TOWARDS A SINGULAR CONCEPT OF LEGAL PERSONALITY

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This paper argues that the only two categories of legal persons recognized in Canadian law are natural persons and the corporation, and that the essential attributes of a corporation are name, state sanction, and perpetual succession. This essential attribute approach to corporations has the benefit of certainty and ease of application in classifying foreign entities and in clarifying the status of Indian bands. There is no compelling argument in favour of recognizing a third category of legal person, and doing so would only create unnecessary uncertainty.

Le présent article soutient qu'il existe uniquement deux catégories de personnes morales en vertu du droit canadien : les personnes physiques et les sociétés (« corporations »); et que les attributs essentiels des sociétés sont la dénomination sociale, l'assentiment de l'État et la succession perpétuelle. Cette approche reposant sur les attributs essentiels vis-à-vis des sociétés a l'avantage de la certitude et de la facilité d'application pour ce qui est de la classification d'entités étrangères et de la clarification du statut des Premières Nations. Il n'y a aucun argument convaincant qui privilégie la reconnaissance d'une troisième catégorie de personnes morales; et l'ajout d'une telle catégorie ne ferait que créer de l'incertitude inutilement.

"The only legal person known to our law is the corporation – the body corporate."[1]

1. Introduction

The general thesis of this paper is that "corporation" is the common law term for a legal person other than a natural person, and there is no third category of legal person. As will be argued in this paper, there is an historical symmetry between the concept of a (non-natural) legal person and the concept of the corporation as recognized in the common law. Moreover, there is no compelling reason for the common law to recognize a third category of legal person. This issue is important because recognizing a third category of legal person would raise a number of difficult issues. For

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* Bull, Housser & Tupper LLP.

1 *Hague v Cancer Relief & Research Institute*, [1939] 4 DLR 191 (Man KB) at 193 [*Hague*].

example, would the powers, rights and obligations of such a person, and those of its members, differ from those of a corporation? How would we differentiate between the category of corporations and third category of legal persons?

This paper will also argue, based on the historical development of the corporation, that the essential attributes of a corporation are name, perpetual succession and state sanction. Perpetual succession means that there is no change in the ownership of property of the corporation when the members change, while state sanction means that mere association cannot lead to the creation of a corporation; the state must approve of its corporate existence. If those attributes are present, then there is a corporation – a separate legal person. This approach can be applied to the classification of foreign entities; a necessary first step in determining the Canadian tax consequences for a foreign entity is to determine whether it is a partnership, corporation or trust. It can also be applied to First Nations. The *Indian Act*[2] does not explicitly state that Indian bands have legal personality or that they are corporations. That has led to longstanding questions as to the capacity of Indian bands to hold property and engage in certain activities. Based on the essential attributes approach put forward here, it will be seen that an Indian band has the essential attributes of a corporation and so should be considered a corporation.

This paper is confined to an analysis of the subject under the Canadian common law. The concepts discussed here could be quite different under the civil law of Quebec. While there may be valid arguments for a bijural country to adopt a uniform concept of legal personality and corporations across the two legal systems, such issues are beyond the scope of this paper. This paper does not discuss the fiction theory or realist theory of corporate personality, leaving that for philosophers.[3] For our purpose, the fiction theory is at least implicitly accepted in Canadian law. As well, the development and decline of the strict interpretation approach to corporate powers, and the various systems of incorporation (registration, letters patent) do not bear directly on our inquiry.

2. Legal Personality and the Corporation

The proposition that a corporation is the common law word for a legal person other than a natural person is best understood by considering the

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2 RSC 1985, c I-5.

3 As Duff observes: "English judges seldom pay more than verbal homage to metaphysics, and when metaphysicians disagree, a lawyer can surely choose the view that suits his convenience and common sense;" see Patrick W Duff, "The Personality of an Idol" (1927) 3 Camb LJ 42 at 47.

history of the corporation in the common law. A study of that history leads to the proposition that the essential attributes of a corporation are perpetual succession and state sanction. How the corporate idea became a part of the common law cannot be understood without a review of its Roman antecedents.

The concept of the corporation was adopted into English law from Roman law, via canon law.[4] For the sake of brevity, the following discussion glosses over the subtleties and ambiguities inherent to the ancient systems of law mentioned. Rather, the following discussion is meant to capture the context necessary to understand how corporations became a part of the English common law.

The concept of the corporation goes back at least as far as the Romans.[5] Owen summarizes the status of the corporation in Roman law as follows:

> Roman corporations also existed in both the ecclesiastical sphere and the area of trade and commerce. Roman law divided corporations into four classes: public government bodies, or municipalities, called *civitates*; religious societies, such as the *scribae* employed in the administration of the state; and trade societies, such as the *fabri*, *pictores* and […] . Private corporations were permitted only for purposes that were sanctioned by the law, the decrees of the Senate, and the constitutions of the emperors.
> …
> Ulpianus, a Roman jurist circa 200 CE, declared that where "any thing is owing to a corporation, it is not due to the individual members of the same, nor do the latter owe what the entire association does." It appears, therefore that these entities manifested at least one principal characteristic of the modern business corporation – a separation of the assets and liabilities of the corporation from the assets and liabilities of its members. This was achieved by recognizing the corporation as a legal unit (or person) separate from its members at least for this limited purpose.[6]

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4 Bishop Carleton Hunt, *The Development of the Business Corporation in England 1800-1867* (Cambridge: Harvard University Press, 1936) at 3.

5 There may have been Greek antecedents as well; see John R Owen, "Foreign Entity Classification and the Character of Foreign Distributions," in *Report of Proceedings of Fifty-Seventh Tax Conference*, 2005 Tax Conference (Toronto: Canadian Tax Foundation, 2006) at 20:3. Seymour points to the priesthoods of Isis and of Bel as early examples of the corporation; see Edmund Bayley Seymour, Jr, "The Historical Development of the Common-Law Conception of A Corporation" (1903) 51 Am L Reg 529 at 531.

6 Owen, *ibid*. Owen developed this summary based on the work of Seymour, *ibid*, and Clarence E Martin, "Is a Corporation a 'Person'?" (1938) 44:4 W Va LQ 247-69.

The Romans recognized perpetual succession, including the insignificance of a change in membership for the legal subject as a whole, the separate rights and duties of the corporation, separate property ownership, and the ability of the members of the corporation to deal with the corporation as strangers.[7] As will be argued in the context of the development of the corporation in the common law, perpetual succession, that is, separate ownership of property, became the core of the concept of the corporation, as it appears to have been recognized in Roman law.

Notwithstanding the development of the corporation in Roman law, Owen observes that the corporate idea "disappeared with the invasion of the Goths into Italy."[8] For a time, the concept could not survive in the context of "constant warfare and military regimes."[9]

Although it disappeared, it was not entirely forgotten. The concept of the corporation was advanced by canon law. The moral and spiritual unity of the community of believers translated naturally into a temporal unity: the Church. As stated by Joseph Smith:

> The Church was interested in the more profound and all embracing problem of everlasting life and in consolidating philosophically its position as the intermediary between man and God. The efficacy of its mission depended on the perpetuity of its institutions… To the Canonists the corporate idea is useful to give their church institutions the vitality, perpetuity and strength which temporal authorities were disposed to deny them.[10]

For what appear to be reasons of theology, practicality and historical precedence, the Church latched firmly onto the idea of the corporation. The canonists elaborated on the idea of a juristic person using ecclesiastical, German[11] and other sources, including to what extent a corporation, as an incorporeal entity, could be seen as a person.[12]

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7 This summary is based on Gierke, *Das Deutsche Genossenscheftsrecht*, as excerpted in Joseph W Smith, *Development of Legal Institutions* (St Paul, Minn: West Publishing Co, 1965) at 636-40, and comments of Smith thereon. The reader may also wish to review Rudolf Sohm, *The Institutes* (Oxford: Clarendon Press,1901); William W Buckland, *A Textbook of Roman Law*, 4th ed (Cambridge: Cambridge University Press, 2007) at 174; and Max Radin, *Handbook of Roman Law* (St Paul, Minn:West Publishing, 1927) at 266 *et seq*, for more detail.

8 Owen, *supra* note 5 at 20:5.

9 *Ibid*.

10 Smith, *supra* note 7 at 645.

11 Interestingly, in the German tradition, group unity was brought about by the mere fact of association; see Smith, *ibid* at 646.

12 Pope Innocent IV stated that, as a mere legal concept, a corporation could not be excommunicated, was not capable of having a will, and could not act except by its members.

English law for some time did not recognize the corporation. It has been suggested by some that, without the influence of Roman and canon law (hence the brief overview above), English law would have developed a system of representation that would have eliminated the need for the corporation.[13] The corporation did not develop earlier in English history because of the nature of feudal society, especially at the time of the Plantagenets.[14] Before their time, there were cooperate social organizations such as counties and hundreds. Even the Anglo-Saxon concept of fellowships did not give rise to a separate legal person. While these associations were in some ways treated as units, they were seen as a set of rights and obligations between all the members of the group. According to Smith, the law developed largely out of cases dealing with ecclesiastical establishments and the influence of canon law.[15] During feudal periods there was some tension between the state and the church, and a consequent need to define the Church's position in English law. The Church was particularly keen to secure the perpetual ownership of Church property, and to avoid the feudal obligations inherent in feudal tenure.[16] As will be seen below, the canonist desire for perpetual ownership, also known as perpetual succession, is important; it was seized on by the English courts and commentators as at least one of the essential attributes of the corporation, and probably its most important attribute.

The historical record is scant, but it appears that the Roman and canonist concept of the corporation came into English law at some point between Edward III's grant of community to the men of Coventry and Henry VI's Charter to Southampton in 1445. It is doubtful that the corporate form was recognized in English law when Edward III granted the men of Coventry the right of having a community.[17] In that grant, there are rights conferred upon the men of the community, but it seems qualitatively different that the incorporation effected by the Charter of Southampton. The Coventry charter does not convey any sense of a separate

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Prior to this, some canonists had suggested the logical conclusions of a corporation being treated as a real person, rather than as a purely conceptual entity; see Gierke in Smith, *ibid* at 644.

13 Smith, *ibid* at 636.

14 Seymour, *supra* note 5 at 533, suggests that it was introduced into English law, thanks to the clergy, before Conquest in 1066, but there is scant evidence of that.

15 Smith, *supra* note 7 at 654. See also Seymour, *supra* note 5 at 432-33. As also noted by Seymour, the statement that the corporation is a fictional person derives from Sinibald Fieshi, who became (ironically, given his character) Pope Innocent IV; see Seymour, *ibid* at 540.

16 Owen, *supra* note 5.

17 This in itself was an advance in English law; formerly, royal charters were a recognition of a community that already existed in fact. The Charter of Coventry was instead a grant of the liberty to form a community; see Smith, *supra* note 7 at 653.

personality, while the Charter of Southampton does.[18] Henry VI's Charter to Southampton expressly incorporated the Borough of Southampton and explicitly enumerated certain powers. These include a name separate from the individuals comprising the borough, the power to sue and be sued in the corporate name, the ability of the corporate borough to hold lands, and the ability to do so in perpetual succession.

One of the oldest cases on corporations, but the one that sets out the meaning of corporation most clearly, is *Sutton's Hospital* (1612). In that case the Court stated:

> Now it is to be seen what things are of the essence of a corporation: 1. Lawful authority of incorporation: and that may be by four means, sc. By the common law, as the King himself, &c. by authority of Parliament; by the King's charter (as in this case); and by prescription. The 2d, which is of the essence of the incorporation, are persons to be incorporated, and that in two manners, s.c persons natural, or bodies incorporate and political. 3. A name by which they are incorporated; as in this case governors of lands, &c. 4. Of place for without a place no incorporation can be made; here the place is the Charter-house in the county of Middlesex … 5. By words sufficient in law, but not restrained to any certain, legal and prescript form of words.
> …
> That when a corporation is duly created, all other incidents are tacite annexed. … As 1. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, etc. and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc. that is also declaratory, for when they are incorporated, they may make or use what seal they will. 4. To restrain them from aliening or demising but in certain form; that is an ordinance testifying the King's desire, but it is but a precept, and doth not bind in law. 5. That the survivors shall be the corporation, that is a good clause to oust doubts and questions which might arise, the number being certain …. 8. To make ordinances; that is requisite for the good order and government of the poor, etc. but not to the essence of the incorporation.[19]

Sir William Blackstone (1765) and Stewart Kyd (1793) both wrote treatises on corporations. The attributes identified by the Court in *Sutton's Hospital* and other jurisprudence were repeated in their work. The attribute of perpetual succession was highlighted by Blackstone as "the very end of its incorporation: for there cannot be a succession forever without an incorporation."[20] Those words reflect Lord Coke in *Sutton's Hospital*

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18 *Ibid* at 646.

19 *The Case of Sutton's Hospital* (1612), 10 Co Rep 23a [*Sutton's Hospital*] at 29b.

20 Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press,1765-1769) at 453-55. Similar comments were made by Stewart Kyd in

where he stated that "a capacity to take in succession cannot be without incorporation."[21] It was therefore recognized early in English legal history that the attribute of perpetual succession is at the heart of the meaning of corporation and separate legal person. The canonist purpose in adopting the concept of the corporation thus carried through into the English common law. Obtaining that essential quality was the very aim of incorporating, since it avoided the necessity of transmitting property every time there was a change in membership.[22] This importance was reflected in former US Chief Justice Marshall's 1819 description of perpetual succession:

> A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incident to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many person are considered as the same, and may act as a single individual. They enable a corporation to manage it own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting to from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.[23]

A Treatise on the Law of Corporations (London: J Butterworth, 1793) at 12-13. The characteristic is also noted in *Halsbury's Laws of England*, 3d ed, 4. See also William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, rev (West Group 1990) vol 1 at 441. Despite the references to American authorities and cases in this paper, the reader can expect US lawyers to be appalled by the notion that a limited liability company would be considered a corporation under the common law.

[21] *Sutton's Hospital*, *supra* note 19 at 26(b) [964]. See also Blackstone, *ibid* at 454-55; and *The Conservators of the River Tone v Ash* (1829), 10 B & C 371(KB) [*River Tone*].

[22] It thus resolves the problem of how to administer property that comes into a possession of a group of persons for the purposes of the group; see Seymour, *supra* note 5.

[23] *Dartmouth College v Woodward*, (1819), 4 Wheat 518 (USSC) at 35. Although an American decision, the US Supreme Court was considering a corporation created by the British Crown when New Hampshire was a Crown colony and before it became a state. Thus it is really a statement on English law.

The foregoing quote was accepted by nineteenth century Canadian courts.[24] In another case, where statute clearly vested property in individuals as trustees rather than in a corporate body, there could be no corporation.[25] In another case, the trial judge had found that a commission was a corporation since it had "utility and perpetual succession," but the appeals court found no such attribute and concluded that commission was not a corporation.[26] The purpose of separate holding of property coincides nicely with the reason corporations became so popular in the seventeenth century – the need to aggregate capital.[27] It is also notable that the case often regarded as the seminal case on the separate legal personality of the corporation, *Salomon v A Salomon & Co Ltd*, was really about the separate ownership of property.[28]

The other essential attribute appears to be that the corporation must be created by the state.[29] A corporation cannot exist in the common law without the authority of the Crown, whether by royal prerogative (historically common) or under the authority of statute (the only method used today in Canada). The need for state sanction is an important distinction between the common law concept of the corporation, and the civil law concept (going back to the Roman legal system) which recognized corporations by mere association. Although there can be no corporation without the sanction of the state, however, there are no particular words necessary to create a corporation. In *Sutton's Hospital*, Lord Coke stated "That to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words."[30] That no particular words are required is supported by the subsequent English case of *The Conservators of the River Tone v Ash*,[31] the early Canadian case of *The Trustees of the Franklin Church*,[32] and the US Supreme Court's

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24 *The Trustees of the Franklin Church v Maguire* (1876), 23 Gr 102 at para 13 (Ont Ct Ch) [*Franklin Church*]; *Ulrich v National Insurance Co* (1877), 42 UCR 141 (Ont HCJ) at 158.

25 *Cochrane v Peterborough (Town)* (1863), 13 UCCP 111 (UCCP).

26 *Power Commission of St John v New System Laundry Ltd*, [1928] 2 DLR 661 (NBCA): "I fail to see in what way [the legislation] bestows these characteristics …"

27 See Seymour, *supra* note 5 at 543.

28 [1897] AC 22 (HL). The concept of a corporation as a separate person was well established centuries before, at least as early as *Sutton's Hospital*, *supra* note 19.

29 State sanction was critical to Hobbes' political theory; see McLean, *infra* note 134. This may have been influential in the development of English law.

30 *Supra* note 19 at 30a and 30b.

31 *Supra* note 21 at 384 [487].

32 *Franklin Church*, *supra* note 24.

decision in *Hancock v Louisville & Nashville Railroad Co*.[33] In other words, because something is not labelled a corporation does not mean that it is not a corporation under the common law. As in other areas of the law, it is legal substance that matters, not labels.

The additional attribute of a name could, feasibly, be argued as an essential attribute, since there must be some means of identifying the legal person for discourse, documents, and judicial decisions. As a practical matter, it is doubtful that the inquiry will ever arise where there is no identifiable name.

Based on the foregoing, the essential attributes of a corporation are state sanction and perpetual succession, and possibly a name. There are a number of other attributes that are "tacitly annexed" to a corporation, including the capacity to own property (perpetual succession would be meaningless without it), the ability to sue and be sued (a logical necessity for owning property, since something is property only to the extent that one can exclude others from it), and to contract. Such attributes are also found in section 17(1) of the BC *Interpretation Act*,[34] and subsection 21(1) of the federal *Interpretation Act*.[35] These sections appear to be a codification of the common law by describing the attributes that are tacitly annexed to a corporation.

Having noted the essential attributes of a corporation, it is useful to consider what are not essential attributes. For example, other attributes are conventionally linked to the concept of a corporation. They include limited liability, shareholders, freely transferable interests, and a board of directors. None of those attributes were identified by the courts in the old common law, or by the old commentators. Consideration of those attributes, starting with limited liability, will reveal why.

The Court in *Sutton's Hospital* listed a number of attributes. *Halsbury's* states that the requirement for a place is now obsolete, which seems reasonable and accords with probably universal modern legislative practice.[36] Blackstone says that bylaws are essential, while Kyd says that

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33 145 US 415, 12 S Ct 971, 36 L Ed 755 (USSC, 1892), at 4 [*Hancock*]. See also, *State Highway Commission of Missouri v Bates*, 296 SW 418 (Miss SC, 1927) [*Bates*] at para 6:

> As the cases say, a legal entity does not have to be called a corporation to make it a corporation. It suffices if it exercises the functions of a corporation. It is a legal entity created by the state, with all the powers and obligations of a corporation …

34 *Interpretation Act*, RSBC 1996, c 238, s 17(1).

35 *Interpretation Act*, RSC 1985, cI-21, s 21.

36 *Halsbury's Laws of England*, 3d ed, vol 9, at 21.

rules for internal governance can be prescribed by the common law instead. A corporation (at least a corporation aggregate) requires rules for internal governance, but it is doubtful that this is a serious obstacle to finding that there is a corporation; a court could easily find rules for governance somewhere, whether by analogy or by implication, and as a practical matter it is doubtful that a legislature would create a legal person without providing for some internal regulatory structure.

Perpetual succession should not be confused with perpetual existence. It has never been understood to mean that the corporation must continue to exist forever or even for an indefinite period. As noted by Kyd in 1793, perpetual succession may exist during the pre-determined finite existence of a corporation.[37] As an example of perpetual succession for a finite period, in 1850, the United Provinces of Canada passed a statute for incorporation which, while giving corporations separate legal personality and their shareholders limited liability, limited the life of corporations to 50 years.[38] *Halsbury's Laws of England*[39] also refer to the ability of the Crown to grant a charter of incorporation for a limited duration, and cites examples.

The limited liability inherent in the status of incorporation and separate legal personality was recognized as long ago as 1440 by the English courts, but the context was medieval and not commercial.[40] When the English Parliament decided to allow incorporations by registration, after the anti-corporate policy which had found its strongest in expression in the *Bubble Act*[41] had worn off, it expressly denied the shareholders limited liability (the slogan "no profit without responsibility" was popular at the time.)[42] It later allowed limited liability in 1855.[43] Indeed, Nova Scotia and Alberta both provide for types of corporations whose

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37 Stewart Kyd, *A Treatise on the Law of Corporations* (New York & London: Garland Publishing, 1978 [1793]) at 17. See also *New Brunswick Power Co v Maritime Transit Ltd*, [1937] 4 DLR 376 (NBCA).

38 *An Act to Provide for the Formation of Incorporated Joint Stock Companies, for Manufacturing, Mining, Mechanical or Chemical Purposes*, SC 1850, c 28.

39 *Halbury's Laws of England*, 3d ed, vol 9, at 4, fn (m) and 23.

40 Smith, *supra* note 7 at 683, citing YB 19 Hen VI, Pasch pl 1; 30 Hen VI, Mich pl 19.

41 *Bubble Act 1720* (UK), 6 Geo I, c18.

42 See e.g. Ambrose Bierce, *The Devil's Dictionary*, *sub verbo* "corporation": Corporation, n. an ingenious device for obtaining individual profit without individual responsibility.

43 FE Labrie and EE Palmer, "The Pre-Confederation History of Corporations in Canada," in Jacob Ziegel, ed, *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) at 57.

shareholders have unlimited liability.[44] Other legal relationships provide for limited liability, including limited partnerships and limited liability partnerships. Accordingly, though the natural and logical result of incorporating, limited liability can be denied while still leaving a corporation, and so it is not an essential attribute.

As for the internal organization of a corporation, today's modern business corporations have shareholders and board of directors. Examples of corporations with alternative structures are commonplace, however. For example, societies and municipalities are both corporations yet have very different internal organizational structures.[45] The existence of corporations sole, discussed below, also shows that a particular internal structure is not required.

In addition to limited liability, shareholders and a board of directors, modern business corporations often have freely transferable interests. For example, shares of public corporations are transferable with few restrictions for most shareholders. Yet most private corporations have tight restrictions on the transferability of shares, frequently expressed through a requirement in the articles that the directors consent to any transfer,[46] or through a shareholders agreement preventing the transfer to third parties without consent. Historically as well, corporate charters frequently limited the transferability of shares.[47] The early continental joint stock companies sometimes required the sanction of the body of shareholders before transfer.[48] Transferability merely refers to the fact that the personality and existence of the corporation are separate from the owners, and therefore interests in the corporation could be transferable. There is no logical necessity for interests in a corporation to actually be transferable. There is an American case that specifically states that the transferability of shares is not essential to a corporation, noting that there are many non-share corporations, such as hospitals and colleges.[49] Interests in societies and municipalities, both of which are corporations, are not freely transferable. Furthermore, the transferability of "shares" is not peculiar to corporations, since units of modern limited partnerships are clearly tradable, and shares

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44 *Companies Act*, RSNS 1989, c 81; *Business Corporations Act*, SA 2000, c B-9, Part 2.1; *Business Corporations Act*, SBC 2002, c 57, Part 2.1.

45 *Society Act*, RSBC 1996, c 433, s 4; *Local Government Act*, RSBC 1996, c 323, s 7.

46 In BC, this is permitted by the *Business Corporations Act*, *supra* note 44, s 113, which provides that shares are transferable as provided in the articles.

47 Armand DuBois, *The English Business Company after the Bubble Act: 1720 – 1800* (New York: Commonwealth Press, 1938) at 111.

48 Lehmann, as excerpted in Smith, *supra* note 7 at 668.

49 *Warner v Beers*, 23 Wend (SC Errors, NY 1840) at 103.

of unincorporated joint stock companies (partnerships) have been tradable as well.[50]

It has recently been suggested that the meaning of the term "corporation" is open-textured and fluid.[51] If true, for our purposes that would mean that the term corporation is not necessarily tied to its historical roots of state sanction and perpetual succession. It is undeniable that language is open-textured; it is often difficult to provide precise boundaries to the meaning of any particular word.[52] The open-textured nature of language gives rise to many legal disputes. Based on the historical development of the corporation in the English common law, however, the definition of a corporation is fairly precise: it is something sanctioned by the Crown that has perpetual succession. That is evident from the canonist purpose of adopting the corporation into English law and from the early English cases and commentary.

In contrast, the meaning of the term "share" is quite open-textured and historically fluid. Conventional usage is to refer to the share as a divisible unit representing a proportional share in the capital of the corporation. When we speak of shares, we could easily speak instead of units. For tax purposes, the language of the *Income Tax Act* (*ITA*)[53] is predicated on this conventional usage of the term share. "Share" is not defined in the BC *Interpretation Act*, or in corporate governance statutes. DuBois provides a useful historical perspective:

> Few terms of art had become crystallized [by the eighteenth century]. The words *joint stock, capital, capital stock,* and *fund* were used interchangeably to describe the sum total of the proprietors' interest in the company. The distinction between *stock* and *shares* was not precisely drawn. As a rule, in a business corporation the phrase *stock* or *joint stock* would be used, while in the unincorporated organization the division into *shares* was accented. In many corporations, however, especially navigation and water companies, the proprietor's holding was described as a share.
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> The New River Water Company is an example of this practice. In the Committee Minute Book of 1778-1782, the proprietor's interest is constantly described in the term "one eighth part of the Share or the one fourth Part of one Share" belonging to

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50 For an opposing view with respect to the transferability of trust units, see Maurice Cullity, "Legal Issues Arising out of the Use of Business Trusts in Canada," in Timothy G Youdan, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 193.

51 Matias Milet, "Hybrid Foreign Entities, Uncertain Domestic Categories: Treaty Interpretation Beyond Familiar Boundaries" (2011) 59:1 Can Tax J 25 at 32, 34 and 46.

52 *Ibid* at 35.

53 RSC 1985, c 1 (5th Supp).

> respective individuals. The organization was divided into seventy-two shares which were subdivided in turn into eights, thirty-seconds, and other fractional parts. This arrangement is to be taken as a survival of seventeenth century structure rather than as one typical of the eighteenth century. … The Financial structure of the New River Company is complicated by the diffusion of the shares, as a result of a seventeenth century arrangement, into two distinct halves, the adventurers' shares and the King's shares.[54]

It is trite law to say that a share is a bundle of rights against a corporation.[55] There must be more than that given that society members have bundles of rights, but not "shares," and given that creditors of a corporation have a bundle of rights against the corporation, but not "shares." *Halsbury's Laws of England* states that a share is a "a right to a specified amount of the share capital of a company," and is personal estate.[56] In terms of case law, in *Borland's Trustee v Steel*, Farwell J defined shares as follows:

> A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se [in accordance with the corporation's enabling statute] … A share is not a sum of money … but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of more or less amount.[57]

More recently, Lord Millett for the House of Lords in *IRC v Laird Group plc*,[58] observed that "the judicial nature of a share is not easy to describe." Lord Millett observed that it is intangible personal property, and a chose in action. Lord Millett then cited *Borland's Trustee*. Lord Millett noted that "shares" confer proprietary rights in the company though not in its property. Back in Canada, the Federal Court Trial Division in *Kieboom v Minister of National Revenue*[59] and the Alberta Court of Appeal have both

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54 DuBois, *supra* note 47 at 346, 377.

55 See e.g. J Anthony Van Duzer, *The Law of Partnerships and Corporations*, 2d ed (Toronto:Irwin Law, 2003).

56 *Halsbury's Laws of England*, 4th ed, 1996 reissue, vol 7(1) at para 437.

57 [1901] 1 Ch 279 at 288 [*Borland's Trustee*]. This was a bankruptcy case where someone was arguing that the articles gave that person a right to the shares at any time. The trustee in bankruptcy disagreed. The plaintiff argued that a share was a sum of money dealt with in a particular manner. See also *Re Paulin*, [1935] 1 KB 26 at 36 (CA); *IRC v Crossman*, [1937] AC 26 at 34 (HL).

58 2003 UKHL 54 at para 35. This case was not centrally concerned with the definition of share. It was primarily concerned with whether a dissolution is a transaction in securities.

59 (1991), 91 DTC 5478, at 6 (FCTD) [*Kieboom*]. A taxpayer caused a corporation controlled by himself to issue non-voting shares to wife and later to children. The case

considered the juridical nature of a share.[60] In *Kieboom*, the Federal Court stated that a share is "simply a proportionate interest in the net worth of a business." That is probably the most useful definition. Since members of non-business corporations have rights and obligations *vis-à-vis* a corporation, this must be the particular right or obligation that renders that bundle of rights and obligations a "share."

The digression into the meaning of the term share hopefully illustrates how some terms are more open-textured and fluid than others. Defining a corporation as something with perpetual succession, and therefore legal personality, is a fairly precise and useful definition. For example, when considering whether a Nevada limited liability company (LLC) is a corporation under Canadian law, rather than asking the vague question of whether the LLC is a separate legal person, it is possible to determine whether a change in membership of the LLC is seen in the law as a change in ownership of the underlying property. If the change in the LLC's membership means that the law recognizes a change in the ownership of the property held in the LLC's name, then there is no perpetual succession and no corporation. A change in underlying property as a result of a change in membership would have significant consequences, including with respect to sales taxes, land transfer taxes, and taxes on capital gains. If on the other hand the domestic law does not see a change in ownership of the underlying property when membership changes, then the LLC has perpetual succession and is a corporation under Canadian law. As will be described below, the BC Supreme Court has held that a Nevada LLC is a corporation under Canadian law.

3. Classifying Foreign Entities as Corporations

Whether a foreign entity is a corporation is important. There are particular tax consequences that befall corporations. Under the *ITA*, corporations are subject to a particular taxation regime. For example, the corporation itself is subject to tax on its income, and distributions by corporations to their members are subject to tax as well. For a foreign entity, such as a US LLC, to comply with the Canadian tax obligations, it is necessary to determine whether it is a corporation. On basis of the previous section, whether a foreign entity is a corporation depends on whether the entity has perpetual succession.

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was about whether resulting diminution in taxpayer's equity position in corporation a gift. Although finding against the taxpayer, the court found that the transfer of equity was not the transfer of a share.

60 *Britannia Collieries Ltd v Hauser* (1922), 18 Alta LR 43 at 48 (CA). In this case the defendant was alleged to be selling shares of a syndicate contrary to a prohibition on selling shares of corporations, syndicates etc. without a license.

The case law described in the previous section is critical to the classification of foreign entities for tax purposes because there is limited statutory guidance on the meaning of the term corporation. The *ITA* defines a corporation only as follows: "'corporation' includes an incorporated company,"[61] an unhelpfully circular definition. The *Income Tax Act* of British Columbia states that corporation has the same meaning as in the federal *ITA*.[62] Other tax statutes are similarly unhelpful. For example, BC's *Corporation Capital Tax Act* (*CCTA*), a statute at the heart of a legal dispute in one of the cases discussed below, had a definition that served only to include certain categories of corporations, such as Crown corporations.[63] Other statutory aids provide limited guidance. The BC *Interpretation Act* definition merely states that a corporation is something that is incorporated, including "a corporation sole other than Her Majesty or the Lieutenant Governor."[64] Section 17 of the *Interpretation Act* declares that a corporation can sue and be sued in its own name, contract in its own name, and so forth, but that section is framed to clarify the powers of a corporation, not to define a corporation. Section 17 is thus framed to deal with the opposite inquiry than ours. If something is a corporation, section 17 clarifies some of its attributes.[65]

Given the absence of statutory guidance, it has been necessary in tax cases to turn to the common law definition of corporation, as we have already explored above. The Supreme Court of Canada stated in *Backman v Canada*[66] that "it is presumed that Parliament intended that the term be given its legal meaning for the purposes of the Act." The Court also expressed this sentiment in *Will-Kare Paving & Contracting Ltd v Canada*[67] noting that the *ITA* is not a commercial code and that "reference must be given to the broader commercial law to give meaning to words that, outside of the Act, are well-defined." This reasoning applies generally to tax statutes.

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61 *Supra* note 53, s 248.

62 RSBC 1996, c 215, s1(1).

63 RSBC 1996, c 73, ss 1(1) *sub verbo* "corporation."

64 *Supra* note 34.

65 It also addresses the issue of whether the legal person known as a corporation has all the powers of a natural person. Being a legal person does not necessitate having all the powers of a natural person; if the Crown can create a legal person, it can handicap that person. The *ultra vires* doctrine, though now mostly anachronistic, demonstrates that possibility.

66 2001 SCC 10, 1 SCR 367 [*Backman*] at para 17.

67 2000 SCC 36, 1 SCR 915 [*Will-Kare*] at para 31.

With respect to the classification of foreign entities,[68] the Court stated in *Backman* that, in determining whether a foreign constituted relationship qualified as a partnership under Canadian law, the essential elements of a partnership under Canadian law must exist in that foreign relationship.[69] The Supreme Court accepted this as the approach taken earlier by the Tax Appeal Board in its decision *Economics Laboratory v The Queen*.[70]

In *Economics Laboratory*, the Tax Appeal Board considered whether a German entity was a corporation or a partnership for Canadian purposes. The Board looked at the attributes of the German entity under German law, and found that it could own property, incur losses for which the members were not liable, could sue or be sued, and was otherwise treated as a separate legal person under German law. The Board therefore concluded that the German entity was a corporation under Canadian law.

The essential attribute test is the basic approach adopted by the Tax Appeal Board in *Economics Laboratory*, although the attributes considered by the Board extended beyond perpetual succession (the Board referred to owning its own property, which is logically the same thing as perpetual succession). That is also the approach taken by the Supreme Court of Canada in *Backman*, although with respect to partnerships rather than corporations.

Coming about thirty years after *Economics Laboratory*, *Boliden Westmin Ltd v British Columbia*[71] involved an appeal under the *CCTA*. The Act imposed a tax on the capital of a corporation that was employed in BC, with some adjustments. Boliden had claimed a deduction from capital for its investment in an LLC as an investment "in shares of other corporations."[72] Thus, Boliden had to establish both that (1) the LLC was a corporation, and (2) its member's interest in the LLC was a share of a corporation. If Boliden failed to establish either, it would not be entitled to its deduction. At the hearing, the Crown conceded that, if the LLC was a corporation, then a member's interest in an LLC was a share. The Court

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68 It is unfortunate that the term "entity classification" is commonly used for this exercise. It presupposes some sort of personality. A better term would be relationship classification. Is the set of relationships properly characterized as a partnership (mutual agent for each other in pursuit of profit), trust, bailment, or one of separate legal personality (i.e. corporation)? However, since entity classification is the common term, I have adopted it here. The Ontario *Partnership Act*, RSO 1990, c P5, s 2, recognizes that it is a question of relationships classification.

69 *Backman*, *supra* note 66 at para 17.

70 (1970), 70 DTC 1208 (TAB) [*Economics Laboratory*].

71 2007 BCSC 351, (2007), 68 BCLR (4th) 349 [*Boliden*]. It is important to note that I was the lawyer who argued *Boliden* on behalf of the taxpayer.

72 *Supra* note 63, s 11(2)(a).

accepted that concession and characterized it as fair. As a result, the only issue before the court was whether the LLC was a corporation.

The Nevada LLC at issue in *Boliden* had the following attributes, amongst others: it was created under lawful authority;[73] it had members; it had perpetual succession;[74] it could sue and be sued in its own name;[75] it could hold property in its own name;[76] it had rules for internal governance;[77] and it could contract in its own name.[78] The Nevada Revised Statutes carefully avoided the word "corporation" or "incorporation" when creating an LLC. This is not surprising, since state legislatures wanted to create something that would not be considered a corporation for US federal tax purposes, so avoiding the term seems prudent. As already noted, however, no particular words are necessary for the creation of a corporation. A Nevada LLC has all the essential attributes of a corporation: state sanction, perpetual succession and a name. One would expect, based on the history of the corporation in the English common law as set out above, that it was a corporation under Canadian law.

Boliden[79] argued that it was a corporation because the LLC had the key hallmark of a corporation under Canadian law, perpetual succession. For good measure, Boliden further argued that the LLC had rules for internal governance, limited liability, and could receive grants of privileges.[80]

The Crown essentially argued that an LLC looked a lot like a partnership, and therefore was not a corporation. This was based primarily on the two limitations of the LLC, namely that that there were restrictions on the transferability of members' interest, and that it had a limited life of fifty years according to its constating documents. The Crown argued that the LLC was more like a partnership, and lacked the quality of perpetual succession.[81] The similarities of an LLC to a partnership can also be seen

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73 E.g. Nevada Revised Statutes [NRS], c 86.

74 In *Boliden*, the petitioners provided expert evidence that the Nevada LLC had perpetual succession, as that term is used herein.

75 NRS at s 86.281.

76 *Ibid* at s 86.281.

77 *Ibid* at s 86.161(2).

78 *Ibid* at s 86.161(3)(a).

79 In BC, provincial tax assessments are appealed by way of petition to the court. Although I have generally glossed over it in this paper, there were in fact two appellants (petitioners) in the *Boliden* case, as the reader will see upon reading the decision. However, nothing turned on there being two appellants.

80 *Boliden*, *supra* note 71 at para 16.

81 *Ibid* at para 15.

in the internal structure of an LLC, where the members act like partners and there is usually a manager rather than a board of directors.

The Crown also argued that it could not be considered a corporation because of the peculiar definition of LLCs in British Columbia's corporate legislation. The now-defunct *Company Act*[82] (as well as the succeeding *Business Corporations Act*[83]) contained a set of registration provisions applicable to LLCs. The *Company Act* defined "LLC" to mean something that is recognized as a legal entity in its organizing jurisdiction but does not qualify for registration as an extra-provincial company (that is, as something that is not a corporation).[84] BC's current *Business Corporations Act* similarly states that an LLC is something that is not a corporation.[85] The Crown's argument attempted to use that definition section in a strange way. A definition typically defines a term as it will be used in the legislation. The Crown was arguing that the definition actually affected the substantive law. Put another way, instead of the definition section saying that any reference to an LLC in the statute means something that is a legal person but is not a corporation, the definition section actually determined that an LLC is not a corporation under the common law in general. This issue was not discussed by Groves J in the *Boliden* decision, but the result implies that the Court agreed with Boliden and did not accept the Crown's argument on how to interpret the definitions section. Nor did the Court accept the Crown's assertion that the *Company Act*, a corporate regulation statute, was *in pari materia* with the *CCTA*, a taxing statute, such that the *Company Act* definition should apply for *CCTA* purposes.[86]

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82 RSBC 1996, c 62.

83 SBC 2002, c 9.

84 *Supra* note 82, s 1(1): "In this Act, … 'limited liability company' means an organization that (a) is formed in a jurisdiction other than British Columbia, (b) is recognized as a legal entity in the jurisdiction in which it was organized, (c) does not qualify to be registered under this Act as an extraprovincial company, and (d) is not a partnership or a limited partnership."

85 1(1): "In this Act, … 'limited liability company' means a business entity that (a) was organized in a jurisdiction other than British Columbia, (b) is recognized as a legal entity in the jurisdiction in which it was organized, (c) is not a corporation, and (d) is not a partnership, including, without limitation, a limited partnership or a limited liability partnership." The *Business Corporations Act* also has a definition of corporation: "'corporation' means a company, a body corporate, a body politic and corporate, an incorporated association or a society, however and wherever incorporated, but does not include a municipality or a corporation sole."

86 *Boliden*, *supra* note 71 at para 21. Although an LLC does not fit within the definition of limited liability company under BC corporate law, because it is in law a corporation, it is unlikely that the BC corporate registrar would allow an LLC to register as a corporation. The registrar is likely to insist that it register extra-provincially under the particular LLC provisions. As a practical matter, it is unlikely that a foreign LLC would engage in a dispute with the registrar over the matter. It is also unlikely that a court

Rendering his decision orally from the bench, Groves J held:

> Next, turning to the facts of this case, I am satisfied that despite the distinction drawn in Nevada between a company and a corporation, the limited liability statute of Nevada essentially sets up what we in British Columbia, and certainly in British Columbia at the time of the imposition of this tax on these petitioners, would have called a corporation. It has numerous hallmarks of a corporation. It has, of note, limited liability. It has shares of sorts, though of a different name. It creates a separate legal person. It allows this separate legal person the right to deal with property, to contract, to sue, to receive grants or privileges in its own name.[87]

Groves J's decision was brief. Although using a broader list than just perpetual succession, Grove J looked at the attributes of the LLC and held that it had the attributes that made it a corporation. In doing so, the decision is similar to that in *Economics Laboratory*.[88] As already mentioned above, the Tax Appeal Board in that case listed essentially the same set of traits that Groves J did and held the German entity to be a corporation for Canadian tax purposes. Because of the listing of the approach, however, it is also possible to characterize Groves J's decision as adopting a looks-like approach: the LLC looks like a corporation and therefore is a corporation. It is unfortunate that the oral decision of Groves J did not refer to any of the legal authorities put before him. The above-cited key paragraph leaves the test for determining whether something is a corporation unclear.

The next tax cases of interest are UK decisions. The UK decision in *Anson v HMRC*[89] (the lower tribunal decision was reported as *Swift v HMRC*[90]) is of particular interest, since it also grapples with the nature of a US LLC under UK law. However, that decision builds on the earlier decision in *Memec plc v IRC*[91] on the attributes of partnerships, and so *Memec* must be considered first.

Memec plc, a UK corporation, owned the shares of Memec GmbH, a German corporation. Memec GmbH in turn owned the shares of two German subsidiaries. The subsidiaries paid tax on their profits, and then paid dividends to Memec GmbH. Memec GmbH paid additional tax, then paid dividends to Memec plc. Those dividends were subject to withholding

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would prevent an LLC from recovering in an action in a BC Supreme Court on the basis that it should have technically registered as a corporation rather than a limited liability company, as those terms are defined in the BC's *Business Corporations Act*.

87 *Ibid* at para 19.

88 *Supra* note 70.

89 [2011] UKUT 318 (TCC), [2011] STC 2126 [*Anson UT*].

90 *TC 00399*, [2010] UKFTT 88 [*Swift*].

91 [1998] STC 754 (CA) [*Memec*].

tax. The effective German tax rate as a result of this structure was 56.48 per cent.

To reduce the German tax, Memec plc entered into a so-called "silent partnership" with Memec GmbH, whereby Memec plc contributed capital to Memec GmbH in return for a percentage of Memec GmbH's profits. Losses would reduce the balance of Memec plc's contributed capital. Memec GmbH was not taxable in Germany on the portion of the profits it paid to Memec plc, thus eliminating German tax for Memec GmbH.[92] The payment by Memec GmbH to Memec plc of its share of the profits was subject to dividend tax. This structure effectively reduced the German tax in the structure to 32 per cent.

Having reduced German tax, Memec plc attempted to reduce UK tax by claiming as a foreign tax credit the tax paid by Memec GmbH's subsidiaries. To do so, Memec plc had to show that its share of the profits were in fact dividends from the subsidiaries (in which case, the UK-German tax treaty specifically provided relief in the UK for corporate taxes paid by the German corporation). It attempted to make that claim under domestic UK law, on the basis that the silent partnership was "transparent," and on the basis of the certain definitions in the tax treaty between the UK and Germany. It is the first argument that is of greater interest here.

With respect to domestic law, Memec plc argued that the silent partnership should be treated as a partnership under UK law. This argument would make sense under Canadian law too; since a partnership is not a separate legal person, any dividends received by a partnership are actually dividends received by the partners themselves. Gibson LJ considered the nature of English partnerships. He noted that (1) an English partnership is not a separate legal person, (2) the partners carry on the business of the partnership in common with a view to profit, (3) the partners act both as principals and as agents for each other, (4) every partner is jointly liable with the others, and (5) the partners have a beneficial interest in the underlying property. On the other hand, the silent partnership was a contractual relationship where the silent partner contributed capital to the owner of the business and under the contract shared in the profits of the owner's business and bore the burden of any losses; only the owner of the business had an interest in the assets or carried on the business, and the silent partner had neither an interest in the assets nor carried on the business; and the silent partner was not liable to third parties. This fell short of a partnership arrangement. This appears to be the correct characterization in Canada as well: the so-called silent partnership could be more properly

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92 This is slightly simplified. In fact, the arrangement reduced Memec GmbH's tax by 86%, in accordance with Memec plc's share of the profits.

characterized as a lending arrangement than as a partnership arrangement. In any case, Memec plc failed on this argument; it was not in a partnership with Memec GmbH, and therefore the dividends paid by the subsidiaries to Memec GmbH could not be considered dividends received by Memec plc under UK domestic law.

On the topic of partnerships, there was an interesting but distracting issue as to Scottish partnerships, since under Scottish law they are separate legal persons. This is reminiscent of the Canadian bijural problem, since Quebec apparently regards partnerships as separate legal entities a well. Both Gibson LJ and Sir Christopher Staughton, in separate judgments, mentioned the anomalous treatment of Scottish partnerships as partnerships for UK tax purposes,[93] but declined to resolve that anomaly. Since the silent partnership was not a separate person under German law in any case, the topic of Scottish partnerships was a red herring.[94] When the Supreme Court of Canada considered in *Backman*[95] whether a Texas arrangement was a partnership under common law, it did not concern itself with whether it met the definition of partnership under the Quebec civil law.

Memec plc also argued that the silent partnership arrangement gave it a direct interest in the dividends paid by the subsidiaries. Gibson LJ rejected that argument. The source of Memec plc's income was the contract with Memec GmbH, not the shares owned by Memec GmbH in its subsidiaries.

As is evident from the foregoing, the issue of characterization as a corporation did not arise in *Memec*. Although in the concurring decisions Gibson LJ and Sir Christopher Staughton both referred to the anomalous treatment of Scottish partnerships under UK tax law, they stopped short of resolving it. Since *Memec* did not involve the meaning of the term corporation, and was concerned instead with whether the contractual relationship between Memec plc and Memec GmbH gave rise to a partnership, it is doubtful that *Memec* should be read as setting out a test

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93 It is interesting to note the separate legal personality of partnerships, such as a Scottish partnership, under certain civil law regimes. This should be understood in the context that under the civil law system, it was not necessary to have state sanction to become a corporation. The separate legal personality arose as a result of functioning as a body. For historical reasons, particularly in reference to feudal obligations and rights, that approach was never the law in England, or Canada; a grant from the Crown was required to have a corporation, which remains true today in Canada's common law jurisdictions. This differing juridical approach to corporations is interesting from a bijuralism standpoint, but is generally beyond the scope of this paper.

94 Query whether Scottish partnerships are partnerships or corporations for Canadian tax purposes.

95 *Supra* note 66.

for determining whether something is a corporation. At most, it establishes the approach for determining whether there is a partnership under UK law, or some other form of contractual relationship. Based on the Supreme Court of Canada decision in *Backman*, which found that a particular relationship did not qualify as a partnership, the same result would probably have obtained in Canada.[96] Nonetheless, the court in *Swift*[97] relied on the decision in *Memec* in establishing its approach to characterization.

In *Swift*, a UK tax court known as the First-Tier Tribunal addressed whether a US LLC registered in Delaware was a corporation for UK income tax purposes, though the issue arose indirectly. In *Swift*, the Court had to properly characterize the income earned by Swift from the LLC.

Jones J first noted that the LLC (not the members) owned the business.[98] Importantly, Jones J also found that the members of the LLC were entitled to the profits as they arise. He then referred to a spectrum, ranging from an English partnership without legal personality, a Scottish partnership with legal personality, through to a "UK Company" with legal personality. In doing so, Jones J stretched the approach adopted in *Memec* to include corporations, thereby creating a spectrum approach to entity classification, but without regard to historical UK cases on the nature of a corporation. Jones J stated that he had to decide where along that spectrum the Delaware LLC fell.

Jones J was particularly swayed by the organizational documents of the LLC which provided that the members are entitled to its profits. He held that, because of that entitlement, the LLC fell on the partnership side of the line drawn somewhere on the spectrum. It is difficult to see how the entitlement to income was relevant to whether the Delaware LLC was a corporation. Jones J found that the LLC carried on the business as principal. That conclusion requires a separate person. As a separate legal person, it is difficult to conclude that the LLC is not a corporation. There is no logical reason why the automatic allocation of income would detract from that conclusion, considering that it does not factor into the essential attributes of a corporation. Indeed, as will be seen below, the UK Court of Appeal rejected the automatic allocation of profits of being a relevant consideration.[99]

That Jones J was affected by the similarities of the LLC to a partnership is not surprising; the operating purpose of US state legislatures

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96 The result in *Memec* would probably be the correct result under Canadian law as well, as per the *Backman* decision by the Supreme Court of Canada.

97 *Supra* note 90.

98 *Ibid* at para 20.

99 *Anson UT*, *supra* note 89 at paras 84, 85.

in creating LLCs was to create something that looked as much like a partnership as possible while retaining separate legal personality and hence limited liability for its members. There is nothing in the concept of corporation, given the broad range of corporations in existence (for example, municipalities, societies, the Crown), however, that prevents a corporation from having the internal structure of a partnership. Indeed, the UK Parliament created limited liability partnerships, which look like partnerships in terms of internal structure, but the enabling statute explicitly provides that they are corporations.[100]

The spectrum approach adopted by Jones J has been advocated by commentators in Canada,[101] at least with respect to classification of foreign entities for Canadian tax purposes. For example, Marc Darmo has advocated a spectrum approach to determining whether a foreign entity is a corporation for tax purposes.[102] Darmo correctly notes that asking whether something is a separate legal person is not a helpful question.[103] Without considering what it means to be a legal person, that question does not advance the inquiry. The correct question is whether the law ascribes the essential attributes to the entity, in this case whether it has state sanction and perpetual succession (whether it has a name is unlikely to be an issue). In defence of a spectrum approach, Darmo notes that a partnership can have separate legal personality in Quebec, and that the Canada *Interpretation Act* provides that a partnership will not be considered a corporation even if it has separate legal personality under provincial law.[104] Certainly, bijuralism raises a number of problems. In the tax world, it is desirable to have a consistent tax regime across Canada, and that is particularly difficult when the tax regime is predicated on the prevailing commercial law. The existence of the civil law system does not, however, mandate a change in the common law.[105] On the contrary, the gap is partly

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100 *Limited Liability Partnerships Act, 2000*, (UK) 2000, c 12, s 1(2).

101 See e.g. Marc Darmo, "Characterization of Foreign Business Associations," in "International Tax Planning" (2005) 53:2 Can Tax J 481at 496-504; Nathan Boidman and Michael Kandev, "Foreign Entity Classification and the Meaning of 'Corporation/ Société' in the Income Tax Act," in "International Tax Planning" (2009) 57:4 Can Tax J at 880-904.

102 See e.g. Darmo, *ibid*.

103 *Ibid* at 491.

104 *Ibid*.

105 A contrary argument might be developed based on the fact that the corporation was adopted in the common law from the civil law. Seymour quotes an anonymous author as saying, "In no department of our law have we borrowed so copiously and so directly from the civil law;" see Seymour, *supra* note 5 at 531, quoting Kent, Comm 14th ed, at 268 et seq. A counterpoint to such an argument is that the common law has clearly developed its own corporate tradition, with such innovations as the corporation sole. See Seymour, *ibid* at 537.

bridged by statute. With respect to corporations, the *Interpretation Act* provides direction on the interpretation of federal statutes, and states that "In every *enactment* … 'corporation' does not include a partnership that is considered to be a separate legal entity under provincial law."[106] By its own wording, however, section 35 is confined to the interpretation of statutes and does not purport to alter the common law. There does not appear to be any legal basis for supposing that the existence of the civil law regime has changed the definition of corporation under the common law.

The spectrum approach is where foreign entities are compared with entities or relationships known in Canadian law, and the most appropriate Canadian analogue is chosen for classification purposes. That approach contrasts with the essential attribute approach advocated here, which focuses on whether the foreign entity has the attributes of state sanction and perpetual succession. The spectrum approach has some attractiveness, since it would potentially help the taxpayer obtain an appropriate level of tax across multiple jurisdictions, but it ignores the historical development of the corporation. Abandoning that bright-line approach for the spectrum approach would also lead to increased uncertainty. As noted by Milet, "certainty and predictability [are] especially important given our self-assessment system."[107] Different persons could come to different but reasonable conclusions on whether something is a partnership, a corporation, or a trust. In Canada, a spectrum approach has no basis in the common law. Since the *ITA* does not provide for any entity classification rules that would override the common law, a spectrum approach would require a legislative change to the *ITA*.[108] It is one thing to concede that a different approach might make more economic sense, and be fairer, but acknowledging that does not make it so in the law. Since the current approach is a one size fits all approach,[109] it may be desirable to have a legislative change allowing for a different approach, such as the check-the-box approach adopted by the US.

To put it another way, the *ITA* does not reflect the principle that similarly situated taxpayers should be taxed similarly.[110] For example, a business can be set up as a partnership, a closely-held corporation, or by use of a trust structure. Historically, businesses have been carried on

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106 *Supra* note 35, s 35(1) [emphasis added].

107 Milet, *supra* note 51 at 41.

108 With respect to the common law provinces. Classification under the Quebec civil law could be a different matter entirely.

109 Milet, *supra* note 51 at 31.

110 *Ibid* at 39. Note that Milet was not suggesting that that principle be used for entity classification. However, contrasting that legal principle with the structure of the *ITA* is useful.

through all three legal structures, depending on the shifting moods of Parliament and the populace over the centuries. In an economic sense, there is no difference between, for example, three persons carrying on business as partners, as the shareholders of a corporation and its managers, or as the trustees of a trust. The typical features of a modern business corporation can be built into a partnership or a trust arrangement. In that sense, persons carrying on business through any of those three sets of relationships should all be taxed similarly. The *ITA* contains highly detailed regimes dealing with all three sets of relationships, but those rules do not provide for economic equivalence. The legal personality of a corporation is a legal fiction. The *ITA* has made a trust a separate person for tax purposes, thus adopting that legal fiction for one type of relationship that is not similarly recognized in the commercial law. The *ITA* has specifically not done so for partnerships. For example, business income earned by a corporation is taxed at one of two corporate tax rates currently, and then shareholders (if not otherwise exempt) are taxed on dividends when that income is distributed, though at a lower rate than on other income to reflect that the dividends are paid out of tax-paid corporate income. Individuals are taxed at graduated rates on income. A trust is taxed at the highest marginal rate applicable to individuals but the trustees can allocate the income to beneficiaries. If those beneficiaries are individuals, they will pay tax on the income allocated to them at graduated rates applicable to individuals instead of the flat highest rate applicable to trusts. These kinds of differences permeate the *ITA*. While the *ITA* generally attempts to arrive at the same overall taxation rate notwithstanding the structure chosen, that is not always the case and may depend on the nature of the various parties involved.[111] The structure of the *ITA* is predicated on the proper legal classification of relationships, and so does not allow for a spectrum approach to relationship classification.

The *Swift* decision[112] illustrates the difficulty of applying the spectrum approach. What if the operating agreement of the Delaware LLC had not provided for an automatic allocation of income as it arose? In that case, would Jones J have held that the LLC fell on the other side of the line, and was a corporation? Using separate legal personality as the test, rather than the allocation of income, not only has a better basis in law, but is also easier to apply and provides greater planning certainty. There is also no compelling

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[111] For example, a pension plan is tax exempt. If it invests in a business through a corporate structure, the corporate level tax cannot be avoided even though the pension plan will be exempt on its share of dividends. On the other hand, there may be no tax at all on the pension plan's share of income earned through a partnership or trust (the rules known as SIFT rules have relatively recently been enacted to prevent that outcome in many, but not all, cases; for example, real estate investment trusts are still permitted).

[112] *Supra* note 90.

reason for a "looks like" approach; its vagueness only leads to uncertainty. Given that the Court accepted that the LLC had separate legal personality, the correct conclusion would have been that the LLC was a corporation.

On appeal (reported as *Anson*),[113] Mann J of the Upper Tribunal overturned the Lower-Tier Tribunal decision in *Swift*. His decision can be summarized briefly. Mann J stated that "*Memec* demonstrates and contains both a helpful starting point and an element of further guidance. The starting point is an English partnership."[114] Mann J stated that "a proprietary right in the underlying assets [of the LLC] seems to me to be a crucial factor in the inquiry, and Mr. Anson had none."[115] Although based on the language in *Memec* and not tied to the historical development of the corporation in the common law,[116] this focus on the proprietary right in the assets corresponds to the earlier observations made here that the concept of corporation is intertwined with the concept of separate ownership of property, or perpetual succession. Mann J had already noted earlier in the decision that the "LLC had its own corporate identity; it conducted the relevant business; it owned all the business assets; all the business liability were its own, not those of its members."[117] Since the LLC owned the underlying assets, and the members did not, the LLC was not an English partnership, and was also not akin to a Scottish partnership.[118] As for Anson's entitlement to the profits, which had been a key point for Avery-Jones J, Mann J observed that one cannot own "profits," since profits are an abstract calculation, not an asset.[119] Anson was not taxed in the UK on the same profits that were taxed in the US: "What was taxed in the United States were in law, reality and substance the profits of LLC, albeit attributed to the members for taxation purposes (by election)."[120] Rather, Anson was taxed on distributions from the LLC.

Anson further appealed to the UK Court of Appeal. Lady Justice Arden for the Court of Appeal asked whether the source of Anson's income was the profits of the LLC or merely a distribution out of its profits.[121] The

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113 *Anson UT, supra* note 89. The first and second level decisions are reported under different names because the lower tribunal decision was reported as an "anonymised decision." On appeal, Mann J rejected that as a proper approach in the circumstances and the first few pages of the appellate decision addressed that issue.

114 *Ibid* at para 47.

115 *Ibid* at para 53.

116 *Ibid* at paras 47-48.

117 *Ibid* at para 36.

118 *Ibid* at para 53.

119 The Supreme Court of Canada has glossed over this point in applying the tax exemption in section 87 of the *Indian Act* to business income earned by Indians.

120 *Anson UT*, *supra* note 89 at para 53.

121 *Revenue and Customs v Anson*, [2013] EWCA Civ 63 at para 37.

separate legal personality of the LLC was determinative.[122] Lady Justice Arden did not go on to explicitly determine whether the LLC was a corporation for UK purposes, but did reference Delaware as being the place of its "incorporation."[123]

Although it results in economic double taxation, which is an unfair fiscal result for Anson, it is difficult to see how the Upper Tribunal or the Court of Appeal erred in arriving at their decisions. Once it is determined that the LLC, and not its members, is the owner of the assets, the income generated must be that of the LLC, and not its members.

It has been suggested that there is an ill fit between the concepts of corporation and the foreign entities, such as an LLC.[124] Given the separate legal personality of an LLC, in particular its attribute of perpetual succession, and the flexible and varied structures given to corporations, there does not appear to be any ill fit between the concepts of the LLC and the corporation.[125] There is an ill fit, however, between the tax regime in Canada, which has adopted an approach based on legal substance, and the tax regime of the US, which through its check-the-box regime has adopted, to a large extent, an approach based on economic substance. In other words, the problem is not the mismatch of legal categories, but rather the mismatch of tax regimes. That mismatch of tax regimes was particularly evident in *Swift*, where the flow-through treatment in the US and the generally non-flow-through treatment in the UK was at the heart of the case. As well, the mismatch of tax regimes gives rise to the unique language of tax treaties and the approach of the Tax Court to interpreting such a treaty in *TD Securities (USA) LLC v The Queen*.[126]

In *TD Securities*, an LLC with a branch operation in Canada claimed the benefit of the reduced rate of branch tax applicable to residents of the US, pursuant to the Canada-US income tax treaty. The Canada Revenue Agency (CRA) argued that, because the LLC was treated as a flow-through (that is, a partnership) for US tax purposes, it was not a resident of the US for treaty purpose.[127] To be resident in the US for treaty purposes, one must be "liable to tax" there. The argument of the Crown was that, because

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122 *Ibid* at para 77.

123 *Ibid* at para 71.

124 Milet, *supra* note51 at 32: "The accepted manner of classifying foreign entities in Canada can be likened to trying to fit square pegs into round holes," and at 47 with reference to "forcing foreign entities into often ill-fitting categories."

125 Milet, *ibid* at 32, 46.

126 2010 TCC 186, 5 CTC 2426 [*TD Securities*].

127 This has been the longstanding position of the Canada Revenue Agency (CRA); see e.g. CRA document no 9713120, May 20, 1997.

of the flow-through treatment, the LLC was not liable to tax; its members were.

TD Securities was not a classification case because both the taxpayer and the CRA accepted that the LLC was a corporation under Canadian law. Boyle J of the Tax Court only held that the LLC was a resident of the US, however, after an extensive comparison of the LLC with partnerships. Since partners are entitled to treaty benefits, Boyle J held that LLCs should be too, at least in this case where all the members of the LLC were residents of the US who were subject to US income tax on their income earned through the LLC. Does this mean that categorization of foreign entities for domestic legal purposes is different from categorization for treaty purposes?

Notwithstanding the extensive comparisons, Boyle J did not say that an LLC is a partnership. Rather, it appears that, because partners of partnerships are entitled to treaty benefits, and LLCs are economically similar to partnerships, a broad and purposive interpretation of the treaty requires that LLCs be considered resident under the treaty (at least, pre-Fifth Protocol).[128] In response to Milet's suggestion that there is an ill fit between the concepts of corporation and LLC, I have suggested that the ill fit is actually between different tax regimes. The US tax regime provides for flow-through treatment such that the income earned by the LLC is considered to be income earned by the member(s) of the LLC, and that applies to S Corporations as well. That is how the US has achieved integration. Canada's regime achieves integration differently, taxing the corporation in the first instance, then taxing the shareholder at reduced rates when the income is distributed. As stated by Milet, "the presumption of consistency of expression … arguably has less weight in the interpretation of a tax treaty than in the interpretation of the Act."[129] The *ITA* is interpreted in a technical manner, whereas a treaty must be construed in a liberal manner. This could be stated differently. The *ITA* must be interpreted in accordance with commercial law, as reaffirmed by the Supreme Court of Canada, but treaty interpretation involves other considerations. A tax treaty must bridge two different tax regimes. That need finds expression in the structure and language of tax treaties, which differ from the structure and language of domestic legislation such as the *ITA*. As noted by Gibson LJ in *Memec*, a treaty is addressed to judges of both countries. That context justifies the economic substance approach taken by Boyle J in *TD Securities* to treaty interpretation, in comparing the LLC to partnerships, which allowed him to bridge the gap between two very different tax regimes.

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128 *TD Securities*, *supra* note 126 at paras 48, 50, 51, 53, 54, 56, 57.

129 Milet, *supra* note 51 at 41.

Outside of the treaty context, the essential attribute approach advocated here is more likely to provide certainty and consistency. It is also based on the historical jurisprudence while a look-like or spectrum approach is not.

4. No Need for a Third Category of Legal Person

The history of the corporation in English law suggests that the concept of a corporation is synonymous with the concept of a non-natural legal person. That is reflected in the statement by Blackstone that "artificial persons [having perpetual succession] are called bodies politic, bodies corporate, or corporations."[130] Similarly, in *Hague*, where Dysart J of the Manitoba Court of King's Bench held as follows:

> What is a corporation? According to our system of law, a corporation is a group or series of persons which by a legal fiction is regarded and treated as a person itself. It is a legal entity composed of persons. In law "a person" is any being that is capable of having rights and duties, and is confined to that. Persons are of two classes only – natural persons and legal persons. A natural person is a human being that has the capacity for rights or duties. A legal person is anything to which the law gives a legal or fictitious existence and personality, with capacity for rights and duties. The only legal person known to our law is the corporation – the body corporate.[131]

In other words, the concept of the corporation is synonymous with the concept of a legal person other than a natural person. There are some contrary cases, however. The *Swift* decision has already been discussed above, and was overturned on appeal.

There is an Australian High Court decision,[132] with several separate judgements, one of which implies that that there can be legal persons other than corporations and natural persons. To the extent that any of the separate judgments suggest that there can be an artificial legal person that is not a

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130 Blackstone, *supra* note 20 at 446.

131 *Supra* note 1 at 193. See also *Lundrigan v Rose*, [1999] NJ No 282 (QL) (Nfld PC), where the Court held that "The Burin Soccer Association is not a legal person, because it is not a body corporate. It is an association of persons who have come together for a common purpose, the promotion of the sport of soccer in their community." See also *Kucor Construction & Developments & Associates v Canada Life Assurance Co* (1997), 32 OR (3d) 548 (Gen Div) at 554: "To revert to basic legal principles, the law regards as persons with distinct and separate legal rights only individuals and corporations."

132 *Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd* (1947), 74 CLR 375 (Aus HC). Latham J didn't say either way; he just found that they are artificial persons capable of being sued. Starke J did the same. McTiernan J found no corporate attributes. Williams J said at some points that it is a corporation, and at other points that it is a quasi-corporation, whatever that might mean.

corporation, it is contrary to the Manitoba decision in *Hague*.[133] It also appears to have no support in the English legal background discussed above. Most importantly, the point did not need to be decided and does not appear to have been the subject of thorough argument.

Notwithstanding the two aforementioned cases suggesting that there could be a third category of legal person, there is no need for another category. Corporations are not limited to business corporations. Corporations include the obvious, such as societies incorporated under the relevant provincial legislation, and municipalities. Perhaps more surprising for many readers, it also captures the Crown. The Crown is a corporation sole.[134] Edward Jenks describes a corporation sole as follows:

> But English Law knows another kind of corporation, the "corporation sole," in which the group consists, not of a number of contemporary members, but of a succession of single members, of whom only one exists at any given time. This kind of corporation has been described by eminent legal writers as "freak;" but it is a freak which undoubtedly has a legal existence. It has been said that the Crown is the only common law lay corporation sole; though the Master of Trinity College, Cambridge, has been claimed as another example, and statutory examples, such as the Public Trustee and the Treasury Solicitor, are conspicuous. But the examples of ecclesiastical corporations sole are numerous. Every diocesan bishop, every rector of a parish, is a corporation sole, and can acquire and hold land (and now also personal property) even during the vacancy of the see or living, for the benefit of his successors, and can bind his successors by his lawful conveyances and contracts. But, obviously, the distinction between the bishop or rector, in his personal and in his corporate character, is even harder to grasp than that between the members of a corporation aggregate and the corporation itself …. [135]

The foregoing statement has been accepted by the BC Court of Appeal.[136] It is not difficult to uncover the legal benefit for the monarch to be a

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133 *Supra* note 1.

134 This corresponds with Hobbes' conception of the state as a corporation (i.e., a collectivity forming a single entity that is itself capable of action); see Janet McLean, "Personality and the Public Law Doctrine" (1999) 49 UTLJ 123. McLean discusses some of the philosophical problems inherent in seeing the Crown as a fictitious person. Since such concerns go to the heart of the nature and authority of the state, they are beyond the scope of this paper.

135 Edward Jenks, *The Book of English Law*, 6th ed, Paul B Fairest ed (Athens, Ohio: Ohio University Press, 1967) at 118-19.

136 *British Columbia (Board of Industrial Relations) v Canadian Imperial Bank of Commerce* (1981), 125 DLR (3d) 487 at para 50 (BCCA), where an administrative body had limited powers and lacked the separate personality and existence necessary for a corporation. For a more recent recognition of the concept of a corporation sole, see *John Doe v Bennett*, 2002 NFCA 47, (2002), 215 Nfld & PEIR 310 (NFCA).

corporation sole. If it were not, there would be no sovereign authority between the time of the death of prior office holder, and the crowning of the new office holder. Since all real property is held as tenants of the Crown, the Crown being the only absolute owner, all ownership interests in real property would disappear during the intermission. Since the sovereign is a corporation sole, it has perpetual succession (and in the case of the sovereign, perpetual existence), and so there can be no question of the lack of a sovereign authority during the intermission. Corporations sole are created by special act of Parliament,[137] and so have the quality of state sanction.

Given the flexibility of the concept of corporation, there is no need for a third category. Moreover, recognizing a third category would only raise additional issues. What would be the rights and powers of this third type of legal person? Perhaps more critically, how would the powers, rights and obligations of such a person, and those of its members, differ from those of a corporation? How would we differentiate between the category of corporations and third category of legal persons? If a corporation is identified by perpetual succession, how is a non-corporate, non-natural legal person identified? Since the *ITA* only recognizes individuals and corporations for tax purposes (it also deems property held on trust to be owned by a separate individual), how would the third category of legal person interact with the Canadian tax regime, or a common law province's real property regime? A third category would only create legal uncertainty with no corollary benefit.

5. First Nations

The issue is not relevant only with respect to classification of foreign entities for Canadian tax purposes. It is also relevant to the proper treatment of various "entities" under Canadian law. This section applies the essential attribute approach to First Nations to determine whether Indian bands, traditional First Nation governments, and modern treaty nations are corporations – that is, separate legal persons.

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[137] For an Industry Canada discussion paper on corporations sole, see Government of Canada, online: Industry Canada <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00384.html>.

A) Indian Bands

The *Indian Act* defines "band" as follows:

> "band" means a body of Indians
> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
> (b) for whose use and benefit in common, moneys are held by Her Majesty, or
> (c) declared by the Governor in Council to be a band for the purposes of this Act.[138]

Although the *Indian Act* does not state explicitly whether a band is a legal person, there are a number of provisions in the *Indian Act* that provide guidance on this point. Like business corporations, societies and municipalities, bands have rules for internal governance, a governing council, rules for populating the council, and a method of determining membership.[139] While the *Indian Act* does not state that a band can own property, it implies it when it exempts from taxation the "personal property of […] a band situated on reserve," exempts such property from seizure by creditors, and refers to a band selling certain types of tangible personal property.[140] The ability to own property in the name of the band must mean that there is a legal person. The essence of property is the right to exclude the world[141] – if there is no one to hold those rights, there can be no ownership of property.[142] Similarly, the ability of the band to enter into agreements with its members implies that the band has legal personality,[143] as does the prohibition on the band entering into certain types of contracts.[144] The *Indian Act* also imposes rights and obligations on the band itself,[145] including the obligation to maintain roads, bridges, ditches, and so on.[146] It seems unlikely that Parliament intended to impose that obligation on each of the individual band members, which would have to be the case if the obligations have not been imposed on a separate legal person known as the band. Some sections of the *Indian Act* draw a distinction between the band and the band council,[147] but that is no different

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138 *Supra* note 2, s. 1(3).

139 *Ibid*, ss 8, 74.

140 *Ibid*, s 87-90, 32.

141 *Manrell v Canada*, 2003 FCA 128, 3 FCR 727 at para 25.

142 It should be noted that it is sometimes possible for ownership of personal property to be held in the name of a non-person, such as an association. That is typically not possible for real property ownership. Also, registration is rarely the determining factor for ownership of personal property.

143 *Indian Act*, *supra* note 139, s 90(2).

144 *Ibid,* s 50.

145 See e.g. *Indian Act*, *ibid*, s 8.

146 *Ibid*, s 34.

147 See e.g. *Indian Act, ibid*, ss 8, 34, 20, 62, 64.

from the BC *Business Corporations Act* sometimes referring to the corporation and sometimes to the directors or board of directors.

Interestingly, the *First Nations Fiscal and Statistical Management Act* states that, *for greater certainty*, a band has the capacity to contract, and to sue and be sued, but that provision applies only for the purposes of Part 4 of that Act.[148] BC's *Indian Self Government Enabling Act*[149] allows for the creation of Indian districts which have legal personality. It does not touch on the legal personality of a band, but doing so would probably be an impermissible encroachment on federal jurisdiction in any event.

In short, the *Indian Act* implies legal personality for a band. As a manifestation of the aboriginal right or treaty right to self-government, it is reasonable to provide a band with full legal personality. With respect to the case law, the lack of explicit declaration in the *Indian Act* as to the legal personality of a band led to a lack of certainty and some back-and-forth in the case law. The early cases indicated a lack of personality, but more recent cases have recognized it.

There are numerous cases grappling with the issue of whether the Indian band is the appropriate party to be named in the litigation, whether as plaintiff or defendant. That issue turns on whether an Indian band has legal personality.[150] Back in 1976, the Manitoba Court of Queen's Bench,[151] without considering the nature of a corporation, or previous decisions that hold that a corporation can be created without using the word corporation, suggested that since a band is not a corporation it is not a legal person, notwithstanding that it seemed to have the same powers as a corporation. The court resolved the dilemma as to the appropriate party by making an order for a representative action. On the other hand, in 1979 the BC County Court held that an Indian band could enter into legally binding agreements on its own behalf, and therefore could be sued in respect of such contracts

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148 *First Nations Fiscal and Statistical Management Act*, SC 2005, c 9, s 12. The statute grants the council of a band the authority to make local revenue (tax) by-laws; see s 5.

149 RSBC 1996, c 219, s 17.

150 Otherwise there would have to be a specific rule allowing a band to be named as a party, just as there is a special rule for partnerships. The court rule allowing partnerships to be named does not make partnerships legal persons, but is an administrative convenience preferable to naming every partner.

151 *Mintuck v Valley River Band No 63A* (1976), 9 CNLC 196 (Man QB) at paras 15- 21. See also *Regina v Cochrane*, [1977] 3 WWR 660 (Man Co Ct); the Court also held that a band was neither a natural person nor a corporation but fell within the definition of a mail contractor for the purposes of the *Post Office Act*. One wonders how there can be a party to a contract without that party being a person recognized in law.

in its own name, and therefore was properly named as a party.[152] Other provinces' courts grappled with the same issues.[153] A BC Supreme Court decision in 1994 held that a band is not a person for the purpose of the *Family and Child Service Act*, but the family law context was such that the compelling conclusion was that only natural persons had standing in such a case.[154]

In light of the uncertainty, some courts opted to take the safe approach and leave both the band and the band representatives as parties in the litigation.[155] In one BC Supreme Court decision, the Court ordered judgment against a council representative personally as well as against the band.[156] In naming the band in the order, it was not clear whether the Court was making an order against the band as a separate legal person or against each member of the band, but it seems that the Court intended the impose the obligation on the band itself separate from its members.

In the 1999 Manitoba Court of Appeal decision in *Nelson House Indian Band v Frost,*[157] the Court observed the marked reluctance in the case law to recognize a band as a legal entity, and suggested that this reluctance flowed from the lack of express words in the *Indian Act*. Nonetheless, the court recognized the legal personality of the band.[158] The following year, the BC Supreme Court, in *William v Lake Babine Indian Band*,[159] after discussing the authorities, also held that a band is a juridical person. Both the Alberta Queen's Bench[160] and Saskatchewan Provincial Court[161] appeared to follow suit in 2002. In *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*,[162] the BC Court of Appeal

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152 *Cache Creek Motors v Porter*, (1979), 14 BCLR 13 (Co Ct).

153 *King v Gull Bay Indian Band* (1983), 22 ACWS (2d) 39 (Ont Dist Ct); *Springhill Lumber Ltd v Lake St Martin Indian Band*, [1986] 2 CNLR 179 (Man QB); *Kucey v Peter Ballantyne Band Council*, [1987] 3 CNLR 68 (Sask CA); *Wewayakum Indian Band v Canada and Wewayakai Indian Band*, [1992] 2 CNLR 177 at 182 (FCTD).

154 *Family and Child Service Act, Re*, [1994] 1 CNLR 89 (BCSC).

155 See e.g. *Muchalaht Indian Band v Canada*, [1990] 1 FC 275 (FCTD). See also *Matsqui Indian Band v Bird*, [1993] 3 CNLR 80 (BCSC).

156 *Froste v Pavilion Band*, [1993] BCJ No 1914 (SC) (QL).

157 (1999), 169 DLR (4th) 606 (Man CA).

158 *Ibid* at paras 15-22.

159 [2000] 1 CNLR 233 (BCSC) at para 33 [*William*].

160 *Horseman v Horse Lake First Nation*, 2002 ABQB 765, 218 DLR (4th) 523 (Alta QB) at para 35; see also *Campbell River Band v Roberts*, 2001 ABQB 428, 290 AR 296 (QB).

161 *Canada (Minister of National Revenue) v Ochapowace Ski Resort Inc*, 2002 SKPC 84, 225 Sask R 225 at para 13 (Sask Prov Ct).

162 2012 BCCA 193, 319 BCAC 273, leave to appeal to SCC refused, [2012] SCCA No. 336 (QL) [*Kwicksutaineuk/Ah-Kwa-Mish*].

stated that a person is "a natural person, corporation or a body given such capacity through legislation,"[163] and then accepted that a band is a juridical person.[164] Accordingly, the recent case law appears to confirm that Indian bands have legal personality.

Interestingly, intertwined in the debate on whether a band is a legal person is the issue of whether it is a corporation. For example, in *William*, the Court stated that the band is not analogous to a corporation,[165] although the analogies seem easy to make (governed by a council which is elected by members, rules for internal governance, able to hold property in its own name, able to sue and be sued in its own name). In *Nelson House Indian Band*, the Manitoba Court of Appeal, without deciding the issue, observed that an Indian band appeared to meet the definition of a corporation, notwithstanding the lack of express words to that effect in the *Indian Act*.[166]

An Indian band meets the essential requirements noted above for corporate status: it has the sanction of the state (it is created by the Indian Act), and there is perpetual succession. Given the capacity to own property separate from the members, an Indian band is properly thought of as a corporation.

B) Traditional First Nations Governments

In BC, it is common for traditional chiefs to have more legitimacy in a particular community than does the band council. But do they have a status in the common law, and is that status that of a corporation?

The fact that the British Crown enters into treaties with First Nations suggests that the Nation itself has some sort of standing as a legal person in the common law, as does the Canadian courts' recognition of the vague concept of a right to self-government. In *Pawis v The Queen*,[167] however, Marceau J of the Federal Court noted that the treaties are not treaties in the international law sense, but rather a treaty between the Crown and a group of her subjects.[168] That being said, the treaty was with the collective group

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163 *Ibid* at para 64.

164 *Ibid* at para 76.

165 *Supra,* note 159 at para 35. See also *Montana Band v Canada*, [1998] 2 FC 3 (TD); *Sabattis v Oromocto Indian Band* [1986] 1 CNLR 145 (NBQB).

166 Express words are not required to create a corporation; see *River Tone*, *supra* note 21 at 384 [487]; *Franklin Church*, *supra* note 24; *Hancock*, *supra* note 33 at 4. See also *Bates*, *supra* note 33 at para 6.

167 (1979), 102 DLR (3d) 602 (FCTD). See also *The Queen v Blackfoot Band of Indians* (1982), [1982] 3 CNLR 53 (FCTD).

168 See also *Simon v The Queen*, [1985] 2 SCR 387; *Hay River v R* (1979), 101 DLR (3d) 184 (FCTD); *Beattie v Canada*, 2004 FC 674, 4 FCR 540.

and not with each individual. The treaty gave rise to collective rights, but since the group had no separate legal personality, the rights could only be enforced by an action on behalf of the group, where particular individuals act as representatives of the group. The BC Court of Appeal had a chance to comment on the legal personality of the nation in *Oregon Jack Creek Indian Band v CNR*.[169] The Court affirmed that the rights are communal, noting that the rights do not vest in an entity which "clearly does not exist today." Accordingly, the Court confirmed that representative actions were appropriate for enforcing treaty rights. There is no doubt that aboriginal rights, whether derived from a treaty or not, are collective rights (and can only be enforced through representative actions). That principle alone does not resolve whether the tribe or nation retains any legal status, other than to indicate that such rights are not vested in such tribe or nation itself, if it has any legal status.

The issue of legal capacity almost came before the Supreme Court of Canada in *R v Sioui*.[170] The Court had to decide whether the terms of the Huron surrender amounted to a treaty. The Court discussed the capacity of the Crown to enter into the treaty (the French had not yet been defeated at the time of the surrender), but unfortunately the only capacity discussion about the Huron involved their lack of land to cede.

In a non-treaty context, the issue also arises with respect to the aboriginal right of self-government. This issue was partially explored by the Supreme Court of Canada in *Delgamuukw v British Columbia*,[171] which involved a claim for aboriginal title brought by 39 Gitskan chiefs and 12 Wet'sewet'en chiefs, suing on their own behalf and on behalf of all the members of their respective houses. The Court confirmed that aboriginal rights were communal rights.[172] With respect to the right to self-government, the prior levels of court had found that the possibility of self-government was incompatible with parliamentary sovereignty and the division of powers.[173] The Court did not decide this issue because of the errors of fact made by the trial judge and the need for a new trial.[174] If the lower courts were correct in that view, then it is unlikely that the nation has any legal status in Canadian law: if self-government is incompatible, then the existence of the nation as a legal person must also be incompatible.

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169 (1989), 56 DLR (4th) 404 (BCCA).

170 [1990] 1 SCR 1025.

171 [1997] 3 SCR 1010.

172 *Ibid* at para 115.

173 *Ibid* at paras 20, 34, 45.

174 *Ibid* at para 170.

If a First Nation were recognized as a legal person, it would lead to some interesting issues. Different First Nations had different government structures. For some, there was one government for the entire Nation. For other Nations, each chief was the highest authority.[175] In the latter case, would the legal person still be the Nation as a whole, and if so, then who would speak for the Nation if the traditional law only allowed each chief to speak for his part of the Nation? Or would each chief occupy the corporate office for his part of the Nation, like the Crown is an office occupied by the Queen, such that each chief could be considered a corporation?

In the wake of *Delgamuukw*, aboriginal rights cases continue to be brought as representative actions.[176] Indeed, it may be more appropriate than Indian bands bringing such cases since bands are not necessarily successors to the Nation.[177]

British Columbian politics are always interesting, and Gordon Campbell, who was opposition leader at the time but who subsequently became premier and went on to champion First Nations reconciliation in BC, challenged the Nisga'a Treaty.[178] At issue were the self-government provisions of the treaty. Interestingly, Williamson J stated that "the treaty illustrates that the Crown accepts the Nisga'a Nation has the authority to bargain with the State and possesses rights which are negotiable." Williamson J went on to hold that:

> … I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga'a Final Agreement does the latter expressly.[179]

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175 See e.g. "Gitxsan Nation: A Preliminary Review of Ethnographic, Historical and Archaeological Resources," British Columbia Ministry of Attorney General, Legal Services Branch, Aboriginal Research Division, April 6, 2010.

176 *Soldier v Canada (Attorney General)*, 2006 MBQB 50, 200 Man R (2d) 216 at para 45.

177 See *Tsilhqot'in Nation v British Columbia,* 2007 BCSC 1700, [2008] 1 CNLR 112; *Queackar-Komoyue Nation v British Columbia (Atty Gen)*, [2007] 1 CNLR 286 (BCSC).

178 *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123.79 BCLR (3d) 122 (SC).

179 *Ibid* at para 33.

Although not explicit in the lengthy discussion by Williamson J, it appears that the traditional First Nation does not have any real self-government other than as provided by the *Indian Act*, but that there is a communal *right* amongst the members of the Nation to have self-government and that right can find expression in a treaty. It is therefore doubtful that, in the absence of a modern treaty, a traditional government of a First Nation – typically the hereditary chiefs of the First Nation – form a separate legal person which can qualify for the public body exemption, or that each chief occupies a separate corporate office that can qualify as a public body.[180]

C) Modern Treaty Governments

Modern treaties specifically address self-government and the legal personality of the nation. For example, there is the *Tsawwassen First Nation Final Agreement* (TFA) between the Provincial and Federal Crowns and the Tsawwassen First Nation. The TFA defines the Tsawwassen First Nation as "the collectivity that comprises all Tsawwassen Individuals." The latter are defined as those individuals eligible to be enrolled under the TFA. Section 7 of Chapter 16 states that the Tsawwassen First Nation is "a legal entity with the capacity, rights, powers and privileges of a natural person." The Nisga'a Final Agreement (Chapter 11), the *Maa-nulth First Nations Final Agreement* (MFA) and the *Lheidli T'enneh Final Agreement* (LFA) do the same thing, except multiple times for the Maa-nulth and Nisga'a First Nations. The MFA and LFA define them as the collectivities and then makes them legal entities. In the LFA, the predecessor was the Lheidli T'enneh Band, which ceased to exist and all band assets and liabilities transferred to the Lheidli T'enneh First Nation. The same occurs under the MFA. That is also the case with modern treaties entered into outside British Columbia. For example, the First Nation of Nacho Nyak Dun is a legal entity and has the capacity, rights, powers and privileges of a natural person, under section 9.2 of the *First Nation of Nacho Nyak Dun Self-Government Agreement* dated May 29, 1993. All the agreements mentioned, particularly given that all or key parts of them have been given the force of law by the respective legislative bodies, represent state sanction.Thus there is no issue as to legal personality, and therefore they should be recognized as having corporate status.

It is interesting that the legislature has chosen not to describe modern treaty governments as corporations, even though they have invested them will all the attributes of a separate legal person and their closest analogy, municipalities, are recognized as corporations. However, on the basis that the modern treaty First Nations have "separate legal personality," and have been invested with perpetual succession, they are properly seen as corporations.

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180 See *Kwicksutaineuk/Ah-Kwa-Mish*, *supra* note 162.

6. Summary

In this paper I have argued that there are only two categories of legal persons recognized in Canadian law: natural persons and the corporation. The legal concept of the corporation is broad enough and flexible enough to accommodate a wide range of circumstances, as is evident from the various well known types of corporation: the business corporation, the society, the municipality, co-operatives, ecclesiastical corporations, and the Crown. There is no apparent need for a third category of legal persons, and no clear benefit. Distinguishing between corporations and some other category of non-natural persons would be difficult. The only arguments for such a third category come from authors in the tax area, where there is a motivation to create such a third category to achieve, arguably, a better fit between the tax regimes of different nations. The context of such efforts makes clear the real problem: it is not that foreign entities do not fit within established Canadian categories (trusts, partnerships or corporations), but that the combination of the other countries' tax regimes (most notably that of the US) and Canada's tax regime can lead to problematic results that are not adequately or easily resolved by tax treaties. Such arguments in favour of a third category of legal person do not reflect an appreciation of the historical development of the corporation in the English and Canadian common law.

Accepting that the corporation is the only category of non-natural legal persons does not resolve the issue of having to determine whether something fits within that category. In other words, what does it mean to be a separate legal person? Based on the historical development of the corporation in our common law, there are three essential attributes: name, state sanction, and perpetual succession. These attributes are based on the historical roots of the corporation in our common law. As was recognized by a number of jurists centuries ago, perpetual succession is the very core of what it means to be a corporation. Finding these three attributes under the foreign law provides a fairly clear, bright-line test that can provide consistency and predictability to the determination of whether something is a separate legal person. This test is preferable to an approach that would give primacy to the tax system of the foreign jurisdiction rather than Canada's common law and income tax regime. It forms a sound, jurisprudential basis for concluding the LLCs, and other foreign entities, are corporations under Canadian law. It also assists in clarifying the legal status of Indian bands.