BANKING ON CORPORATE

BY NEILL MAY

Environmental law runs afoul

It is very hard to avoid puns when writing about environmental law issues. The issues, and positions taken, are often polarizing, and the themes and perspectives articulated are commonly recycled. Hopefully this lowest form of wit will not seep into, and unduly contaminate, this column.

Recently, regulators in Ontario have reached decisions, made orders, and issued (emitted?) statements indicating they are prepared to greatly expand the scope of persons against whom environmental remediation orders can and will be made. In isolation that is not a bad thing — maintaining a clean environment is indisputably a laudable objective. Expanding that scope raises certain questions, naturally, such as whether the expansion of that scope is fair and is properly focused to achieve its intended results. Environmental law is largely designed to force individuals and businesses to take account of an externality: the effect of their activities on the environment. The irony is that, in expanding the scope of remedial activity in the manner recently witnessed, regulators may themselves be creating very significant externalities.

At a panel discussion this winter on the intersection of insolvency and environmental law, a representative of the Ministry of the Environment stated that, in seeking orders under the Environmental Protection Act (Ontario), the ministry is willing to look beyond the polluter, where the polluter is a corporation, not only to its directors and officers but to its shareholders. The EPA contains a mechanism to do this where the "management and control" of the polluter is not confined to the polluter itself. But the speaker went beyond those words to invoke a concept that touches the hearts of corporate lawyers: she said, "we think of it as truly a piercing of the corporate veil."

There is very limited precedent to interpret the meaning of "management and control" in the EPA. However, recent enforcement initiatives, in addition to the comments cited above, suggest the ministry intends to interpret these words broadly. It recently issued an order against Tembec Industries Inc., a non-controlling, indirect shareholder of a bankrupt polluter, to step into the polluter's shoes at significant cost to address historic contamination. Tembec had only been a shareholder (and an apparently passive one) over a period during which the polluter was compliant. The Environmental Review Tribunal has been reading from the same script. In 2009, the tribunal ordered a municipality to pay for a cleanup to the extent that a private polluter's insurance was insufficient because the pollution had travelled through the municipality's sewers. Then last year, the tribunal ordered a former director of a former owner of a polluted site to fund a remediation.

While the words "management and control" in the EPA have not been subjected to much judicial consideration, the doctrine of "piercing the corporate veil" is established law in Canada, and has been so for over a century.

The fundamental concept of the "corporate veil" is that a corporation is a separate legal entity, distinct from its owners, and therefore liable for its own actions. From a policy perspective, limited shareholder liability is integral to encouraging public participation in the capital markets and to facilitating the risk-taking that is the seed of growth in capitalist economies. Without limited liability there might not have been the capital to fund the first railroads, the Ford Motor Co., Apple, nor, more recently, Facebook.

There will be cases where justice requires a remedy, but they are by necessity outliers. In *Kosmopoulos v. Constitution Insurance Co.,* the Supreme Court of Canada stated that "the best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience, or the interests of Revenue.'" The corporate veil, in other words, is not to be lifted as lightly as Zsa Zsa Gabor's. Other cases have found that the veil can be lifted where the corporation is acting merely as an agent, otherwise known as a "sham" or "alter ego" corporation, where it was incorporated to facilitate an illegal or improper purpose, or where there is inadequate capitalization of the corporation by the shareholder such that it cannot meet its anticipated obligations.

Or, more salient to the EPA, where provided by statute. This is where the concept of "management and control" in the EPA intersects with the construct of the corporate veil. As noted, the EPA certainly furthers an important policy. So does the corporate veil. There are lots of cases where balancing competing policies is near impossible, but here it is not. There's a balanced jurisprudence already established as to when a shareholder can be liable for a corporation's actions. Furthermore, subordinating the significance of fairness as a criterion for imposing liability in favour of casting a very wide net may lead to unintended results. Bottom line, in seeking to protect our verdant vales, consideration should be given to our corporate veils (if I have to stay away from puns I have to be permitted weak wordplay). CL

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