On Company Law[1]

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The title assigned by the Committee to this paper is a very general one, and it is impossible to treat the subject at all widely. The movement towards uniformity of laws has made great headway. What has been a mere wish is now taking shape in action, and although as yet merely in its beginnings, the movement has been so heartily approved and encouraged that some realisation may be now expected.

There is no subject in which there is so conspicuous a need for removal of the divergences between the laws of the different provinces as that of Company Law. There are varying methods of creating the artificial person, and there are numerous rules of conduct for its more or less active existence.

Commercial relations between provinces have grown to such an extent in the period of Canada's development that it has become an almost daily occurrence for an active lawyer to advise upon company questions arising outside his own province. It may be upon the capacity of a provincial company to con- tract and otherwise exercise its capacity outside of its province of origin. The practitioner has in this connection to consider the nature of the incorporation. Not only is there this want of uniformity, but there are now various questions which require legislation to. remove them. Until such legislation there will be a state of uncertainty, which-to the legal profession and to commercial life will be embarrassing. This is accentuated by the fact that it may appear that certain apparently well accepted legal principles are found to have been mere misapprehensions, and that a long line of decisions have been brought forth in error.

The differing conditions of the law of companies in the several provinces call for action. The business. world will look to the legal profession to lead the movement to abate the present confusion. In this way the lawyers, organized in the Canadian Bar Association, have at once the high privilege and onerous duty

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[1] The following excerpt is a verbatim republication of an article written by Chief Justice Robson on Corporate Law. For access through HeinOnline, see H A Robson, "Company Law" (1916) 36 Can L Times 861.

of leading in the task of devising a satisfactory statutory solution and by -their effort and influence procuring the legislative sanction thereto.

We have been accustomed to think that all companies incorporated in Canada, whether by special statute or by Letters Patent or Certificates of Incorporation under the various Companies Acts, were merely statutory companies and so limited as to capacity by the express statement contained in the charter or memorandum with necessary incidental powers. Our jurisprudence has not considered such charter companies to have had the capacity of prerogative corporations: that is to say, the capacity of natural persons.

In *Baroness Wenlock v River Dee Company*,[2] there appears Lord Justice Bowen's perspicuous statement regarding corporations, originated on the one hand by royal charter and on the other hand by virtue of a statute. The Lord Justice said:

> At common law a corporation created by the King's charter has, *prima facie* and has been known to have ever since Sutton's Hospital Case, the power to do with its property all such acts as an ordinary person can do and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an un- truth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute takes it away, is, I think, to travel on a wrong line of thought. What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory. creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is of no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature, one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits we must look to the statute. The corporation cannot go beyond the

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2 L.R. 36 C D 674.

> statute for the best of all reasons that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute and being prohibited from using certain other powers which it otherwise might have had.

It has been suggested by some practitioners that the doctrine of *ultra vires* operates harshly upon per- sons who deal in good faith with companies acting ostensibly *intra vives*, and which persons never think of the necessity of examining the charter or memorandum of association; that therefore there should be a general obligation on all companies to observe all and whatsoever obligations their directors see fit to assume; that there should be an estoppel upon companies to deny their capacity, and that the prerogative system of incorporation with its incidents of capacity as a private individual. should, therefore, be maintained and become universal throughout all the provinces. Public policy, however, requires protection of creditors in an- other direction, that is to say, they have a right to know the nature of the ventures upon which a company of limited liability may embark, and that the limited liability has its counterpart of limited action. This is pointed out in *Ashbury Railway Carriage Co v Riche*,[3] where Lord Hatherley says:

> When you consider that this Act of Parliament was passed with the view of enabling persons to carry on business on principles which were up to that time wholly unknown in the general conduct of mercantile affairs in this country-when you consider that the general principle of partnership was that every person entering into any partnership whatsoever thereby subjected, before this description of legislation had been entered upon, the whole of his property, whatever it might be, to the demands of his creditors, it is impossible not to feel that when these legislative enactments which gave power to depart from that principle upon certain conditions to be expressed in the Act of Parliament by which companies would be framed with that view came to be made, it was necessary that the public, that is the persons dealing with a limited company, should be protected as well as that the shareholders themselves should be protected.
> 'Accordingly your Lordships will find throughout the whole of the Act of Parliament, as has been already pointed out by the Lord Chancellor, a plain and marked distinction drawn between the interest of the shareholders *inter se*, and the interest which the public have in seeing that the terms of the Act of Parliament by which the privilege of limited liability was conceded were to be construed in such a manner as to protect the public in dealing with companies of this description. The mode of protection adopted seems to have been this; the legislature said: ' You may meet together and form yourselves into a company, but in doing that you must tell all those who may be disposed to deal with you the objects for which you have been associated. Those who are dealing with you will trust to that memorandum of association, and they will see that you have the power of carrying on business in such a manner as is specified, to be

3 44 L J Ex 185.

> limited, however, by the extent of the shares: that is to say, the money you may contribute for the purpose of carrying on that business. You must state the amount of the capital which you are about to invest in it, and you must state the objects for which you are associated so that the persons dealing with you will know that they are dealing with persons who can only de- vote their means to a given class of objects, and who are prohibited from devoting their means to any other purpose. Throughout the Act that purpose is apparent. With regard to the amount of capital, which is one point that I have referred to, the Act did give a special power of variation. But with regard to the Memorandum of Association, that is carefully protected by the twelfth section. It is provided that whatever other things you may do in the way of variation a certain limited power of alteration being given to you, no such power shall you have as to the objects specified in the Memorandum of Association.

If it is desired to create the estoppel against companies from raising the defence of *ultra vires* that should be done by statutory provision establishing the estoppel: that is, if the idea of unbounded corporate power of dealing is to be maintained at all.

The main question comes up as a result of the case of *Bonanza Creek Gold Mining Company Limited v The King*,[4] which is now familiar to everyone. To quote from the case:

> The appellants were incorporated in Ontario by Letters Patent, dated December 23rd, 1904, and is sued under the authority of the Ontario Companies Act and by virtue of any other authority or power then existing, in the name of the Sovereign and under the Great Seal of the province by its Lieutenant-Governor. The letters patent recite that this Act authorizes the Lieutenant-Governor-in-Council by letters patent under the Great Seal to create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the province extends. They go on to incorporate the company to carry on the businesses of mining and exploration in all their branches and to acquire real and personal property, including mining claims, with incidental powers. There are no words which limit the area of operation or prohibit the company from carrying out its objects beyond the provincial boundaries.

The question involved pertained, generally speaking, to the rights of the appellant company to acquire lands in the Yukon Territory.

The judge of the Exchequer Court and a majority of judges in the Supreme Court of Canada held that there was no such right in the company under the in- corporation. The Judicial Committee advised the reversal of those judgments.

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4 10 WWR 391.

In short, the reason was that the charter in question was granted under the Royal Prerogative and that the corporation had all the capacity of a natural person as long as exercised within the scope of provincial objects.

Therefore, all charters granted as was that then in question are prerogative grants with all the incidents fully described in the English cases referred to in the judgments of which *Ashbury v Riche* and *Wenlock v Dee Company* are types.

It is to be noticed that the Bonanza Company's charter was granted not only under the Act, but "by virtue of any other authority or power then existing" in the name of the Sovereign under the Great Seal of the province by its Lieutenant-Governor. Possibly all Ontario charters of incorporation of companies are so expressed.

Perusal of the opinion of Viscount Haldane in the Bonanza Mining Company case leads to the conclusion that it is the fact that a charter is granted under the Great Seal by the Lieutenant-Governor that constitutes the common law nature of the corporation. It did not in that case depend on the recital that the grant was made "by virtue of any other authority or power then existing."

Incorporation in any of the other methods, i.e., by special statute of incorporation or memorandum filed under Acts resembling the British Companies Act does not carry the attribute of unlimited capacity. The capacity derived from such incorporation is that expressed or necessarily implied in the statute or memorandum. But the legislature may provide for the incorporation of non-charter companies with the capacity to accept powers and rights from other jurisdictions. This is just the same as the grant of capacity towards any other object within the classes of objects in the provincial purview. The learned Lord Chancellor said:

> The whole matter may be put thus: the limitations of the legislative powers of a province expressed in sec. 92, and in particular, the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the Provincial Government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra provincial powers and rights is quite another. In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is, therefore, not *ultra vires*, although such a violation may well give ground for proceeding by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies. Where, under legislation resembling that of the British

> Companies Act by a province of Canada in the exercise of powers which sec. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that pre- scribed by the British Companies Act, the principle laid down by the House of Lords in *Ashbury Carriage Company v Riche*, of course, applies. The capacity of such a company may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorize, and therefore excluded, incorporation for such a purpose. Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained *ab extra*, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under sec. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words ' legislation in relation to the incorporation of companies with provincial objects' do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving un- touched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.

Now it is obvious from this that there can be incorporation in the province for all reasonable purposes without resort to the prerogative method. Provincial authorities can incorporate "by or by virtue of statute" (to quote from the judgment) companies qualified to accept powers and rights from other provinces. The "ambit of vitality" is not limited to the province of origin if the statute or memorandum indicates that it shall not be so limited. The Province of Alberta took early measures in this direction by a general enactment declaring that its companies incorporated under the memorandum system should "have and be deemed to have had since the incorporation thereof the capacity of a natural person to accept extra provincial powers and rights and to exercise their powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit," but the Act goes further and says that "unless a contrary intention is expressed in the special Act or Ordinance incorporating the company or in the memorandum of association thereof, such incorporation shall as far as the capacities of such companies are concerned have and be deemed to have had

the same effect as if such companies were or had been incorporated by letters patent under the great seal."

For the reason convincingly given by Lord Hatherly, as above quoted, it is submitted that commercial companies should not be incorporated in such a manner as to have unlimited powers. That involves this that the charter method should not be continued where it does exist, and that where the memorandum system prevails, as in Alberta, the general powers should not be given.

It is submitted that the Royal Charter plan, *i.e.*, the common law or prerogative one, is undesirable for several reasons.

It should be enough, in our devotion to the institutions of England whose common law we inherit, and whose fabric of commercial law we have so largely adopted, that there the old method of incorporation by grace of the Sovereign has been found unfitting to modern conditions. It is true that that method has been adopted for the incorporation of large commercial ventures. But such incorporations are of an extraordinary nature. They usually give legal habiliment to undertakings which, though profit making, are indirectly of public interest. The general method of incorporation in Great Britain for commercial coin- panics, such as are now in mind, is that prescribed by the Companies Act. Britain's practical abandonment of the charter method was in the same spirit of progress that marked the development and simplification of the mercantile law and the introduction of legal reforms. The very growth of business compelled the new order. It has never been found to be lacking. It meets all needs. Its simplicity and the added responsibility and limitations incident to the modern form are for the safety of dealings. It is safe to say that in England there would no more be a return to the prerogative method than to its contemporary constitutional or judicial principles and institutions. Also that the keen minds of the eminent Crown' law advisers there would never have assented to incorporation of the myriad commercial ventures set afloat there with- out imposing the restraint known as the *ultra vires* doctrine. The *scire facias* method of correction of excesses is practically impossible of general application. What use would it be to a bondholder who might find his security being imperilled in what we have heretofore known as *ultra vires* undertakings? Equity will not restrain what may be lawfully done. There is authority for saying that even injunction would not lie. In Kerr on "Injunctions," it is said: "The application of the property of the corporation to other than corporate purposes is not a ground for the interference of the Court unless a breach of trust can be shewn," and Blackstone points out, what has often been repeated, that there is no remedy for corporate excesses, but by the King's Bench as guardian of the

prerogative, that being by the writ of *scire facias* for forfeiture of the charter, nothing else. Possibly nowadays our Courts as Courts of Equity would; where there is a palpable breach of expressed charter and statutory prohibitions, interfere by injunction as in *Rendall v Crystal Palace Co*.[5] It is now submitted however, that shareholders should have the right to know that their company, held out to do certain things, shall be limited to those objects. It will probably surprise shareholders in charter companies in Canada to know that their directors may now lawfully carry on any business they please. Lenders of money, investors in bonds, are in similar plight. Surely it was of some value to them, probably an inducement to invest, to know that dealings of the company not expressly authorised by the Charter, were void and did not bind the company or jeopardise the property on which they had advanced their money. Even if injunction lay a shareholder cannot exercise the vigilance necessary to take advantage of that remedy. It is submitted that this cannot be put too strongly, and that it is enabling a fraud upon the creditor class to permit a company ostensibly authorised for a safe and reasonable undertaking to venture upon another radically different, and probably hazardous one, and yet that seems incontestably to be the position today in the case of charter companies as a result of the re- cent discovery that that they are prerogative companies and that the doctrine of *ultra vires* does not apply to them. In a word your artificial person is better off than a natural person. It has all the powers of a natural person, but with limited liability in its members for its acts.

It is said that directions or even limitations in a charter are matters solely between the Crown and the corporation. It may well be thought that conditions and rules contained in the general Acts are likewise directory, or at least matter only enforceable by the Crown. The Bonanza Case points out that the Companies Act in question, the Ontario one, did not interfere with the prerogative, therefore, the prerogative had its full effect in the creation of the artificial per- son. It is also said that notwithstanding charter restrictions, the corporation has full life and that apparent limitations in the grant do not restrain its exercise of its faculties as it pleases. Restrictions which would do so would be inconsistent with the grant, it is said. To use Lord Justice Bowen's words again:

> Even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has al- ways held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential

5 27 L J Ch. 397.

> part of the so-called bar- gain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King has created.

It is not a condition that the corporation may act validly only to the extent described; conditions are merely collateral, not affecting the inherent validity of the Act. In 1854, in *Eastern Archipelago Company v The Queen*, in dealing with a breach by the company of a stipulation that it should not commence business until certain capital had been paid up, Creswell, J. said:

> Of these directions (which in this charter must be treated as conditions), some appear to have been framed with the object of protecting the shareholders, others for the protection of the public. The clause prohibiting the commencement of business until capital to a certain amount had been paid up, is of the latter description, and extremely necessary for that purpose, inasmuch as the creditors of this incorporated partnership would have no remedy against the members, but against the corporate property only. If, then, the corporation, under colour of their charter, began to trade before they were authorised to do so, it was an abuse of their charter which worked a forfeiture and rendered them liable to have it cancelled by means of a *scire facias*. And this is a matter in which the subject is interested; the abuse of the franchise is to his prejudice, and he, *ex debito jubistitice*, is entitled to a *scire facias* to procure the cancellation of it. Every franchise granted by the Crown is subject to the implied condition that it shall be used according to the grant; and if it must be used otherwise, the franchise is forfeited. Here, the franchise of being a corporation and trading as a corporation was to be exercised when a capital of £50,000 had been paid up, without any express condition, this would have been subject to an implied condition that they should not trade otherwise; and their trading as a corporation, when not authorised to do so, would be an abuse of their charter.

Observe that the basis of the *scire facias* remedy was the public interest in the corporate franchise, not the rights of the shareholders. Nowadays we find ourselves interested more from the standpoint of the shareholder and investor. Substantial transgressions of incorporation conditions should be void, and not merely restrainable by injunction, or punishable by forfeiture in *scire facias* proceedings.

It is quite evident that the result of the revival of this idea of the attributes of the charter company will be to cause uncertainty and produce much litigation until the legislatures step in and restore the state of things to which our own jurisprudence has led us up to the time of the recent pronouncement. It is quite a simple matter to find various cases in our Courts, some comparatively recent, in which a different result had been reached as to the legal capacity of incorporated companies. It would have been for the good of the commercial community if the course of our decisions had remained undisturbed.

A phase one cannot help noticing is the matter of winding up. The Provincial Winding-up Acts relate to companies incorporated by or under the authority of the respective legislatures. They do not expressly interfere to wind up prerogative companies. Not expressly interfering, do they affect them? And in case of charter companies created by the provincial prerogative, can the Dominion extinguish a corporation under the insolvency provisions? Conceivably it might take its property and distribute it, but can it wind it up and extinguish the artificial person created by another and thereto fully qualified sovereign power? The end is evidently not yet.

Directors of a memorandum company are held strictly accountable to keep within the authorised purposes of the company. But what of a company which for the use of its property is equally capable with a natural person? Are the directors to be immune now in respect of what were formerly considered to be *ultra vires* applications of the company's capital? There is also this difference in the two methods of incorporation in that the charter is an executive act which cannot be compelled, whereas the acceptance and filing of the Memorandum of Association can in a proper case be enjoined, the filing and certificate being ministerial acts. This may be of small practical importance as the main essential in the obtaining of a charter is the payment of the fee, but nevertheless as a matter of legal theory it would be much better that the idea of uncontrolled executive discretion be removed, and that every subject have the unqualified right in common with others, to the incorporation of his proper undertakings, subject to due restraints.

Some of our provinces have the charter method and others have adopted the modern English system of the Companies Act. It has been delegated to a committee of this Association to draft a proposed uniform Provincial Companies Act. At the threshold it meets difficulty in determining which method should be recommended. There is now great variance. Apparently four provinces have the Memorandum system, and five the Letters Patent. It is matter for discussion in this body so as to elicit some decision as to the course to be adopted in forming the draft Act. There should certainly be uniformity in this so that the corporations will have the like attributes, no matter from which of the provinces they receive their creation. It is submitted that great advantage would be gained by our associating our systems to that of the English and taking advantage of the jurisprudence that has grown up around it.

The writer closes with the hope that this Association may recommend that that course be adopted.[6]

Winnipeg, June 12th, 1916.
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6 This paper was read at the last meeting of the Canadian Bar Association.