors that would negate the existence of a duty of care.[111]

- the prospect of unlimited liability, as the amount of the liability, the temporal exposure to liability and the range of claimants are indeterminate according to Justice Perell;
- the prospect of a massive extension of liability for purchasers which would be responsible of the safety of their supplier's employees. For Justice Perell, recognizing a duty of care towards Loblaws in this case would be tantamount to establishing a principle of transferring the responsibility for ensuring the safety of suppliers' employees from the supplier companies to the companies that purchase their products.

108. *Odhavji, supra* note 45.
109. *Das supra* note 16 at para 525.
110. *Ibid.* at para 25 and 531.
111. *Ibid.* at para 536.

- and, in line with my comment above, the prospect of preventing companies from making commitments and taking action to improve their corporate social responsibility.

Thus, Justice Perell dismissed the garment workers' actions. He was followed by the Ontario Court of Appeal that held that the motion judge had correctly concluded that it was plain and obvious that the tort claims against Loblaws and Bureau Veritas would not succeed in Court.[112]

*iv- Court of Appeal for Ontario's decision*

Concluding that under the existing precedent established in *Tolofson*,[113] the place where the injury occurred was the injury occurred was the decisive factor in a conflict of laws analysis and confirming that Bangladeshi law applied,[114] the court of appeal first found that the appellants had not cited any Bangladesh case law imposing a duty of care on a buyer with respect to the employees of a subcontractor, and especially not with respect to persons not in the supply chain(in this case, people who happened to be outside the Rana Plaza).[115]

The Court of Appeal placed particular emphasis on the factual problems that prevented the case from meeting the *Chandler*[116] criteria (the first decision, rendered by the Court of Appeal, to establish a duty of care against a parent company concerning the employees of one of its subsidiaries), which are: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought

112. *Das v. George Weston Limited* 2018 ONCA 1053.
113. *Tolofson, supra* note 99.
114 *Das* (Court of Appeal) *supra* note 112 at para 88.
115. *Ibid*. at para 176.
116 *Chandler v. Cape Plc*, [2012] EWCA Civ. 525.

to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[117]

Considering that none of the criteria is met, the Court of Appeal stated that:

- New Wave was not the direct subsidiary of Loblaws but a subcontractor employed by Pearl Global; thus, there was no contractual relationship between New Wave and Loblaws;[118]
- Loblaws and New Wave were not in the same business;[119]
- The defendants did not plead that Loblaws had any particular expertise in building safety and structure;[120]
- The employees had no reasonable expectation that the safety of the building would be guaranteed by Loblaws since the audit requested by the company did not address the structural aspects of the building.[121]

Finally, the Court of Appeal clearly states that pleadings that have the potential to give rise to the recognition of a duty of care on the part of a parent company with respect to the employees of another company must prove two elements: the control of the parent company over that other company and the fact that the parent company assumed responsibility for preventing the harm caused.[122]

Furthermore, considering that the above criteria have not been demonstrated, the Court of Appeal refuses to carry out a significant analysis of the policy factors that run counter to the establishment of a duty of care.[123]

117. *Das* (Court of Appeal) *supra* note 112 at para 80.
118. *Ibid.* at para 177.
119. *Ibid.*
120. *Ibid.*
121. *Ibid.* at para 178.
122. *Ibid.* at para 186.
123. *Ibid.*

C- Comment

These decisions are remarkable first of all for their approach to CSR commitments. The Superior Court of Ontario clearly states that no legal value should be given to codes of conduct and CSR commitments. In *Hudbay*, such undertakings were considered to be a way of creating an obligation, and thus the decisive factor in establishing the proximity between the plaintiffs and the defendants. It is quite the opposite in the *Das* decision: CSR commitments are moral commitments that cannot become legal because the company does not "contemplate" having a legal duty. Justice Perell seems to want to encourage CSR commitments, and certainly not take the risk of dissuading companies from making them. However, it is difficult not to wonder what their purpose is at this point, if, as Justice Perell ruled, the relationship between the plaintiffs and the defendants is not proximate enough for the companies to prevent their harm.

This decision also shows the differences in interpretation regarding the application of the Anns test criteria. According to the *Odhavji* and *Hudbay* decisions, a court may strike out a statement of claim for disclosing no reasonable cause of action when it is "plain and obvious" that the action is certain to fail because the statement of claim contains a radical defect.[124] However, in the *Das* decision, Justice Perell wondered, at the proximity stage, if it is "plain and obvious that a purchaser of goods does […] have a legal duty of care to the employees of the manufacturer of those goods".[125] In the same way, he did not hesitate to mention the existence of policy considerations which suppress the existence of a duty of care, whereas the Court in Hudbay, citing the *Haskett* case law; expressed its reluctance to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage.[126]

124. *Odhavji, supra* note 45; Hudbay *supra* note 35 at para 41.
125. *Das supra* note 16 at para 524.
126. *Hudbay, supra* note 35 at para 74, citing *Haskett supra* note 78 at para 52.

Finally, this case indicates that despite the *Hudbay* decision, Canadian case law has not established a general duty of care of parent companies and proceeds on a case-to-case basis. As rightly stated by Justice Perell, "there is no principled way to draw a line between those to whom the duty if owed and those to whom it is not",[127] which makes Canadian courts decisions on this matter highly unpredictable.

But another way to hold parent companies liable, through the breach of international legal instruments, has been discussed before the Supreme Court of Canada.

## III- Duty of care based on the breaches of international legal instruments, *Araya v Nevsun Resources Ltd*

In *Nevsun Resources Ltd. v. Araya,*[128] the Supreme Court of Canada declined to dismiss a series of claims brought by Eritrean refugees against a Canadian mining corporation for grave human rights abuses committed in Eritrea. This divided decision (5-4) is a landmark case, as it held for the first time in Canada that a private corporation may be liable under Canadian law for breaches of customary international law committed in another country.

### A- Facts and plaintiffs' allegation

The three plaintiffs are former Eritrean nationals who are now living as refugees in Canada.[129] They sued Nevsun Resources Ltd,[130] a mining company whose head office is located in Vancouver, British Columbia,[131] in a representative capacity for more than 1000 former workers,[132] regarding events that occurred at the Bisha mine between 2008 and 2012.[133]

Nevsun entered a joint venture with the government of Eritrea for the development of the Bisha mine, taking a majority share in it through subsidiaries (60% for Nevsun, while the

127. *Das supra* note 16 at para 536.
128. *Nevsun, supra* note 76.
129. *Ibid.* at para 3.
130. *Ibid.*
131. Walton, Beatrice A. "Nevsun Resources Ltd. v. Araya" (2021) 115:1 *American Journal of International Law* 108.
132. *Nevsun, supra* note 76 at para 4.
133. *Ibid.*

Government of Eritrea owned 40%).[134] The plaintiffs alleged that that they were victims of forced labor orchestrated by the Eritrean government. Indeed, they claimed that they were indefinitely conscripted, under Eritrea's National Service Program, into working at the Bisha mine.[135] The plaintiffs were allegedly required to work in inhumane conditions, accompanied by violent, cruel, inhumane and degrading treatment.[136] They alleged that "Nevsun expressly or implicitly condoned the use of forced labour and the system of enforcement through threats and abuse, by the Eritrean military",[137] since these wrongdoings allowed the company to make a profit.

The plaintiffs sought damages for

- breaches of customary international law "as incorporated into the law of Canada"[138] for forced labor, torture, slavery, crimes against humanity, and cruel, inhuman, or degrading treatment;[139]
- breaches of domestic torts such as battery, unlawful confinement, conspiracy and negligence.[140]

B- Supreme Court of Canada's decision

Nevsun brought a series of applications, which can be described as "typical",[141] in order to strike the claim, raising the doctrine of *forum non conveniens* (according to which Eritrea would be a more appropriate forum)[142] or of the act of state, and finally, claiming that the customary international law claims disclosed no reasonable cause of action, pursuant to rule 9-

134. *Ibid* at para 7.
135. *Ibid.* at para 11.
136. *Ibid.* at paras 4, and 11 to 15.
137. *Ibid.* at para 310.
138. *Ibid.* at para 60.
139. *Ibid.* at para 4.
140. *Ibid.*
141. Upendra Baxi "Nevsun: A Ray of Hope in a Darkening Landscape?" (2020) 5:2 *Business and Human Rights Journal* 243.
142. *Nevsun*, *supra* note 76 at para 16.

5 of the Supreme Court Civil Rules.[143] Indeed, the claims are very similar to the two cases described above.

Based on the issues raised by the parties and in particular the defendants, will be examined successively the doctrine of the act of state and the possibility for customary international law to give rise to new torts applicable to corporations.

1- Act of State doctrine

The Act of State doctrine is basically defined as a principle preventing domestic courts from hearing actions assessing the sovereign acts of foreign governments.[144] Justice Abella, who wrote for the majority, cited Lord Millett in *R. v. Bow Street Metropolitan Stipendiary Magistrate*[145] defining the act of state doctrine as "a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state".

Justice Abella held for the plaintiffs and refused to apply the act of state doctrine. Firstly, she highlighted the uncertainty surrounding it. In the majority's opinion, the act of state doctrine would never have been clearly defined in the common law, as "no single definition captures the unwieldy collection of principles, limitations, and exceptions that have been given the name act of state."[146] Thus, the doctrine would not have a definition, or it would be definable only by its "limitations".[147] To substantiate her position, Justice Abella cited judgments, such as *Buttes Gas and Oil Co. v. Hammer,*[148] that have raised the impossibility of applying this doctrine in a

143. *Ibid.*
144. H. Scott Fairley, "International Law Matures within the Canadian Legal System: Araya et al v Nevsun Resources Ltd" (2021) 99:1 *Can B Rev* 197.
145. R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L.), at para 269.
146. *Nevsun*, *supra* note 76 para 29.
147. *Ibid.* at para 42.
148. *Buttes Gas and Oil Co. v. Hammer*, [1982] A.C. 888 (H.L.) ".

homogeneous manner.[149] The Supreme Court begins by citing the *Belhaj*[150] case as an example, in which the judges concluded that the act of state doctrine did not apply by four different lines of reasoning, albeit concerning the same case. To put it in simple terms, the judges of the UK Supreme Court could not agree on whether the act of state doctrine applied to the circumstances of the case, but they did agree that if it did a public policy exception would apply.[151] Moreover, it also quoted Lord Justice Rix who listed the multiple exceptions to the act of state doctrine, including the case of the act of state violating public order or infringing human rights.[152] The Supreme Court noticed that the attempts to apply the act of state doctrine has mainly led to confusion, citing Jagot J. in H*abib v. Commonwealth of Australia,*[153] who observed that "the act of state doctrine has been described as 'a common law principle of uncertain application'".[154] Above all, the majority stated that, if it is highly criticized in England and Australia, it is not part of the Canadian law.[155]

Justice Abella holds that Canadian law had developed its own approach, within the principles of conflict of laws and judicial restraint, a principle which, according to Justice Abella, implies that the Courts should not make decisions that are meant to be legally binding on foreign states, but which does not prevent them from examining foreign law in the interests of the proper administration of justice.[156] She stated that Canadian courts decide issues regarding the application of foreign laws according to ordinary private law principles.[157] Thus, even if the act of state doctrine were part of Canadian law, it would not prevent the plaintiffs' claim from succeeding since a public policy exception would "allow for judicial discretion to

149. *Nevsun supra* note 76 at para 35 and para 43, quoting *Moti v. The Queen*, [2011] HCA 50 at para 52 "*The phrase 'act of State', must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula*".
150. *Belhaj & Rahmatullah (No 1) v. Straw &Ors* [2017] UKSC 3.
151. *Ibid.*
152. *Ibid.* at para 36.
153. *Habib v. Commonwealth of Australia*, [2010] FCA 12.
154. *Nevsun, supra* note 76 at para 42.
155. *Ibid.* at para 28.
156. *Ibid* at para 44.
157 *Ibid.* at para 45.

decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law".[158]

This leads to a second part of her reasoning, where she recalled that according to these principles "the deference accorded by comity to foreign legal systems 'ends where clear violations of international law and fundamental human rights begin'",[159] referring to the notion of "fundamental justice" which may have been used to prevent extraditions.[160]

Therefore, not only is the act of state doctrine excluded from Canadian law by the Supreme Court, but it is also understood that the principle of judicial restraint, which could have led to the dismissal of the plaintiffs' action, was not applied either.[161] Justice Abella concluded that there were no principles as developed in Canadian jurisprudence that were a bar to the Eritrean workers' claims.[162]

The joint dissent penned by Justices Brown and Rowe agreed with the majority's view regarding act of state doctrine.[163]

On the other hand, the dissent written by Justice Coté (Justice Moldaver concurring) seems to want to bring the act of state doctrine into Canadian law, even though it has not yet played a significant role in Canada.[164] It asserts that the act of state doctrine should be applied to the case. According to Justice Côté, the act of state doctrine has what she calls "a non-justiciability branch", that prevents a court to hear any claim in which a central issue would be whether the actions of a foreign state were lawful.[165] The fact that in the case at hand, both parties were private parties does not change the outcome of her reasoning. Justice Côté refers

158. *Ibid.*
159. *Ibid.* at para 50, quoting *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 52.
160. *Ibid.*, quoting *Canada v. Schmidt*, [1987] 1 S.C.R. 500.
161. *Ibid.* at para 59.
162. *Ibid.*
163. *Ibid.* at para 135.
164. *Ibid.* at para 59.
165. *Ibid.* at para 286.

to the US Federal District Court decision in *Presbyterian Church of Sudan v Talisman Energy Inc*[166] where Canada had sent a diplomatic note to the US State Department, as the case involved a company incorporated and domiciled in Canada that had operations in Sudan. For Justice Côté, this event is an example of "how private litigation can interfere with the responsibility of the executive for the conduct of international relations".[167]

The reference to this case has been qualified as "misleading", as Canada's policy concern was not rooted in alleged interference with Canada-Sudan relations, but in its concern for extra-territorial assertions of jurisdiction by US courts over Canadian companies operating abroad, with no meaningful connection to the United States.[168]

In my opinion, it would seem more logical that the judge should have authority in the case of a dispute between two private persons. Moreover, this is at odds with the fact that the act of state doctrine is highly controversial in other common law countries,[169] and with the widespread private international law principle that the domestic judge has an obligation to assess and set aside foreign laws that are contrary to public policy.

However, the central question of the *Nevsun* case was whether customary international law could be applied to a non-state actor.

2- The Possibility that Customary International Law Could Give Rise to New Torts

The majority started by framing what it viewed as the questions raised by the parties. According to Justice Abella, the Supreme Court had to determine "whether the international law prohibitions pled "are part of Canadian law, and, if so, whether their breaches may be remedied".[170]

166 *Presbyterian Church of Sudan v Talisman Energy, Inc.,* 2003 244 F Supp (2d) 289 (S.D.N.Y. 2003) [Talisman].
167. *Ibid*. at para 299.
168. Fairley, *supra* note 146 at 17.
169. *Nevsun*, *supra* note 76 at para 26.
170. *Ibid.* at para 73.

Regarding the first part of the question, Justice Abella begins with a review of the way customary law is incorporated into the common law. She stated that Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption.[171] Indeed, the principle of adoption in the absence of conflicting legislation had been previously confirmed in *Hape*.[172]

The majority then moves on to the other Nevsun's argument that consists in affirming that even if the international customary law mentioned was part of Canadian law, these rules would not apply to corporations. It asserted that, although states are traditionally the main subjects of international law,[173] international law has evolved this past 70 years from its "purely sovereigntist origins"[174] to a legal domain of which individuals and non-state actors are part,[175] especially when fundamental human rights are at stake. Nonetheless, it acknowledged that "because some norms of international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on" are applicable to other non-state entities.[176]

It remained to be determined whether these international customs could entitle the plaintiffs to compensation. The majority considered that since the plaintiffs' claims were based on norms that were part of common law, it was not "plain and obvious" that Canadian law could not recognize a remedy if they were breached.[177] In that sense, it acknowledged the general principle that "where there is a right, there must be a remedy".[178]

Therefore, the plaintiffs' claims are allowed to proceed.[179]

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171. *Ibid*. at para 90.
172. *R. v. Hape*, *supra* note 159.
173. *Nevsun*, *supra* note 76 at para 113.
174. *Walton*, *supra* note 131.
175. *Nevsun*, *supra* note 76 at para 107.
176. *Ibid.* at para 113.
177. *Ibid.* at para 128.
178. *Ibid.* at para120.
179. *Ibid.* at para 132.

However, Justices Brown and Rowe dissent strongly disagreed with the majority on this matter. According to them, converting prohibitive international rules into liability rules would be equivalent to changing the doctrine of adoption.[180] Moreover, they countered that "the right to a remedy does not necessarily mean a right to a particular form, or kind of remedy".[181]

In addition, the partial dissent argued that the common law precluded the creation of new torts where similar torts existed,[182] and suggested that there were existing torts that could be applied to certain plaintiffs' customary international law claims,[183] making the creation of new torts "not necessary".[184] To be specific, according to them, the proposed tort of cruel, inhuman or degrading treatment could be captured by the extant torts of battery or intentional infliction of emotional distress.[185] The proposed tort of crime against humanity could not be created either, because it encompasses too many potential behaviors and lacks specificity.[186] On the other hand, the partial dissent considered that slavery and use of forced labour could pass the "necessity test", i.e. when they cannot be included in torts such as battery, intentional infliction of emotional distress, negligence, or forcible confinement. However, it limited this necessity to very specific (not to say exceptional) cases, citing as examples the case where a person has kept another person in slavery without the need to resort to force or violence, or the use of forced labor in an attempt to pierce the corporate veil through the agency theory.[187]

Justice Brown and Justice Rowe recognized that the plaintiffs' claims were based on a higher degree of harm than usually involved in "conventional torts": however, the issue would be limited to damages and their amount.[188]

180. *Ibid.* at para 148.
181. *Ibid.* at para 214.
182. *Ibid.* at para 213-222.
183. *Ibid.* at para 245.
184. *Ibid.* at para 214.
185. *Ibid.* at para 245.
186. *Ibid.* at para 246.
187. *Ibid.* at para 147.
188. *Ibid.* at para 245.

Again, like the dissent led by Justice Coté concerning the act of state doctrine, the concern is related with the separation of powers. Justices Brown and Rowe dissent asserts that the choice of the kind of remedy should be left to Parliament.[189]

### C- Comments

The majority opinion starts with the strong statement that modern international human rights law "were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities".[190] This sums up the majority's intent, which I believe was to open a new avenue for victims of foreign atrocities to obtain redress. Nevertheless, only the possibility of applying the norms of customary international law to non-State actors is clearly affirmed.[191] The fact that there will be a remedy or the form it will take is not specified and is left to the development of the common law.

It seems rather appropriate to eliminate the act of state doctrine and apply the general principles of private international law; as stated by Lord Justice Rix "it also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law". Indeed, it seems inappropriate in these times of globalization for a judge to have to systematically waive his or her jurisdiction to set aside the application of rules contrary to public policy.

On the other hand, even though the dissenting opinions did not deny the existence of *jus cogens* norms, their main concern was to remain within the boundaries of judicial power. These are the considerations that explain why, Justice Côté seemed to be willing to incorporate the act of state doctrine in Canadian law, and to refuse to recognize the possibility of creating remedies from customary international law norms. These same considerations explain why the partial

189. *Ibid.* at para 229.
190. *Ibid.* at para 1.
191. *Ibid.* at para 128.

dissent chose to emphasize the role of Parliament, which alone, according to Justices Brown and Rowe, had the legitimacy to drive the reform necessary to create a regime of torts inspired by customary international law.[192] They also recalled that even if the creation of new torts inspired by customary international law was considered possible, it was still necessary to demonstrate a sufficient gap between the existing torts and the proposed torts for the judges to be entitled to create these new torts.[193]

According to one scholar, although the Supreme Court majority in *Nevsun* encouraged trial courts to engage in tort recognition analyses and to give effect to customary international law-based prohibitions and rights in domestic law, there are several reasons to be skeptical that the decision provided a sufficient basis for courts to incorporate customary international law standards into the common law of torts.[194]

The first identified reason is the possibility that the conflict of laws rules may preclude the application of Canadian law when the case at stake is extraterritorial.[195] Logically, cases in which a foreign law should be applied will not result in the development of new torts based on customary international law. The author rightly cited the above-mentioned *Das*[196] case, which also involved a Canadian company for acts committed abroad, as an example where the extraterritoriality of a dispute led to the rejection of the application of Canadian law.[197] Indeed, one of the contributions of this case was to recall the importance of the rule (established in *Tolofson*[198]) that the place where the damage occurs determines the applicable law, which implies that in the event of damage occurring abroad, there is absolutely no guarantee (except

192. *Ibid.* at para 225-227.
193. *Ibid.* at para 213-222.
194. Jeremy Zullow, "Canadian Litigation for Violations of Customary International Law: Questions Remaining after Nevsun v Araya" (2022) 80:1 *U Toronto Fac L Rev*. 122 at 136.
195. *Ibid.*
196. *Das* (Court of Appeal), *supra* note 112.
197. *Zullow*, *supra* note 194 at 137.
198. *Tolofson*, *supra* note 99.

for exceptional reasons) that Canadian law is applicable even with respect to engaging the liability of a Canadian company.

Another reason given preventing the creation of torts based on customary international law is the "traditional" approach to tort creation (which the partial dissent would have chosen)[199] the fact that it is necessary to demonstrate a sufficient difference between existing and proposed torts. The majority would not have committed to breaking away from this rule,[200] and, as explained above, the fact that the partial dissent found few examples where the creation of new offenses would be necessary demonstrates that this gap will be difficult to demonstrate in most cases. Moreover, the principles of judicial restraint and deference to the legislature promoted by the partial dissent could be considered as policy reasons preventing the creation of new torts.[201]

The author ends by recalling the main reasons (discussed in this thesis) that prevent the establishment of a duty of care of parent companies.[202] He explains that this difficulty is mainly due to the difficulty of obtaining evidence to prove the control of the parent companies, this control being the most significant element to establish a duty of care.[203]

He therefore considers that the creation of torts based on customary international law is unlikely to flourish in the absence of reform of "Canada's protective corporate liability framework". He insists on the need for courts to allow the corporate veil to be pierced more easily, and the liability of parent companies in the event of non-compliance with customary international law by their subsidiaries.[204]

199. *Zullow*, *supra* note 194 at 131.
200. *Ibid.* at 138.
201. *Ibid.* at 139.
202. *Ibid.* at 144.
203. *Ibid.* at 149.
204. *Ibid.* at 140

## CHAPTER 3

## COMPARATIVE LAW PERSPECTIVE:

## THE FRENCH LAW ON THE DUTY OF CARE OF PARENT COMPANIES

After a chaotic legislative path of more than 4 years, the duty of care of parent companies Act (*Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*[205]), came into force on March 28, 2017.

This Act, which was adopted in response to the Rana Plaza tragedy mentioned above, aims to make parent companies more responsible and to facilitate the compensation of victims of the wrongs of transnational companies. To this end, it establishes a duty of care by requiring the publication of a "vigilance plan"[206] in their annual reports to certain companies.

Very quickly, the bill had its critics. The very willingness to legislate in the area of the duties of parent companies towards their foreign subsidiaries was contested,because issues of corporate social responsibility should be left exclusively to voluntary approaches, [207] according for example to the chambers of commerce and industry, (organizations responsible for representing the interests of commercial, industrial and service companies) among other.

205. Law n°2017-399, JO, 28 March 2017.
206. Art L. 225-102-4 *Code du commerce* [C com].
207. Chambre de commerce et d'industrie Paris Ile-de-France « Proposition de loi instaurant une obligation de vigilance à l'encontre de certaines sociétés » (2015) online *CCI Paris Ile-de-France* <www.cci-paris-idf.fr/etudes/competitivite/droit-entreprise/obligation-de-vigilance-etudes>

Obviously, arguments of the opponents of the Canadian duty of care have also been raised concerning the French duty of care bill: to summarize the opinion of Diane de Saint-Affrique, who wrote an emblematic article containing almost all the arguments of the opponents of this bill, imposing such a duty would destroy the notion of the corporate veil, or else create obligations that would be impossible for companies to meet, since it would be extremely difficult for a group, whatever its size or power, to enforce Western standards in distant countries, where customs and concerns are different.[208]

Finally, the unanimous argument among the opponents of the bill was the loss of competitiveness that such a law would cause to French companies.[209]

Criticized as "a retreat from responsible governance,"[210] it turns out that the bill is actually a continuation of what transnational corporations are already doing. For example, with no legal obligation to do so, Total (Totalenergies SE), a major French oil company, published its first report on respect for human rights in July 2016[211].

Thus, multinationals do not automatically rule out the idea of regulating corporate social responsibility, since some of them were already willing to establish, make public and implement a due diligence plan, including due diligence measures to identify risks and prevent serious human rights abuses, which is the overall principle of the law on the duty of care of parent companies. law.[212]

208. Diane de Saint-Affrique *supra* note 27.
209. Mouvement des entreprises de France « Devoir de vigilance : une loi inefficace qui menace notre économie » (1st December 2016), online : *Medef* <https://www.medef.com/fr/communique-de-presse/article/devoir-de-vigilance-une-loi-inefficace-qui-menace-notre-economie>.
210. Catherine Malecki, « Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre : était-ce bien raisonnable ? » [2017] *Bulletin Joly Sociétés* 5 p. 298.
211. Total, « Total publie un rapport sur les droits de l'Homme dans ses activités » online *Total Energies* <totalenergies.com/fr/news/total-publie-un-rapport-sur-les-droits-de-lhomme-dans-ses-activites>.
212. Meriem Ouassini Sahli « La responsabilité de la société mère du fait de ses filiales » online (pdf) : *Archives ouvertes* <tel.archives-ouvertes.fr/tel-01249559/document>at 22.

## I- Spirit and intent of the law

### A- Inability to hold French transnational companies accountable in France

Before the Act on the duty of care (*Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre)*, in case of damage committed abroad by a foreign subsidiary, a French judge had to perform three legal reasonings. The first is to examine its own jurisdiction to hear the case, the second is to pierce the social veil, and the third is to find abasis of liability for requiring transnational corporations to make reparation for the damage committed in that regard . In the absence of an international law that would allow these three operations to be linked, the seized judge was obliged to resort to the instruments available to him under French domestic law.

However, even when the applicants rely on a national legal basis, the claim as shown by the complaint against the French company Auchan S.A. for misleading commercial practice, in an attempt to hold it accountable in response to the Rana Plaza collapse. The public prosecutor had referred the case to an investigating judge (a magistrate in France in charge of judicial investigations in the most serious or complex criminal cases), who in turn had sent an international rogatory commission requesting an on-the-spot investigation, which was to be transmitted through diplomatic channels to Bangladesh. [213] According to a French NGO, no action has been taken on this request, made in 2015.[214]

Even if the opponents of the duty of care bill pointed to the multitude of European and international instruments on the subject, (OECD Guidelines for Multinational Enterprises,[215] United Nations Guiding Principles on Business and Human Rights,[216] ISO 26000 guidance,[217]

213. « Sherpa » « Rana Plaza / Auchan : 5 ans après, le silence règne » (26 April 2018) Online : *Sherpa* <www.asso-sherpa.org/rana-plaza-auchan-5-ans-apres-silence-regne>.
214. *Ibid.*
215. OECD Guidelines for Multinational Enterprises, *supra* note 6.
216. Business and Human Rights Resource Center, *supra* note 7.
217. ISO 26 000,*supra* note 8.

UN Global Compact[218]). These opponents question the need to legislate in the absence of a legal vacuum. It has to be said that the purpose of these instruments was not to engage the liability of companies that did not comply with them, since adherence to these standards is the result of a voluntary process.

Yet, a large majority of French people believe that "multinationals must be held legally responsible for human and environmental disasters caused by their subcontractors, such as the Rana Plaza disaster in Bangladesh," according to a survey commissioned by the Citizen Forum for Corporate Social Responsibility (CSR), published in January 2015.[219] And 76% of French people believe that it is "unjustified" that a multinational company cannot be held responsible in court for serious accidents caused by its subsidiaries or subcontractors.[220]

This explained the desire on the part of some Parliamentarians in France to legislate on these issues of compensation for victims and the liability of parent companies due to the failures of its subsidiaries.

B- Objectives of the bill

The reactions to the two above-mentioned disasters show that they have for some (including the initiators of the bill) revealed the need to:

- firstly, create a mechanism that makes it possible for ordering companies to be held liable so that it is in their interest to prevent such accidents rather than to focus on lowering costs;

- secondly, give victims the possibility of being compensated by suing parent companies in the State where they have their headquarters rather than where the damage

218. United Nation Global Compact, *supra* note 9.
219. Institut CSA « La responsabilité des multinationales dans les catastrophes humaines et environnementales » (January 2015) online (pdf) *CCFD Terre Solidaire* <https://ccfd-terresolidaire.org/wp-content/uploads/2015/01/institut_csa_pour_le_forum_citoyen_pour_la_rse_-_la_responsabilite_des_multinationales_vf.pdf> p. 6.
220. *Ibid.* at 10.

occurred (as the Indian state's handling of the Bhopal disaster at the time of the disaster to now shows, in many cases neither the laws nor the leaders of the state in which the disaster occurred gave victims any hope of compensation).[221]

The commonly accepted idea among advocates of the need to legislate in this area is that the abundant soft law regarding the duty of care of parent corporations in largely ineffective. It would therefore be necessary to transpose it into "normal" legislation that is legally binding on all. Some multinationals are also calling for regulation of corporate social responsibility. Indeed, some of them already apply these principles themselves *de facto*, and wish that what is imposed on them by the media and the economy should also be imposed legally, and for everyone. This is in order to avoid unfair competition from companies that will develop a comparative advantage by practising social dumping. Social dumping is a practice of employers to use cheaper labour than is usually available at their site of production or sale, for example by moving their production to a low-wage country.

Eventually, the objectives of the bill are clearly defined in the explanatory statement of the bill:[222]

- to make transnational corporation accountable,
- to prevent the occurrence of tragedies in France and abroad
- finally, to enable victims to obtain reparation.[223]

221. France, Assemblée Nationale, « Proposition de loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordres », 6 novembre 2013, online (pdf) <https://www.assemblee-nationale.fr/14/pdf/propositions/pion1519.pdf>.
222. "Assemblée Nationale" *supra* note 17.
223. *Ibid.*

C- More in depth measures, not retained by the French MPs

a) Create a new vicarious liability

A preliminary reform project (known as Catala project[224]), now abandoned, planned to reform the entire law of obligations. In particular, the draft included an article 1360 in the *Civil Code*, which provided that the parent company was liable and had to compensate the victim directly, where the damage had been caused by its subsidiary but in relation to the control that the parent company exercised over it.

Thus, the reform would have created a new case of vicarious liability, not based on fault, but on the notion of control by the parent company over its subsidiary, which would therefore have been legally recognised. The victim would no longer have had to prove any fault on the part of the parent company in order to obtain compensation.[225]

There is no doubt that this section would have greatly expanded the cases in which the liability of the parent company would have been possible. However, the MPs did not adopt this solution, maybe considered as too radical, or dangerous for French business competitiveness, as the bill never passed.

b) Suppression of the corporate veil

For some authors, the limited liability of parent companies is merely an accident of history[226] and therefore has no relevance. To the extent that subsidiaries are part of the capital structure of the company, their behaviour should be automatically attributable to the parent company. The corporate veil – as between related companies - should thus be abolished according to Régis Bismuth. To support this theory, the author takes a retrospective look at the

224. "Ministère de la Justice" « Avant-projet de réforme du droit des obligations (articles 1101 a 1386 du code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil) » (22 september 2005) online (pdf): <*Ministère de la justice*<https://www.vie-publique.fr/sites/default/files/rapport/pdf/054000622.pdf> at 178.
225. *Ibid.*
226. Bismuth *supra* note 24.

evolution of the limited liability of legal persons, a principle that has not always existed. In particular, he cites litigation in the United States in the nineteenth century over whether or not the limited liability of shareholders for corporate debts included their liabilities for torts. For the states, the solution depended on how the corporate law was drafted. California law distinguished between contract and tort liability until the 1930s. Régis Bismuth highlights the asymmetry residing in the fact that wealth can circulate freely within the company and the structure of the group can be used for the payment of taxes at the level of the group or for the payment of dividends, but that when it comes to engaging the responsibility of the parent company for the negative externalities generated by its subsidiaries, this responsibility can remain compartmentalized. This paradox is unjustified according to him, thus torts attributed to a subsidiary should be attributed to the parent company.[227] There is generally little enthusiasm for such an approach: Even those who claim that the abolition of the corporate veil and recognising the responsibility of the parent company would be a demonstration of "common sense, courage and above all justice", consider that this is an "extreme" solution which would push parent companies not to set up in France.[228]

## II- Content of the Act

### A- Measures provided by the Act

The Act requires companies within its scope to develop a plan that includes “reasonable due diligence measures” to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of persons and the environment resulting from the activities of the company and those of the companies it controls, directly or indirectly, as well

227. *Ibid.*
228. Ouassini Sahli, *supra* note 212 at 26.

as the activities of subcontractors or suppliers with whom an established commercial relationship is maintained.[229]

Some of the due diligence measures are specified. These are the classic CSR tools: risk mapping, third party assessment procedures, appropriate risk mitigation or serious harm prevention actions.[230]. In a report on the application of the Act dated January 2020,[231] the French General Economic Council (*Conseil général de l'économie*) defines risk mapping as an analysis of the risks that a corporation poses to human rights, fundamental freedoms, the health and safety of individuals and the environment. It specifies that the risk mapping must then go as far as identifying the most serious risks, which will be treated as a priority.[232] According to the report, subsidiaries and subcontractors must be regularly evaluated on their control of these risks. This requires audit plans or evaluations by questionnaires, training in the analysis of potential risks, regular reporting on the progress made.[233] The report points out that given the number of subcontractors and suppliers a company may have, it is impossible in practice to require complete coverage of a company's entire supply chain.[234] The report adds that when serious risks are identified, actions to prevent and mitigate their impact must be developed and implemented. It also states that these actions can be of a wide variety of nature, without elaborating further.[235] It must be said that the text of the Act does not define more precisely all these risk prevention tools. The bill provides that the terms and conditions concerning the vigilance plan can beset out in an implementing decree,[236] as explained below.

229. Art L. 225-102-4 *Code du commerce* [C com].
230. *Ibid.*
231. *Conseil général de l'économie*, « Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre » (2020) at 22, (pdf) <https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf>.
232. *Ibid.*
233. *Ibid.*
234. *Ibid.*
235 *Ibid.* at 23.
236. Art L. 225-102-4 *Code du commerce* [C com].

The bill also provides that any person having a standing to act may give notice to any company to comply with its obligations relating to the duty of care. If it does not comply with them within three months, the competent court may order the company to comply with its obligations, or the judge may order that the company pays penalty payment.[237] The duty of care therefore introduces new actors - NGOs, consumers, local authorities, trade unions and even competitors -to whom the company will have to answer for measures hitherto considered voluntary.

The due diligence measures must be implemented by any company that employs, at the end of two consecutive financial years, at least five thousand employees within its company and in its direct or indirect subsidiaries whose registered office is located in France, or at least ten thousand employees within its company and in its direct or indirect subsidiaries whose registered office is located in France or abroad.[238]

The bill also provided that failure to draw up or implement the plan would be punishable by a fine of up to10 million euros.[239]

Failure to establish an effective due diligence plan may engage the company's responsibility and require it to repair the damage that could have been avoided.[240]

B- Concessions made to businesses

The bill provided for two mechanisms that were not favorable to companies and that were not finally included in the law, namely: the reversal of the burden of proof (a) and the penal sanction (b). Moreover, this law was to be the subject of an implementing decree which

[237] *Ibid*
238. *Ibid.*
239. Assemblée Nationale *supra* note 17.
240. Art L. 225-102-5 *Code du commerce* [C com].

was to give more precise instructions to companies, nevertheless this decree never came into being (c).

a) Absence of reversal of the burden of proof

One of the concerns of the opponents of the law was the rebuttable presumption of fault on the part of the parent company in the case of human rights violations or environmental damage committed by its subsidiary (allowing the parent company to be held liable if it did not demonstrate that it had not committed any fault by having taken the necessary measures to avoid the damage). This was intended to rebalance the power between the victims and the transnationals corporations covered by the law, who were considered more powerful than the potential plaintiffs.[241]

The corporation in the case of a reversal of the burden of proof, would have to demonstrate that it did everything possible to prevent the damage from occurring. For some commentators, this evidence would most often prove impossible to provide because it could always be argued that the company could have done more, or better[242]. Consequently, it is likely that, except in cases of *force majeure*, the company would in fact always be liable in the event of damage.[243]

However, no reversal of the burden of proof is established in the amended law that came into force. The applicant will still have to prove the company's fault in order to engage its liability, consisting in the absence of implementation or monitoring of the vigilance plan. The applicant will also have to prove the causal link between the insufficiency of the plan and the damage.[244]

241. Sandra Cossart, Marie-Laure Guislain, « Le devoir de vigilance pour les entreprises multinationales, un impératif juridique pour une économie durable » [2015] *Revue Lamy droit des affaires* 104.
242. Diane de Saint-Affrique *supra* note 27.
243 *Ibid.*
244. Art L. 225-102-5 *Code du commerce* [C com].

Thus, contrary to the criticism, most agree a parent company will not be liable for accidents.[245] Moreover, it can be argued that this burden of proof on claimants will significantly reduce the number of cases in which companies will be found liable. It is extremely difficult to obtain information, or to present facts, on the organisation and decision-making process within transnational corporations which have led to the commission of infringements, given the complexity of their organisation.[246]

b) Absence of criminal sanctions

Another sticking point in discussions about the Bill was the civil fine contained in the bill, in case of failure to draw up or implement the plan, of up to 10 million euros.

Certain bodies responsible for representing the interests of commercial enterprises have denounced a disproportionate fine.[247] Yet, the amount of the fine seemed derisory in relation to the turnover of some of the undertakings concerned. For example, Total, (one of the two French companies have been recently given notice to comply with the law under the law on the duty of care concerning a project to develop an oil field) had a revenue of €205.9 billion for the year 2021.

The MPs who challenged the law before the Constitutional Council considered that the fine constituted an infringement of the principle of criminal legality, since the law contained imprecise terms[248] (civil fine is a criminal sanction under French law). Indeed, the principle of "criminal legality", enshrined in Article 8 of the Declaration of Human Rights dated 1789 (*Déclaration des Droits de l'Homme et du Citoyen*), requires that crimes be defined in precise terms that allow everyone to determine in advance what behaviour is criminally punishable and

245. Vincent Bouquet, « Devoir de vigilance : quel impact pour les entreprises ? » (2015) online : *Les Echos*, <business.lesechos.fr/directions-juridiques/0204268249649-devoir-de-vigilance-quel-impact-pour-les-entreprises-concernees-109702.php>.
246. Ouassini Sahli *supra* note 212 at 308.
247. Chambre de commerce et d'industrie Paris Ile-de-France *supra* note 207.
248. Conseil Constitutionnel, « Décision n° 2017-750 DC du 23 mars 2017 » (2017) online : *Conseil Constitutionnel*, <https://www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm>

the penalty incurred. In addition to the imprecision of the terms of the law, the imprecision of the perimeter of the companies included in the field of vigilance was at issue, since the law mentions all the companies controlled directly or indirectly by a company, as well as all the subcontractors and suppliers with whom they have an established commercial relationship, regardless of the nature of the activities of these companies, their workforce, their economic weight or the place of establishment of their activities. Finally, the legislator has not specified whether the penalty is incurred for each breach of the obligation it has defined or only once regardless of the number of breaches.[249] The Council censored the civil fine, considering the terms 'reasonable vigilance measures' and 'adapted risk mitigation actions' lacked specificity, in a decision considered by some to be more political than legal.[250] Indeed, the Constitutional Council is composed of 9 members, and is renewed by third every three years. Thus, every three years, the French President of the Republic, the President of the French Senate and the President of the French National Assembly each appoint a member for a period of nine years. The Constitutional Council is therefore regularly criticized for its lack of independence from the executive and legislative branches.[251] Moreover, the recent decisions of the Constitutional Council have been criticized as systematically being in favor of the companies, like the one censuring a bill against corruption.[252] Thus, there is no longer any criminal penalty for failure to comply with the duty of care of parent companies (there is still the possibility of a periodic penalty payment provided for by law). Therefore, corporations do not have to worry about having to pay a fine in the event of non-compliance with this law.

249. *Ibid.*
250. Cossart, *supra* note 242.
251. Romain Espinosa, « L'indépendance du Conseil constitutionnel français en question » [2015], *Les Cahiers de la Justice* N° 4, at 547.
252. Sandra Cossart, Jérôme Chaplier, Tiphaine Beau De Loménie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" [2017] *Business and Human Rights Journal*, Volume 2, Issue 2 pp. 317-323.

c) Absence of implementing decree

A decree of the Council of State (*Conseil d'Etat*) was to clarify the concepts used in the legislation, which, because its wording was vague, might give rise to jurisprudential interpretations that did not necessarily reflect the spirit of the law (which consisted in the possibility of making parent companies liable and obtaining compensation for victims).[253]

Indeed, the very broad and undefined nature of the areas covered raises doubts as to whether the reference framework set by the Act can be operational.[254]

That is why the defenders of the law feared that this decree would never be adopted, because of a strategy of the employers' organizations to bury the duty of care. [255]

This has now happened, since the decree was finally made optional and still does not exist three years later.[256]

Companies will therefore have to determine the nature and content of their obligations themselves. For example, it remains to be defined what is meant by "reasonable due diligence measures"[257] mentioned in the law that must be included in the due diligence plan. The parent company is therefore free to take the measures it wishes.

Parent companies must also define the "serious violations of human rights and fundamental freedoms, the health and safety of persons and the environment"[258] that must be addressed in the plan. These terms are so broad that they are open to multiple interpretations.

253. Art L. 225-102-4 Code du commerce still provides that " *a decree of the Council of State may supplement the vigilance measures provided for in this article"*.
254. P.-L. Perrin, « Devoir de vigilance et responsabilité illimitée des entreprises : qui trop embrasse mal étreint » (2015) RTD com. 2015, p. 215.
255. Cossart, *supra* note 242.
256. Conseil Général de l'Economie, *supra* note 233 at 13.
257. Art L. 225-102-4 Code du commerce [C com].
258. *Ibid.*

The Act also refers to "appropriate actions to mitigate risks or prevent serious violations"[259] that should be part of the due diligence plan. Again, these appropriate actions are not defined and the company is free to choose which actions it considers appropriate.

Of course, if the purpose of a statute is to be applied to all, it cannot be extremely detailed. However, it is understandable in view of the vague terms used that it was initially planned that a decree by the Council of State would provide more detail as to the content of the vigilance plan. The duty of vigilance is accompanied by undeniable legal uncertainty, but in return, companies enjoy real freedom in defining and implementing the prescribed measures.

Those who were concerned that a law, with a general scope, could not take into account the differences between sectors of activity and was therefore inadequate,[260] can rest assured. The lack of precision of the Act leaves companies completely free to adapt their vigilance plan to the risks specific to their activities.

C- The limited scope of the Duty of Care Act

a) Private international law issues

According to a certain interpretation of the law, when faced with an allegation of failure to exercise due diligence, a judge should apply the conflict-of-law rules enshrined in private international law; and it is only when private international law designates French law that a company could be prosecuted on the basis of the law on the duty of diligence. Adopting this view, an author has developed all the consequences that would result. At the end of an analysis of the potentialities of the traditional conflict-of-law method, the conclusion is that it is far from certain that French law will be systematically applicable, or even that it could be only marginally applicable if foreign elements are present. If the judges adopted this interpretation,

259. *Ibid.*
260. Diane de Saint-Affrique *supra* note 27.

the extraterritorial impact of the Act of 27 March 2017 could be seriously compromised at the sanction stage.[261]

With respect to the action against the parent company, the law institutes liability[262] based on articles 1240 and 1241 of the French Civil Code[263] (which institute the principles of extra-contractual liability) without ever addressing the question of the applicable law. Olivera Boskovic explains that it is far from certain that these actions in tort fall under French law. In France, the law applicable to non-contractual obligations is governed by the European regulation 864/2007/CE of July 11, 2007.[264] The author explains that everything will depend on the type of action brought. The risks contemplated by the statute are varied: infringement of fundamental rights, health risks or serious physical or environmental damage. The applicable law will not necessarily be the same. For example, in the case of environmental damage, Article 7 of the Rome II Regulation allows the victim to choose between the law of the place of the damage, which is in principle applicable, and the law of the place where the event giving rise to the damage occurred. Yet, it is precisely a question of considering that the event giving rise to liability resides in the failures of the parent company which did not establish or implement reasonable measures of vigilance likely to identify and prevent the realization of this risk. As such, French law may apply to this action.

For the other types of damage, one must turn to the general provision, namely article 4 of the Regulation.[265] In principle, this article gives jurisdiction to the law of the place where the

261. O. Boskovic, « Brèves remarques sur le devoir de vigilance et le droit international privé » [2016] D. 2016, at 385.
262. Art L. 225-102-5 *Code du commerce* [C com].
263. Art 1240 and 1241 *Code civil* [C civ].
264. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007].
265. *Ibid.*

damage occurred, which, in our typical case, will be a foreign law that does not allow the liability of the parent company to be engaged.[266]

b) An Act restricted to large companies

The duty of care concerns corporations that employ, at the end of two consecutive financial years, at least five thousand employees within its corporation and in its direct or indirect subsidiaries whose registered office is located in France, or at least ten thousand employees within its company and in its direct or indirect subsidiaries whose registered office is located in France or abroad

It is estimated that the bill would therefore apply only to the largest corporations, likely to between 125[267] and 200 companies.[268]

The Senate attempted to modify the scope of the law by substituting for the 10,000 employees a threshold linked to the achievement of a balance sheet total of more than 20 million euros or a net turnover of more than 40 million euros and a job of at least 500 permanent employees.[269] This would have broadened the number of multinationals concerned. But the final decision was to restrict the scope to the "giants".

In my opinion, this is obviously to restrict the obligation to draw up a due diligence plan to those who have the financial means to do so.

266. *Ibid.*
267. Cossart, *supra* note 242.
268 Malecki, *supra* note 210.
269. France, Sénat, « Rapport sur la proposition de loi adoptée avec modifications par l'Assemblée Nationale en deuxième lecture, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre », 5 octobre 2016, online (pdf) < http://www.senat.fr/rap/l16-010/l16-0101.pdf>.

## III- First case law

The Act has been the subject of a number of decisions, all of which concern the appropriate court to hear actions brought on the basis of the Duty of Care Act. Thus, the substance of the Act has not yet been interpreted by the judges.

Two decisions of the « Tribunal de grande instance » of Nanterre concerning this Act were rendered on January 30th, 2020, and on February 11th, 2021. These decisions aimed to determine which of the civil and commercial courts had jurisdiction to hear a liability action against a company that had not established a compliant due diligence plan.[270]

However, these decisions should not be reduced to a simple procedural question. The real issue was to determine if the is duty of care established by the law was based on tort law, or if the Act simply concerned the management of corporations. In that case, the stakeholders having a standing would be the shareholders only. After having ruled otherwise, the Tribunal declared it had jurisdiction to hear the action, stating that "The wording of article L 225-102-4 of the French Commercial Code reveals that the preservation of human rights and of Nature in general cannot be satisfied with the "insurance management" mentioned in the parliamentary works and with the regulation by the market induced by the presentation of the vigilance plan at the shareholders' meeting, but requires a judicial control. And this can only be done through strong social control, made possible by the publicity of the vigilance plan and by a loose definition of the interest to act, the action being very widely open"[271]

### A- The interim orders of January 30, 2020: the affirmation of the jurisdiction of the Commercial court

In these first legal actions, initiated on October 29, 2019 against Total S.A, a major French group, non-government organizations filed a motion for a summary hearing before the

270Trib gr inst Nanterre, 30 January 2020 [2020], n°19/02833 ; D. 2020. 970Trib gr inst Nanterre, 11 February 2021, [2021], n° 20/00915

271Trib gr inst Nanterre, 11 February 2021, [2021], n° 20/00915

President of the Judicial Court (*Tribunal de grande instance*) of Nanterre on the basis of the French Acton the duty of care of parent companies for failure to comply with its due diligence obligations in the context of oil projects carried out in Uganda and Tanzania by one of its subsidiaries and its subcontractors. More specifically, the plaintiffs requested that "the manifestly unlawful disturbance resulting from the failure of the company Total to comply with its due diligence obligations" cease and that it be enjoined "[272] to establish and publish a set of measures in its due diligence plan [...] designed to prevent the risks identified in the risk map and to prevent serious infringements of human rights and fundamental freedoms, the health and safety of individuals and the environment" in the context of the aforementioned oil projects.

The judge agreed with the arguments put forward by Total in favor of the jurisdiction of the commercial court, namely

- the provisions of Article L 225-102-4 are included in a section of the Commercial Code relating to the management of commercial companies; and

- the compliance plan is included in the management report provided for in Article L.225-100 of the French Commercial Code.

Therefore, one could argue that if the compliance plan simply concerned the management of corporations, the statute that makes it compulsory would only allow shareholders to go to court in case of failure to comply, yet, the action is opened to “any interested person”.[273] However, the court stated that the linkage of the due diligence plan to the management of the company cannot be called into question either by its public nature or by the possibility for any interested person to refer the matter to the judge: "The fact that the due diligence plan is intended to be drawn up with the stakeholders of civil society, that the

272. Philippe Métais and Élodie Valette « Devoir de vigilance : vers une option de compétence ? », (February 17, 2021) online *Dalloz Actualités* <https://www.dalloz-actualite.fr/flash/devoir-de-vigilance-vers-une-option-de-competence>

273. Art L225-102-4 Code du commerce [C com].

information is made public or that any person with an interest in acting may bring proceedings does not call into question the field in which these obligations, which are part of the management of a commercial company, fall".[274]

These issues of jurisdiction are important as the judicial court is usually considered by NGOs as a more efficient "guardian of freedoms". Companies, on the other hand, tend to want to be judged in commercial courts, considered to be more “pro-business” as their judges are elected by their peers among the traders or managers of commercial companies.[275]

B- The interim order of February 11, 2021:
”the vigilance plan of such a company affects society as a whole” (Judicial Court of Nanterre)

Other non-government organizations filed a motion for a summary hearing before the Judicial court, on January 28, 2020, to force Total to comply with its obligations under the Duty of Care Act. The defendant then argued that the court lacked jurisdiction.

The preliminary judge found that the jurisdiction of the commercial court was not exclusive. Thus, according to the judge, the preparation and implementation of the due diligence plan are directly related to the management of the Total, a criterion that is the basis for the jurisdiction of the commercial court. However, this fact alone does not give the court jurisdiction, as the law does not specify that this jurisdiction is exclusive.

The judge then cites the decision of November 18, 2020, in which the Court of Cassation (the court of last instance in France) established a jurisdictional option of the non-traders plaintiffs regarding the disputes related to the Act on the duty of care. Indeed, the usual rule of jurisdiction has always been that the commercial courts have exclusive jurisdiction over disputes between persons considered as "traders" under French law; whereas non-trading

274. Trib gr inst Nanterre, 30 January 2020 [2020], n°19/02833D. 2020. 970.
275. Quentin Chatelier, « Le devoir de vigilance dans la main du tribunal judiciaire (de Paris) » (2022) *Dalloz Actualités* 17 January 2022.

plaintiffs have the choice to settle their dispute with a trader before a commercial court or a judicial court.[276]

Finally, the court demonstrates that the dispute goes beyond commercial considerations. The judge indicates that the effectiveness of the vigilance plan depends on a strong social control and a broad definition of the interest to act:

The preliminary judge dismissed Total's jurisdictional claim and reserved the examination of the merits of the dispute for the court.

These first orders concerning the duty of care Act show how ambiguous the duty of care established by a separate statute, outside the tort law, can be. The danger that the duty of care of parent companies Act is merely the incorporation into law of the CSR standards of multinationals materializes here. It is not surprising that the first disputes concern the nature of this duty of care and the persons who can claim its application.

The decision of November 18, 2020 was confirmed on December 15, 2021 by the Court of Cassation, which reiterated that the plaintiffs had a choice between the commercial and judicial courts.[277]

In my opinion, these decisions show that the judges are determined not to deviate from the text of the law, and that they understand that the purpose of the Act is to protect human and environmental rights. Yet, the judges of the commercial court draw their legitimacy from their knowledge of the business sector. Imposing commercial court jurisdiction would have limited the scope of the Act to commercial issues.

The Parliament finally intervened to give exclusive jurisdiction to the judicial court to hear actions relating to the Act on the duty of care. Since December 24th, 2021, the Paris

276. Cass civ 8 mai 1907, [1907] DP 1911 1 p. 222.
277. Cass com 15 December 2021 [2021] No 21-11. 882.

judicial court has exclusive jurisdiction over actions relating to the duty of care based on Articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code.[278]

278. Art L211-21 Code org jud.

## CHAPTER 4

## ASSESSMENT OF THE EFFICIENCY OF THE NOTION OF DUTY OF CARE IN ESTABLISHING THE LIABILITY OF PARENT CORPORATIONS

The purpose of this chapter is to assess the relevance of the notion of duty of care for the liability of parent companies for damage caused by their subsidiaries.

In particular, the shortcomings of the duty of care as addressed by Canadian courts today will be discussed, with a view to formulating proposals for reform to overcome these limitations.

### I- Conditions to be met to establish a duty of care

As stated by the Supreme Court of Canada, which applied the *Anns* test[279] in *Odhavji*,[280] and explained above, three conditions must be met to establish a novel duty of care : a condition of proximity, a condition of foreseeability and finally the absence of policy reasons that would prevent the establishment of a duty of care (the equivalent of the criterion in British law –applied in *Das*[281] and *Hudbay*[282]- as to whether it is "fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the

279. *Anns, supra* note 52.
280. *Odhavji, supra* note 45 at para 52.
281. *Das, supra* note 16.
282. *Hudbay, supra* note 35.

other"[283]). I shall assess the possibility of establishing each of the conditions under Canadian jurisprudence. But first, as in the three cases described above, the defendants filed a motion to strike the pleadings because the plaintiffs would not disclose any reasonable cause of action, the different approaches taken by judges in dealing with these motions will be analyzed.

A- Analysis of the different approaches to the "plain and obvious test"

Let us now focus on the *Das*[284] case and on Justice Perell of the Ontario's Superior Court of Justice analysis of the plaintiffs' pleading that Loblaws controlled New Wave. This – control -was a "critical pleading"[285]: both Justice Perell and the Court of Appeal considered this to be an essential factor in establishing a duty of care.[286] The three criteria of the duty of care do not refer to the notion of control as such : the proximity criterion is defined as "the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs" . Thus, control is not directly mentioned, although it can be considered as one of the circumstances in question. However, if the company whose liability is to be engaged does not control the actor who committed the damage, it will then be considered that the parent company had no reasonable opportunity to prevent the conduct in question. This opportunity to prevent the conduct in question is for example one of the bases of the vicarious liability of the employer for acts committed by its employee.[287] Therefore, it is undoubtedly required of the plaintiffs to prove that the defendants had the possibility of preventing the harm or protecting them.

283. *Chandler*, *supra* note 116.
284. *Das*, *supra* note 16.
285. *Das* (Court of Appeal), *supra* note 112 at para 71.
286. *Ibid.*; *Das*, *supra* note 16 at para 76.
287. *London Drugs Ltd. v. Kuehne and Nagle International Ltd.*, [1992] 3 SCR 299.

In his judgment, Justice Perell refused to consider Loblaws' control of New Wave as a fact which he was obliged to take as a true.[288] He considered the allegation was based on a "tautological assertion",[289] and that the control of Loblaws over New Wave could not be accepted as proven factual allegations. The fact that agreements providing for compliance with CSR standards were entered into between Loblaws, New Wave and Pearl Global was not considered by Justice Perell to be factual evidence that Loblaws could take steps within its control to prevent harm, but a legal conclusion that he was not obliged to take as true.[290] He reached the same conclusion regarding the allegations concerning the plaintiffs' expectations of Bureau Veritas to ensure their safety.[291] Another example is the characterization by the plaintiffs of the Loblaws' wrongdoings as taking place in Ontario.[292] Justice Perell considered the connecting factors given by the plaintiffs, which he found to be "very thin"[293] and thus refused to consider that the wrongdoings had taken place in Ontario.[294]

In their appeal, the plaintiffs argued that the judge failed to properly apply rule 21 plain and obvious test.[295] The Court of appeal of Ontario did not agree. Citing *Castrello v. Workplace Safety and Insurance Board*,[296] it stated that, "while the material facts that are pleaded in the statement of claim are assumed to be true for purposes of a motion to strike, bald conclusory statements of fact and allegations of legal conclusions unsupported by material facts are not".[297] The Court of Appeal held that the judge has jurisdiction, even at the motion stage, to determine

288. *Das, supra* note 16 at para 22.
289. *Ibid.*
290. *Ibid.*
291. *Ibid.* at para 26.
292. *Ibid.* at para 234.
293. *Ibid.* at para 237.
294. *Ibid.* at para 239.
295. *Das* (Court of Appeal), *supra* note 112 at para 70.
296. *Castrello v. Workplace Safety and Insurance Board* 2017 ONCA 121 para 15.
297. *Das, supra* note 16 at para 74.

what pleading he considered to be factual, what were legal conclusions or attempts to characterize facts to fit a legal theory.[298]

In *Hudbay*, the Ontario Superior Court of Justice, did not dwell on how the plaintiffs intended to prove the control of the defendants over the security personnel deployed at the Fenix mining project.[299] Nor did it discuss the fact that Hudbay/Skye knew or should have known that in Guatemala, violence is frequently used by security personnel during forced evictions of Maya Q'eqchi' communities.[300] Unlike Justice Perell, who held that the existence of plaintiffs' expectations was not a fact that he had to accept as true, Justice Brown simply stated that "Hudbay/Skye made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs".[301] The question the Court asked itself was limited to determining whether these facts, if proven, were likely to establish the foreseeability test. It insisted on recalling that "it is not the role of this court to consider or evaluate the evidence relating to these [the allegations concerning the criminal past of the chief of security] or any other allegations" in response to the defendants' argument that some of the allegations made will be proven false.[302]

Similarly, rather than adopting the same approach as Justice Perell in *Das*, consisting of examining pleadings that he considered to be legal conclusions (and not facts), Justice Brown considered, that important points of law (which includes for example the question of the control) should not be examined at the motion stage, but only at trial.[303] Moreover, according to Justice Molloy cited by Justice Brown, "the pleading must be read generously, with allowances for inadequacies due to drafting deficiencies".[304] A parallel can be drawn with the

298. *Das* (Court of Appeal), *supra* note 112 at para 75.
299. *Ibid.* at para 61.
300. *Ibid.*
301. *Ibid.* at para 69.
302. *Ibid.* at para 62.
303. *Hudbay*, *supra* note 35 at para 42.
304. *Ibid.*

allegation of control not being taken as a factual allegation by Justice Perell as it was based on a “tautological assertion”.[305]

At first glance, one might think that the way in which the plain and obvious test is apprehended differs from one judge to another. In fact, these two judgments show the importance of the judges' appreciation at the motion stage when they have to distinguish between facts and attempts to characterize facts to fit a legal theory.

The real issue at stake is the proof of control. In Hudbay, the plaintiffs argued that as a subsidiary, "CGN is completely controlled by, subservient to and dependent upon Hudbay Minerals"[306]. In addition, the Court recalls that the plaintiffs pleaded that CGN was an agent of Hudbay, which is one of the three circumstances in which the corporate veil can be pierced. Not finding this assertion patently ridiculous or incapable of proof, the Court stated that it "must be taken to be true for the purposes of this motion",[307] and concluded that there was a possibility for the corporate veil to be pierced at trial.

On the other hand, in the *Das* case, the evidence of Loblaws' control over Pearl Global and New Wave rested primarily on the agreements that required compliance with Loblaws' CSR standards.[308] The mere existence of these agreements did not convince the Ontario Superior Court of Justice that Loblaws controlled New Wave: In other words, Justice Perell has found that whether these contracts allowed Loblaws to control New Wave's business was a legal conclusion and not a fact that he had to consider true.[309]

305. *Das, supra* note 16 at para 22.
306. *Hudbay, supra* note 35 para 47.
307. *Ibid*. at para 49.
308. *Das, supra* note 16 at para 22.
309. *Ibid.*

Obviously, the fundamental difference between these two cases lies in the facts: in Hudbay, CGN was the direct subsidiary of Hudbay Minerals, whereas in *Das*, New Wave Style was only linked to Loblaws through its supply chain.

In conclusion, it appears that the control of a parent company over its subsidiary is more likely to be viewed as a question of fact, the principle being that a subsidiary, can always be controlled through the parent companies right to elect and replaced the board of directors at its whim if it so chooses.

On the other hand, since the control of a company over a subcontractor always depends on the possibility of control offered by the contracts between the two parties, it cannot be considered as a fact at the motion stage but as a legal conclusion.

B- Foreseeability

The condition of foreseeability consists in proving that the defendant had the capacity to anticipate the occurrence of the harm. In order to evaluate this capacity, the courts rely on the notion of an objectively "reasonable" person.[310]

As explained by Adeline Michoud, the condition of foreseeability is explained by the idea that it would be unjust to impose a duty of care on a person who could not anticipate it.[311] Obviously, this injustice is based on the fact that if it is impossible to anticipate the harm, it is necessarily impossible to prevent it.

The Ontario Court of Appeal has stated that "the proper reasonable foreseeability analysis [...] requires only that the general harm, not 'its manner of incidence', be reasonably foreseeable".[312] The Supreme Court of Canada defines "reasonable foreseeability" as the fact

310. *Ibid.* at para 507.
311. *Michoud, supra* note 5 at 160.
312. *Bingley v. Morrison Fuels, a Division of 503373 Ontario Ltd*, 2009 ONCA 319, 95 O.R. (3d) 191 at para. 24.

that the harm is the reasonably foreseeable consequence of the defendant's act:[313] thus, more than the defendants' knowledge of the risk of harm, it is the implication of their conduct in the harm that will be decisive.

In *Das*, the alleged damages were caused by an accident, due to the failure of a subcontractor of the Loblaws subsidiary to comply with safety standards. Thus, the damage was not the result of any action on the part of the ordering company. The defendants did attempt to argue that Loblaws knew that the workplaces in Bangladesh were notoriously dangerous. They also relied on the fact that Loblaws promulgated CSR standards to argue that the company necessarily knew that its actions were likely to impact New Wave Style employees[314]. Probably in an effort not to enact a rule that would penalize companies that have promulgated CSR standards,[315] Justice Perell concluded that the promulgation of such standards did not establish the foreseeability requirement.[316] The fact that the defendants sought to extend Loblaws' liability to employees of other garment businesses (and not just New Wave employees) may not have helped to meet the foreseeability requirement (it is difficult to prove that Loblaws should have known, for example, that people outside the building would also suffer injuries from the collapse).[317]

The situation was different in *Hudbay*: the alleged acts that caused the damage were not accidental but were crimes, committed by employees of Hudbay Minerals' direct subsidiary. Moreover, the plaintiffs' theory was that these crimes were the consequence of the authorization of the use of force.[318] Thus, since Hudbay Minerals knew of the risk of violence, the harm

313. *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 at para 30.
314. *Das, supra* note 16 at para 525.
315. *Ibid.*
316. *Ibid.*
317. *Ibid.*
318. *Hudbay*, *supra* note 35 at para 61: "*In the Choc and Chub actions, the defendants' alleged act was to authorize the use of force in response to peaceful opposition from the local community" ;* at para 64 "i*t would have been reasonably foreseeable to Hudbay, […], that authorizing the use of force in response to peaceful opposition from the local community could lead to the security personnel committing violent acts*".

complained of was the reasonably foreseeable consequence of the defendants' conduct. This explains why the Ontario Superior Court found that the condition of foreseeability was met.[319]

It appears that more than the foreseeability of the damage, it is the proof that the defendant knew or should have known that its actions could cause harm to the plaintiffs that will be decisive in proving the condition of foreseeability. Or, as Justice Perell explains, "the [...] element to consider is foreseeability in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct".[320]

Thus, it follows from the *Das* jurisprudence that even if it is proved at trial that the parent company knew the risks of damage to the victim, the condition of foreseeability will be difficult to meet if it is not obvious that the damage is the result of the parent company's conduct. In this case, the defendant will only have a "*moral duty*" to try to prevent the damage, as explained by Justice Perell,[321] which does not amount to a legal duty according to him. At this stage of the jurisprudence, we can therefore affirm that it is not possible to reproach an ordering company (in *Das*, Loblaws) for its inaction to protect the employees of a subcontractor, even if it is demonstrated that it knew (or should have known) of the risk that these employees were running.

C- Proximity

A certain proximity between the defendant and the plaintiff must also be demonstrated in order to establish a duty of care, so that, as with the foreseeability criterion, it is not unfair to impose a duty of care on the defendant.[322] It appears from the Canadian case law that there are multiple criteria that can lead to the establishment of this proximity. First, it may be based on

319. *Hudbay*, *supra* note 35 at para 65.
320. *Das, supra* note 16 at para 523.
321. *Ibid.* at para 525.
322. *Odhavji supra* note 45 at para 52.

the relationship between the defendant and the plaintiff, such as a contractual relationship.[323] It may also be based on the causal link between the damage and the conduct complained of. [324] Third, it may be based on the parties' expectations.[325] Finally, proximity can be based on obligations assumed or imposed.[326]

In *Hudbay*, the Ontario Superior Court relied primarily on public statements about the human-rights record of the ongoing land conflict, as well as corporate social responsibility policies, to find that the proximity test was met.[327] Justice Brown considered this to be a way of assuming certain obligations as well as giving rise to expectations on the part of the plaintiffs.[328]

On the other hand, Justice Perell did not want to take into account the implementation of CSR standards by Loblaws to establish the proximity test. He held that there was no relationship between the employees of New Wave Style and the defendants and that there could be no expectation on the part of the defendants or obligation on the part of Loblaws under these CSR standards since Loblaws and Bureau Veritas were "*not the cause of the dangers at Rana Plaza nor in a position to ameliorate those dangers*".[329] This is explained by Justice Perell's desire not to make the implementation of CSR standards a cause of liability and a handicap for a company, so as not to dissuade them from committing to better employee protection. However, one may question the value of CSR standards taken by a company that is "not in a position to ameliorate" the working conditions of the employees for whom it has enacted such CSR standards.

323. *Das, supra* note 16 at para 527.
324. *Odhavji, supra* note 45 para 56.
325. *Ibid.*
326. *Ibid.*
327. *Hudbay, supra* note 35 at para 69.
328. *Ibid.*
329. *Das, supra* note 16 at para 531.

Of course, the main argument against taking CSR commitments into account as a factor for engaging liability is the possibility of infinite liability. One may fear that if CSR standards fail, it will always be possible to incur liability of the companies having promulgated them on the grounds that they could have done better. Moreover, one may wonder why a company that has promulgated standards or carried out audits in order to improve its social responsibility should be penalized compared to another that has done nothing to try to improve the working conditions of the workers in their supply chain. Nevertheless, it also seems unfair that companies benefit, in addition to an economic advantage thanks to the cheap work in deplorable safety conditions of some workers, from an image benefit due to public declarations or CSR standards that do not commit them in any legal way. The absence of legal value conferred on CSR standards can lead to a lack of real effectiveness of these standards, since the company has nothing to lose (financially and judicially, the risk of image persists) by promulgating CSR standards that are not enforced or not effective. To take the example of the *Das*. One can imagine that the fact that the buildings were notoriously dangerous[330] should have led Loblaws to extend its audit to checking the structural integrity of the building, since this was one of the main risks to employees. However, here again, there would be no choice but to decide on a case by case basis, and with legal uncertainty, which companies having promulgated CSR standards should be held liable or not.

To conclude on the possibility of establishing this proximity test, as stated in Hudbay "*proximity is determined by examining various factors, rather than a single unifying characteristic or test",*[331] which makes it difficult to know whether proximity will be established since it is not known in advance what the relevant facts are to establish it: for example, as we have seen with the examples presented, depending on the remaining facts of a

330. *Ibid*. at para 531.
331. *Hudbay*, *supra* note 35 at para 69.

case and the contractual relationship between the ordering company and the victims of the damage, the fact that the ordering company has committed to CSR standards will be relevant or not.

D- Public policy considerations

The final criterion of the *Anns* test for establishing a new duty of care is the absence of public policy considerations that would prevent the establishment of a duty of care. This is the second part of the *Anns* test since it is a condition for establishing a duty of care, even if the plaintiffs had succeeded in meeting the first two conditions. As explained by the Supreme Court of Canada: "[...] *this stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally*". At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair as between them. This is therefore an additional difficulty imposed on the plaintiffs.[332]

This has led some commentators to assert that Canadian jurisprudence was more concerned with preserving the coherence of its legal system than with the interests of the parties, and in particular the victims.[333] Indeed, this condition of absence of public policy considerations replaces the "fair, just and reasonable" condition applied in the United Kingdom.[334].Adeline Michoud explains that English judges assess the interests of the victims and their access to remedies in order to establish this last condition.[335] However, the condition

332. *Odhavji*, *supra* note 45 at para 51.
333. *Michoud*, *supra* note 5 at 167.
334. *Chandler*, *supra* note 116.
335. *Donoghue v Stevenson*, [1932] UKHL 100 at 580, [1932] AC 562 [Donoghue] at 582-83 cited by *Michoud*, *supra* note 5 at 156.

of absence of policy considerations shows that the aspect of access to justice for plaintiffs, which is one of the problematic issues explaining the desire to engage the liability of parent companies, is not systematically prioritized in Canada.

In *Hudbay*, at the "public policy considerations" stage, Justice Brown did not answer on the merits of whether or not there were policy considerations that would preclude a duty of care to be established. She simply stated that the fact that there are competing policy considerations in recognizing a duty of care in the circumstances of this case precludes a finding that it is plain and obvious that the case would fail. The federal government's efforts to encourage Canadian companies to implement CSR rules are alternately used by both sides as an argument for and against the establishment of a duty of care on the part of Hudbay Minerals Inc.[336] The contradiction between the duty of care of parent companies and the fundamental principle of separate corporate personality is also cited. Many authors pointed to the "uneasy co-existence" of recognizing a duty of care with the separate legal personality of each corporation, which remains a fundamental principle of Canadian corporate law.[337] Thus, it is possible that this principle will be considered by a Canadian court as a public policy consideration that prevents the recognition of a duty of care.[338]

However, Justice Perell, although he held that policy factors prevented the recognition of a duty of care, did not directly cite the principle of separate corporate personality as one of these factors. He first cited as policy considerations the prospect of unlimited liability, because it was not sufficiently circumscribed with respect to the range of claimants, for example.[339] In my opinion, future plaintiffs will have an interest in precisely delimiting the victims for whom they seek to establish the liability of a parent company, and not seeking to establish it for all the

336. *Hudbay*, *supra* note 35 at para 72-73.
337. Radu Mares, *supra* note 18 at 24; *Michoud*, *supra* note 5 at 167.
338. *Ibid.* at 168.
339. *Das*, *supra* note 16 at para 536.

victims of an event, at the risk of being accused of seeking to establish a disproportionate and unjustified liability. The risk, according to the *Das* jurisprudence, is the "deluge of cases"[340] which would be induced because of what could be qualified as an "assumption of responsibility".[341]

Another public policy consideration is the prospect of penalizing companies for enacting CSR standards. These self-imposed CSR rules seem to be a good way to prove that companies have taken responsibility and created expectations on the part of plaintiffs, and thus establish the proximity test. As explained above, this may also have the effect of discouraging companies from implementing such standards, which was considered a public policy factor in not holding Loblaws liable in *Das*.

Here again, the term "public policy considerations" is broad enough that judges can make their own decision based on their interpretation of the facts of the case

Therefore, the assessment of what constitutes a public policy consideration incompatible with the establishment of a duty of care can constitute a factor of legal uncertainty.

a. Shortcomings of the current duty of care approach in establishing a duty of care of parent companies

*i- Burden of proof*

Firstly, the duty of care approach imposes a heavy burden of proof on the plaintiffs.

Indeed, it is very clear that, according to the Canadian courts, the mere fact of having a subsidiary and conducting business in a country where workers may be known to be at risk does not in itself impose a duty of care. Plaintiffs must therefore establish this duty of care and each of its criterion.

340. *Das* (Court of Appeal), *supra* note 112 at para 56.
341. *Ibid.*

While the public-policy criterion does not pose an evidentiary problem for the defendants, the other two criteria do.

The foreseeability requirement, which seeks to establish that the injury was foreseeable, requires proof of the degree of knowledge of the parent company and of how the parent company managed its subsidiary.

The proximity criterion may require plaintiffs to prove the degree of involvement of the parent company in the affairs of its subsidiary.

Such evidence may not be easily available to plaintiffs. Some information is indeed public, such as companies' public commitments on CSR, international standards that demonstrate the consideration of certain risks by the companies,[342] or the fact that a particular location is known to be unsafe for the people who work there.[343]

However, it is very difficult to prove that a parent company actually made the decisions that led to the damage, or that it knew the danger faced by the victims, when the evidence of these facts is based on confidential elements.

In any case, it can be said that the parent company will have control over the information.[344] Thus, accessing and proving the relevant facts to establish a new duty of care may require a great amount of time and money.

*ii- Cases not covered by the duty of care*

As explained above, "reasonable foreseeability" is mainly the fact that the harm is the reasonably foreseeable consequence of the defendant's act.[345]

342. *Hudbay, supra* note 35 at para 35.
343. *Das, supra* note 16 at para 77.
344. Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, "The Third Pillar*:* Access to Judicial Remedies for Human Rights Violations by Transnational Business", (2013) *International Corporate Accountability Roundtable* at 23.
345. *Das* (Court of Appeal), *supra* note 112 at para 75.

Cases in which it is not an action of the defendant but its lack of concrete action and passivity that are at issue seem to be excluded from the possibility of being subjected to a duty of care. Indeed, in *Hudbay*, the proximity criterion is considered to have been met because the plaintiffs pleaded that the defendants had committed a reprehensible act: the authorization of the use of force, which made the subsequent acts of violence foreseeable.[346]

Similarly, the proximity test may be based on the causal link between the damage and the conduct complained of; or, on the obligations imposed or assumed by the defendant. As mentioned in Hudbay, factors considered in defining the proximity of a relationship include "expectations, representations, reliance, and the property or other interests involved".[347] Factors that might give rise to proximity are described in *Odhavji*, including (a) a close causal connection, (b) the expectations of the parties, and (c) any obligations assumed or imposed.[348]

In Hudbay, it is clear that the public commitment to CSR greatly assisted the plaintiffs in justifying that they had expectations of the defendants and in proving that they had assumed certain obligations concerning the respect of human rights.[349] Cases in which the defendant has not made a public commitment to CSR therefore also may be excluded due to a failure to establish the proximity criterion: if the plaintiffs cannot find any way other than public statements to prove that the company had assumed certain obligations other than those imposed by law, and that they expected the company to ensure their safety.

Finally, it seems that cases involving subcontractors rather than direct subsidiaries are currently excluded from the possibility of an establishment of a duty of care against the parent company.

346. *Hudbay*, *supra* note 35 at para 61 and 64.
347. *Cooper*, *supra* note 314 at para 30.
348. *Odhavji*, *supra* note 45 at para. 55.
349. *Hudbay*, *supra* note 35 at para 67.

First of all, as explained above, the presence of a control of the ordering company on the subcontractor will automatically be considered as a legal conclusion that the judges do not have to consider as true, since the ordering company has no influence on the board of the subcontractor.[350]

Moreover, the test of foreseeability depends primarily on the foreseeability of harm in relation to the conduct of the person whose duty of care is to be determined.[351] It is obvious that in the case of damage caused by a subcontractor, it will be more difficult to establish that the conduct of the parent company led to the alleged damage, since it has no formal control over the subcontractor.

*iii- Legal uncertainty*

In the light of the various cases described above, it is possible to affirm that there is legal uncertainty in the stages necessary for the establishment of a duty of care for parent companies.

Firstly, it seems difficult to foresee which approach the judge will choose and especially to distinguish the facts that will be considered as "material facts"[352] to be taken as true, from other facts whose existence may be contested at the motion stage.

The proximity criterion is characterized by the challenge of knowing in advance what the relevant facts are to establish it. As the Canadian jurisprudence on the proximity test set out above states, the proximity test can be established by a combination of various factors.[353] The same fact may be important in establishing proximity between a parent company and plaintiffs

350. *Das* (Court of Appeal), *supra* note 112 at para 75.
351. *Cooper, supra* note 314 at para 30.
352. *Ibid.*
353. *Hudbay, supra* note 35 at para 69.

in one case (e.g., the parent company's commitment to CSR[354]), and be considered ineffective in another.[355]

Finally, the political factors that may prevent the establishment of a duty of care against a parent company are not yet clear. The fact that the Canadian government has taken steps to support the implementation of CSR standards by Canadian companies can be seen as a policy factor preventing the establishment of a duty of care, just as it can be seen as a factor encouraging the establishment of this duty.[356] It is only known that the prospect of unlimited liability (the impossibility "*to draw a line between those to whom the duty if owed and those to whom it is not"*[357]) is a factor to be taken into account by the plaintiffs, since it was considered as one of the policy factors preventing the recognition of a duty of care by Justice Perell.[358]

The legal uncertainty surrounding the establishment of a parent company's duty of care can be explained, on the one hand and as we have seen, by the wide discretion left to the judges in their assessment of the facts and in the way they apprehend their mission, which may of course differ from one court to another. But above all, the establishment of a novel duty of care is based on rather large notions that can take several forms, namely the notions of "proximity" or "foreseeability" and "policy reasons". Thus, the judge has no choice but to assess them on a case-by-case basis.[359] It would therefore be necessary to wait for a multitude of cases and probably several years before being able to determine precisely and in advance the cases likely to give rise to a duty of care of the parent companies.

354. *Ibid.*
355. *Das, supra* note 16 at para 525.
356. *Hudbay, supra* note 35 at para 72-73.
357. *Das, supra* note 16 at para 536.
358. *Ibid.*
359. *Michoud, supra* note 5 at 157.

## II- **Reform proposals**

### A- Establishing a presumption of responsibility based on a due diligence obligation

Professor Radu Mares set out to determine the reasons that could justify the liability of a parent company or a company benefiting from the work of a subcontractor, for the wrongdoings committed by the latter, even if the parent company did not actively contribute to the damage. According to him, the liability of the parent company is justified when the parent company has entrusted its subsidiary, or its subcontractor, located in a high-risk country, with the task of making profits, but has not taken any decision ensuring control or supervision of the subsidiary's activities.[360]

He defines high-risk countries as poorly governed countries in which there is a foreseeable risk of human-rights violations,[361] and stakeholder "*vulnerability*" as the lack of redress for harm (caused, for example, by deficiencies in the law of high-risk countries, or in the effectiveness of remedies available to victims in the event of damage in those countries).[362]

He explains that the conduct of a parent company that creates a subsidiary that is likely to cause unremedied harm, endangering foreign citizens, automatically creates a due diligence obligation on the parent company.[363]

The International Corporate Accountability Roundtable (ICAR) is a non-governmental organization which defines itself as "*a coalition of human rights, environmental, labor, and development organizations that creates, promotes and defends legal frameworks to ensure*

360. Radu Mares, *supra* note 18 at 9.
361. *Ibid.*
362. *Ibid* at 12.
363. *Ibid* at 9.

*corporations respect human rights in their global operations"*[364]takes the same views of parent companies due diligence obligation.[365]

Based on the premise that it is increasingly recognized that it is unfair for parent companies to enjoy significant advantages through their subsidiaries (such as lower labor, manufacturing and regulatory costs, shareholder payouts, and tax benefits) but not be held accountable for human-rights abuses, the organization believes that the parent company and its subsidiary should be considered as parts of the same economic entity for which the entirety should be held accountable.[366]

According to the organization, this principle justifies the establishment by the legislator of a presumption of responsibility of the parent company in case of human-rights violations or all serious tort violations.[367] The parent company could overcome this presumption by proving that it has fulfilled its due diligence obligation.[368]

Of course, such an approach requires the addressing of certain outstanding issues. Allowing the parent company to avoid the presumption of liability in the event of compliance with its due diligence obligation requires defining the due diligence measures expected of the parent company in order to monitor and supervise its subsidiary. Without a precise definition of these due diligence measures, there is a risk of criticism of the prospect of unlimited liability of the parent company mentioned above. Yet, the presumption is rebuttable: the intention is not to ask the parent company to guarantee the absence of human rights violations or to guarantee the absence of major tort violations.

364.Skinner, *supra* note 1 at 3.
365. *Ibid.* at 24.
366. *Ibid*.
367. *Ibid.*
368. *Ibid.*

Unless the measures to be taken by the parent company are precisely defined, the criticism mentioned above (concerning the possibility of reversing the burden of proof of a breach of the French statutory duty of care[369]), which consists of asserting that it would be impossible to prove that the company has fulfilled its duty of due diligence, since it is always possible to consider that the parent company could have done better.

However, this approach has the advantage of resolving at least two shortcomings that have been attributed to the duty of care above.

Firstly, it removes the burden of proof on the plaintiffs to establish a novel duty of care. Thus, it is the parent company that must prove that it performed due diligence. Plaintiffs will presumably still have to prove that there was a human-rights violation or serious harm. In Radu Mares' approach, it seems that plaintiffs must also prove that they are in a state of vulnerability as he defines it, i.e. that they do not have access to compensation for their damages. However, they would no longer have to demonstrate foreseeability or proximity which could require access to information controlled by the parent company.

Secondly, this approach makes it possible to address cases in which no conduct or action that contributed to the damage can be attributed to the parent company. Thus, passivity and the lack of measures taken to prevent the damage may be taken into account in order for the victims to obtain compensation from the parent company.

B- Establishing a statutory duty of care

As explained above, the establishment of a duty of care by case law is associated with legal uncertainty, as judges have no choice but to proceed on a case-by-case basis.

369. *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* Law n°2017-399, JO, 28 March 2017, online <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>.

The answer to this uncertainty could be to establish a statutory duty of care. It would thus be possible to establish a statutory obligation for parent companies to take measures to prevent human-rights or environmental violations.

However, the example of the French law clearly shows that the establishment of a statute does not necessarily remove all legal uncertainty:

- In the event of the establishment of a statutory duty of care, it will be necessary to be vigilant as to the persons having legal standing to act in the event of default by the parent company. We have seen that it was possible, in the case of a statutory duty of care, to consider that this duty concerned the management of the company only, and that the parties with legal standing to act would therefore be the owners of the company, namely the shareholders. However, the shareholder has no direct interest in the company doing everything possible, including financial means, to guarantee the safety of its stakeholders. Such a consideration would jeopardize the purpose of the law, firstly because it would no longer encourage parent companies to try to prevent damage from occurring, since they would have little chance of being condemned in the event of non-compliance with their obligations. Second, the law would fail to achieve its objective of ensuring compensation for victims.
- The statute will also run the risk of being broad and of not defining the precise content of the obligations. Indeed, it is likely that terms such as "serious harm to the environment" or "measures to prevent damage" will be used and are open to interpretation. Since the statute is drafted at a general level, it is normal that it cannot be very concrete. As Pierre Louis Perrin mentioned,[370] soft law texts can be much more detailed. He cites as an example the Consolidated Set of Sustainability Reporting Standards of the Global Reporting Initiative (an independent international standard-

370. *Perrin, supra* note 255.

setting body for sustainability performance and disclosure of information by companies, governmental and non-governmental organizations), which runs to over 500 pages.[371]

- The applicable law should also be defined by the statute. As noted above, if the statute simply states that the parent company will be held liable under the principles of extra-contractual liability, Canadian principles regarding the law applicable to extra-contractual liability would apply, which could result in the application of foreign law, as it would be possible in France.[372] Yet, one of the purposes of a statutory duty of care is to compensate for the lack of remedy provided by foreign laws.

Moreover, establishing a statutory duty of care does not in itself solve the problem of the burden of proof that falls on the victims of damage. Indeed, the plaintiffs must in principle prove that the company did not take the appropriate measures to prevent the damage or did not respect its obligations under the statute. However, this information, which concerns the internal management of the corporation and often complex organizations, may be difficult for the victims to obtain. Plaintiffs will also have to prove a causal link, that is, the fact that it is the absence of measures taken by the parent company that caused the damage. However, this means having to prove that the company could have prevented the damage, which requires proving elements such as the foreseeability of the damage and other notions that may be subjective as explained above.

This burden of proof can be reversed by introducing a presumption of fault on the part of the parent company in case of human-rights violations or all serious tort violations.[373]

371. "Consolidated Set of GRI Sustainability Reporting Standards 2020" (2021), online (pdf) *Cicero Group* <https://cicerogroup.com/wp-content/uploads/2021/05/GRI-Standards-Consolidated.pdf>.
372. *Boskovic*, *supra* note 262.
373. *Robert McCorquodale, supra* note 345.

C- Establishing liability without fault

Again, one of ICAR's proposals must be considered. One of the organization's reports has taken a close look at each of the approaches to overcoming parent-corporation limited liability.

In particular, it points out that the direct duty of care approach does not address the issue of a company that sets up a subsidiary in a high-risk country in order to obtain various benefits, but passes these risks on to local communities by not taking measures to limit the risk of harm occurring (since, regardless of the country, a certain degree of involvement by the parent company is necessary to recognize a duty of care[374]).

ICAR suggests establishing a law to "disregard" limited liability of parent corporations in case of claim of customary international-human-rights violations and serious environmental torts, when the subsidiary is located in a high-risk country[375] - ICAR's definition of a high-risk country is similar to Radu Mares',[376] and is characterized by the inefficiency of the judicial system in providing compensation - and the plaintiffs are able to demonstrate that:

1. they cannot obtain an adequate judicial remedy for such harms in the country due to such corruption, lack of a cause of action, or other judicial or law-related reasons;
2. they cannot determine what entity is responsible, and thus what entity to hold accountable, given the enterprises' complex corporate structure; or
3. a subsidiary is underfunded and thus cannot pay any damages resulting from the violation[377]

374. Skinner, *supra* note 1 and 21, online (pdf) *Icar* <https://icar.ngo/wp-content/uploads/2021/04/PCAPReport2015.pdf>.
375. *Ibid.* at 24.
376. *Mares*, *supra* note 18.
377. Skinner, *supra* note 1 at 24.

The first advantage of this "liability without fault"[378] approach is that plaintiffs do not have to show that the parent company controlled its subsidiary, that it had a duty of due diligence and that it failed to meet that duty.[379]

ICAR considers that this approach is likely to be accepted by policymakers, since it remains limited:

- First, in terms of the companies concerned, by applying only to subsidiaries located in high-risk countries.[380] This criterion has the advantage of silencing concerns about the removal of the corporate veil between all subsidiaries and their parent companies;
- Second, with respect to the claims covered: by applying only to claims of international human rights violations and serious environmental torts, the legislation cannot be said to hold parent companies liable for all claims against their subsidiaries located in high-risk countries.[381]

Finally, ICAR has also considered the international aspect of the claims involved and specifies that the statute should provide that it applies to conduct occurring abroad.[382]

It seems that ICAR has succeeded in proposing a project that overcomes most of the shortcomings of the current duty of care approach. Indeed, this proposal removes the problem of the burden of proof on the plaintiffs and succeeds in including cases where the parent company has not taken the decision to become involved in the management of the subsidiary.

However, a risk of legal uncertainty remains: it still has to be defined which human-rights violations fall within the scope of such a statute, and which countries are considered to have a deficient judicial system that requires the statute to apply.

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378. *Ibid.* at 25.
379. *Ibid.*
380. *Ibid.*
381. *Ibid.*
382. *Ibid.*

# CHAPTER 5

# CONCLUSION

This thesis first presented the Canadian jurisprudence on the issue of the duty of care of parent companies for harm caused by the activities of their subsidiaries abroad:

The *Hudbay*[383] case showed that pleading the direct liability of a parent company by trying to prove a duty of care of a parent company was relevant, since it could be a way to go beyond the corporate veil and the separate legal personality, the plaintiffs having won.

However, the *Das*[384] case showed the absence of recognition of a general duty of care, since the class action seeking compensation from a Canadian ordering company following the Rana Plaza disaster was dismissed.

Both cases outlined that in attempting to prove a duty of care on the part of a parent company, the plaintiffs will have to establish a novel duty of care, and thus pass the test set out in *Anns,*[385] which was opted for by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*[386] in 2003. This test has two parts: the plaintiff must first establish a prima facie duty of care, by proving that the harm complained of is a reasonably foreseeable consequence of the alleged breach; and that there is sufficient proximity between the parties; then the plaintiffs must demonstrate that that there exist no policy reasons to negative or otherwise restrict that duty.

In *Hudbay*, the Court found that the facts pleaded by the plaintiffs, (in short, that the Canadian company knew or should have known that the security personnel were likely to use violence, and that, coupled with the weakness of the Guatemalan judicial

383. *Hudbay, supra* note 35.
384. *Das, supra* note 16.
385. *Anns, supra* note 52.
386. *Odhavji, supra* note 45.

system, this made the harm foreseeable) could establish the foreseeability condition. The Ontario Superior Court's decision in *Das* stated that the important consideration at the foreseeability stage was to prove that the harm claimed was a foreseeable consequence of the defendants' conduct.[387]

At the proximity stage, the two decisions are different: unlike in *Hudbay*, in the *Das* case, the CSR commitments made by a parent company are not perceived as a manner of "assuming obligations", one of the factors that could give rise to a proximity relationship of the *Odhavji*[388] case law.

Finally, it is difficult to state with certainty at this point what policy considerations would prevent the establishment of a duty of care for a parent company under the case law: in *Hudbay*, Justice Brown considered that the fact that there were competing policy considerations was sufficient for the plaintiffs to win at the motion stage, without ruling on the merits;[389] and in *Das*, the Court of Appeal refused to carry out a policy analysis since it held that a prima facie duty of care had not been established.[390]

In *Nevsun,*[391] the Supreme Court of Canada ruled for the first time that a private corporation may be liable under Canadian law for breaches of customary international law committed in another country. Nevertheless, this thesis showed that this decision had an impact that remains to be determined, as only the possibility of applying the norms of customary international law to non-State actors is clearly affirmed,[392] and the

387. *Das, supra* note 16 at para 525.
388. *Odhavji, supra* note 45.
389. *Hudbay, supra* note 35 at para 74.
390. *Das* (Court of Appeal), *supra* note 112 at para 185-186.
391. *Nevsun, supra* note 76.
392. *Ibid.* at para 128.

fact that there will be a remedy or the form it will take is not specified, and is left to the development of the common law.

These three cases showed that, in addition to the conditions necessary for the establishment of a novel duty of care, the recognition of a duty of care of parent companies by Canadian jurisprudence was hampered by:

- The extraterritorial aspect of the cases in question: since the Court of Appeal, ruling on the *Das* case, confirmed that the rule established in *Tolofson,*[393] stating that the law of the place of the damage is applicable, was the prevailing rule,[394] there is no guarantee that Canadian law will be applicable to the cases studied in which the harm is committed abroad. Thus, the fact that Canadian law recognizes that the parent company has a duty of care or that it has committed a tort inspired by customary international law would be irrelevant.
- The boundaries of judicial power: one example is the partial dissent in *Nevsun*, which asserted that Parliament would be more legitimate than the judiciary to effect the reforms necessary to impose obligations on parent companies.[395] In *Hudbay,* the defendants argued that the failure of bills intended to promote the meeting of human rights standards by Canadian companies abroad was part of the policy considerations that prevented judges from recognizing a duty of care of parent companies,[396] expressing the fact that, in their view, the recognition of a duty of care of parent companies for wrongdoings committed abroad by their subsidiaries falls within the jurisdiction of Parliament.

393. *Tolofson, supra* note 99.
394. *Das* (Court of Appeal), *supra* note 112 at para 88.
395. *Nevsun*, *supra* note 76at para 225-227.
396. *Hudbay*, *supra* note 35 at para 72.

This thesis also made a detour into comparative law by analyzing the Duty of Care Act incorporated into French law:

The example of French law has shown that incorporating a duty of care of parent companies into statute law can also be problematic.

The Act, by simply using terms such as "serious harm to the environment" or "measures to prevent damage", was criticized and even partially censured by the Constitutional Council[397] as failing to define not defining the precise content of the obligations of parent companies.

The Act is also criticized for its potential inefficiency, since, as with Canadian law, there is no guarantee that French law will apply to disputes that the Act concerns pursuant to the conflict of laws rules.

Finally, the Act imposes a heavy burden of proof on plaintiffs who must prove that the parent company failed to comply with its obligations under the Act, which may require obtaining information that is difficult to access and controlled by the parent companies.

The shortcomings of the notion of duty of care, whether it is jurisprudential or resulting from statute law, to hold companies liable, are therefore:

- The burden of proof imposed on plaintiffs: the foreseeability and proximity criteria, which require proof of the degree of knowledge of the parent company, and of the degree of involvement of the parent company in the business of its subsidiary, require access to evidence that may not be easily available to the plaintiffs.

397. Conseil Constitutionnel, *supra* note 249

- The fact that some cases are not covered by the duty of care: cases in which it is the passivity, rather than a concrete action of the parent company, that caused the harm, do not appear to be suitable for the establishment of a duty of care of parent companies. The same can be said for cases where the company is not a parent company but simply a ordering company, without a subsidiary being involved but a simple subcontractor.
- The legal uncertainty surrounding the establishment of the duty of care : This is due to the different approaches of judges in assessing the facts presented to them, but also because the establishment of a new duty of care is based on subjective notions of proximity, foreseeability and policy reasons. Thus, judges have to assess them on a case-by-case basis, and it is difficult to determine in advance the cases that are likely to give rise to the establishment of a duty of care toward a parent company.

This thesis concludes with reform proposals:

First, with respect to the principles underlying parent company liability, some scholars agree that, for fairness reasons, the liability of the parent company should be engaged when the parent company has entrusted its subsidiary, or its subcontractor, located in a high-risk country, with the task of making profits, but has not taken any decision ensuring control or supervision of the subsidiary's activities.[398]

As explained in this thesis, the most advanced reform and the one that responds to the most issues identified in this thesis is the one proposed by ICAR, which suggests establishing a law to "disregard" limited liability of parent corporations in case of claim of customary international human rights violations and serious environmental torts,

398. Radu Mares, *supra* note 18 at 9; *McCorquodale, supra* note 345 at 97.

when the subsidiary is located in a high-risk country[399] (i.e. a country characterized by the inefficiency of the judicial system in providing compensation), and when plaintiffs established that:

1. they cannot obtain an adequate judicial remedy for such harms in the country due to such corruption, lack of a cause of action, or other judicial or law-related reasons;
2. they cannot determine what entity is responsible, and thus what entity to hold accountable, given the enterprises' complex corporate structure; or
3. a subsidiary is underfunded and thus cannot pay any damages resulting from the violation.[400]

399. Skinner, *supra* note 1 at 24.
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