AWAKENING SLEEPING BEAUTY: REVIVING LOST REMEDIES AND DISCOURSES TO REVOKE CORPORATE CHARTERS

by

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ABSTRACT

The central objective of this interdisciplinary thesis is to articulate a theoretical, doctrinal and political justification for the reintroduction of corporate charter revocation as a remedy to enhance the accountability of corporations in modern society. Corporations were originally conceived of as public institutions granted charters to carry out specific activities in the interests of society. Where a corporation acted outside of its charter, the corporation's charter could be revoked. Over the past 150 years, corporate lawyers have silently amended corporate laws to provide corporations with rights, powers and privileges that exceed those of individuals. Internal institutional regulation through corporate charters has been replaced by external oversight through administrative regulatory mechanisms. Where incorporation was once considered a privilege, today it is a right. Despite these developments, this thesis argues that theory and doctrine still support the paramountcy of the public over the private, and the legal remedies of corporate charter revocation.

The thesis contains six chapters including introduction and conclusion. Chapter one introduces the legal principle of corporate charter revocation and demonstrates why such a remedy is necessary in the context of modern corporate law. Chapter two considers the four accepted theories of the corporate structure and asserts that a revised "neo-concessionist" approach continues to inform our understanding of the corporation/state relationship.

Chapter three reinforces this theoretical analysis through an historical and doctrinal account of the prerogative remedies of *scire facias* and *quo warranto* and the development of

statutory charter revocation provisions. Chapter four focuses on the place of the state, specifically the Attorney General, in initiating revocation proceedings and some of the political barriers to reinstating the remedy. Through the exploration of these barriers and consideration of several recent American case studies, an effort is made to develop a strategy for the successful implementation of corporate charter revocation. The paper concludes with some thoughts about various outstanding barriers to the successful utilization of the remedy, the nature and application of corporate charter revocation generally, and calls for a continuation of a broader debate about the place of the corporation in modern society.

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A rule of the English common law, once clearly established, does not become extinct merely by disuse': it may 'go into a cataleptic trance', but, like Sleeping Beauty, it can be revived 'in propitious circumstances'.

- Lord Simon of Glaisdale in *McKendrick v. Sinclair* 1972 S.L.T. (H.L.) 110 at 116.

CHAPTER I: INTRODUCTION

The rise of the transnational corporation is one of the most profound events in modern history. The increasing concentration of power in the control of this institutional structure has resulted in a gradual, but marked shift from public, democratic government by the people to private, institutional control. Commensurate with this shift has been a reduction in the degree of corporate accountability to society. The corporation from its earliest incarnations was understood as a franchise granted legal existence through Crown grant. Gradually, control over the corporation shifted to the regulatory sphere. Today, the regulatory regime in Canada is being dismantled leaving a vacuum, which is being filled by self-regulation and voluntary corporate compliance initiatives (see discussion *infra*). Outside of market demand and market regulation, corporations are not being held accountable for their actions. This thesis seeks to begin to reclaim the historic relationship between the corporation and the state through the reintroduction of an historic remedy – corporate charter revocation.

The purpose of this thesis is to explore the modern theoretical, doctrinal and political dimensions of corporate charter revocation and to argue for the survival of the remedy at common law and in statute. Although the focus here is not principally on the nature of the corporation and corporate power, this paper will also explore these issues in the course of discussing corporate charter revocation. To that extent, this paper raises questions about some long-established, yet unsupported, principles underlying our traditional understanding

of the corporation and its relationship to the state.[1] Through an interdisciplinary analysis of corporate charter revocation, I hope to challenge current theoretical, legal and political understandings of the corporation and reveal new or forgotten places for the public to engage the corporate structure.

As stated, this investigation is a response to concerns surrounding the increase in corporate concentration and power and the corresponding decrease in corporate accountability. As the primary tool for economic development in modern capitalist society, the corporate structure has evolved into an autonomous entity immune to any concerns and responsibilities aside from profit maximization for its shareholders. Recent Canadian public opinion polls and comments from business officials reflect this condition. A 1996 Angus Reid survey entitled "Public Perspectives On Corporate Responsibility" found that 45% of Canadians surveyed believed large Canadian corporations have become "less responsible" in the past few years, while only 19% said the corporate sector has become "more responsible".[2] John Z. De Lorean, long-time executive with General Motors was very candid in 1979 when he commented on the nature of the corporation:

> The system has a different morality as a group than the people do as individuals, which permits it to willfully produce ineffective or dangerous products, deal dictatorially and often unfairly with suppliers,

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[1] Christopher Stanley, "Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law" (1987) 19 *Cambrian L.Rev.* 97 at 97 comments: "Company law remains bereft of any serious expansive theoretical examination...company law continues to be largely isolated from the critical gaze...no scholar has yet dared to venture into the mire which constitutes the legitimation system of the capitalist mode of production, the underpinning mechanism for the reproduction of capitalist society." See chapter 3, *infra*, for a discussion of the treatment of corporate legislation in Canada and its confinement to the deliberations of corporate lawyers and accountants.

[2] Angus Reid Group Inc., *Public Perspectives on Corporate Responsibility* (Toronto: Angus Reid, March 29, 1996) available at www.angusreid.com/pressrel/corpresp.html.

> pay bribes for business, abrogate the rights of employees by demanding blind loyalty to management or tamper with the democratic process of government through illegal political contributions.[3]

More recently, Clive Allen, outgoing executive vice-president and chief legal officer of Nortel, a leading Canadian high-tech company, made explicit the general belief about the place of the corporation in society:

> Northern and other companies on the list of Canadian players own no allegiance to Canada...Just because we [Nortel] were born there doesn't mean we'll remain there. Canadians shouldn't feel they own us. The place has to remain attractive for us to remain interested in staying there.[4]

While modern reality sees the corporation as an autonomous actor able to act with minimal constraints, this misguided arrogance articulated by many like Allen demonstrates a complete lack of understanding of the actual legal and historical relationship between the corporation, civil society and the nation-state. This thesis seeks to put this misconception in proper perspective.

Whether one focuses on corporate harm to the environment, consumers, communities, or workers, examples illustrating the growing lack of corporate accountability abound. In September 1998, an official of the San Francisco-based oil multinational Chevron admitted that the corporation had authorized the use of Chevron-leased helicopters to transport Nigerian soldiers to one of Chevron's oil rigs where they fired at Nigerian protestors killing two and injuring several others.[5] Over the past decade, Royal Dutch Shell has been involved in large-scale repression of the Ogoni people in Nigeria and the destruction of their

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[3] J. Patrick Wright, *On a Clear Day One Can See General Motors* (Grosse Pointe, Mich.: Wright Enterprises, 1979) at 164.

[4] Richard Gwyn, "The true allegiance of Canadian corporations" (April 28, 1999) *Toronto Star.*

[5] Amy Goodman, "Drilling and Killing: Chevron & Nigeria's Oil Dictatorship" (September 30, 1998) at www.pacifica.org/programs/nigeria.

homelands in order to obtain access to vast oil reserves.[6] Occidental Petroleum, formerly Hooker Chemical, the company responsible for the Love Canal, has developed oil extraction operations in Ecuador causing extensive environmental damage to the Ecuadorian Amazon region and the Secoya people.[7] In January 1999, Human Rights Watch issued a report outlining Enron Power Corporation's complicity in serious human rights violations by the Indian government to suppress public opposition against the Dabhol Power Corporation of which Enron is a principle shareholder and operator along with General Electric and Bechtel Corporation.[8] None of these corporations have been held legally accountable for these actions.

In Canada, Talisman Energy Inc., a Calgary-based oil company with substantial holdings in Sudan, has allegedly been a major funder and ally of Sudan's military regime and its armed forces since 1997, supporting Sudanese troops "by building a hospital, repairing military trucks, and providing electricity and water pipes to the army camps."[9] In the 1960s and 1970s, Crown Zellerbach gradually abandoned its pulp, paper and sawmill operations and the community of Ocean Falls, British Columbia, due to alleged problems with aging machinery and high transportation costs. The provincial government was forced to purchase the entire

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[6] Bronwen Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch: January 1999) available at www.hrw.org/hrw/reports/1999/nigeria; Gwendolyn Schulman, "Nigeria's crude relationship with Shell: the struggle of the Ogoni people against Shell Oil for greater accountability and protections of Ogoni human rights and environment" (December 1997 - March 1998) 30(4) *Humanist in Canada* 10; Joshua Hammer, "Nigeria crude: a hanged man and an oil-fouled landscape" (June 1996) 292(1753) *Harper's* 58.

[7] Jen Smith, "It's Not Accidental That Occidental Is In Ecuador" (April 22, 1998) (on file with author).

[8] Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (January 1999) available at www.hrw.org/hrw/reports/1999/enron.

[9] Steven Staples, "A Corporation's War in Sudan" (March 22, 1999) (unpublished, on file with author).

town for $800,000, which was turned into a Crown corporation only to close for good in 1980.[10]

Why has the law not responded to such obvious acts of corporate malfeasance?[11] As suggested briefly at the outset of this chapter, regulation of corporate activity was initially controlled *internally* through provisions built into corporate laws and corporate charters, only to be shifted *outside* of the corporation during the twentieth century through the enactment of administrative regulation. While it is not possible to enter into a discussion about regulation in this paper[12], suffice it to say that there has been and remains considerable debate about the origins and motivations behind the regulatory state.[13] Whether one views regulation as a legitimate invention of the state to control corporate behaviour or as a mechanism of

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[10] Andrew Scott, "Derelict Town Promises Peace" (October 15-22, 1998) *Georgia Straight* 32.

[11] For more examples of corporations committing significant and continuous criminal and regulatory violations, see the extensive literature on corporate crime: M. B. Clinard, *Corporate Crime* (New York: Free Press, 1980); J. L. McMullan, *Beyond the Limits of the Law: Corporate Crime and Law and Order* (Halifax, Nova Scotia: Fernwood Publishing, 1992); R. Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (San Francisco: Sierra Club Books, 1988); T. G. Poveda, *Rethinking White-Collar Crime* (Connecticut: Praeger, 1994); M. Tonry and A. J. Reiss, *Beyond The Law: Crime in Complex Organizations* (Chicago: Univ. of Chicago Press, 1993); S. M. Rosoff, *Profit Without Honor: White-Collar Crime and the Looting of America* (New Jersey: Prentice Hall, 1998); N. Sargent, "Law, Ideology and Corporate Crime" (1989) *C.J.L.S.* 39; Laureen Snider, *Bad Business: Corporate Crime in Canada* (Scarborough, Ont.: Nelson Canada, 1993); E. H. Sutherland, *White Collar Crime: The Uncut Version* (New Haven: Yale University Press, 1983); Edward S. Herman, *Corporate Control, Corporate Power* (Cambridge: Cambridge University Press, 1981) at 261-262.

[12] For an extensive accounting of the development of the regulatory state in Canada and suggestions that the introduction of regulation was a response to private rather than public interests, see Carman D. Baggaley, *The Emergence of the Regulatory State in Canada 1867-1939 (Technical Report No. 15)* (Ottawa: Economic Council of Canada, September 1981) at 13.

[13] Many have argued that the regulatory state was and remains, at least in part, a creation of business interests. See e.g. Morton Horwitz, "*Santa Clara* Revisited: The Development of Corporate Theory" (1985) 88 *West Virginia L.R.* 173; Robert H. Wiebe, *Businessmen and Reform: A Study of the Progressive Movement* (Cambridge, Mass.: Harvard University Press, 1962) at 4-5; Scott R. Bowman, *The Modern Corporation and American Political Thought: Law, Power and Ideology* (University Park, Penn.: Penn. State University Press, 1996) at 127-128; K.N. Llewellyn, "The Effect of Legal Institutions Upon Economics" (1925) 15 *Amer. Econ. Rev.* 665 at 672, 678 cited in Neil Andrews, "Bad Company? The Corporate Form in an Uncertain Law" (1998) 9(1) *Aust. J. of Corp. L.* 39 at 47.

corporate design to legitimate corporate activity, the current deregulation movement is quickly eroding the administrative capabilities of government to ensure corporate compliance with environmental, health and safety and labour standards.

In 1995, the federal government cut the budget of Environment Canada from $705M to $507M resulting in staff reductions from 10,000 to less than 4,000, and demoted the department from a senior to a junior ministry.[14] From 1988-1995, Environment Canada launched a mere 63 prosecutions in the whole of Canada (7.2 annual average).[15] In Ontario, the Ministry of Energy and Environment (MOEE) has seen 45% of its budget cut between 1995 and 1998[16] accompanied by a 32% reduction in staff in areas of research, monitoring, inspection and enforcement.[17] The number of charges laid by MOEE dropped more than 50% from 1,640 in 1995 to 724 in 1996 with average fines decreasing from $3,633,095 in 1992 to $1,204,034 in 1997.[18] To bring the point home, a leaked document to the *Globe and Mail* in 1999 revealed Ontario MOEE inspectors were told to ignore pollution incidents and complaints.[19]

The situation in other provinces is the same. In Quebec, leaked ministerial strategy documents from 1996 indicate that the government "intends to create a more passive

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[14] at 183.

[15] *Ibid.*

[16] *Ibid.*

[17] Canadian Environmental Law Association, *Guide to Environmental Deregulation in Ontario* (May 1999) at www.web.net/cela/appendix.html [hereinafter CELA].

[18] Snider, *supra* note 14.

[19] CELA, *supra* note 17.

department that will allow private industry to monitor itself."[20] Between 1994 and 1997, the combined budget of the Environment Department and the Parks and Recreation department went from $357M to $217M. Between 1996 and 1997, the Montreal office of the investigation department of the Environment Department went from 47 to 11 employees, including a reduction from 20 to 4 investigators.[21] Similar cuts were made at the Quebec office. Simultaneously, the ministry closed its entire legal department, transferring all cases to the Justice department, which is already overburdened and lacks the requisite expertise to handle such matters.[22] In Alberta, the Environment Protection Ministry experienced a 31% cut in operating and capital funding between 1992 and 1998 from $405 million to $317 with a projected decrease to $296 million by the year 2000. Staff levels will have declined by 33% between 1993 and 2000. At to top it off, Alberta has committed to cut environmental regulation by 50%.[23]

Aside from government regulation, Edward S. Herman has suggested that response to illegitimate and often illegal corporate behaviour today generally comes in three major forms: "(1) the machinery of corporate democracy – essentially putting up candidates for the board or proposing matters to be voted upon by stockholders in proxies; (2) publicity, boycotts, and withdrawals of business; and (3) lawsuits to force or terminate corporate actions, to activate government regulatory bodies, or to collect damages for alleged corporate

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[20] William Marsden and Rod Macdonell, "Industries told to police themselves" (October 25, 1997) *The (Montreal) Gazette* A7.

[21] *Ibid.*

[22] *Ibid.*

[23] Gary Gallon, "Alberta Environment Budget Cut 31%" (January 26, 1999) 3(4) *The Gallon Environment Letter* citing www.gov.ab.ca/env/.

abuses."[24] While it is not my intention to discredit any of these approaches (all have their usefulness), all three forms approach the corporation from the outside attempting to moderate its behaviour by creating external environmental constraints on corporate activity, rather than changing the creature itself.

These various traditional means of policing corporate behaviour are further constrained by the social, economic and institutional structures within which they operate and the failure of these mechanisms to appreciate the nature of the corporate institution. The fact that these approaches identified by Herman are insufficient to tame the corporate beast is evidenced by the continuation of inappropriate corporate conduct. In the case of corporate democracy, shareholder activism has developed considerably over the past decade, however its success continues to be thwarted, in part, by the concentration of corporate ownership in a relatively few hands, the separation between investor and investment, and the legislated requirement that corporate directors act in the best interest of the corporation.[25] Negative publicity and boycotts have had significant impact on individual corporate decisions and specific corporate actions. However they suffer from being unable to sustain themselves for extended periods. Huge amounts of resources are required to keep the public informed and engaged in every place where the corporation's products or services are sold, and moreover, campaigns face extreme difficulty conveying their message because of resistance by corporate media.[26]

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[24] Herman, *supra* note 11 at 265.

[25] See e.g. shareholder activist organizations in the United States and Canada: As You Sow and the Taskforce of Churches on Corporate Responsibility.

[26] James Winter, *Democracy's Oxygen: how corporate media smother the facts* (1996); Martin Toews, "Media File: corporate power remains the greatest obstacle to understanding our modern environment" (summer 1995) 16(2) *New City Magazine* 33.

Finally, lawsuits are wholly inadequate in addressing the damages sustained by individuals and communities from harmful corporate behaviour. Whether addressing repressive labour conditions[27], product liability issues[28], corporate fraud, or environmental harm[29], the corporate criminal is required to pay a nominal fine, which it incorporates into its financial statement as a cost of doing business. While the mortality of corporations go unchallenged, individuals face jail sentences, life terms (or even death in some jurisdictions) for similar crimes.[30]

One notorious example of this is the famous Pinto case where the Ford Company sold the vehicle to consumers knowing that the placement of the gas tank in relation to the rear bumper created an increased risk of the engine exploding on impact. Ford chose not to recall the vehicles calculating that the cost of potential damage awards associated with personal injury claims were less than the cost of the recall.[31] Not having learned from this notorious example of corporate malfeasance, General Motors was recently ordered to pay $4.9 million – the largest personal injury award in U.S. history – to six people severely burned when their

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[27] "Top U.S. Companies Sued Over Foreign 'Sweatshops'" (January 13, 1999) *Ottawa Citizen*. Human rights groups representing sweat shopworkers in a number of countries have filed two class-action suits in Los Angeles and Saipan seeking $1 billion US in damages, seizure of profits and unpaid wages against 18 companies for alleged mistreatment of sweatshop workers.

[28] See e.g. the thalidomide scandal: Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (New York: Harper & Row, Publishers, 1975) at 56.

[29] See e.g. the history of the notorious Bhopal incident involving Union Carbide in India: Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993).

[30] The irony of this observation has not escaped others, see e.g. Stone, *supra* note 28 at 25; C. Wells, "Corporate Manslaughter: A Cultural and Legal Form" (1995) 6(1) *Criminal Law Forum* 45.

[31] F. T. Cullen, Corporate Crime Under Attack: The Ford Pinto Case and Beyond (Cincinnati, Ohio: Anderson, 1987).

Chevrolet Malibu exploded in flames in a rear-end collision.[32] As in the Pinto case, testimony revealed that General Motors knew of the risk inherent in the placement of the gas tank behind the rear bumper rather than over the axle and had calculated the damage awards from claims arising from this design error would cost the company $2.40 per vehicle compared with $8.59 per vehicle to move the gas tank or incorporate a shield.[33]

Stone also identifies one of the limitations of legal action in the goal that it aims to achieve. The attainment of damages aims to distribute losses in an equitable manner which Stone refers to as a *distributive* goal.[34] However, in the case of corporate wrongs against society in an environmental or social context, it cannot be claimed that the individual who has lost her health from toxic emissions or drinking industrially contaminated water is made whole by monetary compensation. Rather, the law should act as a deterrent seeking to reduce the incidence of harmful behaviour – a *reductive* goal.[35] The problem is that the law will be forever incapable of achieving this later goal as long as the principles of limited liability and corporate immortality are maintained. Limited liability and modern initiatives such as liability insurance and indemnification protects the corporation, its "acting minds" (i.e. directors and officers) and its shareholders from financial liability beyond the extent of their investment. With no threat of receiving a penalty that constrains the corporation's activities

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[32] The award was apparently reduced on appeal to $1 million.

[33] Michael White, "Verdict finds GM at fault for burns" (July 10, 1999) *The Register-Guard (Eugene, Oregon)* 1A. Similar instances of corporate non-disclosure of a known harmful product resulting in death to individuals has occurred in other industries, most notably the pharmaceutical industry. For a detailed account of the horrendous actions of Richardson-Merrell in the 1950s and the thalidomide drug, see Stone, *supra* note 28 at 54-55.

[34] Stone, *ibid.* at 31.

[35] *Ibid.*

or seriously compromises corporate profits, there is no incentive to deter improper corporate behaviour. Furthermore, corporate immortality ensures that the corporate entity will survive regardless of the degree of harm caused by it or its agents.[36]

Irregardless of the debate over the efficacy of state and market-based forms of regulation, the unprecedented presence and influence of corporate activity on our lives demands that we begin to look critically at the corporate institution as a primary cause of our problems. Furthermore, the increasing melding of corporate and state interests coupled with the rising concern about the state's ability and desire to represent the interests of civil society requires that we begin to consider new mechanisms for controlling corporate behaviour. Our disregard for the corporation as a legal institution has allowed it to silently acquire, with the help of corporate lawyers and accountants, rights and powers that have virtually immunized it from any sense of accountability to society.[37] History has demonstrated that merely introducing regulatory tools without understanding the institution being regulated is doomed to failure. Therefore, our first task is to reevaluate the corporate institution and its two hundred years of relatively uncontested theoretical and doctrinal history and begin to question its legitimacy and appropriateness in modern society. Corporate charter revocation not only suggests an alternative response to the problem of corporate delinquency, but also

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[36] Under modern corporate law, a corporation once incorporated survives until it is voluntarily dissolved by its members. Historically, corporations were given charters for prescribed periods of time, however this practice ended with the rise in incorporations and the codification of corporate laws in the middle 19th century. See B.C. Hunt, *The Development of the Business Corporation in England, 1800-1867* (Cambridge, Mass.: 1936).

[37] See discussion *infra* chapter 3. In addition, the enshrinement of the *Charter of Rights and Freedoms* and subsequent judicial decisions extending Charter rights to corporations have given constitutional status to certain corporate rights protecting them against state action: see Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 87. Tax deductions for corporate legal fees and

provides an appropriate entry point for this broader inquiry, which has thus far been virtually ignored by all but corporate lawyers, accountants, and a handful of academics and activists.

The impetus for this study of corporate charter revocation in Canada comes from numerous attempts to invoke the remedy in the United States over the past several years. Petitions seeking the revocation of the corporate charters of UNOCAL, Weyerhaeuser, R.J. Reynolds, WMX Technologies Inc., and tobacco industry lobby associations have been met with varying degrees of success. These case studies are reviewed in detail in chapter 4 of this thesis in the context of developing a strategy for the successful introduction of corporate charter revocation in Canada. These recent efforts follow a long and well-documented history of corporate charter revocation in the United States.[38] Starting with Pennsylvania in 1784, all states enacted statutory charter revocation provisions. Forty-nine states, excluding Alaska, codified the common law doctrine of *quo warranto* in their corporate statutes to regulate corporate behaviour.[39] Until the 1960s, these provisions were used consistently to revoke the charters of corporations on the grounds that they were acting outside of their

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fines reduce the costs of corporate malfeasance. The indemnification of corporate directors and officers eliminates any fears associated with executive decision-making and its implications beyond the bottom-line.

[38] For an extensive account of the use of charter revocation in the United States see Richard L. Grossman and Frank T. Adams, *Taking Care of Business: Citizenship and the Charter of Incorporation* (4th ed.) (S. Yarmouth, Mass.: Red Sun Press, 1999) [hereinafter Grossman and Adams]; Edwin Merrick Dodd, *American Business Corporations Until 1860* (Cambridge: Harvard University Press, 1934); Ohio Committee on Corporations, Law and Democracy, *Citizens Over Corporations* (Akron, Ohio: Exchange Printing, 1999); Thomas Linzey, "Killing Goliath: Defending Our Sovereignty and Environmental Sustainability Through Corporate Charter Revocation In Pennsylvania and Delaware" (Winter 1997) 6(1) *Dickinson J. of Env. L. & P.* 31 [hereinafter Linzey I]; Thomas Linzey, "Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations" (1995) 13 *Pace Env. L. R.* 219 [hereinafter Linzey II]; Richard L. Grossman and Ward Morehouse, "Asserting Democratic Control Over Corporations: A Call to Lawyers" (Fall 1995) 52(4) *The National Lawyers Guild Practitioner* 101; Jim Hightower, *Chomp!* (March/April 1998) *Utne Reader* 57; "Receivers Named" (May 2, 1998) *New York Times* at A8.

[39] For a complete listing of the 49 states that have *quo warranto* statutes in their statutory codes, see Linzey II, *ibid.* at 223.

authority[40]; one of the more notorious cases being the revocation of Standard Oil Company's charter in 1892 for monopoly practices that were injurious to the public.[41] While the remedy in the United States survives now chiefly in statutory form[42], its use provides additional support for the legitimacy of the remedy in the modern corporate context in Canada. However, Canada's unique colonial history, the time and manner of its disassociation from England, and the evolution of its constitutional, statutory and common law requires that the remedy be given separate consideration in the Canadian context.[43]

This thesis is novel in many respects including its methodology. The study of corporate law has been traditionally limited to strict doctrinal analysis. As Christopher Stanley and Mary Stokes note:

> Modern company lawyers remain (purposefully?) stranded in a theoretical mire, with no theoretical framework from which to construct critique, as Stokes makes clear:
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> '...company law as an academic discipline boasts no long and distinguished pedigree. The result is that company lawyers lack an intellectual tradition which places the particular rules and doctrines of their discipline within a broad theoretical framework which gives meaning and coherence to them.'[44]

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[40] Linzey I, *supra* note 38 at 37 citing State of New York People v. Equity Gas Light Co., 36 N.E. 194 (N.Y. 1894); People v. Westchester Traction Co., 108 N.Y.S. 59 (N.Y. App. Div. 1908); People v. Abbott Maintenance Corp., Inc., 200 N.Y.S. 2d 210 (N.Y. App. Div. 1960).

[41] *State ex rel. Attorney General v. Standard Oil Co.* (1892), 49 Ohio St. 137. For an interesting history of the proceedings see Ohio Committee on Corporations, Law and Democracy, *supra* note 38 at 28.

[42] F. Rawle, *Bouvier's Law Dictionary* (St. Paul, Minn.: West Publishing Co., 1914) at 2787; Grossman and Adams, *supra* note 38. According to Grossman and Adams, the United States has abolished the common law remedy of *scire facias*. See also Nolan, *infra* note 171 at 1346 citing Mass. R. Civil P. 81.

[43] There has been no serious consideration of the remedy by Canadian authorities since Wegenast's 1931 treatise on corporate law: F.W. Wegenast, *The Law of Canadian Corporations* (Toronto: 1931). At one time, it merited an entire treatise of its own: see Thomas Campbell Foster, *The Writ of Scire Facias* (Philadelphia: T. & J.W. Johnson, 1851).

[44] Stanley, *supra* note 1 at 99 citing Mary Stokes, "Company Law and Legal Theory" in W. Twining (ed.), *Legal Theory and Common Law* (1986) at 155.

Responding to this analytical void, this thesis takes an interdisciplinary approach, applying theoretical, legal, and socio-political analysis to support corporate charter revocation in the modern context. From a theoretical perspective, I reconsider various theories of the corporation and posit that a neo-concessionist framework remains central to our understanding and treatment of the corporate structure.[45] In conducting this theoretical inquiry, I challenge modern principles underlying the corporation, namely the perception of the corporation as an autonomous, private entity ascribed with the rights and powers of a person, and reassert the view of the corporation as a public institution subject to the will of the state. Second, the doctrinal analysis of the remedy breaks with the traditional myopic view of corporate law by bringing together three bodies of law – constitutional, administrative and corporate – as part of one legal continuum explaining the full nature of the corporation and corporate charter revocation. Making these connections provides the framework for arguing for the survival of the remedy, and goes further to illustrate the ambiguous and contradictory understanding of the remedy and the corporate institution in modern corporate law. Throughout, I endeavour to contextualize my discussion in an historical framework that allows for a broader appreciation of the corporate form and the remedy. I also consider the theoretical and political relationship between the corporation and the state (as the party able to initiate such proceedings), highlighting the conflicts and

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[45] During final editing of this thesis, I became aware of a very recent article by Stephen Bottomley, "The Birds, The Beasts, and The Bat: Developing a Constitutionalist Theory of Corporate Regulation" (1999) 27(2) *Federal Law Review 243*. Bottomley articulates a similar theoretical construction to "neo-concessionism", which he titles "corporate constitutionalism" According to Bottomley at 255, "The theory of corporate constitutionalism begins with the proposition that corporations are more than just artificially created legal institutions (contrary to the suggestion of concession theory) and they are more than just economic institutions (contrary to the argument of contract-based theories). Corporations have *both* of these dimensions, but they are also social enterprises *and* they are polities of their own right Beginning with the proposition, corporate constitutionalism argues that the means by which corporations are governed and by which they govern should be constituted by state *and*

limitations posed by the relationship of these two institutional structures and the ramifications for the application of the remedy.

In considering the fine point of corporate charter revocation in this way, theory, history, doctrine, and politics are used as a framework for discussing and dispelling myths about the nature of the corporation, initiating corporate law reform, and dealing with modern concerns about corporate accountability. Whether or not corporate charter revocation is ever utilized in the future, considering this remedy in its full context helps break down misconceptions about the unchangeability of our economic institutions, the inevitability of globalization and other consequences of corporatization. Most importantly, it provides new opportunities to educate the public and the legal community and have them question previously unchallenged myths about "what is the corporation".

The thesis is broken down into six chapters including introduction and conclusion. Chapter two begins by considering the four accepted theories of the corporate structure and asserting that a revised "neo-concessionist" approach continues to inform our understanding of the corporation/state relationship. Chapter three reinforces this theoretical analysis through an historical and doctrinal account of the prerogative remedies of *scire facias* and *quo warranto* and the development of statutory charter revocation provisions. Chapter four focuses on the place of the state, specifically the Attorney General, in initiating revocation proceedings and some of the political barriers to reinstating the remedy. Through the exploration of these

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corporate rights." In contrast, neo-concessionism would likely place more emphasis on the role of the state and the artificial nature of the corporation.

barriers and consideration of several recent American case studies, an effort is made to develop a strategy for the successful implementation of corporate charter revocation. The paper concludes with some thoughts about various outstanding barriers to the successful utilization of the remedy, the nature and application of corporate charter revocation generally, and calls for a continuation of a broader debate about the place of the corporation in modern society. In the end, it is hoped that this investigation will illustrate the importance of corporate law in discussions around democracy, human rights and the environment, as well as providing a starting point for a larger inquiry into the nature of the corporation and its place in society.

CHAPTER II: THEORIES OF THE CORPORATION

Developing an understanding of corporate theory provides a point of entry for engaging in discussions about the nature of the corporation and corporate charter revocation. Corporate law and theory are the vehicles for either facilitating the legitimization of the corporate structure or for regulating its development. Over the past two centuries, corporate theory accomplished the former, providing a means for legitimizing changes in the corporate form and the gradual accrual of corporate rights and powers.[46] However, corporate theory also provides a window for reclaiming control over the corporate form. For that reason, this chapter focuses on providing an introduction to the evolution of the theoretical foundation of the corporate form.

Unfortunately, the whole concept of the modern corporation has gone virtually unquestioned and unchallenged by lawyers and academics.[47] Corporate legal discourse has been primarily concerned with the doctrinal aspects of corporate law or the contextualizing of corporate legal principles. Critical legal scholar Christopher Stanley notes, "Both approaches enable us to understand the *how* of company law but not the *why*. The latter approach is essentially a theoretically based acceptance of the company as a given legal form. Knowledge without understanding."[48] This leaves those who wish to engage corporate theory with few points of entry.

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[46] Bowman, *supra* note 13 at 10.

[47] *Supra* note 1 at 97.

[48] *Ibid.* at 98.

An additional problem with corporate theory is that corporate law is portrayed in the literature as being unbiased and value-free, blindly dedicated to profit generation and the promotion of economic efficiency. As such, it is difficult to assert new and different views about its structure:

> Law is revealed as built upon fundamental, unvarying and conflict-free values. It repeats doctrinal claims that the law must be certain. This is odd. Most company law writers raise value, interpretative or policy differences but ignore that these are the sole unifying themes with the other articles in the journals in which they publish... legal reasoning and decision making is still underwritten by a belief that there is only one right answer. So it is difficult to show this uncertainty in doctrinal arguments. To do so is to undermine the way things are argued in law. These ways are so well set that they represent a point-of-viewlessness difficult to dispute.[49]

Consequently, corporate law and theory have silently yet steadily undergone remarkable transformations over the past two centuries with only occasional mild tremors registering on the corporate Richter scale.[50]

These changes include the accrual of a large number of rights, powers and privileges over the past century.[51] The latest advancement in corporate law has seen a shift in the last 30 years from a regulatory legislative framework to a faciliatory regime.[52] In just the last three

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[49] Andrews, *supra* note 13 at 42-43.

[50] The notable exception being the debates in England during the 1850s over the introduction of limited liability. See Rob McQueen (LL.M. Thesis: Unpublished).

[51] A complete history of the corporation in Canada is beyond the scope of this thesis and awaits the efforts of other scholars. For consideration of various aspects of its evolution in Canada see F. E. Labrie, "The Pre-Confederation History of Corporations in Canada" in J. S. Ziegel, ed., *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) at 33; Wegenast, *supra* note 43; G. V. Houten, *Corporate Canada: An Historical Outline* (Toronto: Progress Books, 1991); A.W. Currie, "The First Dominion Companies Act" (1962) 28(3) *Can. J. Econ. Pol. Sci.* 387; A. H. Douglas, *A Manual of British Columbia Company Law* (Calgary: Burroughs & Co. Ltd., 1913); T. Mulvey, *Canadian Company Law: A Collection of the Statutes of the Dominion of Canada and the Various Provinces Respecting the Incorporation and Control of Companies* (Montreal: John Lovell & Son Limited, 1913); C. H. Stephens, *The Law and Practice of Joint Stock Companies under the Canadian Acts* (Toronto: Carswell, 1881); H. Veltmeyer, *Canadian Corporate Power* (Toronto: Garamond Press, 1987); R. C. B. Risk, "The Nineteenth Century Foundations of the Business Corporation in Ontario" (1973) 23 *U.T.L.J.* 270; Bakan, *supra* note 37 at chapter 6; Hunt, *supra* note 24.

[52] See e.g. Institute of Law Research and Reform, *Draft Report No. 2: Proposals for a new Business Corporations Law for Alberta* (Univ. of Alberta, Edmonton: *Institute of Law Research and Reform,* January

decades, the act of incorporation has been transformed from a privilege to a right. What once required the grant of the Sovereign now merely necessitates the filing of a number of forms. However, the most significant change is the personification of the corporate institution. Indeed, it has been asserted that "the accommodation of the corporation (a collective form of enterprise) to the individualist precepts of Anglo-American law stands as one of the salient achievements of nineteenth-century American jurisprudence."[53] As will be seen, these two elements – the orientation of corporate legislation and corporate personhood – figure prominently in the debate over corporate charter revocation.

Lack of corporate accountability is predicated on the theoretical legitimization of the modern corporate structure.[54] Corporate theory has responded throughout the past centuries to accommodate the desires of those who would use the corporate form to further their economic interests. This chapter canvases the three main theories of the corporation: concessionism, contractualism and entity theory. The first two are based on the notion of the corporation as a fictitious creature of statute granted its powers by the Crown. The later represents an entirely contrived shift in the perception of the corporate form instilling it with the rights, powers and privileges of the natural person. In addition to these three constructs

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1980) at 4 where it was stated that the primary purpose of the proposed provincial corporate legislation "should be to provide a vehicle which will allow business to be done efficiently." Commentators such as Frank Iacobucci speak of a balance between economic and public interests: Frank Iacobucci et al., *Canadian Business Corporations* (Agincourt, Ont.: Canada Law Book Limited, 1977) at 6. However, drafters of Canadian corporate law have consistently adopted the statements of Ballantine, *Ballantine on Corporations* (1946) at 41: "The primary purpose of corporation laws is not regulatory. They are enabling acts, to authorize businessmen to organize and to operate their business, large or small, with the advantages of the corporate mechanism..." See also R.L. Simmonds, *An Introduction to Business Associations in Canada* (Toronto: Carswell, 1984) at 98.

[53] *Supra* note 13 at 3.

[54] *Ibid.* at 10.

modern corporate theory, in an effort to deal with liability issues surrounding multinational corporations, has begun to wrestle with the concept of enterprise theory which views related corporate entities (i.e. subsidiaries and affiliates) as part of one corporate body. A number of important works have been written in this area, however for the purposes of this thesis the four theoretical concepts are distilled down to their barest principles.[55]

From a consideration of these four views, I attempt to argue for the place of a revised neo-concessionist theory within the understanding of the modern corporation on the basis that, despite the domination of entity theory in modern corporate law, there is no consensus amongst academic theorists, judiciary or legal practitioners regarding the placement of the corporate structure in theory. Despite the fixation of corporate texts on entity theory, adherence to both concessionism and contractualism (non-entity constructs) remain central to our understanding of the corporation, the drafting of corporate laws and the reasoning of the courts to the extent that they have attempted to address the nature of the institution. It is this space created by the lack of consensus about the theoretical nature of the corporation that provides justification, legitimacy and relevance to the application of corporate charter revocation in modern corporation law.

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[55] Chris Tollefson, *Theorizing Corporate Constitutional Rights: Revisiting 'Santa Clara' Revisited* (LL.M. Thesis, York University, 1992); Phillip I. Blumberg, "The Corporate Entity in an Era of Multinational Corporations" (1990) 2(15) *Delaware J. of Corp. Law* 283 [hereinafter "Blumberg 1"] at 283. Blumberg, *The Multinational Challenge to Corporation Law* (New York: Oxford University Press, 1993) [hereinafter "Blumberg 2"]; Gunther Teubner, "Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person (1988) 36(1) *Amer. J. of Comp. L.* 130; Horwitz, *supra* note 13; Mark M. Hager, "Bodies Politic: The Progressive History of Organizational "Real Entity" Theory" (1989) 50(513) *U. of Pitts. L.R.* 575; Sanford A. Schane, "The Corporation Is A Person: The Language Of A Legal Fiction" (1987) 61 *Tulane L.R.* 563; Max Radin, "The Endless Problem of Corporate Personality" (1932) 32 *Colum. L.R.* 643; Arthur W. Machen, Jr., "Corporate Personality" (February 1911) 24(4) *Harvard L.R* 253; John Dewey, "The Historic Background of Corporate Legal Personality" (April 1926) 35(6) *Yale L.J.* 655; Howard Jay Graham, "An Innocent Abroad: The Constitutional Corporate "Person"" (February, 1955) 2(2) *U.C.L.A. L.R.* 155.

Moderate critical legal theorists reject the notion of formal theoretical constructs in law. Corporate law, as with all law, is dependent on the changing values and interests of those who create the law.[56] D.M. Branson cites the modeling of corporate litigation in Delaware (the most favourable jurisdiction in which to incorporate) as an example of how the objective structure of law "can be drastically changed over time by lawyers who try to extend the scope of doctrines which are present only at the margins of the law."[57] Therefore, one should not adhere too rigidly to any one theoretical concept of the law. Nevertheless, understanding the principle theoretical conceptualizations of the corporate form does provide a framework for debating the appropriate nature of the corporation. It is to these four forms that we now turn.

CONCESSIONISM [58]

Concessionism conceives of the corporation "as an artificial entity whose separate legal personality is granted as a privilege by the state."[59]. Reflected in the corporate practice of chartering until the middle of the 19th century, concessionist theory includes two key ideas. First, the notion that the corporation is an artificial or fictional entity existing "only in the contemplation of law."[60] The second element is that the corporation is "an emanation of the state, created by revocable grant."[61] This later element gave to the corporation a public

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[56] For an excellent review of the various schools of theoretical analysis in relation to corporate law, see Andrews, *supra* note 13.

[57] *Ibid.* at 59 citing D.M. Branson, "Indeterminacy: The Final Ingredient in An Interest Group Analysis of Corporate Law" (1990) 43 *Vand. L.R.* 85.

[58] Also referred to as state action, grant theory, fiction theory, artificial entity theory or creature theory.

[59] Stokes, *supra* note 44 at 162.

[60] Tollefson, *supra* note 55 at 13 citing *Dartmouth College v. Woodward,* 17 U.S. 518 (1819) at 636 (per Marshall Ch. J.).

[61] *Ibid.*

character and prescribed to it only those legal rights deemed compatible with the public interest. Accordingly, the majority of early modern corporations were created for the purpose of developing and administering public works.[62] Corporate law ascribed few rights to these corporations. Rather, their activities were severely and explicitly constrained. Corporations had only the right to sue and be sued, to hold prescribed amounts of private property, and to conduct activities expressly outlined in their charters. Among the many differences with the modern corporation, early corporations were subject to full liability, limited by their objects and purposes, permitted to exist for a prescribed period, with fixed capital, and were prohibited from merging or consolidating assets.

CONTRACTUALISM [63]

With the gradual popularization of the corporate form as the primary vehicle for conducting business, it became impractical for the Crown to issue royal corporate charters or to pass Special Acts of Parliament for each new corporation. Contractualism allowed for the shift in emphasis from the Crown as the grantor of corporate life, to the ability of individuals acting as shareholders to seek to incorporate independently. Consonant with the view that only human beings are capable of acquiring rights, contractualist theory maintains the fictitious entity element of concessionism. However, it discards the notion of incorporation as a matter

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[62] See e.g. *Yarmouth Lock and Canal Company*, 51 Geo. III, c.25 (N.S. 1811); *Dundas and Waterloo Turnpike Company,* 10 Geo. IV, c.14 (U.C., 1829); *St. John Mill and Canal Co.* 4 Wm. IV, c.34 (N.B., 1834). See also Stokes, *supra* note 44 at 162.

[63] Also referred to as private action, associational or aggregate theory.

of privilege, rather viewing the creation of the corporation as a contractual arrangement between individuals.[64]

In practice, the Letters Patent model of incorporation instituted during this period to facilitate incorporation created a conflict between contract theory and practice in Canada. While contractualism viewed incorporation as a private contract between shareholders, the Letters Patent mode of incorporation still required the state to sanction the incorporation.[65]

ENTITY THEORY

Popularized by German realists and adopted by academic writers in the United States in the beginning of the twentieth century, entity theory emerged in corporate discourse shortly after the introduction of contractualism.[66] While entity theory also conceives of the corporation as a private institution, it differs fundamentally from contractualism in its conception of the corporation "as having an inner material or social reality existing prior to, and independent of, positive law."[67] The corporation is viewed as an organic body with an independent mind and will from its human agents. The corporation is at the center of this vision, as opposed to

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[64] Tollefson, *supra* note 55 at 15-18. In support of contractualism see also T. Baty, "The Rights of Ideas -- and of Corporations" (1916) 33(3) *Harv. L.R.* 358.

[65] American authors do not draw this distinction because there was no such conflict between theory and practice in the United States. See e.g. Stokes, *supra* note 44 at 162. There is some uncertainty whether contractualism led to a change in the methods of incorporation, or whether public demand generated this new theoretical conceptualization. In his thesis, Tollefson, *ibid.* at 18, suggests that the shift from the concessionist to the contractualist paradigm in the later 19th century resulted in the gradual abandonment of the granting of royal charters and passing of Special Acts of Parliament, and the creation of a letters patent registration system of incorporation resulting in individuals rushing to incorporate.

[66] Stokes, *supra* note 44 at 163.

[67] Tollefson, *supra* note 55 at 20.

the shareholder in the contractualist paradigm. Accordingly, all rights and duties emanate directly from the corporation itself as opposed to its shareholders.

ENTERPRISE THEORY

The increase in corporate concentration through mergers and acquisitions in the last quarter century has presented unique challenges to the governance of corporations. In response to the inability of entity theory to deal logically with issues of liability associated with large corporate groupings, academics, most notably Phillip Blumberg, have put forward the theory of the corporation as enterprise.[68]

Blumberg's thesis is that entity theory is becoming increasingly irrelevant and incapable of accounting for the modern realities of the multinational corporate complex.[69] Corporate theoretical formulations were created in an era when corporations were directly owned by individual human shareholders and academic writings have been limited to this notion of the corporation.[70] Since it became possible for corporations to own corporations[71], these theories have become increasingly inadequate for dealing with modern corporations.

Enterprise theory views corporate groups, rather than each subsidiary company, as the juridical unit:

> The enterprise view, bottomed on economic realities, closely resembles the real entity doctrine, which focuses on the social realities. The real entity theory thus provides some theoretical basis for a legal doctrine that seeks to concentrate on the problems presented by the economic organization and, in

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[68] Blumberg 1, *supra* note 55 at 283; Blumberg 2, *supra* note 55; Teubner, *supra* note 54.

[69] Blumberg 2, *ibid.* at 50.

[70] *Ibid.* at 21.

[71] In New Jersey as early as the late 1800s. For a historical account of this in the U.S.A. see *ibid.* at 52. See also Grossman and Adams, *supra* note 38.

> appropriate cases, to develop legal rights and responsibilities related to the common economic organization rather than to its formal, legal fragments arising from separate filings for incorporation of component parts of the single enterprise. The real entity view, focusing on the sociological existence of the corporate organization, strongly resembles the modern emphasis on the realities of corporate existence. In fact, enterprise law, which rests on economic realities, may be loosely viewed as a variant of the real entity doctrine -- shorn of its metaphysical concept of a group will and its emphasis on the pre-juridical reality of the group -- applied to corporate groups.[72]

By applying principles such as 'control'[73] and the 'unitary business'[74] standard, Blumberg asserts that enterprise theory is beginning to supplement entity theory to support regulatory regimes for multinational corporations.[75]

THEORETICAL DISCORD

The above four theories provide four distinct visions of the nature of the corporate institution. In each case, the theoretical construct has emerged to legitimize a stage in the evolution of the corporate form. Collectively, these theoretical constructs elucidate the metamorphosis of the corporation from a mere fictitious creature of statute to an entity endowed with many of the attributes of the person (and some which exceed those of humans). Today, the corporation as a person at law goes unquestioned. However, closer examination suggests a lack of support for the supremacy of entity theory and argues for the continued presence of both concessionism and contractualism in our present understanding of the corporation despite comments to the contrary by legal scholars.[76]

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[72] Blumberg 2, *ibid.* at 30.

[73] "Control" can be defined quantitatively (e.g. stock ownership) or by employing a functional, pragmatic standard turning on the "reality" of control. In the context of MNCs, Blumberg 2, *supra* note 55 at 329-331, views control as not only affiliation by stock ownership but also where the corporate group is operating under common control.

[74] *Ibid.* at 345. The "unitary business" standard combines control thresholds with an analysis of the economic integration and managerial structure of the corporate grouping.

[75] Blumberg 1, *supra* note 55 at 89-120.

[76] See e.g. Stokes, *supra* note 44 at 162 who states that concession theory has suffered its "demise" at the hands of economic-oriented theories.

The strength of these various theories of the corporation has varied with the public/private orientation of society. Specifically, the debate over the survival of concessionism changes in relation to the perception of the corporation as a public or a private institution. During the eighteenth century, concessionist theory gave legitimacy to a institution that was looked upon with great skepticism by the general public by giving assurances that "as creatures of the state they were supervised and regulated by the state."[77] With the growing needs of the capitalist system, the advances in industrialization and the capacity to generate revenues, the individualist orientation in society came to view state oversight as a hindrance to economic development. Contractualism responded by viewing the corporation as a bundle of contractual relations amongst private shareholders.[78] However, this theoretical framework (and the similar conceptualization of the corporation in entity law) ignored the continued involvement of the state in corporate affairs, especially the defining of corporate rights and responsibilities:

> ...such a view has constitutional implications in that, if the company is perceived to be nothing more than a private contract, the role of the State in determining rights and obligations is limited.[79]

Consequently, contractualism allowed for the shift in corporate law from a regime that regulated corporate activity to one that merely facilitated it, but never negated the role of the state in practice. Regulatory mechanisms were merely shifted outside of corporate law into the administrative realm:

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[77] *Ibid.* at 162. There was great concern during the middle of the 19th century that the corporate structure, specifically limited liability, would corrupt the Christian businessman: McQueen, *supra* note 50; Bowman, *supra* note 13 at 49. Later, progressivists in the early 1900s showed similar distrust and distaste for large corporations, trusts and monopolies and support for state intervention seeking "to provide the underprivileged with a larger share of the nation's benefits; to make governments more responsive to the wishes of the voters; and to regulate the economy in the public interest.": Wiebe, *supra* note 13 at 211-212.

[78] Sandra Berns & Paula Baron, *Company Law and Governance: An Australian Perspective* (Melbourne: Oxford University Press, 1998) at 18-19.

> In the twentieth century, the unfolding distinction between the private or internal dimension of control (the law of corporations) and the public or external dimension of corporate power (public law) reflected ideological as well as practical decision of legislators and judges to adapt the law to the organization structure and power relationships of the large corporation... *This consolidation of the external dimension of corporate power under the aegis of public law facilitated the corporate reconstruction of American capitalism while securing reconstituted relationships of power within society.*[80]

Hurst comments on the same transformation in the United States from an historical perspective, which was essentially mirrored in Canada:

> If internal checks and balances did not convincingly legitimate the power resident in big modern corporations, and the competitive market no longer policed them in classical style, the situation spelled increase of legal regulation. [sic] For there remained the underlying, traditional demand that power be legitimate in the sense that it be responsible or accountable. It was symbolic of the positive force of this demand that Congress should pass the Sherman Act in 1890, just as the main current in the states turned to removing regulatory features from corporation law. The trend of state law meant that we accepted a type of corporate structure which gave generous scope and substantial autonomy to central control as of high value for economic growth; we would accept utility as legitimating this instrument.[81]

In constitutional terms, the line drawn between public and private has never been explicitly articulated, rather being the result of evolutionary segmentation of various areas of the law. As Stokes points out, "...there is a very strong resemblance between this method of legitimating corporate power and that which still prevails today in respect of administrative bodies."[82] Whether part of corporate law or administrative law, state supremacy over the corporate institution by statute and parliamentary sovereignty implies an unseverable 'public' dimension to the corporation.

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[79] *Ibid.* at 18.

[80] Bowman, *supra* note 13 at 127.

[81] James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970 (Charlottesville: University Press of Virginia, 1970) at 108.

[82] Stokes, *supra* note 44 at 162.

Similarly, the movement towards imposing rights of the person on the corporate structure based on the principle of entity theory is a legal artifice with no articulated rationale at law[83]:

> The current widespread use of the expression "corporate citizen" seems to owe more to the objects of the public relations industry than to the analysis of the legal concept of citizenship.[84]

A review of the scant historical debates over corporate theory suggest that entity theory has emerged to legitimize the evolving corporate form without judicial, democratic or rational authority.[85] Moreover, the acceptance of new elements in the form has not necessarily resulted in the abandonment of others. For example, despite the introduction of corporate personhood, the original structure of the corporation as a group of shareholders acting through an institutional structure sanctioned by government remains.[86] This incremental change in form has left the corporation straddling various places in theory and providing no clear conceptualization of the corporate form.[87]

This ambiguity is highlighted in the inconsistent application of corporate theory by American and Canadian courts and government.[88] In his analysis of Charter cases up to 1992,

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[83] Blumberg 1, *supra* note 55 at 30-44.

[84] Environment Protection Authority v. Clatex Refining Co. Pty. Ltd. (1992), 178 C.L.R. 477 at 549 (H.C. of Aust.) (McHugh J.).

[85] This assertion is not a novel one. Horwitz, *supra* note 13 at 181 states that theories of corporate personality arose from "a crisis of legitimacy in liberal individualism arising from the recent emergence of power collective institutions." See also Blumberg 1, *supra* note 55 at 44-45: "...the extensive history of inconsistent utilization of conflicting theories of corporate personality indicates that the theories are employed to support results, rather than as guiding principles to help reach them." For an excellent account of the Marshall court's handling of corporate personality in the United States, see Bowman, *supra* note 13 at 42-53.

[86] Stokes, *supra* note 44 at 162-163 contends that entity theory has "prevailed in the academic literature rather more forcefully than in company law doctrine itself."

[87] Blumberg 1, *supra* note 55 at 28 citing Tuebner, *supra* note 55 at 138 where he states "It should be apparent that each of the three theories [concessionism, contractualism, and entity theory] has something to contribute. It is indisputable that corporations may exist only by leave of the state and that state action, even though limited to the benediction available to all through the general incorporation states, is an integral feature of the problem."

[88] Tollefson, *supra* note 55 at 91; Blumberg 2, *supra* note 55 at 318.

Professor Chris Tollefson demonstrates that where the Supreme Court of Canada has engaged corporate theory in addressing the issues of corporate rights, its application has been "ambiguous and contradictory".[89] American jurisprudence has considered the issue more extensively with equally inconclusive results.[90] In 1886, the United States Supreme Court in *Santa Clara County v. Southern Pacific Railroad*[91], one of the earliest cases on point, summarily dismissed the entire issue by stating:

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to ... corporations. We are all of opinion that it does.[92]

While the Court's statement has been subject to some academic debate[93], this curt, unsupported conclusion was repeated unquestioningly by practitioners and judges over time, quickly becoming the precedent for future judicial legitimization of the corporation as a natural entity at common law.[94] Furthermore, it is clear that while all Canadian corporate

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[89] Tollefson, *ibid.* at 93. Tollefson's analysis illustrates the Court has had a propensity for applying a purposive analysis rather than a theoretical one in many instances. The Court's most recent charter decision in *Canadian Egg Marketing Agency v. Richardson* (1999) 166 D.L.R. (4th) 1 where the extended its earlier reasoning in *Big M Drug Mart Ltd.* (1985) 18 D.L.R. (4th) 321 focusing on the unconstitutionality of a regulatory provision rather than the status of the party. In *Canadian Egg Marketing Agency v. Richardson* it was held that the respondent corporation had standing to challenge the constitutionality of a regulation governing the intraprovincial trade of eggs regardless of whether section 6 applied to corporations or not, because the issue was the constitutionality of the regulation itself.

[90] A full discussion of the treatment of corporate theory by American courts is prohibitive given the scope of this paper. For an extensive study of the application of corporate theories in American jurisprudence see Blumberg 1, *supra* note 55; Horwitz, *supra* note 13; H. Hovenkamp, "The Classical Corporation in American Legal Thought" (June 1988) 76(5) *Georgetown L.J.* 1593; Grossman and Adams, *supra* note 38.

[91] 118 U.S. 394 (1886).

[92] Blumberg 2, *supra* note 55 at 396.

[93] Horwitz, *supra* note 13 at 174; *Ibid.* at 36.

[94] Stanley, *supra* note 1 at 98 comments on this phenomenon:

> ...overt reliance and elaboration of the doctrine of this case [*Salomon v. Salomon Co. Ltd.*] by company lawyers has given rise to both a false impression as to its importance and a subconscious denial of the actual ideological purpose of corporate personality. By re-stating the case and evaluating subsequent interpretations of it I will endeavour to illustrate the way in which noteworthy decisions frequently become taken-for-granted or subject to mythical interpretation, bearing little resemblance to

statutes today define a "person" to include a corporation[95], a closer look reveals that there has been no public debate in Canada's parliament or legislatures over the issue of personhood.[96] Indeed, government has exhibited extreme deference to corporate lawyers in the development of corporate law generally.[97]

Enterprise theory of the corporation, while arguably well-intentioned, also lacks support. Blumberg's primary argument is that entity theory is problematic, irrelevant and out of line with the economic realities of the modern multinational corporate complex.[98] Created to overcome problems around holding parent companies liable for the actions of their subsidiaries, enterprise theory addresses modern corporate realities by providing a rationale for ascribing duties and liability to a corporate group; avoiding the problem of establishing a chain of liability through a series of individual juridical units.

Canadian courts have rejected notions of enterprise theory because of the conflicts it creates with the individuality of the corporate unit.[99] In Canada, the 1896 decision in *Salomon v.*

> their actual importance, having regard to the social and economic context in which they were generated.

[95] See e.g. *Canadian Business Corporations Act,* R.S.C. 1985, c.C-44, s.2(1); *Business Corporations Act,* R.S.0. 1990, c.B.16, s.1(1); *Business Corporations Act,* S.A 1981, c.B-15, s.1(n).

[96] See *infra*, chapter 3.

[97] See *infra,* chapter 3.

[98] Blumberg 1, *supra* note 55 at 100.

[99] Commentators have drawn attention to the use of contractualism and entity theory as legitimizing instruments in the development of capitalist principles of individualism and private property. According to Tollefson, *supra* note 55 at 21, both natural entity and contractualist paradigms advance highly privatized notions of the corporation resistant to state regulation and simultaneously able to facilitate "the doctrinal assimilation of the corporation within the broader legal system." According to Horwitz, *supra* note 13 at 180-181, the notion of corporate individualism underwent a crisis as corporation's increased in wealth and size necessitating a new legal theory to accommodate it from which was born entity theory:

> With corporations acquiring the majority of wealth in the United States, the rise of this powerful collective institution posed a direct threat to individualism requiring a theoretical justification to keep it

Salomon and the adherence to entity law, "have rendered...courts impotent to deal with the problems presented by corporate groups under statutes of general application where Parliament has not specifically addressed the issue."[100] Indeed, Canadian courts have expressly refused to apply the so-called "deep rock doctrine" to the present day. In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*[101], the Newfoundland Court of Appeal, referring expressly to Blumberg, held:

> This principle has gained wide acceptance in the United States where, it is argued, it exists separate from the traditional piercing the corporate veil. (see P.I. Blumberg, The Multinational Challenge to Corporation Law, (New York: Oxford, 1993)). It essentially advocates that the separate entity of corporation and shareholder be rejected and they be treated as a single enterprise when certain conditions are present. In *B.G. Preeco I (Pacific Coast) Limited v. Bon Street Holdings Ltd. et al.* (1989), 37 B.C.L.R. (2d) 258, the British Columbia Court of Appeal rejected the "Deep Rock Doctrine" (the enterprise principle as expressed in Taylor v. Standard Gas & Electric Co. 306 U.S. 307; 96 F.2d. 693) on the basis that it could not coexist with Salomon, which is so firmly entrenched as a foundation of corporate law. In England and Canada, the use of the group enterprise theory has been limited to exceptional circumstances, none of which would be applicable.

Seaton J.A. in *B.G. Preeco I (Pacific Coast) Limited v. Bon Street Holdings Ltd. et al.* (1989), 37 B.C.L.R. (2d) 258 stated

> I do not subscribe to the "Deep Rock doctrine" that permits the corporate veil to be lifted whenever to do otherwise is not fair (see: Pepper v. Litton, 308 U.S. 295). That doctrine and the doctrine laid down in Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.), cannot co-exist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, Salomon's case would have afforded a good example for the application of that approach.

In *Actton Petroleum Sales Ltd. v. British Columbia (Minister of Transportation and Highways)*[102], the Court of Appeal, following the *B.G. Preeco* decision, again refused to apply enterprise theory. In that case, two companies were involved in the business of a gas station that was expropriated by the provincial government. Both companies had a sole

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> within the framework of "'methodological individualism'...the view that the only real starting point for political or legal theory is the individual.

[100] Blumberg 1, *supra* note 55 at 155.

[101] (1995), 126 D.L.R. (4th) 1 (Nfld. C.A.) rev'd in part on other grounds (1997) 153 D.L.R. (4th) 385.

[102] (1998), 161 D.L.R. (4th) 481, (1998) 50 B.C.L.R. (3d) 187 (C.A.).

common director and shareholder, but the companies did not own each other. The Court held that they were separate companies resulting in an award to the second company of damages independent of the award granted to the first company.

Similarly, Blumberg concedes that enterprise theory has only become "firmly entrenched" in the United States and Europe in areas that have been codified.[103] Where common law governs (e.g. contract), American courts still rely on entity theory.[104]

CREATING A MODERN THEORY FOR CORPORATE CHARTER REVOCATION: A NEO-CONCESSIONIST APPROACH

The above analysis illustrates the real theoretical and legal tensions that exist regarding the nature of the corporation. Clearly, no one particular theory satisfies the aims and objectives of all society.[105] The law has been unwilling to adopt any one view of the corporation at the exclusion of the other. More often than not, the courts adopt the theory that suits the desired end. It is in this space created by inconclusive theoretical posturing that I wish to argue for a 'neo-concessionist' theoretical framework. Such an approach is not only substantiated within the context of modern corporate law and practice as described above, but it is also *necessary* in order to properly understand the nature of the modern corporation, and to reinvigorate the

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[103] Blumberg 1, *supra* note 55 at 154. A consideration of the theoretical approaches of Canada's regulating statutes is unfortunately well beyond the scope of this paper.

[104] *Ibid.*

[105] W. Batton, "The 'Nexus of Contracts' Corporation: A Critical Appraisal" (1989) 74 *Cornell L.R.* 407 at 417; Stephen Bottomley, "The Birds, The Beasts, and the Bat: Developing a Constitutionalist Theory of Corporate Regulation", *supra* note 45, 243 at 254. Many have posited that these traditional theoretical constructs are entirely inadequate to address the true 'relations constituting this capitalist mode of production': See e.g. Stanley, *supra* note 1 at 107. In other instances, adherence to one theoretical model requires acceptance of principles that run contrary to the notion of the corporation as an economic vehicle acting within the limitations

possibility of democratic control over the corporate institution through remedies such as corporate charter revocation. In this section, I attempt to define neo-concessionism and outline the rationality for the plausibility and necessity of this theoretical model.

A neo-concessionist understanding of the corporation seeks to address the modern realities of the corporation within the corporate capitalist system while reinforcing the democratic involvement of society in the sanction and regulation of corporate activity. Neo-concessionism melds elements of concession and contractualism to explain these realities. Whereas concessionism argues that the corporation is an artificial entity created by statute, neo-concessionism incorporates elements of contractualism acknowledging the dual nature of the corporation as both a creature of statute and an institution controlled by shareholders. However, while shareholders are responsible for the creation and management of the corporation, the state retains the ability to determine whether the corporation is operating in the interests of society. In this way, neo-concessionism acknowledges the balance that exists in society between free enterprise and state control.

With regards to the second element of concessionist theory, neo-concessionism argues that the ability of the corporation to exist and carry on business is still dependent on the permission of the state. However, the nature of the 'grant' in this instance is distinguished in two ways from concessionism. First, while the grant was historically given to each individual corporation by the King, neo-concessionism places this prerogative in the hands of

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of the larger interests of society. For example, the placement of proprietary and contractual rights above those of the public interest in the contractualist model: Berns & Baron, *supra* note 78 at 19.

the people through modern corporate legislation. Society has sanctioned the corporation as the primary institutional structure for carrying out its economic objectives, however its continued existence is always dependent on the prevailing will of society as expressed by statute. Civil society through the state retains the ability to modify the laws governing corporations and in that way, determines the constitutional nature of the corporation. In other words, despite efforts by corporate lawyers over the years to develop a completely independent institutional structure, the corporation remains a creature of statute subject to the democratic will of society. The fact that the Supreme Court of Canada has rejected the notion of section 7 Charter rights applying to corporations lends support to this perception and the rejection of the corporation as an independent entity at law. Second, neo-concessionism departs from concession by modifying its understanding of the state. State sovereignty over the corporate form is no longer agreeable or sufficient to ensure that corporations remain accountable to civil society within a democratic capitalist state. As discussed in chapter four of this thesis, formal concessionist analysis which envisioned the nature of the monarchical system in England as encompassing the public and private interest as one in the form of the sovereign can no longer be sustained in the capitalist state.[106] A modern appreciation of the state does not see it as one homogenous entity, since "*it* does not exist" as such.[107] Rather, neo-concessionism acknowledges the complex nature of the

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[106] Hobbes' ideas emerged during the period where corporations were chartered with prescribed objects and powers. Accordingly, it is not surprising to find a very compatible relationship between concessionist theory and the idea of an absolute monarch with unquestioned authority to take action against any person or entity in the public interest. The fact that public and private are one in the body of the Monarch avoids any philosophical problem regarding the motivation of the state. In terms of revoking a charter, the monarch has complete discretion whether or not to revoke the charter and is assumed to take into account all interests, public and private, because all are intimately connected to the survival of the sovereign. See Kenneth Murray Knutilla, *State Theories* (Toronto: Garamond Press, 1987) at 20.

[107] Bowman, *supra* note 13 at 280.

modern state and the primacy of civil society in shaping the interests of the state. The real problem of capitalist state dynamics, which seeks to perpetuate economic stability and while resisting any actions perceived to threaten it, does present problems for the reintroduction of corporate charter revocation.[108] This issue is discussed in detail in chapter four of this thesis.

This modified theory of corporate/state relations is supported by three elements within corporate law: (1) the court's reluctance to discard concessionist and contractualist rhetoric, (2) corporate statutory requirements which locate the corporation in a specific place, and (3) the statutory origins and fictitious nature of the institution. The first of these has been discussed at length above. The continued resistance by Canadian courts to abandoning contractualist and concessionist rhetoric suggests a reluctance by the courts to completely remove notions of state sovereignty over the corporation and denies any attempt to fit the corporate structure into any one particular theory. While this uneasiness is buried beneath strong discourses about corporate personhood, it is in this space that one finds theoretical legitimization for the remedy of corporate charter revocation.

Second, evidence of the continued adherence to concessionist constructs is still evident in corporate laws that govern corporations in Canada. Corporate statutes require that individuals seeking to incorporate file and maintain a record (the remnants of historic charters) with the respective corporate registrar.[109] Provisions still exist in all corporate

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[108] Leo Panitch, "The Role and Nature of the Canadian State" in Leo Panitch (ed.), *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977); Snider, *supra* note 11.

[109] See e.g. *Canada Business Corporations Act,* R.S.C. 1985, c.C-44, ss.5 and 7; *Business Corporations Act,* S.A. 1981, c.B-15, ss.5 and 7. As will be discussed later in chapter 3, the continued existence of a record of

statues allowing the registrar of companies to strike a corporation from the register if it fails to comply with various administrative requirements within a prescribed period of time.[110] Finally, contractualism and entity theory continue to be confounded by the fact that the corporation as a juridical unit has its roots in the corporate statutes of nation-states. Despite comments of various corporate executives regarding the freedom of corporations to move as they see fit[111], corporations must register in a specific jurisdiction and are required to abide by the corporate laws of the incorporating state. As Paul Doremus points out in his recent book entitled *The Myth of the Global Corporation*, the perception that

> the global corporation [is] adrift from its national political moorings and roaming an increasingly borderless world market, is a myth. States charter MNCs and shape the operating environment in which they flourish. States retain the political authority to steer their activities.[112]

According to one very recent study, empirical data suggests that corporate expansionism is being constrained by a multitude of national factors, primarily national laws and policy.[113] The main reason for a lack of variance in corporate behaviour is "the domestic institutions and ideologies within which companies are most firmly embedded."[114] Evidence demonstrates "a logical chain that begins deep in the idiosyncratic national histories behind

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incorporation is also critical to meeting the formal requirement of the common law revocation remedy of *scire facias*.

[110] See e.g. *Canada Business Corporations Act,* R.S.C. 1985, c.C-44, s.212; *Business Corporations Act,* S.A. 1981, c.B-15, s.205.

[111] *Supra* note 4; see also www.freedomship.com.

[112] Paul N. Doremus et al., *The Myth of the Global Corporation* (Princeton, New Jersey: Princeton University Press, 1998) at 3.

[113] Mayo, "Ethical Problems Encountered by U.S. Businesses in International Marketing" (April 1991) *J. Small Bus. Mgmt.* 51. The study found that nine issues or dilemmas were cited recurrently by U.S. executives as barriers to the globalizing of their enterprises: bribery, government interference, customs clearance, transfer of funds, cultural/business differences, technology/copyright theft, pricing, immoral entertainment, and product use.

[114] Doremus, *supra* note 112 at 9.

durable domestic institutions and ideologies and extends to firm-level structures of internal governance and long-term financing."[115]

The third argument in favour of a neo-concessionist perspective is the fact that despite the granting of rights to corporations that traditionally belonged solely to individuals, corporations in reality remain fictitious creatures of statute. But for corporate laws that establish and legitimize the corporate form, it could not exist naturally in society. As a consequence of the South Sea Bubble fiasco[116], corporate and securities laws today make it illegal for individuals to carry on business as a *de facto* corporation.

Beyond doctrinal support for a new theoretical understanding of corporate/state relations, the increased concentration of corporate control and the corresponding decrease of democratic control over the institution reinforce the need for a new theory of the corporation. As discussed in chapter three, democratic involvement in the development of corporate law and policy has been virtually absent throughout Canadian history. Corporate law and policy has increasingly reflected individualist principles while abandoning utilitarian principles of a liberal society let alone more collective notions of social welfare. Consequently, corporate law has evolved to suit the interests of the dominant economic elite while failing to facilitate

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[115] *Ibid.* at 139.

[116] For an exhaustive account of the events surrounding the South Sea bubble incident see John Carswell, *The South Sea Bubble* (2nd ed.)(London: Cresset, 1993).

broader social and economic interests. This is evidenced in the growing economic disparity in the world with 20% of the global population owning 80% of world's wealth.[117]

Furthermore, strong mechanisms are required to ensure that the power wielded by institutions is used to benefit all society. This includes not only private interests in society, but the social and economic well-being of society as a whole. Recent efforts to increase the 'private' dimension of the corporation as reflected in entity theory avoids the distinct 'public' dimension of a corporation's influence and impact. Increased corporate concentration through mergers and acquisitions coupled with increasing deregulation necessitate that a place remains within our theoretical understanding of the corporation to allow for public oversight to ensure that corporations act for the benefit of all society. Presently, little if any consideration is given to the impacts of corporate power and concentration on the environment and society as resources are extracted with abandon and revenues are increasingly displaced away from local communities to foreign owners and investors.[118] The argument made by the corporate elite that increased corporate concentration and market freedom benefits the economy (and consequently shareholders and employees) does not negate, but rather enhances, concerns about the potential abuses associated with corporate power and demands that strong mechanisms are in place to ensure greater corporate accountability.

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[117] Jerry Mander, "Facing the Rising Tide" in Jerry Mander and Edward Goldsmith (eds.), *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) at 11.

The need for mechanisms to ensure corporate accountability is also supported by the observable erosion of democratic participation in decisions pertaining to corporate activity. Corporate laws have shifted from being regulatory to faciliatory. Regulations initially created to replace the regulatory dimension of corporate legislation are now being gradually eliminated as obstacles to business and investment. International trade agreements such as chapter 11 of the *North American Free Trade Agreement* are creating dispute resolution mechanisms that allow corporations to have decisions made by independent trade panels that affect environmental and labour policies of nation-states without the public being allowed to intervene or even observe the proceedings. Competition policy is limited to considering the impacts of corporate mergers on the market competition, completely ignoring the voices of those impacted by increasing corporate concentration such as labour, the environment, and the majority of the world's population that has no financial involvement in any corporation. The increasing focus on the market as the sole means of determining what is of benefit for society requires that processes be incorporated into the market's economic instrument – the corporation – to facilitate public involvement thereby ensuring that corporate capitalism serves society rather than the other way around.

It is based on the above arguments that this thesis argues for a new theoretical framework for explaining corporate/state relations. Clearly, concessionism is out of step with modern realities of the corporation and the state. On the other hand, contractualism fails to appreciate the continuing role of the state as the regulator of corporate activity. Entity theory

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[118] See e.g. the recent merger between Weyerhaeuser and MacMillan Bloedel discussed in Ken Drushka, "Into the hands of a foreign giant: Weyerhaeuser's takeover of MacBlo signals a radical transformation of B.C.'s

is an irrational construct and an unsubstantiated attempt by corporate lawyers to create a theoretical justification for increased corporate power. While enterprise theory attempts to address issues of corporate liability within the multinational corporation, its continued adherence to entity theory and its consequent failure to acknowledge the full role of the state in determining and enforcing liability ultimately renders it incapable of satisfactorily addressing the realities of corporate/state relations. In contrast, the neo-concessionist approach provides both an explanation of the nature of the corporation and its ongoing relationship with the state. No theory that does not consider both of these elements is able to truly represent the place of the modern corporation in society.

It is within the context of a neo-concessionist framework and the explicit presence of the state in relation to corporate activity that a justification is provided for corporate charter revocation. Corporate charter revocation is a remedial expression of the ongoing relationship between the corporation and the state based on notions of collective public interest and institutional accountability. However, theory in the absence of supporting jurisprudence has relatively little meaning. Therefore, armed with this new theoretical construct, chapter three of this thesis goes on to explore the doctrinal support for the continued existence of corporate charter revocation.

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forest industry" (July 12, 1999) 10(18) *BC Report* 40.

CHAPTER III: AWAKENING SLEEPING BEAUTY

The previous chapter tried to break down the prevailing theoretical structure of the corporation in order to create space for a wider discussion about the "*why*" of the corporate form.[119] Inevitably, dealing with corporate behaviour necessitates returning to the *how* and an exploration of the doctrinal aspects of corporate law. Challenging the doctrinal norms of corporate law is even more difficult given the strict adherence to black-letter law and its attendant myths:

> One of the burdening problems of modern company law analysis is a formalist adherence to the rule book... The textbook tradition remains as ever a major part of the consciousness of legal scholars... The doctrine which emerges mirrors the reality of the cases but not the reality of law in society. The consciousness of the textbook writer is thus based upon a closed model of rationality and the textbook itself becomes an authoritative formalistic structure, with importance given to form rather than to content.[120]

Positing alternatives to the accepted and sanctioned paradigms of corporate form and regulation is to run contrary to years of legal thinking based on unquestioned premises. The corporation seen as an instrument allowing for the division of management and labour requires that protectionist elements be put in place to shield management from liability and secure the generation of profits.[121] No other configuration of the corporation is permitted lest it upset the interests that it was created to serve. This chapter represents one further attempt to question the unquestionable through the reintroduction of two seemingly forgotten

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[119] Stanley, *supra* note 1 at 98.

[120] *Ibid.* at 98, 102.

[121] It is not the intention of this thesis to explore the economic theories underlying the corporation. For a discussion of that aspect of the corporation see e.g Stokes, *supra* note 44; Bowman, *supra* note 13; Herman, *supra* note 11 at 257; Hoverkamp, *supra* note 89; W. W. Bratton. Jr., "The New Economic Theory of the Firm" (1989) 41 *Stan. L.R* 1471. See also Stanley, *supra* note 1 for an enlightening Marxist analysis of the corporation.

prerogative remedies that appreciate the internal structure of the corporation and its inherent connection to the state.

The primary deviation from modern corporate thinking is to view the corporation as a public institution operating in the public interest. As Samuels suggests, the modern view of the corporation as a 'private' institution in corporate law has stifled any discussion of the complex 'public/private' distinction inherent in any institutional structure:

> Legal rights are obviously public in character (they are what they are at least in part because of government action or inaction) but they are also private in character in that they pertain to nominally private parties and they are arguably the result of a matrix of private pressures on government to resolve conflicts of interest in one way or another. In other words, rights are in some sense both private and public and what is instructive is the selective way in which they are perceived and acted upon as one or the other.[122]

A public notion of enterprise has been reinforced throughout history by the presence of legal mechanisms allowing the Sovereign, state and common citizens to initiate proceedings to revoke the charter of a corporation where it has acted outside the scope of its charter, misused or abused the privileges of its charter, or acted contrary to the public interest.[123] Control over corporate life first existed through the prerogative remedy of *quo warranto* by which the Crown retained its right to revoke a corporation's charter where the corporation acted *ultra vires* its charter. This constitutional remedy was later complimented by the common law remedy of *scire facias* that allowed an individual with the *fiat* of the Attorney General to bring an action for the revocation of a corporation's charter on the grounds that the corporation had misused or abused its charter. In the twentieth century, many

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[122] W. J. Samuels, "The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language" 114 at 120 in Warren J. Samuels & Arthur S. Miller, *Corporations and Society* (New York: Greenwood Press, 1987).

[123] See e.g. L.C.B. Gower, *Principles of Modern Company Law* (4th ed.) (London: Stevens, 1979) at 162.

jurisdictions have enacted (and in some instances, later repealed) charter revocation provisions in their corporate legislation. It is the objective of this chapter to provide doctrinal support for a renewed view of the corporation as a public institution and to explore the various forms of the revocation remedy used to ensure corporate compliance with the public interest.

The origins of the corporation and charter revocation lie in the murky history of Anglo-Canadian constitutional and administrative law. The corporation was originally conceived as a constitutional entity created by grant of the Sovereign to operate in the public domain.[124] There was initially no distinction between private and public corporations; corporations were solely "public" institutions. Consequently, we see the first corporations in Canada (and indeed other colonies) were municipalities or public utilities.[125] All corporations operated within constitutional parameters, which manifested in the form of administrative constraints placed on the corporation through the objects of its charter. The Sovereign's prerogative powers provided the inherent right to revoke the corporation's charter at the will of the Sovereign.[126]

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[124] Bowman, *supra* note 13 at 39.

[125] See e.g. *Dundas and Waterloo Turnpike Company* (1829), 10 Geo. IV, c.14 (U.C.); *Halifax Bridge Co.* (1796), Geor. III, c.7 (N.S.); *Yarmouth Lock and Canal Company* (1811), 51 Geo. III, c.25 (N.S.); *St. John Mill and Canal Co.* (1834), 4 Wm. IV, c.34 (N.B.).

[126] Harry Street & Rodney Brazier (eds.), *Constitutional and Administrative Law de Smith* (5th ed.) (Middlesex, England: Penguin Books, 1985) at 139-140: "Prerogatives are *inherent* in so far as they are derived from customary common law. They are *legal* in so far as they are recognized and enforced by courts; and, ... their ambit is determinable by the courts." See further discussion of the prerogative, *infra*.

Corporations were originally viewed as a "body politic" akin to all other public institutions and were accountable to the Crown in the same fashion to act for the benefit of the public interest.[127] One early English decision even speaks of a trust relationship existing between the sovereign and corporation, although admittedly in the context of a municipal office. In *R. v. City of London*[128], mandamus was sought by an alderman who allegedly did not take the oaths of office properly according to the Statute 1 *Will. & Mar.* thus voiding his place. In denying the remedy on procedural grounds (framing of the writ), the court commented on *Quo Warranto*:

> [the corporation] is a body politick, to which a trust is annexed, and male administration of it is cause of forfeiture, and it may be dissolved; and for this he cited the Statute of Quo Warranto, where if the corporation does not appear upon summons, the franchise shall be seised into the King's hand *nomine districtionis;* and if it does not come during the eyre, it was lost and forfeited for ever, 2 Inst. 282.

And again in *City of London v. Vanacker*:

> ...if a franchise be granted to a corporation, it is under a trust, that the corporation shall manage it well, which cannot be done by a byelaw.[129]

Accordingly, it was Holt C.J.'s view in *R. v. Mayor and Corporation of London*[130] "...that a corporation may be forfeited if the trust is broken and the end of the institution be perverted." American authors viewed the situation similarly:

> The principle of forfeiture is that the franchise is a trust; and all the terms of the charter are conditions of the trust; and if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. And the corporate powers must be construed strictly, and must be exercised in the manner and in the forms and by the agents prescribed in the charter.[131]

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[127] See chapter 4 for a detailed consideration of the term "public interest" and the influence of corporate interests on it.

[128] (1691) Skin. 310, 90 ER. 139.

[129] (1691) 12 Mod. 270 at 271, 1 Ld. Raym. 496.

[130] (1691), 3 Shower Rep. 280. Carr argues for the *ultra vires* doctrine and comments that "This is clear enough; but in the seventeenth century, when action against corporations was political more often than legal and when the equitable doctrine of restraining *ultra vires* actions by injunction had not yet been developed, Holt could see no other remedy by 'forfeiting the corporation.'"

[131] Rawle, *supra* note 42 at 2789 citing Kent 298, 299; 1 Bla. Com. 485; *People v. Trustees of College,* 5 Wend. (N.Y.) 211; *Chesapeake & O. Canal Co. v. R. Co.,* 4 Gill & J. (Md.) 121.

As discussed in chapter two, concessionism provided the theoretical framework for this initial conceptualization of the corporation. Its two key premises are (1) the notion that the corporation is an artificial or fictional entity existing "only in the contemplation of law"; and (2) that the corporation is "an emanation of the state, created by revocable grant."[132] The later element gives to the corporation a public character prescribing to it only "core" legal rights necessary to carry on business that were deemed compatible with the public interest: the right to sue and be sued and to conduct activities prescribed by their charters. Corporations were subject to full liability, limited by their objects and purposes, existed for a prescribed period, had fixed capital, and were prohibited from merging or consolidating assets.

The early 1800s saw a shift of the corporation to the private domain with the vesting of property rights in the corporate form as a "core" right of the corporation, and the consequential enactment of statutory frameworks and rights of action to protect these private interests. Yet, the public notion of the corporation continued until the early half of the twentieth century through the means of incorporation by Letters Patent.[133] The Crown delegated the administration of corporations to an agency of the Crown through the implementation of the Letters Patent system. As such, it continued to oversee the administration of corporations. Letters patent required the corporation to state its objects and the Crown retained the ability to quash the issuance of Letters patent in the case of

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[132] *Dartmouth College v. Woodward,* 17 U.S. 518 (1819) at 636 (per Marshall Ch. J.).

[133] Prior to the introduction of the Letters Patent system, corporations were incorporated by sovereign grant or special act of Parliament, however this became too burdensome as incorporation became a more popular vehicle in the mid-nineteenth century.

administrative error or misuse or abuse of the corporation's charter.[134] The Sovereign's powers survived in unwritten form through the common law prerogative remedies of *scire facias* and *quo warranto*.[135]

Administrative discretion became undesirable following World War II and society moved towards increased corporate autonomy through the codification of public laws. As Iacobucci points out in his survey of corporate law reform in Canada, "one of the underlying principles in recent legislative reform [was] to limit ministerial or administrative discretion in the regulation of companies."[136] Until the later half of this century, Canadian companies legislation followed two approaches: the memorandum of association system in which incorporation is a matter of right[137], and the letters patent system in which incorporation is a privilege conferred through the exercise of ministerial discretion.[138] Corporate autonomy was manifested through the uniform introduction of a registration system of incorporation in all jurisdictions allowing for incorporation as of right, and the elimination of limited corporate objects and purposes that were a requirement under the Letters Patent system of incorporation.[139] As discussed later in the paper, one of the most significant forces in corporate legislation has been the movement based on entity theory principles towards

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[134] See *supra* note 109.

[135] See discussion, *infra*.

[136] Iacobucci , *supra* note 52 at 18.

[137] This system was based on the English model and was initially followed in Alberta, British Columbia, Newfoundland, Nova Scotia and Saskatchewan with British Columbia being the last to abandon it in 1973.

[138] This system was based on the American model and was initially followed in Manitoba, New Brunswick, Prince Edward Island, Quebec, Ontario and Canada. The *Canada Corporations Act,* R.S.C. 1970, c.C-32 is an example of this system, although it only applies to not-for-profit corporations today.

methods of incorporation that view incorporation as a right and corporations as analogous to the person.

This chapter asks the question to what extent does the remedy of corporate charter revocation remain alive in Canadian law. In order to answer this question, an exhaustive review of legal literature, jurisprudence, legislative debates, government hearings, and files from Canadian cases considering the remedy is undertaken. The first part of the chapter explores the nature of the prerogative, which is essential for a proper understanding of the prerogative remedies of *quo warranto* and *scire facias,* and reveals how these remedies are understood as part of the unwritten constitution of Canada. The second section reviews the legal history of *quo warranto, scire facias* and statutory charter revocation provisions in some detail in order to establish the continued existence of the remedy. Applying the information on the prerogative outlined in the first section, the final part of the chapter considers whether the prerogative remedies of *scire facias* and *quo warranto* have survived. From this analysis, this chapter seeks to argue for the survival, constitutional authority and relevance of corporate charter revocation in the context of modern corporate law as a means of holding corporations accountable to the public interest.

In a broader sense, this chapter explores the 'legal moorings' of corporations in corporate law and argues that as long as corporations remain creatures of statute, corporate law and legal remedies such as corporate charter revocation are the vehicle for retaining national

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[139] The registration system permits incorporation as of right simply by complying with necessary filing requirements. See Iacobucci, *supra* note 52.

sovereignty over corporations.[140] The corporation is constrained by constitutional and administrative requirements and subject to the interests of the state as representative of the public. Despite the modern statutory differentiation between the "public" and "private" corporation, both common law and statute law continue to subject corporations to the supreme authority of the state and reflect the tension between the non-entity and entity conceptions of the corporation. Through a study of the legal origins and history of corporate charter revocation and corporate law, corporate power changes from being some unidentifiable impenetrable force to simply a series of deliberate legal constructs created by corporate interests in the quest for economic supremacy.

THE NATURE OF THE ROYAL PREROGATIVE

A detailed consideration of the prerogative remedies of *quo warranto* and *scire facias* first requires consideration of the nature of the prerogative itself. The prerogative dates back to the days before Parliament ever existed. According to Dicey, the royal prerogative is "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown".[141] Jones and De Villars allude generally to these prerogative remedies procedurally facilitating notions of an unwritten constitution:

> Where do the ordinary courts get their authority to review the lawfulness of governmental action? Nothing in the written constitutions of either the United Kingdom or Canada specifically gives the courts this important power. On the contrary, the superior courts have from time immemorial simply asserted their "inherent" jurisdiction to supervise the legality of actions taken by other officials,

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[140] Doremus, *supra* note 112.

[141] Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed.) (1959) at 424. De Smith, *supra* note 126 at 140 argues that this definition is incomplete because it refers only to powers, but it is sufficient for our purposes. For a comprehensive discussion of the scope of the prerogative see George Winterton, *Parliament, The Executive and The Governor-General* (Melbourne: Melbourne University Press, 1983) at 111-112 [hereinafter Winterton I].

> tribunals or delegates, which supervision was facilitated procedurally by the development of the prerogative remedies.[142]

Prerogative remedies can be and have been abrogated or diminished by statute, but only in an express manner.[143]

With the enactment and substantial amendment of corporate laws over the past century-and-a-half, the question also arises whether the prerogative is extinguishable. It appears to be an indisputable principle at common law that the prerogative can be extinguished by statute.[144] However, one of the seminal decisions in the area of charter revocation from the House of Lords includes strong dicta to the contrary. According to Platt B. in *Eastern Archipelago* affirming the decision of the court, the Crown may

> ...not, in derogation of the right of the public, so limit and fetter the exercise of the prerogative, which is vested in the Crown for the public good. The Crown cannot dispense with anything in which the subject has an interest; *Thomas v. Waters* (Hardr. 443, 448); nor make a grant in violation of the common law of the land; 2 Roll. Abr. 164, Prerogative le Roy.[145]

In that decision, Pollock C.B. concurred with Platt B. in stating

> The public has so much interest in the correct conduct of those who enjoy any chartered rights, that it may well be contended that the power of the subject to question whether or not the charter be legal, or whether the charter has been forfeited by a breach of the condition, cannot be taken away even by the Crown.[146]

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[142] David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1985) at 9.

[143] Street & Brazier, *supra* note 126 at 144-145. Winterton I, *supra* note 141 at 112-115 cites a list of authorities asserting that the prerogative can also be abolished by necessary implication and is only expressly displaced in rare instances. Typically, "it will be impliedly ousted by legislation, dealing with the same subject as the prerogative, which evinces an intention to cover the field", although he concedes that the standard to oust the prerogative will depend on its nature. See e.g. *Att.-Gen v. De Keysers Royal Hotel Ltd.,* [1920] A.C. 508 at 575-576 (H.L).

[144] *Supra* note 126 at 144.

[145] *Eastern Archipelago Company v. The Queen,* (1853) 2 El. & Bl. 858 at 998 [hereinafter *Eastern Archipelago*]..

[146] *Ibid.* at 1006.

These judicial comments follow the historic view that the prerogative writs of administrative law existed to oversee the routine operations of the constitution and suggests that these features of the common law could not be abolished or displaced by statute. This contrasts with Winterton's general comments regarding the prerogative in the Australian context that "when a prerogative has been altered or abolished by legislation the repeal of that legislation will not revive it."[147] However, Winterton also points out that prerogatives are rarely abolished, but rather tend to be superceded by legislation. Whether a prerogative superceded by legislation is revived upon repeal of the legislation remains an open question.[148] It is likely in this gray area that the comments in *Eastern Archipelago* and Winterton's commentary are able to coexist.

There is no generally accepted principle of law that a prerogative may be lost merely by disuse.[149] De Smith citing a Scottish appeal to the House of Lords agrees that prerogatives do not become extinct merely by disuse, but irrelevance may render a prerogative obsolete.[150] In that instance, Lord Simon of Glaisdale stated

> a rule of the English common law, once clearly established, does not become extinct merely by disuse'; it may 'go into a cataleptic trance', but, like Sleeping Beauty, it can be revived 'in propitious circumstances'. It cannot, however, revive if it is 'grossly anomalous and anachronistic'.[151]

However, Winterton's comments suggest that the matter remains open: "where there is a dearth of judicial authority or modern governmental practice, determination of the existence

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[147] Winterton I, *supra* note 141 at 117, fn 66.

[148] Street & Brazier, *supra* note 126 at 144 citing Lord Denning M.R. and Russell L.J. in *Sabally and N'Jie v. Att. Gen.* [1965] 1 Q.B. 273. See also Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) at 164-166, 169-172, and 190-197.

[149] Street & Brazier, *ibid.* at 141 citing F.W. Maitland, *Constitutional History of England* (1908) at 418.

[150] *McKendrick v. Sinclair* (1972) S.L.T. 110 at 116-117 (H.L.) cited in Street & Brazier, *ibid.* at 143.

[151] *Ibid.*

and scope of an asserted prerogative can be very difficult. Complex questions are especially apt to arise when the Crown alleges that a disused prerogative has survived..."[152]

The Crown cannot create or enlarge the scope of a prerogative. In the context of applying prerogatives to novel situations, Winterton notes that while new prerogatives cannot be created or enlarged: "the prerogative, being part of the common law, shares its capacity to evolve to meet new situations, and the adaptability of the prerogative has often been noted."[153] Yet, Winterton is cautionary in his approach arguing that "the courts should be very careful in extending or "adapting" existing prerogatives to new situations."[154]

It is evident from the above that the status of a prerogative that has fallen into disuse suffers from a hopeless state of ambiguity and confusion.[155] However, if we follow the prevailing view and what is clearly the accepted modern understanding of the relationship between common law and statutory law, there is little if any debate that statutory abrogation of the common law must be explicit, and according to at least one Justice, stated in the negative.[156] Accordingly, in light of the absence of any negative statement abrogating either prerogative

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[152] Winterton I, *supra* note 141 at 115.

[153] George Winterton, "The Prerogative in Novel Situations" (July 1983) 99 *L.Q.R.* 407 at 408 [hereinafter Winterton II] citing *Jolley v. Mainka* (1933) 49 C.L.R. 242 at 281-282 (Evatt J.); *Report of the Committee of Privy Councillors appointed to inquire into the interception of communications* (1957), Cmnd. 283; H.V. Evatt, *Certain Aspects of the Royal Prerogative* (unpublished LL.D. thesis, University of Sydney, 1924) at 16-17: "It has been argued that prerogative powers "are 'category' powers, with detailed content changing as the essential needs of government change."

[154] Winterton II, *ibid.* at 408. For a fuller discussion of the prerogative in novel situations see Winterton I, *supra* note 141 at 115-116.

[155] See Winterton I, *ibid.* at 117.

remedy, it is not surprising to find upon a review of the case law on point a reluctance on the part of the courts when faced with the issue to hold that the prerogative power of the Crown to revoke the charter of a corporation has been abrogated by statute.[157] This silence on the part of the courts and the legislature argues strongly for the survival of the prerogative to revoke a corporation's charter. I shall return to consider the issues of extinguishment, disuse, irrelevance and revival at the end of this chapter.

The reluctance to abandon the prerogative remedy of charter revocation also supports the continued adherence to concessionist principles. Concessionist theory is premised on the understanding that the granting of corporate existence is an inherent prerogative of the Crown acting in the public interest.[158] As discussed in the following section of this chapter, the survival of the prerogative remedies of *quo warranto* and *scire facias* and the Crown's ability to revoke a charter pursuant to statute in some jurisdictions suggests that concessionism has not been completely discarded, but rather remains a legitimate and recognized part of the theoretical framework of the modern corporation.

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[156] Cresswell J. in *Eastern Archipelago, supra* note 145 at 999 quoting 2 Inst. 200: "It is a maxim in the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law."

[157] *Attorney General of Canada v. Hellenic Colonization Association,* [1946] 3 D.L.R. 840 (B.C.S.C.) (Farris C.J.) [hereinafter *Hellenic*] where the court held that the common law with respect to charter revocation has not been extinguished by disuse or abrogated by statute.

[158] See discussion of concessionism, *supra*.

LAYING THE AXE TO THE ROOT OF THE TREE: THE CONSTITUTIONAL REMEDIES OF QUO WARRANTO AND SCIRE FACIAS

i. Quo Warranto

As with virtually all prerogative powers[159], there is much confusion, ambiguity, and differentiation in the historic literature regarding *quo warranto*.[160] The prerogative remedy of *quo warranto* requires the respondent to demonstrate "by what authority" it has the right to occupy a public office or carry out a specific act.[161] In the context of corporations, this royal prerogative had a much broader application historically when corporations were undisputedly viewed as public franchises. Blackstone defined it as:

> ...a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or mis-user [sic] or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse.[162]

Blackstone's definition identifies two aspects of the prerogative which are of special interest. First, the prerogative was an inherent right belonging solely to the Crown, and second, the burden rested on the corporate defendant to establish that its actions were authorized. With respect to the first element, the authority to carry out any activity or exercise any franchise was originally a privilege limited to the extent of the sovereign's grant which the

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[159] For a full discussion of the nature, definition and scope of the prerogative, see Winterton I, *supra* note 141 at 111-112.

[160] Wegenast, *supra* note 43 at 89; Rawle, *supra* note 42; A. S. Oppe, *Wharton's Law Lexicon* (London: Stevens and Sons, 1938); James L. High, *A Treatise on Extraordinary Legal Remedies embracing Mandamus, Quo Warranto and Prohibition* (Chicago: Callaghan and Company, 1874) at 470; James Grant, *The Law of Corporations* (London: Butterworths, 1850) at 296; Edward Jenks, "The Prerogative Writs in English Law" (1923) 6 *Yale L.J.* 523.

[161] David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law* (3rd ed.) (Scarborough, Ont.: Carswell, 1999) at 573.

King could challenge through the prerogative: "...the King, by virtue of his prerogative, sent commissions over the kingdom to inquire into the right to all franchises, *quo jure quove nomine illi retinent,* etc.; and, as they were grants from the crown if those in possession of them could not show a charter, the franchises were seized into the king's hands without any judicial proceeding."[163] It was originally invented "solely as a royal weapon... to try the validity of the feudal franchises."[164]. Baker eloquently summarizes the history of the prerogative:

> Extensive use of this procedure was made by Edward I in what was intended to be a comprehensive survey of inferior jurisdictions... The statute also provided that, to save costs, writs of *quo warranto* should be returnable before justices of eyre. This had the unintended consequence that *quo warranto* disappeared with the eyre system itself. There was a revival under Henry VIII, and three or four special eyres were commissioned for the purpose. At the same time a less cumbrous procedure was devised, in the form of an information laid in the King's Bench by the attorney-general. [The prerogative was converted by the *Statute of Gloucester* of 1278[165] into the statutory writ of *Quo Warranto.*[166]] This 'information in the nature of a *quo warranto*' thereafter completely supplanted the procedure by writ. The Tudor revival was once interpreted as part of a government campaign to suppress private authority, but it now seems that most of the informations were brought on the relation of private suitors; and by the seventeenth century it was a recognised procedure for subjects to promote such informations in the name of the master of the Crown Office. The last major political use of *quo warranto* occurred when Charles II sought to remodel municipal corporations by forcing new charters upon them. The City of London fought this reform to the bitter end, and was called upon by information to show 'by what warrant' it claimed its privileges; in 1683 the King's Bench delivered the shattering judgment against the city that its liberty of being a corporation be seized into the king's hands... After this period, the steady suppression of private and irregular jurisdictions by act of parliament reduced the need for *quo warranto*; but its scope was nevertheless extended to cover all usurpations of public functions of importance, even if they were not judicial.[167]

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[162] W. Blackstone, *Commentaries on the Laws of England* (Philadelphia: Rees Welsh & Co., 1898) at para 262, fn 16 citing *Grier v. Schackleford,* 2 Constn'l Rep. (Treadway) 642 at 649.

[163] Rawle, *supra* note 42 at 2787.

[164] Jenks, *supra* note 160 at 527. "Franchise" in the context of *quo warranto* is defined as "A special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right.": *Black's Law Dictionary* (5th ed. 1979) 592. Up until the 19th century, there was no distinction between the public and private corporation, hence "franchise" included both.

[165] 6 Edw. I.

[166] One early authority argues placed a limitation upon the royal prerogative, although no indication of the extent of this limitation is provided. See Rawle, *supra* note 42 at 2787.

[167] J.H. Baker, *An Introduction to English Legal History* (3rd ed.)(London: Butterworths, 1990) at 167.

Halsbury and Baker both make unsupported assertions that informations in the nature of *quo warranto* were abolished in England, substituted with a right to sue for injunctive relief in any case where a person acts in an office in which they are not entitled to act.[168] However, this is not so in Canada where the remedy continues to be invoked to challenge the authority of a public office and the actions of public officials.[169] More likely, as Jones and de Villars suggest, the remedy is rarely utilized because courts generally exercise their discretion to refuse the remedy where alternative procedures are available.[170] It is my submission, that, the status of the prerogative remedy in Canada is by no means clear in light of more recent judicial commentary.

ii. Scire Facias

Aside from one early treatise, the history of the common law remedy of *scire facias* is equally nuanced and scantly recorded.[171] *Scire facias* ("that you cause to know") originated as a judicial writ, founded upon some record[172], seeking to have the charter of a company

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[168] *Halsbury's Laws of England* (3rd ed.) (vol. 9) (London: Butterworths & Co., 1954) at 99n; Baker, *ibid.* at 167.

[169] See e.g. *Bigstone v. Big Eagle* (1992), 52 F.T.R. 109, [1993] 1 C.N.L.R. 25; *Sargent v. McPhee* (1967), 60 W.W.R. 604 (B.C.C.A.), challenging the appointment of a member of a public inquiry; *cf. Shaw v. Trainor,* 66 D.L.R. (2d) 605 (P.E.I. C.A.); *R. v. Gee* (1965), 51 W.W.R. 705 (Alta. Dist. Ct.) but *cf. R. v. Clark,* [1943] O.R. 501, [1943] 3 D.L.R. 684 (Ont. C.A.), leave to appeal refused [1944] S.C.R. 69, [1944] 1 D.L.R. 495 (S.C.C.); *R. v. Steinkopf* (1964), 49 W.W.R. 759, 47 D.L.R. (2d) 105 (Man. Q.B.), set aside (1964), 50 W.W.R. 643, 48 D.L.R. (2d) 671 (Man. C.A.). See also Oppe, *supra* note 160.

[170] Jones and de Villars, *supra* note 161 at 573 citing examples under Part 5 of the *Local Authorities Election Act,* S.A. 1983, c. L-27.5; *R. v. Stevens* (1969), 2 N.S.R. 406, 3 D.L.R. (3d) 668 (N.S.S.C.).

[171] Foster, *supra* note 43; J.M. Roland, "Cancelling Charters of Canadian Companies: Division of Prerogative Powers" (1963) 21 *U.T. Fac. L.R.* 75; R.E. Kingsford, *Commentaries on the Law of Ontario being Blackstone's Commentaries on the Laws of England adapted to the Province of Ontario* (vol. 1) (Toronto: Carswell, 1896); D. M. Walker, The Oxford Companion to Law (Oxford: Clarendon Press, 1980); J. R. Nolan, Black's Law Dictionary (St. Paul, Minn.: West Publishing Co., 1990); Rawle, *supra* note 42; Grant, *supra* note 160 ; Oppe, *supra* note 160.

[172] Rawle, *ibid.* at 3015. *Scire facias* when founded on non-judicial records (i.e. letters patent and corporate charters) is the commencement and foundation of an original action and its purpose is always to repeal or forfeit the record. "The jurisdiction of the Courts in such cases [i.e. *scire facias*] at common law is strictly confined to

repealed or revoked for its misuse or abuse.[173] As with *quo warranto,* the burden is on the defendant to show cause why they should have advantage of such record or why the record should not be annulled or vacated. It has broad application in a variety of contexts[174]. In the specific context of charter revocation, it includes a public remedy for repealing letters patent in which instances it was treated as an original proceeding[175]:

> The action of *scire facias* to repeal letters patent is a proceeding of the Crown for the benefit of the public, adopted and authorised upon information that the letters patent are void and of no force or effect in law, for some such reason as that the conditions upon which the grant was made were not performed, or that the grant was improperly made; or, in effect, that a monopoly, supposed to have been granted legally has in fact been granted illegally, and to the prejudice of the public or of Her Majesty's subjects.[176]

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corporations created by matter of record.": *CIBC v. Cudworth Rural Telephone Co.,* [1923] 4 D.L.R. 16 at 26 (S.C.C.).

[173] See *City of London v. Vanacker, supra* note 124 at 1233 where habeus corpus was sought after a sheriff had refused to be appointed in the City of London: "For all franchises which are granted are upon condition that they should be duly executed, according to the charter that settles the constitution. And that being a condition annexed to the grant, the citizens cannot make an alteration; but if they neglect to perform the terms of the patent, it may be repealed by scire facias."

[174] The doctrine of scire facias was initially employed in many circumstances:

(a) a process to revive a judgment after the lapse of a certain time, or on a change of parties, or otherwise to have execution of the judgment, in which case it was a continuation of the original action;

(b) a judicial writ directing a debtor to appear and show cause why a dormant judgment against him should not be revived;

(c) a mode of proceeding against special bail on their recognizance;

(d) a legal, as opposed to equitable, form of judicial foreclosure. After mortgagor default, the mortgagee obtains a writ of *Scire facias* which is an order to show cause why the mortgaged property should not be sold to satisfy the mortgage debt. If mortgagee prevails, the court will issue a writ of *levari facias* directing an execution sale of the mortgaged real estate (*scire facias sur mortgage*);

(e) a process for judgment creditors to obtain execution against shareholders; and

(f) a means of repealing letters patent in which case it was an original proceeding.

(g) In the sixth context which is the area of interest in this instance, there are two scenarios where letters patent may be revoked:

(h) with respect to invention/patents, revocation of a patent on breach of the condition to enroll a specification (*The Queen v. Neilson*); and

(i) revoking corporate letters patent.

[175] The name is used to designate both the writ and the whole proceeding: *City of St. Louis v. Miller,* 235 Mo. App. 987, 145 S.W. 2d 504, 505.

[176] *R. v. Prosser* (1848), 11 Beav. 306 at 313.

As Talfourd J. articulated, proceedings under *scire facias* may be taken (1) if the charter has been obtained by fraud or misrepresentation[177]; (2) if the Crown has granted a charter under a mistake as to the facts, or under a misapprehension as to the construction or effect of the charter[178]; (3) if the Crown has exceeded its powers[179]; or (4) if the corporation has done something which is prohibited or is not authorised by its charter[180].

As a judicial writ it was viewed as being part of the inherent jurisdiction of the court. Many early decisions speak of it as a constitutional remedy[181], and a prerogative writ[182], suggesting that it, along with other prerogative writs like *quo warranto*, formed part of the original common law[183] which made up part of the unwritten constitution of Canada.[184] The inherent nature of the remedy is also suggested in one court's statement that to every Crown grant

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[177] *R. v. Boucher* (1842), 3 Q.B. 641; *Banque d'Hochelaga v. Murray* (1890), 15 App. Cas. 414.

[178] Grant, *supra* note 160 at 20-21.

[179] *Eastern Archipelago*, *supra* note 145.

[180] *Jenkin v. Pharmaceutical Society of Great Britain* (1921), 1 Ch. 392, 90 L.J. Ch. 47; *R. v. Pasmore* (1789), 3 Term Rep. 199 (per Ashhurst J.). See also *Bonanza Creek Gold Mining Co. v. The King* [1916] 26 D.L.R. 273 at 284.

[181] See Talfourd J.'s comments in *Eastern Archipelago, supra* note 145, fn 94.

[182] *Eastern Archipelago, ibid.* at 886, 914; *Portal v. Emmens* (1876), 1 C.P.D. 644 (C.A.). Halsbury states that "A subject whose rights are affected by a franchise or charter granted to a corporation may, as of right, procure the cancellation or forfeiture of the charter by *scire facias*, for the prerogative of the Crown is the privilege of, and may be used by, the subject on the fiat of the Attorney-General." See also *R. v. Hughes* (1865) 1 L.R. 81 at 87 (P.C. on appeal from the Supreme Court of the Province of South Australia): "The writ of *scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a Record."

[183] Winterton I, *supra* note 141 at 112. See e.g. *Att.-Gen. v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 at 567 (H.L.); *In re a Petition of Right,* [1915] 3 K.B. 649 at 659 (C.A.).

[184] Dale Gibson, "Monitoring Arbitrary Government Authority: *Charter* Scrutiny of Legislative, Executive, and Judicial Privilege" (1998) 61(2) *Sask. L.R.* 297 at 305 hints at this notion of the executive prerogatives constituting part of the nation's unwritten constitution.

there is annexed by the common law an *implied condition* that it may be repealed by the Crown by way of *scire facias*.[185]

Along with its murky origins, its status and demise are also open to considerable speculation. There is dispute over the extent to which the remedy has been abolished in England. Jones and de Villars contend that *scire facias* is "probably now obsolete".[186] Halsbury opines that *scire facias* to repeal letters patent was abolished in England in 1947.[187] However, Halsbury's more comprehensive analysis of the remedy's history states that while *scire facias* was abolished in other respects, proceedings to revoke a charter had to be instituted on the Crown side of the Queen's Bench Division[188] which were left intact by the *Crown Proceedings Act, 1947.*[189] This is supported by the earlier statements of Talfourd J. in the 7-1 decision in *Eastern Archipelago*:

> ...it is sufficient for the argument to contend that a new restriction on the ancient remedy by scire facias, beyond that implied in the necessity for the Attorney General's fiat, cannot be implied from doubtful words, but should, at least, be clearly and unequivocally expressed.[190]

In contrast to the questionable status of the remedy in England and its abolition in the United States, a comprehensive review of statutory and common law in Canada reveals that the remedy has been affirmed rather than abolished[191], except in the provinces of Ontario,

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[185] Halsbury, *supra* note 168 at 99 citing *Eastern Archipelago v. R., supra* note 145 at 869.

[186] *Supra* note 142 at 358ff. See discussion *infra*.

[187] Oppe, *supra* note 160 at 904; Walker, *supra* note 171 at 1107.

[188] *Halsbury's Laws of England* (3rd ed.) vol.11 at 153-154.

[189] 10 & 11 Geo. 6 c.44, s.11. *Ibid.* at 153-154. The issuing of a writ of *quo warranto* is not a proceeding on the equity side of the court, but is a common-law proceeding: *Fulgham v. Johnson,* 40 Ga. 164, 166 (1869).

[190] *Supra* note 145 at 995.

[191] The *Crown Liability and Proceedings Act,* R.S.C. 1985, c.C-50, does not interfere with or even refer to the prerogative. It does explicitly refer to *quo warranto,* although only to affirm its existence (s.20.4(2)).

Quebec and British Columbia where it has arguably been superceded by statutory provision.[192] The Ontario court in 1904 expressly refrained from deciding whether the *Ontario Companies Act,* R.S.O. 1897, c.191, waived the Crown's prerogative right to grant and revoke letters patent.[193] *The Attorney General of Canada v. Hellenic Colonization Association* [hereinafter *Hellenic*][194], the most recent case in which a charter was revoked (reviewed in detail *infra*), indicates that the common law remedies were not abolished as of 1947. In 1955, the Ontario Court of Appeal expressly declined to comment on whether the power to cancel letters patent of incorporation was statutory only, or whether the prerogative right still existed.[195] The most recent case to refer to the issue of charter revocation comes from the Ontario Court of Appeal.[196] In that decision the court referred favourably to the

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[192] See *infra* for an account of the remedy in Ontario and British Columbia. With respect to Quebec, "Ces dispositions, reproduites de l'ancien code de procédure, avec quelques amendements de minime importance également reproduits de nos statuts antérieurs au premier code, ne laissent pas de doute que nous n'avons en ce pays aucun vestige de l'ancien bref de Scire Facias.": *La Compagnie Generale des Boissons Canadiennes c. Le Procureur General de la Province de Quebec* (1906) Q.R. 15 K.B. 536 at 545-546 (per Bossé J.). Reference to "pays" must certainly refer only to Lower Canada or what is today known as Quebec given the date of the decision and the historical differences in the legal systems of French and English Canada.

[193] *Attorney-General (Ontario) v. Toronto Junction Recreation Club* (1904) 8 O.L.R. 440 at 441. In that case, the defendants were denied an interlocutory injunction restraining the plaintiff from recommending to the Lieutenant-Governor in Council that an Order-in-Council be passed canceling the defendant's charter on the grounds that the defendant was conducting an illegal business (gambling) contrary to the *Criminal Code, 1892.* The court held that the defendants were not in the position to express "some sort of pious opinion as to the mode in which the discretion of the Attorney-General, and the Attorney-General alone, should be exercised, in a case in which he thinks it his duty to intervene..." Dugald Donagy, counsel for the Federal Government in the *Hellenic* case, *supra* note 157, noted in an opinion letter on 12 July 1944 that the *Toronto Junction* case never went to trial because the "Ontario Government decided to adopt the procedure in the Ontario Act for canceling the company's incorporation. Anglin J. seemed to think that *scire facias* should not lie where the Companies' Act contained procedure for cancellation."

[194] *Supra* note 157.

[195] *Border Cities Press Club v. Attorney-General of Ontario* [1955] 1 D.L.R. 404 (Ont. C.A.) at 412. In that case, the court found that the Lieutenant-Governor in Council was exercising its power to revoke the defendant's charter pursuant to section 29 of the Ontario *Companies Act*, R.S.O. 1950, c.59, s.29, rather than Crown prerogative.

[196] *Re Cole's Sporting Goods Ltd.* (1965), 2 O.R. 243.

1923 decision in *Oxweld v. Oxyweld*[197], insinuating that the common law action of *scire facias* survives. Unfortunately, these comments are also clouded in ambiguity because the *Oxyweld* case, while referring to *scire facias,* ultimately concerned itself with the Ontario *Companies Act* since the common law was not pled. Most recently, comments made by officials of the Companies and Corporations Branch of the federal Department of the Secretary of State support its survival.[198] Finally, it would be surprising to find that a prerogative remedy such as *scire facias* is dead given the absence of any reported comment in the English or Canadian legal literature about its passing.[199]

iii. The Three Seminal Cases: *Eastern Archipelago, Dominion Salvage and Hellenic*

It is evident from the above discussion that the argument in support of the continuing prerogative power to revoke the charter of a corporation rests on three seminal decisions of the court: *Eastern Archipelago Company* v. *R*[200], *Attorney General of Canada v. Hellenic Colonization Association* v. *Attorney General*[201], and to a lesser extent *Dominion Salvage & Wrecking Company* v. *Attorney-General of Canada*[202]. *Eastern Archipelago* and *Dominion Salvage* are important for the statements of the court that root the remedies in the unwritten

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[197] [1923] 2 D.L.R. 123 (C.A.).

[198] See testimony of Mr. Louis Lesage, Q.C., Companies and Corporations Branch, Department of the Secretary of State to the House of Commons Standing Committee on Banking and Commerce reported in Canada, House of Commons, Standing Committee on Banking and Commerce (2nd sess., 26th Parl.), *Minutes of Proceedings and Evidence, No. 15: Respecting Bill C-22, An Act to amend the Companies Act* (Ottawa: Queen's Printer, February 26, 1965). The substance of Mr. Lesage's comments is outlined *infra* at 253-257ff.

[199] In contrast, the abolition of *scire facias* has been documented in the United States: see e.g. Nolan, *supra* note 171 at 1346 citing *Mass. R. Civil P.* 81.

[200] *Supra* note 145.

[201] *Supra* note 157.

[202] (1892), 21 S.C.R. 72.

constitution. *Hellenic* is a vital decision because it is the most recent consideration of the remedy by a Canadian court. A detailed review of the cases provides a great deal of insight into the nature of the remedy and establishes a foundation from which to argue for its survival at law.

a. Eastern Archipelago Company v. R.

The decision of the House of Lords in *Eastern Archipelago* in 1853 provides a rare consideration of the prerogative remedies of *quo warranto* and *scire facias* in their historical context. The facts of the case are also of interest because they illustrate the types of restraints under which corporations initially operated in the Commonwealth. In this seminal case, the company obtained a charter of incorporation in 1847 for various purposes including working certain coal mines in the island of Labuan. The charter required, amongst other things, that at least £100,000, one-half of the corporations' capital, be subscribed for within one year from the date of the charter and that at least £50,000 be paid up within that same period. It also required that a proper deed of co-partnership and settlement should be executed by the members. Finally, it prohibited the carrying on of business until three directors certified to the President of the Board of Trade that subscription and paid up thresholds had been met. If these requirements were not met within the time prescribed, the Queen could revoke the charter. The company ran into difficulties raising the funds and got the Board of Trade's approval for the initial £50,000 of required capital to include the value of the company's property.

Sir James Brooke presented a memorial to the Attorney General requesting the Attorney General grant his fiat for the issuing of a *scire facias* against the company for the repeal of

the charter "on the ground that the representations made to the Government, on the faith of which the charter was granted, were false representations, and also that the subsequent conditions, on the due performance whereof the efficiency and liability and success of the company depended, had never been performed."[203]

The Court of Queen's Bench gave judgment for the Crown in a 2-2 split decision that was later affirmed by the Exchequer Chamber. The company petitioned the Queen to instruct the Attorney General to enter a *nolle prosequi* to prevent revocation of the charter and prayed that all further proceedings in the action of *scire facias* be stayed pending the Queen's decisions. The Lord Chancellor held that there was no authority to review the final judgment of the court of Queen's Bench. On appeal to the House of Lords, the court in a 7-1 decision upheld the revocation of the company's charter with each judge providing an independent written judgment.

In his reasons, Martin B. held that the issuance of the writ of *scire facias* as with *quo warranto* must be granted by the A.G. upon the plaintiff showing reasonable cause for their issuing to the court. Where reasonable cause is shown, "the Court is bound by the law to grant them, and they are *ex debito justitiae*, in the sense that the Court would act contrary to law, if, under such circumstances, it refused to permit them to issue."[204] Following *City of London* and *Vanacker,* he states:

> I find it laid down that a corporation may be dissolved for either of these two causes, misuser or abuse; and that there is a tacit or implied condition annexed to all such grants as the present, that they shall

[203] *Supra* note 145 at 984.

[204] *Ibid.* at 992.

> not be misused or abused, and that if they be, the charter or franchise is forfeited. In *Rex v. The City of London,* Lord Holt lays down, in regard to a corporation or a body politic to which a trust is annexed, that any mal-administration of it is a cause of forfeiture, and that it may therefore be dissolved; and again, in *The City of London v. Vanancre,* the same eminent Judge states that all franchises are granted upon condition that they shall be duly executed according to the grant, and if the parties to whome they are granted neglect to perform the terms of the patent it may be repealed by *scire* facias." [205]

Martin B. also referred to *Blackstone's Commentaries* that "where the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void."

In his supporting judgment, Talfourd J. referred to the constitutional dimension of the remedies when he stated:

> I think the directions, which have been so isolated, are conditions in respect of which *scire facias* may be brought in the ordinary way, by a relator with the sanction of the Attorney General's fiat, and that the special power of revocation does not suspend that *constitutional remedy*. Any further restriction on the *constitutional right of the individual to the writ of scire facias* aside from the requirement of attaining the Attorney General's fiat "cannot be implied from doubtful words, but should, at least, be clearly and unequivocally expressed. [emphasis added][206]

The comments made by these two justices in delivering judgment against the company form the foundational nexus between constitutional law, administrative law and corporate law -- the inherent constitutional right of the Attorney General or sanctioned individual to apply to have the charter revoked by way of the prerogative writ of *scire facias*.

b. Dominion Salvage & Wrecking Company v. Attorney General of Canada

This 1892 decision of the Supreme Court of Canada rests on Quebec statutory law, which is not addressed in this thesis. Nevertheless, the judgment's consideration of the *Eastern Archipelago* case and the powers of the Attorney General provides further context for the remedy.

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[205] *Ibid.* at 993.

The facts of the case were similar to those in *Eastern Archipelago.* The company was granted its charter by Act of Parliament, 44 Vic. c.61. The charter provided that the company could hold $300,000 in capital and stated that as soon as $100,000 dollars was subscribed for and 30% paid up, a meeting of the shareholders could take place for the election of directors.[207] The charter further provided that the subscription and deposit in question had to be made within six months from the date of passage of the Act. The Attorney General alleged that the provisional directors made a fraudulent subscription of $40,000 to one individual in trust for the company in order to satisfy the terms of the charter.

In a 5-0 decision, Taschereau J. revoked the company's charter finding that the transaction was fraudulent and that the company's charter had been contravened.[208] Unfortunately, he stated from the outset that it was unnecessary to consider the issue of whether *scire facias* applied to a company created by Act of Parliament since Quebec law provided a statutory remedy under which to proceed to revoke a charter.[209] The case is therefore unable to shed further light on the scope of the remedy. Citing *Eastern Archipelago*, Taschereau J. noted that the court could not inquire into the Attorney-General's discretion to grant a *fiat.*[210]

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[206] *Ibid.* at 995.

[207] *Supra* note 202 at 81.

[208] *Ibid.* at 86 and 93. Gwynne J., *ibid.* at 93-99, writing a separate judgment did not support the revocation of the charter based on the fraudulent transaction, but concurred with the majority in order to relieve the relator director of liability to creditors. Interestingly, then Minister of Justice, Sir John Thompson, decided not to revoke the fiat granted by his Predecessor, Sir Alexander Campbell, for this very reason. See letter from the Canada Life Assurance Company to the Hon. Donald MacInnes (March 6, 1890) (Document retained by the National Archives of Canada at Department of Justice, RG 13, vol. 76, file 1890-283. Copy of letter on file with author).

[209] *Ibid.* at 82.

[210] *Ibid.* at 92.

However, he went on to comment on the approach which the Attorney General should take under such circumstances:

> In view, however, of the assertion made by counsel at the bar that such contrivances, as have been proved to have been concocted in this case by the directors of this company to simulate a compliance with the conditions of their charter, are frequently resorted to, under similar circumstances, by those intrusted [sic] with the organization of similar companies, I deem it but right to say that, in my opinion, the Attorney-General, in [sic] duty bound as he is to check, as much as it is in his power to do it, such infractions of the laws of the country, could hardly have been expected, in the present instance, to withhold his fiat. [sic] The beneficial effect of these proceedings upon those who may in the future assume such organizations cannot but prove to be a powerful protection to the public....

The case is therefore significant for its favourable consideration of the decision in *Eastern Archipelago* by the Supreme Court of Canada some 40 years earlier and the courts comments on the role and responsibilities of the Attorney General.

c. Attorney General of Canada v. Hellenic Colonization Association

The sole reported Canadian decision to comment on corporate charter revocation since 1892, *Hellenic* implicitly affirms that the common law remedies of *quo warranto* and *scire facias* were alive and well as of 1946.[211] While the decision has never been subsequently considered, the correspondence between the parties to the action recognized the importance of this precedent setting case.[212] The fact that the Department of Justice retained the file on the case and placed it in the National Archives also speaks to its importance.[213]

In Hellenic, the Attorney-General of Canada sought a declaration revoking the charter of a federally-incorporated society that had been carrying on gambling operations in its various

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[211] *Supra* note 157.

[212] Letter of Dugald Donagy, counsel for the federal government, to F.P. Varcoe, Deputy Minister of Justice (12 July 1944).

[213] Department of Justice file #143499 retained by the National Archives of Canada at Department of Justice, RG 13, series G-1, vol. 2868, file 143499, parts 1&2.

premises across the country and had been charged and convicted under the Criminal Code on numerous occasions for carrying on such activities. The society had been initially incorporated for the following purposes:

> (a) to inculcate, cultivate and promote among its members the social virtues, good fellowship, mutual helpfulness and rational recreation;
> (b) to assist and promote the immigration to Canada of worthy Europeans and to encourage and comfort them, and generally to promote colonization;
> (c) to promote social welfare among its members by arranging all forms of social entertainment; and
> (d) to create branches or lodges throughout the Dominion of Canada and to establish club rooms where it members may meet together to promote the objects aforesaid.[214]

The historical context of the case is almost as significant as the specific facts of the case and deserves to be documented. Presumably as a consequence of troops seeking sources of entertainment during WWII, the Hellenic Colonization Association, originally chartered as a social club for new immigrants, carried on gambling clubs in a number of northern communities in British Columbia and Alberta and was convicted numerous times under the *Criminal Code* for such activity.[215] Numerous insistent representations from the Attorney-General of British Columbia pointing out complaints from American and Canadian authorities, urged the federal Minister of Justice and Secretary of State to amend the *Dominion Companies Act* to provide for revocation of charters of non-profit corporations under Part II of the Act.[216] The Secretary of State and the Attorney General of Canada refused to amend the legislation under the War Measures Act in force at the time, as the matter was not perceived to relate to war. However, the Secretary of State did petition the

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[214] *Supra* note 157 at 841.

[215] Letter of R.L. Maitland, Attorney-General of British Columbia, to Hon. Norman McLarty, Secretary of State (14 June 1943).

[216] *Ibid.* See also Letter of McLarty to the Hon. L.S. St. Laurent, Minister of Justice (18 June 1943); Telegraph of Maitland to McLarty (18 June 1943); Letter of McLarty to St. Laurent (5 July 1943). Interestingly, at that time, charter revocation provisions for misuse and abuse of a charter only existed with respect to for-profit corporations.

Governor-General to proceed under the common law to have Hellenic's charter revoked in the public interest:

> The undersigned is of the opinion that by reason of an increasing number of complaints due, it would appear to war conditions in centres of population in several Provinces of Canada, it is necessary in the public interest that authority should be conferred for proceedings to wind up or dissolve a corporation incorporated under Part II of the Companies Act when, in the exercise or professed exercise of powers which appear to be beyond those conferred by its letters patent of incorporation, it commits an indictable offence or operates in a fashion which in the case of joint stock companies incorporated under Part I would lead the Secretary of State to certify to the Attorney-General of Canada that proceedings should be instituted for winding-up.[217]

According to a letter from counsel for the federal government, Dugald Donaghy, it was felt that "this case will establish a modern precedent" as the issue had never been addressed by the common law courts.[218] Indeed, subsequent research confirms that the case was precedent-setting in its time and remains so today.

The facts of the case demonstrate a notorious and consistent record of violations by the society.[219] Under the charter, branch charters were issued to more than twelve branches.[220] The charter of one branch was originally revoked in 1938 and then regranted in 1943 to the same individual under a different corporate name. Management in the society transferred to different individuals, but the operations were the same, and the society was subsequently convicted two more times. A third management team took over and received a further conviction. The second branch also went through two sets of management under which the

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[217] Letter of Secretary of State of Canada to the Governor-General in Council (5 July 1943).

[218] Letter of Dugald Donagy, counsel for the federal government, to F.P. Varcoe, Deputy Minister of Justice (12 July 1944).

[219] *Supra* note 157 at 841-842.

[220] *Attorney General of Canada v. Hellenic Colonization Association, Statement of Claim* (29 January 1945).

branch was convicted each time. Three other branches were also convicted during the same period.

Chief Justice Farris[221], at the conclusion of the case, commented to counsel in reserving on his decision, that "this case would either create new law or re-establish old law that has not been invoked for a long time and that he desired to give a written judgment because it is laying down a precedent for the future. [sic]"[222] In revoking the society's charter, Farris C.J. found that the society "at no time *bona fide* operated under its charter but wrongly used its charter as a cloak under which to operate its illegal branch club gambling operations and that the defendant misused or abused its charter to such an extent as being against general public policy."[223] In directly addressing the issue of whether a common law right exists to annul a charter for misuse or abuse despite s.28 of the federal *Companies Act*, which provided for forfeiture for non-user only, the court found that it did. Citing Martin B.'s comments in *Eastern Archipelago*[224], his honour upheld the survival of the common law remedies in holding that "the Dominion *Companies Act* has taken nothing away from the common law rights to have a charter annulled but has given certain other grounds on which it may be

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[221] Farris C.J. became Chief Justice of the British Columbia Supreme Court in 1942. Prior to joining the bench, he was a partner in O'Shea Farris (1909), Russell, MacDonald, Hancock & Farris (1912-1914), Farris, Farris & Emerson (1914), and Farris, Farris, McAlpine, Stultz, Bull & Farris (1916-) which was to become Bull, Housser & Tupper, one of the largest corporate law firms in British Columbia. A liberal, freemason and baptist, he specialized in corporate law and interestingly held executive positions in a significant number of resource and investment companies. (*The Canadian Who's Who* (vol.VI, 1952-1954)(Toronto, Ontario)).

[222] Letter of Dugald Donaghy to Deputy Minister of Justice (12 June 1946).

[223] *Supra* note 157 at 844.

[224] *Supra* note 145.

cancelled under the statute."[225] Accordingly, the case stands for the affirmation of common law charter revocation as of 1946.

While the court noted that revocation was to be considered in relation to the unique facts of each case, Farris C.J. explicitly dismissed the concern that allowing charter revocation actions would bring chaos to corporate activity in Canada and suggested, in *obiter*, grounds under which revocation would be considered:

> It was argued that to give effect to this ruling would jeopardize many of our great Canadian corporations having branches across Canada, when some branch might misuse or abuse the charter and this would mean that the whole charter would be destroyed creating a chaotic condition in the management of our Canadian corporate structures. This view I cannot agree with. This must be a matter to be determined in each separate case. Isolated cases of abuse or misuse should not be sufficient for a declaration or annulment. The abuse or misuse must be of such a nature as to be offensive to public policy. To my mind the abuse or misuse must be of such consecutive acts and the general policy of the association such as would indicate a clear intention that the company or association wished to use the charter as a mere cloak for its improper acts."[226]

According to a letter from counsel to the Deputy Minister of Justice following release of the decision, the Chief Justice questioned counsel during the hearing "as to whether or not the Charter of a large corporation such as the C.P.R would be subject to forfeiture in the event that the company committed a mere violation of one of the provisions of its charter." However, counsel for the government "did not enter into any argument based on speculation as to what might happen to the railway company in the event of some violation of its charter."[227]

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[225] *Supra* note 157 at 846.

[226] *Ibid.* at 846.

[227] Letter of Dugald Donaghy to the Depute Minister of Justice (12 June 1946).

Counsel for the government, Donaghy opined in correspondence that if the corporation was created by statute, it was "doubtful whether it can be dissolved under a *scire facias*."[228] Alternatively, if incorporated by Royal Grant it can be annulled by *scire facias*.[229] In his view, a company incorporated under Part I of the *Dominion Companies Act,* R.S.C. 1906, c.59, was not a company incorporated by statute -- "a company incorporated under that Act does not purport to derive its existence from the words of the statute merely but from the act of the Sovereign who through the medium of the Governor General delegates his authority to the Secretary of State, subject to restrictions on its exercise. However, later comments suggest the opposite opinion and acknowledge the absence of any certainty on that point:

> "In passing, it is interesting to note that under the English *Companies Act* as well as the British Columbia *Companies Act* a company is not created by letters patent; a Certificate of Incorporation is issued by the Registrar of Companies. There does not appear to be any delegation of the Royal prerogative to the Registrar to issue a grant or letters patent; and it may well be argued that the company derives its existence from the words of the statute merely. Whether or not the certificate of incorporation can be set aside by the court by any proceeding in the nature of a *scire facias* has never been decided by the English courts. A reference is made to the point in the case of *Broderip v. Solomon* (1895) 2 Ch. 323... Lopes L.J. says at 341 – "I wish to add that I am inclined to think that a *scire facias* would go to repeal the certificate of incorporation but I express no decided opinion on the point."

Consequently, while the case would seem to stand for an affirmation of both *scire facias* and *quo warranto*, there is uncertainty whether *scire facias* applies in the context of corporations incorporated by statute.

STATUTE

Having given consideration to the origins, scope and legal foundation of the prerogative remedies, it remains to consider the changes resulting from the enactment of statutory

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[228] Opinion of Dugald Donaghy (12 July 1944) citing Blake Q.C. in *Dominion Salvage* and Lindley and Lopes L.J.J. in *Broderip v. Solomon* (1895) 2 Ch. 323 at 337 and 341 in support.

[229] *Bonanza Creek, supra* note 180.

revocation provisions in most Canadian jurisdictions and their subsequent repeal in many instances. As in all aspects of this study, consideration of corporate charter revocation provisions reveals more about the nature of Canadian corporate law generally than the specific remedy. This is important because it helps to demystify corporate law and provides a deeper contextual understanding of the dynamics that have affected the relationship between corporations and the public, and the survival of charter revocation.

Most notably, Canadian corporate law has been influenced by the five following elements:

(a) the pursuit of uniform legislation amongst Canada and the provinces[230];

(b) the movement from a letters patent model to a registration model of incorporation (or alternatively, from incorporation as privilege to incorporation as of right)[231];

(c) the shift in perception of the purpose of corporation legislation from regulatory to enabling[232];

(d) a consistent belief that corporate legislation is the concern and interest of corporate lawyers and accountants exclusively[233]; and

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[230] Iacobucci, *supra* note 52 at 12.

[231] *Ibid.* at 18. Wegenast, *supra* note 43 at iii states: "By a strange turn of legislative history, we find the British parliament in 1862 adopting the method of incorporation by registration, which had been devised in the American Colonies after the Revolution because of the lack of the Royal prerogative, while two years later the Canadian Parliament definitely abandons the registration system which had been borrowed from the State of New York in 1850 and designs its own system based on the original common law method of incorporation by letters patent."

[232] Iacobucci, *ibid.* at 6. Unfortunately, the size of this paper limits discussion of this critical transformation. For its roots in English corporate law, see McQueen, *supra* note 50 at 218-231. Reflecting on the latest wave of corporate reform in the 1970s, Iacobucci discusses the need to obtain a balance between regulating and facilitating corporate activity. This is the ideological framework that underlies the whole principle of charter revocation. Historically, corporate statutes followed the role of the prerogative in regulating corporate activity and providing remedies, such as charter revocation, where corporate actions were contrary to the public interest. Since then, Iacobucci, referring to law reform documentation from across the nation, argues that it has become "widely accepted in Canada that the main purpose of a corporations statute [sic]...is to enable people to form and operate corporations as efficiently and cheaply as possible, keeping regulatory and remedial aspects of the state to a standard which sensibly takes account of the interests of shareholders, creditors, management and the public." (at 6).

(e) the extreme deference of government to corporate legal experts in drafting corporate legislation and the virtual absence of public consultation. [234]

The final two elements underlie the fact that Canadian corporate law has been wholly the design of business interests. While this study provides supporting empirical evidence for this claim, Stone has observed this state of affairs in the United States much earlier on:

> To claim society's desires will be realized so long as the corporations "follow the edict of the populus" fails to take into account *the role of corporations in making the very law that we trust to bind them...* The whole history of commercial law is one in which, by and large, the "legislation" has been little more than an acknowledgment of rules established by the commercial sector, unless there are the strongest and most evident reasons to the contrary.[235]

Furthermore, the lack of public consultation and existing statutory uniformity amongst the various jurisdictions reflects the historical haphazard approach to corporate law reform in

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[233] The most obvious observation about charter revocation provisions in Canada is the lack of debate around their creation and existence. To some this might suggest that little importance was ascribed to them because they have been little used in the past century. However, the continued existence of these provisions in corporate legislation and the scant recorded debate suggests that the silence more likely results from a generally held belief that public constraint on corporate activity, while distasteful, is necessary. A more conspiratorial (and presently unsubstantiated) view suggests that the silence may also be attributed to a desire by the corporate community not to draw attention to such provisions which directly threaten corporate life, but rather focus discussion on less-intrusive regulatory regimes. Furthermore, this lack of debate is embedded within a larger belief amongst government representatives that corporate law is non-partisan and beyond comprehension by average citizens and parliamentarians. In second reading of the 1965 federal amendment, the Hon. John. J. Connolly, Secretary of State, commented "It has been said that this is a lawyer's bill. In one very restricted sense it is, because I think it is the lawyers who are primarily concerned with the operation of company law. However, it is also a bill for the accountants..." (*Debates of the Senate* (1964-65) at 519).

[234] A review of government documentation and the literature on corporate law reform reveals that there has been no broad-based consultations or discussions involving the public about the role of the corporation or the purpose of corporate law. It therefore comes as no surprise that corporate laws have given increasingly narrow consideration to the "public" impacts of the corporate structure and corporate activity. "[Corporate legislation] ...enacted in Canadian jurisdictions...does not challenge the traditional assumptions that the object of the business corporation is the maximization of profit and that the role of the corporations statute should be to enable it to do so in a fair and effective manner. The statutes require that decisions and actions taken on behalf of the corporation be taken in accordance with law and in the best interests of the corporation. They impose no obligation to act in the public interest, whatever that might be, apparently assuming that the public interest in a free enterprise economy is best served by the pursuit of profit.": Iacobucci, *supra* note 52 at 9. See McQueen, *supra* note 50 at 385 for account of how English lawyers and accountants 'normalized' and promoted features of the modern corporation in the late 19th century.

[235] Stone, *supra* note 28 at 94.

Canada.[236] It speaks to the lack of consensus, even amongst corporate lawyers and government, about the theoretical and structural development of the corporation.[237] Ironically, it is likely also the reason why the remedies of *quo warranto* and *scire facias* have been overlooked and codified with consistent irregularity by the various federal and provincial jurisdictions.[238] This distinctiveness is the key to understanding the reasons for the creation and enduring quality of these provisions. Accordingly, this section will consider the distinct histories of charter revocation provisions in select jurisdictions and contemplate their effect on the survival of the common law charter revocation remedies today.

Modern corporate legislation contains a variety of provisions that speak to the issue of the life of the corporation. There are winding-up provisions which traditionally deal with voluntary dissolution of a corporation upon insolvency and can typically only be initiated by directors, shareholders or creditors. Second, there is dissolution upon failure to satisfy administrative requirements (e.g. filing, issuing financial statements, carrying out the requirements stipulated in the charter, letters patent or articles of incorporation). Each of these areas would require a thesis unto themselves to discuss properly and are therefore not addressed directly in this paper. The focus of this work is to chronicle the provisions that

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[236] Frank Iacobucci, *supra* note 52 at 12: "...Many reforms are in response to problems exposed in the case law or in dramatic business failures. Others are based on experienced common sense. Many, however, are derived from legal concepts which, even if unassailable in theory, may or may not be effective in practice. Others are based on theoretical speculation which can border on paternalism as to what is best for private enterprise particularly, and society generally. On many issues, empirical evidence is unattainable or difficult to interpret, and the effort to obtain it might have delayed the process of reform. Thus, of necessity, much of corporate law reform amounts to sophisticated guesswork..."

[237] See *supra* note 50.

[238] Government's abrogation of responsibility in many respects in the preliminary drafting of corporate legislation and their failure to consult with other sectors of society should also raise questions about the legitimacy of ways in which corporate law has been codified.

provide for the revocation of a corporation's charter for substantive violations by the corporation or where the corporation is not acting in the public interest.[239]

i. Federal

Up until 1975, federal corporate legislation was based on the letters patent model of incorporation. Following major revisions to the federal *Companies Act* in 1934[240], the Act was again amended in 1935[241] at which time a charter revocation provision was inserted.[242] These amendments initially drafted by the Department of Justice were introduced in response to recommendations from the Royal Commission on Price Spreads.[243] Recommendation 4 of the Royal Commission dealt tangentially with the issue of charter revocation by commenting on the permissible scope of corporate activity:

> Companies should be incorporated only for activities that they intend seriously to pursue at the time of incorporation. They should be prevented from engaging in activities not directly related to those for which they were incorporated unless they have previously secured, -- approval of shareholders, and supplementary letters patent.

Despite disagreeing with many of the Commission's recommendations, the Secretary of State responded favourably to this recommendation[244] stating at one point that "in a complicated code such as company law you must leave some discretion to the administration in dealing

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[239] The paper will not address revocation provisions applicable to extra-provincially registered companies, although they also exist.

[240] The Companies Act was repealed by S.C. 1934, c.33, s.208 and superseded by the S.C. 1934, c.33 [Bill 85]. According to the then Secretary of State, the Hon. C. H. Cahan, "the new bill was introduced to this house, printed copies of the proposed bill were widely circulated throughout Canada to economists, accountants, lawyers, universities, companies and corporations..." (House of Commons Debates (June 14, 1935) at 3650).

[241] The Companies Act Amendment Act, 1935, S.C. 1935, c.55.

[242] *House of Commons Debates* (1935). Introduced by Cahan for first reading on June 5, 1935 at 3306. Second reading on June 14, 1935 at 3650. Extensive debate followed at 3650, 3663, 3678, 3682, 3865, and 3901. Third reading on June 24, 1935 at 3910. Received Royal Assent on July 5, 1935.

[243] The Royal Commission was originally struck as a select special committee of the House of Commons on February 2, 1934. They were appointed as a royal commission on July 7, 1934.

[244] *House of Commons Debates* (June 14, 1935) at 3652 (C.H. Cahan).

with exceptional cases which arise..."[245] The provision adopting the recommendation was agreed to by the House with almost no debate.[246] Interestingly, there were no corporate lawyers on the Commission or advising it.[247] On the basis of the Commission's recommendations, section 5(4) of the *Dominion Companies Act* was amended to provide that:

> Any company that
>
> (a) carries on any business that is not within the scope of the purposes or objects set forth in the letters patent or supplementary letters patent,
>
> (b) exercises or professes to exercise any powers that are not truly ancillary or reasonably incidental to the purposes or objects set forth in the letters patent or supplementary letters patent, or
>
> (c) exercises or professes to exercise any powers expressly excluded by the letters patent or supplementary letters patent,
>
> is liable to be wound up and to be dissolved if the Attorney General of Canada upon receipt of a certificate of the Secretary of State setting forth his opinion that such company has carried on business or exercised or professed to exercise powers as in this jurisdiction for an order that the company be wound up under the provisions of the *Winding-up Act*. (S.C. 1935, c.55, s.2; R.S.C. 1952, c.53, s.5)[248]

Interestingly, in drafting the provision, the government went further than the Royal Commission's recommendations. The recommendation appears to have been concerned primarily with companies pursuing activities not endorsed by its shareholders (and consequently, not of benefit to them), whereas the provision's wording does not limit

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[245] *Ibid.* at 3652.

[246] There was brief discussion regarding some incidental wording in the provision (*Ibid.* at 3866). Most of the debate focused on provisions dealing with no par-value shares.

[247] During discussion of the new Act in the House, Mr. Ilsley, one member on the Royal Commission, commented "...I think we should have had at least one corporation lawyer to advise us. Unfortunately, there is a feeling that most corporation lawyers have a single line of approach. It is believed that their business is to act for persons incorporating companies, for promoters, for investment houses and the like, to see that they do not get into trouble, no matter who else may. It may have been that the judgment of my colleagues was sound when they felt that we should take the line we did and go ahead without assistance of a highly experienced corporation lawyer." (*Ibid.* at 3680)

[248] During this period, the Secretary of State was responsible for the administration of the corporate registry. The revocation of a charter being a quasi-criminal proceeding necessitated that such proceedings be initiated by the Attorney General upon the recommendation of the Secretary of State. See discussion of the proceedings in *Hellenic, supra* note 157, for an example of process in practice.

consideration to shareholders but envisions revocation where a company's activities negatively affected a larger constituency.

In the wake of a Royal Commission on Crime in Ontario in 1963, an amending statute introduced in the Senate in 1965 revised the Act considerably, including changing its name to the *Canada Corporations Act*[249], and amendments to s.5(4) requiring that the Attorney General make application to the court for a winding-up order.[250] Submissions were apparently restricted to the corporate community.[251] One of the rare bits of recorded debate[252] on the issue of charter revocation occurred during proceedings of the Federal Standing Committee on Banking and Commerce considering amendments to the Act,

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[249] S.C. 1964-1965, c.52 [Bill S-22]. *Debates of the Senate* (1964-65). First reading introduced by Hon. Senator John J. Connolly on May 7, 1964 at 413. Second reading and referred to Standing Committee on Banking and Commerce on May 20, 1964 at 519. Standing Committee's report was submitted to the Senate on November 19, 1964 at 1078 and 1091. There was extensive discussion of the Bill in the Senate which was focused primarily on praising committee members at 1091, 1109. Third reading on November 25, 1964 at 1114.

House of Commons Debates (1964-65). The Bill was given first reading in the House of Commons on December 18, 1964, introduced by Hon. Maurice Lamontagne, Secretary of State. Second reading on February 19, 1965, and referred to the Standing Committee on Banking and Commerce. House was in committee on the bill on March 25, 1965 at 12813. Third reading on March 26, 1965 at 12842. Royal Assent received on April 2, 1965.

[250] S.C. 1964-1965, c.52. s.5(3). The original Bill S-22, *An Act to Amend the Companies Act*, 2d Sess., 26th Parl., 1964, cl.5(2) (1st reading 7 May 1964), also sought to add several administrative grounds for dissolution, but these were not enacted. Notes accompanying first reading of the Bill made no comment on the provision then in force. In voicing support for the Bill during second reading, the Hon. David J. Walker commented on the provision stating "This is an excellent thing, and it should have been done long ago." (*Senate Debates* (May 20, 1964) at 516) However, his subsequent comments suggest that he was considering the application of the provision in respect of administrative grounds for dissolution.

[251] In debate on the Act, the Hon. Thomas Vien, describing the process leading to the proposed amendments stated: "When, on the suggestion of the Bar Association and of other public bodies, the Companies Act was submitted to the Secretary of State for amendments, recommendations were made to the cabinet, and an interdepartmental review committee including three members of the legal profession, drawn from Ontario and Quebec, was created pursuant to a recommendation of the Legislative Committee of the Cabinet. The Companies Branch of the Department of the Secretary of State submitted to that interdepartmental committee a volume of information that had already been accumulated." (*Senate Debates* (May 14, 1964) at 481).

[252] There was no debate on the provision in the House or the Senate (*House of Commons Debates* (March 25, 1965) at 12815).

including the above-mentioned provision.[253] The minutes of proceedings indicate that prior to the proposed amendment, it was the government's position that there was no statutory provision authorizing the Attorney General to revoke a corporate charter and consequently, only recourse to the common law was available.[254] It was at this time that the government representative testifying before the Committee explicitly stated that the provision had a broader application than merely the dissolution of a charter for failure to meet administrative requirements, that being to allow the Attorney General of Canada to go to the courts to have a company wound up where it "was not carrying on in an ethical manner".[255] Examples such as the unlawful practice of medicine and possibly gambling operations were given at the time.[256] The Committee also indicated that it believed that members of the public were one group who would motivate the Secretary of State to instigate revocation proceedings upon "sufficient evidence" from the complainant.[257] The Committee also indicated that the provision was not to be applied frivolously and felt confident that the Secretary of State would refrain from doing so.

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[253] Canada, House of Commons, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence, No. 15* (Ottawa: Queen's Printer, February 26, 1965)(Chair: Mr. Hayden). Other members included Senator Molson (a leading Canadian industrialist), Senator Leonard (corporation lawyer and executive), Senator Bouffard (corporate lawyer, Bar of Quebec), Senator Cook (corporate lawyer and Newfoundland executive), Senator Walker (corporate lawyer, Bar of Ontario), and Senator Wallace McCutcheon (lawyer and industrialist). In praising these individuals, the Hon. John J. Connolly commented "...to have men who are experienced in dealing with legislation do this work in this most thorough, *objective* and *nonpartisan* way is a credit to our parliamentary institutions." (*Senate Debates* (November 25, 1964) at 1114.) [my emphasis]

[254] *Supra* note 198 at 402-403. Mr. Lesage's reference to the common law cannot be taken to mean that the common law no longer exists, because the amendment made did not change the grounds existing previously under the statute to revoke a corporate charter, but only the procedure for initiating such proceedings. The court in *Hellenic, supra* note 157 at 846 explicitly stated that the common law survived the wording in the *Dominion Companies Act, 1934*.

[255] *Supra* note 198 at 402.

[256] *Ibid.*

[257] *Ibid.* at 402-403. According to the Mr. Lesage's comments, complaints made in a few past cases did provide the requisite evidence. Unfortunately, the parties to those cases were not identified at the time.

The introduction of the *Canadian Business Corporations Act* ("CBCA")[258] in 1975 was the first major revision of federal corporate law since 1934, representing a watershed in the evolution of corporate law in Canada and the turning point for statutory charter revocation. Starting in 1967, a taskforce was created to review the state of corporate law in Canada and make recommendations for a new federal act. Inspired by the Model Business Corporations Act created by the American Bar Foundation and Ontario's *Business Corporations Act*, the taskforce reported its recommendations in 1971 which among other things "recommended that administrative discretion (which was the foundation of the CCA and all other letters patent legislation) was unnecessary and undesirable and ought to be reduced."[259] This view won the day resulting in a fundamental change in the relationship between the corporation and the state. Namely, it made incorporation a matter of right as opposed to one of privilege.[260] In moving away from a letters patent model of incorporation, the drafters of the legislation removed the charter revocation provisions and inserted the following dissolution clause [hereinafter "dissolution clause"]:

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[258] S.C. 1974-75, c.33. *House of Commons Debates* (1974-75). Introduced by Hon. André Ouellet (Minister of Consumer and Corporate Affairs) with first reading on October 21, 1974 at 546. Second reading at 1200-1210 at which time it was referred to the Standing Committee on Justice and Legal Affairs. Third reading was on January 27, 1975 at 2622. Royal Assent received on March 24, 1975 at 4447.

[259] *Detailed background paper for the New Canada Business Corporations Bill* (Ottawa: Consumer and Corporate Affairs, 1971) at 7. See also Iacobucci, *supra* note 52 at 4,7; J. M. Wainberg, *Guidebook to Canada Business Corporations Act* (Don Mills, Ont.: CCH Canadian Limited, 1975) at v.

[260] In hearings before the Standing Committee on Justice and Legal Affairs, Mr. John Howard, Assistant Deputy Minister (Corporate Affairs), Department of Consumer and Corporate Affairs, commented "The bill attempts to adopt what has been European law for centuries, that is, to declare that a corporation has the capacity and powers of a natural person, and so eliminate altogether consideration of the *ultra vires* doctrine." (Canada. House of Commons. Standing Committee on Justice and Legal Affairs (1st sess., 30th parl.) *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs respecting Bill C-29, An Act respecting Canadian Business Corporations* (1974) at 3:23.)

> 206. (1) The Director or any interested person[261] may apply to a court for an order dissolving a corporation if the corporation has
>
> (a) failed for two or more consecutive years to comply with the requirements of this Act with respect to the holding of annual meetings of shareholders;
>
> (b) contravened subsection 16(2) or section 21[access to corporate records], 151 [consolidated statements] or 153 [providing copies of documents to shareholders]; or
>
> (c) procured any certificate under this Act by misrepresentation.

The relevant reference in section 206(1)(b) is to section 16(2) which provides that "a corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in an manner contrary to its articles." It is submitted that this provision is essentially meaningless within the context of registration system of incorporation adopted by the federal act. Under this system, corporations are no longer required to list their objects.[262] Therefore, aside from acting illegally, there are no grounds for arguing under s.16(2) (or its equivalent in provincial legislation) that the corporation's activities are *ultra vires*.[263] Furthermore, involuntary dissolution for illegal acts is not covered in the Act. It would appear therefore

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[261] "Interested person" is not defined in the Act, but "'person' includes an individual, partnership, association, body corporate, trustee, executor, administrator or legal representative" and "'individual' means a natural person': *ABCA,* s.1.

[262] Shareholders may choose to restrict a corporation's objects, but this is completely at their discretion and is rarely, if ever, done.

[263] The doctrine of *ultra vires* is closely akin to the prerogative writs of *quo warranto* and *scire facias* in many respects, however a proper consideration of this doctrine is beyond the scope of this paper. In the context of modern corporate law, the doctrine is arguably dead. For a discussion of its history and the controversy surrounding its present existence, see Barry Slutsky, "Ultra Vires -- The British Columbia Solution" (1973) 8 *U.B.C. L.R.* 309; Michael A. Schaeftler, "Ultra Vires -- Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations" (Fall 1983) 9(1) *J. of Corp. Law* 81; Leon Getz, "Ultra Vires and Some Related Problems" (1969) 3 *U.B.C. L.R.* 30; Select Committee on Company Law, Ontario Legislature, *Lawrence Report* (1967); Mary Anne Waldron, "The Process of Law Reform: The New B.C. Companies Act" (1975) 10 *U.B.C. L.R.* 179; James C. Baillie, "The Rewriting of Canadian Business Statutes" (1976) 1 *Can. Bus. L.J.* 242; F. Iacobucci, "The Business Corporations Act 1970" (1971) *U.T.L.J.* 416 at 426; A. Barak, "The Recommendations of the Company Law Reform Committee and the Doctrine of Ultra Vires" (1968) 3 *Israel L. Rev.* 127; P. T. Carden, "Limitation on Powers of Common Law Corporations" (1910) 26 *Law Quar. R.* 320; A. Harno, "The Privileges and Powers of a Corporation and the Doctrine of Ultra Vires" (1925) 35 *Yale L.J.* 13.

that complainants must resort to the common law to seek such a remedy with respect to federally incorporated companies.

The Standing Committee on Justice and Legal Affairs did not consider the provision, or section 16 respecting the scope of permissible corporate activity.[264] Indeed, it appears that some members of the Canadian Bar Association who testified before the Standing Committee were not even aware that such automatic dissolution provisions existed in the bill.[265] The *CBCA*, including the dissolution clause, has since been followed as a model in Alberta, Saskatchewan, Manitoba, and the Yukon.

Section 5(4) of the *Dominion Companies Act* detailed above appears at first glance to cover the same territory as the common law remedies of *quo warranto* and *scire facias*, suggesting that it has displaced the remedies. However, the more recent judicial decision in *Hellenic* states that common law survived the wording in the federal act.[266] Based on this precedent, it is argued that the procedural amendments to the provision under the *CCA* did not displace the common law remedies. This is a critical observation when considering the status of the common law in relation to similarly comprehensive statutory charter revocation provisions in other jurisdictions. Furthermore, the better view would suggest that the repeal of the statutory charter revocation provisions under the *CCA* with the introduction of the *CBCA* has

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[264] *Supra* note 260 at 12:17,49. Committee members included Mr. Hugh Poulin (Chairman), Mr. Francis Fox, Mr. Blais, Mr. Carter, Mr. Dick, Mr. Fairweather, Mr. Gilbert, Mr. Hnatyshyn, Mrs. Holt, Mr. Lachance, Mr. Landers, Mr. MacGuigan, Mr. Marceau, Mr. Nielsen, Mr. Pinard, Mr. Poulin, Mr. Prud'homme, Mr. Robinson, Mr. Rondeau, Mr. Wagner, and Mr. Woolliams.

[265] *Ibid.* at 5:17 (Mr. D.L. Campbell from the CBA).

[266] *Hellenic*, *supra* note 157 at 846.

not extinguished or modified the scope of either prerogative remedy because neither was extinguished or diminished by express words or direct implication.[267]

ii. Alberta

Alberta's corporate statutory landscape provides an excellent case study because it illustrates many of the common elements of corporate law reform experienced in all jurisdictions and also has a particularly colourful history with respect to charter revocation provisions. Today, Alberta has two statutes in force governing corporate entities: the earlier *Companies Act* ("ACA") and the more recent *Business Corporations Act* ("ABCA").

On February 16, 1912, the *Companies Ordinance* S.A. 1901, c.20 was amended by the *Statute Law Amendment Act, 1911,*S.A. 1911-12, c.4, s.24 which added the following provision on charter revocation:

> The certificate of incorporation of any company and any certificate amending or varying the same, may at any time be forfeited, revoked, and made void by an order of the Lieutenant Governor in Council and such forfeiture, revocation and making void may be on such conditions and subject to such provisions as to the Lieutenant Governor in Council may seem proper.

This provision clearly gave great latitude to the Lieutenant Governor in Council to revoke corporate charters. The *Company Ordinance* was later renamed the *ACA* but remained virtually the same in form until 1929[268] when it was substantially amended based on the English *Companies Act of 1862*. Section 157 provided:

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[267] See discussion of the nature of the prerogative writ, *infra* chapter 2. There is an argument that with the adoption of the registration system of incorporation under the *CBCA* and the consequent treatment of the corporation as person with incorporation as of right, that there is no longer an ability to revoke its charter. From a theoretical perspective, the adoption of entity theory and the analogy of the person is no bar to the use of such remedies, since equivalent action against human individuals is an accepted part of our legal system (i.e. life imprisonment).

[268] *Companies Act, 1929,* S.A. 1929, c.14, granted Royal Assent on March 20, 1929.

> On sufficient cause being shown, and upon such conditions and subject to such provisions as may be deemed proper, the Lieutenant Governor in Council may revoke and cancel the incorporation of a company and declare the company to be dissolved.

This amendment brought in the notion of due process.[269] While this provision was conceived to facilitate dissolution by the Lieutenant Governor in Council upon request of the corporation's representatives, the wording was broad enough to permit other grounds for revocation.

On April 8, 1941, amidst the pressures of war and calls for fiscal restraint, this provision was struck out and replaced by the *Companies Act, 1929, Amendment Act, 1941*[270]:

> 157. (1) Upon sufficient cause being shown to the Registrar, he may issue to the Lieutenant Governor in Council a certificate under his seal of office declaring that he is satisfied that the incorporation of any company should be revoked and canceled.
>
> (2) Upon receipt of such certificate, the Lieutenant Governor in Council may revoke and cancel the incorporation of the company and declare the company to be dissolved upon such conditions and subject to such provisions as may be deemed proper.
>
> (3) Every person who by himself or in association with others, carries on or attempts to carry on the business of a company, the incorporation of which has been revoked and canceled, and which has been declared to be dissolved, shall be guilty of an offence against this Act."

The rationale for this amendment is not clear. It is possible that with the increase in bodies incorporating, there was a need to create a more efficient mechanism for vetting corporate matters, therefore the responsibility for reviewing corporate activity was delegated to the

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[269] J. L. Stewart, *Company Law of Canada* (Toronto: Carswell, 1962) argues at 168 that the statement "on sufficient cause being shown" makes it a condition precedent to an order for dissolution that the corporation and its members be given an opportunity to appear and show cause why an order of dissolution should not be made: *Re Cooks & Waiters Club* [1938] 4 D.L.R. 790. See also Manitoba Act 1932, s.325 which argues for the view that if due process is not explicitly stated in the provision then it is not needed to be accorded to the corporation. This requirement would be required regardless pursuant to the doctrine of natural justice.

[270] S.A. 1941, c.10, s.8.

Registrar. More interesting is the (typical) observation that there was never any reported discussion around this amendment.[271]

Following the federal corporate legislation, Alberta enacted a *Business Corporations Act* ("ABCA") in 1981.[272] Characteristically, the discussions did not address the historic revocation provision in relation to liquidation and dissolution.[273] Rather, the revocation provisions were silently omitted and replaced by the standard dissolution clause.[274] Based on the similar statutory evolution and wording of the charter revocation provisions in Alberta, it is submitted that the prerogative remedies remain alive in Alberta for the reasons identified in the discussion in the federal context.

iii. British Columbia

British Columbia boasts a unique corporate legal history, legislative structure, and is the site of the most recent debates on the corporation in wake of current attempts at reforming the province's corporate legislation. The province's early company acts were based on the

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[271] In an article canvassing the record 123 bills passed during the session, the amendment was not mentioned amidst discussion of 20 of the bills: "Pass 123 Acts, Set New Record", *Edmonton Journal* (8 April 1941) 1. The Speech from the Throne also made no reference to the amendment: *Edmonton Journal* (20 February 1941) 1, 8.

[272] S.A., 1981, c. B-15 [Bill 43]. Alberta, Legislative Assembly, *Debates* (1981). First reading introduced by Hon. Julian G. Koziak, Minister of Consumer and Corporate Affairs on May 12, 1981 at 671. According to his introduction, Bill 43 (previously Bill 85) had been left on the order paper to die in the previous session "to permit wide distribution of that Bill and discussion over the course of the winter months." Second reading on May 25, 1981 at 934. Koziak's comments at that time dealt with *ultra vires*. The Act was given third reading and royal assent as part of a large batch of various legislation on June 2, 1981 at 1071-1074.

[273] Institute of Law Research and Reform, *supra* note 51. The Institute's report makes the following comment about the provision: "Apart from *ACA* s.187 (a discussion of which we think unnecessary and irrelevant, particularly as we are advised that business corporations are rarely, if ever, dissolved under it)..." (at 155). In this manner, it dismissed this entire remedy as irrelevant. Not surprising, given the general approach of such modern corporate legislation "of allowing corporations to manage their own affairs..." (at 150).

[274] Section 206 of the *ABCA*. See discussion of the *CBCA*, *supra*.

English letters patent model and prior to 1915 only had provisions for voluntary winding-up and revocation of licences of extra-provincial companies.[275]

On March 6, 1915, the *Companies Act*, R.S.B.C. 1911, c.39 ("BCCA"), was amended by the *Companies Act Amendment Act, 1915,* S.B.C. 1915, c.12. Section 3 of the amending Act added section 27A to the Act regarding charter revocation:

> On sufficient cause being shown, and upon such conditions and subject to such provisions as may be deemed proper, the Lieutenant-Governor in Council may revoke and cancel the incorporation of a company and declare the company to be dissolved.

This provision remained in force until April 18, 1973, when the *Company Act* was repealed and replaced with the *Companies Act,* S.B.C. 1973, c.18 (Bill 16).[276] However, the charter revocation provisions survived as section 277 in a unique form:

> 277. (1) The Lieutenant-Governor in Council may, by order, cancel the incorporation of a company, direct that it be struck off the register and declare it to be dissolved.
>
> (2) Every order made under subsection (1) shall be published in the Gazette.

The fact that the provision was left in the new legislation appears to have been the result of disinterest on the part of the corporate legal community who ignored the dissolution and winding-up provisions in the Act.[277] This disinterest may be partially due to focus on other

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[275] Douglas, *supra* note 51.

[276] British Columbia, Legislative Assembly, *Debates* (Jan. 25, 1973). It received first reading transmitted by the Lieutenant-Governor on February 2, 1973 at 163. The Hon. Alexander Barrett Macdonald, Q.C., Attorney-General for B.C., moved a "fairly simple piece of legislation" for second reading on April 4, 1973 at 2205. The bill went through third reading and was passed on April 17, 1973.

[277] Corporate Legislation Committee, C.B.A. (B.C. Branch), *Comments on Proposed B.C. Companies Act (Bill 66) submitted to the Attorney-General's Corporate Legislation Committee* (Vancouver: October, 1972) at 131. The report states "We regret to advise that we were unable to elicit any interest whatsoever from members of the profession in respect to this Part of Bill 66 and accordingly have no comments or recommendations in this regard." The report was the culmination of comments of 9 sub-committees of lawyers to the Commercial Law subsection of the C.B.A and "the comments and recommendations contained in this report represent the opinions of all or substantially all members of the Commercial Law Subsection..." (at introduction). Furthermore there was no discussion at the CBA's mid-winter meeting on Feb. 2 & 3, 1973 of Bill 16 (previously Bill 66): Valerie Meredith (ed.), *The Proposed Companies Act of British Columbia* (Vancouver: Centre for Continuing Education, 1973).

amendments which arguably abolished the *ultra vires* doctrine by no longer requiring companies to list their objects, and placing no restrictions on the kinds of business that may be carried on by a corporation.[278]

After seven years of consultations between the Ministry of Finance, Consumer and Corporate Affairs Branch and a committee of corporate lawyers, the Branch put out a proposed Draft Act ("BCDA") in 1997 which amongst other amendments, removed the charter revocation provision. For reasons unknown, no comment was made regarding this deletion in the Guide which accompanied the Draft Act. In 1998, the matter was brought to the attention of the government and assurances were received that the provision would remain in any new version of the Act.[279] On June 24, 1999, true to its word, the government retained the provision in the new Bill 85, however it moved it from being a stand-alone provision to subsection 6 of section 446 of the new Act which applies to the dissolution of a corporate charter for failure to comply with administrative requirements. It remains to be seen how this will affect the interpretation of the provision.[280]

It is difficult to envisage how the British Columbia charter revocation provisions could be interpreted to have abolished the common law remedies in light of arguments made earlier in

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[278] Meredith, *ibid.*

[279] In response to considerable public response to the draft legislation in 1998 by groups such as the Council of Canadians, Michael Jantzi Research Associates representing ethical institutional investors, and the Citizens' Council on Corporate Issues (of which the author is Executive Director), the government set up a separate consultation process for the non-corporate sector. Assurances were received during these consultations that the provision would remain in the new legislation.

[280] Informal discussions with Ministry officials indicate that legal counsel from the Attorney General's office was of the opinion that the government had no authority to revoke a corporate charter for other than administrative reasons and therefore the scope of the provision was not diminished. Clearly, the evidence provided in this thesis suggests otherwise.

the federal context. However, from a practical perspective, the Attorney General would be unlikely to rely on the common law where a statutory provision exists to allow revocation of a corporation's charter. The significance of retaining the common law in this instance where there is a statutory provision in force is that it potentially provides standing to a broader range of petitioners.

iv. Ontario

Ontario was originally a letters patent jurisdiction, and despite adoption of a registration system of incorporation, retains letters patent terminology in its corporate legislation. The *Ontario Joint Stock Companies' Letters Patent Act* of 1874[281], was a consolidation of separate quasi-general incorporation statutes for joint stock companies in specified industries, none of which had revocation provisions.[282] The 1874 Act itself only had a provision for forfeiture for non-user (s.55). In 1897, the statute was amended significantly and renamed the *Ontario Companies Act,* R.S.O. 1897, c.191. A strong revocation provision was inserted as section 99:

> The charter of a company incorporated by letters patent, may at any time, be declared to be forfeited, and may be revoked and made void by an order of the Lieutenant-Governor in Council on sufficient cause being shown to the Lieutenant Governor in Council in that behalf, and such forfeiture, revocation and making void may be upon such conditions and subject to such provisions as to the Lieutenant-Governor may seem proper.[283]

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[281] S.O. 1874, c.35. Assented to March 24, 1874.

[282] *Telegraph Companies Act*, R.S.O. 1887, c.158; *General Road Companies Act*, R.S.O. 1877, c.152; *Timber Slide Companies Act*, 44 V. c.19; *An Act respecting Joint Stock Companies for the construction of Piers, Wharves, Dry Docks and Harbours*, R.S.O. 1877, c. 154; *An Act respecting Joint Stock Companies for the Erection of Exhibition Buildings*, R.S.O. 1877, c.155;

[283] 60 V., c.29, 97(a); R.S.O. 1897, c.191, s.99.

While the Act was repealed and reintroduced several times subsequently, the provision remained part of the statute until 1953.[284] On April 2, 1953, the *Corporations Act* was enacted repealing the *Companies Act*. It provided:

> 317(1) Where sufficient cause is shown, the Lieutenant Governor may by order, upon such terms and conditions as he or she considers fit,
>
> cancel the letters patent of a corporation and declare it to be dissolved on such date as the order may fix;
> declare the corporate existence of a corporation incorporated otherwise than by letters patent to be terminated and the corporation to be dissolved on such date as the order may fix; or
> cancel any supplementary letters patent issued to a corporation.
>
> (2) The Minister, under such circumstances and at any time as the Minister in his or her discretion thinks advisable, may authorize any officer of the Ministry of the Minister to conduct an inquiry for the purpose of determining whether or not there is sufficient cause for the making of an order under subsection (1)...

The surprising thing about this provision is that in remains in force in Ontario today[285], although other provinces that have used the Ontario act as a model have abandoned the provision. According to one author, unlike section 28 of the *Dominion Act,* the wording of this provision allowed the Lieutenant-Governor to revoke a charter without reference to the court because the Ontario legislation conferred the power on the Lieutenant-Governor rather than the Lieutenant Governor in Council.[286] In addition, forfeiture is not automatic but occurs only when some step is taken by the executive.[287]

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[284] The Act was repealed on April 20, 1907 but the provision was maintained in the new *Ontario Companies Act,* S.O. 1907, c.34, s.22. The Act was again repealed on April 16, 1912, but the provision was maintained in the new *Ontario Companies Act,* S.O. 1912, c.31, s.29; R.S.O. 1927, c.218, s.30; R.S.O. 1937, c.251, s.30(1); R.S.O. 1950, c.59, s.29(1).

[285] R.S.O. 1953, c.19, s.325(1)[repeal of *Companies Act* and enactment of *Corporations Act*]; R.S.O. 1960, c.71, s.326 [subsection (2) inserted at this time]; R.S.O. 1970, c.89, s.347; S.O. 1972, c.1, s.1 [making provision (2) gender neutral]; R.S.O. 1980, c.95, s.317; R.S.O. 1990, c.C-38, s.317.

[286] Stewart, *supra* note 269 at 167 referring to *A.G. v. Toronto Junction Club* (1904), 8 O.L.R. 440 and *Border Cities Press Club v. A.G. Ont.* [1955] O.R. 14 (C.A.),

[287] Moto-Sway Corp. of America v. Standard Steel Construction Co. [1939] O.W.N. 311.

Ontario also introduced an utterly unique provision on April 26, 1963[288] in response to the Royal Commission on Crime in Ontario under Mr. Justice Roach which applied only to corporations of a "social nature". It reads:

> Despite anything to the contrary in any Act, in any letters patent or in any supplementary letters patent, if it
>
> (a) is made to appear to the satisfaction of the Minister that a corporation that has objects in whole or in part of a social nature,
> (b) occupies and uses a house, room or place as a club that, except for paragraph 197(2)(a) of the *Criminal Code* (Canada), would be a common gaming house as defined in subsection (1) thereof; or
> (c) occupies premises that are equipped, guarded, constructed or operated so as to hinder or prevent lawful access to and inspection by police or fire officers, or are found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting or with any device for concealing, removing or destroying such means or contrivance,
>
> the Lieutenant Governor may make an order under subsection 317(1).

This provision also remains in the Ontario statute[289], but has never been judicially considered. The introduction of this provision, while of limited scope and value, illustrates the piece-meal approach of government to addressing aspects of corporate activity of concern to the public interest. Rather than using the opportunity presented by the Royal Commission to consider the place of the corporation in society in broader terms, the government drafted its legislative amendments solely in accordance with the recommendations arising from the limited mandate of the Royal Commission and the precipitating events. This is reminiscent of the origins of company law in England where the report of one inquiry focused on issues relating to fraud ultimately dictated the form of modern corporate legislation.

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[288] *Legislature of Ontario Debates, 4th sess., 26th leg.* Bill 146 was introduced by Hon J. Yaremko (Provincial Secretary) and given first reading on April 17, 1963 at 2499. Second reading on April 22, 1963 at 2645. House in Committee, but not debated on April 26, 1963 at 2882. Given Royal Assent on April 26, 1963 at 2957.

[289] R.S.O. 1990, c.C-38, s.316.

As mentioned at the outset, the continued reference to 'letters patent' in the Ontario *Corporations Act* is an example of the retention of concessionist ideology in our modern corporate legislation. Despite adoption of the system of registration, the use of letters patent highlights the requirement of the corporation to obtain authorization from the state to operate, albeit that the authorization is as of right upon filing of the requisite documentation. This observation coupled with the similar wording of Ontario's charter revocation provision provides a solid basis from which to argue that the common law remedies survive in addition to the strong statutory provisions.

ANALYSIS

From the introductory discussion of the nature of the prerogative (*supra*), consideration of the history of the prerogatives, and the statutory evolution of corporate charter revocation, it is evident that *quo warranto* and *scire facias* face substantial hurdles before they can be considered as viable modern legal mechanisms. Four specific issues are identified here:

(1) whether they have survived given their age and disuse;

(2) whether they remain relevant in the context of modern corporate law;

(3) whether they have been abrogated or merely superceded by statute where statutory charter revocation provisions exist; and

(4) whether they have been revived with the subsequent repeal of statutory charter revocation provisions in various jurisdictions.

This section attempts to address these issues, however it should be stated at the outset that the conclusions drawn are only speculative given the paucity of recent academic or judicial commentary.

i. Disuse

While the common view expressed by Jones and de Villars is that *scire facias* is "probably now obsolete", substantial judicial commentary to the contrary leaves the state of the remedy in question.[290] In the *Hellenic* decision, the charter of a society was revoked for misuse and abuse, Farris C.J. stated that the common law survived:

> the Dominion *Companies Act* has taken nothing away from the common law rights to have a charter annulled but has given certain other grounds on which it may be cancelled under the statute.[291]

Of the three decisions cited in support, one involved charter revocation by writ of *quo warranto*[292] while the other two dealt with the matter by way of *scire facias*[293], suggesting that the Chief Justice had both remedies in mind in his reference to the survival of "common law rights". Moreover, the fact that the court upheld their existence some forty years after the last reported case in which they were used to seek revocation of a corporation's charter, suggests, in addition to the view held by De Smith[294], that the existence of the prerogative has not been jeopardized by disuse. A final argument in support of the survival of the remedy despite disuse is the continued reference to it in several federal statutes.[295]

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[290] Jones and de Villars, *supra* note 142 at 358ff.

[291] *Supra* note 157 at 846. The relevant section of the Act (s.28) provided for the revocation of a charter for non-use. This is now a standard provision in most corporate statutes. See the end of the section on *quo warranto, infra,* for a detailed discussion of the facts and significance of the *Hellenic* decision.

[292] *R. v. The City of London, supra* note 128.

[293] *Supra* note 145 at 89: "I find it laid down that a corporation may be dissolved for either of these two causes – misuser or abuse; and that there is a *tacit* or *implied condition* annexed to all such grants as the present, that they shall not be misused or abused, and that if they be, the charter or franchise is forfeited."; *The City of London v. Vanacker, supra* note 129.

[294] *Supra* note 126.

[295] *Canada Cooperative Association Act,* R.S.C. 1985, c.C-40, s.137, speaks of proceedings by *scire facias*. *Canada Corporations Act,* R.S.C. 1970, c.C-32, s.142 still remains in force with respect to corporations without share capital (i.e. not-for-profit corporations) governed under Part II of the Act.

ii. Irrelevance

Presuming that the prerogative remedies of *quo warranto* and *scire facias* have survived in the context of revoking corporate charters despite disuse, the issue then becomes whether *quo warranto* has been rendered irrelevant by virtue of modern developments in corporate law. It is argued that the introduction of incorporation by way of registration displaced the Crown's prerogative to withhold or revoke a charter for reasons other than those prescribed by legislation.[296] It is further asserted that the granting of the rights, powers and privileges of the person to the corporate form coupled with the introduction of a registration system which eliminated restrictions on corporate objects and purposes, removed the ability to revoke a corporation's existence where the corporation acted *ultra vires* its charter.[297] However, Winterton's consideration of the prerogative in novel situations suggests that the prerogative may have survived the transition from the letters patent system to the registration system.[298] The fact that incorporation is now a right does not diminish the Crown's prerogative to revoke a corporation's charter. Neither *scire facias* nor *quo warranto* are restricted to

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[296] This shift in the system of incorporation under federal legislation (which was the precursor to all modern provincial legislation) was not taken after consideration of the role of the corporation and the protection of the public interest, but rather pursuant to the traditional neo-liberal objective to make incorporation more attractive at the federal level, and the fear that companies were incorporating provincially rather than federally. See *Debates of House of Commons,* 1974-75 at 4418; 1935 at 3653. In debating the 1935 federal amendment, Cahan cautioned the House:

> But I would remind the house that the dominion parliament is not the only legislative body in Canada which controls the incorporation of companies. It has been decided by the privy council that the grant of letters patent by the crown in the province of Quebec gives to the company the power to carry on every and any activity which is within the legislative competence of the province of Quebec, the same as if the company were a private person or individual, and other provincial legislatures have taken advantage of this decision of the privy council to the effect that the crown in the right of the province in Quebec is authorized to grant such charters. Other provincial legislatures by their own legislation have conferred upon their companies distinctly and expressly the same right as an individual would possess.

[297] See Slutsky, *supra* note 260.

[298] Winterton II, *supra* note 153.

operating in the charter context. While the courts have intimated that *scire facias* does not likely apply to enterprises incorporated by Act of Parliament, it is asserted that *scire facias* would likely be found to apply to all forms of record of incorporation, including the record produced upon registration under the current model of incorporation. The notion of the 'record' is a well-founded notion in administrative law and applies in all contexts. While the courts refer to letters patent, it is only because that was the mode of incorporation and record at the time. Accordingly, it is submitted that there is no difficulty in transplanting the notion of the 'record' to the modern context.

Furthermore, *quo warranto* is not concerned with the form or procedure of incorporation, but rather the actions of the incorporated institution. While corporations are no longer required to list their objects and purposes as they did under the letters patent system, it is submitted that *quo warranto* may still be invoked where the corporation exceeds its articles of incorporation (i.e. acts illegally).[299] Moreover, the lasting connection of the corporation to the public sphere through statute supports the continued notion of the corporation being accountable to the public through government; the common law remedies being one mechanism to effect that end.

iii. Abrogation

As indicated earlier, there has been no explicit abrogation of either common law remedy at the federal or provincial levels. Therefore, the only matter requiring consideration is whether

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[299] Query whether society should consider reintroducing certain limitations on the objects and purposes of corporations in light of modern environmental, social and economic concerns.

the prerogative has been displaced by necessary implication pursuant to the wording of a statute or been merely superceded.

Reference to the rules of statutory interpretation are essential to undertake a proper analysis of this issue. Pierre-André Côté asserts that there is a need to strike a balance between the authority of the new text and that of the former uncodified law. [300] In principle, the courts will look first at the statutory provision and attempt to discern its intent. Only if it is not clear on its face will they resort to the previous state of the law for guidance.[301] Therefore, to the extent that a statutory provision addresses the issue of charter revocation, the courts are less likely to refer back to the common law for guidance.

There is also the related issue of whether the statute covers the same territory as the common law. *Craies on Statute Law* is unequivocal on the point that express and unambiguous language is absolutely indispensable in statutes that confer or take away legal rights, "whether public or private."[302] With respect to corporate charter revocation, most academic scholars contend that the changes to Canadian corporate law in the past 50 years have removed any limitations on the activities of corporations (i.e. nothing is *ultra vires* the

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[300] Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed.) (Cowansville, Quebec: Les Éditions Yvon Blais Inc., 1991) at 44.

[301] *Bank of England v. Vagliano Brothers*, [1891] A.C. 107; *S.S. Industries v. Rowell*, [1966] S.C.R. 419 at 425 (Martland J.); *Northern Crown Bank v. International Electric Co.*, (1911) 24 O.L.R. 57 (Ont. C.A.); *Wilkinson Sword (Canada) v. Juda*, [1968] 2 Ex. C.R. 137.

[302] S.G.G. Edgar, *Craies on Statute Law* (7th ed.) (London: Sweet & Maxwell, 1971) at 112. See also *Deeble v. Robinson*, [1954] 1 Q.B. 77: "Plain worlds are necessary to establish an intention to interfere with common law or contractual rights." *Re Cuno* (1889), 43 Ch.D. 12 at 17: "In the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

corporation) and therefore there remain no grounds on which to permit or merit the revocation a corporate charter.[303] For example, section 15 of the *CBCA* provides that "A corporation has the capacity, and, subject to this Act, the rights, powers and privileges of a natural person."[304] Sections 16(2) states that "A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles." And finally section 16(3) asserts that " "no act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act." Slutsky and others contend that the sum of these provisions have the effect of fully occupying the field leaving no room to question the actions of corporations. However, a close reading of section 16(3) shows that nothing is said about the actions of corporations outside of company law. In fact, the notion of illegal or criminal acts by the corporation are not contemplated at all within the four corners of the legislation. Corporate law only addresses internal relations within the corporation, not its acts in relation to the broader community. Consequently, it would seem that the common law remedies of *scire facias* and *quo warranto* have not been abrogated by the modern elements of the corporate structure. Certainly, one cannot claim that the provisions in modern corporate statutes have 'expressly' and 'unambiguously' extinguished these prerogative powers.

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[303] See e.g. Slutsky, *supra* note 260.

[304] *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, s.15(1). Similar, if not identical, provisions to this section and the others cited in this paragraph are contained in the corporate legislation of all the provinces.

With respect to statutes that actually provide provisions expressly granting authority to the Attorney General or Lieutenant-Governor in Council to revoke the charter of a corporation, the situation is somewhat different.[305] The different wording in the charter revocation provisions of every jurisdiction make it exceedingly hazardous to draw generalizations and no such attempt is undertaken here. In all likelihood, it will take legal challenges in each jurisdiction to determine the state of the prerogatives. The decision in *Hellenic* does not answer the issue because in that instance, the court was considering the status of the common law in relation to section 28 of the federal *Dominion Companies Act* that provided for revocation for non-user, whereas the charter revocation provisions at issue refer to involuntary dissolution.[306]

iv. Revival

There is no consensus on the status of a prerogative upon repeal of a statute that previously covered the same territory as the prerogative, but did not expressly extinguish the prerogative.[307] This issue is of critical importance since most jurisdictions have introduced and later repealed corporate charter revocation provisions.[308] Unfortunately, existing ambiguity in this area of law will likely remain given the reluctance of the courts to deal with legal quagmires and the untold ramifications of taking a definitive position on the issue. On the whole, the better view is that the courts would find that the common law has merely been

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[305] See British Columbia and Ontario provisions, *supra.* For an historic discussion of this point see Roland, *supra* note 171.

[306] *Supra* note 157; Roland, *ibid.*

[307] Roland, *ibid.*, raises the issue at the outset of his article, but unfortunately does not go on to explore the point. However, his comments in the context of determining the division of prerogative powers over corporate charter revocation imply that the prerogative writ of *scire facias* has not been superceded by statute in all jurisdictions.

superceded in such a case. To rule otherwise would upset the principles of constitutional supremacy and the long-standing deference shown towards the royal prerogative upon which the rule of law rests. Furthermore, the views of De Smith and Lord Simon of Glaisdale in *McKendrick v. Sinclair*[309] with respect to the permanency of the prerogative provide strong support for the survival of *quo warranto* and *scire facias*.

v. Proper Remedy

The final element requiring consideration is the relationship and distinction between *scire facias* and *quo warranto*. The similar origins and remedial outcomes of the two prerogative remedies have resulted in considerable confusion, overlap and randomness in their application and treatment by academics.[310] This section of the paper provides a detailed analysis of some of the judicial and academic commentary with the objective of discerning which of the two is the proper remedy in any given instance, and through that process, coming to understand each remedy more fully. The conclusion which I draw from the analysis is that the remedies are practically indistinguishable in their outcomes, namely the revocation of the corporation's charter, however they may be applicable in different circumstances today.

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[308] See analysis of statutory history in various Canadian jurisdictions *supra*.

[309] *Supra* note 129.

[310] Baker, *supra* 167 at 167 refers to *scire facias* as an "analogous procedure"; J.A. Mullin, Q.C., "Termination of Corporate Existence" in *Lectures* (Law Society of Upper Canada: 1968) at 289; Wegenast, *supra* note 43 at 89.

Many judicial decisions and early commentators state that *scire facias* is the proper procedure for seeking to revoke the charter of a corporation. In *Queen v. Aires*[311] where the charter of a market was sought to be revoked, the Chief Justice cited *Sir Oliver Butler's case*[312] as express authority for *scire facias* being the proper remedy and that the Crown *de jure* ought to permit subjects to sue in the name of the King. Halsbury contends that "the directions given in a charter of incorporation are equivalent to conditions upon which it is given, and where it is alleged that there has been a breach of a condition upon which incorporation has been granted, the question may be tried by *scire facias*."[313] Blackstone provides that "Where the crown hath unadvisedly granted any thing by letters-patent which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by a writ of *scire facias* in chancery."[314] Blackstone's explanation suggests that it is to be used in the context where breach has been committed in relation to an existing charter granted by letters patent, akin to the principle of seizure.

Similarly, Bouvier's Law Dictionary (1914) asserts that *quo warranto* is the usual and more appropriate remedy to forfeit corporate charters and offices and *scire facias,* though used for that purpose, is more especially applicable to the repeal of letters patent.[315] This distinction points to what is the main difference between the remedies and the reason for the confusion

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[311] (1716), 10 Mod. Rep. 354, 88 E.R. 762, sub. nom. *R. v. Eyre* (1717) 1 Stra 43.

[312] (1680) 3 Lev. 220, 2 Ventris 344.

[313] *Supra* note 168 at 97.

[314] Blackstone, *supra* note 162 at para. 261 citing Dyer, 198 and 2 Lev. 220.

[315] *Supra* note 42 at 3015.

that exists in this area. *Quo warranto* questions the authority of a public office. *Scire facias* is an administrative remedy that looks at the face of the record (i.e. charter, letters patent, articles of incorporation) to ask whether the entity has acted *ultra vires* the charter. At the time when corporations were undisputedly public institutions, the authority of the enterprise was found within its charter. Therefore, the remedial approaches appear to overlap. As greater artificial distinctions were drawn between the private and public conceptions of the corporation, the application of the two remedies began to diverge.

There is some commentary to suggest that *quo warranto* was the appropriate remedy with respect to what is now considered public companies (e.g. municipalities and public utilities), whereas *scire facias* was the common law remedy with respect to present day private companies.[316] The mention of *scire facias* in the *Canada Corporations Act*[317], provides some support for this contention. However, this explanation does not seem tenable given that there was no early distinction between public and private companies. While different types of business were treated differently throughout history, for the purposes of incorporation, businesses were not divided into public and private enterprises until the 1800s, well after the introduction of these prerogative remedies, and the implementation of the letters patent mode of incorporation.

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[316] V. E. Mitchell, *A Treatise on the law relating to Canadian Commercial Corporations* (Montreal: Southam Press Limited, 1916) at 159.

[317] R.S.C. 1970, cC-32, s.137.

A further distinction is that *scire facias* can only be utilized where there is an existing corporate unit on the record capable of acting, whereas *quo warranto* may also be applied where there is only a *de facto* corporation[318]:

> By Forfeiture of its charter through negligence or abuse of its franchise, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of quo warranto, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings.[319]

Therefore, *quo warranto*, unlike *scire facias,* can be utilized to challenge the authority of a corporation to act where its charter has not been granted, or has already been forfeited, annulled or vacated.

Other comments suggest that the distinction between the two remedies is that *quo warranto* focuses on the actor, whereas *scire facias* focuses on the nature of the act. *Quo warranto* questions the authority of the individual director, officer, agent or corporation itself to do the act in question.[320] In contrast, *scire facias* places the burden on the corporation to show cause why the corporation's actions fall outside the allowable activities of its charter. From this perspective, the two remedies are simply two faces of the same coin. In the first instance, the capacity of the individual is challenged. In the latter case, the legitimacy of the act is queried. While this helps to further clarify the nature of the two remedies it does not

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[318] *Supra* note 42 at 3025: *"Scire facias* is also used by government as a mode of ascertaining and enforcing the forfeiture of a corporate charter; 3 Wood, Ry. L. 208, n.; where there is a legal existing body capable of acting, but who have abused their power; it cannot, like *quo warranto* (which is applicable to all cases of forfeiture), be applied where there is a body corporate *de facto* only, who take upon themselves to act, but cannot legally exercise their powers."

[319] *Supra* note 171 at 390.

[320] *Glover v. Giles* (1881) 18 Ch. D. 173 at 180, 50 L.J. Ch. 568, 29 W.R. 603, 45 L.T. 344 at 345-346: "There is a perfectly well-known method by which an incorporation may be recalled or made void. It is competent to proceed by *quo warranto* and to show that those persons who represent themselves as members or officers of a corporation are not so."

appear to help distinguish which is the preferred remedy in any given instance. Most cases where charter revocation would be sought in a modern context will involve some unsanctioned act of the corporation or its representative with the act also being illegal (i.e. *ultra vires* the corporation).

Finally, there is the comment that the remedies are distinct in their outcomes. According to Parke J. in *Eastern Archipelago*, *quo warranto* does not destroy the corporation, but merely negatives the unauthorized corporate act, whereas *scire facias* calls for the revocation of the corporation's charter.[321] Parke J.'s position appears supportable in light of the distinction drawn between the two remedies in the preceding paragraph. *Quo warranto* merely nullifies the actions of the unauthorized actor. Even where the actor is determined to be the corporation as a whole, it is suggested that the remedy goes only to canceling the unauthorized activities and seizure of the corporation's property, not termination of the franchise.[322] In contrast, *scire facias* only provides for the extinguishment of the record of incorporation.

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[321] Parker J., in denying that the Crown should bear its costs in a Criminal proceeding such as *quo warranto*, makes the following statement distinguishing *quo warranto* and *scire facias*: "Now the consequence of this suit was of equal concern to this corporation, as that of a capital prosecution to the life of a particular person; for the very life and being of this corporation were in question; and if costs were once admitted in the case, those writs of *scire facias*, though they had not yet so harsh a sound in the ears of *Englishmen*, yet he would undertake to prove, they would have ten times more pernicious effects, than *quo warrantos* of old; for a judgment in a *quo warranto* did not destroy the franchise, but a corporation might still, notwithstanding that, have another struggle for its liberty; but in the case of a *scire facias,* the judgment was a repeal of the charter; and if a jury could for once be so managed as to give a partial verdict, it was but getting those costs taxed as a poor borough was not able to pay, and the business would be done; they could not pay the costs, and without that, they should not have a new trial in order to come at right and justice."

[322] Rawle, *supra* note 42 at 2789. In the first instance, it was historically termed *ouster* as no franchise exists to be forfeited: A body corporate *de facto* which took upon itself to act as a body corporate but which from some defect in its constitution could not legally exercise the powers it affected to use formerly might have been dissolved by a judgment in *quo warranto;* see *R. v. Pasmore* (1789), 3 Term Rep. 199 at 244, *per* Ashhurst J.;

From a strictly doctrinal perspective, it would appear that the primary distinction between the two remedies in the present context is that *quo warranto* applies with respect to public offices, whereas *scire facias* looks at the record of incorporation. This differentiation suggests that *scire facias* would be the more acceptable and easily assertable remedy today, however as argued earlier, it remains to attempt to reintroduce notions of the corporation as a public enterprise which would make room for acceptance of *quo warranto* as an alternative remedial option. One exception to this conclusion is where the objective is to prevent a *de facto* corporation from continuing. Aside from seeking an injunction to that effect, *quo warranto* would appear to be the only available option from between the two prerogative remedies.

In conclusion, the status of the prerogative remedies of *quo warranto* and *scire facias* are mired in the uncertainties of legal history. Contested aspects of constitutional law, administrative law, statutory interpretation and corporate legal history create formidable obstacles to putting forward conclusive arguments in favour of corporate charter revocation. Legitimizing alternative perspectives of corporate law and corporate discourse are made more difficult because of the lack of critical analysis and questioning in this area of law.

Nevertheless, this chapter has attempted to bring together theory, history and legal doctrine together to begin to explore ways out of our paralysis in dealing with the corporate structure. I first explored the nature of the prerogative placing it within the framework of an unwritten

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and *R. v. Amery* (1787), 1 Term Rep. 575 at 584 (per Ashhurst J.). In the later case, it was deemed *seizure* because a charter existed to be seized.

constitution. I then focused attention on the two prerogative remedies of *quo warranto* and *scire facias,* drawing connections to their roots in constitutional and administrative law, as well as exploring their evolution through case law and codification in a number of Canadian jurisdictions. Finally, I returned to consider various arguments related to the prerogative nature of the remedies, namely that they have been extinguished by the elements to which all prerogatives are susceptible: disuse, irrelevance, abrogation, and succession.

While the status of the remedy remains uncertain, the evidence strongly supports several conclusions:

(1) charter revocation survives in British Columbia and Ontario in their statutory provisions;

(2) where statutory provisions once existed, they merely superceded and did not extinguish the common law;

(3) the common law has not bee expressly abrogated nor been rendered ineffectual by disuse;

(4) *quo warranto* and *scire facias* are distinct, alternative remedies in most instances where corporate charter revocation is sought to be applied.

Less conclusive is the evidence regarding the relevance of the remedies in the modern context.

Having spelled out a theoretical and doctrinal defence of the remedy, it remains to consider the socio-political context to assess the ability and constraints on introducing the remedy in Canada. Application of the remedy is dependent on state involvement through the Attorney

General or Cabinet. Therefore, it is essential to understand and appreciate the relationship between the state and the corporation in order to develop any real chance of reviving use of the remedy. The following chapter attempts to engage this critical element.

CHAPTER IV: THE STATE AND CORPORATE CHARTER REVOCATION

The literature on charter revocation to date has focused predominantly on presenting doctrinal support for corporate charter revocation. Chapter three built on this work by presenting the legal landscape in Canada regarding corporate charter revocation. However, scholars have yet to turn their attention to consideration of the social and political context in which the remedy operates. The result is that initiatives by civil society to reintroduce the remedy in the United States have been met with limited success in the courts (see case studies discussed *infra*). In Canada, corporate charter revocation has not been used in the past fifty years, and only very infrequently since confederation. Clearly, attention must be given to the political barriers to implementing the remedy and the development of a responsive strategy if there is to be any hope of furthering its acceptance and use. The objective of this chapter is to begin this process by taking the study of the remedy beyond its mere doctrinal justification and to consider it within Canada's social and political realities.

The question addressed in this chapter is what are the socio-political barriers to realizing corporate charter revocation in practice and given these obstructions what strategic steps can be taken to increase the likelihood of the successful utilization of the remedy in Canada given the nation's present political and economic climate. This chapter begins by considering three obstacles through the lens of liberal and Marxist theories of the state and mapping each on to the Canadian context. The conclusions drawn from a study of these barriers is then applied to begin to develop a response strategy. This strategy is then considered in relation to recent United States charter revocation case studies identified in the introduction to this thesis.

Modern state theorists discuss three aspects of the state that represent barriers to the implementation of corporate charter revocation. The first is the general observation of the lack of autonomy of the state from the interests of the dominant economic elite as a result of the cross-fertilization of personnel – commonly referred to as the 'revolving door' syndrome.[323] The second barrier exists on an institutional level and has two elements. First, our economic system dictates that the state as institution must concern itself primarily with maintaining economic stability in order to ensure the preservation of capital (which creates government revenue through taxation) and the means of production in the hands of owners – the dominant economic class. Second, state theorists contend that the ability of the corporation to move operations in response to economic conditions makes the state vulnerable and incapable of making decisions in the interest of society. The final barrier is based on the ideological concern of distinguishing between private and public interests in the context of business activity. Each of these impediments is discussed more fully below.

With respect to the issue of autonomy, both liberal and Marxist theories of the state provide insights into the state's present reluctance to revoke corporate charters and more importantly, what is required to successfully petition government to initiate such proceedings. Bob Jessop in his text *State Theories* summarizes the views of these two dominant theoretical views of the state. In short, liberalism suggests that the state will take any action where there is at least a majority supporting it.[324] Marxism argues that the state is unwilling to revoke the life

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[323] *Supra* note 105 at 116.

[324] Bob Jessop, *State Theory: Putting Capitalist States in their Place* (University Park, Pennsylvania: Pennsylvania State University Press, 1990) at 171-175.

of a corporation where it will jeopardize long-term economic stability or dominant hegemonic interests.[325] Bringing these two notions together, the general conclusion drawn in this chapter is that any first effort to reintroduce such a remedy into legal discourse requires finding a corporation with a notorious record of violations around which there is well-established public disdain and whose extinguishment will not jeopardize the long-term economic interests of the community in which it operates. While this conclusion illustrates the lack of state autonomy in controlling the corporate class, it also suggests a strategic first step towards the potential use of the remedy.

PERSONNEL BARRIERS

The first barrier to the reintroduction of corporate charter revocation is the intermeshing of state institutions and private business, which form the dominant economic elite. The liberal model of the state envisions a formal autonomy with clear lines drawn between government and the various interests in society. The state is capable of being influenced, but this occurs only through normal democratic channels. Liberals and conservatives alike see "the system of government in the advanced capitalist societies ensures that the state is an impartial instrument of popular rule."[326] However, a post-marxist critique contends that the state-bourgeoisie relationship is an interlocking composite of relationships between personnel of

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[325] *Ibid.* at 185.

[326] *Ibid.* at 172.

various state agencies based on class, education, kinship, personal and ideological associations:

> The "bourgeois state has tended to be run by people very largely of the same class as people who commanded the 'private sector' of the economy of capitalist societies (and for that matter the 'public sector' as well)."[327]

In the Canadian context, Leo Panitch's empirical study reveals "...that the linkages between the state and the dominant class have been, and remain, not general and abstract, but particularly close and intimate... And one sees in terms of state functions, that, from its very beginnings, the Canadian state has played a tremendously large role in fostering capital accumulation."[328] Ralph Miliband dismisses this analytical approach because of counter-evidence showing that the state has historically continued to serve the dominant interest even where it did not staff the state apparatus.[329] Jessop also challenges this "revolving door" conception of the state arguing that those without close personal ties are more likely to pursue "the global, hegemonic interests of capital" which are the shared interests of the state.[330] While these critiques suggest that the "revolving door" analysis cannot fully explain the corporate/state dynamic, there can be little doubt that existing corporate/state relations are a dominant factor in government's resistance to any political action, such as corporate charter revocation, that is perceived to violate the interests of the dominant economic elite and the stability of the economic system. The remedy is perceived as "draconian"[331]; harmful to a

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[327] Ralph Miliband, *Marxism and Politics* (Oxford: Oxford University Press, 1977) at 69.

[328] Panitch, *supra* note 108 at 9.

[329] Martin Carnoy, *The State and Political Theory* (Princeton, N.J.: Princeton University Press, 1984) at 52; Knutilla, *supra* note 106 at 117.

[330] *Supra* note 324 at 179.

[331] *Supra* note 16 at 36.

nation's economy because it presents a threat to business corporations.[332] Appreciating this corporate/state relationship is essential in the context of corporate charter revocation given that only the state has standing to initiate such proceedings under Canadian law.[333]

In practice, the barrier posed by the intermingling of state and business manifests itself in the office of the Attorney General. Unfortunately, the responsibility of the Attorney General for the overseeing of the administration of justice in Canadian society and the consequent independence bestowed upon the Office has shielded it from extensive scrutiny by government and the courts.[334] This deference, while having its place in ensuring the integrity

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[332] Historically, corporate charter revocation was seen as necessary to guard against corporate activities that threatened the integrity of business, which at the time was relied on the reputation of individual businessmen: see McQueen, *supra* note 50 at 93,105-107.

[333] Both the common law and statutory versions of corporate charter revocation require that the Lieutenant Governor in Council or Attorney General commence proceedings to revoke a corporation's charter. Alabama is one of the few jurisdictions in North America that allows for an individual citizen to commence proceedings. See discussion *infra* regarding private prosecutions and the proceeding commenced to revoke the charter of R.J. Reynolds in Alabama. While there is some question as to the right of individuals to bring an application in *scire facias* or *quo warranto*, the issue of public standing is beyond the scope of this paper. The issue of public standing with respect to the prerogative remedies has a unique history, however, given the age of judicial pronouncements on this point the courts would likely be led to a large degree by more recent thinking on the issue generally. For a consideration of the topic of public standing, see Bryce C. Tingle, "The Strange Case of the Crown Prerogative Over Private Prosecutions or Who Killed Public Interest Law Enforcement" (1994) 28(2) *U.B.C. L.R.* 309; Peter P. Mercer, "The Citizen's Right to Sue in the Public Interest: The Roman *Actio Popularis* Revisited" (1983) 21(1) *Univ. of Western Ontario L.R.* 89; P. Burns, "Private Prosecutions in Canada: the Law and a Proposal for Change" (1975) 21 *McGill L.J.* 269; F. Kaufman, "The Role of the Private Prosecutor" (1961) 7 *McGill L.J.* 102; and the decisions of the Supreme Court of Canada in *Thorson v. Attorney-General of Canada (No. 2),* [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil,* [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 362; *Minister of Justice of Canada v. Borowski,* [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588; *Hy Zel's Inc. v. The Attorney-General for Ontario,* [1993] 3 S.C.R. 675, 107 D.L.R. (4th) 634; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration,* [1992] 1 S.C.R. 236, (1992), 88 D.L.R. (4th) 193.

[334] For a consideration of the history of the Office of the Attorney General in Canada see: Gil McKinnon, Q.C. and Keith Hamilton, "The Need for an Independent Prosecution Service in B.C." (January 1997) 55(1) *The Advocate* 37; Philip Stenning, *Appearing for the Crown, A Study Conducted for the Law Reform Commission of Canada* (Brown Legal Publications) at 1-31; Eric Colvin, "The Executive and the Independence of the Judiciary" (1986/87) 51(2) *Sask. L. Rev.* 229 at 229. Briefly, with the creation of independent government in England following the Glorious Revolution of 1688, the Attorney General became an elected member of the House of Commons accountable to Parliament, although he was not a member of Cabinet. During the early colonial period in Canada, an Executive Council was established including the Attorney General who was

and independence of the judicial system, has had the effect of ignoring the real inherent conflicts within the position of the Attorney General as an elected official, member of Cabinet and a part of the corporate elite.

The issue of the apparent and perceived conflict of the Attorney General as member of Cabinet on the one hand and Chief prosecutor on the other has been debated extensively by members of the legal community.[335] Attorneys General consistently cite the requirement that the Attorney General make decisions independent of any political considerations. However, comments by then Attorney General of Canada, Senator Jacques Flynn, reflect the general belief amongst the judiciary, leading authorities, and elected officials that the Attorney General, as an elected official and member of Cabinet, is allowed to consult with other government members prior to reaching a decision on any given issue[336]:

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responsible for the government business, prosecutions and legal matters before the courts. The inclusion of the Attorney General in the Executive Council was a departure from the English model which excluded the Attorney General from Cabinet. In the 1850s, incidentally the same time as the Canadian government was considering the introduction of limited liability and the codification of corporate legislation generally, there was a "heated debate" in the Legislative Assembly over whether the Attorneys General should be allowed to hold Cabinet positions. As McKinnon and Hamilton recount, a motion calling in part for the exclusion of the Attorney General from Cabinet was defeated and has never been debated again in Canada.

[335] A full consideration of the nature and scope of the conflict is beyond the scope of this paper. See e.g. John Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984); Sir Thomas Hetherington, *Prosecution and the Public Interest* (London: Waterlow Publishers, 1989); Gil McKinnon and Keith Hamilton, *ibid.*; Hon. Brian R. D. Smith, "The Role of the Attorney General – or Walking the Tightrope" (1988) 46 *The Advocate* 255; Grant Huscroft, "The Attorney General and *Charter* Challenges to Legislation: Advocate or Adjudicator?" (June 1995) 5 *Nat. J. of Const. L.* 125; John Ll. J. Edwards, "The Office of Attorney General: new levels of public expectations and accountability" in Philip C. Stenning, *Accountability for Criminal Justice* (Toronto: University of Toronto Press, 1995) at 294; Hon. Ian Scott, "Law Policy and the Role of the Attorney General: Constancy and Change in the 1980s" (Spring 1989) 39 *U.T.L.J.* 109; Bruce P. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions between Punitive and Restorative Paradigms of Justice" (May 1998) 3 *Can. Crim. L. Rev.* 69; Gil McKinnon and Keith Hamilton, "Taking Politicians Out of Prosecutions" (November 1994) 52(6) *The Advocate* 843.

[336] For a list of authorities cited see Canada, Department of Justice, *Prosecution Policy of the Attorney General of Canada: Guidelines for the Making of Decisions in the Prosecution Process* (Ottawa: Minister of Supply and Services Canada, 1993) at 52 and accompanying footnotes.

> In dealing with a case which has been referred to him the Attorney General is unquestionably entitled to obtain information and advice from whatever sources he sees fit, including his colleagues in Cabinet. The course of action which he adopts in particular cases must, however, in the last analysis be his decision. The Attorney General does not act on directions from his colleagues, other members of Parliament or anyone else in discharging his duties in the enforcement of the law. On the other hand he must, of course, be prepared to answer in Parliament for what he does. These principles are well known and established not only in Canada, but in the United Kingdom and elsewhere where the system of Parliamentary democracy exists.[337]

Not surprisingly, many argue that such distinctions are merely a failed attempt to create the perception of autonomy and independence and contend that the political and judicial aspects of the Attorney General's office should be separated.[338]

In reality, it is submitted that it is impossible for the Attorney General, no matter how well intentioned, to separate the actions of consultation, decision-making and accountability to the state and hope to administer justice in an impartial and unbiased manner. Mapping Professor Joel Bakan's analysis of the Canadian judiciary onto the office of the Attorney

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[337] Canada, Senate Debates (October 18, 1979) at 126 cited in *ibid.* at 51; See also the oft-quoted comments of Sir Hartley Shawcross, "Notes of an address entitled "The Office of the Attorney General" to the Law Society (London: February 18, 1953) at 12 cited in Smith, *supra* note 335 at 258:

> I do not mean by that that the Attorney General is not entitled to his own political life; far from it... but of course he may engage in contentious politics, the only, but the essential qualification being that he must not allow them to affect his official actions in those matters win which he was to act in an impartial, even quasi-judicial way. But there is nothing startling or inconsistent with the British tradition in that. It may seem odd to strangers, but in this country it is well accepted that a man can be an active party politician and at the same time, but in another capacity, bring an absolutely impartial and honest mind to bear on the problems of a non-political nature with which he has to deal. A man may take an active part in politics, but when he comes to discharge his official duties, he discharges them in an entirely non-political way. In truth, the real danger in these matters always is that the politician, in his conscientious anxiety to be impartial, falls over backwards in favour of his political opponents, but perhaps that is not altogether a bad thing.

For similar references see Huscroft, *supra* note 335 at 24ff; comments of the Hon. Mark MacGuigan in 1983 in "The Position of the Attorney General of Canada on Certain Recommendations of the McDonald Commission" (unpublished, August 1983) at 6-9; comments of the Hon. John Crosbie in 1988 in Canada, *House of Commons Debates* (August 17, 1988) at 18437-38; comments of the Hon. Roy McMurty in 1978 in Ontario, *Legislature Debates* (December 23, 1978); and the Hon. Ian Scott in "The Role of the Attorney General and the Charter" (1986-1987) 29 *Crim. L.Q.* 187.

[338] Unfortunately, discussion of the appropriate role of the Attorney General is beyond the scope of this thesis. For a discussion of this point, see the many authorities cited *supra* note 336.

General helps to elucidate this point. Attorneys General "...operate at or near the centres of social, economic, and political power and within an institutional framework committed to perpetuating the existing social order."[339] While the Attorney General (or other representative responsible for overseeing the administration of justice[340]) has formal autonomy in the administration of justice, the formulation of policy and prosecutorial agendas are intimately bound up in the government's broader economic agenda:

> ...the attorney general is beholden to the prime minister for his position, such that political fortitude and personal integrity of a considerable degree may be required for an attorney general to buck the opinions of his or her cabinet colleagues in a crisis situation where critical policies or the legitimacy of the government are in question.[341]

The institutional bias towards supporting corporations as the engines of the economy and the vested interests of government in supporting private enterprise play against the independent mandate of the Attorney General. In short, the pressures imposed by the dominant economic elite through the rest of Cabinet and government results in the Attorney General's acquiescence to the will of those interests.

Furthermore, the Attorney General's office is loath to prosecute those who represent the pillars of society. In the context of white-collar crimes, "the prosecution finds itself trying to convict church-going, well-dressed, well-spoken, community leaders – men not apt to be judged harshly, except in the most extreme cases where responsibility and bad faith are

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[339] Bakan, *supra* note 37 at 31. These comments are even more appropriate in the context of the Attorney General who is much close to political power than the judiciary.

[340] Several jurisdictions around the world, including Nova Scotia have gone to varying degrees to create greater distinction between the political and legal roles of the Attorney General. See McKinnon and Hamilton, "The Need for an Independent Prosecution Service in B.C.", *supra* note 334.

[341] Archibald, *supra* note 335 at 93-94. See also Stenning, *supra* note 335.

unmistakable."[342] Government is often portrayed as the enemy of business in such instances by the corporate media that may jeopardize its political survival. In an era where governments are slavishly following the corporate agenda of deregulation, voluntary compliance and privatization, it seems naïve to trust that the Office of the Attorney General will extricate itself from the political realities and act pursuant to its duty as representative of the public interest.[343]

In addition to the nature of the office, the Attorney General as individual member of the establishment and the Canadian elite brings to his position a predominantly conservative approach, as well as a prevailing belief and commitment to the political, economic and social status quo. Despite the consistent rhetoric about the impartiality of the Attorney General in the administration of justice[344], it is important to question the trust society places in the value judgments of an elected individual who comes from an "elite group of predominantly white, upper-middle-class, male lawyers..."[345] While no attempt is being made here to generalize about the backgrounds or personal politics of various Attorneys General, it is important to understand and appreciate the class-based relations between Attorneys General and the establishment forged through formal education and professional relations.

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[342] Stone, *supra* note 28 at 63.

[343] Eric Colvin, *supra* note 334 at 247: " The primary concern has been with the Attorney General's independence from party-political interests in making prosecutorial decisions. In this context, a contrast is drawn between, on the one hand, the narrow party interest and, on the other hand, the wider public interest which should guide the exercise of discretion."

[344] See e.g. Scott, *supra* note 16 at 120.

[345] Bakan, *supra* note 37 at 31. I acknowledge the partial exceptions to this premise, such as Ussal Dosanjh, current Attorney General for British Columbia.

Prosecutorial guidelines do exist to ensure some degree of consistency and certainty in the Attorney General's decisions, however they are so discretionary as to be essentially meaningless in instances where political agendas conflict with prosecutorial duties. The Attorney General asserts that such discretion is necessary to allow for flexibility in dealing with individual cases. While there is considerable merit to this argument, discretion also provides latitude for subjectivity in prosecutorial decisions made by the Attorney General. Given the above noted institutional, social, and economic forces at play, this subjectivity is more likely to be influenced by prevailing personal and political, and dominant hegemonic forces often not in accord with the larger public interest.

Federal and provincial prosecutorial guidelines require consideration of two points in deciding whether to prosecute a given case: (1) whether there is sufficient evidence to justify the institution or continuation of proceedings; and (2) whether the public interest requires a prosecution be pursued.[346] Assessing the sufficiency of evidence requires that there be a "reasonable prospect of conviction".[347] Determining whether the public interest criteria is met "will vary from case to case" [348] and "must not include any consideration of the political implications of the decision."[349] Many factors are enumerated to help guide the Crown's deliberations, however they are merely provided to aid the decision-maker.[350] The final

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[346] *Supra* note 336 at 1. Similar prosecutorial guidelines exist for each provincial Attorney General: Archibald, *supra* note 335 at 82-83.

[347] *Supra* note 336 at 1.

[348] *Ibid.* at 3.

[349] *Ibid.* at 49.

[350] *Ibid.* at 3-5. Public interest factors which may arise to be considered in a particular case include:

(1) the seriousness or triviality of the alleged offence;

decision is discretionary. What is not addressed by the factors and left solely to the prosecutor is a determination of what is meant by the public interest. For example, in the context of charter revocation, one factor calls for considering "whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive", while another requires assessing "whether the alleged offence is of considerable public concern".[351] Clearly, charter revocation would be seen by some as being harsh or oppressive, while at the same time stopping the harmful activities of a notoriously harmful corporate entity would be of "considerable public concern". Leaving such decisions to the discretion of an individual generally from a elite segment of society facing direct political pressures as an elected

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(2) significant mitigating or aggravating circumstances;

(3) the age, intelligence, and physical or mental health or infirmity of the accused;

(4) the accused's background;

(5) the degree of staleness of the alleged offence;

(6) the accused's alleged degree of responsibility for the offence;

(7) the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;

(8) whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;

(9) the availability and appropriateness of alternatives to prosecution;

(10) the prevalence of the alleged offence in the community and the need for general and specific deterrence;

(11) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;

(12) whether the alleged offence is of considerable public concern;

(13) the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;

(14) the attitude of the victim of the alleged offence to a prosecution;

(15) the likely length and expense of a trial, and the resources available to conduct the proceedings;

(16) whether the accused agrees to cooperate in the investigation or prosecution of others, or the extent to which the accused has already done so;

(17) the likely sentence in the event of a conviction; and

(18) whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, or national security.

official and member of Cabinet cannot guarantee a proper assessment of the interests of civil society.

A clear example of this is the policy of staying all private prosecutions. It has been long-standing policy in British Columbia for the Attorney General to stay and assume conduct over all private prosecutions laid in the Province.[352] It is right to question from the outset how the Attorney General can implement such a blanket policy which does not consider each case on an individual basis in light of the prosecutorial guidelines. Although beyond the scope of this thesis, it is arguable that the ability of the Attorney General to stay private prosecutions not only goes against basic democratic principles, but is also not supported in law.[353]

Even the creation of such guidelines to oversee prosecutorial discretion is an inherently political exercise.[354] Bruce P. Archibald argues that the three central responsibilities of the state – policy making, social control, and legitimization – are all carried out by the Attorney General in administering the justice system and setting the prosecutorial agenda. Each of these political activities take into consideration governmental policies and objectives and

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[351] *Ibid.* at 4.

[352] Attorney General, Criminal Justice Division, *Private Prosecutions* (1990) (on file with author and the Sierra Legal Defence Fund).

[353] For a full discussion of this fascinating point, see Tingle, *supra* note 333.

[354] Archibald, *supra* note 335 at 92.

public values. Essentially, "deciding whether an area is 'political'...is itself a political matter."[355]

An example which demonstrates conflict within the Office of the Attorney General where class interests are pitted against one another is the 1996 B.C. Hydro investigation. McKinnon and Hamilton summarize the incident as follows:

> On February 17, 1996, a Liberal MLA publicly disclosed information suggesting that some of B.C. Hydro officials and their family members had participated in the purchase of shares in a Hydro subsidiary, contrary to Hydro policy. By the end of February the media published additional details of the transactions, which were, in our view, sufficient to warrant a commercial crime investigation under s.122 of the *Criminal Code* (breach of trust by an official). However, the RCMP announced in the first week of March that it would not initiate an investigation without a formal complaint, and no one in the Ministry of the Attorney General made one.
>
> It was not until April 18, 1996 that the RCMP announced that, in response to a private citizen's complaint, it was commencing a criminal investigation and was requesting the appointment of a Special Prosecutor.
>
> The RCMP's "no complaint, no investigation" stance is out of character with its practice in routine criminal investigations and could suggest a passivity unique to politically sensitive cases [read corporate crimes]. It is equally disturbing that the Attorney General's Ministry, with a recognized expertise in commercial crime prosecutions, was either not alive to the criminal law implications of the facts reported in the media, or chose not to discuss its concerns with colleagues in the RCMP's commercial crime unit.[356]

In light of such examples, it is not unreasonable to speculate that the policy of many provinces to stay all private prosecutions has been taken, at least in part, to control proceedings that could adversely affect corporate interests.[357]

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[355] Bakan, *supra* note 37 at 38.

[356] McKinnon and Hamilton, *supra* note 334 at 46.

[357] Ministry of Attorney General, Criminal Justice Division, "Policy – Private Prosecutions" (1990) (unpublished policy document on file with author): "Generally speaking, the policy of the Ministry of the Attorney General does not permit a private prosecution to proceed." For a consideration of Alberta's policy on stays see K. Webb, "Taking Matters Into their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement" (1991) 36 *McGill L.J.* 770 at 827. For an excellent consideration of the legal validity of this alleged prerogative power see Tingle, *supra* note 333.

The example of the Westray Mining case highlights another connection between the Attorney General and government, namely, the financial dependency of the Attorney General on government, creating at least a perceived demand on the Attorney General to act in accordance with state policy. On May 9, 1992, coal-dust ignited a methane explosion in the Westray mine killing all 26 men working underground. Westray Coal Inc. was a subsidiary of Curragh Inc. established in November 1988 when Curragh purchased Pictou County coal. Prior to the accident, there had been major cave-ins in the mine and warnings from Labour department inspectors to spread limestone and clean up the coal dust "to prevent an explosion". The Labour department filed 52 charges under the *Occupational Health and Safety Act* that were all subsequently dropped. Criminal charges against mine managers Gerald Phillips and Roger Parry for manslaughter and criminal negligence causing death were also dropped due to bungling of evidence by the prosecution. A February 22, 1993 memo from two prosecutors on the file to their superiors in the Department of Public Prosecutions complained of a shortage or resources to do their job and stated that the prosecution service must have its own budget to avoid the need to go "cap in hand to government, which is itself a suspect in the case."[358]

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[358] Vancouver Sun (May 6, 1993) A9 cited in McKinnon and Hamilton, *supra* note 334 at 43. An inquiry into the whole matter found that "it is a story of incompetence, of mismanagement, of bureaucratic bungling, of deceit, of ruthlessness, of cover-up, of apathy, of expediency and of cynical indifference.": K. Peter Richard, *The Westray Story: A Predictable Path to Disaster* (Province of Nova Scotia, November 1997). Only two executives testified at the inquiry. Curragh executives Clifford Frame and Marvin Pelley did not despite the inquiry finding the company management "derelict" in their duty to ensure mine safety.

Recommendation 73 of the inquiry called for changes to the legal system to increase accountability of corporations and their executives which was accepted by the government. The inquiry also received submission from David Roberts of the United Steelworkers of America calling for three initiatives:

(1) the creation of a new criminal offence "that would impose criminal liability on directors or other responsible corporate agents for failing to ensure that their corporation maintained an appropriate standard of occupational health and safety in the workplace;

(2) the creation of the offence of "corporate killing"; and

The above analysis supports Leo Panitch's findings regarding the Canadian state and speaks to a deeply entrenched relationship between the Attorney General and dominant hegemonic forces within the Canadian capitalist state:

> It suggests, above all, an ideological hegemony emanating from both the bourgeoisie and the state which is awesome, which is reflected in the sheer pervasiveness of the view that the national interest and business interests are at one, and which certainly ensures the smooth functioning of the relationship between the state and the capitalist class.[359]

Overcoming the resistance to corporate regulation by the state through mechanisms such as charter revocation requires addressing this corporate/state relationship.

INSTITUTIONAL BARRIERS

The second barrier focuses on two elements of the institutional power of corporations that make it difficult for the state to control corporate activity – corporate capital and institutional mobility. With respect to capital, the dependence of global society on the corporation as the primary structure for generating wealth poses a formidable barrier to the implementation of corporate charter revocation. Furthermore, this dependence has been exacerbated by the

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(3) the adding of provisions to the *Occupational Health and Safety Act* that would broaden the liability of directors and officers for offences under the act to "prevent such individuals from hiding behind the corporate veil when their corporations violate health and safety legislation.

The inquiry felt these were appropriate in the given instance, but called for further study and research. It found the lack of accountability in the legal system indicated a weakness in the legal system (at 600-601).

In the end, no director was held liable for the events. There was no damages awarded payable by the company and the shareholders and directors did not pay any additional fines or damages aside for the actual value of the company (i.e. of their shares) when the company became insolvent. Curragh slipped into receivership and creditors lost more than $200 million. Consultants advised the reopening of the mine and the federal and provincial governments wrote off $83 million in loans and guarantees. In the end, it was the government that apologized to the public and promised action on the inquiry's recommendations.

[359] Panitch, *supra* note 108 at 13.

growth of corporate wealth and power under corporate laws that permit, and indeed encourage, the unlimited acquisition of capital and the ability to merge and amalgamate. These two aspects of the corporation have allowed for the evolution of modern transnational corporations to the point where many are larger than most nation-states in terms of revenues.[360]

As owners of the means of production and those in possession of wealth and power in society, the dominant corporate class has the greatest capability to exert pressure on the state in order to control it and use it to serve its needs.[361] According to Professor Laureen Snider:

> There is ample evidence that the modern state, despite the documented damage corporate crime causes, has frequently acted to vitiate laws against it. It has drawn up ineffective laws, impeded enforcement, savagely cut the budgets of regulatory agencies and interfered in their decision-making processes if they were upsetting important business interests.[362]

Governments and communities are often unable to exert control over corporate activity because the corporation is perceived to be the root of economic well-being, providing tax revenues to government and wages to employees. In the context of corporate charter revocation, while the Attorney General maintains formal autonomy in the administration of justice, the overriding concern to maintain economic stability leaves the Attorney General incapable of acting in a manner that would adversely affect dominant economic interests, even where there is broad public support for such initiatives. The example of the Californian Attorney General's blunt refusal to consider the petition to revoke the corporate charter of

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[360] *Supra* note 117.

[361] *Supra* note 105 at 117.

[362] Laureen Snider, "The Regulatory Dance: Understanding Reform Processes in Corporate Crime" (1991) 19 *Int. J. of Soc. of Law* 209.

UNOCAL is but one example of this attitude.[363] Rather, state involvement moves from regulating corporate activity to facilitating a more positive business environment primarily for executive and shareholder benefit through deregulation, financial and administrative support of business and foreign direct investment, and an obsession with cutting the debt at the expense of protection of the commons.[364]

This dynamic between the dominant corporate class and the state is exacerbated in the context of the modern capitalist state which has been taken hostage by the neo-liberal belief that the free market should dictate the decisions of society. More and more, reliance is being placed on an economic paradigm to determine the best interests of society. This economic determinism has allowed the corporation, as the primary institutional mechanism for facilitating economic growth, to gradually acquire increasing control over the means of production and its resulting benefits. Aside from homogenization of corporate and state interests through the co-mingling of personnel (*supra*), the pressure of dominant corporate interests as controllers of global production and capital, and governments' dependence on

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[363] For details on the manner in which the Attorney General dealt with this matter, see *infra* at 133.

[364] Snider, *supra* note 362 at 214 conveys the situation admirably:

> "...it is widely accepted that modern states do have an interest in facilitating the development, growth, and accumulation of capital by the private sector, and in promoting the extraction by capital of surplus value. In other words, the structural realities of modern national states are such that they must try to ensure the profitability of the private sector... the survival of the nation-state, its revenues, its social welfare, educational and military programmes (as well as the fate of the party in power), are all dependent on this, both directly and indirectly. Attracting capital and avoiding its flight are therefore central criteria by which policy initiatives are judged, whether these concerns are voiced up front or remain in the background. In fact, business power is perhaps most significant in ensuring that some policy options, those seen as most inimical to business, never become part of the state's agenda. This initial 'cut' at what kind of policy alternatives are possible operates below the level of formal politics, below the arena where actors compete on a public stage for scare resources; it even underlies agenda setting (the crucial intermediary layer wherein certain options become defined in or out of the political process.) The real and perceived interests of business, then, shape everyday government discourse at every level, and are part of every government decision."

corporate activity to generate tax revenues, undermines the ability of governments to make decisions that jeopardize the existing economic system. As Bob Jessop emphasizes, economics and politics for the capitalist state are inexorably bound. The paramount concern of the state is maintaining a healthy economic climate that allows for the productivity of private interests which in turn generate revenues for the state through corporate and income taxes.[365] The state therefore has a vested interest in maintaining the vitality of capitalist production.

Furthermore, the state's role within competitive capitalism is to legitimize the interests of the dominant corporate class by equating them with the interests of society generally.[366] The liberal argument is that corporate well-being means prosperity and a sustained quality of life for all classes. In order to reconcile this objective with other conflicting democratic interests, the state must exercise "a specific form of politics through which the needs of capital can be presented as the interests of all the people and...a certain degree of self-restraint on the part of particular capitalist interests as well as a flow of concessions to maintain support of other interests."[367] Jessop refers to this political approach as the 'politics of hegemony':

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[365] Miliband, *supra* note 327 at 74 refutes this conceptualization of the state as an instrument of the dominant class because it removes all form of discretion: It tends towards determinism, making personnel of the state merely cogs in the wheel of the capitalist apparatus without any freedom of action. "While the State may act, in Marxist terms , on *behalf* of the ruling class, it does not, Miliband contends, act *at its behest.*" See also Carnoy, *supra* note 329 at 53, Knutilla, *supra* note 106 at 118.

[366] While my reference to dominant corporate interests suggests a consensus amongst the bourgeousie, Miliband contends that this approach oversimplifies decision-making processes in a complex society. His observation is that the dominant class does not always share a common view on issues. Even where the dominant class exerts its collective economic clout by withholding capital, Miliband argues that the lack of consistent outcomes in such situations indicates that they are not always sufficient: Carnoy, *supra* note 329 at 52.

[367] *Supra* note 324 at 179-180. Jessop notes in the context of transnational corporations that the international mobility of capital requires the state to go further in maintaining a positive business environment or face the risk of capital flight, such as reducing restraints on labour and environmental compliance.

> Hegemony involves political, intellectual and moral leadership rather than the forcible imposition of the interest of the dominant class on dominated classes. Such leadership is exercised through the development of a national-popular project which specifies a set of policies or goals as being 'in the national interest' – policies or goals which actually serve the long-term interests of capital at the same time as they advance certain short-term, narrow economic and social interests and demands of subordinate groups.[368]

This educative process involves all elements of society and seeks a pluralization of forces rather than a polarization around extreme class interests. Political forces then play off these interests in exchange for agreement on the central state objectives of maintaining the long-term accumulation process in the economy. This, in turn reinforces "the classless image of bourgeois democratic politics."[369] In short, our pluralist society and parliamentary structure with a few dominant parties forces diverse interests to be diluted in seeking to formulate a majority which ultimately works to secure bourgeois hegemony.

From the perspective of corporate charter revocation, the primary insight derived from this post-Marxist analysis is that the state is primarily concerned with maintaining long-term economic stability, not individual capitalist interests. Herein lies the root to the reintroduction of corporate charter revocation within a corporate capitalist system. The quest for hegemony does allow for the sacrifice of individual capital interests by the state since "the role of the state is not to promote the narrow, economic interests of particular capitalists but to secure the social conditions in which market forces can operate to maximize capital accumulation in the long-term."[370] The state will not take such measures where it threatens to jeopardize the dominant economic hegemony, *however* it could conceivably consider

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[368] *Ibid.* at 181.

[369] *Ibid.* at 184.

[370] *Ibid.* at 185.

utilizing such a tool against individual capitalists that threaten the broader economic interests of the state.[371] Unfortunately, this analysis disregards the growing number of incidents where government does assist individual interests within the dominant class. With increasing corporate concentration and size, national and regional governments are indeed succumbing to individual capitalist demands in order to secure their presence in the government's jurisdiction, even if it means favouring them over other members of the dominant class or denying their constituencies of other benefits.[372] As a result, Marxism does not provide a complete inventory of the necessary political elements required to successfully revive corporate charter revocation.

The second aspect of the barrier created by the corporation as an institution is corporate mobility. Corporations have the ability to move operations according to economic conditions. This leaves the state vulnerable and incapable of making decisions in the interest of society that appear to diverge from economic imperatives. Although corporations are incorporated in a specific jurisdiction, they have the capacity to operate extra-jurisdictionally, and if necessary, to reincorporate in another jurisdiction if it provides a more favourable environment. Our legal and economic systems have been shaped to facilitate corporate institutional and capital mobility. While individuals are rooted to a particular state through citizenship, a corporation has no formal nationality, its legal status, assets and capital having

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[371] Examples of situations where this might be applicable include corporate securities fraud, fraudulently representations to the public which result in public distrust within the entire economic sector, and any number of activities such as environmental non-compliance which give the company an advantage over its competitors and distort market activity.

[372] See e.g. Alcan's recent success at having the director residency provisions in the *CBCA* changed to allow for their recently announced merger.

complete freedom of mobility. In the context of corporate charter revocation, the problem is therefore that a corporation who has its charter revoked in one jurisdiction may simply move and incorporate in another jurisdiction.

There are several critical observations to make about institutional mobility of corporations. First, as discussed in chapter two of this thesis, recent studies indicate that while the perception is that corporation's are 'stateless', devoid of 'legal moorings', the fact is that even large transnational corporations are tied to place. In most instances, the culture, laws, politics and ideology within the country of the parent corporation informs the decisions of the entire enterprise.[373] Furthermore, while companies have mobility in theory, it is important to understand why they chose to incorporate and operate where they do. In most instances, the fact that a corporation has incorporated or extra-jurisdictionally registered federally or provincially within Canada means that it is receiving a benefit from operating in the given jurisdiction, either through the acquisition of resources for export or consumer markets for imports. Denying their ability to operate in the jurisdiction will have a negative impact. Furthermore, it would most definitely stigmatize the name of the corporation if it attempted to go and incorporate in another jurisdiction. The real connection to place, dependence on local resources and markets, and concern associated with harm to the corporation's goodwill suggest that the legal mobility of corporations is not itself capable of neutralizing the impacts of corporate charter revocation. No corporation can afford to sacrifice these elements as a result of having its charter revoked within Canada. These observations suggest that it is not so simple for a corporation to reincorporate in another jurisdiction once its charter is revoked.

IDEOLOGICAL BARRIERS

The final obstacle to the reintroduction of corporate charter revocation considered here is the ideological concept of the public interest and determining to what extent it must be infringed to merit use of the remedy. Historically, the common law has envisioned the remedy of charter revocation to be employed where corporations are acting against the public interest.[374] Even though existing charter revocation provisions in Canadian corporate statutes make no explicit reference to it, such a concept is evident in the corporate literature and the minds of those who drafted the statutory revocation provisions.[375] Furthermore, prosecutorial guidelines which the Attorney General must follow explicitly call for the Attorney General to consider the public interest in deciding whether or not to proceed with a prosecution (discussed *supra*).[376]

Appreciating the political understanding of the public interest in the context of corporate charter revocation, requires consideration of two questions: (1) what constitutes the public interest, and (2) what is the degree of infringement of the public interest required to revoke a charter. The first question requires a qualitative assessment of how the 'public' is understood

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[373] See *supra* note 111.

[374] See e.g. *Eastern Archipelago, supra* note 145; *Re Cole's Sporting Goods Ltd. et al.*, [1965] 2 O.R. 243. Charter revocation provisions in the corporate laws of that states of Kentucky, Massachusetts, New York, Oregon and New Jersey also make explicit reference to the public interest.

[375] Institute of Law Research and Reform, *supra* note 52. See also the many references to the public interest in comments made by representatives of the Secretary of State and the Attorney General's office in relation to the *Hellenic* decision, *supra* chapter 3.

[376] *Supra* note 336.

within a democratic state. The second question requires a quantitative assessment that is to some extent dependent on the specific social and political circumstances surrounding each particular case. From the perspective of developing strategy, this section focuses primarily on addressing the first question with only some general comments directed towards the second given its case-specificity.

Determining the nature of the public interest presents one of the most formidable and elusive hurdles to its potential use as a modern remedy. In today's pluralist society, it is extremely difficult to establish a sense of what constitutes the 'public interest'. The contested nature of this principle is compounded by the ever-changing political, moral, economic and social climate of a community.[377] Philosophers and academics have debated the existence of the concept of a "public interest" since the time of Plato.[378] Some, including the Supreme Court of Canada at one point[379], have argued that such a concept does not exist.[380] However most

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[377] According to Mansbridge, *infra* note 378 at 6: "what is public, what is good, and what is the public good will probably always be, and should be, contested. Because arguing about what words mean is one way of arguing about how we should act, trying to legislate definitions of contested concepts is like trying to legislate an end to political, moral, and conceptual debate."

[378] A detailed discussion of the nature of the public interest is beyond the scope of this paper. For an excellent summary of its history and nature see Jane Mansbridge, "On the Contested Nature of the Public Good" in Walter W. Powell and Elisabeth S. Clemens (eds.), *Private Action and the Public Good* (New Haven: Yale University Press, 1998) at 3. See also Patrick Gerald Nixon, *The Public Interest and Public Policy Decision Making* (Western University, London, Ont., September 1976) (LL.M. Thesis); Robert D. Holsworth, *Public Interest Liberalism and the Crisis of Affluence: Reflections on Nader, Environmentalism, and the Politics of a Sustainable Society* (Boston, Mass.: G.K. Hall & Co., 1980); Virginia Held, *The Public Interest and Individual Interests* (New York: Basic Books, Inc., 1970); Richard E. Flathman, *The Public Interest* (New York: John Wiley & Sons, Inc., 1966); Carl J. Friedrich, *The Public Interest Nomos V* (New York: Atherton Press, 1962); Leif Lewin, *Self-Interest and Public Interest in Western Politics* (Oxford: Oxford University Press, 1991); Glendon Shubert, *The Public Interest* (Glencoe, Illinois: Free Press, 1960).

[379] *R. v. Morales,* [1992] 3 S.C.R. 711.

[380] Glendon Shubert, *supra* note 4 at 220 asserted that "there is no public interest theory worth of the name". Anthony Downs cited in Held, *supra* note 378 at 2 concurs that "the term public interest is constantly used by politicians, lobbyists, political theorist and voters but any detailed inquiry about its meaning plunges the inquirer into a welter of platitudes, generalities and philosophic arguments."

acknowledge some concept of a public interest[381], as evidenced by the common use of the term in political discourse, and focus on providing greater clarity to the idea.[382]

There can be little debate that Benthian individualism is the dominant ideology shaping the contours of the public interest today. According to prevailing liberal philosophy, the public interest is seen as a synthesis of "individualistic interest".[383] Reference to the 'public interest' by government and the judiciary is increasingly a reflection of the perceived interests of individuals as individuals, rather than the upholding of prescribed societal values or a common 'higher good'. According to the liberal pluralist analysis, people can conceivably chose to instruct the state to do virtually anything provided that it does not violate the general principles of individualism and the desire for order and stability which is represented by the state.

From this analysis, it is observed that liberal theories of the state do not exclude the use of corporate charter revocation *per se* provided that the remedy's use is a response to the will of the people and not an act of state totalitarianism. It was from this perspective that corporate charter revocation was historically portrayed as a means of protecting the rights of individuals adversely affected by the actions of the corporation.[384] Thomas Locke would

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[381] See comments such as Schroeder J.A. in *Re Cole's Sporting Goods Ltd. v. C. Coles & Co. Ltd.* (1965) at 250: "It is a well-settled and deeply rooted principle of our law that private rights and interests must yield to the transcendent claims of the public interest."

[382] For example, the Attorney General's prosecutorial guidelines, *supra* note 336, explicitly require that Crown counsel consider the public interest in deciding whether to prosecute.

[383] Bowman, *supra* note 13 at 7.

[384] McQueen, *supra* note 50.

view the use of such a remedy as a means of protecting the property of individuals threatened by the immoral actions of a corporation. In the proper context, utilitarians would accept it provided that it achieved the maximum happiness for the greatest number of individuals. Yet, despite this legitimization of the remedy, the overwhelming opposition of liberalism towards state intervention in the market means that more than majority support might be required to gain acceptance for the idea of the state revoking charters of corporations.[385] The inadequacy of liberal theory to explain the complexities of determining the public interest is explained by observing the undermining influence of our market-based society on the expression of individual interests. Increasingly, economic interests are the sole interests considered in democratic decision-making systems:

> In a society conceptualized as capitalist the 'public interest' as defined will correspond to the economic necessity of capitalist relations involved in the mode of production.[386]

The corporate institution itself facilitates this homogenization of interests. By bringing individuals into an institutional structure whose sole objective is wealth accumulation, individuals adopt the institution's interests as their own since their economic well-being is dependent on the institution's prosperity:

> What has happened, I believe, is the reorganization of the propertied class, along with those of higher salary, into a new corporate world of privilege and prerogative. What is significant about this managerial reorganization of the propertied class is that by means of it the narrow industrial and profit interests of specific firms and industries and families have been translated into the broader economic and political interest of a more genuinely class type.[387]

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[385] This acceptance to do the bidding of the popular will highlights a contradiction in formal liberalism between opposition to state intervention and belief in democracy. If it is the will of the people to increase state intervention through the use of corporate charter revocation, why should liberals oppose it as excessive state intervention? See John Ralston Saul, *The Unconscious Civilization* (Concord, Ontario: Anansi Press Limited, 1995) where he argues that people need to realize that the government is the public.

[386] Stanley, *supra* note 1 at 102.

[387] C. Wright Mills (1956) cited in Bowman, *supra* note 13 at 237.

All classes involved in the capitalist economic system view the corporation as the sole economic instrument for ensuring economic stability, job security, social welfare and even environmental sustainability. As such all interests resolve themselves into the common interest of maintaining the well-being of corporate enterprise.

Moreover, liberalism includes the corporation as a member of the public in its assessment of the public interest. Not only is the corporation viewed by individuals as the vehicle for individual economic self-fulfillment, but the corporation as a legal "person" at law is also an 'individual' comprising part of society's population in Bentham's calculations. With the introduction of corporate personhood, the corporation is no longer viewed as an institution whose regulation is of interest to the public, but rather an individual in its own right who is part of the larger society in making determinations of what constitutes the public interest. Corporate interests become consonant with the public interest, which is all in stark contrast to the historic perception of the corporation as a fictitious entity existing to carry out the public interest.[388] Furthermore, the increasing number of corporate individuals expressing the same interest (i.e. profit maximization) dilutes the pool of voices in society. According to Scott Bowman, the whole arena of policy formation is confounded by the inability to discern a clear distinction between the public interest and corporate interests:

> These issues raise the further question of whether, on a given issue, a clear public interest actually can be identified and distinguished from the avowed or tacit interests of corporations. Under these circumstances, it may be that the corporate interest and the public interest have been defined or interpreted to be one and the same.[389]

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[388] See *supra* chapter 3.

[389] Bowman, *supra* note 13 at 128.

Again, the corporation as a collective of individual interests and an individual itself effectively dominates public expression narrowing the scope of what is considered in the public interest to things that are in the economic interest of the individual.

In short, what is detrimental to the public interest is limited to what is detrimental the economic well-being of dominant corporate interests, such as monopolistic behaviour and unregulated financial flows.[390] The destruction of the corporate entity is seen as the destruction of the public good. Revoking a corporation's charter has the negative impact on the individual interests of directors, employees, and shareholders. Simply put, the revocation of a corporate charter is seen as an attack on the institutional structures that support the dominant economic ideology. Individual interests, synonymous with corporate interests, become absorbed into the dominant hegemony – profit maximization. Alternatively, the Platonic view that revoking the charter of a corporation with a notorious record of environmental, health and safety or human rights violations is advancing the collective public interest by maintaining environmental integrity and social justice loses its place as the discourse narrows.

The facilitation of this homogenization of corporate and individual interests is further advanced through the drafting of corporate legislation. Julius Cohen states that laws

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[390] Heather Scoffield, "Baby food business needs rival, Ottawa told" (December 2, 1998) *The Globe & Mail* A10 where a federal trade tribunal recommended that a 148-per-cent anti-dumping duty placed on Gerber baby food in jars by the Canadian International Trade Tribunal, effectively removing Gerber from the Canadian market and leaving a virtual monopoly for H.J. Heinz Co. of Canada Ltd., should be removed because according to the CITT "the continued imposition of the anti-dumping duties in the full amount is not in the public interest". As far back as 1834, the courts stated in *Queen v. Prosser, supra* note 176 at 317 that ""an

articulate the established basic values of the community, "the basic values need not have originated from all or most of the members of the community; indeed, as is more likely, they spring from the more articulate and influential within it."[391] Cohen's comments acknowledge the ways in which law is capable of shaping and distorting the perspectives of individuals in society. Indeed, Cohen's comments describe the development of corporate legislation in Canada (and the United States). Created exclusively by influential corporate lawyers and absent public debate, corporate statutory law has shaped the perceptions of the public towards corporate interests instead of the public shaping corporate laws. Indeed, corporate law reform provides an example of how the utilitarian construction of the public interest can be distorted by the scope and content of legislation.[392] Specifically, the major redrafting of Canadian corporate legislation in the 1970s legitimized the conceptual shift of corporate law from being regulatory to faciliatory.[393] In the process, corporate law has also codified the separation of private economic concerns and public concerns including the environment, health and safety and social welfare by creating a regulatory regime outside of the corporate statutory framework. Consequently, corporate governance and the public interest have come to be seen as separate rather than mutually dependent.

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illegal monopoly is a public grievance" and that "there can be no doubt that it is the duty of the Crown to protect the public from illegal monopolies."

[391] Julius Cohen, "A Lawman's View of the Public Interest" in Friedrich, *supra* note 378 at 155, 156.

[392] See section on "Statutes" in chapter 3.

[393] Institute of Law Research and Reform, *supra* note 52 at 5: "No doubt the conduct of business corporations, like the conduct of individuals, should conform to standards imposed in the public interest, e.g., they should observe obligations to refrain from damaging the environment and to refrain from engaging in unfair trade practices. However, ...so far we are inclined to the view that general obligations to the public should be imposed by laws dealing with those obligations, and not by business corporations law."

In addition to the contamination of the notion of the public interest by private corporate interests, the government bureaucracy presents added impediments to the articulation of the interests of civil society. Jessop comments that to the extent the formal democratic state provides democratic rights to engage in political processes, these are often eroded by such things as deliberate state action, institutional barriers, legislation and public processes lacking any "real teeth", lack of electoral choice and the availability of resources to assist the public in engaging in the political process.[394] Second, Jessop also questions the ability of an elected assembly to voice the interests of their constituents where they conflict with the interests of the political executive and the permanent government bureaucracy who are part of the dominant economic elite.[395] Again, in the context of corporate charter revocation, the normative and political nature of the Attorney General, especially the explicit and hidden aspects of the Attorney General's decision-making and discretionary powers, must be addressed.[396] As Bruce P. Archibald notes, it is necessary to consider not only the institution, but the particular office and individual responsible:

> While one may create structures which tend to clarify roles and responsibilities in politically helpful ways, the success or failure of such institutional arrangements often rests with the calibre of judgment and the quality of personal integrity possessed by the people who occupy such critical positions as attorney general or director of public prosecutions. Unless such people are committed to appropriate ideals of justice, and are prepared to exercise their responsibilities in the public interest with an enlightened view of politics, the best institutional arrangements may fail.[397]

It is my submission that while the principles guiding prosecutorial discretion permit, and indeed, would appear to encourage the commencing of proceedings in *scire facias* or *quo*

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[394] *Supra* note 324 at 177.

[395] *Ibid.* at 177-178.

[396] This discussion is not concerned with a consideration of the merits of the various structures for the Office of the Attorney General. My comments presume the current structure will remain in place for the foreseeable future. For a discussion of possible reforms to the Attorney General's office see *supra* notes 335, 336.

[397] Archibald, *supra* note 335 at 98-99.

warranto where there is sufficient supporting evidence of a violation of the public interest, the Attorney General as chief prosecutor, member of the ruling elite (i.e. Cabinet) and the dominant economic class, is prevented from acting in the public interest where such action interferes with corporate interests.[398]

DEVELOPING A STRATEGIC RESPONSE

The above analysis of the barriers to engaging the state provides insights for developing a strategic framework for the favourable reintroduction of corporate charter revocation. With respect to the personnel barriers, the analysis suggests that it is important to select a corporation that has minimal ties with the state through interlocking directorates or other personal associations. Reference to the corporation's list of directors in its Annual Report or 10K filings with the Securities Commission can help in that regard. In the longer term, reform efforts should focus on changing the institutional relationship between the Attorney General and the state apparatus in Canada in order to give the office more autonomy, and giving standing to the public to seek revocation of corporate charters on their own behalf.[399]

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[398] Historically, various Attorney Generals across Canada have elected to initiate revocation proceedings during the 19th and early 20th century, however recourse to this remedy has gradually dissipated and was employed for the last time by the federal Attorney General in 1946 in *Hellenic,supra* note 157, only after much insistence on the part of the British Columbian government. See discussion in section on the *Hellenic Colonization* case in chapter 3.

[399] Such standing is already provided for in some American states (e.g. Alabama). See literature, *supra* note 336 for a discussion of suggested changes to the Attorney General's office to give it more autonomy.

Consideration of the institutional barriers suggest that it is advisable to select a corporation with low to moderate economic presence and strong connections to place either through management, resource requirements, or consumer markets. The target corporation should have a relatively modest economic presence in the community and the economic benefits should accrue to as few people as possible. The corporation should also be dependent on place to reduce the likelihood of movement, such as all executive being resident in the region where the corporation operates, and no subsidiaries operating extra-jurisdictionally.

The analysis of ideological barriers suggests a number of necessary considerations. A clear and measurable majority of public support is essential and attaining that degree of support is dependent on assuring the public that such action will not affect their economic welfare. Furthermore, the chosen case must not be perceived to jeopardize the dominant class hegemony in order to acquire the support of the corporate portion of the public. One approach to achieving this consensus is to focus on corporate targets that have been stigmatized to such a degree that they are viewed by the dominant corporate elite as a liability to the legitimacy of capitalist enterprise (e.g. David Walsh, the CEO of Bre-X). This support from the dominant elite in turn provides a space for the Attorney General to endorse such proceedings.

In short, success is more likely if the target is a small, local corporation with few employees and minimal links to business, industry and the rest of the community, in order to ensure that there is minimal fallout following revocation. Admittedly, this conclusion highlights the systemic resistance to challenging the status quo with respect to corporate/state relations and

corporate control. Many concerned with the addressing the actions of large transnational corporations around the world may be unsatisfied with this approach, however it is necessary to take this approach in the first instance in order to ensure the best chance for establishing a positive legal precedence.[400] A definitive statement by the courts in the positive regarding the remedy is critical to ensuring the long-term acceptance of the remedy.

A recent example of a potential first case involves a Vancouver-based food products company. On December 1, 1999, a company based in Mission, British Columbia that produces Asian food products was ordered to stop production by provincial health authorities.[401] The company had been cited for violating municipal zoning regulations, provincial pollution laws and federal regulations for lack of potable water, problems with sewage treatment and sanitation, and failure to undergo compulsory health inspections. Yet, the locally owned and operated company has continued to carry on business despite repeated orders to cease and desist production. The fact that the company is small, locally owned and operated, and has been cited for violations related to health and food (of interest to the public in light of recent scares in Europe), suggest that it would be an ideal case for seeking revocation. Another potential case involves the oil and gas company, Talisman Energy. Having allegedly financed the Sudanese government's repressive actions against its population to allow for the extraction of oil and gas from indigenous territories, Talisman is currently under investigation by the Canadian government at the urging of American

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[400] Conversely, if the purpose of attempting to initiate proceedings is to raise public awareness about the relationship between the corporate entity and civil society, then there is substantially greater merit in bringing proceedings against a larger entity that will garner greater media coverage and public response.

[401] Rick Ouston, "Korean Food Firm in Mission Ordered Shut" (December 1, 1999) *Vancouver Sun* at B1, B4.

authorities. While operating outside Canada, the company is relatively small within its sector and has received considerable negative press from the media resulting in a coalescing of public opposition.

APPLICATION OF STRATEGIC RESPONSE TO AMERICAN CASE STUDIES

Given the lack of examples of corporate charter revocation in Canada, it is helpful to analyze some of the recent attempts made in the United States using the strategic approach described above. In the United States there have been six attempts to revoke the charter's of various corporations, only one having been successful. The successful instance involved the revocation of the charters of the Tobacco Institute and the Council for Tobacco Research in the State of New York. In New York State, ex-Attorney General Republican, Dennis Vacco, initiated proceedings against these two not-for-profit tobacco lobby groups on the grounds that they (1) obtained their charters through fraudulent misrepresentation and concealment of material facts; (2) transacted their business in a persistently fraudulent or illegal manner; and (3) exceeded the authority conferred upon them by law and abused their powers in a manner contrary to the public policy of the State.[402] Citing numerous decisions in support of revocation where there was demonstrated a "grave, substantial and continuing abuse, involving a public rather than a private right"[403], Crane J. of the New York State Supreme

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[402] Memorandum of Law in Support of Petition for Dissolution, *People v. The Council for Tobacco Research – U.S.A. Inc. and the Tobacco Institute Inc.* available at www.oag.state.ny.us/healthcare/tobacco/dissolve.html.

[403] *People v. Oliver Schools, Inc.* 206 A.D. 2d 143, 619 N.Y.S. 2d 911 (4th Dep't 1994); *People v. Abbott Maintenance Corp.*, 11 A.D. 2d 136, 201 N.Y.S. 2d 895 (1st Dep't 1960), *app. denied* 11 A.D. 2d 928, 206 N.Y.S 2d 534 (1st Dep't 1960), *app. and rearg. den.*, 11 A.D. 2d 928, 206 N.Y.S. 2d 535 (1st Dep't 1960), *app.*

Court on October 21, 1998, appointed receivers for both groups, ordered each group to file a $500,000 bond and provide a statement of assets and liabilities, names and creditors and claimants and all other information relevant to dissolution proceedings.[404] The fact that this effort satisfied many of the necessary elements identified above likely helps to explain its success to a large degree. The actions of the government were supported by strong public opposition to the tobacco industry, while the revocation of the charters resulted in minimal collateral damage to the tobacco industry or society since neither organization was directly involved in the production and sale of tobacco, nor employed a significant number of individuals.

In contrast, the inability to even get in the door of the Attorney General's office in the attempt to revoke UNOCAL's charter in California was a clear result of the lack of public consciousness and support and the extreme consequences that would result from killing a large transnational corporation. On September 10, 1998, 30 organizations[405] filed a 127-page petition with California's Attorney General seeking to have the Union Oil Company of California's (UNOCAL's) corporate charter revoked for alleged human rights and environmental violations. The petition alleged 10 separate counts against UNOCAL, cited

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den., 8 N.Y. 2d 710, 208 N.Y.S. 2d 1025 (1960), *Ivit. to app.* N.Y.S. 2d 422 (1960), *aff'd* 9 N.Y. 2d 810, 215 N.Y.S. 2d 761 (1961).

[404] "Receivers Named" (May 2, 1998) *New York Times* A8; www.heed.net/updates06.html.

[405] Petitioners included the Action Resource Center, Alliance for Democracy of U.S.A., Alliance for Democracy of Austin, Texas, Alliance for Democracy of San Fernando Valley, California, Gloria Allred, Amazon Watch, Asian/Pacific Gays and Friends, Burma Forum Los Angeles, Democracy Unlimited of Humboldt County, California, Earth Island Institute, Santa Monica city councillor Michael Feinstein, Feminist Majority Foundation, Free Burma Coalition, Free Burma – No Petro-Dollars for SLORC, Global Exchange, Randall Hayes, National Lawyers Guild of U.S.A. and its California chapters, National Organization for Women and its California chapter, Program on Corporations, Law and Democracy, Project Maje, Project Underground,

24 state and federal laws, 45 cases, 40 international laws, 14 academic articles, 47 newspaper stories, and 55 other supporting scholarly works.[406] Despite this extensive record, Attorney General Daniel E. Lungren and Senior Assistant Attorney Rodney O. Lilyquist declined the petition a mere five days later in a one-paragraph letter to counsel.[407] The petition was denied a second time without review on May 27, 1999, by Lilyquist and the newly-elected Democrat Attorney General Bill Lockyer.[408] Prior to the UNOCAL initiative, the most recent use of charter revocation in California was by conservative Republican Attorney General Evelle Younger in *Citizen Utilities Co. of California v. Superior Court of Alameda County*[409], where the Court of Appeal held that the Attorney General had the authority to revoke the charter of a private water company alleged to be delivering impure water to customers. Following the judgment, the company settled by agreeing to sell its assets to a public water company and go out of business.[410]

In three other cases, the Community Environmental Legal Defense Fund in Shippensburg, Pennsylvania, was unsuccessful in petitioning the state's Attorney General to revoke the charters of WMX Technologies Corporation, Waste Management Inc. and the forestry giant,

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Rainforest Action Network, Harvey Rosenfield , Surfers' Environmental Alliance, and the Transnational Resource and Action Center.

[406] News Release, "Bar Group Blasts Attorney General's Refusal to Act on UNOCAL Petition" (September 17, 1998).

[407] Letter from Daniel E. Lungren and Rodney O. Lilyquist to Robert Benson, National Lawyers Guild (September 15, 1998). For a full account of this initiative see www.heed.net/revoke.html.

[408] Letter from Lilyquist to Benson (May 27, 1999) available at www.heed.net/update13.html.

[409] 56 Cal. App. 3d 399.

[410] Robert Benson, "Soft on Crime?" (October 14, 1998) *The Recorder (San Francisco)* available at www.heed.net/update08.html.

Weyerhaeuser.[411] It is submitted that the lack of success in these instances was based on similar reasons as those surrounding the attempted revocation of UNOCAL's charter.

The facts surrounding a revocation petition filed by a private citizen in Alabama against R.J. Reynolds Inc. falls in between these two extremes. In the state of Alabama (the only state that allows for a private citizen to initiate proceedings to revoke a corporation's charter), William Wynn, a Jefferson County circuit judge acting as a private citizen, launched charter revocation proceedings against Philip Morris Corp., R.J. Reynolds Tobacco Inc. and three other tobacco corporations pursuant to section 6-6-590(a) of the Alabama state corporation code.[412] The application was recently denied, however the stature of the applicant and the public opposition to the tobacco industry generally provided at least some support for the potential success of the application. While the court provided no reasons for refusing the plaintiff's application, the company's size and presence likely played a considerable role in determining the outcome.

These American case studies illustrate the formidable nature of the barriers that exist to implementation of the remedy. In all instances, choosing a large transnational corporation as a target proved unsuccessful, at least from the perspective of establishing a positive legal

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[411] Linzey II, *supra* note 38 for discussion of the initiative against WMX Technologies and Waste Management Inc.; Letter from Community Environmental Legal Defense Fund, Program on Corporations Law and Democracy and the Blue Mountains Biodiversity Project, to Washington Attorney General, Christine Gregoire (September 15, 1995)(on file with author).

[412] Richard L. Grossman, "Slaying Big Tobacco" (September 6, 1998) *The Birmingham News* 2C.

precedent.[413] Furthermore, most efforts appear to have disregarded the corporation's size and place within the community (e.g. Weyerhaeuser that employs thousands of people across the United States and is one of the largest, most respected, forest companies on the continent.) Aside from the Alabama initiative, none of the unsuccessful cases appear to have attempted to read the agenda of the government or the Attorney General to focus on issues of concern to the state (e.g. health, public safety, drugs). In many cases, attention was focused on companies in sectors facing broad public discontent (e.g. tobacco, forestry), but it is submitted that this public opposition was not brought together sufficiently to demonstrate clear overwhelming public interest in support of revocation.

Some may be quick to conclude based on the experiences in the United States that corporate charter revocation is simply not an accepted or viable remedial option in Canada. In this regard, it is helpful to observe that the state already utilizes analogous remedial approaches to revoke the licences of businesses (and therefore their ability to carry on business).[414] "Show cause" hearings are frequently held requiring company's to "show cause" why they should be allowed to retain their operating licences.[415] For example, under section 277 of the

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[413] In each case it is arguable that the attempt resulted in significant increases in public awareness about the activities of the various corporations and considerable negative media coverage.

[414] The distinction between the charter revocation and licence revocation is one of form and substance. Both *scire facias* and the show cause hearing have the effect of preventing the business from operating, however *scire facias* terminates the actual legal existence of the corporation itself, whereas a revocation of a municipal licence simply prevents the corporation from conducting the licenced activity, but does not prevent it from continuing on in some other line of business. However, the municipal 'show cause' hearing is distinguishable on the important point that it is prone to administrative injustices since the licencee is charged and tried by municipal officials. For a negative critique of the 'show cause' hearing, see Raymond E. Young, "Licensing, Legislative Bias and the Limitation of Liberty" (1987) 45 *The Advocate* 829.

[415] See e.g. *Sunrise Hotel Ltd. v. City of Vancouver* (December 21, 1973) Doc. No. X5393 (unreported) (Hinkson J.) where the applicant hotel sought to quash the resolution of Vancouver City Council suspending the hotel's licence.

Vancouver Charter the Chief Licence Inspector has the power to summarily suspend any licence where the licence holder (for our purposes, a corporation)

> (a) is convicted of any offence under any Statute of Canada or of the Province of British Columbia;
> (b) is convicted of any offence under any by-law of the city with respect to the business, trade, profession, or other occupation for which he is licensed or with resect to the relevant premises;
> (c) has, in the opinion of the Inspector, been guilty of such gross misconduct in or with respect to the licenced premises as to warrant the suspension of his licence;
> (d) has, in the opinion of such official,
> (e) conducted his business in a manner; or
> (f) performed a service in a manner; or
> (g) sold, offered for sale, displayed for sale, or distributed to a person actually or apparently under the age of sixteen years any thing that may be harmful or dangerous to the health or safety of a person actually or apparently under the age of sixteen years.[416]

Where the Chief Licence Inspector suspends the licence, he may recommend to Council the further suspension or revocation of the licence.[417] In such instances, the Council holds a quasi-trial at which the licencee appears and is required to provide evidence as to it should be allowed to keep its licence. For the purpose of this analysis, the important thing to note is that government regularly takes steps to curtail the activities of corporations acting against the public interest. It is also important to observe that "show cause" hearings are traditionally used against small, local operations that have a generally negative reputation within the community in which they operate.

The above analysis and case studies demonstrate that while significant difficulties exist, a strategic approach to introducing corporate charter revocation could result in a favourable outcome for petitioners seeking revocation of a corporation's charter. However, it is critical that such an approach looks beyond the actions of the corporation to consider its relationship

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[416] *Vancouver Charter,* R.S.B.C. 1953, c.55, s.277. It would seem eminently appropriate to establish similar criteria for the revocation of a corporation's charter.

[417] *Ibid.,* s.278. Similar provision is provided for in the *Municipal Act,* R.S.B.C. 1996, c.323, s.668(1).

to the state. The issue of the role of the state is extremely complex and state theorists acknowledge that no theoretical conceptualization has yet been able to explain the nuanced "empirical reality of corporate domination".[418] Indeed, some posit that one cannot speak of a theory of the state, because the state as one monolithic entity does not exist.[419] However, it is submitted that the barriers presented in the context of corporate/state relations can be overcome. The fact that the charters of the two not-for-profit tobacco organizations were revoked indicates that government will take such measures where the political climate supports it. The other American cases reinforce the need to focus at first on small, local institutions with minimal community presence in order to ensure minimal political fallout. What is ultimately required is that those seeking to bring such petitions broaden their strategies to consider not only the wrongs committed by the malfeasant corporation, but the social and political context in which the corporation operates.

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[418] Bowman, *supra* note 13 at 273; Panitch, *supra* note 108 at 5.

[419] Bowman, *ibid.* at 280.

CHAPTER VI: CONCLUSION

As stated at the outset, this paper is only a first step in expanding the discourse around the legal and institutional dimensions of the corporation through the exploration of one forgotten remedy. No single study can hope to fully canvas any issue, especially one that has been ignored for so long by government, academics, lawyers, judiciary, and the public-at-large. In these closing pages, I will attempt to summarize the terrain covered, mention some of the issues that require further consideration, and draw some conclusions about the nature of corporate charter revocation and corporate law.

Charter revocation is fascinating for more than just its striking outcome. From a legal perspective, it brings together three disparate areas of law -- constitutional, administrative and corporate law. From a theoretical perspective, it challenges us to question the nature of our institutional structures and their relationship with each other. In historical terms, it provides a point from which to enter into an exploration of lost understandings about the nature of the corporate form. And from a political point of view, it provides an illustration of how the powers of the corporation have come about through a highly undemocratic assertion of unsubstantiated and poorly understood constructs.

This thesis has taken an interdisciplinary approach considering these four perspectives to argue for the survival of the historical remedy of corporate charter revocation. Chapter two reviewed the four principle theories of the corporation and proposed a new "neo-concessionist" view; a view that acknowledges the public and private dimensions of the

modern corporation and provides a theoretical foundation for the continued existence of corporate charter revocation. The fact that no existing theory has been able to adequately capture the real public and private aspects of the corporation speaks to the need for new ideas in this area of study, which was abandoned in the 1930s and only modestly reconsidered since the 1980s. [420]

Chapter three canvassed the history of the remedy itself both at common law and in statute. While one may only speculate on the state of the law in the virtual absence of any jurisprudence or academic commentary, it is certain that charter revocation remains alive through statute in the provinces of British Columbia and Ontario. In other jurisdictions, the better view must be that the common law remedies survive in light of the constitutional nature of the prerogative, existing jurisprudence, the deference paid by courts to the prerogative, and the fact that neither *scire facias* nor *quo warranto* have ever been explicitly extinguished. What remains less certain are issues such as the application of *scire facias* to corporations incorporated under the registration model of incorporation.

Chapter four considered what is more likely the major impediment to the reintroduction of the remedy – the relationship between the corporation and the state. Three major barriers – personnel, institutional, and ideological – were explored and the understandings gleaned from this analysis, coupled with the experience of several revocation efforts in the United States, were applied to develop a strategy for the successful reintroduction of the remedy in

[420] A recent special issue of the Australian *Federal Law Review* provides some of the most progressive new thinking in this area. See articles in (1999) 27(2) *Federal Law Review.*

Canada. Developing a strategy to engage the state in the application of such a remedy given its obsession with trade liberalization, economic development, and deregulation is daunting to say the least. Alternatively, working to change institutional structures or legal principles to allow for civil society to initiate proceedings to revoke a charter will involve long-term efforts on their own.

Furthermore, gaining acceptance for corporate charter revocation and other reform initiatives will require ongoing efforts, including educating the government, the judiciary and the public about the need for such changes and dispelling fears of pending economic disaster. As discussed, there exists a tension between the public's condemnation of corporate crimes and the resistance by government and courts to penalizing even the most egregious corporate activity. Comments made by Justice Henry Friendly in his judgement in a civil case brought by a number of plaintiffs against Richardson-Merrell for damages resulting from the use of thalidomide illustrates the deference paid to the corporation by our legal system:

> ...while agreeing that Richardson-Merrell's liability had been proven, observed that the possibilities of multiple punitive awards "on the part of hundreds of plaintiffs are staggering," and added that if insurance wasn't available to keep the company whole, "A sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin."[421]

Judge Friendly's remarks are a declaration of the paramountcy of property over life.[422] The long-term task of the corporate charter revocation movement is to begin the process of

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[421] Stone, *supra* note 16 at 55-56 citing *Roginsky v. Richardson-Merrell, Inc.,* 378 F. 2d 832 at 841 (2d. Cir. 1967)(Friendly J.).

[422] With respect, the court's comments are also somewhat misleading. Such harm caused by a corporation is rarely the result of a "single management sin". Rather, as in the Pinto case, they reflect a predisposition within the corporate culture and a history or conspiracy to undermine the law. Furthermore, argument for the need to protect innocent shareholders is undue. In the first place, the reality is that the majority of shares in most corporations are held by the directors, management, or investors with a high level of knowledge about the

explaining the relationship between the corporation, state and civil society, to dispel fears and empower citizens to take their rightful place in civil society as overseers of both corporate and state institutions.

In addition to the issues addressed in this thesis, there are many additional issues of law and practice that confound the use of this remedy. Legal issues such as the potential of a section 2(d) *Charter* challenge[423], appropriate forum and evidentiary thresholds[424], and how to ensure against the revival or reconstitution of a dissolved corporation[425] must all be

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corporation. With respect to arms-length shareholders, prudent business people would be the first to argue against the notion of an "innocent" shareholder. As with the principle *caveat emptor,* no person would suggest investing in a company or transacting with it without first obtaining knowledge about it. Hiding behind a shield of ignorance is not an acceptable standard to set in any context.

[423] Any attempt at revoking a corporate charter must consider a possible section 2(d) challenge under the *Charter of Rights and Freedoms.* The recent decision in *Canadian Egg Marketing Agency v. Richardson* suggests that restricting the right of individuals to associate through incorporation would constitute an infringement of section 2(d) of the *Charter.* In that decision, it was held that governmental restrictions on ability of individuals (including corporations) to carry on an activity, namely intraprovincial trade, did not constitute an infringement on the individuals right to associate. The right to associate is not infringed in that instance, only the right to carry on the activity in question. This leaves open the issue whether preventing individuals from incorporating would constitute a section 2(d) violation. Given the strong facts which would have to be presented in any attempt to revoke a corporate charter, it is safe to say that any finding of a section 2(d) violation would be saved under section 1 of the *Charter.*

[424] The potential for success at revoking a corporate charter is directly dependent on the supporting evidence. Strong, irrefutable evidence supporting a notorious record of (wilful?) violations including convictions and penalties under provincial and federal law is essential. As noted in several decisions, slight misdemeanors or violations are insufficient grounds for seeking revocation:

> "Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the Crown, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them": *Eastern Archipelago* at 993 (per Martin B.). See also statements made by Farris C.J. in *Hellenic, supra* note 157 at 846.

[425] While some might contest the point (e.g. Doremus, *supra* note 112), there is general consensus that corporations are increasingly operating on a global scale: "In many cases these corporate empires span several continents employing hundreds of thousands of workers from dozens of countries. When individuals wield such power, their economic objectives, and the social responsibilities they entail, transcend national boundaries. The exigencies of empire necessitate a global perspective." (Bowman, *supra* note 13 at 19) Corporate entities are divided into countless subsidiaries to further limit liability and confound attempts at establishing a chain of accountability. (Blumberg I and II, *supra* note 55) Any attempt at regulating corporate activity, even in part, through the threat of charter revocation, requires that governments on regional, national and international levels

addressed prior to attempting to initiate proceedings. Unfortunately, a full consideration of each of these concerns is beyond the scope of this paper and must be left to the lawyers who will hopefully take up this cause in the future. For now, they are only briefly mentioned here for the sake of completeness.

Corporate charter revocation is admittedly an extreme remedy to be reserved for similar cases. The primary importance of reinstating such a remedy is to act as a deterrent and provide clear limits on state-sanctioned corporate behaviour. In the end, whether corporate charter revocation is accepted as a legitimate modern remedy is not the critical issue. More important is what it teaches us about corporation and our relationship to this institutional structure. It is essential that we continue to look critically at the corporation and mechanisms for governing it. Clearly, charter revocation is only one aspect of a larger approach to redressing society's relationship to the corporation. While it stigmatizes the targeted corporation, the complexities of our economic system and globalization means that it is unlikely that charter revocation alone will have the desired affect of taming corporate behaviour.

Ultimately, the aim of such corporate reforms is not to eradicate the corporation as an institution entirely, but rather to create a more sophisticated entity that is responsive to more than just the bottom-line; an institution accountable to the broader constituency whose well-

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work together to prevent corporation's whose charters are revoked from simply reincorporating in another jurisdiction. Of course, a jurisdiction that revokes a corporate charter can prevent the corporate entity from operating in that jurisdiction, but that may not be sufficient. Similarly, consideration must be given to preventing individuals from incorporating under a different name or importing products and services into the revoking jurisdiction under the guise of another corporate entity.

being is affected by corporate activity. To that end, we must question the shift from state control over corporations to the present context where decisions affecting society are made undemocratically in corporate boardrooms with virtually no transparency or accountability. Furthermore, we must challenge the present system that permits a fictitious institution to have a voice in determining the interests of the public. From a legal perspective, this necessitates reconsidering notions of corporate personhood and the right of corporate free speech. If corporations are to be considered "persons" at law, then we must infuse them with a more sophisticated and complex range of interests so that they and the individuals that represent them have the capacity to act in a truly socially responsible manner. Finally, we must also begin to seriously question prevailing norms that place the economic welfare of the corporate elite and shareholders above that of humanity and the environment, and that prescribes stronger sanctions against individuals than corporations for similar crimes.

With the dominant presence of the corporation in modern society, it is surprising that we have yet to seriously question the structural elements and theoretical premises of the corporation created over a century ago to meet very different needs, interests and values. More than fifty years ago, Berle and Means prophesized change in their seminal text on corporate law, *The Modern Corporation and Private Property*:

> It is conceivable, -- indeed it seems almost essential if the corporate system is to survive, -- that the control of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.[426]

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[426] Adolph A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (rev. ed.) (New York: Harcourt, Brace, & World, 1967) at 254-255.

In spite of the present movement towards a global capitalist economic system, it is hoped that this may still come to be. Corporate charter revocation and the ideas and principles underlying it have a part to play in this transformation. Critical inquiry of this nature has been dormant for too long, it is time to reawaken it.

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