Of Butterflies and Bitterness?: Legal Fictions in Corporate and Securities Law

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Of Butterflies and Bitterness? : Legal Fictions in Corporate and Securities Law

Mary Condon*

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Introduction: the corporation as a legal fiction

The theme of fictions in law in the context of corporate and securities law raises some intriguing issues, and I am particularly grateful for the opportunity it gives me to rethink some of my previous work on corporate law. At one level, the topic of fictions in law is an obvious one for an Anglo-American corporate lawyer. One of the first principles of Anglo-American corporate law that students learn is that the corporation is best understood as a legal fiction. The principle is otherwise known as the doctrine of the separate legal personality of the corporation. This is the idea that law grants a corporation a legal identity that is separate from its owners or shareholders, on the one hand, and those who make decisions on its behalf — officers and directors — on the other. Thus, the corporation is a fictitious creation of law. The doctrine has had a tremendous rhetorical and persuasive power in legal thinking and everyday discourse about the corporation, and is an example of the power of legal fiction to constitute reality. People talk about corporate citizens, especially in recent debates about the social responsibility of corporations or ongoing debates about the criminality of corporations.1 What I want to do in this talk is to interrogate that core assumption about the corporation, that it has a separate legal identity, not so much from the point of view of contesting the idea’s philosophical elegance or its political consequences — both of which are indeed significant — but rather from the position that the doctrine, and its creation, the fictional corporation, is being increasingly undermined from within and without corporate law.

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1 Academic discussion of the social responsibility of corporations is traceable to the debate between Dodd and Berle. See Merrick DODD, "For whom are Corporate Managers Trustees?", 45 Harv. L. Rev. 1145 (1932); Adolf A. BERLE, "For whom Corporate Managers are Trustees: A Note", 45 Harv. L. Rev. 1365 (1932). For the corporate criminality debate, see John C. COFFEY, "No Soul to Damn; No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment", 79 Michigan Law Review 386 (1981); Gilbert GEIS and Joseph DIMENTO, "Should We Prosecute Corporations and/or Individuals?", in Frank PIERCE and Lauren SNIDER (ed.), Corporate Crime. Contemporary Debates, Toronto, University of Toronto Press, 1995, p. 72.
itself, such that doubt is cast on the sustainability of this core idea about the corporation. Having tried to demonstrate this disintegration, I want to suggest a couple of possible reasons for it.

The legal personhood of the corporation is taken to have a number of consequences, well known to students of corporate law. Chief among these are the facts that the corporation can carry on business, own property, have rights, sue and be sued and have a perpetual existence. A further extremely important consequence is said to flow from the separate existence of the corporation, that is, the limited liability of shareholders for corporate debts. Since a corporation is legally separate from the shareholders who own shares in it, these shareholders are not liable for debts incurred by the corporation that it is unable to pay. This is the feature that distinguishes corporations from most other forms of business organization, like partnerships or sole proprietorships, and obviously works to protect assets of shareholders from being seized by the corporation's creditors.

I. The history of the creation of the corporate legal form

It is also widely believed by corporate lawyers that the "discovery" of the legal fiction of the corporation's separate personality occurred in the English House of Lords case of Salomon v. Salomon in 1897. However, Paddy Ireland, who has written extensively on the history of the corporate legal form, points out that the process of recognition of the legal form of the corporation in England was a much longer one than can be encompassed in a single legal decision. The process began with The Joint Stock Companies Act of 1844 which applied only to what were called "joint stock" companies (what we would now call "public" companies) and ended with the Companies Act 1907, which extended the use of the legal form to all types of business firms. He attributes what was in fact a relatively slow rate of acceptance of the idea of the corporation as a separate legal entity in part to the fact that the increasing "centralisation of capital" represented by the economic form of the joint stock company was widely seen in negative terms. This was largely because of the violation it represented of the idea of individual responsibility for commercial obligations. Meanwhile, extension of the separate legal entity status to so-called "private" firms was spurred by liability fears flowing from the "Great Depression" in the last two decades of the nineteenth century. It took a significant amount of time for the idea of the corporation to attain respectability and it only attained this when the form could be used by partnership-type entities. So Ireland argues that two factors were crucial to the development and widespread use of the legal form of the company. On the one hand, its link to the success of the economic form of business enterprise, as an arrangement whereby small amounts of capital could be contributed to the large economic enterprises such as public utilities, canals and railways that developed during the industrial revolution, in part accounted for its acceptance. But even more importantly it was the link to the availability of limited liability for shareholders that ultimately secured its dominance.

II. Economic analysis of the separate personality doctrine

In the contemporary analysis of Anglo-American corporate law, there is little doubt that neo-classical economics currently dominates the field as a theoretical perspective from which to describe and evaluate the norms of corporate law. Interestingly, those writing from this perspective are somewhat ambivalent about the importance of what is considered in legal doctrinal terms to be the distinguishing feature of a corporation — its
separate legal personhood. Some law and economics scholars argue that the doctrine of corporate legal personality is economically important because it allows "the capital for a business venture to be collected from a number of investors, over time, while avoiding the costs of transfer of the venture's assets when new participants are admitted, or existing participants depart." It also allows the business itself to be transferred on a more cost-effective basis through the transfer of its shares, rather than its assets. In other words, because what owners of a corporation own are shares of the company rather than a proportionate share of the assets of the company, ownership of the company can change without disruption to the affairs of the business, thus reducing transaction costs. It should be noted, however, that this rationale for the legal fiction of the corporation is really a rationale for developing the idea of the freely transferable share as an autonomous form of property, which is not an inevitable consequence of the separate legal personality doctrine.

On the other hand, other law and economics scholars such as Brian Cheffins argue that:

those writing from an economic perspective attach little significance to the fact that as a matter of legal formality a company is a separate entity. They emphasise instead that a business firm is a focal point for bargaining relationships entered into voluntarily and thus operates as a "nexus of contracts." As such, a company resembles a market, which is a medium where buyers and sellers engage in free and willing exchange.11

These buyers and sellers include shareholders, directors, debtholders, creditors, suppliers, employees and so on. Cheffins is aware of the potential critique that parties such as shareholders and employees may not really bargain but act on a "take it or leave it" basis12 — or the opposite might equally be the case, especially in relation to employees, but he still finds it helpful to "deconstruct the corporate entity and examine directly the relationships between the key participants."13 This allows the analyst to understand the corporation as an efficient mechanism for the development of bargaining relationships among participants who interact "on the basis of reciprocal [and presumably rational] expectations and behaviour."14

III. How does a corporation act?

The effect of the doctrine of separate personality, according to Klein and Coffee, is that both lawyers and laypersons reify the corporation.15 We think of it as being capable of acting, of owning property, and also, as other areas of law suggest, of paying taxes or committing crimes. Yet within corporate law there is a recognition that corporations may only act through human agents. Corporate law solves in the following way the problem for action that it has created in recognizing the fictional corporation. It establishes categories of actors (i.e. directors and officers or managers) who operate the corporation. This creates quite a bit of conceptual difficulty, for who is to appoint these

13 B.R. CHEFFINS, loc.cit., note 11, 32.
agents? The answer is that the owners of the company are required to appoint the directors/managers, but directors are agents (or principals) of the legal person of the corporation. This is operationalized by creating a fiduciary duty of directors and officers to act "in the best interests of the corporation" and to act with "care, diligence and skill" in the management of the company's affairs. These duties must be owed to the company, while acting on its behalf, since it is separate entity from the shareholders. It is the corporation which is the principal. Again law and economics analysis ignores the purity of the legal distinction between the corporation and its shareholders by talking about the idea of "agency costs", which is the idea that self-serving managerial conduct imposes costs, not on the corporation, but on shareholders, thus reducing the value of their investment.

IV. The decline (and fall?) of the legal fiction

I've made the claim that the notion of the corporation as a fictional person is generally seen as firmly established in the legal and popular imagination. If there are some conceptual difficulties about how the corporation actually acts these have now been well settled. What I want to try to argue here is that the fiction is actually becoming increasingly untenable because of doctrinal and other analytical developments which, viewed collectively, work to destabilize the power of the fiction and suggest that the form is in fact much more fragile than might be thought. Specifically the fiction is being increasingly undermined from within the doctrines of corporate and securities law themselves. At least six or seven pressure points, I think, can be articulated.

A. Jurisprudence on lifting the veil

In the 1997 Queen's Business Law Symposium on "The Future of Corporation Law", William Friedman presented a paper where he considered the myriad of Canadian cases in which courts have ignored the fiction of the corporate entity and assessed liability for a debt owing by the corporation against its shareholder(s), according to common law principles. These decisions have often been justified by judicial decision-makers as being necessary to produce "just and equitable" results in specific cases of contractual or tortious claims against corporations. Thus courts have "lifted the veil" of the corporation where there has been fraud involved, where the company was incorporated for "an improper purpose", where the company is really an agent of the shareholder, where a group of corporations are so connected as to constitute "a single economic unit" and so on. His review of these cases suggested, he argued, that there has been:

a continuous expansion of the exceptions to limited liability in a rather inconsistent fashion depending on where a court decides the economic risk should fall. As the limits continue to expand, it becomes increasingly difficult to understand the original principle. ... It is no longer sufficient to simply advise that incorporation will suffice to limit one's liability to the investment being made.

Thus discretionary decision-making by courts, with the aim of doing justice in individual cases, has steadily encroached on the "purity" of the legal fiction.

B. Creditors of small corporations request personal guarantees from the corporation's shareholders

It is relatively uncontroversial that, as an empirical matter, creditors — often financial institutions — of small corporations routinely request personal guarantees from the corporation's shareholder(s). In other words, creditors contract around the legal principle of separate personality with its attendant implication of limited liability for shareholders, in order to attempt to secure their loan to the company. As a very high proportion, numerically, of Canadian companies are in the category of small, closely-held companies, this is a practically

17 Id, p. 24.
significant departure from reliance on the legal principle. On the other hand, in relation to publicly-traded companies, the Canadian phenomenon of control blocks of shares frequently being held in family-owned hands could also be used as empirical support for the argument that the legal separation of shareholders from the corporations they control is more notional than real.18

C. Personal liability of officers and directors

An often-repeated concern about the context of corporate decision-making in Canada is the alleged frequency with which governments encroach on the principle of corporate separate personality by imposing personal liability on directors and senior officers of corporations, by means of statutory provisions both inside and outside the business corporations acts, for acts done on behalf of the corporation. While the suggestion that this state of affairs has resulted in a flight from corporate directorships has not been empirically substantiated in Canada,19 it is true that this is an increasingly used form of sanction imposed by legislation. Examples include liability for impairing the solvency of the corporation, breaches of disclosure requirements of securities legislation, non-payment of employee wages, environmental offences, failure to fulfil obligations under pension benefits legislation, occupational health and safety offences, failure to deduct or remit employee tax liabilities and so on.20 On the common law side, the 1998 decision of Budd v. Gentra21 raised the spectre of the possibility of assigning personal liability to directors in the context of an oppression action. Insofar as these personal liabilities are imposed when directors are acting on behalf of the corporation, this is a further example of ignoring the legal implications of separate legal personhood.

D. Breaking down of the significance of the separate legal identity of the corporation

I have argued in other work that the pervasiveness of the so-called oppression remedy in corporate litigation is a testament to a breaking down of the significance of the separate legal identity of the corporation. This provision in federal and provincial business corporations statutes is a remedy available where an act of the corporation or its directors produces a result, or the business of the corporation has been carried on, or the powers of the directors have been exercised in a manner which is "oppressive, unfairly prejudicial or unfairly disregards" the interests of security holders, creditors, directors or officers. Although the class of complainants is broadly cast, the legislative history suggests that the motivation was to give a remedy to minority shareholders of companies where directors' actions were oppressive to them, and there were limited exit options. The remedy has been successfully argued for in cases where directors have tried to "squeeze out" the minority shareholder by reorganizing the share structure of corporation22 or they have, through amalgamation, radically transformed the business interests of company23 or where "managing shareholders" have engaged in self-dealing at the expense of the corporation and the interests of some individual shareholders.24 Significantly, one of the unresolved issues about the scope of the oppression remedy has been whether it can be made available against shareholders of the company. The Ontario Court of Appeal in Brant Investments


19 See however the 1996 Report of the Standing Senate Committee on Banking, Trade and Commerce (Kirby Report) which noted that "High-profile resignations from the boards of significant Canadian corporations because of concerns over personal liability for corporate debts brought the issue to the attention of the media and the public at large." [at p. 12]. At footnote 39, the report noted that in 1992, the directors of Westar Mining, Canadian Airlines and Peoples Jewellers resigned over concerns about their liability. See also the report of the TSE Committee on Corporate Governance in Canada, Where were the Directors?, December 1994.

20 For the liability of directors under the CBCA, see sections 118 and 119 of the CBCA.


_Ltd. v. Keeprite Inc._ had been firm about the fact that no fiduciary duty flows from majority shareholders to the minority. However, the recent case of _Stern v. Imasco_ in October 1999 contained comments by Mr Justice Cumming to the effect that:

[The source of the oppression will be from within the corporation. However, the source of the oppression can conceivably be from someone who is merely a shareholder. For example, it might be that a shareholder effectively controls corporate decision-making in a closely-held corporation through a shareholders' agreement such as to cause the wrongdoing.]

What is the relevance of this discussion to my thesis about the increasing whittling away of the separate legal existence of corporation? The effect of oppression cases is that the directors can be fulfilling their fiduciary duties to the corporation but may still oppress complainants, thereby triggering a remedy. The remedy creates a situation where disputes among corporate actors can be litigated directly, rather than through the persona of the corporation as a derivative action or common law breach of duty would require. Courts in oppression cases look inside the corporate veil to assess the significance of corporate acts for individual shareholders. Arguments of directors or controlling shareholders that actions were taken in best interests of the corporation will no longer be dispositive arguments. Indeed, the extension of the language of "interests" to securityholders, creditors, directors or officers suggests, as I have said elsewhere, "that the corporation may be more accurately viewed as a site of competing constituencies [that comprise the corporate entity] rather than as a self-contained legal phenomenon." It could be argued that oppression is a remedy for "internal" corporate actors to seek against other internal participants. In response to this claim I would say that first, the definition of "complainant" is not limited to this, in that it includes registered or beneficial securityholders, director or officers or former directors or officers, the Director who administers the business corporation.

27 _Id._, para. 95.
28 M. CONDON, "Pandora's Box or Trojan Horse? Recent Developments in the Use of the Oppression Remedy under the CBCA", [1994/95] _Meredith Lectures_ 466-469.

statute, or any other person who is a proper person to make the application. Second, a strict reading of the separate legal entity principle would require that even shareholders be considered "external" to the corporation. Indeed it is the shifting nature of the categories of "insiders" and "outsiders" to the corporation that is partly responsible for the incoherence of the separate entity principle. Thus shareholders are insiders for purposes of oppression but outsiders for purpose of limited liability.

**E. Recent developments in Ontario corporate law relating to takeover bids**

The next area I want to look at is the recent developments in Ontario corporate law relating to takeover bids. In the summer of 1998 two contested takeover bids were litigated in the Ontario courts which arguably also bolster the position that I have been taking here, which is that in more and more ways the separate identity of the corporation is being ignored in decision-making and legislation. The cases were those of _CW Shareholdings Inc. v. WIC Western International Communications Ltd._, a decision of Blair J. in the Ontario General Division Courts and _Pente Investment Management Ltd. v. Schneider Corp._, decided by the Ontario Court of Appeal. Takeovers of course involve a situation where a "bidder", often someone who is already a shareholder of the corporation, makes an offer to acquire sufficient shares of the company so as to give that bidder control over the corporation. The offer is made directly to the target shareholders, in accordance with securities legislative requirements about disclosure of the terms of the offer, particular lengths of time to consider the offer and equal consideration offered to all shareholders, and can be as much a surprise to the directors of the company as it is to the shareholders. These two decisions are interesting for a number of reasons, such as the facts that the court in both cases considered the standing of a "bitter bidder" to be a complainant in an oppression action, the fact that both cases involved public corporations which were, or had been, controlled by a single family, but with much of the
equity of the corporation provided by holders of non-voting shares, thus raising very familiar but difficult issues of intra-shareholder relations, the fact that both cases involved the directors involved seeking to resist the takeover bid through the use of defensive tactics, and the rhetorical language used by Blair J., who talks about butterflies, stormy seas and tea parties to describe the events at issue — thus demonstrating a capacity for legal fiction-writing!

The specific argument that I want to make here relates to the holdings in these cases about the duties of directors of a company faced with a hostile takeover bid. Commentators have argued that the effect of the decisions in WIC and Schneider has been to adopt "a form of" the U.S. Delaware court's "Revlon Duty" in which once the directors of a company have decided that a takeover is inevitable, the duty of the board changes from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. This significantly altered the board's responsibilities ... the directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for stockholders at a sale of the company.

There is some ambiguity in the decisions of WIC and Schneider on the question of whether maximizing value for the shareholders requires an auction (i.e. finding competing bidders) to be held for the company. It is also the case, as Halperin points out, that a company with a single controlling shareholder cannot really be "in play" if that shareholder does not want to tender to a bid. But what is significant about these cases for present purposes, I think, is that it makes explicit the lack of separation between the corporation and its shareholders when it comes to directors judging the merits of a takeover. The consequence of the separate entity doctrine as it applies to directors' fiduciary duties is suspended in the context of takeover bids. In other words, the separate entity principle is not a completely accurate description of the reality of relationships among corporations, directors, shareholders in all contexts.

F. The relationship between the bodies of corporate and securities law

In many ways the whole corpus of modern securities regulation creates problems for the integrity of the idea of separate personhood. How to characterize the relationship between the bodies of corporate and securities law has been subject of amount of commentary, usually from the point of view of considering the alternative jurisdictional authorities and philosophies of regulation of administrative agencies vis-à-vis the courts. It is uncontroversial that securities regulation governs the issuing of securities by issuers to public investors, in large part through the mechanism of regulating the information that investors should have to assist them in making informed investment decisions about buying and selling their securities. Thus the regulation does not apply to those issuers who operate businesses without selling securities "to the public" (i.e. private companies). On the other hand it regulates a broader category of business enterprise than corporations, including partnerships and trusts. But insofar as issuers are corporations, securities regulation is clearly about governing the relationship that a corporation has with its investors/shareholders. I would argue that in governing this relationship, the fundamental precepts of securities regulation ignore the question of the separate personhood of the corporation. For example, Klein and Coffee point out that the prohibition on trading by insiders (i.e. directors, officers or significant shareholders) on the basis of material undisclosed information, which is a symbolically-significant aspect of securities law, suggests a recognition of a responsibility flowing from those directors or shareholders directly to other shareholders of the corporation with whom they have a fiduciary relationship.

32 Id., p. 4.
33 Id., p. 6.
might trade. In other words, the prohibition against insider trading does not exist because the company would be thereby harmed by the insider's activities, but because other shareholders would be. In relation to takeover bids and defensive tactics, the animating logic of securities regulators' interventions is in terms of preventing abuse of shareholder rights. This is seen as paramount over a discussion of whether a board is acting in the best interests of the company. By adopting this stance, shares become a commodity which is tradable in spite of the implications of that trading for the company itself.

In another sense, securities commissions in all provinces of Canada are enabled to regulate and sanction issuers, as well as directors and shareholders of issuers, in the "public interest". The interpretation of the "public interest" in these contexts tends to revolve around regulatory assessments of damage to the public credibility of, and confidence in the fairness of, the securities trading markets if particular transactions were to proceed or be prevented from proceeding. Such transactions have included takeover bids, awarding stock options to key employees and the issuing of securities using exemptions from the Act's requirements. The fact that trading in securities and issuer or investor decision-making about this or the treatment of takeover bids is considered by legislatures to be vested with a public interest means that relations among individual issuers, their shareholding and directorial constituencies are considered to have systemic implications for the capital markets and will be treated accordingly by regulators. Individual contracting between an issuer and its investors, [or in the "secondary" markets, among investors], will be viewed in this more general context. These concerns about market credibility and efficiency are in part prompted by the fact that more individuals are becoming investors, whether directly or by way of membership of mutual or pension funds. To reiterate, "private" exchanges between issuers and their shareholders are subordinated to a broader set of concerns about the "public interest" in market behaviour.

G. The standpoint of feminist analysis

Finally, another quite different position from which questions have been raised about either the conceptual appropriateness or empirical validity of the separate personhood doctrine has been from the standpoint of feminist analysis. The set of claims made here is an aspect of the general feminist analytic preoccupation with interrogating the idea that law, in its categories and application, is gender-neutral. Feminist legal scholars say that this is a "fiction" about law that they seek to expose. Feminists who have addressed this issue in the context of corporations and corporate law have started from a number of different places. At a conceptual level, one version of feminist thought is critical of legal validation of separate corporate identity, on the basis that carving out spaces and categories of separation, autonomy and boundary-drawing is associated with masculinity and valued on that basis, while femininity is associated with the connectedness and altruism that allows the (male) autonomy to exist. On an empirical level, we are all familiar with the hand-wringing about the "glass ceiling" and the dearth of women on boards of corporations as directors. Less than 10% of the directors of Canadian public corporations are women. On this issue, though, it can hardly be said that corporate legal norms about qualifications of directors have any role in explaining this gap, since the qualifications imposed by corporate law are typically minimal — involving prohibitions against being insane or bankrupt —, precisely in order to allow family members, including women, to be directors.

However, one more fruitful place to develop a feminist analysis is in the context of the family-run company. Many of the insights in this area have emanated from researchers in Australia, who have examined the role played by women as participants in family-run businesses. One of the major findings of this research has been an interrogation of the practical importance of legal distinctions drawn between "the corporation" or the "business"

36 S.L. HALPERIN, op. cit., note 31, 23.

and other aspects of family activity.\textsuperscript{41} For example in empirical interview-based research conducted by Belinda Fehlberg into women's involvement in family businesses in England and Australia, she concluded that it was not possible for the women she studied to draw a sharp line between the business and the family. Rather the distinction is a blurred one. Thus she reports that she found evidence of "overlap between household and business financial arrangements"\textsuperscript{42}. Also "women were often happy to do this [work for the business] because working in the business gave them a sense of joint enterprise with their husband, and provided a way of balancing work outside the home with domestic and child care responsibilities."\textsuperscript{43} Again, "involvement in the family business reflected the often passionate belief that marriage and business were intimately intertwined."\textsuperscript{44} Spender, as a result of her examination of corporate law cases which featured women as participants, asks whether contract, as law and economics scholars would have it, is really the "glue" that creates the family-run business?\textsuperscript{45} She examined corporate law cases reported in Australia over a six year time period for evidence of women's participation, and found that 75% of the women involved in such litigation were wives or \textit{de facto} spouses of other protagonists in the litigation.\textsuperscript{46}

Returning to the jurisprudence on the oppression remedy in Canada, it is possible to see similar evidence of what are essentially family-based disputes being litigated as corporate disputes via oppression because there is a corporation involved. One of the foundational oppression remedy cases in Canada is \textit{Ferguson},\textsuperscript{47} which involved the Imax [Systems] Corporation at the time when it was owned by three heterosexual couples including the Fergusonsons. When they divorced, she contended that her ex-spouse did everything he could to squeeze her out of the company, including attempting to force redemption of the class of shares that she owned. She sought a remedy under the oppression provision, which was granted to her on the basis that the conduct was oppressive, even though it may have provided economic benefits to the corporation. The Ontario Court of Appeal said that, when dealing with a "close" corporation, the court may consider the relationship between the shareholders and not simply legal rights as such. In \textit{Ferguson}, the "personal" relations between the two ex-spouses were clearly significant in the uses that were sought to be made of the corporate form. An even more interesting example, perhaps, is the \textit{M v. H}\textsuperscript{48} case involving a lesbian couple which, as is well known, became a constitutional question of the definition of spouse under the \textit{Family Law Act}.\textsuperscript{49} What is less well known is that M and H had run a business together, and as the relationship broke down, H began to operate the company "as though she were the sole owner."\textsuperscript{50} Epstein J. gave M a remedy under the oppression provisions thus providing her with the financial support denied by the application of family law principles. Other cases include those of \textit{Nanej v. Concrete Holdings}\textsuperscript{51} where a son alleged that his parent shareholders tried to squeeze him out because they were unhappy with his choice of partner and his lack of attention to the business. To conclude on this issue, feminist-oriented research suggests that in the context of a family run business, the boundary between the company and the family is a very porous and malleable one.

\textbf{Conclusion: how to explain the breakdown of corporate form?}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{41} P. SPENDER, "Exploring the Corporations Law Using a Gender Analysis", \textit{3:1 Canberra L. Rev.}, 82-93 (1996).
  \item \textsuperscript{42} B. FEHLBERG, "Women in Family Businesses: English and Australian Experiences", Paper presented to the Corporate Law Teachers' Conference, p. 8 (1997).
  \item \textsuperscript{43} \textit{Id.}, p. 9.
  \item \textsuperscript{44} \textit{Id.}, p. 14.
  \item \textsuperscript{45} P. SPENDER, \textit{loc. cit.}, note 41, 95.
  \item \textsuperscript{46} \textit{Id.}, 87.
  \item \textsuperscript{47} Precited, note 22.
  \item \textsuperscript{48} (1993) 50 R.F.L. (3d) 92 (Ont. Ct., Gen.Div.).
  \item \textsuperscript{49} R.S.O. 1990, c. F.3.
  \item \textsuperscript{50} \textit{M v. H.}, supra, note 48 at 95.
  \item \textsuperscript{51} (1995) 23 O.R. (3d) 481.
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political philosophy. Liberalism can much more easily encompass the idea of individuals and individualism than it can deal with the idea of a collective. Thus,

sovereign individuals, taking risks while they optimize their own resources, are at the core of our political and legal liberalism and of our market-based economic principles. The corporation is a fly in the ointment, because, by functional definition, it is a collective. It is a combination of capitals, both inorganic and human.52

The contradiction between our political commitment to individualism and the empirical evidence of corporations as complex organizations is managed, according to Glasbeek, "by virtue of a great legal sleight of hand, which of course is to treat the corporation as an individual."53 The corollary of that position presumably would be to admit that all of the examples I have given of where the doctrine has been ignored or inconsistently applied or fails to accord with empirical reality are simply instances of the contradiction becoming unmanageable. From this point of view, the lack of consistency between the rhetoric and reality of corporate personality's existence is to be expected and will continue.

Another possible explanation for the inconsistent application of the legal fiction is that it has in fact outlived its usefulness. This is partly because increasingly shareholders are themselves corporations or institutions such as investment funds, so individuals are sheltered from liability anyway.54 If we compare the current era to that when the corporate legal form was first instituted, what do we see? In the current era of mega-mergers, it is no longer individual investors through whom we need to consolidate capital, but we need to obtain it from the resources of other collective, business entities.55 In so far as limited liability for individuals investing in "public" companies was the raison d'être of recognizing the corporation historically, this is no longer that significant a concern. Individuals who invest do so through the media of investment funds and pension funds, a strategy encouraged by the tax system and regulatory regimes. At the other end of the spectrum, legislative and contractual experience with incorporated partnerships or sole proprietorships already suggests a lack of reliance on the corporate legal form. So one provocative possibility is that we are seeing the decline of the corporate legal form because it is no longer congruent with the economic form of the corporation.

Another even more speculative possibility is that it is the very focus on markets, which is promoted by law and economics scholarship, that has overshadowed the importance of individual business activities conducted through corporations. Remember that law and economics sees the corporation as a useful economic actor in so far as it mimics a market. Making this argument in detail would require showing that the legislative provisions and decisions I’ve discussed were animated by market-based principles, a task which I cannot embark upon in the confines of this paper. In general, of course, this argument accords significant power to the intellectual influence of law and economics to orchestrate change in the functioning of key economic institutions. All that I would say about that, in conclusion, is that the corporation itself has been a testament to the power of ideas, and of fiction, to change the world.

52 Harry J. GLASBEEK, "Comments on 'The Limits of Limited Liability'", in The Future of Corporation Law, p. 30-34.
53 Id.
55 See Thomas A. HOCKIN, "Institutionalization, 'Retailization' and Shifting Responsibilities : The Canadian Experience", in Hans BLOMMESTEIN and