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## Limited by Law? Gender, Corporate Law and the Family Firm

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## Chapter 10

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# Limited by Law?

## Gender, Corporate Law, and the Family Firm

Mary Condon

### Introduction

The business enterprise is central to the operation of the Canadian capitalist economy in that it is a vehicle for the accumulation of profit, as well as a significant social location of employment. It is therefore one of the key mechanisms through which inter-class relations are mediated. A number of feminist scholars have pointed out that those class relations cannot be understood in isolation from gender relations. As Folbre and Hartmann (1988: 192) note disparagingly, 'the rhetoric of class interest simply subsumes the possibility of gender interests.' In their historical study of the English middle class between 1780 and 1850, Davidoff and Hall (1987: 13) begin their analysis from the proposition that 'gender and class always operate together'. The development, and claim to moral superiority, of the middle class in the period they studied 'was articulated within a gendered concept of class. Middle-class gentlemen and middle-class ladies each had their appointed place in this newly mapped social world.' Indeed, they argue that gender played a strategic role in the development of the middle class in that 'A heavily gendered view of the world was utilized to soften, if not disavow, the disruption of a growing class system as the master and household head was transmuted into employer on the one hand and husband/father on the other:

In the contemporary period, the intersection between gender and class has been examined by feminist scholars in the context of women as workers (Fudge, 1991), but less in the intra-class context of women within the ownership class. One significant aspect of an examination of the potentially gendered nature of business ownership would be the extent to which women's role in, and membership of, that class is mediated by their position within the family (Zeitlin, 1989; Davidoff and Hall, 1987}. As Folbre and Hartmann (1988: 191} point out, in the context of working-class women, 'members of families are

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assumed to have the same class membership and class interests as their male wage earner.' Yet women who do not have access to a wage themselves are dependent on a wage-earner, or are possibly more dependent on state benefits. Women who do work for a wage may still be expected to assume greater responsibility for family well-being. This latter point may still hold true even if women are themselves property or business owners (Belcourt, 1991: 67). One important social location where the intersection of class, gender, and family relationships can be observed is the family business,<sup>1</sup> in which women may have the opportunity not just to be workers in the enterprise but also to be owners or managers. Indeed, the family business is a location where analytically distinct class positions, of owner on the one hand and worker on the other, become blurred. Further, investigation of the role of women in family businesses may provide insight into the manner in which two spheres of liberalism's 'private' realm—the business enterprise and the family—intersect (Boyd, 1997; Davidoff and Hall, 1987).

If the question of whether and how women's participation in family businesses is 'gendered' has been neglected by feminist researchers, even less an object of attention has been the contemporary significance of legal rules in the constitution and maintenance of that gendered family business enterprise. This chapter seeks to make a contribution to that assessment. In accordance with the theme of this collection, law will be examined as a 'gendering strategy', that is, a process that produces gender identities and 'insists on a specific version of gender differentiation' (Smart, 1992: 34). An attempt will be made to assess the continuing importance of the rules of *corporate* law in maintaining gendered identities and opportunities for women in family businesses. Historically, of course, as Davidoff and Hall (1987: 275-89) demonstrate, law played a largely restrictive role in that women were limited in the forms of property they could legally hold and what they could do with that property. It is useful to ask whether corporate law now plays a more facilitative role for women. Does it constitute differences between the roles of women business owners and those of their male counterparts? Are the 'subjects' of corporate law gendered?

It should be emphasized that the examination of corporate law from a feminist perspective is in its infancy. Such work as has been done has by and large focused on a preliminary demonstration that the fundamental premises of corporate law, though ostensibly gender-neutral, in fact are permeated with gendered understandings and discourses (Lahey and Salter, 1985; Bauman, 1991). This feminist rereading of corporate law can usefully be linked to a recent and broader feminist project of critiquing the premises of economics (Nelson, 1996; Folbre and Hartmann, 1988; Ferber and Nelson, 1993; McCluskey, 1996), since the economic perspective on law is one of the more enduring, and contested, intellectual perspectives on law in the North American context (Easterbrook and Fischel, 1991; Cheffins, 1997; Trebilcock, 1991; Williams, 1991). The first task of this chapter, therefore, is to outline

some of the key premises of corporate law, along with the critique from feminists about their gendered underpinnings. The purpose of doing this is to demonstrate how the doctrines of corporate law may operate at a symbolic level to constitute gendered understandings of the appropriate structure and operation of business enterprises.

However, this chapter is in part a plea to move to the second stage of feminist engagement with corporate law. This is to specify, using the admittedly limited sources of empirical information that currently exist, the actual influence of corporate law in structuring gendered business *practices* and producing gendered material effects for women within firms, recognizing the variation in types of corporate enterprises. It will be argued that in the specific context of the family firm, there is a need to be sensitive to other constitutive practices that may be at work in this domain. Thus, care must be taken in attributing primacy to the specific role of corporate law in the gendering of family business enterprises.

## Corporate Law, Economics, and Gender

Business enterprises can be operated through a variety of legal forms, such as sole proprietorships, partnerships, co-operatives, joint ventures, and corporations.<sup>2</sup> These different legal frameworks for doing business allocate the risks, responsibilities, and benefits of enterprise in a variety of ways. One implication of this is that these different legal forms may create different legal resources, opportunities, and restrictions for the mediation of class or gender relations in the context of the business enterprise. One legally authored form of enterprise, the corporation, is popularly regarded as the most pervasive mechanism for doing business, despite the fact that in Canada, as in other jurisdictions, many small enterprises are not actually incorporated (Freedman, 1994). Corporate law is best understood as a set of rules governing the structure and organization of a business entity and as a device for allocating responsibilities for action within the organization. From the law and economics perspective, the purpose of corporate law is to allow a business or firm to function in the interests of efficiency. From this perspective, corporate law provisions are a cheaper alternative to an individual market-based negotiation of terms on which to invest, work, manage, supply raw materials or resources, and so on. As Easterbrook and Fischel (1991: 34) put it, 'corporate law fills in the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance.' Thus, the major ways in which the legislated rules of corporate law are said to facilitate the operation of business enterprises are the following.

### *Separate Legal Entity*

Section 15 of the Canada Business Corporations Act (CBCA) provides the corporation with a separate legal personality that is autonomous from those who

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own it (shareholders) and those who run it (directors). Corporate law thus creates a new category of legal 'person'. Its personhood enables the corporation to 'act', in legal terms, independently of those who own and/or run it. It can have legal relationships with outsiders to the corporation, such as creditors, suppliers, customers, and clients, as well as with its own shareholders and directors. Its individual personhood allows it to make contracts, to sue and be sued, and to have rights.

One strand of feminist theorizing would focus on how this emphasis on carving out spaces and categories of separation and autonomy, which is played out in liberal philosophy and scientific discourse as much as it is in corporate law, 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 (England, 1993: 40). More specifically, Hall (1995: 173) argues that the separate legal entity doctrine 'operates to split both the involvement and responsibility of directors from the acts and relations of a corporation. It starts with the assumption that directors . . . are not primarily responsible for the acts they undertake on behalf of or as a corporation.' This feminist theme that the norms of corporate law operate to displace responsibility for the consequences of action from where it 'rightly' belongs, in this case with the directors, is one that will recur when we look at the other fundamental contribution of corporate law to the organization of a corporation, that of limited liability for shareholders.

### *Specialization and Hierarchy*

Corporate statutes establish specific roles to be played by actors within the corporation. These legally established roles are then allocated different rights and responsibilities. The most significant roles are those of shareholder, director, and officer (CBCA, ss. 24, 102, 121). Corporate law thus establishes one type of legal distinction between the identity of 'owner' and that of 'worker' in a business enterprise. Shareholders make the investment of capital that, pooled together, allows the enterprise to function (Ireland et al, 1987). Should the enterprise make a profit, shareholders will likely see the market value of their shares increase and possibly get paid dividends on those shares. Many corporations contain a number of 'classes' of share ownership, each of which bestows a set of corporate 'rights' on the holder. The most significant distinction among classes of shareholders has to do with whether the shares are assigned voting rights at shareholder meetings. Holders of voting shares are considered to 'control' the corporation in the sense that they are the shareholders who elect the board of directors and also make a number of significant corporate decisions requiring their approval (CBCA, ss. 24, 173, 183). As shareholders, they have no particular obligations to the firm and, indeed, remedies are available to them if actions taken by the company or its directors are not in their best interests. Discussion of some of these remedies, including the inaptly named 'oppression' remedy, will form a significant part of the second half of this chapter.

On the other hand, directors are elected by shareholders to run the company on their behalf. Their legal responsibilities are not particularly clearly specified in the corporate statutes, beyond an admonition to take some care in running the corporation and to act in its 'best interests', a formulation known in corporate law as the fiduciary duty, or the duty to be loyal (CBCA s.122). Much debate has surrounded the question of whether these statutory responsibilities mean that they have to act in the best interests of the shareholder-owners only, or that they can take into account the interests of constituencies other than shareholders, such as workers, consumers, the environment, and so on.<sup>3</sup> Officers are full-time employees who are appointed by the board of directors to run the company, ostensibly \With oversight by directors. The reality in small corporations such as family businesses, however, is that all these legal roles actually may be filled by the same people, a fact that makes the accountability devices of voting and requiring loyalty, established by the corporate legal rules, somewhat redundant.

From an economic point of view the establishment of legally distinct roles within the corporate structure is justified by the virtues of specialization and comparative advantage. As Easterbrook and Fischel (1991: 11) put it:

The separation of risk-bearing [via investment] from employment is a form of the division of labor. Those who have wealth can employ it productively even if they are not good managers; those who can manage but lack wealth can hire capital in the market; and the existence of claims that can be traded separately from employment allows investors to diversify their investment interests. . . . Investors bear most of the risk of business failure, in exchange for which they are promised most of the rewards of success.

Further, as Cheffins (1997: 34) points out, 'The hierarchical organization of a firm offers another important advantage which is that joint production can be organized on a more effective basis.'

A feminist perspective would counter, at the most obvious level, with the empirical observation that despite the fact that these legally established categories are formally gender-neutral, comparatively few women perform these roles. One of the difficulties with drawing conclusions here is that the actual extent of women's *shareholding* in corporations whose shares do not trade on public markets (i.e., most family-run corporations) is hard to conclusively establish. But case law dealing with family businesses tends to reveal anecdotally that if women are shareholders, the classification of shares they hold are the non-voting shares. In other words, while they may be owners, they do not necessarily share control (*The Queen v. Mcclurg* 1990; *Re Ferguson*, 1983). This makes Davidoff and Hall's (1987: 277) historical point that 'It was primarily women who were the beneficiaries of "passive· property yielding income only: trusts, annuities, subscriptions and insurance' of continued contemporary relevance. On the other hand, with respect to the larger, publicly

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traded corporations, one of the recurring liberal feminist criticisms of the corporate sector in Canada has been the paucity of women directors. At the moment 9 per cent of public Canadian corporations have women directors (Carlyle, 1995).

At another level, feminists would be attentive to the fact that these legally established categories of shareholder, director, and manager have the effect of assigning power, control, and inequality in specific ways. Hierarchical organizations, both commercial and non-commercial, have long been subjected to a feminist critique for their tendency, not only to exclude women in the interests of particular versions of 'social cohesion', but to express masculine values (Ferguson, 1984; Elson, 1994: 39-40; Gabaldon, 1992: 1429). Even more significantly, it is necessary to be attentive to what happens once women come to play these roles in particular corporate hierarchies. Although the empirical evidence we will later consider deals only with one corporate sector, the family business, one of the important research findings in this respect is that women owners or decision-makers in these enterprises do not necessarily *exercise* the power or control the legally defined categories of shareholder or director accord them. Understanding why this is so is crucial to our ability to draw conclusions about the role of corporate law in reproducing gendered social and material relations in the context of the family business.

### *Limited Liability*

It has been noted that the allocation of specific legal risks and liabilities is closely connected to the creation of specific corporate roles. The establishment of limited liability for corporate shareholders (CBCA, s. 45) is often seen as *the* fundamental feature of corporate law. This principle means that, generally speaking, shareholders are not personally liable for any debts incurred by the corporation that it is unable to pay. All that a shareholder stands to lose in making a corporate investment is the value of the investment that she or he has contributed. This occurs despite the fact that the shareholder, depending on the number of shares held or other roles performed, may be in a position to cause the corporation to incur the debt in the first place. Nor, as a matter of corporate law, are directors usually personally liable for the debts of a corporation, either, although a number of recent statutes will assign specific responsibilities to directors, such as in the environmental law area. But directors can be sued by the corporation, or its shareholders, for failure to abide by their duty of loyalty to the corporation.

Law and economics scholars have an elaborate set of justifications for the doctrine of limited liability (Easterbrook and Fischel, 1991; Cheftins, 1997; Gabaldon, 1992). Among the most popular arguments from this perspective are that the rule allows investors to diversify their risk and so promotes further investment, since they know in advance how much risk they bear in investing in a corporation (that is, they know the maximum they can lose). The rule also allows the stock market to value shares appropriately, since it does not have to

take into account. In assigning values to shares, the wealth of, and likelihood of recovery from, individual shareholders. This enables the stock market to work efficiently. Furthermore, limited liability reduces the need to monitor or oversee the decision-makers in the firm (assuming the owners are not themselves the decision-makers), because the shareholder's exposure to risk is not unlimited. The apparent problem with monitoring is that, first, it is costly, especially in large corporations with many shareholders, and, second, shareholders with only an insignificant holding have no incentive to engage in monitoring that would benefit shareholders generally (the 'free rider' problem). In this sense, allocations constituted by the limited liability doctrine privilege the interests of shareholders over those creditors who lend the company money, or who supply it with goods, but do not thereby obtain an ownership interest. In response, law and economists argue that limited liability actually equalizes the position of shareholders and creditors since both groups stand to lose only what they invest. Shareholders, of course, stand to *gain* more than creditors should the corporation turn a profit.

As we can see, these justifications revolve around ideas of promoting efficiency generally, and more specifically, of shifting risk to where it is most efficiently borne. Theresa Gabaldon has engaged in an extended critique of the law and economics justifications for limited liability from a feminist perspective. She points out that while the economic analysis of limited liability 'permits particular actors . . . to calibrate the economic gambles that they are willing to take' on the basis of a profit/loss calculation, it does not 'address the responsibility-culpability characterization'. She argues that 'liability limitations artificially distance individuals from the real-life effects of the enterprise in which they invest, thus decreasing their acknowledged personal responsibility.' She further asserts that the 'key difference between economic and feminist reasoning on this point is . . . the feminist belief that interest in monitoring is a social good, rather than a duplicative waste' (Gabaldon, 1992: 1424). This argument presumably cannot be taken to the somewhat essentialist length of saying that if women ran corporations, they would be more likely to accept personal responsibility for their actions. It is rather to acknowledge that the legal rule on limited liability constitutes understandings of the appropriateness of risk displacement and the need for accountability for corporate 'harms' in particular ways, which may, at least in part, be related to the interests of those with superior economic power within the corporate enterprise. For a particular strand of feminist analysis, participation and accountability are valued in and of themselves, irrespective of whether they contribute to the efficient operation of a corporate enterprise.

Finally, it should be pointed out that law and economists are generally more sanguine than are feminists about the possibility of unlimited liability for shareholders in the case of small corporations. This is because in those contexts, the connection between the capacity of the shareholder to control the corporation and its ultimate actions is a closer one. This position, of course, is



based on an assumption about shareholder control that would benefit from being supported by empirical investigation, particularly where women fill those shareholding roles in family businesses.

### *Profit Maximization*

While profit maximization is not unique to the corporate form of business enterprise, there are various ways in which the norms of corporate law lend particular support to this goal. For example, the judicial interpretation of the fiduciary duty of directors to act in the best interests of the corporation has emphasized the interests of shareholders in corporate profit maximization at the expense of attempts by corporations to engage in 'socially responsible' behaviour (*Dodge*, 1919; *Parke*, 1962; *Varity*; *Teck*, 1972; Tolmie, 1992). This is why corporations that attempt to be socially responsible usually use as a justification the fact that such behaviour is in the shareholders' interests. Another example of corporate law support for the goal of profit-making is the rule with respect to shareholder proposals, which is that shareholders can only request the corporation to act, or refrain from acting, in order to achieve the economic interests of *the* corporation as opposed to other, more 'social' interests (CBCA, s. 137).

The singularity of this goal of corporate enterprise is justified by economic theory at a number of levels. At one level, the rational actor who is the core of economic theorizing is assumed always to act in his or her self-interest so as to maximize his or her 'utility'. An economic system, and the legal rules that support that system, must seek to allow individuals to pursue their particular self-interest in the course of their interactions with others, since to do otherwise would be to impose a particular set of preferences on them. As England (1993: 45) points out, although self-interest need not imply *selfishness*, or specifically in the context of corporations, profit maximization, 'in practice, most economists do assume selfishness in markets.'<sup>1</sup> England sees this as flowing from the 'separative model of self', which is at the core of economic reasoning. With respect to the fiduciary duty of directors in the corporate law context, however, loyalty (often considered antithetical to selfishness) to the corporation *is* expected, but this loyalty is required to be exercised in the interests of profit-making for shareholders. At another level, economists argue simply that a singular goal is more efficiently accomplished than a multifaceted one. Furthermore, it is argued to be undemocratic to require or expect unelected directors of corporations to achieve socially responsible or distributive outcomes by their decision-making.

In assessing whether this focus on self-interest and profit maximization is a gendered one, scholars such as Folbre and Hartmann (1988: 193, 195, 197) caution against a potential feminist response that women 'are not as economically rational or self-interested as men'. They characterize the argument that 'women altruistically choose' to put the interests and well-being of others, such as *family* members, ahead of their own economic interests as 'ideological'.<sup>5</sup>

They argue that a more fruitful approach would be to bring 'the traditional boundaries between self-interest and altruism into question' and to 'develop a more complete theory of economic interests, one that can encompass concepts like cooperation, loyalty, and reciprocity'. A family business is, of course, an important place to see a multilayered economic rationality at work. Anderson's work (1993: 34-5) contains an example that nicely illustrates, in a business context, this effort to develop an expanded understanding of economic rationality. She describes the couple who 'struggle for years to . . . establish a family restaurant' and who are offered a buy-out from a franchise operation. She argues that 'A concern for the narrative unity of their lives, for what meaning their present choices make of their past actions, could rationally motivate them to turn down the offer.'<sup>6</sup> In other words, despite presumed financial benefits to be gained from selling out, an expanded definition of economic rationality would instead result in a continued commitment to, and satisfaction with, an enterprise to which they had devoted a significant part of their lives. Fehlberg's study of women involved in family businesses, discussed in more detail below, found that 'involvement in the family business reflected "the often passionate belief that marriage and business were intimately intertwined"' (1997: 14).

To summarize, then, an attempt has been made to articulate the ways in which corporate law may operate at a symbolic level to 'engender' the corporate form, by privileging values of efficiency over accountability, hierarchy over inclusiveness, risk displacement over responsibility, and profit-making over social responsibility. But it is important to investigate empirically the extent to which, and how, this discursive framework of corporate law actually structures practices within the family firm. It is a truism of socio-legal scholarship that the 'fit' between the 'law in the books' and the 'law in action' is not usually a complete or smooth one. It is to this issue that we now turn.

## **Women, Corporate Law, and Family Businesses: Some Empirical Evidence**

I have noted that the family business provides one empirical entry point into the question of the opportunities for, and characteristics of, women's involvement in business enterprises as owners or directors. Research into how the participation of women in this realm is structured is relatively new, but still a few trends may be observed. Again, there has been little empirical consideration to date, especially in Canada, of how the role of women in family businesses has been mediated by law, though a number of Australian feminists recently have embarked on such a project. The goal is to use this empirical evidence to assess the power of corporate law in 'gendering' the participation of women in these enterprises.

The first two of the following empirical studies described did not, in fact, have the role of law as a primary focus. In an English study titled 'Entrepre-

neurship, Ethnicity, and Gender', Phizacklea (1988) examines the contemporary relationship among class, gender, and race in the context of the family firm. In answer to the question, 'Do members of a family firm share an identical class situation or not?' she responds in the negative. Her study of the operation of the clothing industry in the West Midlands demonstrated that 'All female members and young male members of the family are working under patriarchal relations of production, they remain dependent for their maintenance on the 'boss' who is usually also the head of the household, in return for their efforts' (Phizacklea, 1988: 31). She concludes that while it has been well documented that 'access to "family" or community members as low-wage workers is a key competitive advantage for many ethnic businessmen'. what has been less evident is 'the extent to which this "family" and "community" labour is female and subordinated to very similar patriarchal control mechanisms in the workplace as in the home.'<sup>7</sup>

In a 1991 groundbreaking study conducted for the Canadian Advisory Council on the Status of Women, Belcourt et al. investigated the 'struggles, challenges and achievements' of more than 200 women business owners across Canada. One of the main purposes of the study was to 'consider how public policy might facilitate the work of female entrepreneurs and thus help to harness the economic benefits of this form of business development' (Belcourt et al., 1991: 1). In a telling example of the absence of corporate law as a variable studied, it is not completely clear that the businesses surveyed were in fact incorporated, although the study contains a table (ibid., 11) entitled 'company start up', indicating that 60 per cent of the women surveyed founded their businesses themselves, 29 per cent bought them, and 5 per cent inherited them.<sup>8</sup> The overall conclusion of the study was that in addition to the usual difficulties facing all entrepreneurs in making a success of a new business venture, 'a woman entrepreneur faces conditions that appear to be attributable almost completely to the fact that she is a woman in a non-traditional occupation. . . . Surrounded by opportunities but hemmed in by circumstances, the woman entrepreneur sees her ability to realize business and personal success limited by a number of obstacles' (ibid., 65).

In proceeding to identify those obstacles, the study enumerates issues such as: discrimination,<sup>9</sup> clustering in business sectors with low financial pay-off, limited relevant work experience or management training, shortage of peer support networks or an inability to make use of them because of being 'overloaded with business and family responsibilities' (ibid., 67) and insufficient financial return. Included in the list of obstacles were those of the 'conflicting demands of managing a business, a home and children' and 'no operational support from husbands'. With respect to the former, the study notes that 'the double shift is standard'. with most of the women entrepreneurs they studied, unlike men entrepreneurs, assuming 'complete responsibility for home and children'. With respect to the latter, few of the study's respondents 'were able to rely on their husbands for anything but token help'. The help

given by husbands was characterized as 'one-shot', but 'nothing close to the continuing responsibility taken on by many wives of male small business owners'. Significantly, Belcourt et al. conclude that 'although some have broken new ground in the business world, thus far they have not renegotiated the traditional division of family and household tasks' (ibid., 69-70). Thus, while this study did not set out to examine the effects of corporate law rules on women's experience of entrepreneurship, what is striking about its conclusions, as well as those of the Phizacklea study, is that the most influential practices in the gendering of entrepreneurship have to do with the intractability of the traditional familial roles played by women rather than being attributable to what business law rules 'allowed' or required women to do. This suggests that corporate law's gendering role may be less significant than that of traditional family organization or familial divisions of labour.

Australia has been a more fertile location for feminist legal consideration of the role of women in family businesses. For example, Dodds Streeton (1994) examines the liability of women as company directors or guarantors for the debts of their spouses or the companies of which they are directors, in a process now widely characterized as 'sexually transmitted debt' (Fehlberg, 1994: 475). She argues that women directors became liable for company debts because they 'share the hallmarks' of a surety, who guarantees the debt. Yet, 'Although formally appointed as directors, these women will often have little opportunity for actual involvement or input into the business because of their 'traditional' role in the patriarchal family and their exclusion from matters of business' (Hall, 1995: 175). Dodds Streeton (1994: 16) ultimately concludes:

The fundamental problem of women's vulnerable position in personal and family relationships with men, and their relative exclusion from commercial experience and control cannot be solved by law. . . . If the law attempted to address the problem of the pervasive vulnerability of women as a group by absolutely precluding creditors from access to their assets, it would effectively destroy their legal capacity, restrict their access to credit, and totally undercut the achievement of equal and independent status.

In similar vein, Fehlberg describes two studies of women's involvement in family businesses, one conducted in Australia by Singh (1995) and the other conducted by Fehlberg herself in England (1997). These studies found that although the women surveyed tended to be very 'involved' in the family business on a day-to-day basis, they were 'likely to view themselves as less powerful than their husband or de facto partner in the family business context' (Fehlberg, 1997: 2). Interestingly, one of the findings of the Fehlberg study was that women who described themselves as having no role in the family business often held the legal positions of company director, company secretary (officer), or shareholder. Yet, 'they had never considered exerting their formal legal rights as directors or shareholders in order to obtain a direct financial benefit

from the business. Similarly, women who held shares invariably did not know the extent of their shareholding' (ibid., 8). The Singh study contained one example of 'Mrs. A not being "allowed" to see the books, even though she was the company secretary, [which] indicates strongly the discrepancy between formal legal rights and practical realities.' Fehlberg concludes that 'these findings challenge the accuracy of contractual assumptions that legal rights are readily acted upon and translated into practical benefits.' Furthermore, even women who were involved in the 'financial operation' of the business had 'no role in strategic decision-making', a position Fehlberg characterizes as 'informed powerlessness'. Thus, 'the business emerges in these studies as ultimately the province of the male decision-making authority. Women may be very involved in family businesses without sharing the strategic decision-making power' (ibid., 15).

To what extent does this empirical material shed light on the feminist critiques of corporate law doctrines described above? In the first place, it suggests that the analysis of the doctrine of limited liability of shareholders as being responsible for the passivity and noninvolvement of shareholders in the direction of corporate activity is incomplete. Rather, the picture that emerges here is that women as owners or directors of family businesses continue to be enmeshed in power inequalities that derive from the practices of traditional family relations. As Grbich (1987: 329) puts it in the context of taxation laws. 'Positions for women appear never to be secured by rights to income or to property so long as her position is part of familial relations.' Furthermore, we have seen that one of Singh's findings was an 'often passionate belief that marriage and business were ultimately intertwined' (Fehlberg, 1997: 14), suggesting again that the formal legal characterization of a company as a separated and independent actor has no particular resonance in the context of family businesses.

## **From Oppression to Corporate Power?**

The material discussed in the preceding section arguably suggests some limitations on our ability to impute a significant power to corporate law to accomplish unaided the 'gendering' of family businesses. Another striking feature of the picture painted by this empirical material is that, while the extent of corporate law's contribution is arguably unclear, women appear vulnerable in the family business or entrepreneurial context, victims of their lack of commercial experience or their position in the family. But a rather contradictory impression emerges if we consider some examples of the use by women shareholders of the shareholder remedies provided for in various provincial corporate statutes and the Canada Business Corporations Act. The most controversial remedy is that known as the oppression remedy, which allows shareholders and other 'complainants' to seek a judicial remedy if their interests have been 'oppressed' or unfairly prejudiced by actions taken by the corporation or its directors.

Another is the winding-up remedy \Which allows a court to order a company to be wound up or liquidated, and its assets dispersed to shareholders, if a shareholder has legal grounds for such a request. An interesting feature of the cases considered below is precisely the use of these remedies in the context of *family* dissolution, a situation where women's economic interests are considered by family lawyers to be particularly vulnerable.

One of the best-known Canadian shareholder oppression cases is *Ferguson v. Jmax*.<sup>10</sup> Here the mobilization of the corporate law remedy had the effect of allowing the complainant shareholder to achieve recognition for her contribution to the business enterprise and to remain a shareholder despite significant opposition from another powerful shareholder, her ex-husband. The case involved a business (Jmax) owned by three heterosexual couples, the Fergusons and two others, both of which couples were previous associates or friends of Mr Ferguson. All three women involved held non-voting preference shares, whereas the men held voting shares (meaning, as we have seen, that they had control of the decision-making). Only Ms Ferguson, of the three women, actively participated in the company. The Ontario Court of Appeal found that 'she worked hard in *the* company's interest and was *one* of its founders together with the three men.' In fact, the three men 'were each employed in other endeavours and could not devote their full time to *the* company.' In 1974, Ms Ferguson divorced her husband on the grounds of his infidelity. The issue we are interested in revolved around her contention, which was accepted by the court, that from the time of the divorce Mr Ferguson did his utmost to squeeze her out of her shareholding in the company. He first tried to prevent the declaration of dividends to the class of shares that she owned and ultimately used corporate procedural devices to attempt to pass a resolution that would have had the effect of forcing redemption (repurchase) by the company of her class of shares, thereby eliminating her involvement as a shareholder. Ms Ferguson was pressured by other shareholders to sell her shares because, according to them, her former husband would not countenance the declaration of dividends while she would share equally in them.

The court held that the conduct of Mr Ferguson on behalf of the company was oppressive. Thus (p. 135), 'I am satisfied that what she says is true. The company could pay dividends. Mr. Ferguson set out to stop the payment because he did not \Want Mrs. Ferguson to share in the benefits in the growth of the company and wanted to force her to sell her shares to him or to one of the other men in the company. . . . In my opinion this conduct was oppressive and unfair to her.' Significantly, the court concluded that when dealing with a 'close' corporation (a small company with few shareholders), the court 'may consider the *relationship between the shareholders and not simply legal rights as such*' (emphasis added). Even though evidence was provided that there were economic advantages to the corporation of doing the reorganization of the share classes, the conduct was oppressive because the 'reasons that motivated management' were unfair. In rather disturbing language, the Court

of Appeal characterized the attempt to pass the corporate resolution to redeem Ms Ferguson's shares as 'a final solution to the problem of the ex-wife shareholder'. On the basis of the evidence, the court was unwilling to accept that the company had a valid business purpose in attempting to squeeze her out. She was thus able to mobilize to her advantage norms of corporate law requiring directors to have valid business reasons for their actions on behalf of corporations. In view of our earlier discussion about the need articulated by feminists for a broader conception of economic interests, it is also significant that Ms Ferguson's interest in this company, as recognized by the court, was one that came out of her loyalty to and history of participation in it. The result ultimately allowed her a continued interest in the company's affairs and prosperity rather than resorting to the family law approach of dividing of property and severing ties.

Another example of the strategic use of corporate law by women shareholders comes from the more recent *M. v. H.*<sup>11</sup> case. Here a lesbian couple were separating. One of the couple applied for interim support from the other under the Family Law Act, which was denied on the ground that she did not come within the definition of 'spouse' in the Family Law Act. She also claimed interim relief from oppression under s. 248 of the Ontario Business Corporations Act. She made this claim because of the alleged oppressive actions of her former partner with respect to the company of which they were both 50 per cent shareholders. The latter began operating the company as though she were the sole owner. The plaintiff was refused access to the company's books and her signature was imitated (with her knowledge) on cheques that required joint signatures. Epstein J. concluded (p. 100) that 'the evidence here strongly supports a conclusion that *the* defendant, particularly in excluding the plaintiff from any meaningful participation in [the company] during the past 5 years and then closing the business down after the parties separated, was in violation of the plaintiff's expectations that could be said to have been (or ought to be considered as) part of *their compact as shareholders*' (emphasis added). The court therefore used the plaintiff's expectations as a shareholder to establish a standard of corporate conduct to which the defendant was expected to adhere. Significantly, the court ordered money to be released from a corporate account to the plaintiff by way of a loan, to be non-interest-bearing, and to be available to the plaintiff until the ultimate resolution of this action. Thus the judge awarded her support under corporate law rather than family law principles. The norms governing relations among shareholders in a small business were ultimately more effective for the lesbian plaintiff, in the context of relationship dissolution, than those acceptable within a family law context.

Finally, *Belman v. Belman*<sup>12</sup> is particularly interesting for the insight it affords into the differing legal implications of behaviour depending on whether the context is marital or corporate. The case dealt with a claim for division of assets following divorce. The judge's treatment of this claim explicitly

separated the 'family law' issue from the 'corporate law' issue. The first of these involved a claim by the former wife for a payment of \$250,000 over and above the equal division of the spouses' property on the basis of her 'extraordinary contribution to the marriage' (p. 64). The husband had agreed to this in 1990 'after much discussion', but withdrew his agreement on hearing about an alleged affair between his wife and one of her business associates. This was consistently denied by the wife, though the court found that the husband had a 'sincere belief that it was true'. Because the wife's claim to the \$250,000 was based by her on 'a moral obligation that arose out of her extraordinary contributions to their marriage', the court concluded that the 'alleged affair was relevant to that rationale' (p. 68). Further, Spence J. considered that he 'would have difficulty concluding that Mr. Belman's reaction was unreasonable'. Mr Belman was therefore released from the obligation to pay the money to his former wife.

However, what was considered a reasonable reaction in the context of marital obligations was regarded otherwise in the corporate context. The corporate law issue arose from a claim by Ms Belman for a transfer to her of her former husband's 50 per cent ownership in the corporation. This claim was made on the grounds that there was a 'loss of mutual confidence' between the two owners such that the business could no longer be conducted effectively. In response to this, the husband claimed that he had not lost confidence in his former wife (having forgiven her for her alleged conduct), so that the grounds for a mandatory transfer of his shares were not present. In his consideration of this issue, the judge again relied on the response of the husband to the information he received about his wife's alleged affair. Mr Belman's denunciation of his wife following his accusation about the affair, and his statement that 'he did not wish to see her again or to continue to work with her' (p. 78) meant that *her* loss of confidence in their ability to carry on together in the business 'was entirely appropriate' and could not be said to be 'arbitrary or unreasonable'. Mr Belman had requested that the court consider his wife's concerns about continuing to work with him as a business partner as being 'exaggerated or without foundation'. Significantly, Spence J. concluded that this was 'in effect an invitation to the court to substitute its business judgment for that of Ms. Belman and should accordingly be treated with the greatest caution' (p. 79). The result of this, therefore, was that Ms Belman's business judgment was deferred to by the court even though her interpretation of her 'moral obligations' was not. The privilege that courts tend to award to the business judgment of directors in running corporations as they see fit prevented the former husband in this situation from being able to characterize his wife's wish to dissociate him from the business as exaggerated and unreasonable.

As we have seen, the remedy sought by Ms Belman was an order that would direct the transfer to her of Mr Belman's shares for fair market value. The latter wanted, instead, a court-ordered shareholders' agreement relating to the direction and management of the business, which would allow him to remain a



shareholder in the business. In choosing between these two proposals, Spence J. favoured that of the wife, ordering a mandatory transfer of Mr Belman's interest in the company to her at fair market value. The demands of running a business effectively, it seems, preclude any tolerance for ongoing disputes and loss of confidence in a partner's business acumen.

The significance of these cases is only partly that they show, in contrast to the Australian material referred to earlier, how women in family-run enterprises can use corporate law principles to their advantage.<sup>13</sup> Even more important is a specification of the corporate law logic that proves compelling in these cases. This logic has to do with a privileging of judgments about how to run a business effectively and requirements for 'valid business purposes' in making decisions, as well as for demonstrations of loyalty to a company. It seems that as long as they formulate their claims in terms of these corporate logics, plaintiffs in cases such as *M. v. H.* or *Belnian* may escape the potentially negative effects of how *family* law norms reinforce prevailing understandings of 'appropriate' family relationships.

## Conclusion

It may well be premature to draw conclusions on the basis of such preliminary data. But the data so far suggest that there is no easy answer to the question of the extent to which corporate law is complicit in, or furthers, the oppression of that class of women who are business owners or managers. The answer depends in part on a close consideration of the relationship between the role of corporate law as discourse and its importance in structuring actual business practices. While the discourses of corporate law may have general social effects in privileging particular sets of values, it is crucial to develop a nuanced understanding of how these discourses actually operate in a variety of contexts. Further, it is arguable that corporate law is not solely responsible for bringing into being gendered subject positions within family firms. It is clear that those women who seek to use corporate law to their material advantage are required to formulate their claims in terms of particular arguments about loyalty to a corporation and the efficient running of business enterprises in order to be successful, as they sometimes are. But it is also arguable that the gendering of women's role in the family firm by corporate law cannot be understood in isolation from the family relationships and familial practices in which those women are implicated. If, in fact, women do not routinely exercise the economic power the legal categories of corporate law give them, the reason for this may have to do with the gendering practices of these traditional family relations and, particularly, the *family law* that supports those practices. In this sense the gendering effects of corporate law and family law may in fact be contradictory or at odds with each other. This suggests that, in order to draw conclusions about the importance of law as a gendering strategy, it is necessary to be sensitive to the ways in which different discourses of law, such as

those produced by family law and corporate law, interact with each other to produce gendered subjects and material consequences, and to appreciate that different arenas of law may support a multiplicity of outcomes for women.

## Notes

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1. It should be noted that 'family business' is a term of art; there is no specific legal definition of this concept.
2. In this paper, the terms 'corporation' and 'company' are used interchangeably.
3. Of course, directors are supposed to abide by all regulatory requirements with respect to consumer and environmental legislation.
4. See also Cheffins's contention (1997: 156) that the mainsprings of capitalism tend to derive from what many think of as baser human motives, such as self-interest and the desire for personal profit.'
5. See the feminist literature (Waring, 1990; Boyd, 1997) on how business profit-making is subsidized by women's unpaid labour.
6. Interestingly, Anderson does not tell us whether either or both of this fictitious couple was a woman, or whether there was any dispute between them about what decision to make!
7. The mediating effect of race on the gendered nature of participation in family businesses is an extremely significant issue in the Canadian context, raising as it does the further question of the role of law in that process. Unfortunately, these intersections cannot be pursued here.
8. The complication here is that another 'ownership' table in the study indicates that some women owned their business in conjunction with 'major' or 'minor' partners (partnership being a separate form of business enterprise). The authors also quote a 1988 study by Lavoie that appears to indicate that the choice of the legal form of a business enterprise (e.g., a sole proprietorship or a corporation) is itself gendered. Thus, 'Lavoie noted

the tendency of women to operate their businesses as sole proprietors hips, although she observed that women in traditionally male sectors tended to follow the organizational structure preferred by men owners (incorporation)' (Belcourt et al., 1991: 12).

9. This included differential treatment by creditors, suppliers, customers, and even employees. It seemed that 'being married and having children contributes to the perception of stability in male applicants, but these same factors are taken to suggest unreliability in women applicants' (Belcourt et al, 1991: 66).
10. *Re Ferguson and Imax Systems Corp.* (1983) 43 O.R. (2d) 128 (Ont. C.A.).
11. *M. v. H.* (1993) 50 R.F.L. (3d) 92 (Ont. Ct., Gen. Div.).
12. *Bel1nan v. Belman* (1995) 26 O.R. (3d) 56 (Ont. Ct., Gen. Div.).
13. It should be recognized that the ability to advance these corporate law remedies may largely be a function of the legal advice obtained by the plaintiffs.