CITATION: *R. v. 1137749 Ontario Ltd. (operating as Pro-Teck Electric),* 2018 ONCJ 502
St. Catharines
DATE: 2018.07.26

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

1137749 ONTARIO LTD.
Operating as PRO-TECK ELECTRIC

Before Justice Fergus ODonnell
Reasons on sentence appeal released on 26 July, 2018

Mr. I. Johnstone & Mr. P. Wright ... for the Crown/Electrical Safety Authority
Mr. A. Larmand..... for the defendant, Pro-Teck

Fergus ODonnell, J.:

Overview

1. In 2010, Antonio Merante failed to do something he should have done and, years later, a man died because of it. In 2016, Mr. Merante did something he should not have done, this time in order to avoid the consequences of what he had failed to do in 2010. Those two mistakes bring us here today.

2. What Mr. Merante failed to do was comply with the safety rules that protect residents of Ontario from injury — or, as it happens, death — arising from unsafe electrical work. What he did six years later was engage in a bit of corporate sleight of hand to protect "his" assets and to leave the prosecution with hollow justice.

3. But the prosecutor found out about what Mr. Merante had done and asked the justice of the peace who was about to sentence Mr. Merante's

company to hold Mr. Merante personally responsible for what had happened.

4. The justice of the peace at Pro-Teck's sentencing was clearly unimpressed with Mr. Merante's alleged corporate hanky-panky. Indeed, she was clearly unimpressed with the reliability of his evidence overall. It seems clear that she would have done as the prosecution requested, if only she had the authority to do it. She concluded, however, that, as a justice of the peace, she had no such power. She declined the prosecutor's request to hold Mr. Merante personally responsible for what his company had failed to do.

5. The prosecution appealed. As a result of delays getting the transcript and trouble locating Mr. Merante to serve him, the prosecution was late filing its appeal. Their application to extend the time to file came before me. Mr. Merante's company argued that the prosecution should not be allowed an extension because they had no viable ground of appeal. I found that they had at least an arguable basis for the appeal and extended time. The matter then came back before me for the appeal itself.

6. I found the reasons of the justice of the peace at the sentencing to be considered, thorough and meticulous. She gave fair hearing to the arguments on penalty and on whether or not to hold Mr. Merante personally responsible for the fines she imposed. I think that her assessments of the evidence, of the nature of Mr. Merante's behaviour, of the sentencing regime under the legislation and of the appropriate fines are unassailable.[1] In fact, I have reached the conclusion that she made only one error of any substance. It is precisely the error that the prosecution alleges. I find that a justice of the peace does in fact have the authority in appropriate circumstances to do as the prosecution asked. I find that the appropriate circumstances were made out here. (Indeed, as I said earlier, I have no doubt that the learned justice of the peace herself felt the circumstances were made out, feeling only that she lacked the power itself). I find that the prosecution's appeal must succeed.

For Want of a Nail, the Kingdom Was Lost

7. There is an old proverb about the potentially calamitous outcomes of seemingly "minor" errors: a blacksmith shoeing a horse for a dispatch rider omits a nail, as a result of which the horse loses the shoe and throws its rider, as a result of which the message the rider was carrying does not

[1] The maximum penalty for a corporation charged with these offences is one million dollars per count. The prosecution sought total fines of $500,000.00 across the three counts. Pro-Teck asked for total fines of $50,000.00. Her Worship imposed total fines of $430,000.00.

make it to the battlefield, as a result of which the battle is lost, as a result of which the kingdom is lost. All for want of a nail.

8. This cautionary proverb speaks to the importance of attention to detail, of doing things right, of the risk of unintended consequences. It is of central importance in the background to the present case: an electrical contractor working on a renovation fails to get a permit; the electrician assigned to the job connects an underfloor heating pad that was installed by a tiler even though the electrician, not having installed the tile himself, cannot confirm that a required heat sensor had been put in place underneath the tile; the electrician connects the 120 volt heating pad to a 240 volt power supply, thereby quadrupling the potential heat generated in the floor; because there was no permit taken out, there are no inspections, which could have caught the errors; when an elderly occupant of the house falls on the floor some years later, he suffers very severe burns and dies in hospital three weeks later. For want of a permit, a life was lost.

9. The present case, however, is not about causation or whether or not the electrical contractor is guilty of violations of the *Electricity Act,* S.O. 1998, c. 18. That question has already been answered: the contractor, a numbered company, 1137749 Ontario Ltd., which carried on business as Pro-Teck Electrical, pleaded guilty before Justice of the Peace Moses to three charges and was sentenced to fines totalling $430,000.00 after a contested sentencing hearing. The fines imposed were never appealed, most likely because there was no point in appealing: whatever assets Pro-Teck may have had to begin with (it was no corporate titan, but rather one of thousands of small, owner-operated businesses in the province), Mr. Merante had transferred its assets to himself and to a newly-created electrical contracting company, right around the time that the charges were laid. A corporation with no assets has no reason to appeal a sentence.

10. As I have noted, however, an unusual thing happened on the way to the sentencing hearing. The provincial government has delegated its power to regulate electrical safety to the Electrical Safety Authority, or "ESA".[2] The ESA prosecutes alleged violations of the *Electricity Act* and regulations. In preparing for the sentencing hearing, the ESA prosecutor sought financial information about Pro-Teck since a corporation's financial condition is relevant to the issue of sentence. As a result of its preparation for sentencing, the ESA announced at the outset of the sentencing hearing that it might be asking the court to "pierce the corporate veil", i.e. to hold Mr. Merante, who was the sole shareholder and sole officer and director of Pro-Teck, personally responsible for any fines imposed. After hearing the

[2] In the course of these reasons, I may refer to the ESA, the prosecution or the Crown, all meaning the prosecutor under the *Electricity Act*.

evidence on sentencing, the prosecution did pursue that request. Ultimately, Justice of the Peace Moses found that she lacked jurisdiction to make such an order. That decision lies at the centre of the present appeal.

11. I propose to discuss the following issues in these reasons: a summary of the facts, including the offences to which Pro-Teck pleaded guilty, the evidence from the sentencing hearing, including the evidence alleged by the ESA to justify piercing the corporate veil and holding Mr. Merante personally responsible for the fines, the reasons for judgment of Justice of the Peace Moses in which she found she had no jurisdiction to pierce the corporate veil, the standard of review, whether or not a justice of the peace in a trial such as this has the jurisdiction to pierce the corporate veil, whether or not the corporate veil should have been pierced, and miscellaneous other issues.

The Facts
The Work at the Duplex

12. The elderly gentleman of whom I have spoken was Alexander Mulchenko. Mr. Mulchenko's life began in Stalin's Russia in 1930 and ended in the more bucolic environs of Niagara-on-the-Lake in 2014. By 2010, he was enjoying the twilight years of his life with his family in a house that was being re-fitted for himself, his wife, his daughter and his son-in-law. The house was set up as a duplex, which would allow Mr. Mulchenko and his wife to live separately from, but in immediate proximity to, their daughter and her husband. The features of the house made allowance for the fact that Mr. Mulchenko had suffered a stroke in 2005.

13. The family hired Old Towne Building Company as the general contractor. Old Towne in turn hired Pro-Teck as a subcontractor to perform all of the electrical work. Pro-Teck had been incorporated in 1995. Mr. Merante, a master electrician, was the sole shareholder of Pro-Teck and its only officer and director. The evidence establishes clearly that he was the directing mind and will of Pro-Teck. Nobody else had any interest in, or control over, the company.

14. It was not Mr. Merante personally who did the work on the house. That work was done by one of his employees, Joe Cirillo. Mr. Merante, however, was the staff member at Pro-Teck responsible for obtaining the required approvals for any electrical projects undertaken by Pro-Teck. Applications can be made by telephone, by facsimile, by email or online through the internet. If an online application was submitted but

not approved, the system would generate a rejection notice. Pro-Teck never did obtain a permit for this project. Because there was no permit taken out, the ESA had no knowledge the project even existed until after Mr. Mulchenko suffered his fatal burns. Because the ESA did not know of the project, it did not perform any of the inspections that would otherwise have taken place.

15. Mr. Merante testified about the application process during the sentencing. He said that he had applied online for an authorization for the project but had problems with the system, something he said was common. It is clear that Justice of the Peace Moses did not give any weight to Mr. Merante's evidence on this point. Indeed, she found his evidence and his credibility generally to be problematic, one of a number of findings on her part that are entirely unassailable. As it happens, the ESA did a review of all of Pro-Teck's applications over a four-and-half-year period from November, 2008 to April, 2013, which encompasses the time of this work. During that time, Pro-Teck submitted about 108 applications by various other methods, but not a single online application. It would be a remarkable coincidence indeed if the only time Mr. Merante submitted an online application was the present case and that no record of his attempt to apply for that permit online exists.

16. It seems clear from the evidence that the underfloor heating in the bathroom on Mr. Mulchenko's side of the duplex was not mentioned in any of the invoices presented by Pro-Teck and, indeed, the time involved in the connection, however brief that may have been, was not billed for. It appears that the family provided the underfloor heating mat and Old Towne had a tiler install the mat underneath the floor when the tiles were installed. It was the connection of the mat to the electrical system in the house that was done by the Pro-Teck electrician.

17. As I have mentioned, there were two flaws with the installation. First, there was no in-floor heat sensor installed as part of the system. The heat sensor should have been installed with the mat under the tile. The heat sensor is essential to regulating the heat generated by the mat. Insofar as he connected to the electrical system a mat installed by the tiler, which was then overlain by tiles, the Pro-Teck electrician could not have been certain if a heat sensor had or had not been installed. Second, the Pro-Teck electrician connected a 120 volt underfloor heating mat to a 240 volt electrical supply, thus increasing fourfold the amount of heat generated. The instructions that came with the floor mat clearly specified both the need for a heat sensor and the requirement for a 120 volt power supply.

Mr. Mulchenko's Entirely Avoidable Death and the Investigation

18. If we fast-forward from the time of the construction in 2010 to the spring of 2014, Mr. Mulchenko was still occupying his side of the duplex. By that time he was a widower. At the end of the evening on 5 April, 2014, his daughter saw him get up from watching television and head off to make his usual preparations for bed. It was her and her husband's habit to leave Mr. Mulchenko some time to prepare for bed in privacy and then to go and check on him. On that night, Mr. Mulchenko's son-in-law Andre Krioukov, went to check on Mr. Mulchenko and found him lying on the bathroom floor. The floor was hot. Mr. Mulchenko was soon taken to hospital. He had severe burns on twenty-two percent of his body. He died about three weeks later.

19. The ESA caused examinations to be done of the in-floor heating. Within thirty minutes, the floor reached a temperature of one-hundred-and-twenty-nine degrees Fahrenheit. For safety reasons, the test was aborted once the floor temperature reached one-hundred-and-forty-four degrees. Had a sensor been in place or if the system had been connected to a 120 volt power supply as it was designed for, the floor would not have reached critical temperatures.

Charges Are Laid; Guilty Pleas Are Entered

20. *Electricity Act* charges were laid against Pro-Teck in August, 2014.

21. The trial was set to begin on 29 April, 2015. Faced with Pro-Teck's denial that it had any involvement with the in-floor heating, the ESA did a further inspection of the electrical work at the house before trial. That inspection demonstrated that the electrical cable used for other work in the house that Pro-Teck admitted performing matched the electrical cable used to connect the in-floor heating in Mr. Mulchenko's bathroom to the electricity supply. Since the cable was time-stamped by the manufacturer, this left no doubt about Pro-Teck's involvement in the heater connection. On the first day set for trial, Pro-Teck pleaded guilty to three charges under the *Electricity Act*, namely:
    - Failing to apply for an inspection of the work;
    - Failing to install electrical equipment in a manner consistent with the protection of persons and property;
    - Connecting a device to the electricity supply without an inspection or an authorization to do so.

22. The facts were read in by way of an agreed statement of facts, complete with photographs, a copy of which was filed with the court. The case was then adjourned to December, 2015 for sentencing submissions.

The Evidence on Sentencing Reveals a Timely Re-Organization of Mr. Merante's Business Affairs

23. Mr. Mulchenko's daughter and his son-in-law testified at the sentencing, providing additional detail of the facts set out above. There was also evidence from ESA inspectors. The defence witnesses on sentencing were Mr. Merante and Pro-Teck's accountant, Scott Caldwell.

24. Pro-Teck was incorporated in 1995. Mr. Merante was the only shareholder and he was the only officer and director. Every electrical contractor in Ontario must have a master electrician on staff and a master electrician can work for only one employer. Mr. Merante was that master electrician, which connotes a minimum of eight years' service as an electrician plus completion of qualifying examinations. Over the course of its roughly twenty years in business Pro-Teck employed various electricians and apprentices. For a period of time, the duration of which is unclear, but which ended years before this installation and many years before the trial, Mr. Merante's then spouse worked for Pro-Teck. She was neither a shareholder nor an officer.

25. Mr. Merante incorporated Master Electrical Contracting Services Ltd. on 10 September, 2014. I shall call it Master Electric for the purposes of these reasons. Mr. Merante agreed that this was, "right at the same time" that he learned that Pro-Teck was going to be charged with offences under the *Electricity Act* arising out of Mr. Mulchenko's death. Then, on 30 September, 2014, Mr. Merante filed a notice with the ESA to change his master electrician's designation. The form said that his termination date from Pro-Teck was 30 September, 2014 and gave the reason for termination as, "not longer employed with this co.", and, "found employment elsewhere." I think that the most charitable way of describing Mr. Merante's language in filling out this form would be to call it, "not untrue", a formulation used by a colleague of mine to describe something that is misleading or not entirely forthcoming but, technically, "not untrue"; there are many shades of deceit. It is technically true that Mr. Merante had, "found employment elsewhere", but that employment was with Master Electric, a corporation that shared the same address, same equipment, same personnel, same client-base, same suppliers, same shareholder, same officer and same director as his previous employer, Pro-Teck. Of course the, "same shareholder, same officer and same director," were himself. Of course, he was going to continue to be,

effectively, his own employee and his own boss. Of course, the "elsewhere" where he had found new employment was the exact same place to which he had gone for work every day before. Nothing had changed but the name. Which might have been perfectly fine, except for Mr. Merante's depletion of Pro-Teck's assets.

26. Although it has no evidentiary significance, the administrators at the ESA licensing office found this whole process peculiar. That is because it was peculiar. Things that are "not untrue" often are peculiar.

27. On 30 September, Mr. Merante also submitted the paperwork necessary to obtain an ESA contractor's licence for Master Electric, naming himself as the designated master electrician for Master Electric.

28. Mr. Merante and his accountant testified about Pro-Teck's business affairs and its financial statements, covering the period from around 2006 until 2014, which was only a partial business year for Pro-Teck as that was the year in which Mr. Merante shut Pro-Teck down and started operating Master Electric. It would be fair to say that the accountant had a more detailed understanding and recollection of Mr. Merante's and Pro-Teck's financial affairs than Mr. Merante had. It would be fair to say that from both a credibility perspective and a reliability perspective, the accountant outperformed Mr. Merante by a substantial margin. Ultimately, with respect to one of the central foci of sentencing, Her Worship concluded, entirely reasonably:

> "Here, the harm done was not just the result of employee error or incompentence, but was ultimately the result of deliberate inaction by an electrical contracting corporation operated by an experienced Master Electrician."(at p. 20).

29. At the time of the switch from Pro-Teck to Master Electric, Pro-Teck owned a property on Kalar Road. Mr. Merante sold that property to himself for $34,327 plus assuming the mortgage. Pro-Teck also had a vehicle and Mr. Merante assumed the outstanding loan on that vehicle. There was no independent evidence of the value of either the property or the vehicle. The decisions on the terms of transfer were made entirely by Mr. Merante. These were clearly not arm's-length transfers. There was no independent confirmation of the actual value of the assets at the time the transfers were made, which is, of course, the crucial time. This all followed on very soon after Mr. Merante learned that Pro-Teck was going to be charged, indeed within about a month of that knowledge. In light of Mr. Merante's evidence, there is absolutely no reason for confidence that the terms of these transactions were based on any consideration other than Mr. Merante's self-interest, protecting Pro-Teck's assets from vulnerability

to the penalties and making the assets of the corporate defendant Pro-Teck unavailable to the prosecution in the event of a conviction.

30. Prior to creating Master Electric and making these transfers, Mr. Merante had been told by his insurer that his insurance policy would respond to any civil claim arising out of Mr. Mulchenko's death, but that any fines imposed were not covered by that policy.[3]

31. It was put to Mr. Merante that the charges against Pro-Teck were the reason he opened Master Electric. He answered that it was something he had wanted to do for a long time, but faced with the charges and the fact that there was going to be a fine, "financially it was a bit of a disaster. I was losing money quite a bit and I wanted to prepare to have something left so I can at least pay for whatever it is that – if I would've continued under Pro-Teck they would've cleaned all the funds." He went on to say that his Yellow Pages bill was $650.00 per month and Yellow Pages told him there was no way out of the contract unless he cancelled the phone number. The following day, Mr. Merante added in his testimony that one reason for opening Master Electric was that the ESA publicizes the charges it has laid so he felt that once that bulletin came out Pro-Teck's phone would stop ringing from customers.

32. Pro-Teck's accountant, Scott Caldwell, also testified. His firm had done Mr. Merante's accounting work since 1995 (i.e. the advent of Pro-Teck) and Mr. Caldwell personally had carriage of the account since 2005. It came out in both Mr. Merante's and Mr. Caldwell's evidence that Mr. Merante had two other corporations, besides Pro-Teck and Master Electric. These two companies had been created in the mid-2000s, with a view to investing in real estate. For the sake of simplicity, I shall refer to these companies as Holding Co. and Realty Co. It was Mr. Caldwell's evidence that Realty Co. acquired two properties, one on Fraser Street in Niagara Falls, which was purchased in 2009 entirely with money lent to Realty Co. by Pro-Teck and then sold arm's-length in 2011, and the other at 4278 Kalar Road in Niagara Falls, which remained in the ownership of Realty Co. That property had been bought with a loan from Pro-Teck to Realty Co. plus a mortgage taken out with a credit union. There was also an adjacent property, 4268 Kalar Road, which Mr. Caldwell said was owned by Pro-Teck, but which was sold to Mr. Merante in 2014, the year that the charges were laid.

[3] As of the time of the sentencing, which was almost two years after Mr. Mulchenko's death, no civil action had been instituted.

33. It was Mr. Caldwell's understanding that almost none of the funds advanced by Pro-Teck to the related corporations had been repatriated to Pro-Teck. The amount advanced was $116,803.00 and as of the 2014 financial statements still figured at $106,803.00. Mr. Caldwell believed the small repayment to Pro-Teck in 2014 was just in relation to Pro-Teck having paid for some accounting fees for the related corporations.

34. Mr. Caldwell testified that Pro-Teck itself owned 4268 Kalar Road, which consisted of a shop property and a rental home. That property was transferred to Mr. Merante in 2014 at a supposed value of $167,000.00. When asked if the transfer was done at fair market value, Mr. Caldwell responded that, "Mr. Merante provided us with his estimate of the fair market value which is, was an increase over the book value." In cross-examination, he agreed that he had no way to assess whether the transfer was at fair market value. An entry in the 2014 accounts (the latest year available at the time of the sentencing), showed an amount due from Mr. Merante to Pro-Teck of $49,261.00. Mr. Caldwell explained that "the largest portion" of that figure would arise from the transfer of 4268 Kalar Road from Pro-Teck to Mr. Merante.

35. As of the time of the trial, Mr. Merante was personally living in the house at 4268 Kalar Road.

36. Mr. Caldwell testified that the only other asset he was aware of being transferred from Pro-Teck to Mr. Merante was a 2013 pick-up truck, which Mr. Merante estimated to have a market value of $39,493.00. Mr. Caldwell recalled Mr. Merante discussing his desire to protect his assets in August, 2014, which would have been around the time the charges were laid.

37. Although this observation is not necessary to my conclusion, I note that Mr. Merante's failure to draw a clear line between his business and personal affairs and assets appears not to have been limited to the time around the *Electricity Act* charges. It appears that he failed to draw a similar distinction in 2008 when he paid his divorce settlement to his wife out of Pro-Teck rather than personally. While it might have been perfectly legitimate for him to pay himself a dividend from Pro-Teck and to pay his wife from the proceeds of that dividend, that is not what he did and the amount paid was indisputably not salary for her employment at Pro-Teck. The simple point is that Mr. Merante appeared at that time to have failed to distinguish between his personal and corporate personas.

38. Mr. Merante testified that there were no assets transferred from Pro-Teck to Master Electric. When then asked if Master Electric had

purchased all new tools when it incorporated, however, Mr. Merante said that Master Electric was using Pro-Teck's tools, but that they still belonged to Pro-Teck. Master Electric was using Pro-Teck's computer and telephone equipment and its office supplies and its goodwill. (While Pro-Teck's name as an electrical contractor may have had no value, and would even have been a liability once it was charged in a case involving a fatality, the company had established relationships with suppliers). Master Electric was not paying for any of these benefits.

Her Worship's Reasons for Judgment

39. As I have said, I think that Justice of the Peace Moses's reasons for judgment are admirable. The work shows a clear understanding of the evidence and the issues and virtually every conclusion she reached seems solidly rooted in the evidence and in the law.[4] I found her conclusion with respect to penalty to be a perfectly reasonable balance of the numerous, sometimes conflicting, considerations that a sentencing court must blend into a fit sentence, including the particular nuances that apply to sentencing in the regulatory context. In this particular case, that balancing had to consider, amongst other things, the fact that these were first offences by a small corporation that had pleaded guilty, but also that the offences were serious and the ultimate consequence of the offences was the loss of human life. Her Worship's reasons also take into account the important distinction between sentences under the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1 and the *Electricity Act*, including the divergent penalty structures (maximum penalties under the *Electricity Act* are double those in the *Occupational Health and Safety Act)* and the materially different nature of the protected populations under each statute.

40. Her Worship's reasons also reflect clear understanding of the concept of piercing the corporate veil and of the very important distinction between Mr. Merante's right to stop conducting business under the Pro-Teck corporation after the charges were laid (which he was entitled to do) and of the particular steps beyond simply shutting down the business that the ESA alleged took Mr. Merante out of bounds and which the ESA alleged should deny him the protection of corporate separateness by piercing the corporate veil.

41. The following observations are both noteworthy and fully supported on the evidence:

[4] There was a minor misunderstanding on Her Worship's part, where she noted a comment Mr. Merante made about, how "they both suffered," around the time of his divorce. Her Worship said that made no sense because Mr. Merante had four children. In fairness to Mr. Merante, it seems that by "both" he was referring to his family and his business, not to his children. Nothing hangs on the error.

a. "This lack of full cooperation and lack of sincere remorse were compounded by *the deliberate actions taken by the operating mind of the corporation, which were designed to minimize, control, and avoid the company's consequences of committing the offences."* (at p. 23).
b. "It appears that the behaviour of Antonio Merante, as operating mind of Pro-Teck Electric was less than principled in artificially reducing the company's assets." (at p. 36).
c. "This made the revelation of several important factors to be not unlike the exercise of pulling teeth." (p. 44, in relation to Pro-Teck's production of documents).

42. Even if I as the reviewing court were not convinced that Mr. Merante moved assets out of Pro-Teck specifically in order to deprive the prosecution of access to those corporate assets of Pro-Teck, these findings on Her Worship's part would require me to defer to her as the trial court. They are solidly rooted in the evidence and depend to a large extent on findings of credibility. As it happens, I am also satisfied that no other conclusion is rationally open on the evidence.[5]

43. As I have said earlier, the only area of substance where I feel Justice of the Peace Moses erred was in her conclusion that she had no jurisdiction to pierce the corporate veil. Her Worship's consideration of this issue constituted a relatively short portion of her otherwise comprehensive reasons for judgment. Much of it focused on whether there was a specific statutory grant of authority to give her power to pierce the corporate veil or on whether there was a specific case on all four corners to make the existence of the power clear. What is lacking is the essential analysis of the doctrine of implied powers, which necessarily leads to the conclusion that a justice of the peace has the power the prosecution says it has to pierce the corporate veil in appropriate, albeit narrow, circumstances. In fairness to Her Worship, a particularly helpful authority on this issue from the Court of Appeal was not delivered until four days after Her Worship delivered her reasons for sentence, including her rejection of the application to pierce the corporate veil.

The Standard of Review

44. The issue of whether or not a justice of the peace sitting as a trial court under the *Provincial Offences Act* has the jurisdiction to pierce the

[5] After a thorough review of the evidence about Pro-Teck's financial situation and various of its transactions, Her Worship also noted (at pp. 34-35): "…the manner in which these factors were presented and the nature of the evidence tendered, gives the Court great insight into the attitude and behaviour of the corporation."

corporate veil in an appropriate case is a question of law. The standard of review is, therefore, correctness, i.e. the decision on the corporate veil issue at trial is not a discretionary conclusion that requires deference by a reviewing court (such as a decision on where a particular sentence should fall in a range of sentence). The various standards of appellate review are comprehensively canvassed in the judgment of the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33.

Does a Justice of the Peace Have the Power to Pierce the Corporate Veil in a *Provincial Offences Act* Trial?

45. The corporate structure of doing business is now so common that one gives very little thought to it in the course of one's everyday life. Corporations are everywhere.

46. As I have said, I think, perhaps, the key error in Justice of the Peace Moses's conclusion that she lacked the power to pierce the corporate veil may lie in this: I think she felt constrained by the absence of a crystal-clear, binding black-letter statement, whether in legislation or in case precedent, confirming that she had that power. I think that if she had looked at the question of the nature of the work done by justices of the peace in the context of the principle of implied jurisdiction and beyond the narrow constraints of what is specifically stated in the *Provincial Offences Act*, she would have reached a different conclusion. I think that her conclusion that she had no such jurisdiction effectively neuters the provincial offences court in relation to what will be a rare but very important aspect of that court's work.

47. In this area, as in many, context matters. A great deal of the work done by justices of the peace is taken for granted, but it is all important. In the criminal and quasi-criminal realms, justices of the peace issue the vast majority of search warrants and similar authorizations; they handle the great majority of bail hearings, arguably the most important determinant of how a person's criminal case will resolve. Another huge percentage of their volume of work involves presiding in traffic courts, itself a matter of great concern to the defendants and to public safety.

48. However, less frequent but no less important, included in the justice of the peace's docket are cases like the one before me. The modern state is, to a very large extent, a regulatory state. There are, it seems, rules about everything, some might say too many rules in some contexts, but, whether that contention is right or wrong, that is an issue for the legislature or someone's blog rather than here. Many of those rules involve important matters of public welfare and the trials of allegations of breaches of those

rules are, depending on the province, region and local practice, usually entrusted to justices of the peace. They include areas such as environmental protection, labour standards, occupational health and safety, securities regulation and the matter before the court in this case. People expect when they open a tap for water to drink that others will not be free to contaminate the water supply. Employees reasonably expect that their workplaces will be safe. Investors require proactive protection from unscrupulous actors in the financial markets. When it comes to things as omnipresent as electricity, everybody expects that, unless they do something incredibly daft, their home electricity supply is no threat to them or their families. Nobody expects that their bathroom floor heater will kill them. But it can.

49. The enforcement of those standards lies first with regulators and inspectors and eventually with the courts. In a world where corporations, large, medium and small, are omnipresent, where public welfare offences are almost all-encompassing and where justices of the peace are realistically the trial judges in almost all quasi-criminal prosecutions, the question of whether or not a justice of the peace performing that role has the power to pierce the corporate veil has profound significance.

50. There are issues, both simple and complex, here. There are obviously also broad societal issues about the virtues and vices of the corporate structure, of the good and harm that that structure has left in its wake over the centuries. (Perhaps the most noteworthy comment about the nature of a corporation was made by the 18th century British Lord Chancellor, Baron Thurlow, who observed that, “Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.”) As interesting and as important as the latter category of issues may be in a world of mergers and “big data”, they are, however, primarily political issues, matters for legislatures more than courts. It is, nonetheless, the legitimate business of the courts when there are allegations that there has been abuse of the corporate structure.

51. Certain realities are indisputable. A corporation has its own legal existence, separate and apart from its shareholders, its officers and its directors. Unless the law, either statutory or common-law, provides otherwise, if a corporation does a wrongful act, it is the corporation that must be punished, even if it cannot be subjected to the same range of punishments that a human actor might be subjected to.

52. It is equally indisputable that there are statutory and common-law provisions that limit the legal separateness of a corporation in certain instances. One such example reflects the fact that as a legal person but

one without a body to be punished or a conscience to be damned, a corporation necessarily has to act through human actors. For example, s. 78.2 of the federal *Fisheries Act,* R.S.C. 1985, c. F-14, provides that, "Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in,"… the offence is liable to punishment. The *Electricity Act*, itself, has a version of officer and director liability for offences committed by a corporation in s. 113.20(3) and s. 113.20(4).

53. The common-law has also developed an exception to the concept of corporate legal separateness. This is the notion of "piercing the corporate veil", which is defined by *Black's Law Dictionary* as, "the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." While, in the absence of precise authority directly on point, there may be dispute as to whether or not a justice of the peace has the power to pierce the corporate veil, there is no dispute that the power exists for at least some judicial authorities. As recently as 2014, the Court of Appeal for this province re-affirmed the existence of the power: see *Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (Energyshop Consulting Inc./Powerhouse Energy Management Inc.),* 2014 ONCA 85.

54. The precise question for me, however, is not whether the power to pierce the corporate veil exists, but whether a justice of the peace sitting in a *Provincial Offences Act* court possesses that power. As I have said, I think that the answer to that question must be an unqualified "yes".

55. The question of "jurisdiction" involves multiple aspects, including whether or not a court or tribunal has power over the proceedings and over the person appearing before it, along with the power to make the order in issue. The question of whether or not a court or tribunal has the power to make an order will depend on the nature of the court. A superior court enjoys inherent jurisdiction, which statutory courts such as the Ontario Court of Justice and statutory tribunals do not enjoy. The first place to look for the jurisdiction of a statutory court or tribunal is in its enabling statute, but the absence of any specific grant of jurisdiction does not end the inquiry. Far from it.

56. I do not believe that I have to recount any authority beyond the Court of Appeal's recent decision in *R. v. Fercan Developments et al.*, 2016 ONCA 269, in order to dispose of the issue of jurisdiction here. This is the decision that was delivered within days after Her Worship's reasons for sentence were delivered and it covers the relevant law. The issue in that

case was whether or not a judge of the Ontario Court of Justice had the jurisdiction to make an order of costs against the Crown in relation to a prolonged but ultimately unsuccessful criminal forfeiture application. As with the issue of the jurisdiction to pierce the corporate veil, there was no specific statutory provision granting this court any such power. That lacuna required the Court of Appeal to address the issue of implied jurisdiction.

57. The following portions of the Court of Appeal decision in *Fercan* synopsize the applicable principles for implied jurisdiction, which determine the outcome of this appeal:

> [44] As a statutory court, the Ontario Court of Justice does not have any inherent jurisdiction and derives its jurisdiction from statute. It is well established that a statutory court or tribunal enjoys both the powers that are expressly conferred upon it and, by implication, any powers that are reasonably necessary to accomplish its mandate: *Dunedin*, at para. 70. The jurisprudence has recognized that statutory courts possess certain implied powers as courts of law: *R. v. Romanowicz* (1999), 1999 CanLII 1315 (ON CA), 45 O.R. (3d) 506 (C.A.), at paras. 59-60. In addition, powers may be implied in the context of particular statutory schemes as well.
>
> [45] This court recently considered the "doctrine of jurisdiction by necessary implication" in *Pierre v. McRae*, 2011 ONCA 187 (CanLII), 104 O.R. (3d) 321. Justice Laskin, at para. 34, noted that a power or authority may be implied: (i) when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling its mandate; (ii) when the enabling act fails to explicitly grant the power to accomplish the legislative objective; (iii) when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction; (iv) when the jurisdiction sought is not one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; or (v) when the legislature did not address its mind to the issue and decide against conferring the power to the statutory body.
>
> [46] Whether a statutory court is vested with the power to grant a particular remedy depends on an interpretation of its enabling legislation: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 S.C.R. 140, at para. 36. When ascertaining legislative intent, a court is to keep in mind that such intention is not frozen in time. Rather, a court must approach the task

so as to promote the purpose of the legislation and render it capable of responding to changing circumstances: *Dunedin*, at para. 38.

[47] Furthermore, as in any other statutory interpretation exercise, courts need to consider the legislative context when interpreting the legislation at issue: *ATCO Gas & Pipelines Ltd.,* at para. 49.

[48] Finally, I note that the power being conferred does not have to be absolutely necessary. It only needs to be practically necessary for the statutory court or tribunal to effectively and efficiently carry out its purpose: *Dunedin*, at para. 71.

58. I have earlier set out the broad nature of the work of justices of the peace in *Provincial Offences Act* trials. While all of those trials are important to the immediate litigants and while all of the "smaller" trials are collectively important to society, for example, in terms of the public safety objectives safeguarded by thousands of *Highway Traffic Act* prosecutions, other trials will, in and of themselves safeguard absolutely vital public interests. The present trial demonstrates that non-compliance with permit requirements can result in a person's death. The names "Grassy Narrows" or "Walkerton" should forever resonate in this province as proof that matters as basic as water quality, matters that could lead to charges before a justice of the peace under either federal or provincial legislation, are of vital importance to public well-being, and not in any small way. The list of such areas of public welfare legislation is long, but no purpose is served in recounting every example.

59. If one looks at the list of circumstances in which Laskin J.A. said that implied jurisdiction would apply to confer jurisdiction on a statutory court, it seems to me that the work of the provincial offences court will tick off at least several of the boxes when it comes to the question of whether or not that court (or the Ontario Court of Justice more broadly) enjoys the power to pierce the corporate veil (in an appropriate case; the question of whether or not a power exists is an entirely different question from whether or not the jurisdiction should be exercised in any particular case). It bears noting that the question, in the context of the present case, really boils down to whether or not the sentencing court should have the power to defeat an effort by a defendant to neuter the court in imposing a just and effective sentence by making that sentence unenforceable, meaningless and illusory. Looking at the list of criteria set out by Laskin J.A. in *Pierre v. McRae,* above, it is clear that:

a. Neither the *Courts of Justice Act,* R.S.O. 1990, c. C-43 nor the *Provincial Offences Act,* R.S.O. 1990, c. P-33, explicitly confers the power to pierce the corporate veil (this is hardly surprising as

legislation rarely if ever confers a power that has been established by the courts themselves in common-law).

b. There is no suggestion that the legislature considered granting the Ontario Court of Justice the power to pierce the corporate veil but decided that the power should not be granted.[6])
c. The Ontario Court of Justice and, more specifically, its justices of the peace presiding in provincial offence courts have a remarkably broad mandate including the primary role in adjudicating upon a vast range of potentially very serious cases arising under many pieces of public welfare legislation. That is a mandate, "sufficiently broad to suggest a legislative intention to implicitly (*sic)* confer jurisdiction" (*Fercan,* at paragraph 45).
d. When a court imposes a sentence, for either a criminal or regulatory offence, it seeks to send a message to both the defendant and to the broader society that the offence that has been proved is unacceptable, that it will carry consequences and that society will be protected. If an officer, director or shareholder in a corporation can render any such consequences meaningless by the simple stratagem of denuding a corporate defendant of its assets by transferring those assets to his own benefit and the court is powerless to defeat that end-run, society is left with a court that realistically cannot fulfil its mandate. This has nothing to do with numbers, neither the frequency of the power being called on, nor the dollar amounts involved. It does not matter if cases where the court will be called upon to pierce the corporate veil are one in a thousand, one in ten thousand or one in a hundred thousand. If the court lacks the power to pierce the corporate veil when it is needed, the entire proceedings are rendered a sham.

60. To put the matter another way, it has been said that a court's power to pierce the corporate veil will be triggered when failing to act, "would be too flagrantly opposed to justice". It is simply inconceivable that a justice of the peace conducting a provincial offences trial lacks a very specific

[6] Section. 80 of the *Provincial Offences Act* does specifically preserve common-law defences, in like manner to the federal *Criminal Code*. That strikes me as merely a specific "belt and suspenders" approach, to ensure that there is no room for doubt about one specific area of quasi-criminal law, inherited from a distant time when Canadian criminal law itself migrated from a common-law to a statutory foundation. I do not take it as excluding the general application of the common-law as it develops from time to time. For example, the law relating to voluntariness of statements and the law of hearsay, including the enormous developments of the latter area over the past two decades, are but two examples of common-law principles applied daily by both superior and inferior courts. To interpret the *Provincial Offences Act* as not recognizing the existence of powers rooted in the common-law would, to the contrary, violate the edict in s. 64 of the *Legislation Act,* S.O. 2006, c. 21, which requires that, "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

power (clearly possessed by other courts) that is essential to avoid a "flagrant" circumvention of justice.[7]

Piercing the Corporate Veil in the Present Case

61. The leading Ontario case on when the corporate veil can be pierced to hold an officer or director personally liable is the decision of Laskin J.A. in *642947 Ontario Ltd. v. Fleischer,* where the following comments can be found:

> [67] Halasi and Krauss' second argument is that the trial judge disregarded well-known principles of corporate law in holding them personally liable. In my opinion, however, the trial judge took the correct view in concluding (at p. 298 R.P.R.) that "Krauss and Halasi cannot hide behind the corporate veil." **To pierce the corporate veil is to disregard the separate legal personality of a corporation, a fundamental principle of corporate law recognized in Salomon v. Salomon & Co.**, [1897] A.C. 22, [1895-9] All E.R. Rep. 33. **Only exceptional cases -- cases where applying the Salomon principle would be "flagrantly" unjust -- warrant going behind the company and imposing personal liability.** Thus, in Clarkson Co. v. Zhelka, 1967 CanLII 189 (ON SC), [1967] 2 O.R. 565 at p. 578, 64 D.L.R. (2d) 457 (H.C.J.), Thompson J. held that instances in which the corporate veil has been pierced "represent refusals to apply the logic of the Salomon case where it would be flagrantly opposed to justice". Similarly, Wilson J. observed in Kosmopoulos v. Constitution Insurance Co., 1987 CanLII 75 (SCC), [1987] 1 S.C.R. 2 at p. 10, 34 D.L.R. (4th) 208, that **the law on when the corporate veil can be pierced "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**

[7] As I note later, I have considered the fact that the concept of piercing the corporate veil is a concept that developed in the context of private litigation, not in the criminal or quasi-criminal/regulatory environment. I have also considered the fact that in much (perhaps all) of such civil litigation, the person to whom it is proposed to ascribe personal liability will typically be a party (or added party) to the litigation. In the circumstances of this case, at least, none of that matters. First, there is absolutely no principled reason why the civil/criminal distinction makes any difference when it comes to piercing the corporate veil. The question remains the same, i.e. whether or not a person should lose the benefit of the very important legal distinction between corporations and those who own, manage or direct them as a result of the individual's personal wrongdoing, i.e. their abuse of the corporate structure itself. Depending on the specific facts of the case, such as the size and nature of the corporation and the role of the individual in the corporation, piercing the corporate veil in the quasi-criminal context may raise issues of fairness and the right to be heard, but none of those issues arises here. Mr. Merante was put on notice that the ESA would be seeking to attribute financial responsibility to him personally (that notice may have come late in the day, but that is because the issue only became a live one once the financial disclosure was made, late in the day). He had the right to seek an adjournment and to seek representation separate from Pro-Teck's counsel. He did neither. On the hearing of this appeal, it was made clear that Pro-Teck's counsel was representing the interests of Pro-Teck, Master Electric and Mr. Merante.

justice, convenience or the interests of the Revenue': L.C.B. Gower, Modern Company Law (4th ed. 1979), at p. 112".

[68] **Typically, 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"**: Clarkson Co. v. Zhelka at p. 578. Sharpe J. set out a useful statement of the guiding principle in Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 1996 CanLII 7979 (ON SC), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): **"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."**

[69] **These authorities indicate that the decision to pierce the corporate veil will depend on the context. They also indicate that the separate legal personality of the corporation cannot be lightly set aside.** …

(my emphasis)

62. The governing principles for piercing the corporate veil are largely encompassed by the portions of Justice Laskin's reasons that I have bolded above. They are also distilled in the judgment of Grace, J. in *Chan v. City Commercial Realty Group Ltd.,* 2011 ONSC 2854, as follows:

> [19] It is trite to say that generally a corporation is a separate legal person. Most of the time the identity, rights and obligations of companies and their shareholders are distinct.
>
> [20] However, the rule is not inviolate and will not be applied if its result would be "too flagrantly opposed to justice". The *alter ego* theory is designed to prevent the use of a corporate vehicle to achieve an objective which offends a right minded person's sense of fairness.
>
> [21] 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.

[22] Two elements must be proven by the plaintiffs in this case: first, that the activities of the companies were completely dominated by Martin and Samuel and second, that they engaged in improper conduct that unjustly deprived the plaintiffs of their rights.

63. I commented earlier in these reasons that Pro-Teck was not a major actor, but rather one of countless small contractors using the generally entirely legitimate tool of incorporation to conduct its affairs. It is important to keep in mind that the size of what was illicitly transferred from Pro-Teck to Mr. Merante or to Master Electric is not the point here. That will be one issue for the ESA to consider in enforcing the prosecution's rights to payment of the outstanding fines. The point here is the principle: society has made a policy decision to allow the use of separate corporate legal personality. That social choice comes with costs and benefits. It is a fundamental expectation that those who wish to take advantage of the right to keep the corporation's legal liabilities separate from their own personal legal liabilities, will themselves respect the idea of corporate legal separateness. Mr. Merante did not do that. He relies on Pro-Teck's separate legal persona to shield himself from the $430,000.00 in fines levied against Pro-Teck, fines which he knew his insurer would not cover. At the same time, he ignored that legal separateness by conveying real property owned by Pro-Teck to himself personally, at a price determined by him. He was vendor and purchaser and appraiser, all in one. He did the same with the vehicle. His interest and his duty were in conflict. His personal interest was to secure as much as he could for himself. His duty was to respect the fact that he was not an entirely free actor in relation to Pro-Teck's assets, even if he was the sole shareholder and officer and director. His duty was to respect the process of law and to accept the fact that whatever assets Pro-Teck owned might be called on to pay any penalties assessed as a result of the regulatory charges Pro-Teck faced. Instead he cherry-picked the benefits of incorporation and ignored the obligations.

64. Mr. Merante is ultimately the directing mind and will of his own misfortune. It is ironic that, in order to maximize the protection of "his"

assets, he stepped out of bounds and thereby put his own personal assets in jeopardy, something that would not have happened if he had not over-reached, if he had not ignored the dividing lines between what was his and what was Pro-Teck's. Had Mr. Merante done nothing, whatever assets belonged to Pro-Teck would have been available to the ESA to pursue in payment of the fines owed by Pro-Teck. That would have applied to everything from the screwdrivers owned and used by Pro-Teck, through any vehicles it might have owned (subject to any liens) to any money owed to Pro-Teck by related corporations and to any real property owned by Pro-Teck (subject to any mortgage-holder's prior interest). The ESA might have realized significantly on the fines levied, or hardly at all. And, under the corporate structure that legitimately set Pro-Teck's affairs separate from Mr. Merante's affairs, that would all have been unassailable. Offences were committed. Only the corporation was charged. Only the corporation was found guilty. Only the corporation's assets would be vulnerable.

65. If Mr. Merante had simply shuttered Pro-Teck and left its assets intact and gone on and opened up Master Electric, he could not have been faulted. He and Pro-Teck were separate legal entities. The fact of the *Electricity Act* charges did not require that he be personally indentured to Pro-Teck forever, or even for a single day. His master electrician's papers were likely one of his most valuable assets insofar as they gave him the right to run an electrical contracting business and earn a living thereby. If he had not transferred Pro-Teck's vulnerable assets to himself, he could have taken his employees and set up shop as Master Electric and left behind the inconvenient Yellow Pages contract and the bad stigma of the Pro-Teck name, which he feared would alienate customers once the charges became public knowledge. But he did not simply do that. Two roads diverged before him and Mr. Merante took the one marked self-interest and deceit rather than the one that was marked by his duty to respect his obligations as a shareholder and his duty to accept that the protections that came with Pro-Teck's corporate status also created responsibilities.

The Procedure at Sentencing

66. There were various objections raised, or comments made, at different points in the process with respect to how the prosecution handled this matter. I shall deal with them briefly as I think they are without merit.

67. First, I do not think there is any reason to fault the ESA with respect to when they brought their application to pierce the corporate veil. Obviously, it was known to the ESA as early as the autumn of 2014

that Mr. Merante had transferred his master electrician's licence to Master Electric, thus leaving Pro-Teck without a master electrician. Indeed, the ESA as the regulator is the body that authorized that transfer at his request. (Whether or not the ESA as regulator had internal mechanisms to notify the ESA as prosecutor of that development is unknown). However, as I have said there was nothing illicit in the stand-alone act of Mr. Merante taking his master electrician's qualifications, opening up Master Electric and leaving Pro-Teck in a state of limbo, so long as he respected the separate legal identities of Pro-Teck, himself and Master Electric. There was nothing within the knowledge of the ESA at that point that would justify the piercing of the corporate veil. The ESA put Mr. Merante and the court on notice that they "may" be seeking to pierce the corporate veil at the sentencing. It was only the evidence heard on the sentencing that provided the foundation for the request that the ESA ultimately pursued.

68. It was also suggested that if the ESA wished to attribute responsibility to Mr. Merante personally or to his new corporation, Master Electric, they should have charged them specifically. Any such assertion misses a number of points. First, Master Electric did not exist until four years after the offences. There was never any basis upon which Master Electric could have been charged. Second, the decision to charge an officer of a corporation is dependent on the structure of the applicable legislation and what is known to investigators at the time of the investigation and that decision is also a matter of prosecution discretion. It is entirely possible that charges against Mr. Merante personally would have been viable under the due diligence requirements the *Electricity Act* imposes on officers or directors, but there is not even a scintilla of evidence that the original decision to charge only the corporation was improper or ill-considered, at least not until the ESA learned of Mr. Merante's asset predation at the end of the proceedings. In any event, the prosecution's discretion is not lightly to be reviewed by a court, the prosecution and judicial functions being separate for very good reason.

69. It has also been argued that if Mr. Merante had been charged personally, he would have faced only the much lower maximum fines that could be imposed upon an individual under the *Electricity Act.* This argument appears superficially valid, but does not withstand scrutiny. If Mr. Merante had been charged personally, he personally would have faced maximum fines of $50,000.00 per count under the *Electricity Act* on one or more of the counts on which pleas were entered. However, he would still remain vulnerable to the application to pierce the corporate veil to hold him personally responsible for Pro-Teck's fines in light of his transfer of assets out of Pro-Teck, which I am satisfied beyond a reasonable doubt was done for the purpose of shielding those assets from

any fines imposed by the court. As an individual, Mr. Merante would also have been exposed to a possible jail sentence of up to a year. Even for a first offender, the possibility of a jail sentence for these offences resulting in death would be real.

70. It should also be kept in mind that Mr. Merante's exposure to the higher penalties available for corporations under the *Electricity Act* arises directly from his own actions. It does not lie in his mouth to accuse the prosecution of malfeasance arising out of wrongful acts on his part that came to the prosecution's knowledge only at the fifty-ninth minute of the eleventh hour. If he had not transferred Pro-Teck's assets into his own name or to the benefit of his new corporation, Master Electric, there would have been no basis for the ESA's application to pierce the corporate veil. The issue would never have arisen. His exposure to the higher range of penalties is not an end-run by the ESA around the sentencing distinctions made in the *Electricity Act,* it is a self-inflicted wound on Mr. Merante's part. He complains now that the ESA seeks to tear down the walls that separate a corporation from its officers, shareholders and directors, but that is not what happened here. Mr. Merante tore down those walls and took Pro-Teck's assets for his own and Master Electric's benefit when the charges were laid. All that the ESA did was find the hole that Mr. Merante had made and pursue him through it. That is what a reasonable person would expect a diligent prosecutor to do.

71. These arguments all ultimately miss the point and by a wide margin. The prosecution applied to pierce the corporate veil because it alleged that Mr. Merante had himself pierced the veil in order to shield Pro-Teck's assets from recovery in the event that a penalty was imposed at trial, not because the ESA was seeking to attribute direct responsibility for the offences to Mr. Merante. The ESA sought to pierce the corporate veil, in effect, because it had a basis to argue that Mr. Merante had sought to pervert the course of justice by making Pro-Teck in effect judgment-proof. The ESA's application was triggered by Mr. Merante's own decision to ignore his and Pro-Teck's separate legal existence for his own personal financial benefit. In laying the charges against Pro-Teck, the ESA respected the notion of corporate structure and the separation between corporate and personal status, even in the context of a small, owner-operated business. This is generally exactly what a prosecutor should do unless there is, from the outset, some basis, in both the available evidence and in the public interest, for laying charges against individuals also.

72. The suggestion that the ESA should have applied to add Mr. Merante or Master Electric as defendants simply ignores the fact that, by Mr. Merante's acts, all three "persons", two corporate and one personal,

ceased to have any meaningful separate identity as a result of Mr. Merante's transfer of assets. They were, for all intents and purposes, one "person". In my view, the same error was made by Her Worship, when Moses J.P. wrote that, "the role of this Court is to sentence the defendant only." As I noted earlier, the simple fact that most of the authorities on piercing the corporate veil involved civil cases where the human persons who were the object of the application were also parties to the action is not determinative of whether a "non-party" can be the object of an application to pierce the veil. That determination will be fact-specific and will depend very heavily on whether or not the person on whom the Crown seeks to inflict consequences has been heard on the application. As I have said, the precise facts of this case, Mr. Merante's interests were fully represented at the sentencing hearing.

73. I have considered the fact that the common-law concept of piercing the corporate veil is a concept that has developed in the context of contract disputes and other civil litigation. I have asked myself whether or not the sometimes very different character of regulatory offences renders piercing the corporate veil a poor fit in the quasi-criminal environment. I see no reason why the doctrine cannot validly apply despite the very different contexts. Indeed, the comments I have made earlier lead me to conclude that failure to pierce the corporate veil in a narrow class of appropriate cases in the quasi-criminal context could lead to flagrant injustice. It is important to keep in mind that one of the principal distinctions between civil litigation on the one hand and quasi-criminal or regulatory offences on the other is that a conviction for a regulatory offence often carries with it the risk of jail for an individual defendant. Since corporations have, "no body to be punished", they cannot be subject to imprisonment and, therefore, piercing the corporate veil cannot imperil anyone's liberty interests. There is no doubt that piercing the veil could have a significant impact on a person's financial interests, but the stringency of the test for piercing the veil ensures that no injustice will be done to the individual in the quest to avoid allegedly flagrant injustice by him.

The Appropriate Remedy

74. These were proceedings under Part III of the *Provincial Offences Act*. This is an appeal from sentence under s. 116 of the *Provincial Offences Act* and my powers are defined by s. 122 of that Act. I am satisfied that the present proceeding constitutes a valid appeal from sentence and that the order sought by the appellant lies within my authority under s. 122, even though the central issue is whether or not the corporate veil should be pierced to hold Mr. Merante personally and his new corporation Master Electric accountable for the sentence imposed. The issue of piercing the corporate veil was, in the circumstances of this case,

purely a sentencing issue. It did not come to light until after the guilty plea and shortly before the sentencing proceedings and it was irrelevant before sentencing. Other than the quantum of the fines (which has not been appealed),[8] the question on the sentencing hearing was whether or not Mr. Merante had by his conduct merged his personal and corporate selves in such a way as to render them indistinguishable for the purposes of imposing the consequences of sentence.

75. It is a long-established principle of appellate review that one of the bases for review of a sentence is the existence of an error in law by the sentencing judge. The validity of that principle in the regulatory context specifically is made out by the decision of the Court of Appeal for Ontario in *R. v. Cotton Felts Ltd.,* [1982] O.J. No. 178. Pro-Teck specifically recognized that principle of law in its factum. I am satisfied that Her Worship's conclusion on jurisdiction constituted an error in law. On the evidence in this case, once it is clear that the sentencing court had the jurisdiction to pierce the corporate veil, the only rational conclusion is that the test for piercing the veil was made out by Mr. Merante's wrongful acts in diverting Pro-Teck's assets, acts that were done for the flagrantly unlawful purpose of defeating the course of justice.

76. Accordingly, the prosecution's appeal succeeds. I am satisfied that Mr. Merante's acts deprive him and Master Electric, both beneficiaries in one way or another of the diversion of assets, of their legal separateness from Pro-Teck. He in effect treated all three legal entities as one; as he sowed, so shall he reap. The fines levied against Pro-Teck may be recovered from Mr. Merante personally and from Master Electrical Contracting Services Ltd., 2433302 Ontario Ltd.[9]

Pro-Teck's Application for Costs

77. Pro-Teck asked that it be awarded costs under s. 129 of the *Provincial Offences Act.* I do not believe that Pro-Teck is entitled to

[8] Indeed, Pro-Teck's factum on the appeal describes the fines as "demonstrably fit".

[9] Although it was not argued before me, I have considered the issue of whether or not Mr. Merante and Master Electric should only be liable to the extent that it can be proved that a specific dollar value of assets was wrongfully converted to either of their benefit rather than being left in Pro-Teck for the satisfaction of Pro-Teck's fines, surcharges, etc. Having come up with that idea, I find it to have no merit. First, I believe that it would place an unrealistic burden on the prosecution to require them to disentangle Mr. Merante's financial weaves and dodges; it was long ago determined that all the king's horses and all the king's men could not put Humpty Dumpty together again. Second, Mr. Merante tore down the walls of corporate separateness between himself/Master Electric on the one hand and Pro-Teck on the other. Those walls having been rent asunder by his own hands, they cannot fairly be raised again in his defence: as he has sown, so shall he reap. Finally, the concept of corporate separateness is far too important to society to provide such a fragile, partial and impractical consequence for those who would seek to pervert justice by disregarding it.

costs. I do not believe costs would be appropriate whether Pro-Teck succeeded on the appeal or not. There is absolutely no prosecution misconduct here. There are no exceptional circumstances that would justify freeing Pro-Teck from the financial burden of the proceedings. To the contrary, Pro-Teck comes into the appeal with unclean hands. Its principal, Mr. Merante, consciously disgorged the corporation of assets and transferred those assets to himself or to another corporation controlled by him doing precisely what Pro-Teck did, operating out of precisely the same place. The only reasonable conclusion is that that disgorgement was motivated by a desire to deny the prosecution access to assets that belonged to Pro-Teck, the defendant in the charges relating to Mr. Mulchenko's wrongful death. The alternative explanations for why Mr. Merante shut down Pro-Teck are unconvincing. Even to the extent that some of those explanations may make sense, they only justify starting a new corporation, not disgorging Pro-Teck of assets that properly belonged to Pro-Teck.

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