Air-Care Ltd. v. Blais and Les Immeubles Pro-Can Limitée et al.

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Under article 2013e C.C., it is provided that when a supplier contracts with a builder, he must, in order to protect his privilege, notify in writing the *proprietor* that he has made a contract with the builder for the delivery of materials. In *Air-Care Ltd.* v. *Blais and Les Immeubles Pro-Can Limitée et al,*[1] Mr. Justice Frederick T. Collins has given a most interesting interpretation to the word "proprietor", unjustifiably, it is submitted with respect, "piercing the corporate veil".

La Banque Provinciale du Canada purchased a building and the land upon which it was situated from the Crown, and transferred the ownership of it to *Immeubles Pro-Can Limitée,* its wholly-owned subsidiary company. Pro-Can entered into a contract with *J.-L. Guay et Frère Limitée,* general contractors, by which that firm undertook to do desired renovations. The Guay Company awarded a subcontract to *Unic Heating and Air Conditioning Limited,* who, in turn, entered into a contract with plaintiff company to supply various equipment relating to ventilating and air conditioning. In accordance with article 2013e C.C., plaintiff, before delivering any materials, wrote a letter of notice, but instead of this letter being written to Pro-Can, the registered owner of the property, it was written and addressed to the Bank. Subsequently, Unic went into bankruptcy and defendant Blais was named trustee. As plaintiff was not paid its claim, it registered a privilege as a supplier of materials against the immoveable property. The privilege was duly registered and notice of such registration was given to Pro-Can. The only issue involved was the question of whether the notice given to the Bank was sufficient to protect the rights of the plaintiff.

Mr. Justice Collins went into a lengthy examination of the relationship between Pro-Can and the Bank. It was discovered that all employees, officers, and directors of Pro-Can were employees, officers, and directors of the Bank. Pro-Can was not listed in the

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[1] [1964] C.S. 241.

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telephone book and did not prepare separate yearly financial statements. The head office of both companies was situated at the same address and the correspondence of Pro-Can was frequently sent on Bank stationary. The subsidiary company was wholly owned, controlled and operated by and for the benefit of the Bank, and the learned judge concluded that the letter to the Bank constituted notice to the subsidiary company.

The Court, with respect, has overlooked the fundamental principle of company law. The corporation is a legal entity. It is distinct from its shareholders; it is distinct from its officers, its directors and its employees. The *Banque Provinciale du Canada* is an entity distinct from *Immeubles Pro-Can Limitée*. In *Aluminum Company of Canada Limited* v. *City of Toronto*,[2] Rand, J. clearly explained these notions:

> "It is now settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; ... The business is in fact that of the latter. This does not mean, however, that for other purposes the subsidiary may not be the legal entity to be dealt with."

Pro-Can Limitée is the legal entity which must be dealt with. The wording of article 2013*e* C.C. states:

> "... he must notify the proprietor of the immoveable in writing..."

This point is clear. The proprietor was not notified and it is submitted that the claim of plaintiff was thus unfounded in law. The learned judge states:

> "... so long as the proprietor knows of the claim as a result of some action in writing on the part of a supplier, either by direct notice, by the delivery of invoices, or in some such similar manner, the supplier's rights are preserved for all materials supplied thereafter."[3]

He backs this claim with a long list of jurisprudence.[4] The cases cited, however, are, it is submitted, off point. The jurisprudence has not permitted notice given to one individual or legal entity to serve as notice to another distinct entity merely because of a close

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[2] [1944] S.C.R. 267 at 271.

[3] [1964] C.S. 241 at 249.

[4] *Cantin et Fils Ltée* v. *Tremblay* [1954] Q.B. 673; *Léo Perrault Ltée* v. *Lemieux* (1932) 36 R.P. 63; *Desrosiers* v. *Léger and Champagne* (1923) 29 R.L. 435; *Ouellet* v. *Hamel and Laporte* [1963] Q.B. 64; *Papillon* v. *Bérubé* [1946] K.B. 310; *Faille* v. *Lefrançois* (1927) 33 R.L. 100; *Morissette* v. *Pichette* [1955] S.C. 231; *Belisle* v. *Riendeau* [1950] S.C. 39; *Mott Co. Ltd.* v. *Associated Textiles of Canada Ltd.* (1934) 57 K.B. 300; *Darabaner* v. *Pruneau Ltée* [1960] Q.B. 1042; *Blouin* v. *Dame Martineau* (1925) 63 S.C. 73.

relationship between two separate legal persons. The cases referred to deal only with the sufficiency of the writings to serve as notice or the sufficiency of the notice when given to the authorized agent of the proprietor. The true meaning of article 2013*e* C.C. becomes clearer when compared to article 2013*f* C.C. Under this latter article no writing is required: verbal notice suffices,[5] since the subcontracting builder need merely have "notified" the proprietor. The former article, however, requires notice given in writting to the proprietor. This is quite a different idea. Even if the subsidiary be taken to have had knowledge of the notice to its parent, the knowledge cannot constitute notice to itself.

A parent company is not the agent of its subsidiary nor vice-versa. In the case of *Ebbw-Vale Urban District Council* v. *South Wales Traffic Licensing Authority*,[6] Cohen, L. J. states:

> "Under the ordinary rules of law, a parent company and a subsidiary company, even a hundred percent subsidiary company are distinct legal entities, and in the absence of an agency contract between the two companies one cannot be said to be the agent of the other."

And, in the case of *The King* v. *B.C. Brick and Tile Co.*,[7] it was stated:

> "The fact that the same persons control two companies and that the officers are much the same and that the companies have business relations with each other will not alone make one company the agent of the other."

The learned judge realized that a "proprietor" is "one who has the legal right or exclusive title to anything",[8] but refuses to apply it:

> "While it cannot be said that the bank was the legal proprietor, it was for all intents and purposes the real proprietor."[9]

The Civil Code is a text whose terms are unequivocal and precise and must be given effect. Pro-Can was the proprietor within the meaning of the Code. This notion cannot be dismissed on the grounds that the Bank was the "real" owner or that the Bank "practically" controlled all its operations.

It is now well established that a company duly incorporated under the Companies Acts of Canada or the provinces cannot be disregarded on the ground that it is a 'sham' or 'alter ego'. It is a

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[5] *La Compagnie de Carrelages de Québec Ltée* v. *Darabaner* [1959] Q.B. 861.
[6] [1915] 2 K.B. 366 at 370.
[7] [1936] 3 D.L.R. 23.
[8] H. C. Black, *Black's Law Dictionary*, 4th ed. (St. Paul's, Minn., 1951), p. 1384.
[9] [1964] C.S. 241 at 250.

distinct legal entity. This distinction between the company itself and its shareholders is fundamental.[10]

When can the corporate veil be pierced ? There are basically only two such occasions. The first, and most frequent, is when Parliament prescribes that for certain purposes the acts of the subsidiary company shall be deemed to be the acts of the parent company.[11] The second such instance occurs when a company is formed for the purpose of doing a wrongful act. Under these circumstances, the courts have held the shareholders responsible, for to allow them to go untouched when hidden behind the corporate veil would amount to a mockery of justice.[12] Neither of these situations is relevant in the present case. The learned judge states that the subsidiary company was incorporated by the Bank for its own purpose, probably from an administrative or a tax point of view. Are we to infer from this that the Court would treat Pro-Can as a distinct entity from an administrative or tax view-point but not from a civil law one ?

Plaintiff company registered its privilege against the immoveable and notified Pro-Can of this registration. Thus, Air-Care did know who the owner of the property was. It would seem that plaintiff was careless in notifying the wrong party of their contract. The learned judge, it seems, found for plaintiff on the supposed "equity" alone. The Bank had withheld the amount owing from the contractor when it received the notice and thus, Pro-Can would not find itself, out of pocket. Suppose indeed that through ignorance or negligence, the money had not been withheld. Could Collins, J. have insisted that the privilege was nevertheless effective because the Bank, though not Pro-Can, had been notified ? Had he so held, he would have denied Pro-Can, the proprietor, the protection of the rigorous formalities which the Code prescribes for privileges, which are *stricti juris*. Had he on the other hand been moved to admit that Pro-Can, having received no notice, need suffer no privilege, (and need not bear the loss consequent on not having withheld payment), the learned judge would have *made the validity of a privilege depend on whether payment has or has not been withheld to meet it* — a most remarkable inversion of the provisions of the Code.

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[10] *Clark* v. *Thomas J. Gaytee Studios Inc.* [1930] 4 D.L.R. 1038; *Salomon* v. *Salomon and Co.* [1897] A.C. 22, *Export Brewing and Malting Co.* v. *Dominion Bank* [1937] 3 D.L.R. 513; *Pioneer Laundry & Dry Cleaners, Ltd.* v. *M.N.R.* [1940] A.C. 127.

[11] *Ebbw-Vale, supra; Attorney-General of Canada* v. *Coleman Products Co.* [1929] 1 D.L.R. 658.

[12] Fraser and Stewart, *Company Law of Canada*, 5th ed., (Toronto, 1962), pp. 18-21.

It must be realised that plaintiff and Pro-Can are not the only parties concerned with the outcome of this action. Guay Company, the general contractor, is also deeply interested. If Guay has already paid Unic the amount of their subcontract and the privilege is held to be effective, then Guay will find itself out of pocket for the amount of plaintiff's claim, since Pro-Can, after paying plaintiff, would not, of course, be forced to pay Guay as well. In talking in terms of equity all interested parties should be taken into consideration, and, therefore, it is submitted that since in either case one party will be harmed, (Air-Care or Guay), the strict letter of the law should be adhered to.

Notwithstanding the case at bar, certain reforms in our law seem in order. The Civil Code only envisages a three-party situation, either proprietor-builder-subcontractor or proprietor-builder-supplier. In a four party structure, such as the present case, there is little protection given to the builder. It is suggested that a supplier of materials, when dealing with a subcontractor, should be required to give notice to the builder as well as to the proprietor. This would allow the builder to protect himself in the same manner as the owner, namely, by withholding monies owing to the subcontractor until all privileged claims of the supplier are extinguished.

The fact that Pro-Can is a separate and distinct legal entity is a fundamental rule of company law and should not be ignored. Pro-Can, in short, was the proprietor of the immoveable. The Code is clear — the proprietor must be notified in writing. It is not sufficient that he knew of the contract. The rules on privileges are very special exceptions to the general law and as such must be restrictively interpreted. *Dura lex, sed lex* is a principle rightly applicable here, especially where the equities are not so obviously in favour of plaintiff as at first sight might be imagined.