Must a Parent Company Remediate the Pollution Done By Its Corporate Subsidiary?

Environmental laws make companies responsible for remediating the pollution they cause. The concept of liability may get tested when the environmental harm is caused not by the company but one of its corporate subsidiaries. Liability depends largely on control and whether the subsidiary was truly independent of the parent. The following scenario illustrates the factors that courts consider when deciding whether to hold a parent liable for a subsidiary's pollution.

Situation

A parent company owns 100% of the shares of a subsidiary that operates a wood treatment facility in BC. The parent company must approve the subsidiary's budget each year as well as any large capital expenditures it wants to make. The subsidiary leases the site on which the facility operates and needs the parent company's approval to renew the lease. The parent company is also actively involved in defending and monitoring environmental charges filed against the subsidiary. The subsidiary's operations contaminate the site. The provincial government orders the parent company to remediate the contamination. Under the BC *Waste Management Act*, operators are responsible for remediation of a contaminated site and 'operator' is defined as a person who is or was in control of or responsible for any operation located at a contaminated site.

Question

The parent company is liable as an operator for remediating the contamination for all of the following reasons EXCEPT:

1. It has financial control over the subsidiary
2. It owns 100% of the subsidiary's shares
3. It has control over the subsidiary's lease of the site
4. It's involved in the subsidiary's environmental affairs.

Answer

A parent company's sole ownership of a subsidiary doesn't necessarily make it an operator under the Act and thus liable for the subsidiary's contamination.

Explanation

This scenario is based on a case from BC called *Beazer East Inc. v. BC (Environmental Appeal Board),* 2000 BCSC 1698 (CanLII), which involved a site leased by a wood treatment facility that was contaminated by the work done there from 1931 to 1982. A parent company owned the facility from 1969 to 1988, when it sold the facility to another company. In 1995, environmental problems were discovered at the site. Two years later, the government issued a remediation order that named the facility's parent company as a person responsible for the remediation. It claimed that the parent company was the site's prior owner and operator. The parent company disputed that claim and appealed the order.

The court agreed that the parent company wasn't the site's prior owner, but ruled that it was, in fact, a prior operator. As noted above, the BC *Waste Management Act* (Act) makes operators responsible for remediation of a contaminated site and defines 'operator' as a person who is or was in control of or responsible for any operation located at a contaminated site. The parent company wasn't the site's prior operator just because it had sole ownership of the subsidiary. But there was enough direct and indirect evidence to persuade the court that the parent company was generally in control of and responsible for the subsidiary's operations at the site. And because the parent company was the site's prior operator, it was responsible for remediating the subsidiary's contamination.

Why Wrong Answers Are Wrong

A is wrong because a parent company's financial control over its subsidiary is strong evidence that it controls the subsidiary's operations. Here, the parent company has extensive financial control over the subsidiary: The subsidiary needs the parent company's approval of its annual budget and any large capital expenditures.

C is wrong because control over the contracts subsidiaries make is an indication that the parent company controls the subsidiary and its operations. The parent company in this case has control over the subsidiary's contracts. For example, the subsidiary can't sign a new lease for the site without approval from the parent company.

D is wrong because a parent company's involvement in its subsidiary's environmental affairs is also evidence of its control over the subsidiary's operations. Here, the parent company is actively involved in defending and monitoring environmental charges filed against the subsidiary. Thus, it's reasonable to conclude that it has control over the subsidiary's operations'especially for environmental compliance purposes.

Ruling

The Canadian Supreme Court upholds By-Law 270 and throws out the lawsuit.

Reasoning

The enabling law in this case (Sec. 410(1) of the *Québec Cities and Towns Act*) allows municipalities to make by-laws 'to secure. . . health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Québec. . . .' By-Law 270 is a lawful application of this power, according to the Court. The Town passed the By-Law in response to the health concerns expressed by its residents, including letters to the Town Council and a petition with more than 300 signatures. Moreover, By-Law 270 has no impact on any neighbouring municipalities. It applies only to the application of pesticides within Town limits.

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, 2001 SCC 40 (CanLII)

BY-LAW IS INVALID

Here's another case in which a court ruled that a municipal by-law was *ultra vires*.

Situation

Toronto adopts By-law No 12347-2011 banning the possession, consumption and sale of shark fin or shark fin food products within the city. Individuals representing a pro-business group called the Fair and Responsible Governance Alliance (FARGA) claim the by-law exceeds the City's powers under the enabling act, the *City of Toronto Act* (the Act). Shark fin sale and consumption is a global environmental issue, and the Act authorizes the City to adopt only laws regulating municipal matters, they claim.

Ruling

The Ontario Superior Court agrees that By-Law 12347 is *ultra vires* and strikes it down.

Reasoning

Preventing an environmental threat and cruelty to animals is a legitimate basis for municipal regulation under the Act. However, the court continued, the by-law must be tailored to achieving those objectives. A ban on possession, sale and consumption within the City of Toronto could 'not possibly have any benefit in protecting sharks,' the court reasoned, noting that Toronto isn't even a major market for shark fin soup and that China accounts for 95% of the world's shark fin consumption. And because its purpose is to affect matters beyond the City's boundaries without any identifiable benefits to its inhabitants, By-Law 12347 is *ultra vires* the Act, the court concludes.

Eng v. Toronto (City), 2012 ONSC 6818 (CanLII)