Exposing the Corporate Myth: A Re-Thinking of the Legal Conception of Corporate Personhood

by

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Abstract

This thesis provides a critical view of the way the Supreme Court of Canada (the "SCC") has applied rights and freedoms under the *Charter of Rights and Freedoms* (the "*Charter*") to corporations. I argue that a close reading of SCC cases involving corporations seeking protections under the *Charter* reveals that the SCC is bound by a conception of corporate personhood that binds judicial decision-making. This result seems to stem from the SCC's unconscious use of language that is consistent with Wittgenstein's *Tractatus Logico-Philosophicus*. This results in a slavish commitment to revealing the truth of corporations and applying the *Charter* accordingly. In place of this, I argue that Wittgenstein's subsequent approach to language in the *Philosophical Investigations* helps reveal that corporations are not objects with internal states of affairs; rather, "corporation persons" is just another language game. Seeing language this way helps do away with a commitment to truth about corporations and frees the SCC to see them as economic tools that are subject to our control.

Keywords: *Charter of Rights and Freedoms*; Ludwig Wittgenstein; corporations; corporate rights.

Dedication

To my daughters, Elizabeth and Emma.

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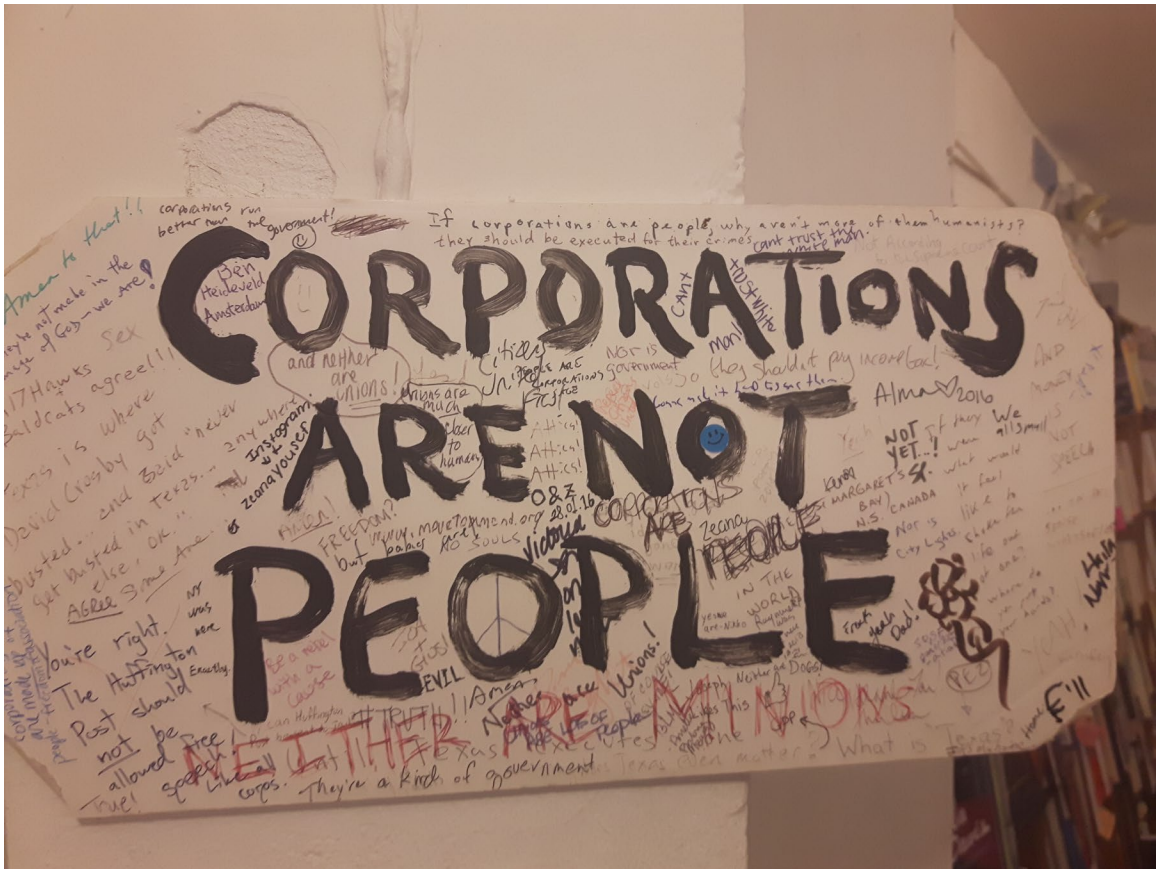

Sign in the basement of City Lights Booksellers & Publishers in San Francisco

Chapter 1.

Introduction

Corporations have been equated to psychopaths and Frankenstein (Bakan 56, *Liggett Co* 567). They pursue wealth with a singular focus. This pursuit of wealth is not only the function of a corporation but it is mandated by law. Corporations are therefore committed to and deeply self-interested, a pursuit that is supported and required by Canadian statutory and common law. Despite these monstrous characterizations of corporations, Canadian law recognizes corporations as persons despite having "neither bodies to be punished, nor souls to be condemned" (Anderson et. al. 1). Initially, corporations were likened to a person as a way to conceptualize the difference among the person who creates a corporation, the person or people who manage corporations, and those who invest in corporations from the corporation itself. Corporate personhood, therefore, was a suitable metaphor to delineate the corporation from others who deal in or with corporations. Mostly, the concept protects investors and shareholders from the debts and liabilities of the corporation.

Despite a corporation's singular dedication to making a profit and despite the monstrous comparisons made about corporations, the Supreme Court of Canada ("SCC") has extended the notion of personhood for corporations to allow it protection under the *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982*, c. 11 (for the purposes of this thesis, I shall refer to this as the "*Charter*"). Granting *Charter* rights and freedoms to an entity whose sole purpose is to pursue a profit results in the protection of the economic interests of this legal fiction. Granting corporations access to the *Charter* provides a legal avenue, when appropriate, for corporations to challenge legislation. The result of this challenge, if successful, would be a judicial declaration that the disputed legislation (or the offending portion thereof) be deemed invalid despite the fact that the legislation in question might have a valid social purpose. Where a corporation is fined under the legislation or otherwise limited in its pursuit of profit, that corporation – an entity with responsibilities only to itself to generate a profit – can alter a small portion of the Canadian legal landscape by challenging laws as inconsistent with the *Charter*. And while a successful *Charter* challenge by a corporation also benefits

natural persons, it has the absurd result of protecting the economic interests of corporations.

This absurd result is, in part, brought about by the SCC. In its numerous *Charter* judgements involving corporate challenges, the court has hypostatized corporations; they treat this abstract and mythical concept as something concretely real. They have, on occasion, treated corporations as something that exist independent of the positive law, the very law that gave rise to their existence, and granted them the same ontological status as natural persons. In doing so, the SCC has employed a representationalist account of language. It is precisely through this representationalist account of language that the SCC has hypostatized corporations.

A representationalist account of language requires that language functions as a medium whereby the speaker utilizes language accurately or inaccurately to describe the world. Language, then, must reach out to reality and accurately describe it for something to be true. This account of language is consistent with Wittgenstein's early philosophy of language depicted in his *Tractatus Logico-Philosophicus*. The judges of the SCC tend to use a representationalist approach to language, albeit inadvertently, when discussing what corporations are for the purposes of *Charter* cases. They are inclined to see corporations as possessing interests, interests in freely expressing themselves, for example. Where a corporation's "interests" align with the purpose of a *Charter* right or freedom, the SCC has historically granted corporations the right or freedom in question. This method of determining the scope of a *Charter* right or freedom is called the purposive approach.

The SCC has also employed corporate theory as a way to distinguish corporate personhood from natural persons. This mode of theorizing has often resulted in the differences between corporate and natural persons; however, the premise is that there is an entity called a corporation that exists, which demands that we describe it correctly. . In this thesis, I will argue that both the purposive approach and corporate theorizing hypostatizes corporations and, in doing so, the SCC uses language in a manner consistent with the representationalist model of language. Moreover, I shall argue that Canadian courts ought to move away from this approach to language in favour of seeing language as a series of games, a view espoused by Wittgenstein in his late work.

A litigant may also seek standing in *Charter* declaratory actions to challenge legislation as invalid under the *Charter*. The overall effect is the same: a corporation will benefit from the *Charter* challenge whether it is granted the right or freedom or simply given standing to make a *Charter* argument. Moreover, I will suggest that arguments that rely upon standing resulting in benefits to corporations also rely, indirectly, on a representationalist model of language. To avoid the absurdity of this result, I argue that the SCC (and Canadian courts in general) ought to adopt an approach to language closer to the philosophy of language as it is expressed in Wittgenstein's *Philosophical Investigations*.

I will contrast the SCC's representationalist-type language with how the courts ought to be using language by explaining and applying Wittgenstein's *Philosophical Investigations* in which language is understood as a form of social practice within specific rules. Through the lens of language as a social practice comprised of different language games, the SCC can provide a separate account of corporate *Charter* rights through the recognition that the concept of corporate personhood occupies a different language game than that of natural personhood. With this recognition, the SCC can unshackle itself from the purposive analysis, corporate theorizing, and/or corporate standing that treat corporations as facts that language must accurately describe. In place of these approaches to describing corporations, the courts can shift their approach to language in favour of a discourse that recognizes that language is comprised of different language games. This proposed shift in language will relieve Canadian courts of their perceived need for fidelity to the concept of 'corporation' in favour of a far less rigid conception whereby corporations are granted rights or freedoms only when it serves to promote and protect actual people.

The hypostatization of corporations through judicial discourse effectively limits what policy makers can do when legislating because their decisions (through legislation) are subject to the review of Canadian courts. For example, when any level of government passes a law, it must be mindful not to tread on the rights and freedoms of natural persons. The *Charter*, then, is a mechanism that limits governmental law-making authority vis-à-vis persons, including corporations. I will argue that changing the way in which judges talk, a way that is consistent with Wittgenstein's view set out in the *Philosophical Investigations*, will help the SCC not only shed its representationalist

commitment to language but adopt an approach to corporations that sees them as merely economic tools that are subject to judicial scrutiny and control.

To arrive at this conclusion, I shall provide an overview of the historical developments of corporations through case law. Looking at the genesis of and changes to the conception of corporations through British and Canadian cases in chapter two will reveal how the common law has attempted to forge a unified and consistent conception of corporations but has ultimately failed to do so. So even on a representationalist view of language, it appears impossible to know what the facts of a corporation are. In chapter three, I will then survey cases that have been appealed to the SCC, which involve corporations that have invoked the *Charter*. In reviewing these cases, I intend to show how the SCC utilizes language resulting in the hypostatization of corporations, whether through the actual granting of a *Charter* right or freedom or by granting the corporation standing to make a *Charter* argument.

Once I have provided a history of *Charter* cases involving corporations, I will review several Canadian cases in chapter four that consider the scope of internal corporate governance. By surveying these cases, I will unveil what, at a fundamental level, corporations are. This will reveal how the SCC's purposive analysis is misguided because corporations have a single purpose: to derive a profit. To therefore equate corporate personhood with natural personhood exposes the need for a new language game for corporations.

As such, in chapter five, I shall argue how the SCC has used language in a representationalist fashion by summarizing and applying Wittgenstein's early philosophy of language and then demonstrating how the SCC (and Canadian courts generally) can avoid the pitfalls of a representationalist commitment to language that can be corrected by adopting a way of thinking about language consistent with later Wittgenstein's views on language. Understanding language as a series of games could be a gateway to a more critical understanding of the consequences of granting corporations rights and freedoms under the *Charter*; moreover, it could open up a productive dialogue that both recognizes how corporations occupy a different language game and that granting corporations rights and freedoms under the *Charter*, under certain conditions, can effectively serve to expand and protect the rights and freedoms of natural persons.

Chapter 2.

The Genesis of Corporate Personhood

In this chapter, I want to trace the case law starting in the United Kingdom and in Canada (with one case from New Zealand) that shows how the corporation was first recognized as a separate legal person and how that concept has developed over time. Through the history of this case law, I intend to show two things: first, that the courts in Canada have not developed a consistent idea of corporate personhood; and second, that the courts are indeed willing to set aside the separateness of corporate personhood in the promotion of justice.

By surveying the case law where the issue of corporate personhood arises, I will trace the development of corporate personhood and explain how Canadian courts have tried to create a unified concept of corporate personhood. The courts have, however, struggled to find a singular concept of corporate personhood. Despite this, I will later argue that the SCC has been willing to recognize a robust sense of separate personhood for corporations when it comes to corporate challenges to legislation where the Charter is invoked. Second, I will survey a number of cases where courts have been willing to set aside the separate identity of the corporation. The courts are willing to set aside corporate personhood when it would otherwise oppose justice. In chapter 5, I will argue from analogy that courts, as a general rule, are similarly justified in setting aside corporate personhood and, as a result, are not entitled to the benefits of the *Charter*. And I argue that this is acceptable despite Canadian statutes that recognize the separate personhood of corporations. To begin this discussion, I will discuss some background to the advent of the corporation and the case law that has dealt with this concept.

Corporations have existed since (approximately) 1670 and can be traced back to statutory law (McGuinness 411). In England, they derived their existence by way of either a royal prerogative or by a special act of parliament (VanDuzer 90-91). Because each of these methods of incorporation was time consuming and cumbersome and, therefore, limiting efficient access to the marketplace, the English Parliament passed the *Joint Stock Companies Act*, 7 & 8 Vict., cc. 110 & 111, in 1844 (VanDuzer 91). This

enabled the creation of corporations through a much simpler process that required the registration of certain documentation. Since the passing of this statute, corporations still come into existence through registration in England (VanDuzer 91). Subsequently, the English Parliament passed the *Companies Act*, (U.K.), 1892, c. 89 (the "*Companies Act*"). This statute, which also requires the registration of corporations, is the model for incorporation in many Canadian jurisdictions today (VanDuzer 92).

Once created, a corporation "ordinarily consists of a group of individuals who have pooled their various resources for common benefit" which "entails the severing of all legal connections between individual shareholders and the assets, liabilities, and direct control over the business" (Welling 76 and 82). The corporation is managed by directors and officers and will have a shareholder or shareholders. The benefit of being a shareholder is that they can enjoy a return on their investment while avoiding the burden of unlimited personal liability. Prior to the advent of corporations, those who entered business as a sole proprietor or partner in a partnership were took on liability that exposed all of their personal and business assets in the event of a lawsuit against them. However, it wasn't until the English case of *Salomon v. A. Salomon and Co.* [1897] A.C. 22, 66 L.J. Ch. 35, 75 L.T. 426, 45 W.R. 193, 41 Sol. Jo. 63 (Eng. H.L.) ("*Salomon*") that there was judicial recognition that corporations, once properly registered, are indeed a separate legal person from the company's shareholders and directors.

In *Salomon*, the House of Lords had to determine whether certain creditors of A. Salomon and Co. could recover losses from the natural person, Aron Salomon - who created and controlled the company – or whether those creditors were limited to recovery of their losses from the company itself. Mr. Salomon was a shoemaker and ran his shoe-making business as a sole proprietor. Eventually, Mr. Salomon wanted to take advantage of the limited personal liability offered by the United Kingdom's *Companies Act* so in 1892 and he incorporated a company (Welling 78). Section 6 of the *Companies Act* required that there be at least seven shareholders. To satisfy this requirement, Mr. Salomon, his wife and five adult children each subscribed as shareholders. Mr. Salomon held 20,001 shares with each of his family members holding one share (Davies 34). Mr. Salomon and his two sons were directors (*Salomon* 48; Welling 78).

On June 1, 1892, the newly created company purchased from Mr. Salomon the assets of the business, which were held by him as a sole proprietor (*Salomon* 48). A. Salomon and Co. purchased Mr. Salomon's assets through the issuance of shares and, more importantly, a secured debenture to Mr. Salomon in the amount of £10,000 (VanDuzen 126). This debenture was secured against the assets of the company so that if the company went bankrupt, Mr. Salomon, as a secured creditor, would rank first among any other creditors for the distribution of any remaining assets.

In less than a year, A. Salomon & Co. Ltd. became bankrupt. Upon bankruptcy, there were only enough assets to pay back the £10,000 debenture to Mr. Salomon; with insufficient assets to pay back other unsecured creditors (Welling 78; VanDuzen 126; Davies 34). The liquidator, who was appointed under the *Companies Act* to wind up the company and distribute any remaining assets to creditors, had to ensure payment of any assets of A. Salomon & Co. Ltd. to creditors in priority sequences. As a secured creditor, Mr. Salomon was entitled to payment prior to any unsecured creditors (McGuiness 67; VanDuzen 126) and was "thus paid first rendering the unsecured creditors'' debt unsatisfied (*Salomon* 48).

In an attempt to recover their losses, the unsecured creditors, through the liquidator, took legal action against Mr. Salomon, the natural person. The plaintiff creditors argued that A. Salomon and Co. Ltd. was a sham and that the creditors were ultimately doing business with Mr. Salomon the natural person, not the company. Because Mr. Salomon was personally carrying on the business and he effectively granted himself a secured debenture, the company was little more than an agent on behalf of Mr. Salomon. As such, Mr. Salomon's claim for the debenture was simply a claim against himself (VanDuzen 126).

As a corollary to the argument above, the creditors argued that the company was not duly created (McGuiness 67). Each of Mr. Salomon's wife and children were issued one share each. With Mr. Salomon owning 20,001 shares, there was an imbalance of power. Therefore, each of the family members were not acting with a mind of their own as shareholders but were under the direction of Mr. Salomon. Rather, the creditors argued, there should be a balance of power in the creation of the company and this lack of balance rendered the creation of the corporation a sham (Davies 3). The

incorporation of the company was, according to the liquidator, inconsistent with the true intent of the *Companies Act* (McGuiness 67).

In addressing the question of whether the company was a sham, the House of Lords considered the intent of the *Companies Act*. On behalf of the House of Lords, Lord Halsbury claimed that he could "only find that the true intent and meaning of the Act [is to] give a company a legal existence with … rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence" (*Salomon* 39). He went on to say that if the "Legislature intended to prohibit something, it ought to specify what that something is" and the *Companies Act* does not require "the incorporation of seven independent, *bona fide* members, and a will of their own and were not the mere puppets of an individual who, adopting the machinery of the Act, carried an old business in the same way as before when he was the sole trader" (*Salomon* 38).

Lord Justice Kay agreed with Lord Halsbury stating that the *Companies Act* was "intended to allow seven or more persons *bona fide* associated for the purpose of trade to limit their liability under certain circumstances and to become a corporation" (*Salomon* 39-40) and went on to say that the House of Lords has "nothing to do with the question whether such a result be right or wrong, politic or impolitic, if this company has been duly constituted by law. Whatever may be the motives of those who constitute it, I must decline to insert into the Act of Parliament limitations which are not to be found there" (*Salomon* 40).

The law that emerges from the *Salomon* case is that companies are "a distinct legal *persona*" (*Salomon* 45). The practical result is that companies shield certain stakeholders, such as shareholders, officers and directors, from any of the rights, liabilities and obligations that properly belong to the company. Therefore, the liquidator was unsuccessful in suing Mr. Salomon, the natural person, for the debts of his company. The company, as a separate legal person from Aron Salomon, was under a contractual obligation to pay back any monies owing to its creditors. And since Mr. Salomon was one of those creditors – and a secured one at that – his debt was paid first. With no money remaining in the company, the liquidator was unable to turn to the principle of the company, Mr. Salomon.

That corporations are separate legal persons has a number of legal consequences. A shareholder may be a creditor, even a secured creditor, of the corporation in which he/she holds shares, that shareholder may also be an employee of the corporation (VanDuzen 139-140). This shareholder may also act as a director and/or officer of the company. Despite the multitude of roles that a shareholder may play within the company, the corporation owns its own property (VanDuzen 140). While a shareholder has an interest in the property belonging to the corporation, that interest falls short of ownership (VanDuzen 139). The company as a separate legal person, then, provides limited liability for investors of that corporation, such as shareholders. This distinct legal *persona*, resulting from *Salomon*, provides clarity for parties, such as creditors, wishing to contract with a corporation.

Salomon is one of the most widely cited cases in common law jurisdictions, and, indeed, Canada. It is commonplace to declare the separateness of corporations from those that invest in and manage them. However, the context in which legal personhood has been extended far beyond an economic context. Lord Justice Kay and Lord Halsbury of the English House of Lords both hint towards the limit of corporate personhood in *Salomon*. To reiterate, Lord Justice Kay said that shareholders limit their liability by associating "for the purpose of trade" while Lord Justice Halsbury suggested that corporations possess "rights and liabilities appropriate to itself" (*Salomon* 39-40, 38). I will discuss an appropriate interpretation of corporate personhood and its limits in Chapter 5; however, these statements by the House of Lords reveal the possibility that corporate personhood was a metaphor that served as means to illustrate how shareholders (and others involved in the corporation) enjoy limited liability. The development of corporate personhood starts with *Salomon* and this has been a key case in upholding this concept.

For example, the case of *Lee v. Lee's Air Farming, Ltd.* [1960] 3 All E.R. 420 ("*Lee's*"), originating out of New Zealand and appealed to England's Privy Council, recognized the separateness of an employee of a company and the company itself. And this recognition is consistent with a strict economic interpretation of the *Salomon* case. Mr. Lee formed a company, Lee's Air Farming, Ltd., in 1954 to carry on his business of aerial top-dressing (*Lee's* 420). Mr. Lee was the governing director, controlling shareholder and was employed by the company as its chief pilot (*Lee's* 420). Mr. Lee had complete control over the company. During the course of employment, Mr. Lee was

killed. The appellant in this case, Mrs. Lee (and spouse of Mr. Lee) claimed compensation under New Zealand's *Workers' Compensation Act*, 1922 (section 3.1) (*Lee's* 420).

The New Zealand Court of Appeal denied payment to Mrs. Lee on the grounds that Mr. Lee had appointed himself the governing director "for life and there remained with the company no power of management whatsoever" and therefore, he could not be considered a "worker" if he was both "giving orders and obeying them" (*Lee's* 424). As such, the issue before the Privy Council was whether Mr. Lee was a "worker" of the company and therefore entitled to a settlement under the *Workers' Compensation Act* (*Lee's* 425).

Relying, in part, on the *Salomon* case, the Privy Council found that Mr. Lee was indeed a worker. Lee's Air Farming, Ltd. kept records of wages paid, Mr. Lee was in fact flying the plane on behalf of the company when he died – for which he was paid those wages – and, in performing such tasks, the Privy Council said that Mr. Lee was not acting as the governing director. "There appears to be no [great] difficulty in holding that a man acting in one capacity can give orders to himself in another capacity" (*Lee's* 428). For economic purposes, the Privy Council decided that Lee's Air Farming, Ltd. was a separate person from Mr. Lee, the natural person and employee.

Despite the ruling in *Salomon* and *Lee*, which have sided with the idea the corporations are separate legal persons, Canadian courts have, at times, eroded the separateness between corporations and those that create or hold shares in them. The willingness of the Canadian courts to pierce the corporate veil and disregard the separateness of the corporation from a natural person involved in that corporation in some commercial disputes renders Canadian common law on companies as a distinct legal *persona* inconsistent. The lack of clarity around companies as separate legal persons, then, renders decisions where Canadian courts have been willing to say that companies are separate legal persons in the context of *Charter* litigation less authoritative. I will visit this idea below in chapter 5; however, I will discuss an SCC case that seems to articulate inconsistent interpretations of the *Salomon* case then review a number of other cases where courts have considered arguments

While Canadian courts generally do accept that corporations are persons, there has been a tendency by courts in Canada to "pierce the corporate veil" where the courts "disregard the separate existence of the corporation in relation to some specific claim, usually the claim of a creditor of the corporation who would not be paid because the corporation has insufficient assets to satisfy the claim" (VanDuzen 143). Piercing the corporate veil occurs when a court disregards the separate personhood of a corporation to hold directors and/or officers personally liable (see pages 10 -11 of the *Kosmopolous* decision below). Piercing the corporate veil, however, merely grants relief to a plaintiff but does not result in the dissolution of the corporation. In most of these cases, the court has a principled approach to piercing the corporate veil; however, the SCC's decision in *Kosmopoulos v Constitution Insurance Co of Canada*, [1987] 1 SCR 2 ("*Kosmopolous*") demonstrates a departure from *Salomon* and *Lee's* above.

This erosion of the separateness of companies is arguably evident in the SCC's decision in *Kosmopoulos*. However, the SCC maintains that the *Kosmopolous* decision strictly upholds *Salomon* (*Kosmopolous* 12). In this case, Mr. Kosmopoulos had a leather goods business in which he was the sole shareholder and director of the corporation. He took out an insurance policy on certain business assets when he operated as a sole proprietor (*Kosmopolous* 7). However, on advice from his legal counsel, Mr. Kosmopolous incorporated Leather Goods Limited (*Kosmopolous* 7). Upon incorporation, Mr. Kosmopoulos took out an insurance policy on the assets of the corporation but the policy was made out in his own name. Subsequently, there was a fire that damaged the assets of his business and the insurance company refused to pay. The insurer's refusal to pay arose from the fact that the corporation, not Mr. Kosmopolous, owned the assets. The policy was made out to Mr. Kosmopolous and the insurer argued that only the corporation and not Mr. Kosmopolous had an insurable interest in the assets (*Kosmopolous* 7-8; VanDuzen 141).

In order to obtain an insurance policy, the insured must demonstrate that they have an insurable interest. An insurable interest is the relationship between the insured and the thing being insured, a relationship whereby the insured stands to lose if the thing being insured is damaged or lost (Boivin 93). The traditional view is that a sole shareholder does not possess a legal interest in the assets owned by a corporation and therefore does not have an insurable interest in those assets (*Kosmopolous* 6).

The SCC cited the *Salomon* case but noted that treating corporations as separate legal persons or disregarding this principle and "lifting the corporate veil" to reveal a natural person "follows no consistent principle" (*Kosmopolous* 10). The SCC said in no uncertain terms; however, that it would not add to this inconsistency through an attempt to lift the corporate veil (*Kosmopolous* 10). Avoiding this inconsistency gave rise to another: specifically, the SCC said the sole shareholder, Kosmopolous, had an insurable interest when it had previously stated that sole shareholders do not possess such an interest.

For consistency, the SCC should have applied the *Salomon* case to render a decision that would have recognized the separateness of Kosmopolous (who had taken out the insurance policy) and his corporation (which had no such insurance policy). Rather, the SCC held that Kosmopoulos had "a moral certainty of advantage or benefit from those assets but for the fire" and, therefore, he had an insurable interest" (*Kosmopolous* 30). The sole shareholder, then, was able to access the advantages of incorporation – including the lower corporate tax rate and limited shareholder liability – while maintaining the benefit of the insurance policy.

Broadening the scope of 'insurable interest' to allow a sole shareholder to have an insurable interest over the assets of the company ostensibly left the concept of separate personhood for the corporation intact. However, the SCC reworked the allocation of risk that was traditionally set up through the incorporation process. Shareholders enjoy limited personal liability when they invest in a company but the company itself takes on unlimited personal liability. The SCC effectively flipped this allocation of risk by protecting the corporation for Mr. Kosmopolous's failure (through his lawyers and/or insurance agent) to transfer the insurance policy from his to the company's name. This reallocation of risk permitted the company to enjoy the protection of the corporate veil to shield itself from the conduct of the shareholder. In trying to avoid adding to the confusion of piercing the corporate veil, the SCC effectively conflated the separateness of corporate personhood with natural personhood.

Despite the SCC's imprecision in the *Kosmopolous* case around the separateness of a shareholder's and a corporation's interests, there are instances where the courts will pierce the corporate veil on more principled grounds. The following is a sample of cases meant to demonstrate how courts have developed principled reasons to

disregard corporate personhood; however, it is not meant to provide a complete overview of cases regarding the piercing of the corporate veil. Canadian court will not uphold the separateness of corporate personhood when the courts believe that maintaining their separateness would result in a flagrant opposition to justice.[1] I will pick up again on this principled approach to casting aside corporate identity and argue by analogy how the courts can and should take a similarly principled approach when refusing to grant rights and freedoms under the *Charter* to corporations.

The SCC cited the argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens" and that if the veil is to be lifted, it is only done "in the interests of third parties who would otherwise suffer as a result of that choice" (*Kosmopolous* 11). In addition to a historically inconsistent approach, Canadian courts have demonstrated a willingness to pierce the corporate veil where recognizing the separateness of corporate personhood would result in a flagrant opposition to justice.

While the corporation was held intact in the Ontario case of *Clarkson Co. Ltd. v. Zhelka et al.* [1967] 2 O.R. 565 ("*Clarkson*"), this case helped shape the principled reasons that courts will follow when deciding whether or not to pierce the corporate veil. Clarkson Co. Ltd., the plaintiff in this action, sought a declaration before the court that certain lands held by the defendants, one of whom was named Ms. Zhelka, were held in trust for George Selkirk (*Clarkson* 565). Selkirk, who was the brother of Zhelka, had incorporated a number of companies for the purposes of his land dealings. In 1960, Selkirk transferred land to Zhelka and then claimed bankruptcy (Puri 104). Clarkson Co. Ltd. was appointed Selkirk's bankruptcy trustee and argued that first, the land held by Zhelka and others was held in trust for either Selkirk personally or one of his companies. If the land was held in trust for Selkirk by one of his companies, Clarkson Co. Ltd. argued that the corporate veil should be pierced because the company was not an "independent trading unit" but rather was a sham or cloak for Selkirk (*Clarkson* 566).

Since the court found the transaction between Selkirk's company, Industrial Sites and Locations Ltd. and Zhelka was "for the purpose of defeating, hindering or delaying the creditors or prospective creditors…from recovery of their claims, it concluded that the

[1] See my discussion and *Clarkson Col Ltd. v. Zhelka et al.* [1967] 2 O.R. 565 on the following two pages.

property was indeed held in trust for Industrial" (*Clarkson* 571). Yet despite the attempt to defeat creditors and the fact that Selkirk was "in complete control over" Industrial (amongst others) rendering them "one-man companies," the court could not see "any fraud upon Selkirk's personal creditors…by the operation of his companies" (*Clarkson* 577). In upholding the corporation as a separate legal person from Selkirk, the court said that piercing the corporate veil occurs under limited circumstances and that *Salomon* is authoritative when it said that "the legal persona created by incorporation is an entity distinct from its shareholders and directors and that even in the case of a one-man company, the company is not an alias for the owner" (*Clarkson* 577). The only time the court will pierce the corporate veil, according to the court in *Clarkson*, is where it "would be flagrantly opposed to justice" to continue to recognize its separate existence (*Clarkson* 578).

This flagrant opposition to justice may arise when first, the company is set up as an "alias or a sham" (*Clarkson* 578). This can arise when company is merely an agent of a controlling person. Second, the courts will pierce the corporate veil when the company is "formed for the express purpose of doing a wrongful or unlawful act, or, if when formed, those in control expressly direct a wrongful thing to be done" (*Clarkson* 578). In cases where evidence supports one or both of these flagrant oppositions to justice, the court will hold liable both the corporation and the person responsible for the wrong.

A corporation being used to perform an unlawful act formed the foundation for the British Columbia Supreme Court to disregard the separate identify of a corporation in the *Big Bend Hotel v Security Mutual Casualty Co*, 1980 CanLII 505 (BC SC) ("*Big Bend*") case. The British Columbia Supreme Court had to determine whether to enforce an insurance policy in favour of Big Bend Hotel. Vincent Kumar incorporated Big Bend Hotel and applied to Security Mutual for an insurance policy in the name of the hotel. However, Mr. Kumar failed to disclose that he had previously suffered fire-loss (*Big Bend* para 6). The hotel burned down and the insurer discovered Kumar's previous fire-loss claim. As a result, the insurer refused to pay out (*Big Bend* para 8). The British Columbia Supreme Court found in favour of the insurer stating that the corporation was set up for the sole purpose of disguising this fraud and treated the claim as if Kumar had made it personally (*Big Bend* para 28; VanDuzen 145). The British Columbia Supreme Court said that there are exceptions to the separateness of personhood for corporations

despite “Canadian and English courts rigidly adher[ing] to the concept set out in Salomon…that a corporation is an independent legal entity not to be identified with its shareholders (*Big Bend* para 24). And one of these exceptions is when there is “improper conduct or fraud” (*Big Bend* para 25).

In a more recent decision on this issue was the *Rogers Cantel Inc v Elbanna Sales Inc.*, 2003 CanLII 43394 (QC CA) (“*Rogers*”) case where the Quebec Court of Appeal similarly pierced the corporate veil. Guy Annable was the sole shareholder, director and principal sales agent of Elbanna Sales Inc. Elbanna Sales Inc. agreed to act as an agent for Rogers to sell and activate cellular phone services (*Rogers* paras 11-13). As part of this agreement, Elbanna, the corporation, signed a non-compete agreement stating that it would not enter into agreements with Rogers’ competitors (*Rogers* para 17). Subsequent to the execution of this agreement, Guy Annable became involved in a corporation that directly competed with Rogers and, while he was not a shareholder of this new corporation, he was actively involved in soliciting customers on its behalf (VanDuzen 145). Again, citing *Salomon*, the Quebec Court of Appeal held that the “corporate veil between Elbanna and Annable, if there was one in this case, is extremely thin” as Annable was the “driving force of Elbanna” (*Rogers* paras 37-38). While Annable did not commit fraud, his solicitation of customers on behalf of a competitor constituted a “serious abuse of his role” (*Rogers* para 41). This serious abuse justified the piercing of the Elbanna corporate veil to reveal Mr. Annable, the natural person, thus allowing for the Court to impose personal liability upon him.

The courts’ willingness to pierce the corporate veil where the corporation is being used for an objectionable purpose arose again in the case of *Wildman v. Wildman*, 2006 CanLII 33540 (ON CA) (“*Wildman*”). The *Wildman* case arose in the context of a divorce where child and spousal support were at issue (*Wildman* para 1). Chris Wildman owned Precision Landscape Construction Limited. Precision, the corporate entity, had an annual income of approximately $700,000 (*Wildman* para 2). At trial, the judge set Mr. Wildman’s income at $700,000 and was ordered to pay spousal and child support on the basis of that income (*Wildman* para 10). Mr. Wildman appealed the lower court’s ruling and argued that there was an error in law because the trial judge improperly pierced the corporate veil by equating the corporation’s income with his own (VanDuzen 149). On appeal, the Ontario Court of Appeal said that “on the facts of this case it would be flagrantly opposed to justice to allow [Mr. Wildman] to hide behind the corporate veil”

and the “law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law” and concluded that piercing the corporate veil may be essential to avoid such injustices (*Wildman* paras 46 and 49) The Court of Appeal ordered Chris Wildman to make support payments on the basis of his corporate, not personal, income (*Wildman* para 50).

In addition to cases where corporations were being used for unlawful purposes, the courts will pierce the corporate veil where it appears that the corporation is simply acting as an agent of another (VanDuzen 150). In this context, agency arises when one person, the agent, represents another, the principal. Agency, therefore, gives rise to a relationship where the agent is authorized to bind the principal in contracts with others (Fridman 5). In order for a corporation to function, it must have agents acting on its behalf and these agents are (commonly) its directors and officers. They bind the corporation in, for example, contracts with other parties. However, Canadian courts will, in certain instances, pierce the corporate veil where it appears as though the corporation is acting as an agent for another, usually the controlling shareholder (VanDuzen 150).

Canadian law was influenced by an early English case on corporations as agent called *Smith, Stone and Knight Ltd v Birmingham Corp* [1939] 4 All ER 116 (KB) (“*Smith*”). In *Smith*, the court listed a number of relevant factors to determine if the corporation was acting as agent for a controlling shareholder. These factors include whether: the profits were treated as profits of the shareholder; the person conducting the business was appointed by the shareholder; the shareholder was the brain of the trading venture; the shareholder made profits by his/her skill and direction; and the shareholder was in constant control (VanDuzen 150-151). These factors must be looked at in the context of the purpose for incorporation and how the corporation is used (VanDuzen 151). Where a corporation is being used as merely an agent on behalf of a natural person, the court will pierce the corporate veil and hold the controlling shareholder liable.

Canadian courts have upheld the *Salomon* case and but the history of case law demonstrates a number of exceptions to the rule that corporations are persons. While the courts grant corporations the status of a person to gain protections for shareholders and do they so on the “unique personality that distinguishes the corporation from its members” (McGuinness 419), there is an additional source of inconsistency around corporate personhood. Corporate personhood is not only recognized in case law but is

entrenched in numerous provincial and federal statutes. However, unlike the abovementioned cases, these statutes provide that corporations are persons without any exceptions. For example, the federal *Interpretation Act*, R.S.C. 1985, c I-21 (at section 35(1)) and the British Columbia *Interpretation Act*, R.S.B.C. 1996, c. 238 (at section 29) have each defined the term "person" to include corporations. This means that any federal or British Columbian statutes that refers to a "person" means *both* natural and corporate persons. Moreover, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 states at section 15(1) that a "corporation has the capacity…the rights, powers and privileges of a natural person." Similarly the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 at section 30 provides that a "company has the capacity and the rights, powers and privileges of an individual of full capacity." The codification of English and Canadian common law provides corporations with a clearly articulated recognition that corporations are persons in Canadian law; Canadian case law is far less clear.

As mentioned, Canadian courts recognize corporate personhood but the courts have, at times, been inconsistent in its approach and, at other times, have taken a more principled approach to piercing the corporate veil. In chapter 5, I will argue that it is possible to reconcile this inconsistency by, first, changing the way in which the courts use language to describe corporations, especially corporate rights under the *Charter*. Eschewing the purposive analysis and corporate rights approach to corporate identity frees judges from thinking of corporations as things with internal properties that must be properly understood. In its place, language as a series of games would not rely upon an 'accurate' account of what a corporation is. Rather, employing language as a series of games in the context of corporate *Charter* rights would free the courts from their attempt to articulate the internal properties of a corporation and would allow them to employ tests, much like the tests used in cases such as *Clarkson*, *Big Bend*, *Rogers*, *Wildman*, and *Smith*. This would allow the courts to consider what, if any, social value there is to granting corporations these rights with the aim of curtailing, or at least minimizing, corporate wrongdoing.

Some argue that the application of *Charter* rights to corporations is merely the "logical outgrowth of the separate personality" (Guinness 419). Seen through the lens of philosophy of language, I will argue that there is nothing logical in the outgrowth of the *Charter* being applied to corporations and that this outgrowth can and should, as a general rule, be disallowed. Before considering cases that involve corporations

challenging legislation under the *Charter* in chapter 4, I will discuss, briefly, the role of the *Charter* in Canadian law at the outset of chapter 3. In chapter 5, I will then explain how language has shaped the courts' conception of corporations and how the courts can re-shape this conception in a way that invites a more flexible approach to corporate personhood. To do so, I will propose a test in chapter 6 that permits corporations to benefit from rights and freedoms under the Charter but only in very limited cases.

Chapter 3.

The *Charter of Rights and Freedoms*: The Rights of Corporations

Before providing an overview of cases decided before the SCC involving corporations that have initiated *Charter* challenges, I will briefly introduce the purpose and some of the content of the *Charter*. I will also summarize when the *Charter* applies and, more importantly, what remedies are available to a successful litigant. I will argue in chapter 4 that corporations were not created to be included among the bearers of rights because they are fundamentally different from natural persons, in part because they were created only to derive a profit. This singular motive renders access to the *Charter* exploitative because of the profound effect that corporations can have on the legal landscape in this country. After this discussion of the *Charter*, I will survey *Charter* cases brought before the SCC by corporations organized by the relevant right and/or freedom.

3.1. Purpose, Content, Applicability and Remedies

On April 17, 1982, the *Charter* officially became entrenched in Canada as a constitutional document (McLachlin). With the advent of the *Charter*, Canada concretized individual rights and freedoms, which was born out of Prime Minster Pierre Trudeau's "desire to anchor Canadian unity in equality and individual rights" (McLachlin). The *Charter* is a "purposive document" which guarantees and protects the listed rights and freedoms but within the bounds of reason (*Hunter v. Southam Inc.* [1984] 2 S.C.R. 145 at 156). Therefore, the *Charter* is meant to prevent any level of government from passing legislation that is inconsistent with it. Over the course of Canadian *Charter* history, some of these rights were extended to corporations.

The *Charter* enshrines six broad categories of rights and freedoms: fundamental freedoms, democratic rights, mobility rights, legal rights, the right to equality, and language rights. The fundamental freedoms include freedom of conscience, religion and expression. Democratic rights include the right to vote while mobility rights permit certain classes of persons the right to enter and leave the country as well as gain a

livelihood in any Canadian province. Legal rights guarantee protections against unreasonable search and seizure, the right to be tried within a reasonable time and the right to life, liberty and security of the person, and the right to be treated equally (Sharpe and Roach 48-49; *Charter* sections 2, 3, 6, 7, 8, 10, and 15).

In addition to the individual rights and freedoms, the *Charter* also recognizes Aboriginal rights. Section 35 of the *Charter* provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Because aboriginal and treaty rights are different in nature than the individual rights and freedoms mentioned above, the *Charter* ensures, in section 25, that individual rights and freedoms shall not derogate aboriginal rights (Sharpe and Roach 49; *Charter*).

Section 52 of the *Charter* states that the "Constitution of Canada, is the supreme law of Canada and that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" (Dickson 15). As such, the *Charter* allows anyone whose rights or freedoms that have been infringed or denied to apply to a court. The court can, first, determine whether or not the *Charter* applies to a given issue; second, if it does, whether the impugned statute is inconsistent with the *Charter*, third, if the statute (or a provision of it) violates the *Charter*, whether it can be saved by section 1 as a "reasonable limit;" and fourth, if the statute cannot be saved by section 1, to apply an appropriate judicial remedy (*Charter* section 24; Dickson 15).

Before the court can delve into the question of whether a statute, or section of it, infringes a *Charter* right or freedom, the court must first ensure that the *Charter* applies to the case. Section 32(1) of the *Charter* provides that it applies to "Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating" to the Territories and to the "legislature and government of each province" (*Charter* section 32). In short, the *Charter* only applies if any government or governmental body makes a decision that affects a person's right or freedom. If the court determines that the *Charter* applies, then it must determine whether or not the statute has indeed infringed upon a *Charter* right or freedom.

Where the court determines such a violation exists, the third step for the court is to determine whether the statute or portion of a statute being challenged represents a

reasonable limit on the individual right or freedom is question (Sharpe 424). Built into the *Charter* is the reasonable limits clause at section 1 and states: "The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*Charter* section 1). Section 1 of the *Charter* allows the courts to balance the importance of the individual right or freedom in question with broader interests of society (Sharpe 66).

The SCC first articulated the test for what constitutes a reasonable limit in *R. v. Oakes*, [1996] 1 S.C.R. 103, ("*Oakes*"), In *Oakes*, the accused, David Oakes, was found guilty of possessing an illegal narcotic banned under the former *Narcotic Control Act*, R.S.C. 1970, c. N-1. Section 8 of the *Narcotic Control Act* provides that where an accused is found guilty of possessing an illegal narcotic, that accused is also guilty of possession for the purposes of distribution (*Oakes* 110). This imposes a reverse onus on the accused, which he or she must then provide evidence that they did not intend to distribute the narcotic. Since David Oakes was found guilty of possession, he was then presumed guilty of possession with the intent to distribute.

Oakes argued that this reverse onus violates the right to be presumed innocent until proven guilty under section 11(d) of the *Charter* because the crime of distribution was presumed. Such a provision is contrary to the principle in criminal law that a person is presumed innocent until proven guilty (*Oakes* 111). The SCC agreed with Oakes and declared that section 8 of the *Narcotic Control Act* was in violation of section 11(d) of the *Charter* (*Oakes* 134). The SCC then turned its focus on whether or not the impugned section could be saved by section 1 of the *Charter* as a reasonable limit on one's right to be presumed innocent.

The *Oakes* case gave the SCC an opportunity to create a test that justifies what a "reasonable limit" ought to look like. The SCC set out two central criteria to establish a limit that is reasonable and demonstrably justified in a free and democratic society: first, the objective of section 1 is to ensure that the legislation is of "sufficient importance to warrant overriding a constitutionally protected right or freedom" (*Oakes* 138). Legislation that is frivolous will not gain section 1 protection. Once the court agrees that the legislation is of significant importance, the means chosen to limit the *Charter* right or freedom must be "reasonable and demonstrably justified" (*Oakes* 139).

This next step requires proportionality that fairly balances the interests of society with those of individuals and groups (*Oakes* 139). The proportionality test breaks off into an additional three steps. First, the legislation must be drafted in such a way as to achieve the objective in question. That is, the objectives must not be "arbitrary, unfair or based on irrational considerations" (*Oakes* 139). The second step requires that where there is a rational connection between the legislation and the objective, there must be a minimal of impairment to the right or freedom in question (*Oakes* 139). And third, "there must be a proportionality between the effects of the measure which are responsible for limiting the Charter right or freedoms, and the objective which has been identified as of "sufficient importance"" (*Oakes* 139) [emphasis in the original]. This requires that the legislation does not have "deleterious effects" on individuals or groups. As such, the more severe the negative effects on individuals or groups, the more important the legislation must be "if the measure is to be reasonable and demonstrably justified in a free and democratic society" (*Oakes* 140).

In *Oakes*, the SCC concluded that the reverse onus in section 8 of the *Narcotic Control Act* did not constitute a reasonable limit on the right to be presumed innocent until proven guilty. Since Oakes was arrested for a small quantity of illegal drugs, "it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity" (*Oakes* 142). This reverse onus is "overinclusive" because it might result in jail time for life. The reverse onus, then, failed the second step of proportionality as it could result in jail time for those carrying negligible amounts of narcotics (*Oakes* 142).

In *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 ("*Irwin Toy*") (which is discussed in Chapter 3.4 below), the SCC eased the strictness of the Oakes test resulting in a greater deference to legislative action through a contextual approach to limiting rights and freedoms under the *Charter*. For example, when discussing minimal impairment, the SCC said that "in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck" (*Irwin Toy* 993). Here, the SCC recognizes the tension between competing groups: those who "will assert that the government should not intrude" on *Charter* rights and vulnerable groups who "claim the need for protection by the government" (*Irwin Toy* 993). However, there are instances

where the courts are not asked to strike a balance between competing groups; rather, the "government is best characterized as the singular antagonist of the individual whose right has been infringed" (Irwin Toy 994). In these sorts of cases, the "courts can assess with some certainty whether the "least dramatic means" for achieving the purpose have been chosen" (*Irwin Toy* 994). The decision in *Irwin Toy*, then, introduced a contextual approach to the section 1 analysis resulting in more deference to legislative action when there are competing rights.

Based on these factors, the court will determine whether the law in question imposes a reasonable limit on the right or freedom.[2] Where the law represents a reasonable limitation based on the justification that the broader interests of society are more valuable than upholding a specific right or freedom, the court will not provide a remedy. However, where there has been both a violation of the *Charter* and a section 1 analysis fails to demonstrate that the law imposes a reasonable limit on one's *Charter* right or freedom, the court will, in accordance with section 24(1) of the *Charter* provide a remedy that is "appropriate and just in the circumstances" (*Charter* section 24(1)). Remedies available to the courts include declaratory relief whereby the court declares that the claimant's rights have been infringed, injunctive relief, and damages (Sharpe 432-444).

More importantly, however, are the remedies that affect legislation, especially as it relates to legal liability for companies. As stated above, section 52 of the *Charter* states that where a law is inconsistent with the *Charter*, that law is of "no force or effect" (*Charter* section 52). This allows the courts to impose a number of remedies such as striking down the legislation or a declaring that a part of the statute is invalid resulting in the severance of it.[3] Where the court finds that an entire statute fails to respect the *Charter*, the court can strike the entire statute down (Sharpe 445). Sensitive to the fact that striking down an entire statute can result in a legislative vacuum, the courts have devised a number of less intrusive remedies (Roach 1143). Out of respect of the role of

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[2] For a comprehensive discussion on how the courts interpret section 1 of the *Charter*, see Robert J. Sharpe's and Kent Roach's "The Charter of rights and Freedoms", 6th edition, at chapter 4.

[3] Since a full discussion of remedies is outside of the scope of this thesis, I will limit my discussion of remedies to two that corporations can leverage in order to escape liability under a statute. For a comprehensive discussion on judicial remedies, see Robert J. Sharpe's and Kent Roach's "The Charter of rights and Freedoms", 6th edition, at chapter 17.

the legislature, the courts opt not to drastically disrupt the structure of statutes. Rather than striking down an entire statute, the courts more commonly elect to sever the unconstitutional portion of the law (Sharpe 445; Roach 1149). Severance nicely balances the courts need to respect the role of legislatures while ensuring that statutes are aligned with the *Charter*.

The ability of corporations to claim rights under the *Charter* and therefore to challenge the constitutionality of statutes before a Canadian court has proven to be an effective tool in reducing corporate liability. Corporations have, for example, initiated *Charter* challenges in the following cases: where a corporation was fined under a statute that limited a corporation's ability to advertise its products directly to children; to remain open on a Sunday; to prevent a corporation's directors and/or officers from appearing in court and presenting evidence that could have damaged that corporation; or to limit the ability of Canadian authorities to conduct investigations. As a legal "person" under Canadian law, corporations have and continue to enjoy the freedom to make such legal arguments under the *Charter*. Where that corporation is successful in its challenge, it may avail itself of one of the judicial remedies (discussed above). The result is that corporations can effect legislative change through the courts by having a section of a statute severed resulting in no fine or punishment for that corporation (this will be discussed throughout this chapter).

In the following section, I will provide a summary of cases involving corporate legal challenges under the *Charter*. I will focus on SCC cases only, some successful, where corporations have argued that they are entitled to a broad range of rights and freedoms. In doing so, I will delve into the reasons of the SCC to expose the way in those judges discuss corporate rights under the *Charter*. This in-depth discussion will allow me to argue that courts have hypostatized corporations. The result has been, I will attempt to show, that the SCC has narrowed the discourse on what a corporation is. The result is that corporations can use the *Charter* as a tool to alter Canadian law to better suit their pursuit of profit.

3.2. Introduction to the *Charter* Rights of Corporations

Since nearly the advent of the *Charter*, Canadian courts have assimilated corporations into the broader category of rights bearers. The courts have granted

standing to corporation either through the public interest standing or private standing. Canada has long standing rules that generally "relate to the question posed, rather than the party posing it" (Ross 155). When public interest standing is sought, three considerations, as set out in the *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 ("*Canadian Council*") must be satisfied: "first, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff [the one seeking standing] is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?" (*Canadian Council* 253). If the plaintiff can establish a positive answer to the first two questions and a negative answer to the final question, that plaintiff will be successful in gaining standing before the courts. The justification for public interest standing is to "avoid immunizing government laws and actions from judicial scrutiny" (Philips 23).

In addition to public interest standing, a plaintiff may seek standing through private standing. This requires the plaintiff who is challenging the constitutional validity of a law to "show exceptional prejudice arising from, or special interest in, the challenged law" (Ross 175). This rule was is limited to parties that are the subject of penal proceedings (Ross 178-179). Where an applicant seeks standing, they must seek public interest standing. Where this is not possible, the applicant "needs to show not only special prejudice, but that his or her Charter rights are affected" and is applicable both to individuals and corporations (Ross 179-180).

Once granted standing, courts will entertain arguments about whether a corporation actually possesses a *Charter* right or freedom. This is done through the purposive approach. The purposive approach requires the court to analyze the purpose of the right or freedom at issue and then determine whether the corporation has an interest that accords with the purpose of that right or freedom (Tollefson 321). If the corporation has an interest that accords with the purpose of the right or freedom then the courts will include corporations among those that bear rights and freedoms. This approach may, therefore, result in the assignment of rights and freedoms to corporations thus rendering "corporate standing or status [as] largely irrelevant" (Tollefson 321).

To aid in making a determination of whether a corporation has rights or freedoms under the *Charter*, Tollefson argues that the courts have, at times, relied upon the "corporate theory" approach. This approach, he argued, resulted in the courts delving into the nature of corporations to determine if they are sufficiently human to warrant the granting of a *Charter* right or freedom (Tollefson 322). One such corporate theory is the natural entity theory which provides that corporations have "an inner material or social reality existing prior to, and independent of, positive law" (i.e. person-made law) (Tollefson 318). The source of corporate being, then, does not arise out of the statutory law that enables its existence or as the sum total of shareholder rights that culminate in the fiction known as a corporation (Tollefson 315). Rather, the corporation is a real entity and the law merely recognizes its existence (Tollefson 319).

The SCC has relied upon each of the abovementioned ways to articulate corporate rights under the *Charter*. I will discuss SCC cases and for each, I will point out which of the approaches judges have relied upon. When determining what interest a corporation has through the purposive approach, the courts make corporate theory-like arguments, which imply that corporations have an "inner or social reality." Additionally, however, the SCC drops a purposive approach and focusses only on corporate theory (especially in the "life, liberty and security of the person cases in chapter 3.5 below). I will conclude that granting a corporation standing, utilizing the purposive analysis, and/or engaging in corporate theory result in the same mistake: the mistake that corporations are something that exist independent of positive law to which language, and therefore, the law must conform. I will urge that when the SCC (or any court) argues that corporations should or should not have rights through a purposive analysis or corporate theory approach, they are assuming that corporations are facts out there in the world that require an accurate use of language to correctly portray their internal facts in the same fashion as when Canadian courts conduct a purposive analysis for natural persons. Similarly, I will argue that granting standing to corporations commits the same mistake.

In chapters 3.3 to 3.10 of this thesis, I will discuss the varied approaches the SCC has employed in addressing corporate rights under the *Charter*. While some cases result in successful *Charter* challenges by corporations, some do not. However, my overall conclusion remains that the totality of corporate cases relying on the *Charter* that have been before the SCC have resulted in the hypostatization of corporations. This

hypostatization is dangerous given the law relating to internal corporate governance . In chapter 4, I will expand upon this idea but showing how the law, both statutory and case law, is set up to not only allow corporations to act solely with self-interest but how, at times, the law demands this.

3.3. Freedom of Religion Cases

In the early cases involving the *Charter*-based freedom of religion, the SCC granted corporations standing to challenge legislation on the basis that it violated a provision of the *Charter*. Of these, one of the earliest *Charter* cases involving a corporation was an appeal to the freedom of religion in the *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 case. The SCC found that while corporations are not things that are capable of having religious views, the court was concerned that the purpose of any particular legislation could violate this *Charter* right. As such, even a corporation had standing to bring such a legal action.

Big M Drug Mart Ltd., a corporation, was found to be in violation of the now repealed *Lord's Day Act*, R.S.C. 1970, c. L-13. The *Lord's Day Act*, with certain exceptions, prohibited any sale or purchase of goods and prohibited or to employ a person to work on the Lord's Day. The Lord's Day was defined as "the period of time that begins at midnight on Saturday and ends at midnight on the following night" (sections 2 and 4 of the *Lord's Day Act*; *Big M Drug Mart* 301). Big M Drug Mart Ltd. was fined under the *Lord's Day Act* for selling goods on a Sunday.

Big M Drug Ltd. then challenged the fine in court by arguing that the *Lord's Day Act* violated the corporation's freedom of religion under section 2(a) of the *Charter*, freedom of conscience and religion. In addressing this issue, the SCC had to determine whether or not a corporation had standing to bring a *Charter* challenge. The Attorney General for Alberta argued that a corporation, being an artificial person, the creation of which is only enabled through statutes, cannot have "a conscience or hold a religious belief. It cannot, therefore, be protected by s. 2(a) of the *Charter*" (*Big M Drug Mart* 312). In response, the SCC said that a person may seek a remedy under the *Charter* "whether real persons or artificial ones such as corporations" (*Big M Drug Mart* 313; Tollefson 323). Whether or not the person seeking the remedy can enjoy the right or freedom is irrelevant (Tollefson 323-324).

The point, according to the SCC, is not that a corporation may or may not enjoy or exercise freedom of religion. Rather, the legislation has the effect of infringing upon one's right to religion. Similarly, the SCC went on, an atheist would be entitled to bring a claim under the *Charter* despite an atheist having no religious affiliation (*Big M Drug Mart* 314). And freedom of religion marks a "truly free society" which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms" and that "[f]reedom must surely be founded in respect for the inherent dignity and the inviolable rights of the *human* person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (*Big M Drug Mart* 336) [emphasis mine]. The SCC concluded that the purpose of the *Lord's Day Act* violated one's freedom to religion and therefore, the proper remedy was to declare the statute invalid, which conferred a benefit not only to natural persons but also corporations (*Big M Drug Mart* 367).

R. v. Edwards, [1986] 2 S.C.R. 713 ("*Edwards*") is another early *Charter* case concerning freedom of religion (the issue of life, liberty and security of the person also arose and that portion of this case will be discussed below). In this case, Edwards Books and Art Limited ("Edwards") (together with three other corporate appellants) challenged the constitutionality of an Ontario statute entitled the *Retail Business Holidays Act*, R.S.O. 1980, c. 453 on the basis that it violated section 2(a) of the *Charter* (*Edwards* 724). Section 2 of the *Retail Business Holidays Act* prohibited the sale of goods by retail on a holiday, which included Sundays. Edwards (and others) were charged and convicted for failing to comply and Edwards in particular remained open between the hours of 11 am and 6 pm on Sundays (*Edwards* 724 and 728).

The purpose behind the *Retail Business Holidays Act* was to provide retails workers with holidays, holidays that included secular holidays such as Canada and Labour Day to allow families and friends the opportunity to coordinate holidays and spend their days off with others (*Edwards* 744-745). Furthermore, the Law Reform Commission prepared a report citing that since "Saturday has come to be regarded as a retail shopping or market day" so Sunday was selected as the day for business closures, but for secular reasons (*Edwards* 745-746). The SCC did not accept the argument that

this law was motivated by strictly secular means as it did not accommodate both employees and shoppers for whom Saturday is the Sabbath (*Edwards* 766). As such, the SCC concluded that the *Retail Business Holidays Act* violated section 2 of the *Charter*. However, the SCC concluded that despite the constitutional infringement, the legislation was saved by section 1 on the basis that the "infringement is not disproportionate to the legislative objectives" and a "serious effort has been made to accommodate the freedom of religion of Saturday observers" (*Edwards* 783). Like the *Big M Drug Mart* case where the SCC granted standing to Big M Drug Mart Ltd, the SCC similarly granted Edwards standing. This same issue came up again in the *Hy and Zel's Inc. v. Ontario (A.G.)*, [1993] 3 S.C.R. ("*Hy and Zel's*") case in which corporations challenged the constitutionality of the same Ontario statute, the *Retail Business Holidays Act*.

Hy and Zel's Inc. (together with another company, Paul Magder Furs Limited) challenged the constitutional validity of Ontario's *Retail Business Holidays Act*. To reiterate, this statute limited holiday shopping including on Christmas Day and Sundays (*Hy and Zel's* 684). Hy and Zel's Inc. and Paul Magder Furs Limited both argued that the *Retail Business Holidays Act* infringed on section 2(a), freedom of religion and conscience, and section 15, the right to be treated equally, of the *Charter* (*Hy and Zel* 688). In December of 1989, the Ontario government ordered Paul Magder Furs to close on Sunday (Christmas Eve), Christmas Day and Boxing Day under the authority of section 8 of the *Retail Business Holidays Act* (*Hy and Zel's* 685). Section 8 provides that the Attorney General may order a business closed and impose any other penalty (*Hy and Zel's Inc.* 685). Paul Madger Furs challenged this closure. Similarly, and also in December of 1989, the Attorney General brought an application against Hy and Zel's for their failure to comply with the *Retail Business Holidays Act* (*Hy and Zel's Inc.* 687).

Both corporations brought separate legal actions and both cases ended up before the SCC because of the duplication of issues. Like *Big M Drug Mart*, there was no argument made in support of a corporation possessing freedom of religion; however, there was a lengthy discussion involving the appropriateness of granting standing where "the party does not claim a breach of its own rights under the *Charter* but those of others" (*Hy and Zel's Inc.* 690). In concluding this case, the SCC stated that the appellants (Hy and Zel's and Paul Magder) did not present sufficient evidence to support their claim and failed to show that their own religious rights have been violated

"[a]ssuming that corporations can have religious rights" (*Hy and Zel's Inc.* 692-693). As such, the SCC denied the appellants standing.

Unlike the *Big M Drug Mart* case but consistent with *Edwards*, the *Hy and Zel's Inc.* case did not result in a victory for the corporate entities. The law remains that, when appropriate, corporations can attain standing to not only challenge legislation under section 2(a) of the *Charter* but, when successful, to benefit from such a challenge. While the court employed a purposive approach to understanding freedom of religion in the latter two cases, the court admitted that corporations have no such interest. But this is irrelevant. Corporations, like Big M Drug Mart, are still able to benefit from a *Charter* challenge. Unlike religion which is not a right belonging to corporations, however, the SCC has included corporations among those entitled to free expression.

3.4. Freedom of Expression Cases

In adjudicating over freedom of expression cases under section 2(b) of the *Charter*, the SCC has included commercial expression as a type of expression worthy of protection. While the courts have categorized types of expression into, for example, commercial or political expression, the content of the expression is not at issue. The SCC, in cases such as *Canada (A.G.) v. JTI-Macdonald Corp*, [2007] 2 S.C.R. 610, has declared that the freedom of expression is "content-neutral and protects the expression of both truths and falsehoods" (637). The focus of this section is on commercial expression. I will neither argue whether commercial expression is worthy of protection under the *Charter* nor the degree of protection commercial expression ought to be granted under section 1. However, I will argue that whether or not expression is classified as commercial misses the point when the expression derives from a corporation. Unlike the freedom of religion cases above, the SCC hypostatizes corporations by implying that corporations have an interest in the right to freely express themselves.

In *Devine v. Quebec (A. G.)*, [1988] 2 S.C.R. 790 ("*Devine*"), the SCC had to grapple with whether the *Charter of the French Language*, R.S. Q., c. C-11 infringed on a person's *Charter* protected right to freedom of expression. The *Charter of the French Language* made French the official language of Quebec and stated that catalogues, brochures and other publications must be in French (section 52), and that public signs,

posters and commercial advertising must be in French (section 58) (*Devine* 799). The appellant, a corporation by the name of Allan Singer Ltd., brought an action challenging the constitutional validity of the *Charter of the French Language*. The SCC agreed with the appellant that a legislative compulsion to communicate in a particular language – French, in this case – infringed one's freedom of expression. In this case, the SCC determined that the scope of section 2(b) includes not only political expression but also commercial expression. The SCC reasoned that it "protects listeners as well as speakers" and "plays a significant role in enabling individuals to make informed economic choices" which makes up an "important aspect of individual self-fulfillment and personal autonomy" (*Ford* 767) (the SCC cited the *Ford* case below in support of its conclusions).

By granting a corporate entity the freedom to express itself under the *Charter*, the SCC justified it because it aids in the "self-fulfillment and personal autonomy" of natural persons. Granting freedom of expression to corporations ultimately benefits people. However, the SCC overlooked the role of advertising, which is the primary way in which a corporation relies on freedom of expression. Advertising is about "improving brand recognition, market demand, and the overall profitability of the enterprise" (Bauman 83). While the emphasis on how granting *Charter* rights and freedoms to corporation affects individuals (which is something I will discuss in chapter 6), the claim that self-actualization is attained, at least in part, through a corporation's ability to express itself through marketing is spurious. This argument also fails to address any drawbacks to granting these rights to corporations.

The SCC had a further opportunity to address whether commercial expression is a type of expression protected by the *Charter* in the *Ford v. Quebec (A.G.)* [1988] 2 S.C.R. 712 ("*Ford*") case. This case was brought by a number of respondents who claimed that the Quebec government's *Charter of the French Language* violated a person's right to freely express themselves, similar to the *Ford* case. In particular, the *Charter of the French Language* required all public signs and posters, and commercial advertising to be in French. Various respondents, who were found to be in violation of this law, including a number of corporations, challenged this legislation on the grounds that it violated their *Charter* protected freedom of expression (*Ford* 721).

Once again, the SCC framed the debate, at least in part, around whether freedom of expression extends to commercial expression (*Ford* 754). In arguing against the protection of commercial expression, the Attorney General of Quebec said that to "extend freedom of expression beyond political expression, and possibly artistic and cultural expression, would trivialize that freedom and lead inevitably to the adoption of different justificatory standards under s.1 [of the *Charter*] according to the kind of expression involved" (*Ford* 763). Moreover, "[f]reedom of commercial expression, and in particular commercial advertising, does not serve any of the values that would justify its constitutional protection. Commercial advertising is manipulative and seeks to condition or control economic choice rather than to provide the basis of a truly informed choice" (*Ford* 763). However, the SCC disagreed. They stated that the Charter "should be given a large and liberal interpretation" and, as such, there "is no sound basis on which commercial expression can be excluded from the protection under s. 2(b) of the *Charter*" again because freedom of expression is content neutral (*Ford* 767). Furthermore, commercial expression has an "intrinsic value as expression" and "protects listeners as well as speakers" by allowing individuals to make "informed economic choices, an important aspect of individual self-fulfillment and personal autonomy" (*Ford* 767).

Unlike the *Devine* case, the *Ford* case goes beyond just the effects that commercial speech may have on the listener of speech and shifts the focus to the "intrinsic value" of commercial expression. This intrinsic value, according to the SCC, arises on the basis of three rationales: democratic self-government; the creation of a competitive market-place of ideas; and truth for its own sake because it is an aspect of individual autonomy and self-realization (*Ford* 765). The hidden assumption is that corporations, like natural persons, are capable of partaking in the expression of this extrinsic value. In chapter 4, I will argue that corporations are not created to partake in these "intrinsic values" but are created with the sole goal to pursue profit (I will argue this in Chapter 4 below).

In *Irwin Toy*, the SCC affirmed the decision in *Ford* while broadening its application. The SCC had to decide whether Quebec's *Consumer Protection Act*, R.S.Q., c. C-40.1 violated Irwin Toy Ltd.'s freedom to express itself. Section 248 of the *Consumer Protection Act* provided that "no person may make use of commercial advertising directed at persons under thirteen years of age" while section 249 provides that "directed to" takes into consider the "context of the presentation" including "the

nature and intended purpose of the goods advertised." Irwin Toy Ltd. was found by the appropriate Quebec authorities to be in violation of this provision and was fined in accordance with the statute (*Irwin Toy* 1002). Irwin Toy then challenged the fine by initiating a *Charter* challenge arguing that sections 248 and 249 (among others) of the *Consumer Protection Act* violated its *Charter* protected right to expression under section 2(b).

The SCC concluded that "there is no sound basis on which to exclude commercial expression from the sphere of activity protected by section 2(b) of the *Charter*" (*Irwin Toy* 967). The SCC went on to say that expression is fundamental "because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual" (*Irwin Toy* 968). In short, the SCC determined that Irwin Toy's speech was consistent with the purpose of freedom of expression under the *Charter*.

While Irwin Toy was ultimately unsuccessful in its *Charter* challenge before the SCC (it lost the case on the basis that it could not satisfy the section 1 analysis of the *Charter*), Irwin Toy was successful in entrenching freedom of expression for corporations. In *Devine*, the SCC seemed to allow corporations freedom of expression by proxy because it ultimately served the interests of natural persons. In *Irwin Toy*, the freedom did not come by way of proxy but belonged to corporations because of the inherent value of freedom of expression itself. The decision in *Irwin Toy* squarely sets corporations alongside natural persons as bearers of some rights.

The *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 case considered whether restrictions on advertising imposed by the College of Dental Surgeons on its members violated the section 2(b) of the *Charter* (*Rocket* 235). The case involved two dentists, Howard Rocket and Brian Price, who were charged with violating certain regulations under a regulation of the *Health Disciplines Act*, R.R.O. 1980. This regulation prevented advertising deemed "disgraceful, dishonourable or unprofessional" but permitted advertising that is limited to a certain size of advertising in a newspaper, not to appear more than three times in the newspaper, and allows information such as geographical location, name of the dentist, contact information and academic qualifications (among other things) (*Rocket* 236-238). Drs. Rocket and Price created a corporation called Tridont Dental Centres, a large chain of dentist offices

across Canada. They advertised with language indicating that their business model was the future of dentistry, how they had grown in size, and that they stay at the Holiday Inn when they travel because like their company, the Holiday Inn recognizes and responds to their changing needs (*Rocket* 236-237).

The central issue, then, revolved around whether the regulation in the *Health Disciplines Act* violated section 2(b) of the *Charter*. The SCC characterized this case as the need to strike a balance between "two values recognized in our society – the need to regulate the scope of professional advertising on the one hand and the value of free expression on the other", a balance struck through a section 1 analysis (*Rocket* 241). In recognizing that commercial expression is protected by the *Charter*, the court said that this type of expression must be considered in light of section 1. To shed light on the issue, the SCC considered how the U.S. courts have addressed the U.S. First Amendment in the context of commercial expression. While the U.S. Constitution lacks an equivalent section 1, the SCC pointed out that the U.S. courts have dealt with different types of expression differently (*Rocket* 242).

Specifically, U.S. courts treat commercial expression with less rigour than other forms of expression. The SCC pointed out the U.S. courts do the following:

> In order to justify a restriction on commercial speech, the state must establish that: (1) the restriction serves a substantial interest; (2) the regulatory measure directly advances that interest; and, (3) the restriction is no broader than necessary to advance that interest (*Rocket* 242).

In Canada, the courts will determine first, whether the legislation in question violates the relevant section of the *Charter*. Then, on a section 1 analysis, the court will consider whether the limitation is reasonable. In the U.S., the equivalent "reasonable limit" is built in to whether or not there is a limitation on freedom of speech at all. So, on the first step of the analysis, the SCC concluded that the relevant sections of the Regulation in question do indeed violate the right of Drs. Rocket and Price to freely express themselves (*Rocket* 245).

Analogous to the way in which freedom of speech is constitutionally protected in the U.S., the SCC in this case said that section 1 of the *Charter* permits the courts in Canada to take "a sensible, case-oriented approach to the determination of their

constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question" (*Rocket* 246-247). In short, "not all infringements of freedom of expression [are] equally serious" (*Rocket* 247). For the purposes of this case, the SCC revealed the tension between a dentist's economic interests in advertisement with the need for consumers to be given sufficient information to enable them to select a dentist (*Rocket* 247). In considering this, the court compared the facts in *Rocket* to the facts in *Irwin Toy*. In the latter case, the Quebec government put in place a provision to protect a vulnerable group, specifically children, from manipulative advertisements aimed at children. The advertisement in *Rocket* is more about consumer choice than protecting a vulnerable group. For this, and other reasons, the SCC concluded that the Regulation cannot be saved under section 1. While this case protects the commercial expression of natural persons, it is instructive on how commercial expression is dealt with in Canada, whether or not the defendant is a corporation.

The type of expression becomes important in the section 1 analysis. It allows courts to extend stronger protections to types of expression that are deemed to be of higher value. Conversely, the court can extend less protection to less valued types of expression, like expression for economic purposes (*Rocket* 247; Bauman 84). So where the expression is purely economic, the court might be more apt to determine that there are reasonable limits (under a section 1 analysis) to *that* type of expression (Bauman 84). Despite the varying strength of protection granted to free expression under a section 1 analysis of the *Charter*, the SCC in *Rocket* once again concretized the protections afforded to corporations in the context of freedom of expression.

One of the most important cases in the fight for freedom of expressions is the *RJR-McDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 ("*RJR*") Among the numerous constitutional issues that arose in this case, RJR -McDonald Inc. ("RJR") challenged the *Tobacco Products Control* Act, S.C. 1988, c. 20, a federal statute aimed at protecting Canadians, especially young people, from the threat to health posed by tobacco through a prohibition on advertising and promotion of tobacco products (*RJR* 224). This case arose, in part, on the requirement that tobacco manufacturers display health warning on their packages (*RJR* 224). RJR challenged the constitutionality of the *Tobacco Products Control Act* and claimed that it limited its freedom of expression under section 2(b) of the *Charter* (*RJR* 239).

The cases on freedom of expression, above, have shaped the debate around a corporation's right to express itself. Because of this case law, the Canadian Attorney General (the lawyers responsible for defending government legislation before the SCC) conceded at the outset that the *Tobacco Products Control Act* does infringe on RJR's right to freedom of expression. The SCC agreed citing such cases as *Ford v. Quebec*, Irw*in Toy*, and *Rocket v. Royal College of Dental Surgeons of Ontario* as support for the proposition that commercial expression is protected under section 2(b) of the *Charter* (*RJR* 267). However, after conducting a section 1 analysis, the court did say that certain types of expression attract a more robust freedom than others.

Justice La Forest said that "the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitled it to a very low degree of protection." This type of advertising serves no "political, scientific or artistic ends; nor does it promote participation in the political process" (*RJR* 282-283). All it does is serve the singular purpose of informing "customers about, and promote[s] the use of, a product that is harmful, and often fatal, to the consumers who use it" (*RJR* 283).

In addition to the subject-matter of commercial expression, the courts also pointed out that tobacco corporations spend tens of millions of dollars on sophisticated advertising that "undermines their claim to freedom of expression protection because it creates an enormous power differential between these companies and tobacco consumers in the "marketplace of ideas"" (*RJR* 283). Moreover, these companies spend additional money to allow them to employ the most advanced "social psychology techniques to convince potential buyers to buy their products" (RJR, 283). These arguments, by virtue of being made in the context of section 1, are about the balancing act the courts' must strike between the *Charter* and what the legislation aims to protect. It is not about whether corporations ought to enjoy protections under the *Charter*. As such, the court held that while the *Tobacco Products Control Act* infringes on RJR's freedom of expression, the infringement is justifiable under section 1 of the *Charter*.

The SCC went on to say that Parliament's decision to ban tobacco advertising was in lock step with "over 20 democratic nations" that have adopted complete bans on tobacco advertising" (*RJR* 308). That there was a need for government to regulate the

advertisement of tobacco seems patently reasonable; to allow a corporation to attempt to undo this legislation through the *Charter* is not. However, the court's commitment to the purposive analysis and the degree of protection granted under section 1 of the *Charter* has resulted in a detraction from what the courts ought to be doing, namely, whether corporations should be allowed to make this type of argument in the first place.

The reasons in *RJR* represent a departure from previous arguments made by the SCC. In earlier cases, the court argued that advertising confers a benefit on individuals because it helps them self-actualize or that freedom of expression has intrinsic value. In *RJR*, the SCC (and in other, more recent freedom of expression cases) freed itself from the rigid application of freedom of expression by dropping these justifications in favour of one that sees that different types of expression ought to receive varying degrees of protection. Despite the judicial concession that not all forms of expression deserve equal protection under section 1 of the *Charter*, the SCC in the *RJR* case continued on the same trajectory of previous SCC cases on the *Charter* right for freedom of expression of articulating a purposive approach to freedom of expression and continuing to classify corporations as bearers of that right. This assumption was carried into the *Thomson Newspapers v. Canada*, [1998] 1 S.C.R. 877 ("*Thomson 1998*"), case.

The *Thomson 1998* case, another *Charter* challenge, involved two media corporations, Thomson Newspapers Company Limited and Southam Inc., which challenged section 322.1 of the *Canada Elections Act*, R.S.C., 1985, c. E-2. This section of the *Canada Elections Act* "prohibits the broadcasting, publication, or dissemination of opinion survey results in the final days of a federal election campaign" (*Thomson 1998* 928). Each of the above-named parties brought an application in Ontario's court for a declaration that section 322.1 of the *Canada Elections Act* violates section 2(b), freedom of expression, and section 3, the right to vote, of the *Charter*. The court skipped its discussion of section 3 of the *Charter* and instead settled the issue on the basis of section 2(b). However, in doing so, the SCC did not comment on the fact that two corporations attempted to bring this claim. There was no distinction about whether these parties had this right or whether they just had standing to bring this claim.

The SCC did conclude, though, that section 322.1 of the *Canada Elections Act* does in fact violate the section 2(b) of the *Charter* (*Thomson 1998* 938). The SCC said that "there can be no doubt that the publication of polling information, and more

specifically opinion survey results, is an activity that conveys meaning" and it "restricts freedom of expression by prohibiting the broadcasting, publication or dissemination of opinion survey result during the final three days of an election campaign" (*Thomson 1998* 938). In finding the *Charter* does not save the infringement of section 2(b), the court reinforced the idea that expression is to be considered in context. That is, *Charter* protection "may vary depending on the nature of the expression at issue" and the "value of expression may be more easily outweighed by the government objective" (*Thomson 1998* 943). The SCC decided that the weight to be given to opinion polls is high because they are "an important part of the political discourse, as manifested by the attention such polls receive in the media and in the public at large, and by the fact that political parties themselves purchase and use such information" (*Thomson 1998* 943). And while the government's objective through section 322.1 of the *Canada Elections Act* is "to prevent the distorting effect of public opinion survey results which are released late in the election where there is no long a sufficient opportunity to respond," it was not a strong enough reason to override freedom of expression (*Thomson 1998* 946).

The final case on corporate freedom of expression cases is the *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 ("*Little Sisters*") case. It involved Little Sisters Book & Art Emporium, a Vancouver-based bookstore and corporation that imported erotica from the United States, had its shipments seized or ordered returned, or delayed for months by Canadian Customs (*Little Sisters* 1136-1137). Seizures included materials such as "magazines, videos and photographic essays" in addition to "books consisting entirely of text, including works by internationally acclaimed authors such as" Marguerite Duras and Jean Genet and included AIDS/HIV safe-sex education literature (*Little Sisters* 1138-1139). Despite the conduct of Canadian Customs, Little Sisters was given no reason for the delays or returns.

The conduct of Canadian Customs disrupted Little Sister's business such as "planned book launches, causing loss of business to competitors stocking the same delayed or prohibited items, and items such as magazines, which depend for their shelf value on their timeliness" (*Little Sisters* 1140). The SCC, however, said that this case is not about the financial losses that Little Sisters suffered; rather, it is about "the loss by a minority of the freedom to read and experience a broad range of writing and depictions, some of it claimed to be of high artistic value" (*Little Sisters* 1140). But Canadian

Customs did not employ a consistent approach to all imported material. On behalf of the SCC, Justice Binnie said that Little Sisters had identified 261 items that were detained between 1984 and 1994 and, among those items, some had been previously ruled acceptable for entry into Canada (*Little Sisters* 1140). In short, the SCC accepted the idea that Little Sisters was the target of unfair treatment by Canada Customs.

Canada Customs is entitled under section 99 of the *Customs Act*, R.S.C., 1985, which provides that Customs officers may inspect imported goods and mail and may do so without the consent of the addressee (*Little Sisters* 1143). Pursuant to the classification scheme under the *Customs Act*, customs officials may deem something as "obscene" (*Little Sisters* 1143). In response, Little Sisters initiated a *Charter* challenge on the basis that the relevant provisions in the *Customs Act* violated both section 2(b), freedom of expression, and section 15(1), the right to equality, under the *Charter* (*Little Sisters* 1147-1148 and 1151-1152). Specifically, the issue surrounding freedom of expression required the courts to consider whether the empowerment of customs officials to determine what constitutes "obscene" infringes on their right to freedom of expression. The specifics of the right to equality will be explained below.

In relation to freedom of expression, Little Sisters believed that the flexibility built into the *Customs Act*, such that Customs officers have the discretion to determine what constitutes obscene, is the crux of the issue. In answer to this, the SCC concluded that "the fact Parliament opted for the more flexible routes of delegated regulation and ministerial directive, is not, I think, a reason to invalidate the legislation itself" (*Little Sisters* 1196). However, the SCC noted that Little Sisters was the target of Customs officers with little to no evidence to support claims that their goods were obscene. There was "excessive and unnecessary prejudice" that included "failure by Customs to devote a sufficient number of officials to carry out the review of [Little Sister's] publications in a timely way", a "failure to adopt internal deadlines and related criteria for the expeditious review of expressive materials" and a "failure to provide [Little Sisters] with in a timely way with notice of the basis for detention of publications, the opportunity to make meaningful submission on a re-determination, and reasonable access to the disputed materials for that purpose" (*Little Sisters* 1202-1203). All this led to a finding that the relevant sections of the *Customs Act* were applied in a manner contrary to section 2(b) of the *Charter* (*Little Sisters* 1203); however, they were saved by section 1 (*Little Sisters* 1205).

The SCC in the *Little Sisters* case returned to the rationale that the protection of free expression to protect the interests of others (in this case, the readers of Little Sister's literature). Also, there fails to be in this case, like all the other cases on freedom of expression, a discussion on the source of that speech. Instead, there is continued judicial reinforcement that commercial expression for corporations deserves protections under the *Charter*. The legal discourse, then, revolves around the degree of protection the expression in question ought to receive under section 1 of the *Charter*. This is based in large part on the SCC's purposive analysis used to interpret and apply *Charter*-based rights and freedoms. By uncovering the purpose of freedom of expression as having an intrinsic value, the SCC has found that corporations have interests that accord with these intrinsic values. Case law surrounding freedom of expression has evolved from early cases that merely included "commercial expression" as protected speech with little concern for the source of the expression. The SCC advanced its analysis by considering what effect granting freedom of expression had on individuals. Unfortunately, the advancement still identifies corporations as a member of "persons" that bear rights and freedoms under the *Charter* while leaving the strength of the protection granted to be decided in a section 1 analysis.

In addition to the purposive approach in cases involving the *Charter* protected right to life, liberty and security of the person, the SCC also relies upon corporate theory to defend the notion that corporations are not sufficiently human to attain such rights. Again, the argument of whether freedom of expression includes commercial expression is not a concern for this thesis. Rather, the problem requires an analysis on who deserves protection under the *Charter*. The SCC failed to raise this problem but instead further concretized the application of freedom of expression to corporations by arguing in favour of commercial expression, generally, but they failed to distinguish the source of the expression.

3.5. The Right to Life, Liberty and Security of the Person

The purposive approach to interpreting the *Charter* has, as in the freedom of expression cases above, resulted in the granting of such rights to corporations. However, the SCC has also found that corporations are not sufficiently person-like to extend them certain *Charter* rights or freedoms. The right to "life, liberty and security of

the person" found in section 7 of the *Charter* is one such right. The first case to consider section 7 of the *Charter* was *Irwin Toy*.

As already discussed, Irwin Toy challenged the constitutionality of Quebec's *Consumer Protection Act* on the basis that it limited its right to freely express itself. Similarly, Irwin Toy argued that this same statute also violated its right to "life, liberty and security of the person" found in section 7 of the *Charter*. The SCC considered whether corporations are able to claim such a right: "There is, however, an issue…namely whether corporations can invoke s. 7 of the *Charter* in their aid" (*Irwin Toy* 1001). The SCC said that "a corporation cannot avail itself of the protection offered by s. 7 of the Charter" (*Irwin Toy* 1002-1003).

In rejecting the argument that section 7 of the *Charter* applies to a corporation, the court said that in order to be successful, "the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice" (*Irwin Toy* 1002)[4]. The SCC turned to a discussion of economic rights under section 7 and determined that economic rights "are not within the perimeters of the s. 7 guarantee" *(Irwin Toy* 1003). They did not rule out economic liberty as part of the section 7, however.

According to the SCC, part of section 7 does allow for certain economic protection, like "social security, equal pay for equal work…and contract rights" (*Irwin Toy* 1003; Bauman 85). However, the SCC continued, "we do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights" and that "the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section" (*Irwin Toy* 1003-1004) [emphasis in the original].

This move away from purely economic rights in section 7 of the *Charter* resulted in the SCC declaring that section 7 "was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" [under section 7 of the *Charter*] serves only to

[4] The principles of fundamental justice include the right to be secure against unreasonable search and seizure and self-incrimination (*Thomson 1990* 462).

underline the human element involved; only human beings can enjoy these rights" (*Irwin Toy* 1004). Despite being successful in securing freedom of expression as a right that properly applies to corporations, the SCC concluded that corporations are not sufficiently person-like to attract protection under section 7.

In *Irwin Toy*, the SCC provided a fulsome discussion about the non-applicability of section 7 to corporations. However, the SCC gave short shrift to this same issue in *Edwards* (the case involving the constitutionality of Ontario's *Retail Business Holidays Act*). The SCC claimed that the appellant's arguments on this issue were "without merit" (*Edwards* 786). Additionally, the SCC failed to provide any discussion about the availability of this argument for corporations in *Edwards*. Despite the brevity on whether section 7 of the *Charter* is available to corporations in the *Edwards* case, the SCC upheld the decision in *Irwin Toy* in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.R. 1 425 ("*Thomson 1990*"). However, because there were natural persons involved in the *Thomson 1990* appeal, the SCC's ruling indirectly benefited Thomson Newspapers.

The *Thomson 1990* case presented the SCC the opportunity to consider the *Combines Investigation Act*, R.S.C. 1970, App. III and whether certain of its provisions infringed upon a person's right to be secure against unreasonable search and seizure (this issue will be addressed in chapter 3.6 below) and whether it infringed on one's right to life, liberty and security of the person under section 7 of the *Charter*. Thomson Newspapers was, at the time of this case, a large Canadian publication company and its management consisted of Brian Slaight, Executive Vice-President, Peter Bogart, Vice-President Finance, and Paul Weeks, who was the controller. These men were ordered to appear before the Restrictive Trade Practices Commission to determine whether Thomson or any of its subsidiary companies had committed the offence of predatory pricing under section 34(1)(c) of the *Combines Investigation Act* (*Thomson 1990* 446).

Section 17 of the *Combines Investigation Act* empowered the Commissioner to "subpoena, administer the oath and question" witnesses and, should the witness fail to testify, the Commission could make a finding of contempt and had the authority to punish that witness (*Thomson 1990* 443). It also allowed the Director under the statute to compel an individual to be examined under oath and to produce records or other documents. To do so, the Director did not need to hold any belief that a violation under

the statute occurred and was not required to disclose the grounds for obtaining the order. Additionally, the order would be granted by way of an *ex parte* application and hearing (an *ex parte* hearing does not require all the parties to be present in order for the court to render a decision) (*Thomson 1990* 455-456). While the SCC upheld the decision in *Irwin Toy* stating that section 7 of the *Charter* does not apply to corporations, the SCC said that section 7 was applicable in this case since the *Thomson 1990* case involved not only a corporation but the above-mentioned managers. Furthermore, if the court found that the relevant sections of the *Combines Investigation Act* were inconsistent with section 7 of the *Charter*, then section 17 of the *Combines Investigation Act* would be of "no force or effect in respect of corporations" (*Thomson 1990* 459).

In determining this, the SCC found that the "right against non-compellability and the right against self-incrimination are part of the principles of fundamental justice" under section 7 of the *Charter* (*Thomson 1990* 470). The SCC concluded that section 17 of the *Combines Investigation Act* violated section 7 of the *Charter* to the extent that it allows the "Director to compel suspects to testify in an investigatory proceeding so as to build up a case against themselves through their own self-incriminating testimony and evidence" and cannot be saved by section 1 (*Thomson 1990* 486 and 490).

In addressing whether the appellant, Thomson Newspapers, could initiate a *Charter* challenge, Justice Lamer stated that section 7, the right to life, liberty and security of the person, of the "*Canadian Charter of Rights and Freedoms* is engaged because human beings as well as a corporation are directly involved" (*Thomson 1990* 442). The SCC was clear that if there was a violation of section 7 for a natural person, the corporation would derive an indirect benefit because the offending provision would be deemed invalid and of no force. In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 199 ("*Wholesale*"), there was an absence of natural people involved in the case so the SCC returned to its justification that corporations have standing to challenge legislation under section 7 of the *Charter*.

Wholesale Travel Group Inc. was found to be in violation of sections 36(1)(a), 36(5) and 37.3(2) of the federal *Competition Act*, R.S.C. 1970, c. C-23 for false or misleading advertising. Wholesale Travel Group was a travel agency that advertised vacations at wholesale prices. The implication, according to the Crown, was that consumers were led to believe that the price of the vacation to the customer was the

price that Wholesale Travel paid, which was not the case. Therefore, the Crown alleged this constituted false or misleading advertising (*Wholesale* 171). The issues that arose in this case were whether section 37.3(2) of the *Competition Act* violated either or both of sections 7 and 11(d) of the *Charter*: the former for imposing absolute liability and the latter for imposing a reverse onus (*Wholesale* 183 and 198).

In considering this, the SCC looked at whether a corporation had standing to challenge the constitutionality of a statute and, if it could, if it were capable of benefiting from a successful challenge (*Wholesale* 178-179). The SCC briefly considered an argument that even if a corporation had standing to bring a constitutional challenge and was successful in that challenge, that the success of that case would only confer a benefit to natural persons and not corporations (*Wholesale* 180). The SCC rejected this argument (however, this is an argument I will make in chapter 6 below).

The SCC cited section 52 of the *Charter* and said "section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law (*Big M Drug Mart* 313). Allowing an unconstitutional provision in a statute to prevail for corporations "would not accord with this Court's general approach to s. 52(1)" (*Wholesale* 180).

To illustrate this point, the SCC cited *R. v. Morgentaler*, [1988] 1 S.C.R. 30 in which Dr. Morgentaler was administering abortions contrary to the *Criminal Code*, RSC 1970, c. C-34 and the Crown proceeded with charges against him. By way of public interest standing, Dr. Morgentaler argued that the provision in the *Criminal Code* banning abortions violated the section 7 *Charter* rights of women. The SCC agreed and this *Criminal Code* provision was struck down. Even though Dr. Morgentaler was a man and his right to life, liberty and security of the person and his right was therefore not directly at stake, he was given standing to make such an argument. The SCC agreed with his argument and deemed relevant provision of the *Criminal Code* to be invalid (*Wholesale* 181). The argument that a man can bring this argument on behalf of women is hardly analogous to corporations bringing arguments on behalf of natural persons despite the fact that both men and corporations benefit. I will address this in chapter 6 below.

On this basis, the SCC concluded that Wholesale Travel did indeed have standing to bring this constitutional challenge and could benefit from it (*Wholesale* 181). The *Competition Act* applies to both natural persons and corporations and, if the challenge is a successful one, the provision must be struck down in favour of both (*Wholesale* 181). Once the SCC concluded that Wholesale Travel had standing to argue this case, it was successful in demonstrating that section 37.3(2) of the *Competition Act* did indeed violate section 7 of the *Charter*. Despite this, the SCC upheld section 37.3(2) on the basis that it constituted a reasonable limit under section 1 of the *Charter* (*Wholesale* 190 and 195).

The above cases are clear in relation to section 7 of the *Charter*: corporations are not sufficiently person-like to claim the right to life, liberty and security of the person. This is scarcely problematic for corporations. Where the goal of a *Charter* challenge by a corporation is to avoid liability, whether or not the right to life, liberty and security of the person applies to corporations or whether corporations simply have standing is irrelevant. Where mere standing is granted and the challenge is successful, the overall effect is the same.

Simply declaring that a corporation is not entitled to a particular right or freedom under the purpose approach or corporate theorizing fails to properly articulate the differences between individuals and corporations. To fully articulate this difference, Canadian courts should state that legislation can violate the *Charter* for natural persons yet still continue to be valid in their application to corporations. I will make this argument in chapter 6 below.

3.6. The Right to be Secure against Unreasonable Search and Seizure

The case law regarding one's right to life, liberty and security of the person, above, dealt directly with the question of the applicability of the *Charter* to corporate persons. In *Hunter v. Southam Inc.* and *Thomson 1990*., the first two cases under consideration involving the right to be secure against unreasonable search and seizure, the application of the *Charter* to corporations was implied. In these two cases, the SCC undertook a purposive analysis; however, it isn't until the final two cases in this section

that the SCC articulated the fact that corporations have an interest that accord with the purpose of the right to be secure against unreasonable search and seizure.

In *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145 ("*Southam*"), the first in a short line of cases dealing with a person's "right to be secure against unreasonable search and seizure" under section 8 of the *Charter*. In *Southam* the SCC had to decide whether sections 10(1) and 10(3) of the federal *Combines Investigation Act*, R.S.C. 1970, c. C-23 authorized unreasonable search and seizures in violation of section 8 of the *Charter*. This federal statute was enacted to counteract the emergence of a few people who controlled enormous financial entities (*Thomson 1990* 453). At issue in the *Southam* case were the relevant sections of the *Combines Investigation Act* which permitted authorities to enter any premise should those authorities have lawful grounds (*Southam* 148). Furthermore, the authorities were authorized by the *Combines Investigation Act* to make copies or remove any documents that could be evidence. On April 13, 1982, the Director under the *Combines Investigation Act* authorized officials to enter the property of the Edmonton Journal, which was a division of Southam Inc., and examine documents on the grounds that Southam Inc. had engaged in anti-competitive behaviour (*Southam* 148-149; Bauman 78).

In making its determination of whether the legislation in this case violated section 8 of the *Charter*, the SCC said the purpose of section 8 is to protect one's right to privacy only when there is a reasonable expectation of privacy (*Southam* 159). The facts of this case demonstrated that Southam was subjected to a search that had a "breathtaking sweep" which was "tantamount to a licence to roam at large on the premises of Southam Inc." (*Southam* 150). Because of the scope of the search and the wording of sections 10(1) and 10(3) of the *Combines Investigation Act* granted such broad investigatory powers, the SCC concluded that the legislation did not accord with the purpose of section 8 and it could not be saved by section 1 of the *Charter* (*Southam* 169 - 170).

In doing so, the SCC failed to argue how the purpose of section 8 of the *Charter* fits at all with a corporation. If the purpose of section 8 is to protect one's right to privacy, it is unclear how a corporation has such an interest. As Bauman points out, the SCC provided no distinction between the expectation of privacy between a human and a corporation (79). Allowing corporate protections under the *Charter* likens corporations to humans. The Supreme Court has consistently articulated individual rights and freedoms

in “human terms” but has failed to articulate what this interest is in relation to section 8 of the *Charter* (Bauman 79). The SCC did not take the opportunity to articulate this when it heard the *Thomson 1990* case in which this issue once again emerged.

In *Thomson 1990*, the SCC had to determine whether section 17 of the *Combines Investigation Act* violated section 8 of the *Charter* (*Thomson 1990* 447). Specifically, the SCC considered whether 17(4) of the *Combines Investigation Act*, which could compel an individual to produce books, papers and records before the Commission, violated section 8 of the *Charter*. The SCC determined that this section includes the protection of privacy but goes beyond the “inviolability of his body” to include a person’s property including books, records and other documents (*Thomson 1990* 491 and 492). The SCC concluded that the impugned section of the *Combines Investigation Act* did violate section 8 of the *Charter* and it could not be saved by section 1. While the SCC did not explicitly say that corporations have an interest that accords with the purpose of section 8, in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 (“*McKinlay*”) the SCC indicated that corporations do have such an interest.

McKinlay involved two companies incorporated under the law of Ontario: McKinlay Transport Ltd. and C.T. Transport Inc. In 1992, Revenue Canada initiated an income tax audit. In accordance with section 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, Revenue Canada issued a letter to the two appellants demanding the production of information and documents in support of the audit (*McKinlay* 631). The appellants refused to comply with the order claiming that it violated their section 8 *Charter* right to be secure against unreasonable search and seizure (*McKinlay* 631 and 636).

In *McKinlay*, the Court reiterated its purposive approach to section 8 stating that “the underlying value to be protected by s. 8 of the *Charter* was the individual’s interest in privacy” but went on to say that that protection was limited to a “reasonable expectation” (*McKinlay* 641). Justice Wilson said that judges must take a “flexible and purposive approach to s. 8 of the *Charter*” (*McKinlay* 647). This flexible and purposive approach resulted in the SCC finding that section 231(3) of the *Income Tax Act* did not violate the appellants’ right to be secure against unreasonable search and seizure. The SCC found that a balancing act must be struck between “the state interest in monitoring compliance with the legislation” and “an individual’s privacy interest” (*McKinlay* 649).

Since the *Income Tax Act* did not permit the invasion into a person's home or business premises but simply called upon a company to produce documents, the expectation of privacy was "reasonably low" (*McKinlay* 649-650). Building upon this case, the SCC provided the clearest statement that corporations, like natural persons, are entitled to privacy under section 8 of the Charter in *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 R.C.S. ("*Lessard*")

The *Lessard* case involved Canadian Broadcasting Corporation (the "CBC") camera crew who filmed some people who were damaging a post office in Pointe-Claire, Quebec (*Lessard* 440). Parts of the film were broadcast on the CBC. The police were not present at the time the people damaged the post office; however, after the broadcast, Montreal police became aware of the tapes and requested authorization from a justice of the peace to search the tapes (*Lessard* 440). After granting the warrant, officers searched the CBC premises in Montreal and seized five tapes containing footage from the vandalism (*Lessard* 441). The CBC took legal action to quash the warrant.

The SCC upheld the decision to issue the warrant (*Lessard* 447). In doing so, the court said that "the search of any premises constitute a significant intrusion on the privacy of individuals and *corporations* alike. Family and business confidences which are irrelevant to the crime under investigation may be reviewed by the unsympathetic eyes of a stranger. A search is always intrusive, upsetting and to some degree disruptive of the life or business of the individual subjected to the search" (*Lessard* 444). The court continued that even though the police have satisfied the statutory conditions upon which a warrant may be approved, the degree of privacy is also an important consideration. "For example, a greater degree of privacy may be expected in a home than in commercial premises" and, within the context of commercial premises, there are some that are deserving of a greater degree of privacy (*Lessard* 444).

Certain corporations, such as those in the business of media, "are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible" (*Lessard* 444).

Southam and *Thomson 1990* started the lineage of cases relating to the right to be secure against unreasonable search as seizure without any reference to the claimant being a corporation. However, the purposive approach that takes into account the interests of corporations seems to be the implicit rationale. In *McKinlay* and *Lessard*, the SCC tackles the question of whether the claimant, as a corporation, is entitled to such a right because it has an interest in privacy, the SCC determined that corporations are able to avail itself of section 8. Like the freedom of expression cases where the SCC articulated how certain types of speech may not be granted the same protections as others, so too the SCC determined that corporations are entitled to a diminished right to privacy in relation to natural persons. In the following case, however, there was no such diminishment of the right. The SCC, relying again on a purposive analysis to the *Charter*, concluded that the right to be tried in a reasonable time is a right that belongs to corporations in the *R. v. CIP Inc.*, [1992] 1 S.C.R. 843 ("*CIP*") case.

3.7. The Right to Be Tried Within a Reasonable Time

In *CIP*, an employee of CIP Inc. was killed in an industrial accident on CIP's property. After an investigation, CIP and three of its employees were charged with an offence under Ontario's *Occupational Health and Safety Act*, R.S.O. 1980, c. 321 for failure to "ensure that the control switches or other control mechanisms on a die press were locked out" (*CIP* 847). After a series of adjournments, counsel for CIP objected asserting that its client's right under section 11(b) of the *Charter*, the right to be tried within a reasonable time, had been violated. In addressing whether CIP's right to be tried within a reasonable time was infringed, the SCC first addressed the issue of whether a corporate accused has such a right (*CIP* 851).

Once again taking a purposive approach to the *Charter*, the SCC found that the purpose behind section 11(b) is to protect the individual's rights and requirements of fundamental justice (*CIP* 855). The SCC detailed the concerns over prolonged trials such as the memories of witnesses will fade over time and even a loss of witnesses (they may move out of the country, become sick, die or otherwise become unable to testify) (*CIP* 856). On this basis, the SCC said that the "availability of witnesses and the reliability of their testimony could have a significant impact upon the appellant's ability to put forward [a] defence" and that the corporate appellant "has a legitimate interest in being tried within a reasonable amount of time" as the "right to a fair trial is fundamental

to our adversarial system" (*CIP* 856). By logical extension, since corporations may be an appellant, the right to be tried within a reasonable time ought to be extended to them to ensure that the courts avoid these concerns.

In short, the SCC concluded that corporations have an interest that accords with the purpose of section 11(b) of the *Charter* and the integrity of our legal system relies upon adherence to this right. However, the SCC ruled against CIP because the cause of the delay was due to CIP's decision to pursue appeals (*CIP* 864). While CIP was unsuccessful in having its case dismissed because the trial was not conducted in a reasonable time, CIP was successful in arguing that a corporation can avail itself of section 11(b) of the *Charter*. Corporate persons have an interest in being tried within a reasonable timeframe. In the next case, however, the SCC recognizes how a corporation is not a person in every instance in *R. v. Amway Corp.*, [1989] 1 S.C.R. 21 ("*Amway*"). In arriving at this conclusion, the SCC seems to be doing both a purposive analysis and corporate theory.

3.8. Compulsion to be a Witness

The *Amway* case arose because the federal Crown began a civil action against Amway for its alleged breach of the federal *Customs Act*, R.S.C. 1970, c. E-10 (*Amway* 25-26). The federal Crown believed that Amway made false declarations with respect to the value of imported goods in an attempt to avoid having to pay duties (*Amway* 25-26). As part of these proceedings, the Crown requested that Amway produce one of its officers to be questioned during examination for discovery (*Amway* 26). In an attempt to avoid having its own officer discovered, Amway claimed that it had the right against self-incrimination under section 11(c) of the *Charter* (*Amway* 26).

Section 11(c) of the *Charter* provides that "any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence." Amway's legal counsel refused because it claimed it was "not required to produce any person to be examined for discovery in view of s. 11(c) of the" *Charter* (*Amway* 26). In respect of the *Charter* claim, the SCC said that a respondent must satisfy three criteria: that it is a person; charged with an offence; and, is a witness in proceedings against that person (*Amway* 37).

In respect of the first criteria, the SCC said that "it is neither necessary nor desirable in this case to decide that under no circumstances may a corporation avail itself of the provisions of s. 11" but concluded that "a corporation cannot be a witness and therefore cannot come within s. 11(c)" (*Amway* 37). In support of its conclusion, the SCC cited the *R. v. N. M. Paterson and Sons Ltd.*, [1980] 2 S.C.R. 697 ("*Paterson*") case. While this case is a pre-*Charter* decision, the SCC said any officer of a corporation that is called to testify is a witness and is a person distinct from the corporation (*Amway* 37; *Paterson* 691).

The SCC in *Amway* agreed with the SCC in *Paterson* by finding that anyone, such as an officer, who testifies on behalf of a corporation, is doing so as a separate person. This is also in keeping with the law developed in the *Salomon* case that corporations are separate legal persons. In arriving at this conclusion, the SCC took a "purposive interpretation to s. 11(c)" and said that this section of the *Charter* is designed to "protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth" (*Amway* 40). However, "it would strain the interpretation of s. 11(c) [of the *Charter*] if an artificial entity were held to be a witness" and that an interpretation in favour of Amway would be an unjustifiable linguistic "metamorphosis" (*Amway* 39). As such, under the purposive analysis, a corporation does not have an interest that accords the purpose of section 11(c) of the *Charter* on the basis that corporations cannot speak for themselves.

3.9. The Right to be Presumed Innocent

In determining whether the *Charter* right to be presumed innocent under section 11(d) applied to corporations, the SCC in *Wholesale* (this case was discussed in chapter 3.5 above) ignored the use of the purposive approach and the corporate theory approach and relied on standing to permit a corporation to challenge legislation under the *Charter*. To reiterate, Wholesale was charged under the *Competition Act* for false or misleading advertisement. In response, Wholesale challenged certain provisions of the *Competition Act* for their ostensible violation of the corporation's right to life, liberty and security of the person. Additionally, Wholesale challenged section 37.3(2) of the *Competition Act* claiming that it created a reverse onus on the accused and therefore

infringed on one's right to be presumed innocent under section 11(d) of the *Charter* (*Wholesale* 158).

The purpose of section 11(d) of the *Charter* is to protect one's right to be presumed innocent "where an accused faces penal consequences" because "an individual must be proven guilty beyond a reasonable doubt" and that the "state must bear the burden of proof" (*Wholesale* 196). This right is available to anyone prosecuted by the state for anything ranging from serious crimes to less serious regulatory offences (*Wholesale* 196). As such, the SCC concluded that the language in section 37.3(2) does indeed impose a reverse onus on an accused. Moreover, this limitation did not present a reasonable limit on the right to be presumed innocent under section 1 of the *Charter* and section 37.3(2) was deemed to be of no force or effect (*Wholesale* 198 and 205).

The SCC relied on the idea of standing to justify a corporation's use of the *Charter* resulting in an indirect benefit to corporations. The SCC did not want to separate corporate persons from natural persons for the purpose of the *Charter* because, in their view, the courts should never convict anyone of an offence when the law is unconstitutional (*Wholesale* 179). The SCC did say, however, that if the legislation was drafted so that it applied exclusively to corporations that corporations might not be able to benefit from the *Charter* right to be presumed innocent (I will expand upon this in chapter 6 below). However, since the section 37.3(2) of the *Competition Act* applied to both natural and corporate persons, the overall benefit of gaining standing resulted in Wholesale, a corporation, to avoid liability under the statute.

3.10. The Right to Equality

As discussed above in chapter 3.4, the *Little Sisters* case dealt with, in part, the concern that the *Customs Act* violated its right to expression. Additionally, Little Sisters argued that the *Customs Act* was applied by customs officers in an unequal manner and thus the impugned provisions of the *Act* violated section 15(1), the right to equality, of the *Charter* (*Little Sisters* 1152). Little Sisters argued that the Canadian *Customs Act* is the source of the discrimination in that it "operates with disproportionate and discriminatory effects on the gay and lesbian community" (*Little Sisters* 1182). After a discussion of the test required by the common law to determine whether the *Customs Act* was, in effect, discriminatory, the SCC held that neither its content nor its effects

result in discrimination based on sexual orientation (*Little Sisters* 1189). In short, the SCC held that the *Customs Act* did not discriminate under section 15(1) of the *Charter*.

A corporation would likely never be successful in Canada in a *Charter* challenge involving section 15. There are specific grounds upon which such a challenge can take place and it is unlikely that a court would say that a corporation could ever be discriminated on the basis of these grounds, such as race, sex, sexual orientation, religion, or colour. It is worth noting that Little Sisters, as a corporation, did not claim that it was the subject of discriminatory treatment. Rather, it was bringing this claim on the basis that it discriminated against a certain class of persons, namely the gay and lesbian community. This was an attempt to circumvent conclusions made by the SCC in cases such as *Irwin Toy* that corporations are not sufficiently person-like to attract certain *Charter* rights and/or freedoms including the right to life, liberty and security of the person. Counsel for Little Sisters likely anticipated an argument by analogy whereby the SCC would find that discrimination can only occur on grounds that affect a natural person. Therefore, appealing to its customer base of natural persons, while unsuccessful, did not truly test the application of section 15(1) of the *Charter* to corporations.

Similarly, it would be difficult for a natural person to bring a section 15 claim against the government for treating corporations differently than natural persons. For example, corporations enjoy a tax rate that is lower than corporations. A natural person would not be able to argue that such a tax rate is discriminatory as corporations are not persons that have characteristics that accord with the grounds for discrimination under section 15 of the *Charter*.

3.11. Concluding Remarks

Whether or not corporations have been granted rights under the *Charter* is a moot point. Whether a corporation is actually granted a right or freedom or whether it is granted standing to make an argument, corporate litigants are still able to benefit from having unconstitutional provisions struck down by the court. This allows corporations to limit their liability under legislation through *Charter* challenges. However, no matter what the approach is, the SCC has hypostatized corporations.

Utilizing the purposive analysis, the SCC first determines the purpose of a particular right or freedom under the *Charter* then the court determines whether the corporation has an interest that accords with that purpose. Ascribing interests to something created by law renders that thing as having a concrete existence, as a fact out-there-in-the-world that requires language to be used accurately. And with standing, the SCC has said no unconstitutional law is enforceable, even against a corporation (see the *Wholesale* case in chapter 3.10). In chapter 5, I will use Wittgenstein's early philosophy of language to argue how each of these approaches to articulating *Charter* rights and freedoms renders the corporation as something concrete and real that deserves, at the very least, the court's time to determine whether a corporation bears certain rights. Before I make this argument, I shall set out in chapter 4 just what a corporation, in law, actually is: it is simply a fiction created by the positive law to generate wealth. To support this, I will cite case and statutory law.

Chapter 4.

The Corporate Purpose: Wealth Maximization with the Aid of Charter Rights

In the cases listed in chapter 3, judges have scarcely addressed what, at bottom, a corporate person is. While there has been recognition in case and statutory law that corporations are persons and a lot of argument about whether or not corporations should get certain rights or freedoms under the *Charter*, an exploration of what a corporation is and how it is managed in the context of the *Charter* is crucial. Such an exploration will reveal why granting *Charter* rights and freedoms, as a general rule, is unwise. In chapter 5, I will argue how philosophy of language, specifically Wittgenstein's late ideas on the subject, can provide clarity around the issue of whether corporations deserve *Charter* rights.

Corporations are simply created to make investors – shareholders and creditors, for example – money. Indeed, ensuring profitability of corporations is not just the job of officers and directors but it is their legal duty, which has been established in statutory and common law. The SCC has determined, through the lens of corporate statutes, that directors and officers of corporations have the duty to make the corporation in which they serve profitable.

This profit motive derives from a directors' and officers' fiduciary duty, which is the duty to act in the best interest of another. In the case of corporate managers, they must act in the best interest of the corporation This duty arises out of statutory law at both the federal and provincial levels.[5] The seminal case on this issue is *Peoples Department Stores v. Wise*, [2004] 3 S.C.R. 461 ("*Peoples*"). In eastern Canada, there used to exist Wise Department Stores Inc. and its wholly owned subsidiary, Peoples Department Stores Inc. (*Peoples* 467). The three Wise brothers, Lionel, Ralph and Harold, were majority shareholders in and directors and officers of Wise Department Stores (*Peoples* 467). Marks & Spencer owned Peoples Departments Stores and

[5] See section 122(1)(a) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44; section 142(1)(a) of the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57; and, section 134(1)(a) of the Ontario *Business Corporations Act*, R.S.O. 1990, c B.16, for example.

ultimately sold its interest in the department store to Wise Department Stores (*Peoples* 468).

As part of the agreement for the sale of Peoples Department Store, Marks & Spencer demanded that the Wise brothers not amalgamate Wise with Peoples Department Stores. This required them, in part, to maintain separate inventory (*Peoples* 469 - 470). However, the inventory of both department stores was housed in the same location causing a comingling of inventory. This comingling resulted in inaccurate record keeping for each of Wise and Peoples Department Stores (*Peoples* 471). To settle this issue, Lionel Wise consulted with Wise Department Stores vice-president of administration and finance, David Clement. Clement recommended a joint inventory procurement policy that required Peoples Department Store to make all purchases from North America while Wise Department Stores would be the sole purchaser for all overseas goods (*Peoples* 471). Approximately 82% of the total inventory was purchased within North America. As a result, Peoples Department Store extended a significant amount of credit to Wise Department Stores (*Peoples* 471).

Despite the procurement policy, Peoples Department Store entered into bankruptcy (*Peoples* 473). While some of Peoples' creditors were paid, there were a number of unsatisfied creditors and these creditors took issue with the decision by the directors to enter into the joint inventory procurement policy (*Peoples* 471 and 473). These creditors then initiated litigation against the Wise brothers, personally, claiming that the three Wise brothers favoured the interests of Wise Department Stores over Peoples to the detriment of its creditors (*Peoples* 473).

In doing so, the creditors argued, the Wise brothers, as directors of Wise Department Stores, breached their fiduciary duty to the creditors under section 122(1)(a) of the *Canada Business Corporations Act*. This provision requires that directors and officers of a company "act honestly and in good faith with a view to the best interests of the company" (*Canada Business Corporations Act* section 122(1)(a)). Before determining whether or not the directors of Wise Departments Store breached their fiduciary duty to the creditors, the SCC first needed to determine whether the directors (and officers) of a company ever owe a fiduciary duty to creditors.

On its way to answering that question, the SCC considered the content of the fiduciary duty in the context of company law. This duty means that directors and officers must work to maximize the value of the corporation (*Peoples* 481). Accordingly, the fiduciary duty can only be owed to the corporation. The SCC said that directors and officers may consider other factors when managing the best interests of the corporation, such as the "interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (*Peoples* 482). Despite this caveat (which is set out in the *Canada Business Corporations Act* at section 122(1.1)), the SCC concluded, in no uncertain terms, that even when the "various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty." "At all times, directors and officers owe their fiduciary obligation to the corporation" (*Peoples* 482). This leaves no room for directors and officers to act in the best interests of others as the "interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (*Peoples* 482 and 483). On this issue, the SCC concluded that the Wise brothers, as directors, could not have breached their fiduciary duty to the creditors of Wise Department Stores because that duty is only ever owed to the corporation.

The SCC had another opportunity to deal with the fiduciary duty in the context of corporations in *BCE v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 ("*BCE*"). This case arose out of an offer to purchase all of the shares of BCE Inc., a telecommunications company (*BCE* 572). Bell Canada was a wholly owned subsidiary of BCE and the sale of BCE was to be completed through a leveraged buyout of which Bell Canada was to be liable for the debt of the leveraged buyout (*BCE* 573). Debentureholders of Bell Canada opposed the transaction on the ground that it would diminish the value of their investment by approximately 20% (*BCE* 573). After the transaction was complete, the value of the debentures was indeed downgraded (*BCE* 577).

To recoup losses, the debentureholders began litigation against the directors of BCE through the oppression remedy.[6] These debentureholders argued that the decision

[6] An oppression remedy, provided for by provincial and federal statutes, affords a broad spectrum of stakeholders of a corporation the right to challenge decisions of directors that are oppressive – decisions that are either illegal or unfair – based on the reasonable expectations of those stakeholders (*BCE* 564). The oppression remedy acts as an exception to the general rule that the party who is the beneficiary of the fiduciary duty is the only party that can enforce the duty. Corporate law necessarily requires a deviation from this principle because directors are, in fact,

of the board of directors to enter into the transaction to sell its shares resulting in a downgrade in the value of the debentures constituted unfair treatment thus violating the directors' fiduciary duty to the corporation (*BCE* 583).

To determine whether the directors of BCE acted in an oppressive manner, the SCC discussed the nature of a director's and officer's fiduciary duty to the corporation. The SCC said that the fiduciary duty is a "broad, contextual concept" which requires management to consider the "long-term interests of the corporation" (*BCE* 584). How this duty is fulfilled is context dependent but, at a minimum, always requires directors to satisfy its statutory obligations (*BCE* 584). The SCC in *BCE* affirmed its decision in the *Peoples* case that directors and officers may consider the interests of others including shareholders, employee, and creditors when fulfilling its fiduciary duty (*BCE* 585). But while the interests of the corporation and its shareholders (as well as other stakeholders) are often aligned, they may diverge (*BCE* 597). When such a divergence takes place, the duty remains clear: directors owe a fiduciary duty to the corporation (*BCE* 584). The SCC concluded that the BCE directors did not engage in oppressive conduct in its decision to enter into the transaction to sell its shares and therefore did not breach their fiduciary duty to the company.

Both the *Peoples* and *BCE* cases conclude that directors and officers must always act in the best interest of the corporation in which they serve. To act in the best interests of the corporation is to maximize its wealth. While this duty may be fulfilled by directors through a consideration of the interests of other stakeholder – creditors, government, the environment – often times the interests of the corporation and other stakeholders diverges. Such divergence does not require the directors of a corporation to juggle the various and divergent interests of the corporation and its stakeholders. Rather, the duty only ever requires that the directors of a corporation act in such a way that allows that corporation to maximize its wealth.

From the perspective of internal corporate governance as discussed in *Peoples* and *BCE*, corporations are very different types of persons than natural persons. Of course, natural persons may be interested in maximizing their personal wealth. There is,

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the natural persons who act for and make decisions on behalf of corporations. In light of this, directors are unlikely to ever bring a breach of fiduciary duty against themselves (*BCE* 585). To address this problem, the law has allowed for stakeholders to bring an oppression remedy against the decisions made by a corporation or its directors (*BCE* 586).

however, a fundamental difference in the pursuit of wealth between a natural and corporate person. The former *may* pursue wealth maximization. Those who manage the latter are *duty bound* to pursue it. Additionally, natural persons may have a wide variety of interests: self-actualization, acquisition of knowledge, pursuing hobbies; having a family, and so on. Corporations only have one interest: wealth maximization. To grant rights and freedoms under the *Charter* to corporations, whose only interest in society is to pursue a profit, is absurd. To the extent that a corporation can be said to have an interest, it is only in this pursuit.

The legal duty of directors and officers to maximize wealth leaves little room for achieving what Joel Bakan believes was the original purpose of a corporation: "a state-created tool for advancing social and economic policy" (158). In fact, the legal duty to generate wealth places the advancement of social interests by corporations at the mercy of wealth generation. A corporation can engage in socially responsible behaviour so long as the behaviour leads to profit for the corporation. Socially responsible corporate behaviour for any other purpose would impose liability upon directors and officers for breaching their fiduciary duty to the corporation.

The promotion of social interests through corporate social responsibility is a paradox (Bakan 110). Any corporate policy that has as its goal to promote the improvement of social circumstances – through donations, corporate sponsorship, or social venture philanthropy – is only justified so long as it results in a profit to the corporation. Otherwise, using corporate money to engage in corporate social responsibility is illegal and, to some like Milton Friedman, immoral. The profits of a corporation belong to shareholders and management has no legal or moral right to use that money for socially responsible means (Bakan 34 and 37). Corporations "can do good" so long as it helps "itself to do well" (Bakan 50). To insist, through the purposive approach in *Charter* litigation, that corporations have interests is inconsistent with the body of law that says that officers and directors must only act to maximize its wealth.

The corporation has been analogized to a person but not the kind of person that the SCC refers to. Rather, critics have likened a corporation to a psychopath or, more literarily, to Frankenstein. Because of their pursuit of profit, Bakan famously referred to corporations as psychopathic. Like psychopaths, corporations are deeply self-interested and lack the ability to empathize (Bakan 56). "Unlike human beings who inhabit [a

corporation], the corporation is singularly self-interested and unable to feel genuine concern for others in any context" (Bakan 56). Psychopaths are also manipulative, a trait that is shared by corporations and, (Bakan 57).

One of the ways that corporations manipulate consumers is through advertising to appear more human. In the *Ford* case, the SCC recognized that commercial expression is for little more than manipulating people into making certain economic decisions (*Ford* 763). However, corporate expression through advertising is not limited to manipulating people into buying what that corporation has to sell. It also attempts to manipulate the public into believing that corporations are human. For example, General Motors ran an ad campaign that attempted to personalize their corporate image by calling it a family (Bakan 18). AT&T used shareholders in its advertisements declaring that it is owned by the people (Bakan 17-18). While these claims bear some truth, they are manipulative marketing forces generated to cast a human light on corporations as a way to cover up the fact that they are, at bottom, a vehicle to make profit. While profit is, at times, a positive result of corporations, this psychopathy is the direct result of the Canadian legal system's demand that corporate management is duty bound to make the corporation in which they serve profitable. Even in very early American case law, it was clear to the court in a Florida case called *Louis K. Liggett Co. et al. v. Lee, Comptroller et al*., 288 US 517 (1933) ("*Ligget Co*."), that corporations were a person in some unusual manner.

The *Ligget Co*. case involved the payment of a graduated license fee for stores that were located in more than one county within the state of Florida. In its reasons, the court observed that a massive amount of "industrial wealth has passed from individual possession to the ownership of large corporations" (*Ligget Co.* 566). The growth of corporations has resulted in a "marked concentration of individual wealth" resulting in a "Frankenstein monster which states have created by their corporation laws" (*Ligget Co.* 567). Seeing the corporation as the monster with no name in Frankenstein aptly characterizes corporations as human creations that take on a life of their own through the legal duty to make a profit.

Rather than comparing corporations to psychopaths or Frankenstein, Deleuze sees corporations as a "spirit, a gas" which form part of our society of control (4). Societies of control are preceded by "disciplinary societies" characterized by an

"organization of vast spaces of enclosures" that include family, school, the factory, perhaps the barracks and even hospitals or, quite literally, prisons (Deleuze 3). In disciplinary societies, people pass from each of these closed environments to the next, each having their own laws (Deleuze 3). Each enclosure is a mold, according to Deleuze, where a person starts over again. From their family (one mold), a person moves to school (another mold) where they must adopt a new set of norms or laws. Disciplinary societies, then, are marked by "short-term and rapid rates of turnover but also continuous and without limit" (Deleuze 5 and 6).

Societies of control have, according to Deleuze, have taken over disciplinary societies and modulate rather than turnover (4). This "modulation is like a self-deforming cast that will continuously change from one moment to the other" and is never finished (Deleuze 4 and 6). For example, continual training has replaced school and, more to the point, corporations have replaced the factory (Deleuze 5). Corporations fit nicely within Deleuze's conception of society as modulating. One aspect of the corporation is that it never dies (unless someone takes positive action to have the corporation unwound or the corporation does not undergo its annual filings). Corporations continue to exist despite the change in management and shareholders and, as a result, can thrive in a society that modulates. And the corporation "constantly presents the brashest form of emulation, an excellent motivational force that opposes individuals against one another" (Deleuze 5). Deleuze is right: corporations, by virtue of the law that permits their existence, are set up to pursue profit. This pursuit has produced terrible opposition between and among people.

A poignant example of how the corporation excels as this "motivational force" is found in the *R. v. Canadian Tire Corporation Limited*, 2004 CanLII 4462 (ON SC) ("*Canadian Tire*") case. This case centered on the importation of fridges from China that contained freon for the Canadian market. The importation of freon has been illegal in Canada since January 1st, 1999 after a regulation was passed under section 113(f) of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 ("*CEPA*") (*Canadian Tire* 1). Canadian Tire continued to stock the fridges throughout 1999. Moreover, Canadian Tire continued to import the fridges containing freon. An investigation by the investigatory body under *CEPA* revealed that Canadian Tire had fridges in stock that were manufactured in October of 1999 with over 4000 units being imported in that year (*Canadian Tire* 6).

On the stand at trial, Gail Bebee – who was the Director of Environment, Health and Safety for Canadian Tire – testified that it was her department's job to track Canadian regulations, advise the buy and make sure that the products Canadian Tire purchased complied (*Canadian Tire* 15). To fulfill this responsibility, Ms. Bebee testified that she contacted the buying team in Hong Kong to determine whether any of the products violated the regulation under *CEPA* to which she said took the word of the vendor that the products met Canadian regulations (*Canadian Tire* 16-17). Despite operating 451 stores across Canada with an operating budget just under six billion dollar (*Canadian Tire* 27) and despite the evidence that freon is a dangerous chemical that is harmful to the earth's atmosphere (Canadian Tire 28-29), Canadian Tire relied on the representation of others to ensure that it satisfied the regulations under *CEPA*. Of the 3090 fridges that Canadian Tire imported, there were enough harmful chemicals to "create a hole in ozone layer of 200 square meters that would last 100 years" (*Canadian Tire* 29).

Both the trial judge and the Ontario Court of Appeal concluded that Canadian Tire did not fulfill its legal duty to avoid importing the fridges containing the illegal chemicals by simply relying on its foreign supplier. Anytime there is a "dilution of public protection by laying off responsibility to a third party for regulation compliance is frequently viewed with a healthy dose of suspicion" (*Canadian Tire* 41-42). More importantly, the Ontario Court of Appeal found that there "was a flavour about the corporation's submissions at trial, and to a much lesser extent on appeal, that the proscribed CFC was not that dangerous and that the foreseeable harm from a breach of the law somewhat speculative" and that compliance with the regulations under CEPA "was not a priority within the risk assessment program" of Canadian Tire (*Canadian Tire* 45-46). The evidence was overwhelmingly stacked against Canadian Tire in this case. In another case illustrating corporate motivation for profit is *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 ("*Nevsun*"). While the SCC in this case could not substantiate the allegations made, the case highlights what lengths corporations may go to in pursuit of profit.

The *Nevsun* case involved an appeal to human rights law by three refugees and Eritrean nationals: Gize Yebeyo Araya, Kesete Fshazion and Mihretab Yemane Tekle and Nevsun Resources Ltd. (*Nevsun* 36). Nevsun Resources Ltd., a Canadian company, owned the Bisha mine in Eritrea. On behalf of 1000 mine workers in Eritrea,

Araya, Fshazion and Tekle sued Nevsun Resources Ltd. for damages because, they allege, that they were involved in Eritrea's National Service Program, which "conscripted through their military service" and placed them "into a forced labor regime whether they were required to work at the Bisha mine…and subjected to violent, cruel, inhuman and degrading treatment" (*Nevsun* 36). As part of their mandatory military training, the Eritrean government required that all Eritreans, upon reaching the age of 18, had to complete 12 months of "military development service" which may include assistance with public projects, including at the Bisha mine (*Nevsun* 38).

In response to these claims, Nevsun argued that Canadian courts had no jurisdiction to hear such disputes to assess the "sovereign acts of a foreign government" including Eritrea (*Nevsun* 37). Unfortunately for the three Eritreans, the SCC agreed. Because the Eritrean respondents relied on international human rights law, the SCC said that to "obtain relief, the respondents [from Eritrea] would have to establish that the National Service Program is a system of forced labour that constitutes a crime against humanity" (*Nevsun* 179). Whether or not the allegations are true, it demonstrates how a corporation is "an excellent motivational force that that opposes individuals against one another." Deleuze said that "we are taught that corporations have souls" (6). Indeed, corporations assist in this education. And this is "the most terrifying thing in the world" (Deleuze 6).

Hebert Marcuse might agree with Deleuze's idea that we live in a society of control. Marcuse said that "contemporary industrial society tends to be totalitarian" which is not limited to a "terroristic political coordination of society, but also a non-terroristic economic-technical coordination which operates through the manipulation of needs vested by interests" (Marcuse 3). At the heart, or very close to it, of this manipulation is the corporation. As discussed above, corporations do this through add campaigns and through their own self-promotion as human or human-like. The successful creation of this manipulation has, in part, led to a perversion of *Charter* rights and freedoms.

Marcuse points out that rights and liberties were crucial elements in the "origins and earlier stages of industrial society" (1). But these rights and freedoms have lost, at least in part, "their traditional and rational content" (Marcuse 1). This is no more evident in the granting of rights to corporations because they somehow have an interest in

certain rights and freedoms. This illuminates what Marcuse calls the "most vexing aspects of advanced industrial society: the rational character of its irrationality" (9). The SCC has successfully developed its own internal logic for granting *Charter* rights to corporations with little awareness of its irrationality.

Granting corporations rights under the *Charter*, then, simply arms corporations with another tool to maximize its wealth. Statutory law, as seen above, aims to limit certain conduct (whether it's the conduct of natural or corporate persons) by, for example, limiting one's ability to advertise to children or set boundaries around acceptable advertising practices for the sale of tobacco . These statutory limitations attempt to restrict the conduct of corporations, conduct that may affect particularly vulnerable members of society. However, having access to the *Charter* allows corporations, when successfully arguing under the *Charter*, to continue to pursue wealth with fewer statutory impediments.

In an attempt to dislodge judges, lawyers, and law-makers from their commonly held view that corporations are persons and thus entitled to *Charter* rights, I shall investigate the manner in which the SCC (and others in the legal community) employs language in the *Charter*-based case law in chapter four. In so doing, I hope to expose is the hidden judicial assumption that corporations are something with an existence independent of language and the positive law. As a result, the SCC seems compelled to articulate a complete and accurate representation of corporations, their interests, and how those interests accord with rights and freedoms.

Unveiling the hidden assumptions made by the SCC and then altering the way in which judges understand and characterize corporations will reveal that corporations are persons but only for very limited purposes. The general rule in Canadian law seems to be that corporations are persons and therefore fall within the scope of those that bear rights. I will offer a different explanation. Through a change in our discourse around corporations, the general rule ought to be that corporations are not among the bearers of rights under the *Charter* unless it would serve the broader interest of society to do so. To support this conclusion, I shall discuss Wittgenstein's early views on philosophy of language as a heuristic device to analyze the hidden assumptions that the SCC makes about language and its application to corporations. For a different explanation on what corporations are, I will then discuss Wittgenstein's later views on the philosophy of

language. Considering corporations in light of Wittgenstein's later approach to language will, I hope, provide a less constrained way to talk about corporations, a way that will provide greater clarity. Ultimately, it could provide a means to impose more effective constraints on corporations.

Chapter 5.

Legal Discourse and Wittgenstein's Philosophy of Language

5.1. Introduction

With the exception of cases that simply grant corporations standing to challenge the constitutionality of legislation, the SCC has made an ontological mistake in *Charter* cases where the SCC says that corporations have interests. Through the purposive approach, the SCC has granted the same ontological status, in some cases, to corporate persons as natural persons. That natural persons and corporate persons can be treated the same for certain purposes is valid (I will discuss this further below). However, this comparison has limited currency. The ontological mistake that the courts make when they use the purposive approach is based on the idea corporations, like natural persons, have interests. But corporate persons and natural persons are ontologically different: without positive law, corporations do not exist. Natural persons do. And something that is the creation of a statute cannot have interests. Even if corporations can be said to have interests, those interests are limited to the single interest of profit.

To correct this mistake, judges can employ language in such a way that releases them from the reductionist confines brought about by how they discuss corporations. Currently, judges seem to be wrapped up in discovering the necessary and sufficient conditions of corporate personhood. The starting point for this discussion appears to be that corporations are persons just like natural persons. With that general rule in place, judges have made exceptions by describing how they are, at times, different. This seems to lead to an epistemic commitment by the courts to describe the outside world correctly, corporations included.

To illustrate how judges seem to use language to seek out the necessary and sufficient conditions of corporate personhood, I will use Wittgenstein's early ideas on the philosophy of language in the *Tractatus* as a heuristic device to show how the SCC characterizes corporations as facts, which have "state[s] of affairs…written into" them

(Wittgenstein *Tractatus* 7). This characterization of language is analogous to the use of language used by the SCC, is a problematic view of language. In its place, I will argue that Wittgenstein's later ideas on philosophy of language, specifically in *Philosophical Investigations*, provide a framework for thinking about "corporations as persons" as just another language game to be placed alongside, with some overlap, other language games. With the adoption of a different way of perceiving language and the role of corporations, the SCC would be unshackled from the limits of language proposed by early Wittgenstein. This unshackling would allow the courts to see corporations as part of a language game different from natural persons. This would replace their current commitment to assuming that a corporation has a state of affairs and that their job is to articulate them accurately. It would enable us to notice the difference between legal persons while also enabling us to identify important family resemblances between them. Wittgenstein's early philosophy of language is a theory "perhaps best regarded as a theory of representation" where any representation provides a "true or false picture of what it represents" (Kenny 44). To represent something, one must get it right. This, in short, is how the SCC has treated corporations. As a fact that imposes the demand upon the courts to get its description right.

5.2. The Bareness of Language: Language as Representation

Before demonstrating a connection between the SCC's characterizations of corporations and Wittgenstein's early philosophy of language, I shall provide an overview of Wittgenstein's philosophy of language from the *Tractatus*. I will then use this as a framework to understand how the SCC uses language in a manner consistent with Wittgenstein and how this approach to language imposes limits on language users. This limitation, a limitation seemingly consistent with the SCC's decisions on corporate rights under the *Charter*, results in a constricted vision of corporations that unjustifiably includes them among those who bear rights under the *Charter*.

Language for early Wittgenstein relied on the idea that what can be said, can be said clearly and what cannot be said is nonsense (Wittgenstein, *Tractatus* 4). This led him to declare that "what can be said at all can be said clearly, and what we cannot talk about we must pass over in silence" (Wittgenstein, *Tractatus* 3). The expression of thoughts had a limit and what *cannot* be talked about is nonsensical (Wittgenstein,

Tractatus 3). Expressing oneself clearly requires an understanding of objects. To "know an object" one also "know[s] all its possible occurrences in states of affairs" (Wittgenstein, *Tractatus* 6). For Wittgenstein, all of the possibilities are part of the nature of that object (Wittgenstein, *Tractatus* 6).

Knowledge of these possibilities lays in the thing itself, its "internal properties" and not its "external properties" (Wittgenstein, *Tractatus* 6). Where one expresses truth about an object, one understands these internal properties because each proposition is logically independent of others (Ayer 17). To provide a complete account of reality, then, "one has to say which of [the logical pictorals or propositions] are true and which of them are false" (Ayer 17).

This provides a clearer idea of what constitutes nonsense for Wittgenstein. A sign is simply the expression of a thought (Wittgenstein *Tractatus*, 13). Nonsense arises when a sign fails to accurately express a proposition (Ayer 18).

Truth about a thing is not expressed in a contextual or relational manner demonstrated through an understanding of its external properties. Rather, the truth about a thing is found within the thing itself. This idea introduces the role that logic plays in language for Wittgenstein. "In logic nothing is accidental: if a thing can occur in a state of affairs, the possibility of the state of affairs must be written into the thing itself" (Wittgenstein, *Tractatus* 6). For early Wittgenstein, where all objects are given then all states of affairs are given (Wittgenstein, *Tractatus* 7). And those states of affairs are "written into the thing itself" (Wittgenstein, *Tractatus* 6). This encoding of truth in the thing itself purges contingency from truth and language.

For Wittgenstein, logic deals with every possibility and "all possibilities are its facts" (*Tractatus* 6). So when an object is given, all of its possible states of affairs are given. Objects, for early Wittgenstein, are unalterable and are distinguishable from one another (Wittgenstein, *Tractatus* 8). And since there are unalterable objects in the world, the world itself possesses an unalterable form (Wittgenstein, *Tractatus* 8). Therefore, the role of language is to decode or represent these objects accurately. Language represents these facts by reaching "out to reality" and are "laid against reality like a measure" (Wittgenstein, *Tractatus* 10).

To utter a factual proposition, we must express a thought through a propositional sign. "In a proposition a thought can be expressed in such a way that elements of the propositional sign correspond to the objects of the thought" (Wittgenstein, *Tractatus* 14). These pictures, articulated through propositional signs, either represent reality with accuracy or inaccuracy. "Reality is compared with propositions" and "the proposition can be true or false only in virtue of being a picture of reality" (Wittgenstein, *Tractatus* 27). Where it is accurate, there is truth; where the picture is inaccurate, there is falsehood (Wittgenstein, *Tractatus* 12).

For Augustine, learning a language is similar to Wittgenstein's concept of language as representationalist in the *Tractatus*. As a boy, Augustine learned language by noticing "that people would name some object and then turn towards whatever it was that they had named" (Augustine 29). After a while, Augustine was able to see that the sound made correlated to the thing being talked about with assistance from the "universal language" of "expressions of the face and yeses, gestures and tones of voice" (29). Over time, the language learner can detect a pattern in speech and then mimic that pattern by mastering pronunciation and learning how to express oneself (Augustine 29).

This way of learning a language is what Wittgenstein calls the "ostensive teaching of words" because the learner gains an understanding of language through the utterance of the word followed by a demonstration of what the word correlates to in the real world (Wittgenstein, *Philosophical Investigations* 7). The ostensive teaching of words is a simplified version of Wittgenstein's representationalist model of language where language reaches out to the world. For both Augustine and Wittgenstein, though, language is the key to help us understand the outside world.

Wittgenstein seems to suggest, as Richard Rorty articulated, that language is a medium. Language "stands between the self and the nonhuman reality with which the self seeks to be in touch" (Rorty, *Contingency, irony and solidarity* 10). Language, then, is to be judged as accurate if it gets reality and the self together and inaccurate or false if it keeps them apart (Rorty, *Contingency, irony and solidarity* 11).

Logic plays a key role in early Wittgenstein's philosophy of language although it's unclear how. He says that it's "impossible to represent anything in language that

'contradicts logic'" such as "to give the co-ordinates of a point that do not exist" (Wittgenstein, *Tractatus* 13). However, the concept of logic cannot be represented in facts (Wittgenstein, *Tractatus* 15). Wittgenstein said that "there can be no representatives of the *logic* of fact" (*Tractatus* 26). Rather, he relies on the self-evident nature of logic. "Self-evidence…can become indispensable in logic, only because language itself prevents every logical mistake.-What makes logic a priori is the impossibility of illogical thought" (Wittgenstein, *Tractatus* 57). Logic, then, manifests itself through propositions. "What finds its reflection in language, language cannot represent. What expresses *itself* in language, *we* cannot express by means of language. Propositions *show* the logical form of reality. They display it" (Wittgenstein, *Tractatus* 31). Logic in language, then, materializes from the proper use of language when it expresses truth.

The accuracy or truth of any representation requires a minimum commonality between the picture and what is being represented (Kenny 47). This is what Wittgenstein calls the "logical form" (Wittgenstein, *Tractatus* 11). He states that "any picture, of whatever form, must have in common with reality, in order to be able to depict it – correctly or incorrectly – in any way at all, is logical form, i.e. the form of reality" (Wittgenstein, *Tractatus* 10). If logic is taken away then logical pictures are impossible (Kenny 48). However, logic is ineffable; it can be shown but not said (Rorty, *Essays on Heidegger and Others* 55). Wittgenstein said that "propositions cannot represent logical form: it is mirrored in them" (*Tractatus* 31).

The ineffable and self-evident characteristic of logic, for Rorty, plays the same role in Wittgenstein's early philosophy of language as a "transcendent Diety" did for theologians (Rorty, Essays *on Heiddegger and Others* 55). God, or in the case of early Wittgenstein, logic, is an unexplained explainer, a thing which "cannot, on pain of infinite regress, be contextualized or explained" (Rorty, Essays *on Heiddegger and Others* 54). Rorty called these "Type A entities" and these types of entities are hopeless at providing clarity to the problem. Rorty goes on to ask, "if God can be *causa sui*, why should not the world be? Why not just identify God and nature"? (Rorty, *Essays on Heidegger and Others* 55). This is precisely the claim that Wittgenstein is trying to make in the *Tractatus*: removing God and replacing it with logic as the unexplained explainer, allows him to save his philosophical idea that there are formal limits to language. Language is

bounded by the world-out-there and the role of language is to get it right. Anything short of that is nonsense.

The SCC appears to utilize language in this manner. Through the purposive approach and theorizing about corporations, judges have identified corporations as persons for the purposes of the *Charter* and then attempt to determine what interests they have. Once it has created propositions that attempt to generate a true "picture of reality" of corporations then the SCC is adequately equipped to accurately assign corporations with the appropriate *Charter* rights and/or freedoms. Admittedly, the courts are concerned with the effects a judgement can have on society (for example, in the *CIP* case, the SCC was concerned about the integrity of the judiciary and, in the *Little Sisters* case, the SCC considered the effects of legislation on minority groups); however, the starting point is that corporations are persons and, as such, deserve protections under the *Charter*.

The role of the courts, then, appears to be like that of philosophy according to Wittgenstein: it "aims at the logical clarification of thoughts" and like law, philosophy aims at thoughts that are not "cloudy and indistinct" by making those thoughts "clear" and with "sharp boundaries" (Wittgenstein, *Tractatus* 29-30). The attempt at outlining these sharp boundaries, however, has resulted in a lack of clarity. When the concept of personhood results in an absurdity (such as in section 7 cases above), the SCC creates exceptions.

Like Wittgenstein, the SCC has treated corporations as propositions with an unalterable form. They attempted to employ language to achieve clear thoughts with sharp boundaries to reveal the truth about corporations. This is particularly true in cases where the SCC uses the purposive approach to determine, through a representationalist mode of language, whether corporations have an interest that accords with the purpose of a right or freedom under the *Charter*.

We see glimmers of the purposive approach in the context of the expression cases in *Devine*, *Ford*, and *Irwin Toy*. In these cases, the SCC justified the granting of freedom of expression to corporations by relying on the foundational reasons behind free expression. Sharing reasons, the *Devine* and *Ford* cases that claim that freedom of expression has an "intrinsic value" and that, at least in part, commercial expression helps to "protect listeners as well as speakers" (*Ford* 767). It's not clear whether the

SCC justifies commercial expression on the principled “intrinsic value” or expression or because granting this right also protects listeners; however the court did say that freedom of expression protects “speakers” (*Ford* 767).

The SCC moved closer to an unconscious commitment to a Wittgensteinian representationalist mode of language in the *Irwin Toy* case. Expression, the SCC said, belongs to corporation “because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual” (*Irwin Toy* 968). Without explicitly appealing to the purposive approach, the SCC appears to imply that corporations are beneficiaries of the inherent values that freedom of expression offers. It appears as though the SCC knows the possible occurrences in the “states of affairs” of corporations, possibilities that are part of the nature of what it means to be a corporation (Wittgenstein, *Tractatus* 6).

Over time, the SCC softened the degree of protection afforded to corporations under section 2(b) of the *Charter*. In the *Rocket* and *RJR* cases, the SCC said that expression for economic purposes receives less protection than other types of expression. Both of these cases involved advertising and judges wanted to strike a balance between one’s right to free expression while protecting the public from manipulative marketing. Despite the softening of the protection, the SCC still valued a corporation’s right to free expression as though having an interest in free expression constituted one of the internal properties of a corporation.

The SCC returned to a robust protection of corporate expression in the *Thomson 1998* case, which centered on the publication of polling information under the *Canada Elections Act*. Thomson Newspapers Company Limited and Southam Inc. initiated the *Charter* challenge and, striking down the provisions of the *Canada Elections Act* that violated the *Charter*, the SCC chose not to do an explicit purposive analysis. But by situating polling information with political expression, the SCC implied corporations, like Thomson Newspapers Company Limited and Southam Inc., have an interest in freedom of expression further implying that corporation are things with internal properties which language must reach out to.

The pursuit of clarity in language, to create “sharp boundaries,” that captures the internal properties of corporations continued in the history of section 7 – the right to life,

liberty, and security of the person – of the *Charter*. In these cases, however, the SCC decided *not* to grant this right. Yet, in not granting the right under section 7, the SCC once again articulated what the "internal properties" of corporations are in cases like *Irwin Toy*, *Thomson 1990* and *Wholesale*. In this line of cases, the SCC adopted a corporate theory approach on its way to refusing corporations this right. Section 7 of the *Charter* is now widely understood to be reserved for natural persons as these rights serve "to underline the human element" (*Irwin Toy* 1004). To say otherwise would be false as the internal properties of a corporation do not allow for such a description.

While the *Thomson 1990* and *Wholesale* cases upheld the decision in *Irwin Toy*, the SCC carved out specific exceptions in each: there were natural people involved in the *Thomson 1990* case and *Wholesale* was successful in availing itself of protections of section 7 by arguing that it had standing to bring such a claim. However, the widely accepted idea is that corporations, despite being legal persons, are not human and therefore do not attract the direct protection of section 7 of the *Charter*. While the SCC is right that corporations are not sufficiently person-like, the reasoning seems logically connected with the cases above relating to freedom of expression; their internal properties, while person-like, are insufficiently person-like to attract such a right.

Unlike section 7 of the *Charter*, the SCC found that section 8 – the right to be secure against unreasonable search and seizure – is a right that appropriately belongs to corporations by once again utilizing the purposive approach. The early cases, such as *Southam* and *Thomson 1990*, began to explore the purposive approach for the purposes of articulating *Charter* rights. In *Southam*, the SCC fleshed out the purpose of section 8 as a way to protect a person's right to privacy where there was a reasonable expectation to such privacy. The court in *Thomson 1990* expanded the scope of the protection to not just the inviolability of one's body but to include the protection of privacy in relation to a person's belongings such as books, records and other documents (*Thomson 1990* 492). In neither of these cases did the SCC claim that corporations have an interest that accords with the protections afforded by section 8 of the *Charter*; *however*, it was the *McKinlay* case where the SCC made a robust commitment to the idea that corporations have interests.

While the corporate appellant was not successful in *McKinlay*, the SCC stressed that the purposive approach resulted in protections under section 8 for corporations.

The SCC said that the expectation of privacy was lower for businesses than it is in a person's home. This protection was more deeply entrenched in the *Lessard* case where the SCC said that the search of premises, owned by a natural person or owned by a corporation, constitutes a "significant intrusion" (444).

The granting by the SCC of the right to be secure against unreasonable search and seizure to corporations seems to continue to treat corporations as the sorts of facts that Wittgenstein discusses in the *Tractatus*. The Justices of the SCC appeared to make truth claims about corporations. They seem to see corporations as objects that form part of reality and the job of language is to represent this reality with accuracy. The way in which the SCC does this is by articulating what interests a corporation possesses in a way that suggests these interests are part of what Ayer refers to as the internal properties of that object (17). Consistent with Wittgenstein, then, the SCC appears to articulate these internal properties so that the appropriate *Charter* rights can be ascribed because the very nature of the corporate object demands it. To get this wrong, to create false propositions about corporations, could result in nonsensical case law. The problem is that the representation then appears to constrain judicial decision-making.

This constraint is evident in cases like *CIP* where the SCC articulated yet another corporate "interest." While CIP was unsuccessful in its attempt to seek protection under the *Charter*, the right to be tried within a reasonable period of time, the fact that the SCC said that corporations have a legitimate interest in this right compels future courts to treat corporations as persons for this purpose. Due to a number of adjournments at trial, CIP Inc. wanted to avail itself of section 11(b) of the *Charter* claiming that its right to be tried in a reasonable time had been violated. The SCC said that the purpose of section 11(b) is to prevent trials extending over prolonged periods of time due to the potential for loss of witnesses and that testimony becomes less reliable. The SCC clearly stated that CIP Inc. has a "legitimate interest" in such a right (*CIP* 856). And like the *Southam*, *Thomson 1990*, *McKinley* and *Lessard* cases addressed corporate interests in relation to section 8 of the *Charter*, the SCC in *CIP* similarly envisioned corporations as objects with a reality independent of language and that language must be employed in such a way as to accurately depict the nature of these entities. The constraint arises based on the idea that a corporation has an interest and that a discussion of this right must account for this interest.

Through the use of the purposive approach in the *Amway* case – despite the case not resulting in the attachment of the right not to be compelled as a witness – the SCC committed same ontological mistake made in previous cases. The SCC determined that the purpose of section 11(c) of the *Charter*, the right not to be compelled to be a witness, is to protect the privacy and dignity of an accused. According to the SCC, granting this right to corporations is irrational because they are incapable of taking the stand. So, corporations cannot be said to have an interest that accords with the purpose of section 11(c) based on its dissimilarity to a natural person (bearing in mind, once again, that an officer of a corporation is distinct from it). The presumption is that corporations have interests, interests that appear to be consistent with Wittgenstein's idea that facts – such as corporations – have states of affairs. To avoid an absurdity, the SCC has tried to articulate statements about corporations that mirror their states of affairs.

The SCC's adoption of the purposive and corporate theory approaches to determining corporate rights and freedoms under the *Charter* has led to corporations being hypostatized in much the same way as the standing argument has. In the *Big M Drug Mart* case, the SCC found it irrelevant whether "real persons or artificial ones such as corporations" have had their rights infringed because it is not a matter of being able to enjoy the right or freedom (*Big M Drug Mart* 313, Tollefson 323-324). This idea was adopted and further expanded upon in the *Wholesale* case.

In *Wholesale*, the SCC granted standing to Wholesale, a corporation, to challenge whether section 37.3(2) of the federal *Competition Act*, which provided a reverse onus, violated one's right to be presumed innocent. To justify overturning this provision for violating the *Charter*, the SCC said that no person should be convicted of an offence that stems from an unconstitutional law. This reasoning, however, begs the question. This statement adopts a sort of Wittgensteinian approach to language under the *Tractatus* by presuming that a corporation bears the necessary and sufficient conditions of personhood. And while the SCC said that legislators can draft the legislation so that it only applies to corporations thus precluding a corporate litigant from achieving standing to make such an argument, it mistakenly treats corporations as objects possessing their own internal states of affairs. Corporations, then, continue to constrain what judges feel they can and cannot do in relation to the *Charter*.

The accuracy or truth of any representation requires a minimum commonality between the picture and what is being pictured, representation and thing represented, sign and referent. This is the way in which the SCC seems to deploy language when thinking about corporations. The result constrains judicial action. The ontological assumption made by the SCC is that corporations constitute a fact which requires language users (i.e. themselves) to arrange language in a manner that chimes with that fact. Language, then, can and should be refined in such a way as to mirror the "states of affairs" of all facts and, indeed, corporations. The SCC implicitly agrees that language is only useful if it accurately measures up to reality. This will help to avoid nonsense while pursuing "sharp boundaries" in language.

This approach to the use of language has led the SCC to apply, and sometimes refuse to apply, *Charter* rights and freedoms to corporations. And while the results may or may not be desirable, the method for arriving at these conclusions is improper. These cases treat corporations as something that all language users, and in particular judges, owe a duty of loyalty. This duty requires language users to understand and properly articulate their states of affairs. In addition to large multi-national corporations amassing massive amounts of wealth and political influence, corporations are also entitled to fundamental rights and freedoms.

The more accurate way to view corporations is as a tool. They are a tool to inspire investment from people, typically shareholders, which give corporations access to greater wealth to increase productivity and profitability, while limiting the liability of those investors to no more than their investment. Unlike sole proprietorships and partnerships that expose the business owners to unlimited personal liability, corporations have been an effective tool in promoting investments.

The *Solomon* case provided a way to think about corporations when it called them a "distinct legal *persona*." The distinctness is between, but not limited to, shareholders and the corporation itself. But there is a way out that might allow the courts to return to a different way of perceiving corporations and that way might lie in Wittgenstein's approach to language in the *Philosophical Investigations*. The *Philosophical Investigations* may provide an illustration of how an old way of speaking is a ladder that needs to be thrown away in favour of something new (Wittgenstein, *Tractatus* 89).

5.3. A Multiplicity of Relations: Language as Games

Wittgenstein came to see his earlier thoughts on language as misguided. In the *Philosophical Investigations*, he saw languages as games, not as final expressions of reality. The *Philosophical Investigations* is, partly, a repudiation of the *Tractatus* (Ayer 67). Younger Wittgenstein wanted sentences to be pictures; later Wittgenstein wanted them to be tools (Rorty, *Essays on Heidegger and Others* 52). More specifically, he analogized the rules of a language game to that of a normal game. He says that a word, like the game of chess, is "not everywhere bounded by rules. But what does a game look like that is everywhere bounded by rules?" (Wittgenstein, *Philosophical Investigations* 44).

A rule, according to Wittgenstein, is more like a signpost. Under his representationalist theory in the *Tractatus*, a proposition was either true or false. Like Augustine learning language by seeing patterns emerge based on the successful correspondence of to something in the world to the words uttered, Wittgenstein's theory of language required correspondence. But Wittgenstein came to see this as an oversimplified view of language. While one may learn nouns in such a way, like "chair" or "bread", it fails to see how context plays a role in language.

By way of example, Wittgenstein used the sentence of a shopping list containing the phrase "five red apples" (Wittgenstein, *Philosophical Investigations* 5). The words "red" and "apple", while likely known by heart, are easy enough to reference. A chart may provide an example of what "red" and "apples" are. Yet there is no such way to ascertain the meaning of "five" (Wittgenstein, *Philosophical Investigations* 6). So Augustine "does describe a system of communication; only not everything that we call language is this system" (Wittgenstein, *Philosophical Investigations* 6). Ostensible teaching of language can lead to a foggy conception of meaning but the fog lifts when "one can clearly survey the purpose and functioning of the words" (Wittgenstein, *Philosophical Investigations* 7). Seeing language in this context is akin to seeing language as a series of games.

In this picture of language as a game, the use of words is contingent upon its context. "The meaning of words is derived by its use" (Wittgenstein, *Philosophical Investigations* 59). This use gives rise to a contextual use of language. Words and

sentences do not form a bounded whole that accurately reflect the world but rather are "a set of indefinitely expandable practices" where the truth of one sentence is contingent upon the truth of another (Rorty, *Essays on Heidegger and Others* 57). Another way of seeing language is that it's a toolbox consisting of different tools. "Think of tools in a toolbox: there is a hammer, pliers, a saw, a screwdriver, a rule, a glue-pot, glue, nails and screws. – The functions of words are as diverse as the functions of these objects" (Wittgenstein, *Philosophical Investigations* 9). The concept of words as tools is useful to help eliminate misunderstandings and give meaning in the context in which the word is being used.

In the context of a language game, language-users strive to "eliminate misunderstandings by making expressions more exact" (Wittgenstein, *Philosophical Investigations* 46). Where an expression is inexact, it is not unusable but subject to criticism and where it is exact, subject to praise (Wittgenstein, *Philosophical Investigations* 46).

Wittgenstein used the example of various kinds of handles found in the cabin of a locomotive to illustrate this point. He said that all the handles in a locomotive look similar; this stands to reason as they are all meant to be handled (Wittgenstein, *Philosophical Investigations* 10). But each handle performs different tasks. One handle allows the engineer to turn a crank to regulate the opening of a valve; another handle is a switch; while yet another handle, when operated, allows the engineer to apply the brakes (Wittgenstein, *Philosophical Investigations* 10). To say, then, that a word signifies something, like Augustine, doesn't mean that we have meant anything. For meaning to emerge, we provide some context in which that word in being used (Wittgenstein, *Philosophical Investigations* 10). The context illuminates the distinction.

Unlike tools, the language user, in particular when language is being used in a new way, is "typically unable to make clear exactly what it is that he wants to do before developing the language" whereas the craftsperson knows which tool to utilize for each job (Rorty, *Contingency, irony and solidarity* 12-13). Language can then be utilized to discuss "utopian politics or revolutionary science (as opposed to parliamentary politics, or normal science). The method is to redescribe lots and lots of things in new ways, until you have created a pattern of linguistic behaviour which will tempt the rising generation to adopt it, thereby causing them to look for appropriate new forms of nonlinguistic

behavior, for example, the adoption of…new social institutions" (Rorty, *Contingency, irony and solidarity* 9). Language as a game consisting of different tools illuminates how language can be used in ways to express new ideas or old ideas in a new way. Language as a game also allows us to recognize that the current use of our language is not producing the kinds of results we want. With this critical eye, language users can then forge a new language game, effectively creating a new tool, to do the work we want it to.

Like later Wittgenstein, Roland Barthes understood that language did not reach out to reality to create eternal truths or eternal truth-values. For Barthes, the idea of myth is similar to Wittgenstein's language-as-game idea. Myth, for Barthes, is a type of speech predicated upon a "system of communication" (Barthes 109). The system of communication has a set of special circumstances that give rise to myth. But with myth, there are no rules that limit what we may say. "A tree is a tree. Yes, of course. But a tree expressed by Minou Drouet is no longer quite a tree, it is a tree which is decorated, adapted to a certain type of consumption, laden with literary self-indulgence" (Barthes 109). Myth balks at the eternal and strives for the contingent.

Unlike mathematics, which is a finished language, myth "is a language which does not want to die: it wrests from the meanings which give it its sustenance as insidious, degraded survival, it provokes in them an artificial reprieve in which it settles comfortably, it turns them into speaking corpses" (Barthes 133). The SCC has treated the idea of corporate personhood as a finished language or, at the very least, is trying to forge a finished language.

Like myths, language games lack a finished quality to them. They are varied and include "describing an object by its appearance, or by its measurement," "reporting an event," "speculating about the event," and "forming and testing a hypothesis" (Wittgenstein *Philosophical Investigations* 15). This lack of a finished quality to language marks a change in Wittgenstein's thinking from his commitment to "search for the general form of propositions…and with it the idea of there being something common to everything we call language" in the Tractatus, which he swapped out for "a multiplicity of relations" in the *Philosophical Investigations* (Ayer 69).

To understand the idea that language is a game or series of games, Wittgenstein analogizes to actual games asking "What is common to all of them?" (*Philosophical Investigations* 36). He rejects the idea of a commonality of all games in favour of "similarities" or "affinities" among them (Wittgenstein, *Philosophical Investigations* 36). To make this point, he breaks off games into different types such as board games; card games, and ball games. Games of the same type will have numerous affinities but between and among different types of games, a number of those affinities will drop out. Not all games, he says, are about winning and losing. When "a child throws his ball at the wall and catches it again, this feature has disappeared" (Wittgenstein, *Philosophical Investigations* 36). Wittgenstein avoids a reductionist account of games in favour a relational one. He said that the "upshot of these condensations is: we see a complicated network of similarities overlapping and criss-crossing: similarities in the large and in the small" (Wittgenstein, *Philosophical Investigations* 36).

This network of similarities or affinities he describes as a "family resemblance" (Wittgenstein, *Philosophical Investigations* 36). Family members possess a number of similar qualities such as build, temperament, eye colour, and so on, which overlap in the same way as games. Games, then, form a family each with their shared and unique qualities (Wittgenstein, *Philosophical Investigations* 36).

Wittgenstein addresses what a game is. In this, he implicitly rejects the Platonic idea that examples are insufficient to build an understanding of what something is. In Plato's Theaetetus, Socrates asks Theaetetus "what do you think knowledge is?" to which he responds that geometry and the art of the cobbler are examples of knowledge (Plato 9). Socrates presses Theaetetus claiming that he has provided many examples but that what is required is one thing: "what, exactly, knowledge itself is" (Plato 10). Socrates was after the necessary and sufficient conditions of knowledge that avoided any reliance upon examples. He wanted to get at something timeless and immutable. Rejecting this reductionist philosophy, Wittgenstein asked rhetorically "Isn't my knowledge, my concept of a game, completely expressed in the explanations that I can give?" (Wittgenstein, *Philosophical Investigations* 40). Our understanding of something, like the concept "game," is built upon examples and analogies (Wittgenstein, *Philosophical Investigations* 40). There is no need to draw a "sharp boundary" or provide all the necessary and sufficient conditions. Rather, if one were to try, the affinity

between different boundaries “is just as undeniable as the difference” (Wittgenstein, *Philosophical Investigations* 40).

This “sharp boundary” in language is no longer necessary according to Wittgenstein. Language is “not everywhere bounded by rules” (Wittgenstein, *Philosophical Investigations* 44). Rules require fidelity. The rule that corporations are persons attempts to express a precise idea and, when fidelity to the rule is not possible, the courts fashion exceptions to the general rule. A sharp boundary requiring exactness is neither something we have “envisaged” nor do we know “what we are to make of this idea” (Wittgenstein, *Philosophical Investigations* 44). Just because something is inexact does not mean it is unusable. What we need is context to make this determination. It is inexact, for example, when one fails to provide the distance of the earth from the sun to the nearest metre; however, the goal is to generate an understanding of the vast distance between these two bodies and, here, inexactness is usable (Wittgenstein, *Philosophical Investigations* 46).

To reiterate, the goal of language is to purge itself of misunderstandings by speaking in a more exact fashion, not with “complete exactness” (Wittgenstein, *Philosophical Investigations* 48). The goal is not to seek out the essence of language. “We are under the illusion that what is peculiar, profound and essential to us in our investigation resides in its trying to grasp the incomparable essence of language. That is, the order existing between the concepts of proposition, word, inference, truth, experience, and so forth” (Wittgenstein, *Philosophical Investigations* 49). If this is the correct view of language then the order must be “a *super*-order between – so to speak – *super*-concepts” (Wittgenstein, *Philosophical Investigations* 49). Language, for the later Wittgenstein, does not need such a lofty account. In order for words such as “language”, “experience”, and “world” to have a use, there must “be as humble a one as that of the words “table”, “lamp”, and “door” (Wittgenstein, *Philosophical Investigations* 49). Wittgenstein was not in pursuit of an ideal for language.

The ideal is too lofty. It demands accordance with logic of which there cannot be any vagueness (Wittgenstein, *Philosophical Investigations* 50). The ideal is “unshakeable” but Wittgenstein demanded that we “must stick to everyday thought, and not get on the wrong track” where such a lofty ideal demands “extreme subtleties” which we are not able to describe (Wittgenstein, *Philosophical Investigations* 51). Any attempt

to do so makes it seem “as if we had to repair a torn spider’s web with our fingers” (Wittgenstein, *Philosophical Investigations* 51).

All this is a rejection of Wittgenstein’s *Tractatus*, which required a formal unity in language ((Wittgenstein, *Philosophical Investigations* 51). To avoid reliance on logic – the Type A entity or unexplained explainer – Wittgenstein drops the idea of logic as central to language altogether. In its place he suggests that language itself is the appropriate tool to work through philosophical problems. “Philosophy is a struggle against the bewitchment of our understanding by the resources of our language” (Wittgenstein, *Philosophical Investigations* 52). The loftiness of language is replaced by the more humble task of using language as a tool to achieve more precision.

To properly understand this new idea of language, Wittgenstein says we need an overview of words that allows us to see connections (Wittgenstein, *Philosophical Investigations* 54). This interconnectedness of language, these ever new and expanding language games, is not a precursor to a future final language; rather, language games are ways in which we can establish new means of comparing things, to determine the similarities and dissimilarities (Wittgenstein, *Philosophical Investigations* 56). The goal of the *Tractatus* was to develop correspondence between the world and what language users say (Wittgenstein, *Philosophical Investigations* 56). The goal of the *Philosophical Investigations* is to do away with a representationalist model of language and to point out that language is a series of games with varying degrees of connectedness.

To properly understand language as interconnected means to understand that meaning of words arises out of its use (Wittgenstein, *Philosophical Investigations* 59). So, true and false are the results of what we say because through language, we create agreement (Wittgenstein, *Philosophical Investigations* 94). Seeing language as games allows the courts to characterize the word “person” for corporations as a separate language game from “person” used in the context of natural people.

Wittgenstein’s later views on language in the *Philosophical Investigations* allow us to see two words, like “person,” that emerge from different language games as having similarities and dissimilarities. The similarities between the corporate person language game and the natural person language game could be as follows: both can own property; both can enter into contractual relationships; both can enter into partnerships;

both are able to pursue wealth; and both are separate from any other person that they loan money to or borrow money from. However, the differences are vast: corporations are legal fictions and have no physical existence; corporations have the *sole* purpose of pursuing profit; corporations enjoy a preferred tax rate in Canada; and corporations only come into "existence" through a process that requires legal recognition. Natural persons share none of these traits.

Despite the overwhelming support by the SCC that corporations are entitled to protections under that *Charter*, there have been glimpses in the court's use of language where they see the phrase "corporate personhood" as nested in a different language game from the phrase "natural person." The SCC, at times, has effectively articulated differences between natural persons and corporate persons. In *Thomson 1990*, Justice L'Heureux-Dube argued, in a manner consistent with Wittgenstein's idea of language games, that corporations are indeed different types of persons than natural people. In her dissent, Justice L'Heureux-Dube said that "[m]odern corporate existence carries with it a notion of privacy which is at odds with the privacy inhering in physical persons. This difference flows from the nature of corporate existence" (*Thomson 1990* 589). The recognition that corporations are fundamentally different from natural persons places each concept of "personhood" into two distinct language games.

Justice L'Heureux-Dube continued that "individuals as a rule have full legal capacity by the operation of law alone" while "artificial persons are creatures of the state and enjoy civil rights and powers only upon the approval of statutory authorities" (*Thomson 1990* 589). Even though Justice L'Heureux-Dube does not articulate what exactly the civil rights and powers that corporations enjoy, she said that "their legal power may be restricted" by, among other things, legislation. These restrictions appear to be boundless as she also said that the state has the authority to terminate a corporation for its failure to comply with the law because it is the state that "defines the parameters of corporate existence" (*Thomson 1990* 589).

This is precisely how Canadian courts ought to address the conception of a corporation: as one more tool within a language game where meaning, and therefore truth, is derived from the context in which it is used. The corporation is a product of and subject to the state and, I would add, to judge-made law. But the need to exercise control is a deeply important point. Like Bakan, Justice L'Heureux-Dube recognized the

different impact corporations have on society because the “business decisions of corporations can affect the economy and thus indirectly influence the interests of many individuals in society at large” which has necessitated “a number of overriding societal objectives designed to control the public repercussions of corporate activities” (*Thomson 1990* 590). It is this background, together with the insights of Bakan, Deleuze, and others, that corporate rights must be viewed.

The House of Lords in *Salomon* hinted at the idea that corporations might be demand a language game all its own when discussing their rights and liabilities. Couched in terms of limited shareholder liability, Lord Halsbury said that a company is an “artificial creation of the Legislature” and “once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself” (*Salomon* 38) [emphasis mine]. This phrase, “appropriate to itself,” seems to suggest a proviso, a proviso which courts and law makers scarcely expand upon. Rather, judges have, as a general rule, adopted the formulation that corporations are persons. However, this proviso deserves some attention.

To reiterate, the House of Lords in *Salomon* had to determine whether Salomon, the company, was distinct from Salomon the natural person who was both a shareholder and debenture holder. It was from *this* perspective that the House of Lords analogized the company as a separate person. In terms of debt obligations, the creditors did business with the corporation. They did not have a contractual relationship with Aron Salomon. The distinction between Salomon the natural person and his corporation, then, was a useful metaphor to help explain who bore the liability.

It does not necessarily follow, then, that a company is its own person in all cases. To do so, would be an unjustifiable linguistic “metamorphosis” (like it would be to grant corporations the right to life, liberty, and security of the person) (Amway 40). The most useful way to conceive of a corporation is that it’s a tool in a particular language game and serves to illustrate how one can invest in a company while enjoying the comfort of limited liability. Language games, for Wittgenstein, are plentiful.

The context of the language game imbues the words used with meaning. Language games include “reporting an event,” “Cracking a joke”, and “Acting in a play” (Wittgenstein, *Philosophical Investigations* 15). To Wittgenstein’s list, I would add

"Speaking about the rights of natural persons" and "speaking about rights corporations" or "talking about natural persons" and "talking about corporate persons." It is important to know where one language ends and another begins" (Kenny 130). Without context, without understanding language as a series of relations, we lose meaning. In the context of the *Charter*, the SCC has largely failed to see where the language game about natural persons ends and where the language game about corporations begins.

As explained above, there are times when the SCC has refused to grant corporations certain rights and freedoms under the *Charter*. The conclusion that corporations are not entitled to certain *Charter* rights and freedoms is indeed the correct result. As discussed in chapter 3, corporations are not entitled to avail themselves of the right to life, liberty and security of the person, and the right not to be compelled to be a witness. The SCC declared that this right belongs to natural persons as corporations are not sufficiently person-like. A legal fiction cannot be deprived of its life, liberty and security of the person.

In discussing whether or not a corporation can be compelled to be a witness, the SCC rightfully pointed out that it would "strain the interpretation" of section 11(c) of the *Charter* (*Amway* 39). Bearing no physical evidence of existence or the ability to speak on its own, a corporation would make a terrible witness. With this observation, the SCC may be credited with seeing the difference between the language game of corporate personhood and of natural personhood. It shows an understanding that corporations may bear economic similarities with natural persons but not a great deal more.

However, the SCC collapses the dissimilarities between corporations and natural persons in their discussion of freedom of expression. In this set of cases (despite extending weaker protection of freedom of expression to corporations), the SCC has been inconsistent in how it applies *Charter* rights to corporations. Among the purposes behind the *Charter* right to freedom of expression is "truth for its own sake because it is an aspect of individual autonomy and self-realization" (*Ford* 765). Like the right to life, liberty and security of the person and the right not to be compelled to be a witness, this purpose is wholly human. The idea that a corporation has any sense of individual autonomy or that it can self-realize if only it was given the freedom to express itself is absurd. Corporations, unlike natural persons, are set up to achieve only profit. They neither have the desire for autonomy nor self-realization. A corporation that makes a

profit is, according to the law and the will of the shareholders, fully "self-realized." The SCC's failure to consistently and properly demarcate the language games between corporate and natural persons has not only led to a declaration that corporations are among the bearers of *Charter* rights; it has also led to a lack of clarity about what it means for a law to be unconstitutional.

The SCC has said that "no one can be convicted of an offence under an unconstitutional law" (*Wholesale* 179). In cases where corporations have been denied the benefit of a particular right (including freedom of religion and the right to life, liberty security of the person), corporations have still been successful in benefiting from *Charter* challenges where they have been granted standing. The SCC did not include the freedom of religion among the rights enjoyed by corporations in the *Big M Drug Mart* case. Big M Drug Mart benefited by being granted standing to challenge legislation that prevented businesses from being open on Sundays. In its defense, the SCC analogized that preventing a corporation from bringing a claim under section 2(a) of the *Charter* is akin to an atheist being prevented from having standing. This analogy fails on the basic premise that an atheist is, by virtue of being an atheist, expressing her lack of belief in God or an organized religion. This just *is* a religious perspective. Corporations are fictions; they have no religious opinions or perspectives. Allowing them to have standing in a case grants corporations access to precisely what it is managers of that corporation are looking for: a legitimate legal means to have legislation that aims at limiting the power of corporations.

Similarly, in *Thomson 1990*, the SCC decided that Thomson Newspapers could benefit from the *Charter* right to life, liberty and security of the person by making the offending legislation invalid. In this case, though, the SCC said that the right to life, liberty and security of the person was appropriately invoked because there were also natural persons involved in making the appeal. The result, however, is that while the natural people enjoy protections under this right, corporations equally enjoy the benefit of a successful *Charter* challenge. Actually having an interest that accords with the purpose of the right is immaterial.

The idea that an unconstitutional law should not be enforced against any person, natural or artificial, misses the point. As discussed above, the appropriate context to consider corporate personhood is within its own language game, separate and apart

from natural persons. While these persons have limited economic family resemblances, they are not part of the same language game when it comes to rights and freedoms under the *Charter*. And since they are not part of the same language game, then any law that is deemed to violate any provision of the *Charter* is only unconstitutional for natural persons. With a contextually driven approach to the word "person," it is an error to say that an unconstitutional law for natural persons is, by logical extension, an unconstitutional law for corporations. If corporations wish to serve a social function of protecting individual rights and freedoms under the *Charter* for the betterment of society at its own cost, then corporations ought to be granted standing in court to make such an argument. This would be done, as a general rule, on the condition that corporations would not be able to enjoy the benefit of successful legal arguments. As far as the *Charter* goes, only natural persons benefit from it. So where the corporation makes successful arguments to invalidate unconstitutional legislation, that legislation ought to continue in full force and effect for corporations, not natural persons.

Wresting control of the word "corporation" from a representation-like model of language and contextualizing it as yet another word in yet another language game provides not only law-makers but also courts with the ability to impose a vision of how we want corporate rights to look. Rather than making statements about corporations that attempt to get at the "truth" of 'corporate-ness', the courts can focus on making statements about corporations that are more exact; whose very exactness depends upon an understanding of the context out of which corporations were born and what use they provide society.

To reiterate, the context illuminates meaning. A representationalist model of language, used unconsciously by the SCC, is not producing the sorts of results that we should accept. Fundamental rights and freedoms are being granted to corporations. When these rights and freedoms are not granted to corporations, they are still receiving the benefit of those rights. However, the differences between corporations and natural persons are more pronounced than the similarities. By recognizing that corporations are created to be focused, above all else, on the pursuit of profit, and that they simply use the *Charter* to pursue this interest, then it is important to reconsider the current approach to rights for corporations under the *Charter*.

In chapter 6, I will provide a sketch of what such a reconsideration might look like. Using the lessons from Wittgenstein's *Philosophical Investigations*, I will propose a test that Canadian courts could use when considering whether corporations ought to be among those that bear *Charter* rights and freedoms. Such a test will recognize that corporate personhood occupies a different language game from natural persons and those rights and freedoms should only be extended to the former if it serves the interests of the latter.

Chapter 6.

Reshaping Corporate Rights: The Public Interest Doctrine

The notion that corporations constitute a person in law has taken on a nearly literal meaning that almost equates corporations to natural persons. By employing a representationalist language, courts have seen corporations as more than vehicles to create profit, more than entities that inspire confidence in investors that extend to them the benefit of limited personal liability. When the House of Lords granted separate legal personhood to companies in the *Salomon* case, it is an open question whether that court intended for personhood to extend beyond the economic separateness of corporations from its investors to one where corporations now enjoy protections under the *Charter*. To reiterate, it is, as a general rule, nonsensical to include corporations among the bearer of individual rights and freedoms. To be sure, cases where corporations have challenged legislation under the *Charter* has undoubtedly conferred benefits to individual Canadians by giving the SCC a chance to articulate the scope and application of these rights and freedoms but it has come at a cost.

Governmental decisions need oversight. The *Charter* together with Canadian courts provides an effective oversight mechanism, which aim at reducing laws that are unconstitutional. However, there are times when government passes a law that is crafted to address social policy issues associated with corporate activity. These include the protection of disadvantaged or vulnerable groups of people, the protection of our environment, or laws that govern the exercise of managerial conduct in relation to the corporation. It is precisely these laws that have, at times, been the focus of corporate discontent. Accessing the *Charter* allows corporations to reduce valid legislative responses to pressing public issues.

The general rule supported by this thesis is that corporations should not be allowed to protect their economic interests (and this is their *only* interest, insofar as a corporation can be said to have an interest) by reducing their legal liability through *Charter* challenges. This general rule includes both counting corporations among "people" that enjoy *Charter* rights and freedoms and granting corporations standing to

argue that certain laws are invalid (to reiterate, corporations should be granted standing to make *Charter* arguments but should not be able to benefit from a successful argument). However, there are times when this rule is too rigid and may prevent effective enforcement of laws that benefit all Canadians, including, in limited circumstances, corporations.

To allow for such cases, the SCC could create a public interest doctrine that provides for certain criteria to be met before a corporation could bring a *Charter* challenge. Such a public interest doctrine would represent a procedural hurdle for corporations that wish to make *Charter* arguments from which they could benefit. Such a test would render the purposive analysis, corporate theory, and arguments that permit corporations to gain standing obsolete. By rendering these approaches to corporate rights obsolete, the courts would also render the Wittgensteinian representationalist model of language in relation to understanding corporations obsolete. A public interest doctrine, then, would recognize that corporations belong to a language game different than that of natural people. Any exceptions to the rule that corporations should not be granted *Charter* rights and freedoms would be justified if and only if a corporation would be able to demonstrate that granting the corporation a right or freedom serves the interests of the public.

To dispense with a related but separate issue, the courts should never resist a corporation that seeks standing to make a *Charter* claim. This could be allowed on the condition that the corporation may not benefit from such an argument. Corporations with a deep commitment to social issues that possess sufficient financial resources can employ a legal team to challenge an allegedly unconstitutional law. Corporate management is free to conduct an internal cost/benefit analysis on this strategy; however, it would not be able to include in that analysis the economic benefit of a reduction in legal liability because if the corporate litigant were successful, the unconstitutional law would only be struck down in favour of natural people.

Where a corporate litigant seeks to convince a court that standing isn't enough and that corporations should be granted the particular right or freedom in question, a corporate litigant would be able to make a claim with a court of appropriate jurisdiction to

demonstrate why its case meets the threshold of a public interest test. If the corporate litigant meets the test, it would then be able to argue the merits of its case.[7]

To establish such a test, it must include sound policy reasons that extend beyond a corporation's interest in maximizing profit. Nearly all the cases discussed in chapter 3 were brought about by corporations seeking to further their own economic interests. While some of these cases saw a benefit conferred to an historically disadvantaged group and the integrity of our legal system (the *Little Sisters* case on the application of freedom of expression to a minority group of people or the *CIP* case on being tried within a reasonable time), there are a number of other cases where corporations simply benefited without conferring a broader social benefit.

So, to provide the humble beginnings to a test, it is useful to review some of the cases discussed in this thesis. A new public interest doctrine might provide for a three-step test that a corporation would have to satisfy before it could make before it would be able to argue whether a law violates the *Charter*. In summary, the three-step test could incorporate the following: first, the corporate litigant would have to demonstrate that granting the corporation a right or freedom under the *Charter* is of "sufficient importance" to the public or a segment of the public. Second, it would have to demonstrate that natural people would not suffer any deleterious effects should the corporation be granted the right or freedom. And finally, the corporate litigant would have to show how granting a right or freedom to a corporation would confer benefits to natural persons. To make this argument, I will survey some cases that can provide some guidance to establishing such a test.

The *Oakes* case might provide some guidance for step one of the test regarding "sufficient importance". To recap, the *Oakes* case provided the framework to determine what constitutes a "reasonable limit" on a *Charter* protected right or freedom. The first step, again, is to ensure that the legislation is of "sufficient importance to warrant overriding a constitutionally protect right or freedom" (*Oakes* 138). This first step can be modified for a public interest doctrine.

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[7] This is a very rough sketch of the procedural hurdle that a corporate litigant would have to face in order to be able attract a *Charter* right or freedom beyond mere standing. A full account of this procedural step is outside the scope of this thesis; however, it would likely arise as voir dire within the trial. If successful, the trial would continue so that the court could hear the merits of a *Charter* challenge under the now established assumption that the corporate litigant would be able to benefit from a successful *Charter* argument.

Where corporations seek protection under the *Charter*, they must establish that applying the right or freedom to a corporation is of "sufficient importance" to the public or a segment of the public. This recognizes that corporations occupy a different language game than natural persons. This factor also helps to dislodge the focus from the corporation's interests and emphasizes the importance of natural persons and the effect that granting a right to a corporation would have.

The "sufficient importance" step could have arisen in the *CIP* case (discussed above). CIP Inc. argued that their right to be tried within a reasonable time had been violated (of course, the SCC agreed that such right extends to corporations but not, as was the case in *CIP*, where the corporate entity was the very cause of the unreasonable length of the trial). Arguments in cases like this that support the extension of this right to corporations would be about maintaining a legal system with efficiency and integrity where witnesses are available to testify with their memories intact. As stated by the SCC, the "right to a fair trial is fundamental to our adversarial system" (*CIP* 856). Maintaining a legal system where trials and appeals with integrity and efficiency would qualify as sufficiently important to grant the right to be tried within a reasonable time.

Freedom of expression may also be another strong justification to support the "sufficient importance" test. Cases like *Irwin Toy* and *RJR* argued that their right to freely express themselves arose in the context in marketing, which might not bring about the relevant degree of "sufficient importance." However, the *Thomson 1998* case involving the publishing of election results might. Here, freedom of expression about election results is part of a transparent democracy and might quality as sufficiently important.

The second step of the public policy doctrine can be analogized with the second step of the Oakes Test. This step of the Oakes test assesses the fairness in the balance of society's interests with the rights of individuals (*Oakes* 139). This step allows the courts to evaluate whether the legislation would have any deleterious effects on the rights of individuals or groups. To do this, the court would weigh the negative effects that the legislation might have on their rights. A modified version of this test for the public interest doctrine would permit the courts to investigate whether natural persons would suffer any deleterious effects should the court grant such rights to corporations.

For example, granting a corporation a right to free speech would render the challenged legislation invalid. Where legislation is in place, for example, to prevent the advertising of harmful or potentially harmful goods (alcohol and/or tobacco, for instance), the court would have to examine the purpose of the law in question. Understanding the purpose of the legislation would provide clarity about the benefits that it's meant to confer upon natural persons. With that in mind, the court would be able to determine whether rendering that law invalid would have a negative effect on natural persons. It could consider issues such as the effects that manipulative marketing can have on people or whether the legislation in question aims to protect the health and safety of individuals. Since corporations engage in multimillion dollar marketing campaigns that attempt to manipulate by appealing to a person's desires, the court might conclude that a corporation should not be permitted such a right on the basis that it can have deleterious effects on certain groups of persons (such as children).

Focussing on the effect that granting a *Charter* right would have on natural persons is something the SCC has, in part, considered when rendering judgement in *Charter* cases involving corporations. This is evident in some of the freedom of expression cases. The SCC has articulated the purpose behind freedom of expression as being fundamental in a "free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both the community and the individual" (*Irwin Toy* 968). Recognizing that corporations occupy a different language game than natural persons, it is inappropriate to suggest that freedom of expression is an "inherent value" enjoyed by corporations. Commercial expression typically, but certainly not always, informs customers about the product and/or service it has to offer. However, the SCC's focus on "community" is helpful. There may be occasions when a corporation challenges legislation under the *Charter*, the court would be compelled – as it did in the *Devine* case – to consider whether granting such a freedom to them would also benefit or negatively affect natural persons

A third step of the public interest doctrine test could consider the benefit that a corporation has on Canadian society or some portion of it. While corporations do pursue a profit, they provide important non-economic benefits to natural persons. For example, media corporations, such as Hunter and Thomson, disseminate important news, political and otherwise. Bookstores, like Little Sisters and Chapters, make available important works of literature. Little Sisters serves the interests of a much smaller but

underrepresented segment of society. Located in Vancouver's West End, Little Sisters has "carried a specialized inventory catering to the gay and lesbian community which consisted largely of books that included…gay and lesbian literature…academic studies related to homosexuality, [and] AIDS/HIV safe sex advisory" (*Little Sisters* 1135). While difficult to measure, Canadian courts could weave into the public interest doctrine considerations of this type.

The SCC made this type of argument in the *Lessard* case where it pointed out that media plays an important role within a democratic society and therefore should be the focus of special consideration (*Lessard* 444). Specifically, the SCC said that in addition to following the statutory requirements set out in the *Criminal Code* for a warrant, the justice of the peace ought to consider a number of factors. One of those factors is the need to balance "between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination" (*Lessard* 445). Additionally, the SCC stated that if the subject of the warrant is a media organization, that the "organization will not be unduly impeded in the publishing or dissemination of the news" as the court here recognizes the important role that media plays in society.

That certain exceptions can be made for sound policy reasons lends credibility to the idea that there are just some corporations that serve a broader social function than just profit and that these corporations ought to be granted limited protections under the *Charter*. Indeed, Justices LaForest and McLachlin recognized the important role that media plays in society. Justice Laforest said that it is a "given that freedom of the press and other media is vital to a free and democratic society" and Justice McLachlin said that "the courts have recognized the special place of the press in a free and democratic society" (*Lessard* 429 and 450).

The basis of this argument is that some corporations serve a broader social function beyond simply providing goods and services in a competitive market place. Only corporations that fulfill a broader social mandate would qualify under this step of the public policy doctrine. All other corporations would not be entitled to such protections.

A three-part public interest doctrine would achieve two main goals: first, it would recognize that corporate personhood is a language game different than natural persons. Such a test would liberate judges from making arguments that must reach out to accurately represent a corporate "reality." And second, by recognizing that corporate personhood belongs to a different language game, Canadian courts would be in a better position to limit their arguments about the granting of *Charter* rights and freedoms to corporations to ones that serve the interests of Canadians and not the economic interests of corporations.

Chapter 7.

Conclusion

What we say matters. How we say it matters at least as much. By adopting a representationalist mode of language, what we say is informed by a certain set of assumptions. This includes the idea that the world is comprised of facts and that language, when utilized with precision, can accurately represent the inner reality of a thing. Representationalist language, or the "how we say it", limits what we can say. Fidelity to the world of facts requires language-users to understand and properly articulate the states of affairs of a thing. This "how we say" also limits what cannot be said: when language cannot represent something accurately, it must be passed over in silence.

In the legal realm, the idea that there are facts that must be described accurately limits what, in particular, judges may say about the law. In the case of corporations, the SCC has dedicated a lot of time to theorizing about what a corporation is and what interests it has. This has led to a confined view about the application of *Charter* rights and freedoms to corporations, a view that concludes, on the whole, that corporations are entitled to such rights. But focusing on the "states of affairs" of a corporation has prevented the courts from considering corporate rights in a broader social context.

Using Wittgenstein's conception of language as set out in the *Philosophical Investigations* is the type of heuristic device can get us to see how meaning in language arises based, in part, on the context in which a word is used. This allows us to see that the "personhood" occupies different language games when used for natural persons and for corporations. Placing these concepts in different language games, then, allows one to recognize similarities but, more importantly, see the vast differences. Through these differences, it becomes clear the absurdity of granting *Charter* rights and freedoms to corporations.

The history of case law surrounding the genesis and development of corporate personhood further illustrates this absurdity. The courts have not only tolerated a piercing of the corporate veil when it serves society's interests, it has also demonstrated

that there is no consistent conception of what exactly a corporate person is. Despite this inconsistency, the SCC has been confident in being able to use corporate theory to describe what a corporation is and, through the purposive approach to the *Charter*, illuminate what interests rightfully belong to corporations.

But the SCC's discussion of what a corporation is and what interests it possesses has, for the most part, been divorced from what the legislated purpose of a corporation actually is. It is, like Bakan said, akin to a psychopath due to the legal duty of officers and directors to act in the best interest of their corporation, an interest that translates into making that corporation a profit. The pursuit of profit, above all else, is the goal of a corporation. And while corporations can do good things, doing them is contingent upon the economic benefit that it provides them.

Recognizing what corporations actually are and the self-interested things they can do (such as *Canadian Tire* and *Nevsun*) further reveals that corporations ought to be treated as having their own language game when it comes to rights and freedoms under the *Charter*. However, a limited view of the corporation as inherently evil or fundamentally flawed may eliminate how corporations can be used as a tool to further protect and promote individual rights and freedoms in Canada.

Adopting a public interest doctrine that, first, recognizes that corporate personhood for the purposes of *Charter* rights and freedoms eliminates the pursuit of corporations as facts with internal properties which courts must describe correctly. Secondly, such a doctrine would free judges to see corporations as entities that serve social interests. These interests include the protection of freedom of expression or the right to be tried within a reasonable time and that corporations would only become a bearer of rights in the event that it serves this broader social interest.

How judges craft legal arguments and how they employ language to support those arguments is important in understanding how the use of language might preclude certain possibilities. Under a representationalist model of language, fidelity to the truth and avoiding nonsense is paramount. Judges have spent a great deal of time dedicating their energy to this. To borrow from Marcuse, there is something irrational about the otherwise rational character of these legal arguments.

Utilizing language as a series of games where meaning is derived through the context in which words are used gives life to innumerable possibilities. It might also help judges escape the irrationality of the current approach to corporate rights and freedoms under the *Charter*. Preserving rights and freedoms for natural people and not corporations would represent a commitment by judges to curtail the ability of already powerful corporations, some of which are multi-national, to effect the legal landscape by appealing to the *Charter*.

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