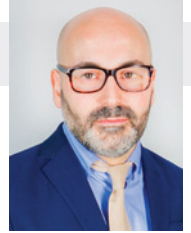


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## Piercing the Corporate Veil Where a Company Misappropriates Funds

THE ONTARIO COURT OF APPEAL HAS RECENTLY CONFIRMED THAT IT WILL PIERCE THE “CORPORATE VEIL” WHERE A COMPANY IS USED FOR AN “ILLEGAL, FRAUDULENT OR IMPROPER PURPOSE”. THE COURT REJECTED THE ARGUMENT THAT THE CORPORATE VEIL SHOULD ONLY BE PIERCED WHERE THE CORPORATION’S “COMPANY STRUCTURE” IS USED TO AVOID OR CONCEAL LIABILITY FOR AN IMPROPRIETY.

In *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2014 ONCA 85, per Pepall J.A., the plaintiff, Shoppers Drug Mart Inc. (“Shoppers”) contracted with the defendant Energyshop Consulting Inc. (“Energyshop”) to manage and pay utility bills for Shoppers’ stores on a nationwide basis (the “Contract”).

The individual defendant, Michael Wayne Beamish (“Beamish”), described himself as “President” of Energyshop. At the time of the contract, Energyshop was not incorporated. The parties never formally executed the Contract, but both Shoppers and the defendants agreed that it was binding on them. Several weeks after entering into the Contract, Beamish incorporated the Defendant 6470360 Canada Inc. (“647”).

Over time, bills were not being paid and late fees began to accrue. Accordingly,

Shoppers and 647 entered into a transition agreement whereby they mutually confirmed the termination of the contract. Shoppers then began to receive notices of default from various utility providers in respect of outstanding invoices that, in its view, 647 ought to have paid.

Shoppers commenced an action to recover its funds that it had transferred to the Defendants for payment of the utility bills. Shoppers then brought a motion against 647 and Beamish for summary judgment seeking payment of the remaining funds that it alleged had been misappropriated.

The motions judge granted Shoppers’ summary judgment motion against 647, but dismissed the action against Beamish personally. In short, the motions judge held that Beamish was not personally liable for unjust enrichment and refused to “pierce the corporate veil” to find

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Beamish liable. According to the motions judge, everything Beamish did was in his corporate capacity and for 647's benefit. There was no asset stripping, nor were there any fraudulent preferences. Although he was the sole shareholder, officer and director of 647, Beamish did not share a legal personality with the corporation. The motions judge stated that "the corporate veil should be pierced not where a corporation has misappropriated funds, but where the very use of the corporation is to hide that misappropriation". Absent evidence that the incorporation of 647 was itself done for the purposes that are illegal or fraudulent, a court should not pierce the corporate veil.

On the appeal of a myriad of issues, the Ontario Court of Appeal reversed the motion judge's decision and substituted an order granting summary judgment against Beamish personally in the amount of \$1,873,372.14.

According to the Court of Appeal, the motions judge should have referred to the Court's previous test in *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) ("*Fleischer*") as to when to pierce the corporate veil in Ontario.

In *Fleischer*, the Court held that the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But "it can also be pierced if when incorporated 'those in control expressly direct a wrongful thing to be done'". 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.

In this case, the Court of Appeal held that there was no "doubt that Beamish was the directing mind and caused the misappropriation and misrepresentation by 647 and the ensuing unjust enrichment". Beamish had sole signing authority over the accounts and authorized the transfer of significant amounts of money, which were supposed to be dedicated to the payment of utility bills. According to the Court, he "expressly directed and caused the wrongful act". There was an unjust enrichment and the corporate veil should be pierced.

Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada has been sought.