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Memorandum of Law

Classification:
Business associations—Nature of business associations—Nature of corporation—Distinct existence—From owner—Lifting the corporate veil—Miscellaneous

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Legal Issue:
Compared to some other Canadian jurisdictions, do British Columbia courts have a different standard with respect to when they will be willing to lift the corporate veil and impose shareholder liability?

Fact Scenario:
A client has asked for information with respect to shareholders' liability in certain circumstances with respect to a British Columbia incorporated company. The client has not provided for review the articles, capital structure, shareholders agreement or other information which may impact the analysis.

Subject: Corporate and Commercial

CONCLUSION:
Recently the British Columbia Supreme Court considered and dismissed the argument that there existed a so called “middle ground” in which British Columbia courts would be willing to lift the corporate veil and impose shareholder liability. Jurisdictions such as Nova Scotia appear to follow the broadest approach in which they will be willing to lift the corporate veil. Other jurisdictions such as Ontario appear to support a more restrictive approach and (with notable exceptions) lift the corporate veil only in circumstances of fraud.

In British Columbia, outside of cases of tax assessment, courts have largely followed the restricted approach of the British Columbia Court of Appeal case of B.G. Preeco, *supra*, in which the court held that the proper legal remedy was to respect the legal autonomy of the corporate entities and to find liability in fraud against only the particular individuals and the particular company which had actually committed fraud.

The Court in B.G. Preeco, *supra* limited lifting the corporate veil to very narrow circumstances:

> The cases in which the corporate veil is pierced on the ground of "fraud or improper conduct" deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit.

The British Columbia Supreme Court has been less consistent in its rulings, but in most circumstances has still adopted a more restrictive approach to lifting the corporate veil than other jurisdictions in Canada. The idea of a "middle ground" where the British Columbia court would be willing to lift the corporate veil was rejected and British Columbia courts have generally not been willing to pierce the corporate veil absent conduct akin to fraud.

ANALYSIS:
British Columbia's *Business Corporations Act,* generally, SBC 2002, c. 57 (the "*BCBCA*") provides:

s. 10 of the *BCBCA* allows a single individual to form a company:

> 10.
>
> (1) One or more persons may form a company by
>
> (a) entering into an incorporation agreement,
>
> (b) filing with the registrar an incorporation application, and
>
> (c) complying with this Part.

s. 30 of the *BCBCA* sets out the capacity and powers of companies:

> A company has the capacity and the rights, powers and privileges of an individual of full capacity.

s. 87 of the *BCBCA* further provides for limited liability of shareholders for corporate debt as follows:

> (1) No shareholder of a company is personally liable for the debts, obligations, defaults or acts of the company except as provided in Part 2.1 [Unlimited Liability Corporations].
>
> (2) A shareholder is not, in respect of the shares held by that shareholder, personally liable for more than the lesser of
>
> (a) the unpaid portion of the issue price for which those shares were issued by the company, and
>
> (b) the unpaid portion of the amount actually agreed to be paid for those shares.

Separate Legal Personality of the Corporation at Common Law
The separate legal personality of the corporation as distinct from its shareholders, even where there is only a single shareholder, has been a fundamental principle of corporate law since the landmark decision of Salomon v. Salomon & Co., [1897] A.C. 22 (U.K. H.L.).

Canadian courts have consistently followed the case of Salomon v. Salomon & Co., "rigidly adhering" to the doctrine of separate corporate personality in Canada. See Big Bend Hotel Ltd. v. Security Mutual Casualty Co. (1980), 19 B.C.L.R. 102 (B.C. S.C.).

Lifting the Corporate Veil (Generally)
In certain circumstances the courts have found it possible and necessary to "pierce" or "lift" the corporate veil, disregarding the separate personality of the company and deal with the economic interests lying behind the legal façade of the company.

Whether a court will do so however depends upon the facts in each particular case and generally courts are unwilling to do so unless they are required by statute or where extraordinary circumstances exist.

In Kosmopoulos v. Constitution Insurance Co. of Canada, [1987] 1 S.C.R. 2 (S.C.C.), the Supreme Court of Canada summarized the principle of lifting the corporate veil at para 12:

> As a general rule a corporation is a legal entity distinct from its shareholders: Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.). The law on when a Court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. 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 the Revenue": L.C.B. Gower, Modern Company Law (4th ed., 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary Collegesupra*, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
>
> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": *Gower, supra*, at p. 138 ...

Madame Justice Wilson's commentary in Kosmopoulos, *supra* that "theoretically the veil could be lifted ... to do justice" in any case has been interpreted both broadly and narrowly by different Canadian courts.

Kevin McGuinness in *Canadian Business Corporations Law*, 2nd ed. (Markham: LexisNexis, 2007) at 49 suggests that the unifying theme in cases where the corporate veil is lifted is the use of corporate veils as a cover for deliberate wrongdoing. Some examples might include: deliberate fraud; where there is a trust relationship, especially where the target who will be attached by lifting the veil has benefited from the breach of trust; and where the shareholders direct criminal activity by the company. However, McGuiness stresses that absent such abuse,

instances where the courts are prepared to ignore the separate personality of the corporate entity are “very rare” and for the most part “limited to cases where the corporation has carried on business as an agent for its shareholders, or has appeared in the circumstances to do so”.

Does British Columbia Have a Different Standard?
It has been argued recently that different jurisdictions within Canada have held to different standards and circumstances under which the corporate veil will be “pierced” or “lifted”. This has ranged from jurisdictions which hold that nothing short of fraud will be required to lift the corporate veil to those jurisdictions where the corporate veil has been lifted for unfairness which would lead to a flagrantly unjust result.

Ontario
Ontario courts may be prepared to lift the corporate veil in circumstances where it is required to “do justice” (See the comment of the Ontario Court of Appeal in obiter in 642947 Ontario Ltd. v. Fleischer, 2001 CarswellOnt 4296 (Ont. CA).) However Ontario courts have also narrowly construed Madam Justice Wilson's commentary in Kosmopoulos, *supra*. In Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), the Court held that Madam Justice Wilson's dictum was “plainly not intended to constitute an in depth analysis of an important area of the law or to reverse a legal principle which for almost 100 years had served as a corner stone of corporate law”. Sharpe J., as he then was, added:

> As just indicated, the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled *and being used as a shield for fraudulent or improper conduct*. The first element, “complete control”, requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently: Aluminum Co. of Canada Ltd. v. Toronto (City), [1944] S.C.R. 267, [1944] 3 D.L.R. 609; *Bank of Montreal v. Canadian Westgrowth Ltd.* (1990), 72 Alta. R. (2d) 319 (Q.B.). The evidence before me indicates that the relationship between Canada Life and C.L.M.S. was that of a typical parent and subsidiary. [Emphasis added.]

Many authorities from Ontario have been noted to require not only that a subsidiary be under the complete control of a parent but also require conduct akin to fraud. For example, in Gregorio v. Intrans-Corp.(1994), 18 O.R. (3d) 527 (Ont. C.A.), Justice Laskin said, at 536:

> ... Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights. ...

Recently in Chan v. City Commercial Realty Group Ltd., 2011 CarswellOnt 3181 (Ont. S.C.J.), Grace J. reaffirmed that the identity, rights and obligations of corporations and their shareholders are distinct and the separate legal personality of the corporation will not be disregarded lightly. At para 21 the Court provided:

Four governing statements can be drawn from the authorities:

a) First, the separate legal personality of a corporation will not be disregarded lightly;

b) Second, the analysis is largely fact specific;

c) Third, typically the corporate veil is lifted when incorporation occurs for a purpose that is illegal, fraudulent or improper;

d) Fourth, even if that is not the case, personal liability may be imposed on a person who controls a company and uses it as a shield for fraudulent or wrongful conduct provided that conduct is the reason for the complaining party's injury or loss.

Nova Scotia

In the case of White v. E.B.F. Manufacturing Ltd., 2005 NSCA 167 (N.S. C.A.), the Nova Scotia Court of Appeal proposed that there were three situations which would warrant the lifting of the corporate veil at paras 49–52:

At the hearing before us counsel for the appellant and intervenor urged that the corporate veil ought not to be lifted except in the most serious of cases where fraud, or deceit, or use of a corporation for an improper purpose is both pleaded and proved. With respect, I think that submission invites a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil. I do not understand that to be the law.

...

In Le Car GmbH v. Dusty Roads Holdings Ltd., [2004] N.S.J. No. 140, 2004 CarswellNS 138 (S.C.), Murphy, J. accurately identified three situations where courts have lifted the corporate veil:

(a) where failure to do so would be unfair and lead to a result “flagrantly opposed to justice”;

(b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual to do personally; and

(c) where the corporation is merely acting as the controlling shareholder's agent.

In the case of White, the Court held that in the facts of the case before it, there was enough evidence to support a conclusion that the company in question was the mere alter-ego of the parent company and controlling shareholder, and the Court was justified in lifting the corporate veil.

British Columbia

It was argued recently by the plaintiff in Emtwo Properties Inc. v. Cineplex (Western Canada)

Inc., 2011 CarswellBC 2211 (B.C. S.C.) that in British Columbia there was a so called "middle ground" where the court would be willing to lift the corporate veil and impose liability absent conduct akin to fraud where a subsidiary was a mere puppet of the parent corporation—i.e. when the subsidiary is the mere alter ego and under the *total control* of the parent corporation.

However, the Court in Emtwo rejected this argument, holding that given the cases of *Edgington*, *supra* and B.G. Preeco, *supra*, decisions of the British Columbia Court of Appeal, it was not open to the Court to agree that there existed in British Columbia a limited exception that allowed the alter ego doctrine to impose liability where control was so dominant that there was no independent functioning on the part of the subsidiary.

British Columbia Court of Appeal

In the leading British Columbia decision of B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. (1989), 60 D.L.R. (4th) 30, 37 B.C.L.R. (2d) 258 (B.C. C.A.), two individual defendants acted on behalf of a corporation named "Bon Street Developments Ltd." in negotiating the purchase of some property. The vendors knew that the corporation had substantial assets. Just prior to the closing of the transaction, the two individuals changed the name of the corporation to "Bon Street Holdings Inc." and the name of a corporation without assets to "Bon Street Developments Ltd." The contract was signed on behalf of the new Bon Street Developments Ltd. While the Court found the individual defendants liable for fraud, it was not prepared to disregard the separate existence of the insolvent corporation to hold the individual defendants or the original Bon Street Developments Ltd. liable under the contract, because the fraud did not relate to the identity of the corporation, but only to its assets.

In B.G. Preeco, *supra*, Seaton J.A. held that the court cannot simply lift the corporate veil whenever to do otherwise would not be fair. At paras 37–40 Seaton J.A. held:

> I do not subscribe to the "Deep Rock doctrine" that permits the corporate veil to be lifted whenever to do otherwise is not fair: see Pepper v. Litton (1939), 308 U.S. 295, 84 L. Ed. 281. That doctrine and the doctrine laid down in Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.), cannot co-exist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, Salomon's case would have afforded a good example for the application of that approach.
>
> In Kosmopoulos v. Constitution Ins. Co., [1987] 1 S.C.R. 2, 36 B.L.R. 233, 22 C.C.L.I. 296, [1987] I.L.R. 1—2147, 34 D.L.R. (4th) 208, 21 O.A.C. 4, 74 N.R. 360, there is an obiter dictum that might be thought to support the "Deep Rock doctrine":
>
> > As a general rule a corporation is a legal entity distinct from its shareholders: Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. 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 the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112.

> I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College*, [260 S.W. 2d 269], cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.

The concluding words in the chapter in L.C.B. Gower, *Modern Company Law*, 4th ed. (1979), from which Wilson J. quoted are these (at p. 138):

> The most that can be said is that the courts' policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority. The results in individual cases may be commendable, but it smacks of palm-tree justice rather than the application of legal rules.

Professor Welling in *Corporate Law in Canada* (1984), put it more firmly. He referred to the American cases that apply the fair play rationale and said (at p. 129):

> Little need be said about this rationale, other than that it simply will not do. There are, so far as we know, no such broadly enforceable standards of “fair play and good conscience,” at least in Canadian corporate law.

...

The cases in which the corporate veil is pierced on the ground of “fraud or improper conduct” deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit.

[Emphasis Added]

As was summarized by the Court in Emtwo, *supra*, Seaton, J. rejected the approach *in*D.N.H. Food Distributors Ltd. v. Tower Hamlets London Borough Council, [1976] 1 W.L.R. 852 (Eng. C.A.), that the corporate veil should be lifted where it is just and equitable to do so or where fairness requires it. (See also Adams v. Cape Industries Plc (1989), [1991] 1 All E.R. 929 (Eng. C.A.)).

In the second case, Edgington v. Mulek Estate, 2008 BCCA 505, [2009] 3 W.W.R. 440, 54 B.L.R. (4th) 165 (B.C. C.A.), the British Columbia Court of Appeal involved a tripartite agreement between purchasers, owners and a company controlled by the owners. The purchasers of leasehold interests in a building purported to exercise options to acquire the freehold interests. The purchasers' contention in exercising their options was that the owners, because they controlled the company, Westpark, had an implied obligation to sell the interests in the units by the time the options could have been exercised. At paras 20–24, Lowry J.A. provided:

> I consider the position taken by the purchasers largely ignores the longstanding principle that a corporation is in law an entity distinct and separate from its shareholders: Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.). Parties to transactions employ the use of corporate vehicles for a reason, as they are entitled to do. Shareholders, despite being in a position of

> control, do not, as a rule, incur liability for the breach of their corporation's contractual obligations. It is not a matter of control; the shareholders of a closely held company like Westpark invariably have control of the company.
>
> The separate legal personality of the corporation will not be lightly disregarded. As recognized in Big Bend Hotel Ltd. v. Security Mutual Casualty Co. (1980), 19 B.C.L.R. 102 (B.C.S.C.), respect for the corporate form is strict:
>
> > On the whole, Canadian and English courts rigidly adhere to the concept set out in *Salomon*, *supra*, that a corporation is an independent legal entity not to be identified with its shareholders.
>
> There are certain circumstances in which what the authorities state to be the "corporate veil" will be "pierced" or "lifted", or where the separate legal personality of the corporation will be disregarded. Such circumstances generally arise where the corporate form has been abused—that is, it has been used for fraudulent or illegitimate purposes (see *Big Bend Hotel*).
>
> This Court has, however, been clear that lifting the corporate veil does not extend to circumstances where declining to do so would simply be unfair. As was said in B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. (1989), 60 D.L.R. (4th) 30, 37 B.C.L.R. (2d) 258 (B.C.C.A.) ...

British Columbia Supreme Court

The Court in Emtwo, *supra* discussed at length several cases put forward by the plaintiff as authority for a so-called "middle ground" which British Columbia courts were prepared to take in lifting the corporate veil, however all were rejected by the Court. The plaintiff provided the case of International Trademarks Inc. v. Clearly Canadian Beverage Corp. (1999), 47 B.L.R. (2d) 193, 85 A.C.W.S. (3d) 306 (B.C. S.C.) as support for its position of a "middle ground".International Trademarks was dismissed by the Court in Emtwo as only providing commentary *in obiter* with respect to whether a parent may be liable for the contractual obligations of a subsidiary when the stringent test of total control is met.

The Court in Emtwo summarized the state of the law in British Columbia as it saw it at para 128–130:

> The circumstances in which the Court will lift the veil and impose the contractual liability of a subsidiary on a parent require more than the exercise of total control by the parent over the subsidiary. The corporate veil will not be pierced absent conduct akin to fraud.

There is no wrongdoing or fraud suggested in this case.

The Court in Emtwo, *supra* also dismissed the case of Harrington v. Dow Corning Corp. (1998), 55 B.C.L.R. (3d) 316 (B.C. S.C.) which adopted the test in International Trademarks, *supra*, with approval. In Harrington, application was made to strike a pleading alleging that Dow Corning was the alter ego or agent of Dow Chemical in the manufacture and distribution of breast implants. In Harrington, the Court held that a subsidiary must be under the complete

control of the parent to an extent that it has no independent functions of its own and exercises no discretion independent of the parent. The Court dismissed the application because the subsidiary, Dow Corning, was not wholly owned, nor in the complete control of Dow Chemical (given that a second parent company, Corning Incorporated, owned half the shares in Dow Corning). The Court in Harrington also referred to the tax case of Aluminum Co. of Canada v. Toronto (City), 1944 CarswellOnt 71 (S.C.C.), summarizing the test as:

> The test for an alter ego or agency relationship sufficient to impose liability on a parent company is a stringent one. The subsidiary must be under the complete control of the parent to an extent that it has no independent functions of its own. It exercises no discretion independently of the parent: *Aluminium Co. of Canada v. Toronto (City)*, [1944] 3 D.L.R. 609 (S.C.C.); Gregorio v. Intrans-Corp.(1994), 18 O.R. (3d) 527 (Ont. C.A.); Hunt v. T & N plc (B.C. C.A.)[reported (1989), 38 C.P.C. (2d) 1 (B.C. C.A.)].

Despite the fact that both the International Trademarks Inc., *supra* and Harrington, *supra* did seem to add support for the position of a “middle ground” in British Columbia, both Courts' comments with respect to lifting the corporate veil were in *obiter* and were based on a test developed in a tax proceeding, as noted below. However neither case was overruled and should not be dismissed summarily.

The Court in Emtwo, *supra*, was not the first to comment on British Columbia's reluctance to expand the circumstances in which the court would be willing to lift the corporate veil. In Save the Heritage Simpson Covenant Society v. Kelowna (City), 2008 CarswellBC 1698 (B.C. S.C.), the Court noted at para 157 the British Columbia Court of Appeal's reluctance to lift the corporate veil:

> The first situation is “where a failure to do so would be unfair and lead to a result flagrantly opposed to justice”. While the Nova Scotia Court of Appeal appears to have accepted that this type of situation warrants lifting the corporate veil, our Court of Appeal has been more reluctant to broaden the types of cases in which the principles of company law are ignored.

In Noel Developments Ltd. v. Metro-Can Construction (HS) Ltd. (1999), 50 C.L.R. (2d) 117 (B.C. S.C.) Shaw J. considered a claim that the parent Metro-Can Construction Ltd. was contractually liable for the obligations of the subsidiary Metro-Can Construction (H.S.) Ltd. In Noel Developments Ltd. all the personnel of the subsidiary were officers or employees of the parent, and the parent owned 100% of the shares of the subsidiary. The construction contract was between the subsidiary and Noel Developments Ltd. Mr. Justice Shaw noted at para. 23–26:

> While Metro-Can denies the alleged misconduct, it argues that, in any event, the allegations relate to the carrying out of the contract and cannot make Metro-Can a party to the contract. At most, Metro-Can submits, such conduct might give rise to a separate cause of action (fraud, for example), but does not suffice to make Metro-Can a party to the contract.
>
> Noel cites corporate veil cases involving taxation and expropriation. Noel contends that these cases do not include fraud or something like fraud in the considerations that are taken into account in lifting the corporate veil. These cases include: Smith, Stone & Knight Ltd. v.

> Birmingham (City), [1939] 4 All E.R. 116 (Eng. K.B.); Palmolive Manufacturing Co. (Ont.) v. R., [1933] S.C.R. 131 (S.C.C.); Halifax (City) v. Halifax Harbour Commissioners (1934), [1935] S.C.R. 215 (S.C.C.); Toronto (City) v. Famous Players Canadian Corp. (1934), [1935] O.R. 314 (Ont. C.A.), aff'd [1936] S.C.R. 141 (S.C.C.); Aluminum Co. of Canada v. Toronto (City), [1944] S.C.R. 267 (S.C.C.); De Salaberry Realties Ltd. v. Minister of National Revenue (1974), 46 D.L.R. (3d) 100 (Fed. T.D.), aff'd (1976), 70 D.L.R. (3d) 706 (Fed. C.A.); *Conseil de la santé & des services sociaux Montréal (Métropolitain) c. Montréal (Ville)*, [1994] 3 S.C.R. 29 (S.C.C.).
>
> While there may be some instances where a form of misconduct akin to fraud has not been an essential element to lifting the corporate veil, no case has been cited which would justify lifting the veil in the circumstances of the present case.
>
> In my opinion, the law applicable to the present case was settled in B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. (1989), 37 B.C.L.R. (2d) 258 (B.C. C.A.). An attempt was made to make the principals of a company liable on a contract the company had entered into. The Court of Appeal refused to lift the corporate veil to make the principals of the company liable on the contract. Based upon a finding that the principals had engaged in fraudulent conduct, the Court of Appeal held the principals liable in fraud. The Court considered "fraud or improper conduct" as a basis for lifting the corporate veil, but confined it to situations where "a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit", (*supra*, p.268). The fraud that the principals had committed was to permit the plaintiff to believe that the company had financial substance, whereas it did not. On those facts, the Court of Appeal refused to lift the corporate veil.

In Down, Re, 2000 CarswellBC 1640 (B.C. S.C.), aff'd 2000 BCCA 637 (B.C. C.A.) a group of trade creditors sought to petition Down into bankruptcy arguing that numerous trade debts incurred by several corporate entities, controlled by Down, ought to be attributable to Down given his illegal activities. The trade creditors argued Down had abused the corporate form and this entitled them to pierce the corporate veil between Down and the companies. Furthermore, the trade creditors argued that the companies had lost the right to maintain their individual legal status when they were operated for bad faith, fraudulent and illegal purposes.

Chief Justice Brenner disagreed, citing the "leading authority in B.C." was B.G. Preeco, *supra* . At 111, he said:

> In that case [*B.G. Preeco, supra*] the Court of Appeal considered and rejected the proposition that "company law does not protect principals of a company who acted fraudulently or dishonestly, and that in such cases the corporate veil should be lifted. ..." While the Court accepted that the principals of the company fraudulently caused the plaintiff to believe that one defendant company had assets which in fact were held by the another defendant company, it refused to lift the corporate veils of the defendant companies.
>
> The Court held that the proper legal remedy was to respect the legal autonomy of the corporate entities and to find liability in fraud against only the particular individuals and the particular company which had actually committed fraud.

> Therefore, under the rule in *B.G. Preeco*, to the extent that the petitioners can show fraud or other dishonest conduct on the part of Down and/or the companies, such conduct would not lift the corporate veils and allow claims in debt of the companies Down used to be extended to Down personally. The claims against Down would be limited to claims against him for fraud he personally might have committed.
>
> ...
>
> The petitioners also argue that the Down companies were mere “puppets” or “facades” because the debtors showed no regard for their independence. However this argument was also advanced and rejected in *B.G. Preeco*. There, despite evidence of the principal's significant disrespect for corporate structure and enterprise (p. 261), the Court refused to pierce the corporate veil on the basis of arguments based on “ device” (p. 268), “ agent” or “puppet” (p. 267), or “group enterprise theory” (p. 268).
>
> *The Court limited the applicability of the piercing of the corporate veil to instances where a corporation is used to effect a purpose or commit an act which the shareholder himself could not effect or commit (p. 268).*
>
> Emphasis added

In Hi-Seas Marine Ltd. v. Boelman, 2006 CarswellBC 721 (B.C. S.C.); aff'd BCCA Hi-Seas Marine Ltd. v. Boelman, 2007 CarswellBC 551 (B.C. C.A.) the Supreme Court had the opportunity to comment on both B.G. Preeco, *supra* and Down, *supra*. In concluding that the plaintiff's claims to lift the corporate veil based on the alter ego principle were found to fail, Davies, J. said at para 99-100:

> In my view, the fundamental basis upon which Hi-Seas' various claims against Boelman must fail is the flawed analysis that if the relationship between Hi-Seas and Trinav is founded upon agency principles (and particularly fiduciary duties to inform and account as determined by the Arbitration Panel), the consequent obligations also create personal liability for an officer or director of a corporate agent who directs the affairs of the trustee. To that extent, Hi-Seas' analysis and submissions entirely disregard the rule in *B.G. Preeco* as applied in *Down, Re*.
>
> Hi-Seas has not pleaded actual fraud and has also not pleaded that any of the actions taken by Boelman of which it now complains were taken to effect a purpose or commit an act which he as an officer, director or shareholder could not effect or commit. It has also adduced no evidence that could in any way support a finding that such was the case or that could establish actual fraud.

Tax Cases

As noted above in B.G. Preeco, *supra*, the British Columbia Court of Appeal acknowledged that the courts have sometimes pierced the corporate veil so as to ignore the separate legal existence of related companies in tax cases. The Court in B.G. Preeco, *supra* referred to De Salaberry Realties Ltd. v. Minister of National Revenue (1974), 46 D.L.R. (3d) 100 (Fed. T.D.)

which treated a group of companies as a single entity for tax assessment.

The Court in Emtwo, *supra*, strongly cautioned against the use of tax cases as support to lift the corporate veil when assessing liability. At 106, the Court in Emtwo, *supra* held:

> The decisions in the Supreme Court of Canada relied on by the plaintiffs [*Buanderie Centrale*, *supra* and *Aluminum Co. of Canada*, *supra*] both concern the application of the alter ego concept in tax cases and the question of whether the activities of one entity justify treating two entities as one for tax purposes, not whether the legal obligations of a subsidiary may be attached to a parent corporation. Those authorities do not deal with an attempt to make the subsidiary's liability under a contract the liability of the parent. As the Court noted in *Aluminum Co. of Canada* at 271, where the business of the subsidiary is in fact the business of the parent, "[this] does not mean, however, that for other purposes the subsidiary may not be the legal entity to be dealt with".

With respect to tax cases, they often involve the statutory requirements which require related companies to be treated as single entities for certain tax and corporate reporting purposes. (See also Fraser v. Minister of National Revenue, [1964] S.C.R. 657 (S.C.C.); Littlewoods Mail Order Stores Ltd. v. McGregor, [1969] 1 W.L.R. 1241 (Eng. C.A.).

FURTHER RESEARCH:
This memorandum has focused on the law of British Columbia and only touched on the law in other jurisdictions briefly for comparison purposes. Further research into other jurisdictions should be undertaken as necessary.

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