

SASE 26th Annual Conference – The Institutional Foundations of Capitalism – July 10-12, 2014
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“Company” and Lawyer’s View: Bye-bye Irresponsibility and Welcome to a New Era!

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FRAMEWORK

1. Background research and hypothesis
2. Competition and company: two worlds but the same economic logic
3. Competition and company: towards a social logic?
4. Implication

Background research (1/2)

Approach by countries with a civilist tradition:
Competition law v. corporate law

Approach by countries with a *common law* tradition: less pronounced opposition (economic reasoning) but distant link

➡ Subjects separately studied

Hypothesis (2/2)

Hypothesis 1: Competition law and corporate law cannot continue to ignore each other

Means may differ but they share a common objective:
Responsabilisation

Hypothesis 2: The “enterprise” is the common denominator and allows to take into account social values

Response to negative externalities through law and its interpretation

Canadian perspective and beyond...

Work in progress!

Competition and companies: Two worlds

Competition law

- Market
- Decentralisation
- Individualism
- Person

Corporate law

- Hierarchy
- Centralisation
- Collectivism
- Group

1. What about competition law?

Two basic premises

- a. General interest is best protected when markets function well
- b. The vocation of competition law is to maintain economic efficiency of market

Market

a. Objective vision of the market

The market is an abstract representation of general interest

Traditionally, competition law makes sure that the market works adequately (but claims challenged since 2000)

Efficient allocation of resources

Competition policies aim at the best efficient way to distribute national wealth

Objective? Implementing Pareto optimality condition

Efficiency = Distribute goods and services amongst consumers or production methods

An ideal of distributive justice against monopolies

Free-market must be regulated in order to avoid the creation of monopolies, which are the sources of « economic inefficiencies »

Linda ARCELIN, *Droit de concurrence, les pratiques anticoncurrentielles en droit interne et communautaire*, Rennes, PUR, 2009, p. 19

Origin: eversince Antiquity, mankind has yearned to prevent hoarding in order to fight starvation

= Original distrust towards monopolies

b. Recent interrogations about objectives of competition law

Critics of the traditional ideology of competition law after post-Chicago ideological context where Chicago school is dominant (resolutely devoted to economic efficiency thanks to Robert Bork's works)

Brussels school: proposition of a more social vision of the competition law in Europe

Comparative position on the societal nature of competition law

USA: judges shyly admit other objectives besides economic efficiency

Europe: acceptance of social objectives such as job protection when mergers occur

Canada: multiple objectives in the Competition Act v. preservation of the optimal allocation of resources as main objective

Canadian example

Recent decision *Tervita*: conservative interpretation of the Competition Act's objectives

Positive environmental impacts of a given transaction cannot be considered as efficiency gains

According to the Federal Court of Appeal, Article 1.1 of the Canadian Competition Act only refers to **exclusively** economic considerations

2. What about corporate law?

Two basic premises

- a. The company is a contract (subject of rights)
- b. The company must maximise its welfare

Company, Firm, Enterprise, Hierarchy

a. Contractualist vision

A priori in terms of methodology: reflection surrounding the contract

But exceeding the company as a subject of rights: lifting of the corporate veil

But recognition of the “enterprise” (“firm”)

- Example related to labour law
- Reflection related to environmental law

Company = contract

Economic interpretation: company = contract and property

« [p]roperty rights theory, as articulated in Hart and Moore (1990) and other representative pieces, says very little about the firm. The problem is that there are really **no firms** in these models, just representative entrepreneurs »

B. HOLMSTRÖM, « The Firm as a Subeconomy » (1999) 15 J. L. & Econ & Org. 74

Vision that is present in all legal traditions!

Company = contract

In common law

Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886)

Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819)

« The rights and duties of an incorporated association are in reality the rights and duties of the **persons who compose it**, and not of an imaginary being »

V. MORAWETZ, *A Treatise on the Law of Private Corporations other than Charitable*, Boston, Little Brown and Co., 1882



In civil law

« In the most traditional perspective, the firm, which does not exist in itself, is perceived by law **only through the aggregate amount of contracts** which gives it support in positive law. We can thus only see, in the undertaking of each firm, a contract game »

J.-P. ROBÉ, « L'entreprise en droit », (1995) 29 Dr. et Soc. 117

Canadian example

« [...] [d]e façon générale, les intérêts de la société rejoignent ceux de l'ensemble des actionnaires, parce que l'atteinte des objets de la société constitue, en principe, la raison d'être de la mise en commun des sommes investies. En tenant pour acquis que les actionnaires recherchent l'atteinte des objets de la société, on peut conclure à une coïncidence habituelle entre la volonté des actionnaires et les intérêts de la société »

Peoples Department Stores Inc. (Trustee of) c. Wise, [2003] J.Q. no 505 (C.A.)

b. Purpose in terms of financial performance

A priori in terms of objective: economic efficiency

Based on an economic interpretation:

- « Black box » = the firm adjusts rapidly to exogenous shocks
- The *homo oeconomicus* model
- Company = production unit, entrepreneur ownership seeking to maximise his profits

I. IOANNOU, « Is the firm really a "black box"? », Ph.d. Business Economics, Harvard Econ Dept & Business School

G. C. Archibald, *The Theory of the Firm*, Harmondsworth, Penguin Books, 1971

Company = financial purpose

« [a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non distribution of profits among its stockholders in order to devote them to other purposes »

Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)

« [n]orms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of **maximizing shareholder wealth** »

M. J. Roe, « The Shareholder Wealth Maximization Norm and Industrial Organization », *University of Pennsylvania Law Review*, 2001, Vol. 149, p. 2063

Shareholder supremacy:

- Disciplinary role of governance
- Central role of shareholders: « *residual claimants* »

Canadian example

Consultation of Federal legislator (2013)

Consultation on the Canada Business Corporations Act

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Canadian example

Consultation of Ontario Securities Commission (2011)

Notices / News Releases

1.1.3 OSC Staff Notice 54-791 – Regulatory Developments Regarding Shareholder Democracy Issues

OSC STAFF NOTICE 54-791

REGULATORY DEVELOPMENTS REGARDING SHAREHOLDER DEMOCRACY ISSUES

The Ontario Securities Commission's 2010-2011 Statement of Priorities included a commitment to review protections for shareholders' rights and corporate governance. In addition, the Standing Committee on Government Agencies (SCOGA) March 2010 report on the Ontario Securities Commission (the OSC) recommended that the province of Ontario institute a formal review of democracy in corporate governance in Ontario. The OSC's submissions to SCOGA noted that the OSC was in the process of a significant review of shareholder democracy.

This Notice provides an update from OSC staff on the current status of our work in the area of shareholder democracy issues. We have identified the following issues as requiring additional review at this time and, potentially, the development of regulatory proposals for reporting issuers:

- *slate voting and majority voting for uncontested director elections,*
- *shareholder advisory votes on executive compensation, and*
- *the effectiveness of the proxy voting system.*

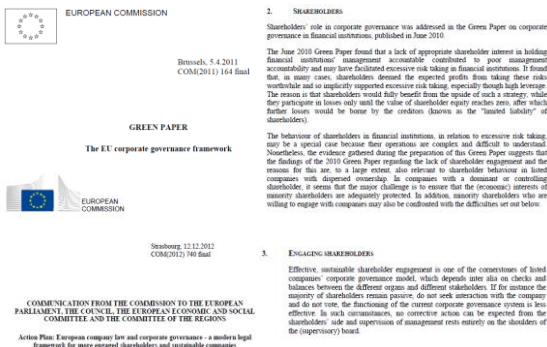
We may identify additional issues as a result of our continued review and developments in the capital markets.

Canadian example

Publication of Studies

- la publication d'un document de discussion par Davies Ward Phillips & Vineberg, S.E.N.C.R.L., s.r.l. intitulé « The Quality of the Shareholder Vote in Canada », en octobre 2010⁸;
- le colloque sur le vote des actionnaires (Shareholder Voting Symposium) tenu en juin 2011 et organisé par RBC Dexia Investor Services Limited (RBC Dexia), en collaboration avec la British Columbia Investment Management Corporation et la Coalition canadienne pour une bonne gouvernance¹⁰;
- le sommet "Shareholder Democracy Summit", de la Canadian Society of Corporate Secretaries (CSCS), qui a eu lieu en octobre 2011¹¹.

European example



Competition and companies: one world

Competition law: law favors the weaker members of society + analyzes "enterprise"

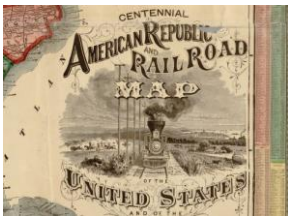
Corporate law: law that gives itself other objectives than economic and financial ones + role of market

II
Different values

1. Competition law

- a. Origin
- b. Antitrust law
- c. Perpetual evolution: toward new objectives

a. Origin of competition law



Social origin of competition law in North America

Railroad arrival: economic development to the detriment of small agricultural owners

b. Trust regulation (1)

Railroads: increase of transportation costs => exclusion of smaller industries

Emergence of Wall Street in response to capital needs

Trust: legal mean to regulate the links between firms operating on the market



vertical merger of the market

b. Trust regulation (2)

Populist movement against the trusts to defend the interests of smaller firms consisting of individual owners by opposition to capitalist companies

1890: Adoption of the *Sherman Act*

Same logic in Canada: strong concentration of the industry, especially in sugar refineries

1889: Adoption of the *Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, S.C. 1889, 52 Vict., ch. 41.

c. Perpetual social evolution

The doctrine questions the objective that consists in the seeking of economic efficiency by the competition law

« The proper functioning of competition is not an end in itself; it is rather a means made to serve a more general finality being the economic and social development of states »

M.-S. PAYET, *Droit de la concurrence et droit de la consommation*, Paris, Dalloz, 2001

In Canada, decision *Tervita* by the Federal Court of Appeal must be noted: « (...) the economic character of the objectives of the Competition Act **does not constitute an obstacle to the integration of redistribution of revenues effects** on grounds of reduction and impediment of the competition in lights of article 1.1, which targets a set of complementary objectives »

K. DIAWARA, *Le contrôle de la puissance de marché*, Cowansville, Éd. Yvon Blais, 2012,

2. Corporation law

a. Only a contract?

b. Only a financial objective?

a. Company ≠ contract

The legal person?

The firm is not a contract: it is a social institution too!

« [...] a social institution [...] whose economic goals must be constrained by social imperatives and needs »

ALI, « Principles of Corporate Governance: Analysis and Recommendation », Tentative draft No. 2, 1984

Excessive reduction of the debate on the nature of the company

« [w]e are presented with a disjoncted **collection of rules** in which the concept of the corporation is sometimes reduced to as a mere legal device (the corporation categorised as a legal person for liability purposes), but at other times is described by reference to the decision of majority voters at a general meeting or "the interests of the members as a whole", or as an entity with interests that transcend the immediate concerns of its present members and directors »

S. Bottomley, The Constitutional Corporation, Aldershot, Ashgate, 2007

Canadian example

« [...] Pour former une compagnie par actions, il est bien vrai qu'il faut des souscripteurs qui, plus tard, deviendront des actionnaires, mais il n'est pas exact de dire que les actionnaires sont la compagnie. Une compagnie à fonds social est un être moral, créé par la loi et composé d'un certain nombre de personnes, mais distinct de chacune d'elles »

Duquenne c. La Compagnie Générale des Boissons canadiennes, (1907) 31 C.S. 409 (C.R.)

« [a] corporation law [...] connotes a statutory institution that does not depend on contract and agency doctrine »

J. L. Howard, « The Proposals for a New Business Corporations Act for Canada: Concept and Policies », dans Law Society of Upper Canada, Special Lectures of the Law Society of Upper Canada (1972): Corporate and Securities Law, Toronto, Richard de Boo, 1972

M. Lizée, « Deux fictions de droit corporatif » (1983) 43:3 R. du B. 649

M. Lizée, « Essai sur la nature de la société par actions » (1999) 39 R.D. McGill 509

b. Company ≠ Financial objective (1)

Law adjusts "too much" simple economic purpose: best interest of the corporation

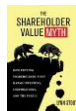
It is not only a shareholder supremacy!

- Relevance of the attention paid to shareholders?

Nevertheless, it remains true that if giant enterprise conflict with national economic and social goals, it is unlikely that the conflict will be resolved by increasing shareholder power, and it seems fair to assume that most shareholders are at least as interested in profits as is management.

Eisenberg, 1976

Most recently!



- Status of the stakeholder theory : future?
- Impact of corporate social responsibility (CSR)
- Another approach of governance: behavioral and cognitive perceptions of finance

Why shareholders?

OECD, [Corporate governance and the financial crisis](#), 2010

Box 4. Key Findings and Main Messages: The Exercise of Shareholder rights

Shareholders have tended to be reactive rather than proactive and seldom challenge boards in sufficient number to make a difference. Ineffective monitoring by shareholders has been experienced both in widely held companies and firms with more concentrated ownership. In some instances shareholders have been equally concerned with short termism as have managers and traders, neglecting the effect of excessive risk taking policies.

The equity share of institutional investors continues to increase but their voting behaviour suggests that they can have important conflicts of interest. Many institutional investors are still not playing an active informed role and when compelled to vote the reaction often appears to be mechanical.

The role of alternative investors (private equity funds and activist hedge fund), which have been active investors in recent years, should not be hampered as a side-effect of regulatory reforms which might be developed to address the specific issues that have created problems.

Effective enforcement of shareholders' rights is still an open issue both in systems with strong private litigation traditions and in systems more based on public enforcement mechanisms. Stronger complementarity between private and public enforcement instruments could contribute to create a more favourable framework for active informed shareholders.

Why shareholders?

OECD, [Corporate governance and the financial crisis](#), 2010

Box 4. Key Findings and Main Messages: The Exercise of Shareholder rights

As the importance of institutional shareholders increases, greater attention needs to be given to proxy advisors and to the potential for conflicts of interest. It is also claimed that there is a danger of "one size fits all" voting advice.

D. GELLES, « Lively Debate on the Influence of Proxy Advisory Firms », *The New York Times*, DealBook, December 5, 2013

When corporate shareholders vote on a big decision — be it a merger with another firm or the election of directors — they often take advice from so-called proxy advisory firms, independent groups that conduct analyses of such issues at companies across the country.

b. Company ≠ Financial objective (2)

Historical background

« From the India Company to commercial companies, including industrial manufacturing, the firm has always been a private interest medium, but also **taking part in a more general social project**, whether it is the modernisation of production or access to consumption »

C. Gendron, « L'entreprise comme vecteur du progrès social : la fin ou le début d'une époque ? », Les cahiers de la CRSDD, collection recherche, UQAM, no 01-2009

Explanation of the role of the state in the constitution of companies: XVe => XXe

Canadian example

ers". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation: see E. M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39 *Can. Bus. L.J.* 398, at pp. 400-1. However, the courts have long recognized

Magasins à rayons Peoples Inc. (Syndic de) c. Wise
2004 CSB 68

Implications (1/2)

Competition and corporate laws: contemporary tendencies

Fields of study are not always what they used to be

Competition law and corporate law are complementary: responsabilisation of the enterprise

- Enduring resistance: Canadian decisions i.e. *Tervita* (competition law)
- Enduring resistance: American *et al.* decisions in takeover bid (corporate law)

Implications (2/2)

Means?

Beyond the opposition market/hierarchy

Corporate law (social interest, lifting of the veil...)/

Competition law (surpass legal entity and idea of hierarchy)

Objectives ? = Economic objective and more

Competition law	Corporate law
Reminder of societal constraints	Promulgate social interests

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THANK YOU!

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