A COMPARATIVE STUDY OF THE OWNERSHIP CONTROL VS. MANAGEMENT RIGHT ISSUE BETWEEN THE CHINESE ENTERPRISE LAWS AND CANADIAN CORPORATE LAWS

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ABSTRACT

An examination of the different laws concerning the ownership control vs. management right issue in China's legal regime as well as in Canada's legal regime will provide the basis of further comparison and analysis. In light of statutes as well as relevant Canadian case law, some literal differences are shown.

The analysis of legal implications of the literal differences of the laws involves four approaches. These are the relationships between the owners and the corporate management, the ownership composition, the government treatment of the government entities, and the commitments, interests and liabilities of the directors.

In the SOECs, the government controls have been curbed and the autonomy of the enterprises has been advocated in recent years by legislation and dominant Party policy. The boundary of government control over the SOECs and the enterprise autonomy has not been defined clearly. In the CCCs government controls have been kept very firm by statute and case law.

In the SOECs, the ownership right of the enterprise assets belongs to the state whereas the statutory right to possess, utilize and dispose of the enterprise entities belongs to the enterprise. The division of the ownership right and the property right to the same object - the enterprise assets - renders a certain inconsistency in managing the enterprise business. However, the ownership of the CCCs is exclusively in the hands of the government. The ownership of the Canadian private corporations lies exclusively in the corporation - the judicial person itself. The pure ownership composition may reduce
the tension of the owners and management to a minimum level.

A SOEC is treated by the government both as a government appendage, designed to carry out government policy, and a self-survivor. A CCC is treated by the government as a special instrument. The directors of the Canadian private corporations can enjoy substantial autonomy in managing corporations, although in many circumstances they are subject to the courts’ involvement.

The Chinese Enterprise Laws require the directors to fulfill their mandates - the commands of the government - although at the same time they are expected to make the enterprises as profitable as possible. The directors of the CCCs have an interest in fulfilling their commitments to the government, which are to serve the mandates of the CCCs. The interests and commitments of the directors in Canadian private corporations lie in making competitive capital return for the corporations and the shareholders.

The reasons why different legal implications exist in the different economic and social milieus. And significantly, it is found that both the legislative implications of the CCCs and the SOECs reveal a kind of compromise.
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Chapter I. Introduction

A. The Purpose of this Comparative Study

One of the key issues in the State-Owned Enterprise in China (hereinafter cited as SOEC) is ownership/control.¹ There has been a lot of discussion about it in China in the last couple of years.² Its importance is recognised by all the entrepreneurs, financiers of corporations - the shareholders - do not have control of the corporations except if they themselves are the directors. In China, state enterprises have already begun, according to the new Enterprise Law (art 2), to implement the separation of ownership of the state from control of the government. China's government is trying to withdraw its direct control influence on the SOECs as much as possible. But at the same time, it still wants to keep control to a certain extent. Therefore there is some tension between the owner - the state - and the management - the directors. Here also involves conflict of the advocated enterprise autonomy and the dominance of the political and ideological leader of the state - the Chinese Communist Party.

This is where the ownership/control issue comes from and the reason why the issue deserves due attention and study.

¹ The issue of ownership/control is one of the most important issues in SOECs. It is clear that an entity cannot be born and exist without the assets of the owner(s). The ownership right guarantees control of the assets. However, it has been discovered both by western corporate experience and by Chinese economists and government that the separation of ownership from control of the business entity is necessary for good management.


Huan Minshu, "Lun liangquancenli de xingzhi" (The Discussion to the Characteristic of the Separation to the Two Right), (1988) 6 Xiandai Faxue, (Modern Law Science Journal).

the scholars, as well as the government. The ownership/control issue is perceived as a touchy question because it involves the public ownership which is related to the ideology of socialism and capitalism. The legal regime also gives a lot of attention to the issue. This article will examine how the legal implications are involved in this particular issue.

In Canada, there are government corporations as well as private corporations. So, comparing the business entities of a capitalist country like Canada with SOECs may be very interesting and also very useful since China is on the way to implementing the market mechanism. Canada has a much more developed economy than China. Observing how Canadian business entities operate under the market economy will provide very good references for understanding China’s enterprises. Thus I turned to the study of Canadian Crown Corporation (hereinafter cited as CCC) and the private corporation.

There are two purposes behind this comparison. One is to deepen the understanding of the differences of the management right issue between the two jurisdictions. With the expansion of international communication and cooperation, the different nations need to acquire more detailed knowledge about each other. This will facilitate investment and cooperation. The other reason is to arrive at some possible solutions to some of the problems in either part. Due to differences that have existed in the different countries, there must be different experiences that can be used by each other. Utilizing this experience will enhance the development of each country.
B. The Scope of Comparison

This article will address the issue of ownership vs. control concerning SOEC from a legal perspective. It will confine itself to the time period following the Economic Reform in 1978. The study of Canadian corporations in this article will fall within the current legal regimes governing Canadian business entities, although some deviations beyond this time scope are inevitable.

Since the study of company law/enterprise law is one that involves many areas and issues, I will examine only the main issues that I think relate to the ownership/control issue of the enterprises to be discussed here. They are the issue of management right, ownership, the relationship of ownership control and management right, and liabilities of management. I will approach these issues by looking at the economic, social political, and environmental backgrounds of the different legal regimes. Other substantial issues existing in corporate law like prospectus, share structure, mergers or liquidations will not be examined in this article.

There are several forms of business entities in China: sole proprietorship, partnership and corporations and enterprises. The types of corporations in China consists of administrative corporations and trading corporations, as well as the

3. As to the reason why these issues are chosen as the approaches to study the issue of ownership control vs. management right, see infra, at p. ?

foreign-related companies. An administrative corporation is actually a level of administration under a ministry of the central government and has a number of state enterprises as its appendages. A trading corporation may or may not be owned by the government and normally does not have any production organs. Therefore the concept of corporation in China is different than that of western countries, where it means a formalized business entity. Due to the fact that China’s corporations are less formal than traditional western corporations, they are not used in this article as the counterpart for the Canadian corporations being compared. Instead, the state-owned enterprises will be compared with Canadian corporations.

"Enterprise" in China is a generic term that encompasses almost all the state-owned and collective entities that engage in business. Of the family of enterprises in China, there are state, collective, and private enterprises. By the end of 1985, registered industrial and commercial enterprises in the People's Republic of China (hereinafter cited as China) totalled 4,217,800, which included 833,400 state-owned enterprises and 3,347,400 collective enterprises. In 1985, 7,900 large and medium-sized, and 85,805 small state enterprises accounted for approximately 70 per cent of

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the PRC's total value of production and for nearly 43 percent of the state's income.

As time goes on, there appears a new trend. During these years, the status of collective and private enterprises has been increasing and the status of the SOECs has therefore been decreasing.10 This trend is also perceived by Nicholas R. Lardy as:

"Although the Communist Party has periodically issued decrees upholding the primacy of state ownership of the means of production, the role of nonstate firms has steadily widened. As already noted these firms by 1990 produced almost half of all output industrial goods, traditionally the sector of socialist economies in which the role of the state is preeminent."..."The transformation has been equally rapid in the services sector in China where private and other nonstate firms have grown dramatically, leaving state firms with an ever shrinking share of service activities."

But, it is, also from the statistics, clear the output of the state enterprises is still


10. It is held that due to the development of the private, collective and the foreign joint ventures economy, the percentage of state sector's industrial output dropped from 78% in 1983 to 66% in 1987.


   And according to the official statistics, in 1989 the general industrial output of China was 1822 billion whereas the industrial output of the SOEC was 1035 billion. So the industrial output of the SOEC was 57% of the industrial output of China.


occupying the biggest amount in the national economy. In Edward Epstein's words:

"Despite a rapid growth in their numbers and the diversity of their trades, individual enterprises are not intended to replace state and collective enterprise; already, however, they serve as an important supplement to commerce and service trades neglected by the public sector"

The Amendment of China's Constitution of 1993 still insists on the spirit that the leading force of the economy should be the state-owned economy. The state enterprises will, at least from the Constitution's point of view, still be charged the dominant position in the national economy.

Moreover, the issue of ownership and management rights in SOECs is a significant issue receiving a lot of attention in China. Separation of state ownership and the enterprise management right was fixed by the Enterprise Law 1988. However, in practice as well as in the Enterprise Law itself, a lot of tension exists between the owner - the state - and the enterprise management. So the SOECs are a very important vehicle for studying the ownership/control issue. Due to the importance of the SOECs in relation to the ownership vs. management issue and its importance in the Chinese economy, this article will address the issues in the context

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12. See supra note 10, the statistics.


15. See the Enterprise Law, infra note 32, at art. 2.
of State-Owned Enterprises only.

There are four basic forms of business organization in Canada: single proprietorships, partnerships, corporations, and cooperatives\textsuperscript{16}. The relative importance of the type of business organization - corporation is very substantial. Take, for example, the manufacturing field. In 1984 about 88 percent of the establishments in manufacturing were corporations, and they accounted for 98 percent of the total sales\textsuperscript{17}. Therefore the dominant economic status of the Canadian corporations makes them suitable for comparison with the SOECs.

There may be various ways to divide Canadian Corporations. Even from the simple perspective of whether the ownership of a corporation is related to the government, Canadian corporations may be divided into Crown corporations, mixed corporations and private corporations\textsuperscript{18}.

Mixed corporations lie Somewhere along the line between purely private corporations and crown corporations. The term "mixed corporation" is normally used to describe a corporation the capital of which has been partially subscribed by private interests and partially subscribed by the government. Both the two kinds of strength exert their influence in mixed corporations. The ratio of the influences of the two kinds of strength varies a lot in different mixed corporations. This makes the

\textsuperscript{16} See David Stager, "Economic Analysis & Canadian Policy", (Canada: Butterworths, 1988), at. p. 482.


situations in the mixed corporations subtle and complicated. So it is not meaningful to compare them with other kinds of business entities. The study of them will not fall within the scope of the comparative study of this article.

My original intention was to compare the laws between the State-Owned Enterprises in China (SOECs) with the Canadian Crown Corporations (CCCs) because of their common feature of public ownership. Going more deeply into the field, however, it is discovered more and more that Canadian Crown Corporations are being put under the general corporate laws, along with the private corporations. This made me extend the scope of the study to the laws governing the whole family of Canadian corporations, both public and private. Another reason for extending the scope is that the intention of China’s government to have the SOECs act under a market economy is compatible with their intention to make SOECs more similar to typical western corporations. In order to coordinate these factors it will make more sense to study the general corporate law which governs private companies in a market economy like Canada.

C. The Structure of the Thesis

Chapter I is the introduction part. It gives an overview to the thesis. The reader may get rough ideas about the central issue of the article and about the scope within

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19. This has been reflected through the implementation of the shareholding system in China. The shareholding enterprises in China are still operating at a trial stage so they have not come to play a significant role in the economy yet.
which the writer is discussing it.

Chapter II will give an overview to both the legal regime governing the SOEC and that of the Canadian corporations in Canada. Readers may get a rough idea of the two jurisdictions.

Chapter III will compare the legal context as to the ownership/control issue in the two jurisdictions of China and Canada. Rather than table all the legal provisions needed in this article, this Chapter will show only the very relevant stipulations and regulations. Some other relevant provisions and rules may appear where necessary in other Chapters. Chapter IV will compare the legal implications and the spirit of the different legal contexts. Four approaches will be used to clarify the issue of management right vs. ownership control. They are the relationship between the directors with the owners, the relationship of ownership assets vs. corporate property, the treatment of the corporations by the owners, and the interest, commitment and liabilities of the directors. This comparison may allow the readers to acquire a deeper understanding of the differences of the objects being compared.

Chapter V will explore the reason for the different legal spirit surrounding the ownership/control issue. Some economic, social, political as well as environmental factors will be employed to analyze the different legal contexts and implications of SOEC and Canadian corporations.

Chapter VI is the conclusion. It will constitute a summary of the comparisons. Since a reassessment of the legal regime in China concerning the specific issue of management right of the directors will appear, some possible solutions will be
Chapter II. Overview of the Legal Regimes

1. The Chinese Regulatory Framework for the SOEC

The regulatory framework in China consists of three sources: the policies of the Chinese Communist Party (hereinafter cited as CCP), the laws adopted by the National People's Congress (NPC), and the administrative regulations enacted by the government. As to the structures of the three institutions, see the diagram in next page.

Since the CCP established the People's Republic of China in 1949, its leadership of the country on an overall basis has been constitutionally fixed. Its power covers

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20. China's Constitution expressly states that one of the tasks of Chinese people is to achieve the four modernizations under the leadership of the Party.

Article 1 provides that leadership is vested in the "working class." Since the Party has always been recognized as the "advanced organization" representing the "working class", the leadership of the Party over the state is thereby confirmed. Furthermore, the Constitution clearly indicates that the guiding principle of the Constitution is the "Four Basic Principles," one of which is the adherence to Party's leadership. See Peng Zhen, "Report on the Draft of the Revised Constitution of the People's Republic of China to the Fifth Session of the Fifth National People's Congress" (Nov. 26, 1982), reprinted in Chinese in Constitution of the People's Republic of China at p. 48.

all aspects of China from politics and ideology to economics, and certainly including law. Generally speaking, any big changes or movements in the nation are launched by Party policy\textsuperscript{21}. Any actions the Party deems appropriate must be enforced through its Party committees.

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<th>Institutions</th>
<th>Structure</th>
<th>Function</th>
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| Central Communist Party Committee | -the Provincial Party Committee  
                             -the Party Committee in Ministries  
                             -the Party Committee in the direct Municipalities Like Beijing, Shanghai and Tianjin. | The mandate of the Party Committees in the provincial level is just to carry out the policies of the central Party committees. |
| National People’s Congress    | the provincial people’s congress and the ones of the municipalities.       | Elect the people representatives and make policies concerning their localities.                   |

\textsuperscript{21} For details, see Ralph, & Minan, \textit{Law and Politics in the People’s Republic of China}, supra note 5, at p. 54-76.
the State Council
(the Government)
-the provincial government
-the Ministries

The following government administrations are the ones at municipal level and the ones of bureaus and the enterprises.

Their mandates are to carry out the instructions of the central government as well as minister the local affairs.

(The contents of the diagram digest from some relevant laws and literatures22.)

These are set up everywhere by the government administrations, various entities and localities. The legal regime was also set up by the Party’s will,23 so Party policies


See the Constitution of the People’s Republic of China, supra note 20.

See the Organic Law of the State Council of the People’s Republic of China, at infra note 85.

And also see Wei Dingren (ed), Xianfa Xue (the Study to the Constitution), (Beijing, Peking University Press, 1989); Xiao Weiyun, Wei Dingren & Chen Baoyin, Xianfaxue Gailun (the Survey to the Constitution), (Beijing, Peking University Press, 1982).

23. The legal regime may be set up by the Party and also ruined by it. For example, when the Party launched a wave of extra-judicial persecution and "liquidation of class enemies" in 1950s, law was casted by Mao Tse-tung (the supreme leader of China after the P.R. China was established in 1949) as an obstacle to achieving socialist ideology. So law schools were closed, legal research ended, and the legal profession disappeared...

See Folsom and Minan, supra note 5.

This point is also perceived as:" Since 1949, the dominant state philosophy to which law became subordinated has consisted of Mao Zedong’s Communism and the ideology, organization and tactics of a Marxist-Leninist-Stalinist Communist Party."..."(T)the function of law was to serve policy and mobilize support for the Party."

are seen as the most important guidelines, even superior to laws.

The NPC is the organization in charge of legislation. Its legislative power is conferred by the Constitution. After the advocacy to the consummation of the legislation after the Economic Reform, the NPC has enacted quite a few laws in China.

China has been an administrative management system since its establishment in 1949. The State Council - the representative of the government - possesses a dominant role in economic matters. It administers the nation by decreeing various administrative rules.

Generally speaking, the three sources are interrelated. The Party may initiate a
particular issue, and then promulgate a Party policy. The administrators in the government may later make relevant administrative rules, advices, or directives to start implementing the Party policy spirit. Sometimes if the issue is proposed at a long-term benefit, the administrative rules, after a period of trial, may be rendered to the NPC to be considered for enactment. Although it is sometimes argued that in China laws are far less important then the Party policy, the Party policy and the administrative rules are normally effective just for a short time before they become the law or are substituted by new policies or rules. The effect of a policy or regulation can be fixed by law only after is reaches maturity, so in this sense a Party policy or an administrative regulation may become a law in the future. However, it appears from time to time that Party policies and administrative rules can have the same power and effect as laws.

A State-Owned Enterprise in China (SOEC) is also subject to the above three sources. After the Economic Reform, the SOECs began to change. The discussion in this article concerns the period after the Economic Reform. The major Party

27. Normally a Party policy will be drafted by the Central Committee of the Party. Then it will be disseminated through the affiliated committees and branches.

28. It is said, "between 1949 and 1979, implementation of China's few formal laws was more a matter of Communist Party policy and will than any attempt at a consistent application of legal principles"


Qiao Shi, who is now the director of the National People’s Congress, held that whenever an administrative rule reached maturity, it could be passed as a law.
policies about the Economic Reform\(^{30}\) and the decision to confirm it\(^{31}\) will be referred to here. The Enterprise Law\(^{32}\) is the main body to govern matters in relation to SOEC. As a legal person, a SOEC is also subject to the Civil Law\(^{33}\). Certainly China's Constitution\(^{34}\) needs to be referred as to some major and principle

\(^{30}\) The economic reform was first initiated at the third Plenary Session of the Eleventh Chinese Communist Party Central Committee in 1978. At that meeting, the CCP Committee called on the people to focus on economic development. Chinese leaders realized that "in order to achieve socialist modernization, the economic structure must be reformed." See the "Communique of the Third Plenary Session of the 11th Chinese Communist Party Central Committee", reprinted in People's Daily, Dec. 24, 1978.

In 1978, when the CCP launched the Economic Reform, the key point they perceived was to improve the performance of the SOEC. Therefore the CCP developed Party policies relating to economic reform in the SOEC.


(hereinafter cited as the Enterprise Law).


\(^{34}\) Supra note 20, Constitution of the People's Republic of China was adopted by the Fifth Session of the Fifth National People's Congress on Dec. 4, 1982, (hereinafter cited as the China's Constitution). The 1982 China's Constitution was enacted after the Economic Reform. It was revised twice after 1982. In 1988, 2 articles was amended One of which recognized the private economy as the supplementary role to the state-run economy. In April 1993, 10 articles were amended, one of which recognized the "socialist market economy" as the dominant role of China's economy.
affairs.

Since the laws in China cannot stipulate everything in detail, some regulations concerning some detailed matters are also in effect. The Enterprise Regulations\textsuperscript{35} governed the matters of the SOECs before the Enterprise Law was enacted. The General Manager Regulations\textsuperscript{36} and the Employee Representative Assembly Regulations\textsuperscript{37} are currently in effect together with the Enterprise Law. They, respectively, deal with specifically the matters about the directors of the SOECs and the Employment Assembly. Since the Leasing, Contracting and Shareholding Systems are several new trials to increase the efficiencies of SOECs for the last few years, the Regulations on the Leasing SOECs\textsuperscript{38}, the Regulations on Contracting SOECs\textsuperscript{39}

\textsuperscript{35} The Provisional Regulations of State-Owned Industrial Enterprises, promulgated by the State Council on Apr.1, 1983, (2 Business Regulation) China Laws for Foreign Business (CCH Austl. Ltd.) (hereinafter cited as "Enterprise Regulations")

It was replaced in 1988 by the Enterprise Law.

\textsuperscript{36} See "Regulations on the Work of General Manager of Industrial Enterprises under the Ownership of the Whole People", promulgated by the State Council on Sept. 15, 1986, reprinted in Daily of China's Legal System, Oct. 22, 1986. (hereinafter cited as the "General Manager Regulations").

\textsuperscript{37} Regulations on Employee Representative Assembly of Industrial Enterprises under the Ownership of the Whole People, promulgated by the State Council on Sept.15, 1986, reprinted in Daily of China's Legal System, Oct.22, 1986, at p.2. (hereinafter cited as "Employee Representative Assembly Regulations").

\textsuperscript{38} See "The Temporary Regulations on the Leasing of Small-Scale Industrial Enterprises Owned by the Whole People",


(hereinafter cited as the Regulations on the leasing SOEC).
and a set of regulations on the Shareholding enterprises\textsuperscript{40} may be mentioned. Since China is implementing the Market Economy, the Regulations on Price Control\textsuperscript{41} would be useful in reference.

B. The Legal Regime of Canadian Corporations

Originally, when a CCC was incorporated it was accompanied by a special act, by which it was generated. So a lot of CCCs are governed by these kinds of special acts. As time progressed, more and more CCCs were established simply by the general corporate law such as Canadian Business Corporations Act (hereafter cited as C.B.C.A), or the respective provincial corporate laws\textsuperscript{42} by which the private corporations are generally incorporated. Therefore, the laws governing the CCC and

\begin{itemize}
  \item[39] The Temporary Regulations on Contracting Operational Responsibility in Enterprises Owned by the Whole People. (hereinafter cited as the Regulations on Contracting SOEC).
  See Zhonghua Renmin Gongheguo Xingzheng Fagui Xiuanbian (The Selected Compilation of the Administrative Laws and Rules of PRC), at supra note 38.

  \item[40] See Guoyou Zichan Guanliju, (the Administration of the State Property), Zhongwai Gufenzhi Fagui Huibian (the Selected Compilations of the Laws Regarding the Shareholding systems of China as well as some other countries), Beijing, the Press of the University of Politics and Law, 1992.

  \item[41] The Regulations of PRC on Price Controls, effective by the State Council, on September 11, 1987. (hereinafter cited as the Regulations on Price Control).
  See Zhonghua Renmin Gongheguo Xingzheng Fagui Xiuanbian (The Selected Compilation of the Administrative Laws and Rules of PRC) Supra note 38.

  \item[42] Since Canada, as we know, divides political-legal responsibility between the federal state and the provinces some relevant provincial statutes and case law will be analyzed in this thesis.
\end{itemize}
those governing the private corporations overlap to an extent.

At the federal level, all the crown corporations are created by one of three methods: a special constituent act of Parliament\textsuperscript{43}, letters patent issued by the ministries of the government or articles of incorporation under the current C.B.C.A.\textsuperscript{44}, or the respective provincial corporations acts.\textsuperscript{45} After a crown corporation is created it naturally possess a corporate status.

Recently, there has been a tendency to put the CCCs under the general corporate law. For example, it is provided that a minister may, subject to the approval of the Governor in Council, procure the incorporation of corporations pursuant to the Canada Business Corporations Act or acquire all of the issued and outstanding shares of any existing corporation\textsuperscript{46}. So in this article, the relevant laws used concerning

\begin{itemize}
\item Some examples of these are Economic Council of Canada, Canadian arsenals Ltd, Canadian Film Development Corporation, Air Canada, Petro Canada and Canadian Broadcasting Corporation, etc.

Under special acts of Parliament, examples of these corporations would include Atomic Energy Control Board, National Harbours Board, National Battlefields Commission, and National Research Council, etc.

\item Canadian Business Corporations Act and Canadian Companies Act. Examples of these are Atomic Energy of Canada Ltd., Defence Construction Ltd., Uranium Canada Ltd., and Polysar Ltd, etc.


\item See Bill c-153, in Canad. House of Commons, Bills. Sometimes a mixed formula has been adopted in the case of share capital parent corporations: the enactment of a special act creating a share capital corporation, which then falls partly under the Canada Business Corporations Act or the Canada Corporations Act.
\end{itemize}
the Canadian corporations are a number of special Acts by which some Crown corporations were generated, some federal statutes concerning some specific issues in the Crown corporations such as the Financial Administrations Act, some Bills, the administrative regulations of the government such as the Government Blue Paper, and the federal general corporate law - the C.B.C.A.

Canada, as a member of the common law system, has a case law mechanism. Lots of case decisions may be used to form a integrated legal source system.


48. See Canada, House of Commons, Bills.

Chapter III. The Different Legal Stipulations about the Management Right vs. Ownership Control

A. Legal Provisions to the Management Right of the SOEC

The most important chapter of the Enterprise law, Chapter Three, details the rights and obligations of the enterprise. It gives the rights to arrange its major business activities like production (art 22) purchasing (art 25) and selling (art 24) including setting its own prices except for those under price control by the State Council (art 26). It also gives the SOECs financial rights to exert budgetary control over retained funds (art 28) and to fix wages and bonuses (art 30). It expressly grants the SOECs the right of control over the state assets - fixed assets - and their disposal (art 29). Certainly the law permits the SOECs to hire, fire or redeploy personnel (art 31 & 32). Most importantly, it is provided that the SOECs can request adjustment of the mandatory plan and can reject assignments outside the mandatory plan (art 23). In addition, the SOECs may lawfully deal with foreign parties and sign

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50. See supra note 32, the Enterprise Law, passed by China’s First Session of the Seventh National People’s Congress.

It has 69 articles and is divided into eight chapters. They cover the issues of the general principles; the establishment, change and termination of the enterprises; rights and obligations of the directors, employees and the employee assemblies; the relationship of the enterprises to the government; legal liabilities; and other issues.

The Enterprise Law is seen as a major development in China’s legal and economic reform and a key element in the country’s attempt to open its economy to market forces.

contracts with them, subject to State Council provisions (art 27); and to engage in joint operations and to issue bonds in accordance with the State Council provisions (art 34). Finally, the law confers on the SOECs a right to reject the exaction of manpower, materials and financial resources by any state organ or unit (art 33). It can be seen that the rights given to the SOECs are very detailed and nearly comprehensive. And it seems the rights are designed to point at the government organs, at least having some defensive attitude to them.

Although the directors are called the legal persons of the SOECs (art 45), Chapter IV of the Enterprise Law states only that enterprise directors appointed by the government or elected by the workers (art 44) have the rights stipulated in art 45, which grant them the rights to decide only several aspects such as the enterprise plan, the administrative setup of the enterprise, the middle-level administrative personnel, and reward or punishment of staff and workers. So comparing with the rights of the enterprises defined by the law, the rights of the directors are very limited.

It may seem amazing that the rights of the enterprise and those of the directors are set forth separately. In light of the provision that the directors should make decisions on important issues with the help of an administrative committee of which he is the chairman (art 47), it is evident that the rights conferred separately to the enterprises other than the managers can be realized only through the decisions made collectively by the administrative committee. Actually the laws stipulate that manager
can enjoy those management rights only indirectly, through the committee\textsuperscript{51} where he is serving as the chairman.

On the other hand, the ownership\textsuperscript{52} control of the enterprises, namely the restriction to the enterprise right, is also provided in the Enterprise Law. Under the current Enterprise Law\textsuperscript{53}, a competent authority department\textsuperscript{54} may issue directive plans to its subordinate enterprises, provide guidance and consultation services to help them in the formulation of policies, and even order them to dissolve. It also has the authority to approve major capital construction and technical transformation plans submitted by enterprises, to approve actions taken by enterprise directors and to appoint, remove, award, and penalize enterprise directors. The competent authorities may also coordinate relations between the enterprises and other units. So, the Enterprise Law gives the competent authorities powers and rights in almost all


\textsuperscript{52}. In China, the true names of the state-owned enterprises are the enterprises owned by the whole people. The state may just be seen as the symbolic owner of the state assets including the enterprises property. Since the people are too dispersed to exert any ownership right to the assets, control of the ownership can only be realized by the state government.

See Zhou Yousu, Gongsi Falu Wenti Yanjiu (The Research to the Legal Questions in a Corporation), (Chengdu, China, Sichuan People's Publishing House, 1991), at 36.

\textsuperscript{53}. The Enterprise Law, at art. 55, 56(1)-(2), 19(2), 44, 48, 56(3), 35, 37, 38, 41, 36.

\textsuperscript{54}. Government control has mainly been exercised through a "competent authority" (or "responsible institution") that takes charge of enterprises. The Competent Authority (Zhu Guan Bu Men) appears in all the laws and regulations concerning the relationship of the enterprises and the government administration.
the management aspects. If the competent authorities so desires, they can still intervene the SOECs very freely.

B. The Laws Governing the Management Right of the Canadian Corporations

(1). In The Canadian Crown Corporations

The management right of a director in a CCC is not set forth in the same detailed fashion as occurs in SOEC. It is expressed roughly. In a passed parliamentary Bill\(^55\) it is provided merely that the directors of the CCCs are in charge of the daily affairs of the corporations.

On the other hand, government control of a CCC is stipulated at length. After examining the special acts and some passed Parliamentary Bills,\(^56\) one observes that the stipulated controls of the government over CCCs include nearly every aspect. As to the policy or guidance matters of a CCC, approval of the corporation by-laws\(^57\)

\(^{55}\) Bill c-24 made some Amendments to the Financial Administrations Act.

\(^{56}\) The Parliamentary bills are the proposed laws. Only after a bill is passed, which requires three readings at the House of Commons, does it have binding authority.


\(^{57}\) In some cases, the government has the power to make by-laws, such as the cases of the Canada Mortgage and Housing Corporation and Teleglobe Canada. In other cases, the board of directors make the by-laws, subject to the approval of the government.
and approval of the development plan\textsuperscript{58} are required. The management organizations of CCCs are constituted by the government’s appointment of directors\textsuperscript{59}. The CCCs need to fulfil the requirement of the government to submit the annual report\textsuperscript{60}. The government influence may go to such a detailed extent that certain categories of contracts need to be approved\textsuperscript{61}.

Since the CCCs are generally financed by the government their major financial actions, such as spending the budgets\textsuperscript{62} borrowing money\textsuperscript{63}, declaring dividends\textsuperscript{64}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} Bill c-153 (1983) provides in section 70 that each agency corporation and proprietary corporation shall annually submit to the appropriate Minister for approval of the Governor in Council, a corporate plan for the corporation.
\item \textsuperscript{59} Both the Lambert Report and Bill c-24 have devoted several provisions to the appointment, dismissal, remuneration, duties and the prevention of conflicts of interest of directors, chairmen and chief executive officers of the crown corporations.
\item See Royal Commission on Financial Management and Accountability (Lambert Report), Final Report at p. 387., and "Bill c-24" which was passed at June 28, 1984, Canada, House of Commons, Bills 21-34, (Ottawa: The Minister of State <Finance>, 1983\textsuperscript{84}), at section 114-126.
\item \textsuperscript{60} The Lambert Report, Bill c-27 and especially Bill c-24 have payed attention to this question. The latter provides that parent corporations file an annual report and it specifies its contents: financial statements, auditor’s report and statement of steps taken to achieve objectives.
\item \textsuperscript{61} This issue is often stipulated in the special acts by which the crown corporations are created. For example, under the CBC Act, the corporation "can not, without the approval of the Governor in Council, enter into any transaction for the acquisition of any real property or the disposition of any real or personal property other than program material or rights therein for a consideration in excess of $250,000." (CBC Act, R.S.C., c. B-11, s.41.)
\item \textsuperscript{62} Section 131 of Bill c-24 requires all the parent companies and their wholly owned subsidiaries to have their capital approved by Treasury Board.
\item \textsuperscript{63} See s. 100 of Bill c-24; s. 134 of F.A.A.
\end{itemize}
\end{footnotesize}
acquiring subsidiaries and transferring shares\textsuperscript{65} normally\textsuperscript{66} have to be approved by the government. To facilitate the government’s needs to interfere in the CCCs, laws grant the government power to issue directives\textsuperscript{67}. So the government may give commands to CCCs whenever it thinks necessary.

For example, substantial government control may be stipulated very clearly in the Acts, such as in the Telesat Act. This Act assigns the federal government a pre-eminent role in the board’s decision-making and provides the state with both a window on developments and levers of control. Under its provisions, all the transference of common shares, the change of the objects of the corporation and all procurement and construction proposals need to be approved by the government\textsuperscript{68}. And the federal government is assigned a veto power in the annual election of

\textsuperscript{64} For example, in Quebec the constituent act of the crown corporations empowers the Minister of Finance or the appropriate minister to declare dividends.

\textsuperscript{65} As to the necessity of getting approval to acquire shares, see Lambert Report, supra note 59, at 337. And see s.102 of Bill c-24.

\textsuperscript{66} Some crown corporations governed by C.B.C.A., such as the Canada Post Corporation, the Export Development Corporation and Air Canada, have the authority to borrow on capital markets. See at infra note 98, Patrice Garant, "Crown Corporations: Instruments for Economic Intervention".

\textsuperscript{67} Early in 1975, the report of the inquiry into Air Canada recommended "a mechanism by which the Government can from time to time and when the national interest calls for it..." Then the 1977 blue paper, Lambert Report, Bill c-27 contain similar provisions. Bill c-24 provides in section 99 that, upon the recommendation of the appropriate minister, the Governor in Council may give instructions to a parent company "if it deems it to be in the public interest to do so"...

\textsuperscript{68} See Telesat Act, at s.20 (2) (3), s.33, s.8.
Telesat's president\textsuperscript{69}.

(2). \textbf{In the Canadian Private Corporations}

The general corporate laws specify the management rights of the directors\textsuperscript{70} of the general corporations\textsuperscript{71}. According to the statutes\textsuperscript{72}, a director has rights concerning company policy matters - making by-laws; concerning the organization of a company - appointing officers and auditors; concerning financial matters - making banking arrangements and concerning, certainly, some minor matters such as adopting forms of security certificates and corporate records. Most importantly, a director has the right to transact any business especially some key transactions such as authorizing the issuance of securities\textsuperscript{73}.

However the directors’ management rights are somewhat subject to the shareholders. This results in tensions. The responsibility of calling the shareholders’

\textsuperscript{69}. See Telesat Act, at s. 14(1).

\textsuperscript{70}. The directors and officers constitute the management team in a company. Since the officers are appointed by the directors, their management right could be seen as included in the directors management right. So in this article, the issue of officers management right will not be addressed separately.

\textsuperscript{71}. Here the general corporations include the private corporations and those CCCs that were not created by special Acts. As was discussed above, some CCCs are under the special Acts whereas the others are just under the general corporate laws.

\textsuperscript{72}. See CBCA. (R.S.C.), 1985, c-84, at s.99(1).

\textsuperscript{73}. Id.
meeting lies on the directors’ side. However, if the directors fail to do so or should the shareholders feel it necessary, the shareholders may call the meeting themselves. Normally the items the directors need to report to the shareholders are financial statements, auditor’s reports, elections of directors and reappointment of the incumbent auditor.  

The statute requires that fundamental matters of the company should be approved by the resolutions of the shareholders meetings. So actually the shareholders meeting is the controlling or balancing power to the directors’ powers apart from any correcting powers of courts generated by litigation. In short, the interrelationship of the directors and the shareholders is one of a balance from the point of view of statutory law.

However, the case law seems to grant to the directors more preferred right versus ownership than the statute. In Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame it was held: "the director’s power to manage the affairs of the company is complete. That is, a majority of shareholders, even if they pass a resolution at a general meeting, cannot dictate at the directors". Also, in Gramophone & Typewriter Ltd. v. Stanley, it was held:

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74. See C.B.C.A., at s.129(5).

75. The fundamental changes which the statute brings are mainly amendments of articles, constraints on share transfers, rights and privileges attached to any class of shares, reduction of stated capital and amalgamation, etc.. See C.B.C.A., from s. 167 to s. 185.

76. [1906] 2 Ch. 34.

77. [1908] 2K. B. 89.
"The directors are not the agents of the shareholders. Once given the power to manage the company, they can exercise the power according to their office." So the case law has given the directors an unfettered management right with respect to the business affairs of the company.

As to the relationship with the shareholders, although the directors may be appointed or removed by the shareholders, the shareholders generally cannot interfere the management right of the directors when they are in office. In Ashburton Oil at al. v. Alpha Minerals Barwick C.J. said:

"directors who are minded to do something which in their honest view is for the benefit of the company are not to be restrained because a majority shareholder or shareholders holding a majority of shares in the company do not want the directors so to act..."

And in the daily management of the company business affairs, directors are not even legally allowed to ask for the approval of the shareholders regarding the company's common business. Probably it is the extent of confidentiality that prevents the business affairs from being disseminated to those dispersed shareholding people.

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78. The shareholders are not the owners of the company. Only the directors can be seen as the agents of the company, although the shareholder may be empowered to decide on the directors' existence in the company. Some may see the removal power of the shareholders over the directors as a kind of ultimate control over the directors.


81. See C.B.C.A. at s. 110 (3). It provides that no managing director and no committee of directors has authority to submit to the shareholders any question or matter requiring the approval of the shareholders.
Chapter IV. The Comparison and Analysis

A. The Comparison of Laws

After seeing the legal context of the ownership control issue in a SOEC, CCC and the private corporations, some characteristics are noted. Rather than analyzing the similarities, only the major differences in the legal context itself will be discussed here.

The management rights of directors of all the SOECs, the CCCs, and the Canadian private corporations are subject to some controlling powers from the above level. In light of the relevant provisions of SOEC, the directors have to be instructed by the appropriate institutions of the government. In the provisions of the CCCs, government approval occupies significant length. In Canadian private corporations, directors have to report to the shareholders at the shareholders meeting. In both a SOEC and a Canadian private corporation the management rights of the directors are expressed in detail whereas Bill C-24 provides roughly that the directors are in charge of the daily management in the CCC.

The government control rights in a SOEC are not as detailed and substantial as in a CCC. A director of a Canadian private corporation seem to enjoy almost complete management rights although the statutory law gives the shareholders

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82. The reason why it is called above level is that the controlling powers have the power to appoint and remove directors.

83. They are only subject to the appointment and removal power of the shareholders.
some literally controlling power over various fundamental aspects of business.\textsuperscript{84}

So, it may be observed that the extent of the tightness of government control over a SOEC falls somewhere between that of a CCC and shareholder to director in the Canadian private corporation.

In light of the laws set up above, it appears that in SOEC, the right of enterprises, managers, employee assemblies, party committees and the responsible institutions are set forth separately and expressly. In light of the statutes and case laws of Canada, it is obvious only the rights of the directors and the shareholders are set forth in the Canadian private corporations, and in CCCs it is almost only the approval rights of the government that are set forth. Notably, all the enterprises, managers, employee assemblies and party committees are existing in the same enterprise, and their decisive rights are related to the same object - namely, enterprise affairs. The relations of their rights are not set forth very expressly whereas that of the rights of the shareholders and the directors in the Canadian private corporations are set forth very clearly in case law decisions.

What are the meanings of the legal context? And what are effects of the legal contexts in practice? To know the answers to these questions, the implications and ideas of the legal contexts need to be presented.

\textsuperscript{84} The reason why I say the controlling power is "literally" is because, as we have seen above, the case law gives the directors more preferential treatment versus shareholders.
B. Implications and Effects of the Different Legal Contexts

To develop the discussion of the different legal implications, several approaches have to be used. Since the focus of this article is on the ownership control vs. the management right, the relationship of the two parts must be examined specifically. And to look into the ownership itself is a necessary step in order to see clearly how the control comes and varies. Similarly, to look into some internal factors of the management such as the commitments, interests and liabilities of directors is also important in analyzing how directors will behave in relation to the owners. In addition, although the owners' treatments of the enterprises should be a part of discussion of the relationships between them, the writer feels it is meaningful to discuss the treatments separately.

So four approaches will be used in order to understand the reality and the implications of the different legal contexts. They are: i) the relationship between the directors and the government in the government-related enterprises; ii) the ownership composition in all the enterprises and corporations; iii) the owners' treatments of the enterprises; iv) the interests, commitments and liabilities of the directors in the enterprises and corporations.
1. Different Relationships between the Directors and the Government in SOEC and the CCC.

a. In the SOEC

China's legal regime authorizes the State Council to set up various Ministries to develop the national economy. The Ministries established the state enterprises in order to carry out their mandates. The Chinese government, as the legitimate representative of the state and the Chinese people, is empowered to exercise the ownership of state-owned enterprises and therefore is entitled to have direct control over these enterprises by the former Constitution. But the extent of this control varies.

In the days before the Enterprise Law was promulgated, it was stipulated that a competent authority must approve important business decisions of an enterprise.

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86. In the days before, the SOEC was called the State-Run enterprises. See China’s Constitution 1988, supra note 20, at art. 16.

87. Sometimes this expression will appear in English translations as "competent authority" instead of the words "responsible institution". The two expressions have same meanings. Both refer to the above level administration of a SOEC. Normally there are two competent authorities or responsible institutions to one SOEC. One, often according to the locality of the SOEC, is in charge of the administrative things such as the appointment of the directors, collection of the taxes and investigation of the environment protection, etc. The other, generally belonging to a central Ministry such as the Electricity Ministry or the Mechanic Ministry, is in charge of the speciality.
and long-term business planning; the competent authority decided sales and directed the business operation of the enterprise in accordance with the state plans; the competent authority also had the power, in many instances, to appoint and remove general managers and other high-rank enterprise executives. Under article 63 of the Enterprise Regulations, an enterprise must implement the decision of the competent authority even if it disagreed with the decision. This demonstrates that the competent authority had control power over enterprises similar to that of controlling shareholders.

After excessive state control over enterprises was blamed for the reason to result in the inefficiency of the SOECs, the legal regime some changes. At present, there are only a few articles in the Enterprise Law concerning the controlling power of the responsible institution. At the same time, the mandatory and guidance plans things such as the approval to the technology reforms and distribution of the state plans.

88. See Enterprise Regulations, supra note 35, at art. 62.

89. See supra, note 31, Decision on Economic Reform, at. p. 20. The decision stated that:

"For a long time in the past, the function of the government and enterprises was not separated and the enterprise became the affiliate of the administrative departments. Central and regional governments monopolized many businesses they should not have taken care of, and many matters that they should have taken care of have not been duly cared."

90. See supra, at Chapter III.

91. It is provided that the state enterprises must carry out the state mandatory plans and fulfil the economic contracts lawfully made.

See the Enterprise Law, at art. 35. Although the words "guidance plan" are not shown in the provisions, they are implied and included in the words "economic
have become more responsive to the enterprises own circumstances than before. The enterprises may ask the state to modulate a planned task if there are no supplies or purchase assurances for that task. And the enterprises have more autonomy in deciding their business beyond the tasks required in the state plan. This is the situation in context.

In reality, the above situation may be preferable to government control. Since the stipulation is very elastic, the extent to which the government administrations may exert their power may be beyond legal control. The responsible government institution still has supervisory power over the SOECs. As the government administrations stand at a more advantageous position compared with the SOECs,

/contracts/. According to Pei Hai, the productions under the guidance plans are normally in the format of economic contracts; they are also a very important part of the state planning to the national economy.

See Pei Hai, "Qiye bixu dui guojia fuze" (The enterprises must be accountable to the state), collected in Yuan Baohua & Ni Zhengmao, Quanmin Suoyouzhi Gongye Qiyea Jianghua (the lectures to the State Enterprise Law), (Kunming: Yunnan People's Publishing House, 1988).

So it is obvious the mandatory and guidance plans are the means of the government to administer the SOECs. And also through these plans the government can implement the national economic policies.

/92/ See Enterprise Law, at art. 23.

However, the state plans will still inevitably influence the utilizing and disposing right of SOEC. They may undermine the SOEC's management right since the management right is composed of the possessing, utilizing and disposing rights.

/93/ For example, the laws provide that the appointment and removal of to a director need to be agreed by both the responsible institution and the Employee's Assembly in a SOEC. However, in reality a responsible institution removed a director of a SOEC despite the disagreement of the Employees' Assembly.

See Qian Rong, "Wei Qiye Yi You" (Worrying about enterprises), Fazhi Ribao, (Daily of Legal Gazette) of May 21, 1993.
they may have the potential to influence the SOEC where necessary.

Moreover, the structure of China's government administration makes the controlling system very complicated. Generally speaking, the national administration institutions exist along two lines. The line of central government system consists of the central Ministries and their affiliations in the localities. The line of local government system consists of the provincial government and its affiliations handling the local affairs from different aspects such as industry, agriculture, tax and security, etc. Under this kind of mechanism, a state machinery enterprise in a local city normally would be subject to all the orders of the local Party committee, the Ministry of Machinery of China which is located in Beijing, and the Machinery or Industrial Bureau of that city and that province.

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94. According to the Constitution of China, the central government - the State Council - is in charge of the provincial government. See the Constitution, supra note 20, at art. 110.

According to the Organic Law of the State Council, the State Council is in charge of the central Ministries. See the Organic Law, supra note 85, at art. 9&10.

So the administrations at the immediate lower level of the State Council are the local governments and the central ministries.

95. Take the situation of Shenyang (a city in China belonging to the Province of Liaoning) Tractor Factory as an example. There are 7 directly controlling authorities above the Factory: namely, the General Bureau of the Agricultural Machinery of the Mechanic Industrial Ministry of China, the Economic Committee of Liaoning Province, the Mechanic Industria Bureau of Liaoning Province, the Agricultural Machinery Industrial Corporation of Liaoning Province, the First Industrial Department of the Shenyang Communist Party Committee, the Economic Committee of Shenyang and the Agricultural Machinery and Automobile Industrial Bureau of Shenyang. In addition, the departments of supply, financing, personnel and salary of all the above authorities may directly issue certain requests to the Factory.

All together, the Factory has to accept from more than 10 of the above departments all their orders, directives and instructions. According to the statistics of
So within this kind of administration system, many government departments at all the central, provincial and municipal levels struggle from time to time to ensure their decisions are well carried out in the SOECs. The problems with this kind of system, as perceived by some others, are five-fold: i) the enterprise directors have to use a lot of energy in dealing with all the meetings held by the government and all the documents the government requires the directors to read; ii) some commands from different government institutions are somewhat contradictory so that the SOECs must be made confused to know how to comply with these commands; iii) a lot of delays may result in that a lot of things need to be approved by a number of administrations and officials; iv) the administrations often design excuses to exact the profits of the SOECs so that the SOECs are made very burdensome; v) the interference of the administrations may make the directors of the SOECs look for excuses not to shoulder the due responsibilities.

This kind of situation must make the SOECs feel confused. It also means that

the Factory, from January to May of 1984, the number of all the instructive documents from all the above level departments was 63, and in the month of May the number of the meetings called by the above level departments that the managers of the Factory had to attend was 33. The contents of the documents and meetings were often repetitive.

For details, see Zhongguo Shehui Kexueyuan Gongye Jingji Yanjiusuo Gongye Guanli Yanjiushi (The Industrial Management Research Group of the Institute of Industrial Economy of the Social Science Institute of China), "Guanyu jiejue woguo guoying gongye qiye duotou lingdao de tantao" (the discussion on how to solve the problem of the multihead-leadership to the state-owned industrial enterprises of our country), (1984), 3 Gongye Jingji Tizhi Gaige Yanjiu (Journal of Research on the Reform of the Industrial Economic Structure), at P.388-402.

96. Id. at 390.
they have to waste a lot of time and energy dealing with the multiple controls imposed on them. Thus the efficiency of the enterprises is inevitably undermined in this system. This gives one of the rationales to reform.

In a word, the relationship of the SOEC to the government remains uncertain. It still has the characteristics of the appendages of the government since the directors are still appointed by the government. However, because it has some independent rights to manage the state assets and to hand over some profits and taxes, it may also be seen as agents of the principal (the state). So actually the relationship is a kind of mixture of appendages and trusts. This makes the relationship between the SOEC and the government somewhat contradictory and uncertain. It also puts the management and the ownership control in an inconsistent situation.

b. In the CCC

Apart from major activities such as transferring shares, borrowing money, declaring dividends, and some major business transactions which need to be approved by the government, as was set forth above, there is more involvement by the government with daily management of a CCC. It is illustrated by Raynwynd Garueau words:

"The government can not be satisfied with the powers of control accorded the shareholders by the companies acts. In addition to being a shareholder, the state is

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97. See above. at Chapter III.
responsible for the common good of the community, which it must never forget..."\(^\text{98}\)

And Patrice Garant concluded:

"So the government, as sole (or the major) shareholder, has the duty to monitor closely the development of corporations that share its own purpose, which is above all, to advance the economic development of the community..."\(^\text{99}\)

In addition, another kind of circumstance may be noteworthy. There is a substantial identity in senior management within the government departments or commissions and the CCC.\(^{100}\) Although they may be different in terms of the roles they play for government institutions or CCCs, they do not have different interests in running the CCCs and serving the mandate of the government institutions.

Moreover, since it is easy for CCCs to be the centre of attention, the government

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\(^{99}\) Id.

The government's involvement in the daily affairs of the CCC was also perceived by Friedmann. He held:"In practice, the controlling ministers have generally refrained from interfering with the ordinary management of the enterprises with the fixing of timetables for railways or the discontinuance of certain services, but they have repeatedly intervened, for policy reasons, in matters not only overriding national interest, but also in matters which would normally be considered to be within the province of commercial management..."


has to be careful to watch their actions.\textsuperscript{101} It grasps the CCCs firmly in its hand because it does not want any trouble from them.

And the firm control is reflected by the diversified administrations that can direct or affect the operation of the CCCs. These are Parliament, the Public Account Committees, the sectoral standing committees of Parliament, the Cabinet, the Governor in Council, the Treasury Board, the Minister of Finance, various other Ministers and the Auditor General, etc., all of which are shown clearly in the following table.\textsuperscript{102}

<table>
<thead>
<tr>
<th>Controller</th>
<th>Branches</th>
<th>Functions</th>
</tr>
</thead>
</table>

\textsuperscript{101} The reason for the government's close monitoring of the CCCs has been perceived as follows:

"Since as soon as there are problems, public opinion and the opposition benches lose no time in demanding answers from the government... (so in practice) informal contact between government as a shareholder and the CCCs is quite often."


\textsuperscript{102} As to the content of the table, see Patrice Garant, supra note 98.
<table>
<thead>
<tr>
<th>Parliamentary</th>
<th>The Parliament,</th>
<th>To create certain Crown corporations by enacting the constituent acts, asking the government to answer some questions in House, discussing supplies or appropriations to capitalize the crown corporations and reviewing the Auditor General's report and the public accounts of the Public Accounts Committee.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Public Accounts Committee</td>
<td>To make recommendations on the creation, classification, financing, financial management practices, auditing and annual reports of the corporations, as well as the relationship between the central agencies and the corporations.</td>
<td></td>
</tr>
<tr>
<td>The sectoral standing committees of the Parliament,</td>
<td>To take part in the debates when discussing appropriations and when the acts are amended.</td>
<td></td>
</tr>
<tr>
<td>Governmental</td>
<td>The Cabinet, (or the Governor in Council,)</td>
<td>The Governor in Council or the Cabinet is in charge of all the affairs of the CCC that need to be approved.</td>
</tr>
<tr>
<td>The Treasury Board,</td>
<td>The Treasury Board serves an important function as financial controller of the CCC.</td>
<td></td>
</tr>
<tr>
<td>The Minister of Finance</td>
<td>The Minister of Finance is normally called upon to hear the borrowing plan of the CCC and to approve it when necessary, especially in the case of long or medium-term loans.</td>
<td></td>
</tr>
<tr>
<td>Other ministers of the government,</td>
<td>The other ministers of the government play a decisive part in the control. They are the main links between the Cabinet, the Treasury Board and the Crown corporations.</td>
<td></td>
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103. Ibid.
The Auditor General assumes posteriori control of the accuracy and propriety of Public accounts; in other words, the financial management of the public service which certainly includes the accounts of the CCCs.

From the above diagram it is obvious that the Canadian government has a kind of systematic mechanism for controlling the CCCs. Without Parliament the CCCs could not be set up legally. After the government establishes the bodies of the CCCs, it approves how they operate. The way that the government deals with the CCCs has to be tabled before Parliament. The most important aspects of the management of the CCCs - financial matters - must be approved by the Auditor General, who is a part of the Parliamentary system. Parliament's decisive power over the legal aspects of the CCCs, the government's or the ministry's decisive power over the administrative aspects of the CCCs, and the Auditor General's decisive power over the financial aspects of the CCCs, demonstrate the large extent to which CCCs are controlled by various aspects of government. Most importantly, the government has to be accountable to Parliament with regard to the affairs of the CCCs. This puts more pressure on the government to control the CCCs more closely.

All the above controllers are somewhat complicated and cumbersome for the CCCs. The latter have to submit to various kinds of information, documents concerning the annual report, development plans, budgets, by-law appointments and dismissal advices, even certain contracts to the various controllers. And before they can go further, then the CCCs must wait for approval, which can only be obtained
after questioning, tabling, debating, etc.

2. The Different Ownership Compositions

a. State Ownership Right vs. Enterprise Property Right: The Two Different Owners of the Same Property - The Ownership Structure in SOEC

China has implemented public ownership since its establishment. It was formally recognized by China’s provisional constitution, the Common Program. It provided that:

"under the leadership of the public economy" state, collective, cooperative, and private capitalist should all play their roles to promote the development of the economy as a whole".104

The nature of a socialist country had to ensure the overall public ownership in China. The establishment of the PRC brought a nationalization policy concerning both agricultural and industrial property105. Since 1956, in which year nationalization was

104. See the Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (the Common Program of the Chinese People’s Political Consultative Conference), at art. 26. in Xianfa Ziliao Xuanbian, (the Selected Material concerning the Constitutions), (Beijing, Peking University Press, 1980), at p. 3.

"Prior to 1949, there had been some expropriation and redistribution of land in areas under the control of the Red Army, but this was limited to areas under their control. This campaign came to fruition after liberation when the new Chinese government made the working class the leaders of the republic and quickly embarked on a program to strengthen the nation, which was articulated in the "Common Program of the Chinese People’s Political Consultative Convention," enacted in
completed, state ownership was constitutionally established\textsuperscript{106}. According to the former Constitution 1988,

"The state-run economy is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state-run economy."\textsuperscript{107}

Although some amendments to the Constitution were made on March 29, 1993, the socialist public ownership remains unchanged. So, the state is still the sole owner of China’s overall property.

The Enterprise Law provides that the property of the enterprise belongs to the state and the enterprise only enjoys the rights to possess, utilize and dispose of it.\textsuperscript{108}

It is held in some civil law theories that the property right of the state-owned enterprises is the major content of the state ownership and that no other enterprises and institutions could be regarded as the subject of the state ownership\textsuperscript{109}. Since the state has long been the sole owner of the state property, it is natural that all the

\begin{footnotesize}
\begin{enumerate}
\item[106] See the Constitution 1954 passed by the 1st Session of 1st NPC of the PRC, at art. 6., in \textit{Xianfa Ziliao Xuanbian}, (the Selected Materials concerning Constitutions), supra note 104, at p. 150.

\item[107] See supra note 20, the Constitution, at art 7.

\item[108] See the Enterprise Law, at art 2.

\item[109] Tong Rou, Zhao Zongfu & Zheng Lichun, \textit{Minfa Gailun} (Introduction to tje Civil Law), (Beijing, People’s University Press, 1982), at p. 97-98.
\end{enumerate}
\end{footnotesize}
state enterprise property belongs to the state.\textsuperscript{110} Currently both state ownership and the enterprise property rights concern state assets, or what may be called enterprise property. As the owner of the state assets, the government has the legal right to protect the assets from being damaged\textsuperscript{111}. As the owner of the property right of the enterprises, the enterprises have the legal rights to lease and/or sell its property upon approval by the State Council.\textsuperscript{112} This creates some contradictions between the two owners.

This situation where the state ownership cannot guarantee its full control and where managers do not have the whole and real management right to the enterprise creates the inherent inconsistency of the issue of the ownership vs. control in the SOEC. This inevitably leads to inconsistent stipulations in the legal context.

\textbf{b. Advances and Sole Shareholder - Ownership Structure in CCC}

There are two kinds of financial methods for creating a Canadian Crown corporation: financing without share capital structure and financing with share capital

\textsuperscript{110} There are even some enterprises being privatized in some localities. see supra note 5, Folsom & Minan, \textit{Law in the People’s Republic of China}, at 859. However, at the current stage, although private property can be allowed in the individual enterprises and the Shareholding enterprises, it is still not realistic to consider the privatization of the SOEC.

\textsuperscript{111} See the Enterprise Law, at art 56(4).

\textsuperscript{112} See the Enterprise Law, at Art. 29
Ownership Structure without Share Capital - The proportions

The financing of a CCC without the share capital comes exclusively from the state revenue. This is reflected in the work of Patrice Garant, which shows the varied means of financing corporations without share capital.\(^{113}\)

No matter which formula is used, all the financing resources come from

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\(^{113}\) Firstly, an act may provide for a capital endowment or credit or working capital, and it determines the amount. For example, see Canadian Film Development Corporation, R.S.C. 1970. C-8, s.18; Farm Credit Corporation, R.S.C. 1970 c. F-2, s. 12.

Secondly, an act may provide for the payment, for a certain period, of "advances", the amounts of which are fixed annually. For example, see Centre de recherche industrielle, R.S.Q., c. C-8, s. 25;

Thirdly, the law may authorize the government or the minister of finance to make discretionary payments from the consolidated revenue fund. For example, see Societe de development immobilier du Quebec, R.S.Q., c. S-11, s. 19.

Fourthly, the act may provide for the payment of advances or loans at the discretion of the minister of finance or of the government but may require that the government determine interest rates, deadlines and other conditions. For example, see Canadian Commercial Corporation, R.S.C., c. C-6, s. 8; Canadian Wheat Board, R.S.C. 1970, c. C-12, s. 12;

Fifthly, the act may state that the government may authorize the finance minister to advance to the corporation any amount deemed necessary for its operation while authorizing the government to guarantee the payment in principal and interest of the loans of the corporation. For example, see St. Lawrence Seaway Authority, R.S.C. c. S-1, s. 28-29.

A sixth formula would be the payment of annual grants authorized by the act for certain purposes. For example, see Canagtrex, S.C. 1980-83, c. 152, s. 15; CBC, R.S.C., 1970, c. B-11, s. 45.

government advances. So, without any doubt, the ownership of this kind of CCC is in the hands of the government.

Ownership Structure with Share Capital - The Sole Shareholding

In recent years we have come a long way from Friedmann's notion that the public corporations only have one kind of financial structure - namely, the appropriation from the Consolidated Revenues. Another financial structure of the CCC has appeared on the scene. This is the share capital structure.

Share capital corporations are normally created by a special act of Parliament. Generally speaking, the Parliament votes them initial capital and expressly authorizes the government or the department to subscribe for shares.

There is a tendency for the government to prefer the share capital structure. It seems that the main reason for this is their desire to give the crown corporations more autonomy and to make them more similar to the general corporations. When the government amended the Hydro-Quebec Act in 1981, Mr. Duhaime said:

"... so that its capital structure will be the same as that of any large North American corporation... It will be easier to compare the financial statements of corporations... Hydro becomes, in a sense, normal in comparison to similar corporations" (translation)

114 Friedmann thought that Crown corporations had no shares or shareholders. See Friedmann, W., The Public Corporation in Great Britain, at 164-165.

115 Debates on National Assembly of Quebec, October 10, 1978, p. 2934.
Bill c-153\textsuperscript{116} addressed the issue of shares in the crown corporations. It provides that, in respect of such Crown corporations, the Governor in Council has the rights and powers of a sole shareholder pursuant to the Canadian Business Corporations Act. Since the shares are more concentrated it becomes easier to exert control.\textsuperscript{117} So it seems obvious that the government, as the sole shareholder, may easily control the directors of the CCCs.

In the case of certain corporations, for example Air Canada, Petro-Canada, the Export Development Corporation and the Canadian Deposit Insurance Corporation, the legislation expressly states that the shares are not transferable\textsuperscript{118}. Moreover, at the federal level, legislation states that no transfer of public property shall be made to any person except on the direction of the Governor in Council or in accordance with regulations\textsuperscript{119}. These provisions are supposedly for keeping control of the CCC. The government always wants to keep an effective control shares in a CCC that

\textsuperscript{116} See Canada, House of Commons, Bills c-153. (Ottawa, Minister of State <Finance>, 1983).


They argued:"...The concentration of Ownership in the hands of an individual or control group creates a large personal stake in promoting efficient wealth maximizing behaviour by the firm's managers...".

\textsuperscript{118} For example, see Air Canada Act. R.S.C., 1970, c. A-11; Petro-Canada Act and Canada Deposit Insurance Corporation Act, R.S.C., 1970, c. C-3.

\textsuperscript{119} See The Financial Administration Act, supra note 47, at s. 52.
involves shares owned by the others.

c. In the Canadian Private Corporations

Since the shareholders buy shares to finance the corporation so that the corporate assets are formed, the study of the issue of ownership in the private company is inevitably involved with the relationship of the shareholders to the corporations.

It should be clear that the ownership of the private corporations lies in the corporation itself rather than the shareholders.\(^{120}\) Obviously the corporation itself, as a purely legal entity, as opposed to the shareholders who finance the corporation, cannot do anything itself. The corporate entity cannot exert its ownership right in a way that interferes with the management right of the director.\(^{121}\)

However, since the shareholders buy shares to finance the company, they have the avail right - the right to the dividends of their shares, to the corporate assets and they also have some rights to the corporate affairs such as approving some fundamental changes to the corporation.\(^{122}\) This puts them in a position against the directors.


\(^{121}\) Id.

They held: "As a corporation can not act in its own person, it must act by agents. These agents, who are entrusted with the management of the corporation, are termed directors...."

\(^{122}\) See supra, at Chapter III, for relevant provisions.
They may appoint and/or remove the directors. The directors need to report certain issues such as fundamental changes to the shareholders meetings.

But in reality the directors do not need to care too much about the opinions of the shareholders. Since the management team constituted by the directors and the managers normally are professionals in managing business, it does not make sense for them to report the detailed business management of the company to shareholders and to get approval from the shareholders. This has also been recognized by the case law.\textsuperscript{123} The shareholders do not need to pay other duties except for buying the shares. So according to the inseparability of right and duty, the law does not offer them more rights than obtaining interests of the shares when they want to interfere with the decisions of the directors concerning the running of the corporation.

The ownership issue in the private corporations also experienced some changes as time went on. According to Mike Rosser, "In the nineteenth century the typical firm was both owned and managed by the same entrepreneur; maximising profit was naturally considered the main objective; today, however, the major part of industrial output is controlled by large public companies which are owned by shareholders and run by salaried managers; only very broad policy guidelines are laid down at shareholder meetings and widely dispersed shareholding means that individual shareholders can have little to say in company decisions."\textsuperscript{124}

\textsuperscript{123} Also see above, at Chapter III.

It is obvious that because of the dispersing tendency of the shareholding, it will also be difficult for the directors to get somewhat unified opinions from the shareholders.

From the standpoints of the shareholders, since the shareholders meetings are not held very often, they are only periodically able to give some sound relevant opinions on business issues. And they have to compare the cost of their monitoring the management details with the changes of the interests they will get. If the cost to monitor is too high, they would rather just sell the shares they hold to find some way out than to suffer the unsatisfactory achievements of the corporations.

In reality, the management team - the directors - is in a more advantageous position than the shareholders, in terms of exerting the power to manage the corporate affairs. And since the motives of the directors and that of the shareholders are almost the same - that is, in terms of seeking the competitive return of the capital - there should be no fundamental contradictions or ideological differences between them. As well, only very broad policies are laid out in the shareholders meeting that binds the directors' actions. So it seems the directors can enjoy almost full autonomy to run the company. There are hardly any contradictions or inconsistencies in the private companies.

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125. Normally once 15 or 18 months, See C.B.C.A, at s. 127.

3. Different Treatment of the SOEC and the CCC

This issue relates to the governments' different attitudes to and usages of the enterprises and the corporations.

a. Treatment to the SOEC

1) Being Responsible for Its Own Profits and Losses

After the Economic Reform in 1978\textsuperscript{127}, the method of Retention of Profit\textsuperscript{128} and that of Responsibility for Profits and Losses\textsuperscript{129} began to be implemented, and the property rights of enterprises began to be separated from the state assets to some extent. After the enterprises pay their taxes to the state, they can have their own

\textsuperscript{127} The economic reform was first initiated at the third Plenary Session of the Eleventh Chinese Communist Party Central Committee in 1978. At that meeting, the CCP Committee called on the people to focus on economic development. Chinese leaders realized that "in order to achieve socialist modernization, the economic structure must be reformed."


\textsuperscript{129} See supra note 85, Zhonghua Renmin Gongheguo Xingzheng Fagui Xuanbian, (the Selected Compilation of the Administrative Laws and Regulations of the PRC), Beijing, Law Publishing House, 1990.
property. This is a big change. So the managers can say immediately that their enterprises have some assets that belong to their own control.

This change, therefore, was facilitated by the legal regime to some extent. The law provides that the state-owned enterprise legal person bear civil liability to the extent of the property the State has given it to operate and manage. And in regard to the property the legal person owns, the enterprise has the right to possess, utilize, profit from, and dispose of it. This means that after the state-owned enterprises obtain the status of a legal person, the property in the enterprise has been separated from the property of the state. The enterprise has thus gained or been granted the property that is subject to the managers' independent management although the property belongs neither to the managers themselves nor to the enterprises. This reflects the state's willingness to have the enterprise utilize the property to make a profit as well as to shoulder the responsibility to increase the value of the state assets - the enterprise property.

So it appears that the state wishes the SOECs to survive by themselves. Due to some opinions that a SOEC may also have its own interests, such as the welfare of

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130. See supra note 33, China's Civil Law, at art. 48.

131. Even in the policies for implementing the shareholding system in the SOEC, it is advocated that the enterprises have to assure and increase the value of their property. See the Trial Methods for the Shareholding Enterprises, at art. 1, in Zhongwai Gufenzhi Pagu Huibian, supra note 40.
the workers,\textsuperscript{132} we may how see the arrangement of the government reflects some notion that a specific SOEC may also be taken as a vehicle to serve the interest of the employees working in it just like the private corporations.

2) Internal Right Balancing in the SOEC

There appears to be two kinds of power in the SOEC for balancing the managing rights of the directors. One is from the Communist Party Committee in the SOEC and the other is from the employee assembly.

a) Control from the Party

As stated before, under the current social and economic system in the PRC, the CCP has always assumed and will doubtless continue to assume the leadership, which is guaranteed by the Constitution.\textsuperscript{133} There are a lot of members in the CCP. The

\textsuperscript{132} See Qi Ming, "Qiye de suyou quan he jingying quan", (the ownership right and the management right to the enterprises), in Yuan Baohua & Ni Zhengmao (ed.) Quanmin suoyouzhi gongye qiye fa jianghua, supra note 51, at 26.

\textsuperscript{133} According to the size of every geographic area or entity, a given organizations of the Party may be called either a "committee" or a "branch". A "committee" is set up for a large entity or geographic area and a "branch" is established for smaller ones, both of which are headed by a person called a "secretary".

See the Constitution of the Chinese Communist Party, supra note 22, at 198.

Party enforces its control over the country through all these affiliations and its members. Nearly all the important positions of the institutions and enterprises are required to be held by Party members.

Originally the leadership of the SOEC was in the Party committee's hands.\textsuperscript{134} In 1984, the Third Plenary Session of the Twelfth Chinese Communist Party Central Committee expressly mandated reform of the old system by re-establishing the general manager responsibility system\textsuperscript{135}. This transfers the leadership of the enterprise from the Party committee to the general manager, thereby reducing the role of the Party committee in enterprises from a "leadership" to a "supervisory

\textsuperscript{134} In China, the leadership of the enterprises once was in the managers' hands and once in that of the Party committees. There have been two different management systems that have been implemented since 1949 concerning the relationship between the Party committee and the general manager in the SOEC, one of which is the "General manager responsibility system" and the other being the "general manager responsibility system under the leadership of the Party committee."

The former allows the general manager to have complete control over management while the latter gives the decision making power to the Party committee while at the same time requesting the general manager to shoulder the responsibility for the implementation of the decisions.

As to the Regulations regarding the "General manager responsibility system" and the "general manager responsibility system under the leadership of the Party committee", see *Zhonghua Renmin Gongheguo Xingzheng Fagui Xiuanbian*, (the Selected Compilation of the Administrative Laws and Regulations of the PRC), (Beijing: Law Publishing House, 1991) at supra note 85.

\textsuperscript{135} See supra note 31, the Party policy, "Decision on the Economic Reform", at p. 21.

After that the General Manager Responsibility System" was stipulated in the General Manager Regulations.
The "Enterprise Law" does not set forth in detail or concrete terms the CCP's role in an enterprise. Only one article out of the sixty-nine articles of the Enterprise Law is devoted to defining the rights and obligations of the CCP. It provides that the CCP shall guarantee and supervise the enterprise's implementation of both the State’s and the CCP's principles and policies. So the Enterprise Law also recognizes the Party committee's supervisory role.

Although it is good to transfer the leadership from the Party committee to the management of the enterprises, one may still wonder what the "supervisory function" means. As to the so called "supervisory function", the vice director of the State Planning Committee has said:

"the supervisory role of the Party committee under the newly reformed system is such that before the general manager makes a decision, the Party committee shall actively propose suggestions and opinions... After the decision is made by the general manager, the Party committee shall ensure the implementation of the decision..."

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136. See supra note 36, "General Manager Regulations", at art.2, 6, &26.

137. See the Enterprise Law, at. art 8.

Kennith T.K. Wong and Zhonglan Huang think that it is possible that the law drafters decided not to deal with the issue of reduction in the CCP's influence because it is so controversial.


138. "Yuan Baohua shou zhongzubu, guojiajingwei he quanzong weituo jiu quanmin suoyouzhi gongye qiye sange tiaoli daqizhe wen" (Yuan Baohua upon the request of the Department of Organization of the Party Central Committee, the State Economic Planning Committee and National General Worker’s Union of China answering the questions of reporters on the three Regulations governing the industrial enterprises under the ownership of the whole people).

through various political and ideological assistance. Where the Party committee disagrees with the general manager, it shall timely put forth its objections and where necessary, report to the competent department of the Party committee at a higher level”

This may give an impression that when the CCP committee in an enterprise agreed with the manager’s decision, it would just act as the adjunct of the management, whereas when it disagreed with the manager’s decision it could only resort to the Party committee in the above level, thereby not bothering the management. However, the provision in the Enterprise Law demonstrates a somewhat different concept.

It reveals that since the Enterprise law grants supervisory power to the CCP in the enterprises, in relation to the implementation of the CCP’s and the state’s policies, the managers still need to be subject not only to the Party’s policy, but also to the CCP’s committee officials’ discretion about whether the managers are on the right track.

In addition, since almost all the managers of the SOECs are Party members, they are subject to the instruction and investigation of the Party. All Party members need to take part in the organization of the Party Committee and to report their political ideas or ideological problem regularly. And if the Committee or the

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139. Generally speaking, the government responsible institution will not appoint a person who is not a CCP member to be in the position of enterprise director. This is the practical situation in China.

140. This point is stipulated in the Party rules to the CCP members. See "Zhongguo Gongchandang Gongye Qiye Jiceng Zuzhi Gongzuo Zhanxing Tiaoli" (The Provisional Rules as to the Organizational Work of the Seed Organizations of China’s Communist Party), collected in Quanmin suoyouzhi gongye qiye fa jianghua (The
branch does not like a member’s action or behaviour, it will accuse that member and encourage him to improve it\textsuperscript{141}.

Anyway, the legal regime seems not to allow the Party committee to exercise control over routine management activities. Under the "Four Basic Principles"\textsuperscript{142}, one of which is adherence to the leadership of the Party, it is not realistic to think the Party can thoroughly abandon their influence in the SOECs, which is the mainstay of China’s economy. So the Party committee functions in the SOECs as a balance to the director’s management right.

\textbf{b) Balancing Power of the Employee Assembly}

The nature of China’s state-ownership and the supreme status of the working-class, which is guaranteed by the Constitution\textsuperscript{143}, support the rationale of giving some controlling power to the workers. The organic mechanism is well set up by the

\begin{flushleft}
\footnotesize\textsuperscript{141} Id. \\
\footnotescript{142} The "Four Basic Principles" are stipulated in China’s Constitution. They are held to be the guiding principles of people’s work and life in China. \\
\footnotescript{143} It is provided that the People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. See supra note 20, China’s Constitution, at art. 1.
\end{flushleft}
It is also provided that the assembly must discuss and comment on almost every matter of business management, and may supervise the performance of high-ranking officers, propose awards or penalties, recommend candidates for the general manager, or nominate the general manager to be appointed by the competent authority\textsuperscript{145}. These provisions demonstrate that the assembly's scope of power is broad, although mostly advisory.

And most importantly, the assembly has decision making power over important matters that concern the employees' welfare, such as plans for the use of the employees' welfare fund and for housing distribution\textsuperscript{146}. If the general manager disagrees with the assembly on these matters, he may request only that the assembly reconsider its decisions, and he must follow the decision which the assembly ultimately reaches\textsuperscript{147}. So, the managers seem not to have the power to decide issues regarding workers' welfare.

\textsuperscript{144} The regulations provide that employee representatives are elected by and chosen from the employees and the assembly adopts resolution by a simple majority; two-thirds of the representatives constitute a quorum; the meetings of the assembly are chaired by a panel consisting of workers, technical and managerial personnel, and executives and the assembly also may set up various special committees to study and discuss matters in specific areas on a regular and standing basis.

See supra note 37, the Employee Representative Assembly Regulations, at art. 12, 14, 18, 16, 21, 7, etc.

\textsuperscript{145} Id. at art. 7.

And see the Enterprise Law, supra note 32, at art 47.

\textsuperscript{146} See supra note 37, the Employees Representative Assembly Regulation, at art 7(3). and the Enterprise Law, at art. 52.

\textsuperscript{147} See supra note 36, the General Manager Regulations, at art. 30.
This legal regime, without any doubt, is giving some power to the Employee Assembly, thus creating a new controlling strength over the managers’ autonomy. The managers thus have to care about how the workers will evaluate their decisions, especially those about reward and punishment. These will often be used to enhance the incentive of the workers but are also sensitive to the workers. To raise the point of democracy in the economic entity is characteristic of China. It is stipulated that democratic management must be carried out in the SOEC\(^{148}\), although this seems to conflict with the "General Manager Responsibility System." Here a new saying, "democratic management" appears. That reminds one that the autonomy of the enterprises may not be said to be given to the managers. This will not only undermine the management of the enterprises but also ruin the rational of having the general managers be responsible for the profits and losses. The political and legal regime in China seems not to give a clear idea of extent to which the general managers should be given their right. This may actually be seen as another means for the government to balance the autonomy of the managers.

**b. The Treatment of CCCs by the Canadian Government - Rendering Privileges**

1), The Origin of the Privileges

The immunities, privileges and prerogatives of the CCC originated from England,

\(^{148}\) It is provided that the Employee Representative Assembly is the basic instrument to implement the democratic management in the SOEC. See the Enterprise Law, at art. 51.
wherein prior to the thirteenth century, the king or monarch could not be sued in any court whatsoever. To use the language of early commentators, the sovereign was the fountain of justice and of honour; the writs were commanded in his name, and through his Attorney-General he guards the public interest against violators. So in exempting the sovereignty from legal liability it was thought that private interests were being subjected to public needs and that this was desirable.

2) The Status to Enjoy the Privileges

As to the crown corporations, when they made their appearance in the second half of the 19th century, the court had to adjudicate and decide whether these corporations should be entitled to the benefit of the crown privileges or simply be treated as general corporations. In the case of Bank Voor Handel En Scheepvaart v. Administrator of Hungarian Property, the court specifically considered the issue of the category of persons who could claim crown immunity, and came up with the following list:

a) the sovereign personally

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150. Id.

151. See Moses Aldrin Kimuli, Legal Aspects of Public or Crown Corporations in Canada, (Master’s Thesis collected in Univ. of British Columbia, 1980).

b) servants and agents of the crown in their representative capacity.

c) persons who are not crown servants or agents but who, for certain limited purposes are considered to be in 'consimili casu' with such servants or agents. 153

Things have become clearer since the effectiveness of the Financial Administrative Act (F.A.A). At the federal level, the F.A.A. defines both Schedule B and C corporations to be agents of the Crown. 154 The status of the Schedule D corporations, as well as some other government-related corporations not listed in any of the schedules to the F.A.A, is somewhat indeterminate. 155

3) The Substantial Immunities

In Canada, CCCs would not be bound by the federal statutes unless otherwise provided. 156 The Special Acts creating the CCCs sometimes expressly exclude the general corporations acts, such as the C.B.C.A. and the respective provincial corporations acts. 157 Also, Crown Corporations are generally exempt from income taxes.

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153 Id. Lord Tucker, p. 627. See also Lord Asquith, p. 630.

154 See supra note 47, the Financial Administration Act, at. s. 38.

155 Concerning these corporations, the issue of whether they can or cannot enjoy the privileges "appears to rest largely on common law criteria of Crown or ministerial control"


157 See, for example, the Petro-Canada Act, which states that:
"27. The following provisions of Part IV of the Canada Corporations Act are not incorporated with this Act, and this Act shall be construed accordingly."
4). International Privileges and Procedural Prerogatives

Apart from the gradually diminished substantial liabilities privileges and immunities enjoyed, the crown corporations do have some other privileges internationally and procedurally.

From all these privileges, it is obvious that the CCCs are really treated by the laws as special entities. They can hardly be treated together with general corporations.159

The Air Canada Act, when it first be pronounced, provided that:
"21. The provisions of the Canada Corporations Act do not apply to this Act..."

The new Canada Development Investment Corporation Bill provides:
"Except where otherwise provided, the Canada Business Corporations Act does not apply hereto (s.9 - translation)."

158. See s.149 (1) (d) Income Tax Act, R.S.C., 1970, c. I-5. But s.27 of the Income Tax Act removes from that exemption a number of proprietary corporations, e.g., Air Canada, C.N.R. Co., and Cape Breton Development Corporation, which are deemed to be private corporations.

159. See the Crown Liability Act (R.S.C., 1970, c. C-38. at, s.3<1>) which finally established the liability of the crown for torts of its servants. Now for purposes of tortious liability, it does not matter whether a crown corporation is or is not a servant of the crown. If it is a servant of the crown, then the crown is vicariously liable for its torts.

Also See Treitel, G.H., Crown Proceedings: Some Recent Developments.

And complaints by contractors thus led to the passing of the Petition of Right Act. The liability of the crown in contract was firmly established in 1874 in Thomas v. Reg. [1874], L.R., 10 Q.R. 31.
In Friedmann’s words, “they place the crown as litigant in a highly privileged position vis-a-vis the citizen.\textsuperscript{160}

c. Treatments of The Canadian Private Corporations - Balancing the Management Right with Courts

Any powers or rights need to be kept in a kind of balance. So the managing power of the directors in the private corporations could not be made absolutely too. Since as we have shown above, Canadian case law does not favour shareholders interfering with the management right of the directors, the question may be asked, who may control or correct the directors when they really have some problems or meet with some problems in running the business?

The Canadian legal context gives us some answers to this question. It provides that a corporation, a shareholder, or a director may apply to a court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation\textsuperscript{161}. And the court may determine whether any other person is a dissenting shareholder who should be joined as a party,\textsuperscript{162} etc. In other words,

\textsuperscript{160} Friedmann, W., "Legal Aspects of Incorporated Public Authorities", 22 A.L.J. 7 at p.7.

\textsuperscript{161} See CBCA, at s. 139(1). It is obvious that even the shareholders ultimate control - appointment or removal of the directors - is subject to court approval. Supposedly fairness is the consideration of the courts in this context.

\textsuperscript{162} See CBCA, at s.184 ss.20.
the governing statute gave the court powers to rectify defects, errors or irregularities in the conduct of the business of a company, and, accordingly, that power was exercised to set aside any purported acts of the directors.\textsuperscript{163}

Provincial legal rules also have relevant stipulations. In British Columbia, it is provided that the courts can call the shareholders meetings if necessary, may give directions to the directors or directly intervene to approve some fundamental business matters of the company; and the directors decisions are subject to courts' corrections if wrong.\textsuperscript{164}

Here we can see the functions of the Canadian courts in the private companies. This actually is a kind of balancing power to the management right and also a posterior control to the private corporations. The reason why it is a posterior control is that if there are no questions during the management, the courts are normally not involved. Court control happens only after a law suit or complaint is issued. Theoretically, therefore, this kind of court control will not result in any delay in the business or any fetter in the decision-making of the management, whereas the control in the SOEC or CCC will surely be due to all the approval required.

Since the courts generally do not have any relationship with any party to the law suit, they are supposed to be neutral and fair to both. However, in the Enterprise Law of China, if any conflict arises between the enterprise and the responsible


\textsuperscript{164} See British Columbia Companies Act with Regulations, (Ont: Tax & Business Law Publishers, 1992), at s. 166, s. 173, s. 150, and s. 146. The Act is hereinafter cited as B.C.C.A.
institution, the enterprise is allowed to complain to the above level of its responsible institution. Whether that above level institution can treat the two parts fairly is suspect since it itself is a kind of administration.

So the C.B.C.A. spirit of courts’ involvement is both conducive to the quick-moving and autonomous characteristics of the corporations in a market economic mechanism and protective - at least theoretically - to everybody’s interests, such as the directors, shareholder, corporations, employees or even the order of the market.

4. Commitment, Interests and Liability of the Directors

Directors can protect whomever they choose - organizations or external constituency - depending on their own needs and the pressures to which they are subject. So, it is clear that the management is decisive force in corporate affairs. Actually, the management is the most important resource in the corporation operations. An examination of the commitments, liabilities as well as the interests of the directors under the respective legal regimes will help to clarify the implications of the management right issue.

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165. See the Enterprise Law, at art. 61.

a. The Directors of the SOEC

It is provided that the directors must work to satisfy the needs of both the plan and the markets.\textsuperscript{167} But the directors also need to make money to be responsible for their profit and losses.\textsuperscript{168} So the means of defining the satisfaction of both the plan and the market need may be a puzzle. The defining authority certainly lies in the hands of the administration since the appraisal of the achievement of the directors lies in the hands of the responsible institution.\textsuperscript{169} So the legal regime requires that the directors of the SOEC be committed to the responsible institutions.

As to the interests of the directors, their appointment and removal are subject to the responsible institutions of the government as well as the appraisal and recommendation of the employment assembly (Zhigong Daibiao Dahui).\textsuperscript{170} So their mandate actually depends on the feelings of the two groups of people. The responsible institution may care about whether the enterprise can carry out the mandatory plan and the guidance plan, and accept the supervision. The employee assembly may care about employee welfare matters and the material interests within the government allowance.\textsuperscript{171} So neither of the two groups of people to whom the directors are committed has much desire to require the directors to earn lots of profit.

\textsuperscript{167} See the Enterprise Law, at art 3.

\textsuperscript{168} See the Enterprise Law, at art 2.

\textsuperscript{169} See the Enterprise Law, at art. 49.

\textsuperscript{170} See the Enterprise Law, at art. 36.

\textsuperscript{171} Even if the enterprise earns more profit, the government has a ceiling for the bonus the enterprise directors may issue to the workers.
for the enterprises themselves.

Bonuses and rewards to the directors also need to be decided by the responsible institutions.\textsuperscript{172} So the enterprises' directors have no direct links with the enterprise profits. Of course if the directors can make a profit they can be proud and are praised by everybody. However, if making profit contradicts the intentions of the responsible institutions and/or the employee assemblies, the directors will certainly observe the interests of the government and the workers.

All the liabilities of the directors have little to do with the profitability or the efficiencies of the enterprises. The general losses to the enterprises lead to administrative penalties.\textsuperscript{173} Only when the state assets in the enterprises are severely damaged may the directors incur some criminal punishment.\textsuperscript{174}

So it is clear that the legal implication is to have the enterprise directors pay commitment both to the profit of the enterprises and to the plan or control of the responsible institutions. The interest or liabilities also need to be decided by the government responsible administrations. This reflects the policy implication that the SOECs should be able to survive by themselves although they should be controlled by the government and serve the state plan whenever necessary.

\textsuperscript{172} See Enterprise Law, at art. 36.

\textsuperscript{173} See the Enterprise Law, at art. 63.

\textsuperscript{174} Id.
b. The Directors of the CCCs

As to the Crown corporations' directors' appointment, although the government in the Blue Paper stated that it is the government's belief that Crown corporations will operate at peak efficiency\textsuperscript{175}, it is clear that in most cases no standard or qualifications are set regarding the appointment of directors.\textsuperscript{176} We could also easily perceive that this makes it more convenient for the government to choose the directors as it likes. Just as Stevens points out, "the criteria for appointment are frequently more for political rather than for demonstrated managerial ability."\textsuperscript{177}

And the Government Blue Paper on one hand demands that, although directors of public corporations must execute their duties efficiently, they must also pay regard to broad policy objects; but on the other hand, it proceeds to say that the common law duties apply to directors of public corporations.\textsuperscript{178}

An important object of utility to the management of government enterprises - that is, one for which they are willing to trade owner wealth - is the maintenance of

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\textsuperscript{176} See for example, s. 8(1) Petro Canada Act; s. 6(1) Teleglobe Canada Act; s. 3 Agricultural Stabilization Act.


\textsuperscript{178} See the Government Blue Paper, supra note 175, p. 27 & 27-28.
political support for the enterprise. Baldwin said:

"...Public managers trade profits for political support because they are constrained to do so by their politician-supervisors..."  

And according to Nisdanen, the most important goals of the public managers are

a). Pay Power and Prestige  
b). Ease of Management  
c). Security of tenure

Of all the factors, even the first was said to have nothing to do with profitability. From the citations above, we have seen that the commitment and interests of the directors of CCCs depend on the government, or the Party survival. The liabilities of the directors of the private corporations also apply to


183. Canada is a country with multi-party elections. The party that wins the election will constitute the government although it may face opposition from minority parties.
the directors of the government corporations.\textsuperscript{184} This point can be seen in the next section.

c. The Directors in the Canadian Private Corporations

The Canadian general corporate law makes provisions regarding the commitment and liabilities of the directors of the private corporations.\textsuperscript{185} It is provided that directors shall act for the best interest of the corporations\textsuperscript{186} and shall disclose the relationships or conflict of their personal interests with corporate business.\textsuperscript{187} This reflects that the directors are to be committed to the interests of the corporation but not necessarily the interests of other individuals or groups. According to Faylor,

"...the directors must work for the best interest of the company, they may have the interests of the members, present and future, in mind, whereas on the other hand, the interests of employees, consumers of the company, products or national interests are legally irrelevant..."\textsuperscript{188}

As to liabilities, the legal context gives very detailed stipulations. For example, it is provided that directors of a corporation who vote for or consent to a resolution

\textsuperscript{184}. See supra note 175, the Government Blue Paper at, 27-28.

\textsuperscript{185}. Some special acts and official reports governing the CCC also subject the directors of the CCC to the general corporate laws.

\textsuperscript{186}. See supra note 164, B.C.C.A., at s. 142.

\textsuperscript{187}. See s.144 & s.147 of BCCA.

authorizing the issue of a share under section 25, for a consideration other than money, are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.\footnote{CBCA, at s. 113 (1).} So it is clear that the directors who commit wrongs are pecuniarily liable to compensate the corporation. This must make the directors very cautious in making decisions so that the efficiency of decision-making is improved and assured to some extent. Similar provisions can also be found elsewhere.\footnote{CBCA, at s. 113 (2).}

More importantly, it has been observed that "...rather than acting solely in a stewardship role of protecting the shareholders interests, the management also considers interests of its own"\footnote{Gordon, R. A., Business Leadership in the Large Corporation, (Berkeley: Univ. of California Press, 1961), at 305.}. The interests of the directors are one of the major factors contributing to the philosophy of the directors' actions.

There are several different managerial theories of the firm that are based on the

\footnote{CBCA, at s. 113 (2).}

\footnote{Gordon, R. A., Business Leadership in the Large Corporation, (Berkeley: Univ. of California Press, 1961), at 305.}
observation of the general corporations. A common assumption of the managerial theories is that the managers who run these shareholder-owned companies will try to pursue their own personal objectives, such as a high salary, security, or prestige, subject to certain constraints. Although these objectives cannot actually be quantified, they are certainly in close relation with the firm’s revenue and/or its growth rate.

According to the theory of Baumol, the main constraint imposed on managers is that they must ensure that their firm makes at least a given minimum level of profit to secure their positions. If the profit achievement is not good their positions will be at stake. Mike Rosser gives two reasons for this.

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192. The main managerial theories of the firm are Baumol’s sales revenue maximisation theory, Williamson’s managerial utility maximisation theory, and Marris’s growth maximisation theory.


195. Firstly, shareholders may vote to replace the management team if they are not satisfied with the profit that the firm earns for them. Secondly, low profits will tend to depress the price at which a firm’s shares are traded. If the firm is actually capable of making a higher profit this will mean that its shares are undervalued. Another firm that recognises this undervaluation may seize the opportunity of buying the shares up at a bargain price and if there is a complete take-over then the original management team may be removed.

See supra note 124, Mike Rosser, Microeconomics: The Firm and the Market Economy, at 117.
The pursuit of personal objectives as well as the threat of being replaced would lead managers to try their best to maximize the profit of the firms. This totally fits with the objectives of the shareholders. This obviously will benefit the consistency of the relationship of ownership right and management right.

So, all the commitments, liabilities and interests are for pushing the directors of the private corporations to be more responsible for their management duty. Thus the spirit in the legal context can be said to serve well the function of making the companies more efficient at making profit.
Chapter V. The Reasons for the Differences

A. The Different Economic and Social Milieus Contribute to the Different Legal Implications and Effects.


a. The Changing Economic Regime - From the Planned Economy to Plan/Market Economy

China began to implement the planned economy shortly after the establishment of the People's Republic of China in 1949. The first 5-Year plan was adopted in 1953. The situation of the beginning of planned economy perceived by Nicholas R. Lardy showed as:

"Provincial planning commissions were formally established in 1954 in most regions, and evidence of their active role became available in the late fall of 1955." "In August, provincial five-year plans were first promulgated. Equally important, at this time planning offices at the county level were beginning to play an increasing role in mobilizing and planning the use of local economic resources. By 1955, over 1,400 counties, about two-thirds of the total, had established their own planning commission."196

The planned economy system was implemented almost as the exclusive economic

mode from 1956 to 1982 and the dominant mode from 1982 to 1993\textsuperscript{197}, in which year it was finally substituted by the market economy\textsuperscript{198}.

Under the former planned economy, before the Economic Reform, all the personnel, financing, assets, supplies, productions and sales were planned and centrally managed by the state, and the centralized and unified management of state-run enterprises by the state executive units from the central government to various local ones was emphasized\textsuperscript{199}. Therefore the production tasks and the prices of the products were also fixed by the government. Under such a system, the enterprises do not need to care about the pressure of competition. On the other hand, even if they

\textsuperscript{197} In 1982, the 12th CCP National Congress proposed that the planned economy was the mainstay and market economy the supplement.


It was stipulated in the 1982 constitution that "The state practises planned economy on the basis of socialist public ownership. It ensures the proportionate and coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market."

See China's Constitution 1982, at art. 15.

\textsuperscript{198} See, at supra note 20, Article 8 of the Constitution 1988, which stipulated use of the planned economy nationally, was changed in the 1993 Amendment to provide for the adoption of the market economy.

See the text of the Amendment to the Constitution printed in Fazhi Ribao (Daily of China’s Legal System) of March 30, 1993.

\textsuperscript{199} This situation was reflected by Alexander Eckstein as:

"Policy makers may, for instance, decide to increase steel production by 10 percent within a year regardless of cost and price considerations. They may then implement this decision by allocating specific numbers of additional workers, certain quantities of materials, fuels, and other inputs to the steel industry."


For more information, also see Wang Liming & Liu Zhaonian, "On the Property Rights System of the State Enterprises in China", 52 Law and Contemporary Problems, at p. 19.
worked hard, they could neither get more profit from the purchaser - the government - nor obtain higher salaries.²⁰⁰ So, both the incentives and the efficiency were very low.

As the market economy is expected to provide a useful supplementary role to the planned economy, thereby encouraging the enterprises to be more productive and enabling them to supply goods and services of higher quality,²⁰¹ it was ushered in by the CCP and the government in 1982.²⁰² Since then, it has drawn more and more attention from the CCP and the government and eventually was added into China's newly enacted Constitution of 1993.²⁰³

Here we can see that, although the characteristic of socialism seems to be

²⁰⁰ This point was perceived by Christopher Howe as:
"...Chinese plans are set mainly in physical terms. Does this leave any role for prices, profits, or variations in personal income?"

Further more, he perceived:"In so far as the economy is controlled by bureaucratic and political action, the penalties for disobedience are criticism, demotion, and penalties specified in written regulations."


²⁰¹ It is obviously only the goods and services of higher quality that can have the potential to compete in the market.

²⁰² This point was perceived and recognized finally by both the government and the CCP.


²⁰³ See Renmin Ribao (People's Daily) of April, 1993.
planning whereas that of capitalism seems to be market\(^{204}\), the country with the planned economy may also employ the market as a tool to set up an environment of competition\(^{205}\). Obviously, this will be more beneficial to China’s future economy than the former planned system which nurtured inefficiency.

After market functioning was allowed as a supplementary role and because the enterprises have been responsible for their own profit and losses, the enterprises inevitably have begun to be more concerned about profit and efficiency. So the effect of ushering in the market mechanism has been reached. Although the market mechanism is principally set up, however, some questions remain unsettled. The state still retains the control of the prices of many products and commodities\(^{206}\). With the government’s confirmation of the market economy the market has become more prosperous, and has begun to draw more and more attention from the entrepreneurs, dealers, as well as the public purchasers. The market participants will surely take

\(^{204}\) This idea is held by many people.


\(^{205}\) Id. at. p.3.

Peter Van Ness suggests that the purpose of employing the market as an instrument of reform in a command economy is to force competition.

\(^{206}\) It is stipulated, "when market-adjusted commodity prices undergo sharp rises or falls, the commodity price departments may set a maximum and minimum reserve price for fixed commodities for a certain period of time and may implement a price rise application system..."

See supra note 41, the Regulation for Price Controls, at art. 11.
advantage of it. To prevent a messy situation from occurring and to retain more or less control, the government shows their strength in monitoring the price and the market activities.

This may be justifiable. However, it surely may lead to some delays in further removing the price restriction and making the market really reflect the requirements of demand and supply. In one word, the market economy mechanism is so nascent that it is hard to say to what extent the government should exert its influence in making the market function well.

China is a country with a long history of the public ownership. It had a rigid system and habitual mechanism that fit with the planned economy, which functions according to the plan and due ratio. So, although China has perceived the socialist production as a kind of commodity production which has to be inevitably

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207. Some market participants may take advantage of the opening up of pricing, in order to earn more profit. For example, 108 low-voltage electrical goods enterprises in March 1987 issued a "joint letter to consumers", in which they announced price rises for 269 products; in November, nine enterprises in Beijing, Chongqing, Shenyang and five other cities called a meeting and decided jointly to raise the price of a certain kind of refractory material they produce.


208. In the Regulations for Price Administration, there are still some commodities whose prices are under the fixed ceilings. See at supra note 41, the Regulations in general.

209. See Ma Hong, "Woguo shehuizhuyi jingji shi youjihua de shangpin jingji" (The manner of our Country's socialist economy is a planned one), 1981. 7 Jingji Yanjiu (Economic Research).
regulated by the value principle\textsuperscript{210}, it will still take more time to change the whole system from a planned task oriented to the market oriented. So, China will have to stay in a state of mixture of the planned and market economy for quite a long period of time.\textsuperscript{211}

Moreover, the current regulations governing the market are insufficient. There are not enough unified and effective laws governing the activities of the market participants and so the functional competition cannot be ensured.\textsuperscript{212} Although there is a Provisional Stipulation concerning the competition\textsuperscript{213}, it is far from the extent and detail necessary to reach the due effect and is somewhat outdated. And the market participants may find it difficult to know what they should do and what

\textsuperscript{210} Value principle here means that whether the commodity could be sold out depends on its real value, which is determined mainly by the commodity's quality and the buyers' need for it in the market.


\textsuperscript{212} See Sun Youhai, "Jianli shehuizhuyi shangpin jingji xin zhixu de falu sikao"(The Legal Consideration to the Establishment of the New Order for the Socialist Commodity Economy), (1989) 1 Zhongguo Faxue (China Law Journal), at 25.

\textsuperscript{213} The Provisional Stipulations on Starting and Protecting the Socialist Competition. (hereinafter cited as the Stipulations on Competition), adopted by the State Council on October 17, 1980.

See supra note 85, Zhonghua Renmin Gongheguo Xingzheng Fagui Xuanbian, (the Selected Compilation of the Administrative Laws and Regulations of the PRC).
not to do.

In a word, since the economic mode in China at the moment is still a nascent stage of market economy, the state still has to use some administrative means to allocate the materials and the productions. As the General Secretary Jiang Zemin said:

"As the economic and legal regulatory instruments are not mature, some administrative management is necessary..."214

This kind of situation will still make the government exert some influence on the economy.

This has influenced the SOECs a lot. There are still mandatory plans, although they may be modified somewhat215. The SOECs are still required to complete some planned tasks. This certainly will make it difficult for them to modulate their product structure as a whole according to the market demand. The state supplies for the planned task and the fixed price by which the state will purchase the products required by the mandatory plan may appear to make it difficult for the SOEC to calculate the cost and do the accounting. And the SOECs may feel difficult to get the real meanings of the prices in the market. So it is obvious that the more intervention, the more difficult it is for an effective market economy mechanism to be set up. This can lead to a vicious circle.


215. It is still provided under the Enterprise Law that the SOEC must meet mandatory plan quotas and perform lawful economic contracts. See the Enterprise Law, at Art. 35.
b. The New Stage of the SOEC - From the Appendage of the Government to the Mixture of the Appendages and the Self-Survivor

Just as the SOECs have experienced transition from a plan economy to a plan-market economy, they have also experienced two different stages concerning their property right. Under the two different stages, the role and the mandate of the SOECs have been changing as well.

Before the Chinese Economic Reform of 1979, the property rights of the SOECs were essentially planned and administered by the administrations of the government. It was required by the laws at the time that the competent authority must arrange for raw material supplies and marketing of enterprises. The competent authority must also shoulder responsibility if its decision proved inappropriate, resulting in economic loss to enterprises.216

So it is clear that at that time, the enterprises just followed with the commands of the government administration. They were just appendages of the government. The major shortcomings of this kind of property right system were described by some scholars in the following terms:217

"... Lack of independent property made the enterprises compete to get the state investment while nobody would care about the gains and losses of the investment capital...

... The sole state ownership rights made the government assume the responsibility

216. See supra note 35, the Enterprise Regulations, at art. 65.

217. See Wang Liming & Liu Zhaonian, at p. 20,
for profits and losses of the SOECs, thus neither pressure for bankruptcy nor incentives for gains existed..."

So it is obvious the enterprises themselves had no independent property rights for themselves at that time. They did not have the responsibility or incentive to run the enterprises well. This led to habitual inefficiency and the psychology of reliance on the government. The requirement by the state that the SOEC be responsible for their own profits and losses is part of its the intention of reducing its subsidizing practices and the heavy burden brought by those SOECs, along with many of the losses we mentioned above.218

When the CCP and the government decided to make the SOEC responsible for their own profits and losses, and therefore more concerned with their efficiency, the key issue they perceived was the invigoration of the enterprises, the core of which is to expand the autonomy of the enterprises219. The excessive control over enterprises was blamed for inefficiency of state-owned enterprises220. It has already

218. The number of SOECs recording losses has been getting bigger in the last couple of years. In 1988, of the 38,480 SOECs included in an investigation by the Minister of Finance, 4,287 enterprises recorded losses rather than profits. In 1989, only 38,030 SOECs were left of the said 38,480 SOEC, whereas the number of enterprises that recorded losses increased to 6,212. This was a 44.9% increment over the year. See The State Statistics Bureau, Zhongguo Tongji Zhaiyao, (A Statistical Survey of China), (Beijing: China Statistical Publishers, 1990), at 69.


220. Id. at p. 20. The decision states that:"For a long time in the past, the function of the government and enterprises was not separated and the enterprise became the affiliate of the administrative departments. Central and regional governments
become a basic Party policy to ensure that the government be appropriately separated from enterprises and that enterprises enjoy sufficient business autonomy.

It seems the SOEC is allowed some autonomy to run things themselves. But unfortunately, the current Enterprise law does not allow this to the full extent. The legal context was enacted carefully, with a subtle balance between the increased power of the enterprise managers and the controlling power of the responsible institutions, and the balancing power of the Party committee and the employment assembly. So now the SOEC are at the stage of a mixture of government appendages and self-survivors. This legal regime is just the reflection of the current stage.

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monopolized many businesses they should not have taken care of, and many matters that they should have taken care of have not been duly cared."

221. Id.

222. Since the policy and legal concepts are not yet sufficiently clear, it is difficult for the practices of the SOECs to be streamlined.

According to an investigation made by the China National Workers Assembly into 855 SOECs in 40 cities, although the SOECs enjoy some autonomy with respect to capital utilization, asset management, and production and personnel, autonomy with respect to importing and exporting, keeping shares of the earned foreign currency, making salary and bonus standards, and establishing joint ventures with other entities, is still far from the SOECs’ reach.

See Zhonghua Quanguo Zonggonghui (China’s National Worker’s Assembly), "Guanyu qiyefa guanche luoshi de diaocha baogao" (the Investigation report concerning the effect of carrying out and implementing the Enterprise Law), Oct. 1990 Fazhi Yuekan (Law Monthly), at p.38.
2. The Different Needs of the Canadian Government Give the Laws of the CCCs and the Private Corporations Two Different Implications

a. Making Use of the CCC as Policy Instruments for Special Purposes

Although as we know, the CCC is a kind of independent legal entity separated from the government, it is substantially appended to the government. From the legal point of view, the government is either the sole or dominant shareholder of a Crown corporation, or the owner of its total assets, or the trustee of it. From the political point of view, no Crown corporations would be generated without certain needs as reflected in government policies.

A typical statement of government expectations of the CCC was expressed by the Minister of Finance, Edgar Benson, at the time Bill C-219 was introduced:

"Able and experienced entrepreneurs will direct the corporation's operations to areas of critical importance in economic development - to high technology industry, to resource utilization, to northern-oriented companies and to industries where Canada has a special competitive advantage."

The legislation often describes the Crown corporations' objects in very general, even surprisingly ambitious terms. For example, in Quebec, the object of the Societe generale de financement (SGF) is to

"stimulate and promote the formation and development of industrial undertakings... so as to broaden the basis of its [i.e., Quebec's] economic structure, accelerate the growth thereof and contribute to full employment" as well as "to induce the people of Quebec to participate in the development of such undertakings

223 See Bill C-219.
by investing a part of their savings therein.\textsuperscript{224}

It is clear from the above example that such a broad interpretation of a Crown Corporation's objectives simply leaves more room for the government to direct the company as freely as possible for the policy needs.

The Canadian government has been playing a very important role in the economic sector. Apart from indirect intervention exerted by government instruments such as regulation, tax, subsidies, loans, grants, procurement policies and the like, which may often be used to achieve some policy purposes, the government has borrowed since more than a hundred years ago\textsuperscript{225} the very tool used by the private economic entities to directly fulfil its economic and/or non-economic objectives. This is the corporation.

From the very beginning, the CCCs were created for special purposes of the government. The first corporations, mainly in the fields of transportation and communications (CN, the CBC, Air Canada) were established between the two World Wars, but it was not until the Second World War that this form of intervention first occurred on a large scale in order to support Canada's war effort.\textsuperscript{226} According to J.Kennedy, "Twenty-eight such Crown corporations were incorporated for war

\textsuperscript{224} c.S-17, s.4 of the Act.

\textsuperscript{225} In particular, from the year of 1841. This is the year Lord Sydenham, as Governor of the United Provinces, established a Board of Works as a separate legal entity to construct a canal system.


\textsuperscript{226} Id. at 2.
purposes..."227

An example may be given from the Canadian Development Corporation (CDC) to see the special usages of the CCC.228 In 1980, the government decided to use the CDC, a Crown corporation in which the government has 48% of its shares, to reinforce a farm machinery company, Massey-Ferguson, when it was going to face bankruptcy.

However, the expectation of the private shareholders to the company was rather simple. They only cared about the dynamic of the capital accumulation. In Stephen Brooks's word, "in a sense this merely demonstrates that the dynamic of capital accumulation, as it unfolds in a firm which relies on private investors for some part of its capital requirements, resists the imposition of politically-determined goals that reduce the competitive return on invested capital..."229

The different standpoints of the public shareholder and the private shareholder in CDC would naturally put them in conflict with one another. At last the management in the CDC decided not to obey the government decision to get involved in Massey-Ferguson.

The government would certainly not feel comfortable seeing its interests in the CDC being ignored to such an extent. CDC's rejection of the Massey-Ferguson


229. Id. at 65.
investment proposal led to a reassessment by the government of the corporation’s role and its relationship to public policy. The Minister of Finance considered that,

"the CDC had become too isolated from its principal shareholder, and sought to increase the government’s influence through new appointments to the board of directors."  

As a result of the government’s consideration, it established the Canada Development Investment Corporation to eventually divest its interest in the CDC. So it is clear that if the government-related corporations do not obey the decisions of the government, the reason for their existence will be lost.

The functions of the CCCs can be described as follows:

- to shoulder certain risky projects in which the private firms are unwilling to get involved
- to redress the inadequacy and inaccessibility of competition policy and the shortcoming of direct regulation
- to develop the rural areas
- to keep a good balance of the industry structure
- to develop projects like the nuclear reactor or the transcontinental airline, etc.
- to obtain real market information and production information which is difficult to obtain from the private firms

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230. Id. From a personal interview given by Stephen Brooks to a CDC official on February 21, 1984.

231. For details, see also Stephen Brooks, "The State as Entrepreneur: From CDC to CDIC", (Winter, 1983), Canadian Public Administration, p. 525-543.

232. Id.
- to offer some kind of relief and stabilization

Since the CCCs are used for special purposes, the stipulated government controls over them are also very substantial.\(^{233}\) In Canada, where the Constitution\(^{234}\) allocates federal and provincial legislative powers in economic matters\(^{235}\), the Special Acts by which the CCCs were incorporated and the Bills passed later on about the CCCs as Bill c-153, and Bill c-24 outline the nature of government control over aspects of appointment of directors, approval to the corporation by-laws, budgets and development plans, the power to issue directives, the requirement of the submission of the annual report, and the approval of certain categories of contracts with a CCC\(^{236}\). Through such controls over detailed matters of the CCCs, the government grasps the CCCs firmly in its hand. It is necessary for them to do so since the CCCs shoulder the particular mandates and should not be operated too freely.

And since one special Act only deals with a specific CCC, it normally stipulates the matters of that company as detailed as possible, certainly including its relationship with the government\(^{237}\). So we can see the speciality of the control over the CCCs.

\(^{233}\) As we set forth above.

\(^{234}\) See the Canadian Constitution Act of 1867.


\(^{236}\) See supra, at Chapter III.

\(^{237}\) For example, the Teleglobe Canada Act states that the corporation shall comply with any direction given to it by the Governor-in-Council or Minister with respect to the exercise of its power. See Teleglobe Canada Act, R.S.C., 1970, c. C-11, at s. 3(9).
If the CCCs were in great number, and if they were the major corporate form, it would be impossible to legislate the special acts one by one.

Although some may argue in favour of giving the CCCs more autonomy, it does not seem to make much sense for the CCCs to have autonomy to compete with the private firms in order to make big money in the market.

So far it seems we can say the relationship stipulated in the legal context of CCCs, between ownership and control, is consistent. Ownership totally belongs to the state. Control is totally in the hands of the government. The government directs the CCC directors (actually the directors and the officials of the competent ministries are often identical) to fulfil their specific mandate in accordance with the purpose for which they were established.

The use of crown corporations in Canada has greatly increased, expanding to nearly all the social fields. These include communications, culture and recreation, financing, insurance and business services, transportation systems and facilities, etc. However, the number of CCCs in each field is very small. According to a

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238. Some authors think that "a reduction of controls would favour a more standard application of corporate law, which might increase the efficiency of these corporations."


239. Id.

According to a statistical table reproduced by Garant, the appearing of the CCC in various fields is shown as communications, culture and recreation, financing, insurance and business services, transportation systems and facilities, etc.
statistics shown by Prichard\textsuperscript{240}, there are three Crown corporations in the field of communications, two in the field of culture and recreation field, eight in the area of financing, insurance and business services, and twenty two in the transportation and facilities field. In percentage terms, crown corporations constitute 2.5 percent of the corporations with which the government is directly involved in the field of communications, 1.7 percent of those in the culture and recreation field, 6.7 percent of those involved in financing, insurance, and business services, and 18.5 percent of those in the transportation and facilities field. So we can see the CCCs only appear as secondary role compared with the private firms in the national economy.

b. Utilizing the Private Corporations to Develop the Economy and Vitalize the Market Economy

Without any doubt, Canada is a member in the big family of the capitalist countries. Although the market economy is the major economic mode used in the western countries, mainly of which are the capitalist countries, western economic theory does not present a unified viewpoint on this question\textsuperscript{241}. However, a number of assumptions are agreed as being characteristics of the market economy: the decision-making authority in the hands of market participants; the self-interested


motivation of market participants to maximize their profits; decentralization of information; and prices that are adjusted appropriately in response to the changes in demand and supply conditions, as the only information needed to make production, purchases and sales decisions, etc.\textsuperscript{242}

If a competitive function could be realized in a type of economic mechanism, this mechanism is supposed to be undoubtedly a good arrangement. It is held by some that since the free market economy will efficiently allocate an economy's resources, it is the "best" solution to the economic problem of resource allocation.\textsuperscript{243}

According to the notion of capitalism, market-economy mechanisms like the Canadian one would be characterized by the prevailing and dominant economic activities made by the private enterprises.\textsuperscript{244}

Accordingly, the most widespread mode of enterprise in Canada is the private corporation. This mode occupies a significant position in the Canadian economy. It has long been a kind of prevailing vehicle for carrying out the economic activities in Canada. This can be revealed by the statistics. In 1988 the number of the Canadian corporations was 591,034, whereas there were only 297 government corporations. In 1987, the whole family of Canadian corporations numbered 606,562, only 248 of

\textsuperscript{242} Id.

\textsuperscript{243} See supra note 124, Mike Rosser, Microeconomics: The Firm and the Market Economy, at p. 7.

\textsuperscript{244} It is held that one of the characteristics is that there are large areas of economic activity which are open to private venture capital.

which were government corporations. The assets portion of Canadian corporations, compared as a whole to the CCCs, was 753,618 million to 34,344 million. And all of the ten largest firms in 1985 in Canada, measured by sales, were privately owned.

Inside the private corporations both the owner - the shareholder - and the manager would seek the same objective - namely, the biggest profit and the least risk. This consistency of purpose benefits the consistency of the ownership/control issue of the company.

As was set forth above, the legal regime makes shareholders hardly to interfere in the decisions made by the management professionals, and normally only with respect to broad policies announced in the shareholders meetings. So it is easy to agree that the relationship between the ownership and control in the private firms is consistent. The management at least theoretically, and legally, enjoys the autonomy of the corporation to a large extent.

The consistent decision-making mechanism can make the private corporations respond to the fluctuation of the market more rapidly and modulate the products very quickly. This is very important since Canada has a dominant role in the market.

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245. See Canada Corporations Financial Statistics (61-207) 1986-87, at Table 1A.

246. Id.

247. They are General Motors of Canada, Canadian Pacific Ltd., Ford Motor Co. of Canada, Bell Canada Enterprises, George Weston Ltd., Imperial Oil Ltd., Alcan Aluminum Ltd., Chrysler Canada Ltd., Shell Canada Ltd., and Gulf Canada Ltd. The total sales of the ten companies was almost $100 billion. The data was taken from "The Financial Post 500" in David Stager, the Economic Analysis & Canadian Policy, (Toronto: Butterworth, 1973), at p. 481.
economy. The factors of the market function well and normally. On one hand, according to the requirement of the balance of demand and supply, all the private companies need to be operated in accordance with that requirement reflected by the price, which can serve as an accurate lever for modulating the functional competitive environment. On the other hand, the activities of the autonomous private corporations can stimulate the consummation of the market mechanism too. The success of the private business will not only benefit the national revenue but also do good to large number of peoples.

Summarily, capitalism - the real market economy - determines the Canadian corporations composition mode. With the requirement of demand and supply only the private firms can have the autonomy to react to it vividly and consciously. Their competition and the positive reaction to the market can also stimulate and develop the consummation of the market. We can say it is also because of the market mechanism that the Canadian government has to set up the CCCs - that is, in order to meet with some policy purposes that the large number of private corporations cannot serve.

B. Compromise of Ideology and Practical Needs

Law is a matter having the characteristics of both ideology and reality. Although it must also be the reflection of the ideology of the ruling class and/or the lawmakers, it must be beneficial to the practical needs of the ruling class. In the words
of Corbett:

"... When in power, the political leaders regardless of ideology respond similarly to stimuli... Although distinctive party ideology may be one of the factors to be included in the calculus, their forces and events vitiate its impact..."

This story can also be discovered in the legal implications of both China and Canada.

1) The Compromise of the Ideology of Socialism and the Utilization of the Market System to Stimulate the Efficiency of the SOEC

The purpose of managing the SOECs is to satisfy the needs of society by following the requirements of both the plan and the market. Actually this is a kind of communist ideology since it is spoken from the perspective of the society, namely the people, the public. Since the rationale for it is the public interest, it will certainly not be possible for the enterprises to compete in the market merely to earn profit for themselves.

As set forth above, the implementation of the mandatory and guidance plans is the means by which the government exerts its influence on the SOECs. The Enterprise Law requires that the SOECs follow the government plans even though the plans may be modulated according to the requirements of the SOECs under the currently advocated market economy. Nevertheless the SOECs still have to produce

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248. See D. Corbett, Politics and Airlines, (Toronto: Allen and Unwin, 1965)

249. See Enterprise Law, at art. 3.
goods for the needs of the society rather than concentrate on profitability.

The inefficiency of the former planned economy and the government administrative method to manage the SOECs were perceived by the CCP and the government at about the time of the Economic Reform. The former economic and management regime resulted in a lack of profitability for many enterprises, which therefore had to be subsidized by the government. Under that economic system, nobody was responsible for the good running of the SOECs. Since the state absorbed all the profits and losses, no good quality standards could be observed. Nobody would benefit from efficiency and suffer from any inefficiency. The state economy was in a slug situation.

The practical needs of increasing the SOEC’s productivity demanded that the CCP and the government render more effective means to solve practical problems. So both the market economic mechanism and, correspondingly, the idea of giving more autonomy to the management were ushered in. Actually these two things began to be utilized in capitalist countries. Under the current China, whose political power is in the hands of CCP, these two matters are contradictory with communist or socialist ideology. Although the two methods have already been implemented, the arguments about whether they are good for the socialist China are continuing. Due to the fact that China’s supreme leader’s ideology is very pragmatist\textsuperscript{250}, the rigid communist

\textsuperscript{250} China’s supreme leader, Mr. Deng Xiaoping, ever said that no matter a cat was white or black, it would be a good cat only if it can catch mise. Although he insists the dominance of the Communist Party, he advocates market economy and the shareholding system too. Party dominance can make the current leaders still be at the leading position. Market economy and shareholding system can make china’s
ideology can move towards the compromise of the communist ideology and the useful methods used in capitalist countries.

China’s situation at the moment reflects the above compromise. The SOECs can keep some profits after handing over certain amounts of tax to the government. Therefore the SOECs and their employees can have their own material interests if they work hard. At the moment rather than working inefficiently under the slogan "Wei Renmin Fuwu" (Serve the Interest of the People), the workers can realize their private material interests to a certain extent. This is surely effective incentives for them to work harder than before. However, there are still ceilings for the distribution of material interests or bonuses to the workers in the SOECs. Although at present the "general manager responsibility system" is being used so that the Party committees can not give orders to the business. The Four Basic Principles, one of which is to adhere to the Party leadership, are still stipulated in the Constitution. At the same time the views of the conservatives in the CCP have always been strong.

251. The "general manager responsibility system" is the one being used. As regards the management of the enterprises, this system places the Party committee in the enterprises in a secondary role compared with the directors. It was utilized for a number of years following the establishment of the PRC, until 1956, in which year this system was criticized as undermining the Party's leadership and thus replaced by the "general manager responsibility system under the leadership of the Party committee". This system was the prevailing form of business management in the PRC until 1984, at which time it was replaced by the "general manager responsibility system".

See Wang Mingkui, "Lun changzhang fuzezhi" (Discussion on general manager responsibility system), 1 Shehui KeXue Zhanxian (Social Science Front), at p. 22-23.
They exert their influence from time to time.\textsuperscript{252}

Under the current compromisory situation in China, almost all the management rights are conferred on the enterprise directors, except for some necessary interference like the government mandatory and guidance plans. The practical need for efficiency and the market requirement requires that certain people be responsible for the management of the enterprises. However, to comply with some ideological requirements, such as the "Four Basic Principles", the Party leadership has to occupy a certain status in the enterprise. Thus, the Party leadership is stipulated as having a supervisory role. To comply with the ideological public ownership, the key of which is that the people are the real masters of the state and the state assets, the role of the Employment Assembly is emphasized in the Enterprise Law\textsuperscript{253}. This may undermine the full realization of the General Managers' Responsibility System.

So, at the current stage, China's development still has to be subject to a kind of mixture of planned and market economy, state ownership and enterprise ownership, and government control over enterprise autonomy.

\textsuperscript{252} In the end of 1992, three years after the "Movement of the Tian An Men Square", Mr. Deng Xiaoping advocated to further the economic reform in China and said that the people who would not like to reform would be driven out of leaders' positions. Obviously he was pointing at the conservatives. Later on, some conservative high leaders countered that the words of just one person should not be made that high value. It is evident they were countering the opinion of Deng Xiaoping that the needs for further economic reform and continuous opening to outside world are urgent.

\textsuperscript{253} See supra, at Chapter III.
2). The Compromise of the Capitalist Ideology to the Practical Needs of the Canadian Government

The ideology concerning the relationship of the private and public corporations in a capitalist economy is reflected by the sayings of the Canadian government. Their President of the Treasury Board, Mr. Sinclair stated:

"We are determined to get the federal government out of ordinary business and commercial operations and hand them over to private enterprises where they belong..."\(^{254}\)

In a later news release, the government declared:

"Canada is distinctively different from other countries for reasons of history, geography and economics and it has been necessary at times to provide government services at uneconomic prices in the national interest... Nevertheless, the growth of the government sector in Canada and the high proportion of Crown corporations with the federal government has to be reserved... Some Crown corporations need the discipline of the marketplace... Selling some Crown corporations will help us achieve a leaner and less expensive government..."\(^{255}\)

So obviously the philosophy of economic development is to develop the private sector.\(^{256}\)

This has also been reflected by the ratio of the public corporations vs. the private

\(^{254}\) See Toronto Star, June, 1979.


\(^{256}\) See D. Cohen, "A Transactional Analysis of Commercial Relations", (1992) 1 UBC Law Review. In this article he held:

"In a market economy, it reflects an implicit political decision to decentralize economic power to private firms and individuals who assume responsibility for the production and distribution of goods and services in society"..."Whereas in western corporation the cravings for the competitive capital return is the overwhelming purpose to run a corporation."
ones we set forth above. The fact that the private corporations play a superior role
to the public corporations in the national economy is consistent with that ideology.

Although the private companies occupy, as we set forth above statistically, a
dominant position in the national economy and prevail in Canada, they are not a
panacea for the whole problem. Their nature - privately owned - decides their weak
points. Due to the fact that their major business concern is to get the biggest capital
return and to avoid even the least risk, some risky, while necessary projects cannot
draw their attention. Due to the fact that most private companies are not big, they
do not have enough power to shoulder some big projects. Because some directors of
the private companies are not honest enough, the government cannot believe their
information when considering whether to give them certain projects instead of setting
up Crown corporations. All these factors contribute to the rationales for creating a
number of CCCs to carry out policy purposes. In contrast, the government is able to
finance a CCC and expand its size according to the requirements of certain projects.
The government’s consistent and constant support to the CCC is inevitable assurance
that satisfactory results will be achieved.

Furthermore, the circumstances of Canada are also a reason to create CCCs. It
is well known that Canada is a large country with sparse population. It is also a
country with large backwoods areas in the north. It is difficult for private corporations
to invest in public utilities in those areas. In addition, somebody holds the fact that
Canada borders with a very aggressive country, the United States, also requires the
Canadian government to do something to meet the big challenge of the large
American firms. Both the geographical and circumstantial reasons contribute to the rationales to create CCCs too.

Although the utilization of the CCC is beyond this ideology, the rationale for creating them is also to have them work as policy instruments. In Chandler’s words,

"The pragmatic argument holds that the creation of public enterprise can be traced to particular situations rather than the workings of any political philosophy..." 257

And it was declared by Tupper that most Canadian political parties have established government businesses despite their espoused belief in private enterprise and individual initiation. 258

As discussed above, the CCCs enjoy privileges, immunities and prerogatives. And only the real government corporations can enjoy such special treatment. This is necessary in fulfilling their mandates - carrying out the policy purposes. Although this may cause unfairness when the government corporations act, and inevitably compete with the general corporations, in their activities, the laws agree with the treatment. And to make full use of this kind of entity, it is provided that almost all the activities of CCCs need to be approved by the government. Both the special treatment of the CCCs and the firm control over them reflect that they are utilized as special instruments to solve special problems. Therefore it is obvious that the rationale of


their existing is practical rather than ideological.

In a word, although the leading ideology is to develop the private firms and private property, some of the needs of the country cannot be satisfied by the private firms but can only be served by the utilization of the government instrument - the CCC. 259

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259. This point is also made in some of the literature. It is precisely what the commentator said in "Public Ownership of Public Utilities: Have Stock-Holders Outlived Their Useful Economic Lives?, V.43, 4, 1982 Ohio State Law Journal, at 821:

"State regulation of privately owned utilities inadequately protects the public’s interests... Some form of public ownership is the only viable solution."
Chapter VI. Conclusion

A. The Summaries for the Comparisons

1. The Management Right vs. Control from the Above Level

Both in SOECs and in Canadian private corporations the management rights of the directors are given in detail, expressly, whereas in the CCCs it is provided generally that the directors are in charge of the daily management.

The management rights of directors of all the SOECs, the CCCs and the Canadian private corporations are subject to some controlling powers coming from the above level. In the SOECs, the directors have to be instructed by the responsible institutions of the government. Of the laws of the CCCs, the government approval is stipulated in significant length. In the Canadian private corporations, the directors have to report to the shareholders at the shareholders meeting.

As to the extent of the government control in a SOEC, it is not as detailed and substantial as in a CCC. The directors of the Canadian private corporations seem to enjoy almost a complete management right, although the statute gives the shareholders some literally controlling power over some fundamental matters. So, it

260 By "above level" I mean the level which includes the power to appoint and remove directors. This is the level of power that the government in Canada enjoys with respect to the CCCs and the government in China enjoys with respect to the SOECs. This is also the level of power that shareholders in Canada enjoy with respect to the directors of private corporations.
may be seen that the extent of the tightness of government control over the SOEC is somewhere between that of government control over the CCC and that of the shareholders' control over the directors in the Canadian private corporation.

2. The Ownership

So the legal implications of the SOEC is that the state enjoys the ownership of the assets and the SOECs enjoy partial rights to the assets such as possessing, utilizing and disposing of them. So, as regards any particular asset, such as a piece of machinery, both the state and the SOEC have some rights to it. The state owns the machinery whereas the SOEC is entitled to use it. The SOECs do not have the avail right to the property whereas the state has. The government responsible institutions also have rights and responsibilities to protect the assets in the SOECs from being damaged, whereas the enterprises have the right to dispose of the assets. This constitute a kind of inconsistency.

In some kinds of CCCs, no matter what formula of capital structure is used, all or the major financing resources come from government advances. This describes that kind of CCCs without a share capital structure. Without any doubt, the ownership of this kind of CCC is in the hands of the government. But even the CCCs with a share capital structure are in the hands of the government.

Initially, Canadian private firms were owned and managed by the same entrepreneur or group of people. As time went on, the ownership and control were
separated. Recently, there is a trend that the shareholder rights are becoming too dispersed to influence the management control of the company. The ownership of the private corporations lies in the corporation itself rather than with the shareholders. This will enhance the autonomy of the directors because, obviously, the corporation itself - as a purely legal entity - cannot do anything to interfere with the management.

3. The Government Treatment of the Entities

The way the Chinese government treats the SOECs is to have them be responsible for their own profits and losses and to balance the director's power by Party committee and the employment assembly. The way the Canadian government treats the CCCs is to grant them some privileges and to enhance their role as special policy instruments. The way the Canadian government treats the private corporations is to have the courts become involved if necessary.

Insofar as the state prefers the SOECs to be responsible for their own profits and losses, it can be inferred that the state intends for the SOECs to survive and develop by themselves, in spite of the fact that they are sometimes required to complete the government plans. This also reflects that the government wants to imposes two conflicting preferences on the SOEC simultaneously.

The Enterprise law grants supervisory power to the CCP in the enterprises over the implementation of the CCP's and the state's policies, and some power to the Employee Assembly, thus creating a balancing strength over the managers' autonomy.
This reflects the government's intentions to get its somewhat conflicted policy preferences well enforced in the SOECs.

The CCCs which are defined as the Crown servant and/or agents can enjoy quite a few privileges, immunities and prerogatives both substantially and procedurally. From all these privileges, it is obvious that the CCCs are really treated by the law as special things. They can hardly be treated together with the general corporations.

Canadian courts function as a kind of balancing power to the management right in and also a posterior control to the private corporations. The reason why it is a posterior control is that if there are no questions during the management, there are normally no court actions involved. Court control happens only after a law suit or complaint is issued.

This will be both conducive to the quick-moving and autonomous characteristics of the corporations in a market economic mechanism and protective at least theoretically, to everybody's interests like the directors, shareholder, corporations, employees and even the order of the market.

4. The Commitments, Interests and Liabilities of the Directors

So it's clear that the legal implication is to have the directors of the SOECs pay commitment both to the profit of the enterprises and to the plan, or to control of the responsible institutions. Their interests and liabilities also need to be decided by the government responsible administrations. This reflects the policy implication that the
SOECs should be able to survive by themselves whereas they should be controlled by the government and also serve the state plan whenever necessary.

The commitment and interests of the directors of the CCC depends on the government, or the ruling party’s survival. This will make the directors be more responsive to the government’s policy purposes, and therefore more useful to the government.

All the interests, commitments and the liabilities of the directors of the Canadian private corporations are in favour of pushing the directors of the private corporations to be more responsible for their management duties. Since both the shareholders and the directors have an interest in the profitability of the company, the spirit in the legal context can be said to serve well the function of making the companies more efficient and profitable.

5. The Legal Implications for the Ownership/Control Issue

The relationship of the SOEC and the government is still uncertain. It still has the characteristics of the appendages of the government because the directors are still appointed by the government. However, because it has some independent rights to manage the state assets and to hand over some profits and taxes, it may also be seen

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261. Canada is a country with multi-parties election and ruling. The party who wins the election will organize the government.
as an agent of the principal, which is the state. So actually the relationship is a kind of mixture of appendages and trusts. This makes the relationship between the SOEC and the government somewhat contradictory and uncertain. This makes management and ownership control inconsistent.

This constitutes an internal contradiction. On the one hand, the state asks the SOEC to compete in the market and to be responsible for its profit and losses, even bankruptcy\textsuperscript{262}, while on the other hand it asks them to produce some goods according to the mandate and/or guidance plan. This surely puts the SOECs in an inconsistent situation. The dilemma posed by the government policies, whether to promote the enterprise autonomy or promote the government control, obviously hinders the ability of the SOEC to turn smoothly into the proposed market economic mechanism - the proposed functional environment full of competition.

Canadian corporations are in two different situations with respect to the ownership/control issue. The ownership of both the CCCs with the formulas for appropriation and the CCCs with the symbolic government sole shareholder belong to the government. And the control right is also solely in the government’s hand. This constitutes the consistency in the CCCs. They are utilized by the government for some special policy purposes. Regardless of the efficiency of the CCCs, since they only occupy a small number of the whole family of Canadian corporations, they would not affect the activities of the other entities as well as the formal running of the

\textsuperscript{262} The Bankruptcy Law began to be effective 4 months after the Enterprise Law was promulgated in April, 1988.
market economy system.

In the private companies, although the shareholders may have some controlling rights stipulated in law, it is hard for them to intervene extensively in the decisions of the directors. The management rights of the directors are almost complete and consistent with the business affairs of the company. This enables the private corporations to respond to market demands rapidly. So actually they are the main vehicle for the Canadian economy.

From the different usages of the Canadian corporations, the ownership and control of the CCC should be almost completely in the hands of the government, and that of the private corporations should be concentrated in a kind of quick-moving and consistent decision maker - the directors of the companies.

Although the different arrangements in the two countries are decided both by the different economic-social situation and the compromising of the ideology and reality, it has to be concluded that the policies reflected by the legal spirit of the corporation laws concerning the arrangements of the usages of the CCCs and the private corporations are more reasonable than that of China so far.

**B. The Reassessment to the SOEC**

It seems the SOECs could have some autonomy to do business themselves. But unfortunately, the current Enterprise law does not provide them with full autonomy. The legal context was enacted carefully, with a subtle balance between the increased
power of the enterprise managers and the controlling power of the responsible institutions and the balancing power of the Party committee and the employment assembly. So now the SOECs are at the stage of mixture of government appendages and self-survivor.

It is not a reasonable ownership structure in the SOEC. The assets in the SOEC are at stake if the enterprise faces bankruptcy. In this case the SOEC may be required to return certain assets to its creditors, and the state ownership of these assets will be undermined. Thus, the state as the owner of the enterprise property may not feel comfortable if the assets are totally beyond its control. 263

The internal structure in the SOEC will divert the director’s energy in running the matters of the enterprises. The reports to the Party committee and the employment assembly required in the laws oblige the directors to care about what the other two groups of people will say when they decide about certain business actions. It will not only take time to get their agreement but also make the managers care about other factors when they are exerting their duties.

The directors’ commitments to the two groups of people diminishes their motivation to earn the biggest profit for the enterprises. Since management is the spirit of the enterprises, workers’ behaviour is closely related to managerial initiatives. The directors need to be connected with the interests of the profitability of the SOEC.

263. As to its ownership right, the state still has the right to supervise the enterprise director’s actions, and it has the right to decide the mandate of and the reward to the directors. This would likely cause the directors to pay close attention to the feelings of the government.
rather than the feelings of the government administration and the workers.

C. Potential Suggestions for SOEC

Learning from the above, China could make some improvements to the enterprises.

1. Consummate the Market Economic Mechanism

According to some western economics theory, some prerequisites are necessary for establishing a formal market competition mechanism. They are the decision-making authority in the hands of market participants, their self-interested motivation to maximize their profits, decentralization of information, and prices that are adjusted appropriately in response to the changes in demand and supply conditions as the only information needed to make production, purchases and sales decisions, etc.\(^{264}\)

If we take these prerequisites to see whether China’s market mechanism can serve as a good tool for stimulating the development of the economy, we can see China still has a long way to go to fulfil them. Due to the characteristics of China, some people think the extent of the success of China’s economy depends on the size of the market

economy that could possibly be permitted.\textsuperscript{265} Regarding China’s practical situation, it is necessary to improve its market mechanism, including loosening the price control administration and loosening the planned material supplies, etc. So, lots of effort still needs to be made in this respect, in order to consummate China’s market mechanism.

2. Enact the Standard Company Law to Govern the Shareholding System and the Private Firms and Have Them Expand

China should set up a standard Chinese Corporate law as soon as possible. After that, China should divide into two parts the SOEC, which at present occupy the dominant role in the national economy. One part, which I call Schedule 1 enterprises, serving functions similar to the CCC, will be in charge of the key sectors of the nation, such as utilities, power industry, transportation, bank and postal services, etc. The other, which I call Schedule 2 enterprises, serving the same function as the Canadian private corporations, mainly deals with the common commodities in markets.

The Schedule 1 enterprises would actually be the real SOECs. The Schedule 2 enterprises should be given the name of companies that involve other shareholdings besides of the government. They will be subject to the standard company code.

Except for the necessary government controls, such as registration and taxation, etc., they are free from any instruction or control. They compete to survive in the market economy. The main part of the national revenue has to be contributed by their taxation since they would occupy a major part of the national production, trade and supplies.

Although the government may have shares in a big number of companies, it has to comply with the standard company code which may clearly stipulate the rights and duties of both the shareholders and the company. Thus, the companies may truly operate independently. They may assume their rights and bear their duties under the protection of the company code. They will undoubtedly be responsible for their profits and losses. So the initiative of the said companies can be elevated. If so, the function of competition offered by the market economy can be realized more.

And to avoid the potential intrusion of the state shareholder, it must be stipulated in the Company Law that the company must serve the produce-for-profit purpose and the interest of the shareholders as a whole.

3. Administer the Real SOECs Serving the Policy Purposes and Public Interests Specially

The Schedule I enterprises which I name as the real SOEC will serve the policy purposes and public interest in the future in China. Although China’s SOECs at
present may be subject to the government's request to serve the likely functions, they would not like to do that any more if no monetary incentive under the future market mechanism. Thus the Schedule I enterprises may be created to serve the public interests or some policy purposes. Some special treatments just like that over the CCC may be offered if necessary.

Since the SOEC are prevalent at the moment, it is not necessary to involve the concepts of immunities and privileges. However, the SOEC is possibly due in the future to enjoy some privileges while fulfilling the public interest and policy purposes. Certainly, these privileges should not be excessive or uncontrollable.

Even as regards the real SOEC, which would serve as the government policy purposes, the control should be legalized and streamlined. In China, the management system has long been an administrative one just like that of the former Soviet Union from which China learnt about its economic system in 1950s. It has a powerful and cumbersome management system in which a lot of things are left to the discretion of government officials. There should be a legal and formal channel to regulate the officials' behaviour, even when they exert their mandate of the state. This is important both to protect the public interest and to make the administration duly and effective.

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266. A lot of local governments in China often ask the enterprises to contribute money or technicians to serve in certain projects, such as building bridges or fixing roads, without receiving any profit.

267. See Ma Hong, "Woguo shehuizhuyi jingji shi youjihua de shangpin jingji" (The Manner of Our Country's Socialist Economy is a Planned Commodity One), (1981) 7 Jingji Yanjiu (Economic Research).
A similar situation also exists in Canada. According to Professor Grant, there surely is a "complex web of multiple bureaucratic approvals attempting to make Crown corporations accountable to everyone in sight..."\(^{268}\). This kind of approval, without any doubt, would delay and render a detriment to the management and running of the CCC.

So how to simplify and make the control system more effective both in China and Canada is a question that requires the efforts not only of scholars but also of the politicians. We expect more efficient, systematic and quick-moving decision-making systems in the two countries.

\(^{268}\) See supra note 98, Patrice Grant, "Crown Corporations: Instruments of Economic Intervention - Legal Aspects".
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