Preface

Academic books about corporate law must tread a fine line. The business corporation has real work to do. It is no sterile laboratory specimen. And vibrant "living" institutions simply won't stand still long enough to be probed and tugged at by the curious.

Among practitioners there is considerable doubt about whether academic corporate law books are of much use. A volume of general "off-the-shelf" doctrinal research is welcome enough. That sort of book can come in rather handy—in the stressful moments before a hastily convened client meeting, say, or when in search of a convenient springboard for more detailed client research. But the further published sources begin to stray from case summaries and annotations, the less interest they hold for the busy corporate practitioner. Theoretical discussions about corporate law are, in particular, apt to strike no-nonsense solicitors as silly, unhelpful, and very far removed from the "real world" in which the business corporation was always intended to operate.

But there is a further consideration. Though it has become trite and even tiresome to say so, Canadian university law faculties must not only function as schools of professional training but must also strive to remain true to the broader educational and research goals of the modern university.

With all that in mind, let me suggest where this text might fit. Its primary purpose is to introduce the basic topics that are usually thought to comprise the law of business corporations in Canada. The approach is chiefly doctrinal, but it also touches here and there on the principal academic discussions that have been advanced about the subject. The goal is to provide the reader—a reader who is assumed to be new to the study of corporate law and has not much in the way of practical business experience—with some understanding about what the study of corporate law entails, and how the academic discussions of the topic relate to the doctrinal considerations.

While this text is meant to introduce readers to much of the traditional "learning" about corporate law, it is not, however, meant to leave the traditions unexamined or unchallenged. Albert Einstein is said to have described common sense as merely that collection of prejudices acquired by age 18. To the cynical, the common law may seem to comprise that collection of prejudices laid down in the minds of judges when they were in law school. If there is any truth to this observation, I hasten to add, it should be understood as a critical commentary on the nature of legal education and not on the nature of judges. To simplify and synthesize the massive collection of the learning that has gone before us requires a cunning use of shortcuts and summaries, consolidations, abstracts, and even summaries of summaries. Not all of the material available for this

purpose is of uniform quality. One would hardly expect that it could be. Still, it should surprise no one that once small errors have crept into the body of received knowledge, they tend to stay. Over time, what were once shunned as pesky vermin become welcomed as familiar pets, and through reassuring repetition, we easily mistake for independent verification what is simply yet another echo.

"Conceptual conservatism" is the very grand name that is apparently used by behavioural economists to describe that unavoidable human tendency to hold fast to ideas first learned and still understood, and to stubbornly resist letting them go, even in the face of incontrovertible evidence disproving them.[1] It is a cognitive bias that goes some way to explaining a few of the peculiarities one observes in the development of the common law. Some celebrated "leading" cases become authorities for "rules" that were as likely to have originated in the minds of early textbook writers as in the words of the judges themselves. And once firmly associated with those propositions for which their styles of cause have become virtual synonyms, these seminal decisions are elevated to a stature approaching Holy Writ. From such intimidating heights these authorities remain almost immune from any serious critical revisiting.

This is not all to the bad. The fact that a well-worn legal principle cannot, perhaps, actually be teased from the text of an eponymous judicial decision is hardly fatal. A sensible idea might just as well be given one name as another. Or as a leading English jurist has so recently put it, a reasonable principle ought to be followed "whatever the legitimacy of its descent."[2] So, although I have mentioned a few interesting discrepancies of this sort in this book, I have tried not to waste much time crowing over them.

In any event, this volume is really only a sampler. It is intended to be introductory and as non-technical as possible. For a comprehensive recitation of all of the recent Canadian corporate law cases, statutory developments, and theoretical research, the reader must turn elsewhere. The aim of this book is to provide a detailed but still rough sketch, not a completed portrait.

A short word about the title of this book. A little over 10 years ago, Roberta Romano of the Yale Law School published a wonderful little collection of her papers in a volume entitled *The Genius of American Corporate Law*.[3] I toyed briefly with the idea of Canadianizing this title, and calling my book something like, *The Above-Average Intelligence of Canadian Corporate Law*. I was, however, led to understand that such a title would be regarded as too eccentric in some quarters, and yet, in others, to be suggestive (at least by Canadian standards) of rather dangerous elitism. So I have settled on the current title, which I am afraid is neither imaginative nor inspiring.

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1 M. Nissani and D.M. Hoefler-Nissani, "Experimental Studies of Belief-Dependence of Observations and of Resistance to Conceptual Change" (1992), 9 *Cognition and Instruction* 97-111.

2 *Johnson v. Gore Wood & Co*., [2001] 1 All ER 481, at 499 (HL) per Lord Bingham.

3 The "genius" identified by Professor Romano, by the way, was said to lie in the "federalist organization" of American corporate law—in other words, in the corporate charter competition that is said to have done so much to influence American corporate law, and to have placed the unlikely state of Delaware in the centre of the US public incorporation map.

It has become customary to thank people in the preface to a book like this. As one gets older, the list of one's intellectual debts grows longer, and so writing a preface becomes more difficult than ensuring compliance with the *Bulk Sales Act*.

This book was written over a period of about two years and in four cities: Halifax, Toronto, Cambridge (England), and Orillia (Ontario). I sketched out the basic framework for the book while teaching Business Associations at Dalhousie University, where I joined the faculty in 1997 after labouring in the corporate law trenches of Bay Street and Bermuda long enough to understand how important to our profession law schools are. The casebook from which I taught this course at Dalhousie was originally compiled by Les O'Brien and Dawn Russell. I have no doubt that much of the organization of this book was very importantly influenced by those materials. The fall of 2002, I spent in Toronto, teaching Business Organizations at the University of Toronto Law School, and working as a consultant in the Corporate Finance and Mergers and Acquisitions Practice Group at McCarthy Tétrault. This was a perfect marriage of academic and private practice influences. I am very grateful to Dean Ron Daniels at U of T as well as the many other members of the U of T faculty who were such wonderful hosts during my brief sojourn there, in particular Tony Duggan, Colleen Flood, Michael Trebilcock and, of course, Jacob Ziegel. At McCarthys, I was thankful for the support and help of many friends old and new, most especially Rene Sorrell, Michael Barrack, Brian Graves, Shea Small, David Tenant, and Bill Richardson.

The manuscript for this book was at last completed while I was on sabbatical leave during the 2003-4 academic year. I spent that year as a visitor at the University of Cambridge Faculty of Law's Centre for Corporate and Commercial Law. While at Cambridge, I benefited very much from the support of many remarkable faculty members. I should, in particular, mention here Brian Cheffins and Len Sealy, as well as Eilis Ferran, John Armour, and John Tiley. At Dalhousie, my thanks go to the "usual suspects": Dean Dawn Russell for her continued commitment to ensure that Dalhousie Law School's business law program is, and continues to be, second to none in Canada; and my business law colleagues at the law school, particularly Keith Evans and Michael Deturbide. I must also say a particular word of thanks to the staff of the Dalhousie Law Library. They are a treasured resource of Dalhousie Law School for whom I continue to be exceedingly grateful. Thanks, too, to Emond Montgomery, especially to Peggy Buchan, and to Paula Pike and Cindy Fujimoto of WordsWorth Communications for their excellent work on the manuscript.

To all of these people I offer my warmest and sincerest thanks. But my final words of appreciation I offer to my family: my children, Robbie, Diana, and Tori, and most especially my wife, Andrea. I am never sure I have fully and fairly expressed my gratitude to her for all that she makes possible for me. It is a great and humbling gift. And I am deeply grateful.

C.C.N.
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