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Can the Director of a Corporation Be Held Personally Liable for Environmental Contamination?

A recent decision of the Ontario Court of Appeal has held that the principal of a company may be held personally liable for environmental damage to another property where that principal exercises control over the pollutant and the corporation.



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Facts

In *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819, per Hourigan J.A., the corporate appellant and the corporate respondent owned adjoining commercial properties. The respondent had been storing waste on its property since 1974, which included petroleum hydrocarbons (“PHCs”). As a result of the respondent’s negligence, PHCs contaminated the soil and groundwater on its property. The respondent had been subject to a number of field orders and compliance orders by the Ministry of the Environment following the PHC contamination.

Due to the flow of groundwater from the respondent’s to the appellant’s commercial property, the appellant discovered that its

property had also been contaminated with high levels of PHCs.

Accordingly, the appellant brought an action against the corporate respondent and its owner (the “individual respondent”) for breach of section 99(2) of the *Environmental Protection Act*, R.S.O. 1990, c.E.19 (the “EPA”), nuisance and negligence.

The trial judge held that the respondents were not liable for any environmental damage caused to the appellant’s commercial property. On appeal to the Court of Appeal, Justice Hourigan set aside the trial judgment and awarded damages to the appellants in the amount of \$1,328,000. The Court of Appeal further awarded punitive damages to the appellant in the amount of \$50,000. In so doing, the Court found that both the corporate and the individual respondent were jointly and severally liable for the

PHC contamination.

Personal Liability Under Section 99(2) of the EPA

Section 99(2) of the EPA allows a plaintiff to bring an action for compensation caused by environmental contamination as follows:

99(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

- (a) for loss or damage incurred as a direct result of,
 - (i) the spill of a pollutant that causes an adverse effect,
 - (ii) the exercise of any authority under subsection 100(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
 - (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

- (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

The Court held that in this case the corporate respondent was liable under section 99(2) of the EPA. The

Court further held that the individual respondent could be held jointly and severally liable with his corporation.

The individual respondent relied on the “corporate veil” to argue that as a corporate principal, he could not be held liable under section 99(2). The Court rejected this argument. Section 99(2) provides that an action lies against the “owner” of the pollutant and the “person who controls the pollutant”. In section 91(1) of the EPA, a “person having control of a pollutant” is defined as “the person and the person’s employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant...”. According to the Court, “parties with control of a pollutant cannot rely on separate ownership of the pollutant to shield themselves from liability”.

The Court further recognized that the issue of whether a corporate principal, director or officer is a “person having control of a pollutant” involves a contextual inquiry. In this case, the Court held that the individual respondent had “control” of the PHCs. The individual respondent was the corporate respondent’s principal and had exclusive control during the period of contamination and discharge of the PHCs:

...[The corporate respondent] is a small business whose day-to-day operations are effectively controlled by one person—[the individual respondent]. His evidence at trial established that it was he

who applied for the Certificate of Approval from the MOE and that he was responsible for both the material being brought on to [the property] and its storage on the property.

The Court further distinguished case law where actions against the former directors of a corporation and its American parent company were struck on the basis that the persons did not have control of the pollutants. In such cases, the directors only became involved once the environmental contamination had been discovered. This was not the case in *Midwest Properties Ltd.* and, accordingly, the individual respondent was held jointly and severally liable for damages to the appellant under sections 99(2) and 99(8) of the EPA.

Personal Liability for Nuisance and Negligence

The Court of Appeal further held that although it did not need to address liability at common law given its findings under the EPA, the negligence and nuisance claims were relevant to determine punitive damages against the respondents.

First, the Court held that the trial judge erred in dismissing the appellant’s claims in nuisance and negligence. Moreover, the Court found that the individual respondent could not rely on the “corporate veil” doctrine to avoid personal liability for these torts. The Court noted that in Ontario, it was without question that a director could be held liable for tortious conduct causing

property damage or a nuisance, even when the directors were acting pursuant to their duties to the corporation.

In this case, the corporate respondent was a “small business whose day-to-day operations are effectively controlled by [the individual respondent], and there is no question that he was intimately and equally involved in the conduct which was both a nuisance and negligent”. Once it was held that a person caused a nuisance to an adjoining property owner which unreasonably interfered with their

use and enjoyment of the property, that individual could not avoid liability by claiming he is a director or employee of a corporation.

Accordingly, the individual respondent was also held jointly and severally liable with the corporation in negligence and nuisance for the appellant’s property damage.

The decision in *Midwest Properties Ltd.* makes it clear that the director of a corporation cannot hide behind the “corporate veil” if it is clear that he or she exercised a degree of control over the pollutant and the corporation. In

such clear cases, the Court will not hesitate to pierce the corporate veil. While *Midwest Properties Ltd.* involved a small corporation with a controlling owner, and thus the director’s liability under the *EPA* and at common law was clear, Ontario Courts may test the boundaries of this decision in future. *The Midwest Properties Ltd.* case clearly does not create indeterminate liability for directors of corporations; the Court retains its discretion to assess liability on a contextual basis, taking into account the individual facts of a given case.

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