



Osgoode Hall Law School of York University
Osgoode Digital Commons

Comparative Research in Law & Political Economy

Research Papers, Working Papers, Conference
Papers

Research Report No. 8/2008

From Condition of Limited Liability to Exceptional Remedy: The History of Shareholder and Director Liability for Unpaid Workers' Wages in Canada

Eric Tucker

Osgoode Hall Law School of York University, etucker@yorku.ca

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/clpe>

Recommended Citation

Tucker, Eric, "From Condition of Limited Liability to Exceptional Remedy: The History of Shareholder and Director Liability for Unpaid Workers' Wages in Canada" (2008). *Comparative Research in Law & Political Economy*. Research Paper No. 8/2008.
<http://digitalcommons.osgoode.yorku.ca/clpe/180>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Comparative Research in Law & Political Economy by an authorized administrator of Osgoode Digital Commons.



Comparative Research in Law & Political Economy

CLPE RESEARCH PAPER 08/2008

Eric Tucker

From Condition of Limited Liability to Exceptional Remedy: The History of Shareholder and Director Liability for Unpaid Workers' Wages in Canada

Forthcoming in *Law and History Review* (2008)

EDITORS: Peer Zumbansen (Osgoode Hall Law School, Toronto, Director, Comparative Research in Law and Political Economy, York University), John W. Cioffi (University of California at Riverside), Lindsay Krauss (Osgoode Hall Law School, Toronto, Production Editor)

CLPE Research Paper 08/2008
Vol. 04 No. 02 (2008)

Eric Tucker

**FROM CONDITION OF LIMITED LIABILITY TO EXCEPTIONAL
REMEDY: THE HISTORY OF SHAREHOLDER AND DIRECTOR
LIABILITY FOR UNPAID WORKERS' WAGES IN CANADA**

Abstract: This article is part of a larger study of the recurrent dilemmas that arise when protective labor law conflicts with the norms of capitalist legality. In this particular case, shareholder liability for unpaid workers' wages was first enacted in mid-nineteenth century New York State as a condition of providing investors with easy access to the corporate form at a time when there was deep unease about its legitimacy. The Canadian debate was more muted, but prominent reform politicians expressed similar concerns about the corporation, leading them to impose first shareholder and then director liability for unpaid workers' wages. In the latter part of the nineteenth-century, as the legal norms of separate legal personality and the limited liability of the makers and managers of corporations hardened into legal bedrock, the understanding of director liability as a condition of incorporation was inverted by the judiciary and treated as an exceptional privilege to be enjoyed only by the most vulnerable workers. In the late twentieth century, the Supreme Court of Canada adopted a similar line of reasoning to justify its holding that workers were not entitled to recover unpaid termination and severance pay from directors when their corporate employers defaulted.

Keywords: labor law, shareholder liability, director liability, unpaid wages

JEL classification: K22, K31

Author Contact:

Eric Tucker
Osgoode Hall Law School, York University
4700 Keele Street, Toronto, ON M3J 1P3
Email: etucker@yorku.ca

FROM CONDITION OF LIMITER LIABILITY TO EXCEPTIONAL REMEDY: THE HISTORY OF SHAREHOLDER AND DIRECTOR LIABILITY FOR UNPAID WORKERS' WAGES IN CANADA

Eric Tucker*

I. LABOR LAW'S RECURRING DILEMMA

The essence of the contract of employment is the performance of service in exchange for wages. As such, labour assumes a commodity form--a capacity that is bought and sold in labour markets. But because labour cannot be separated from its bearer, and is not produced for the market, it has been widely recognized as a special or fictive commodity¹ that has been the subject of a distinct legal regime. Historically, that distinct regime--which will simply be referred to here as employment law--has served both disciplinary and protective functions. On the one hand, it assists employers to extract from the worker the value of the labour they have purchased, while on the other it protects workers against unacceptable exploitation. While these functions are a constant, the scope and techniques of legal discipline and protection vary over time and place, as does the balance between them, depending on such factors as the development of social relations of production, the balance of power

* Professor, Osgoode Hall Law School. The Social Sciences and Humanities Research Council, Canada generously funded this project. Joshua Dougherty, Christopher Donovan, Kevin MacDonald students at Osgoode Hall Law School, and Laurent Gloerfelt, a student at Cleveland-Marshall College of Law, provided research assistance. I have benefited from comments by the journal's anonymous reviewers, as well as from those of Professors Judy Fudge, Harry Glasbeek, and Paddy Ireland. Earlier versions of the paper were presented at the Toronto History Legal History Group and Cleveland-Marshall College of Law, where I wrote the first draft while visiting.

¹ Karl Polanyi, The Great Transformation (Boston: Beacon Press, 1957), 73. Also see Jamie Peck, Workplace: The Social Regulation of Labor Markets (New York: Guilford Press, 1996), ch. 2.

between workers and employers, dominant ideologies, etc. In the fulfillment of these functions, law has encountered a series of recurring dilemmas that stem structurally from labour's special commodity status and socially and politically from conflicts between workers' and employers' interests.

This paper is part of larger project, which aims to identify and trace these recurring dilemmas in the history of Canadian employment law. Here the focus is on the history of a single strand of the wage protection function--shareholder and director liability for workers' wages. The recurring demand for wage protection arises from the near universal practice of paying workers in arrears--that is, after they have provided service. As a result, workers become their employers' creditors and bear some risk that they will not be paid. It is clearly unacceptable, however, for workers not to be remunerated for the service they provided: non-payment of wages is a breach of employers' most fundamental contractual obligation to workers and a cause of hardship to workers and their dependent family members who rely on wages to meet their basic needs without the cushion of significant savings or accumulations of property. As a result, when workers' wages are unpaid, not only are they deeply aggrieved, but also the fictive nature of their commodity status becomes glaringly obvious and there is widespread recognition that an injustice has occurred. It is not surprising, therefore, that the protection of workers' wages has deep roots in the history of employment law, dating back to the Statute of Artificers.² Wage protection has taken numerous forms, including: special procedures for bringing actions to recover wages; some preference in bankruptcy proceedings; liens on property whose value has been increased by the performance of labour; contractor liability for sub-contractors; and

² 5 Eliz. c. 4 (1562). For a discussion of the background to the statute, see Donald Woodward, "The Background to the Statute of Artificers: The Genesis of Labour Policy, 1558-63," Economic History Review, New Series, 33 (1980): 32-44. On the operation of the act and its use for wage recovery, see Douglas Hay, "England 1562-1875: The Law and Its Uses," in Paul Craven and Douglas Hay, eds., Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955 (Chapel Hill: University of North Carolina Press, 2004), 59-116. The earlier Ordinance of Laborers (1349) 23 Edw. III and Statute of Laborers (1351) 25 Edw. III, stat. 2, made no provision for wage recovery. See Robert C. Palmer, English Law in the Age of the Black Death, 1348-1381 (Chapel Hill: University of North Carolina Press, 1993), 14-23.

shareholder or director liability for wages owed by the corporation to employees.³ Regardless of the legal form and technique, the protection of workers' wages runs up against other norms deeply embedded in the legal regime, norms that constitute the legal infrastructure of capitalism, or what will be called here capitalist legality. Thus one manifestation of the recurring dilemmas of labour law is in the negotiation of the conflict between the demand for wage protection and competing norms of capitalist legality.

The history of shareholder and director liability for workers' wages is a particularly useful place to begin exploring the theme of recurring dilemmas because it engages with the construction of a central feature of modern corporate law and capitalist legality--the limited liability of shareholders and directors for the debts of the business corporation.⁴ Indeed, as this article demonstrates, the two are closely intertwined: in parts of Canada and the United States the demand for wage protection did not arise to confront a pre-existing corporate law, but was present in the process of its creation, needing to be accommodated in the first general incorporation statutes. Numerous Canadian and American legislatures responded to this demand by making shareholder and later director liability for unpaid workers' wages a condition of granting widespread access to the privilege of forming limited liability corporations. Yet within a short time, judicial decision-making inverted this understanding of the conditionality of limited liability and instead reconstructed limited liability as a basic norm of capitalist legality rather than as an exceptional privilege. In so doing, the courts also transformed the protection of workers' wages from a normative and legal condition of granting

³ For an early survey of Canadian wage protection laws, see "Legislation in Canada with Regard to Payment and Protection of Wages," Labour Gazette (October, 1906), 377-87.

⁴ Henry Hansmann and Reiner Kraakman, "What is Corporate Law?" in Reiner Kraakman et al., eds., The Anatomy of Corporate Law (Oxford: Oxford University Press, 2003), 1, 8-10. Their view that the widespread adoption of limited liability for corporations is strong evidence of its value, is contested by recent works in economic sociology that see the triumph of the modern corporation as a political accomplishment of powerful actors. See Charles Perrow, Organizing America (Princeton: Princeton University Press, 2002), esp. 207-09 and William G. Roy, Socializing Capital (Princeton: Princeton University Press, 1997).

corporate investors and managers the privilege of limited liability into an exceptional privilege granted by the state in derogation of the norm of limited liability. Then, on the basis of this inversion, judges narrowly interpreted the scope of director liability for unpaid workers' wages both in relation to who and what was protected. The judicial inversion, however, was neither total nor did it completely resolve the tension between the demand for wage protection and the claim of limited liability once and for all. Some judges continued to give priority to wage protection, legislation was enacted extending the personal scope of wage protection laws to all employees, and proposals to abolish shareholder or director liability for workers' wages entirely have not been implemented, even by conservative governments. The dilemma is indeed a recurring one.

This paper is organized in the following way. The next section explores the history of shareholder and director liability for workers' wages and its place in the enactment of the first general incorporation statutes in Canada. It covers the period from 1800 to 1860. The third section examines a series of cases in which the courts were called upon to determine which workers were entitled to recover against shareholders or directors for unpaid wages. In the course of resolving these cases, the courts inverted wage protection from a condition of limited liability to an exceptional privilege. This covers the period from the 1890 to 1970. In contrast to the prior section, which offers a more deeply contextualized study, this section primarily offers a doctrinal history, while locating that history broadly in the changing social, economic and political background. Although perhaps unfashionable, this approach is justified for two reasons. First, the work of legally inverting personal liability from a foundational norm to an anomalous exception and thereby limiting the scope of wage protection laws was performed through the elaboration of doctrine by the judiciary and is important in its own right. Second, for reasons that are suggested, during this period disputes over the extent of director liability for workers' wages were largely confined to the courtroom, and attracted little if any public discussion, thus leaving the judiciary with a free hand. The fourth section addresses the continuing effect of this inversion in a more recent controversy that first arose in the 1980s over directors' liability for termination and severance pay, typically the greatest part of what is owed to workers when corporations default. Here again the focus is on doctrinal developments set against the broader socio-economic context. The

conclusion discusses the implications of the judicial inversion both for current debates over directors' liability and for the recurring dilemma of negotiating worker protection in regimes of capitalist legality.

II. THE ORIGINS OF LIMITED LIABILITY AND SHAREHOLDER/DIRECTOR LIABILITY FOR WORKERS' WAGES

The notion that a group of investors should be able to pool their capital into a legal entity that is distinct from them and only be individually liable to the extent of their personal investment is so broadly accepted today that those who challenge it face an uphill battle.⁵ But this was not always the case. Indeed, the early nineteenth-century history of the corporation shows that the idea of a complete separation between the company and its members took a long while to gain acceptance and that the fight to limit shareholders' liability exclusively to their initial investment was a protracted and difficult one. Incorporation and limited liability for shareholders were, after all, privileges granted by the state, which exempted individuals from the norm of personal responsibility for their actions and debts, even when acting in concert with others.⁶ As such, compelling public policy justifications had to be offered before the state granted such extraordinary privileges to private individuals. In this context, it also seemed eminently fair for the state to adopt measures

⁵ For a critique of limited shareholder liability, see Harry J. Glasbeek, Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy (Toronto: Between the Lines, 2002). For arguments in favour of modest reforms, see Henry Hansmann and Reiner Kraakman, "Towards Unlimited Liability for Corporate Torts," Yale Law Journal 100 (1991): 1879-1934 (supporting shareholder liability to involuntary creditors) and Paul Halpern, Michael Trebilcock and Stuart Turnbull, "An Economic Analysis of Limited Liability in Corporation Law," University of Toronto Law Journal 30 (1980): 117-50 at 149-50 (approving director liability for workers' wages).

⁶ The legal basis of the limited liability of directors to third parties for the debts of the corporation is distinct from that of shareholders, rooted in the law of agency. The article will return to this issue below in the context of its discussion of the substitution of director for shareholder liability in Canada in the 1860s.

reducing the risks limited liability posed for various groups who dealt with corporations.⁷ It was out of these early struggles that shareholder and then director liability for unpaid workers' wages emerged as a compromise that legitimated the widespread availability of limited liability.

A. ENGLISH AND AMERICAN INFLUENCES

The story of the development of the corporate form, limited liability and liability for workers' wages in Canada begins in England, but shifts to the United States by 1800. In England prior to the mid-to-late nineteenth century, joint business endeavors were primarily pursued through partnerships and joint stock companies. Neither of these business associations enjoyed corporate status and, as a result, its members were jointly and severally liable for its debts, including of course workers' wages. Incorporation was a privilege that could only be obtained at great expense by Royal Charter or special act of Parliament and was rarely granted.⁸

British North American colonies essentially followed English practice in the late eighteenth and early nineteenth century. For the most part, this meant that business associations generally carried on without becoming incorporated and without the benefit of limited liability. Limited liability

⁷ For a useful overview, see David Millon, "Theories of the Corporation," Duke Law Journal [1990] (1990): 201-62 at 205-11. This paper does not address the mechanisms for the protection of non-wage earning creditors. These have been extensively discussed in the literature on the history of the corporation. For example, see James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970 (Charlottesville: University of Virginia Press, 1970), 51-53.

⁸ Ron Harris, Industrializing English Law (Cambridge: Cambridge University Press, 2000); Paddy Ireland, "Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality," Legal History 17:1 (1996): 40-73 at 42-43; Michael Lobban, "Corporate Identity and Limited Liability in France and England 1825-67," Anglo-American Law Review 25 (1996): 397-440 at 399-403; Tom Hadden, Company Law and Capitalism (London: Weidenfeld and Nicolson, 1972), 4-17.

corporations were almost exclusively created to carry out public purposes, such as the construction and operation of public utilities, including roads, bridges, banks, water and gas, piers and railways. Professor Risk estimated that in Upper Canada prior to 1841 approximately 60 businesses were incorporated by special statute. Nearly all delegated public power to private organizations for the construction and management of public utilities. Similarly, in Nova Scotia the majority of the 54 corporations created up to 1850 were for public utilities.⁹

In the United States a similar pattern prevailed in the late eighteenth and early nineteenth centuries; nearly all incorporations were by special statute for the purpose of providing public utilities.¹⁰ Public acceptance of limited liability for companies providing public utilities, however, did not easily extend to private business ventures. For example, the 1797 New York act incorporating the Hamilton Manufacturing Society provided for full shareholder liability and in 1809 the Massachusetts legislature adopted the policy of making shareholders in all industrial corporations personally liable to creditors. Full shareholder liability, however, was short-lived, and within a few years most American states adopted a policy of double liability. For example, New York's general incorporation statute for manufacturing of 1811 made shareholders liable for debts owing by the corporation at the time of its dissolution to an amount equal to the value of

⁹ R.C.B. Risk, "The Nineteenth-Century Foundations of the Business Corporation in Ontario," University of Toronto Law Journal 23 (1973): 270-306, at 271-73. Barbara A.M. Patton, "From State Action to Private Profit: The Emergence of the Business Corporation in Nova Scotia, 1796-1883," Nova Scotia Historical Review 16:1 (1996): 21-60 at 32-33. Also, see F.E. Labrie and E.E. Palmer, "The Pre-Confederation History of Corporations in Canada," in Jacob Ziegel, ed., Studies in Canadian Company Law (Toronto: Butterworths, 1967), 42-53 and A.W. Currie, "The First Dominion Companies Act," Canadian Journal of Economics and Political Science 28 (1962): 387-404.

¹⁰ Joseph S. Davis, Essays in the Earlier History of American Corporations (Boston: Harvard University Press, 1917), 106, 317; Hurst, Legitimacy of the Business Corporation, 27; Roy, Socializing Capital, 45-50.

their initial investment (double liability), as did New Jersey in 1816. Massachusetts, however, retained unlimited liability until 1830.¹¹

The debate around limited liability was reignited and intensified in the 1820s and continued through the 1840s as part of a larger political debate over the legitimacy of the corporation. Broadly speaking, opposition came from two groups.¹² The first, which included some Whigs and liberal Democrats, was mostly concerned about the dangers of monopolization and fraud. One fear was that charters would grant corporations exclusive rights to engage in a business, and that private interests would corrupt the legislative process so that only individuals with political sway could obtain the benefits of incorporation and limited liability. Supporters of limited liability met this concern by making incorporation more freely available through the enactment of general incorporation statutes that allowed any group of investors to incorporate by following simple procedures.¹³ A second concern of this group was that corporations would defraud creditors by misrepresenting the amount of capital actually subscribed. This concern was addressed by legislative measures that held shareholders personally liable for part of the corporate debt until their shares were fully paid up and by creating greater transparency, for example, by requiring corporate officers to publish annual reports disclosing the corporation's financial situation. With these protections in

¹¹ Charles M. Haar, "Legislative Regulation of New York Industrial Corporations, 1800-1850," New York History 22 (1941): 191-207 at 194-5; Edward Merrick Dodd, American Business Corporations until 1860 (Cambridge: Harvard University Press 1954), 370-71; John W. Cadman, The Corporation in New Jersey: Business and Politics 1791-1875 (Cambridge: Harvard University Press, 1949), 344; Herbert Hovenkamp, Enterprise and American Law 1836-1937 (Cambridge: Harvard University Press, 1991), 49-55. For one of the earliest discussions of the issue, see Joseph K. Angell and Samuel Ames, A Treatise on the Law of Private Corporations Aggregate (Boston: Hilliard, Gray, Little & Wilkins, 1832, reproduced New York: Arno Press, 1972), 357-64.

¹² Roy, Socializing Capital, 46.

¹³ L. Ray Gunn, The Decline of Authority (Ithaca: Cornell University Press, 1989), 222-45.

place, corporations were viewed as a valuable instrument that facilitated investment in riskier and more capital-intensive enterprises.¹⁴

The second group of opponents articulated a more radical critique of the corporate form rooted in producer republicanism. This was an ideology embraced by a farmers, small business operators and artisans who were united in the defense of independent artisan and commodity production against the growth of capitalist enterprise, characterized by the creation of a permanent working class and concentrations of wealth and power. From their perspective, corporations and limited shareholder liability served as a vehicle which enabled privileged groups to gain unfair advantage over ordinary individuals. As a result, making the corporate form and limited liability more widely available and providing for greater financial transparency were not adequate responses.¹⁵

In the contest between liberals and radicals, the former generally prevailed. For example, in 1828 New York adopted complete limited liability for shareholders once whole amount of the capital had been paid in. Massachusetts followed suit in 1830, while in New Jersey the majority of charters granted to manufacturing companies between 1824 and 1834 made no provision for shareholder liability.¹⁶

Agitation for greater creditor protection renewed in the early 1840s, as the economy recovered from the economic panic of 1837 and the pace of business incorporation increased. For example, in New York double liability became the norm again in 1844.¹⁷ In 1846 a New York State

¹⁴ Hurst, Legitimacy, 33; Hovenkamp, Enterprise, 51; Cadman, Corporation, 345-56.

¹⁵ Tony A. Freyer, Producers versus Capitalists: Constitutional Conflict in Antebellum America (Charlottesville: University of Virginia Press, 1994), 1-14; Sean Wilentz, Chants Democratic (New York: Oxford University Press, 1984).

¹⁶ Haar, Legislative Regulation, 196; Hovenkamp, Enterprise, 51; Cadman, Corporation, 345.

¹⁷ New York State Senate, Report, No.143 (22 November 1847), 9. The double liability provision became known as the Oriskany clause, named after the manufacturing corporation whose charter renewal application set the new standard.

senate committee examined the larger policy questions that had been percolating just beneath the surface. The chair of the committee and author of its report was Thomas Barlow, a lawyer and a judge of the court of common pleas in Madison County, in central New York.¹⁸ Barlow noted that popular opinion was growing against special incorporation and “in favor of imposing such liability upon all stockholders, as shall render the corporation safe as to the interests of creditors....”¹⁹ Barlow’s report largely reflected the producerist position. First, it identified the danger posed by the concentration of wealth: “The accumulation of wealth is a concentration of power, in all practical affairs, and bears oppressively against the interests of those of limited means, devoted to the same business purposes, and such concentration should not be created by law, unless some resulting benefits will be realized to the people, paramount to the evil.”²⁰

While the encouragement of manufacturing and industrial pursuits that required concentrations of capital was a legitimate reason for granting the privilege of corporate status, it did not justify limited liability. “Men cannot be allowed to escape their obligations in this manner; for if they could, an aristocracy of wealth and means would spring into existence at once, bearing omnipotent sway to the ruin, beggary and slavery of thousands of our industrious mechanics and laborers.”²¹ The report recommended that charters be granted “stripped and naked of the favored feature of exemption from just responsibility, and imposing individual personal liability for all debts incurred; thus assimilating bodies corporate

¹⁸ On Barlow, see <http://www.barlowgenealogy.com/Politics/index.html> (5 March 2007).

¹⁹ New York State Senate Report of the committee on manufactures, on petitions for the incorporation of manufacturing companies, No. 13 (19 January 1846), 1.

²⁰ *Ibid*, 2.

²¹ *Ibid*, 3.

to voluntary associations, justifiable and responsible in the ordinary business affairs of men.”²²

The issue of incorporation was considered at length during the 1846 New York State constitutional convention. One reason for calling the convention was widespread concern over the scope of government involvement in the economy and many of its reforms aimed to curtail the legislature’s power to distribute public largess to private interests.²³ Consistent with that goal, the standing committee on corporations proposed a constitutional provision prohibiting special incorporations but permitting the enactment of general incorporation statutes. A modified version of that resolution was accepted after lengthy debate.²⁴ While there was widespread support for general incorporation laws, the issue of limited shareholder liability was more divisive. Initially the convention voted to entrench unlimited proportional shareholder liability, but the issue was re-opened and a majority of the convention delegates were convinced that it was best to leave the matter to the legislature. As a result, the constitution specified that “[d]ues from corporations shall be secured by

²² *Ibid.*, 4.

²³ Gunn, *Decline of Authority*, 170-97 and “Antebellum Society and Politics (1825-1860) in Milton M. Klein, ed., *The Empire State* (Ithaca, NY: Cornell University Press, 2001), 390-93; Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (New York: Fordham University Press, 1996), 95-116.

²⁴ Charles Z. Lincoln, *The Constitutional History of New York*, Vol. II (Rochester, NY: Lawyers Co-operative Publishing, 1906), 184-95. According to A.B. Johnson, president of a Utica bank and a strong supporter of free incorporation, the measure lifted the “demoralizing effect of legislative attempts to restrain men unnecessarily from promoting their own interests” by making incorporation readily accessible to all, thereby eliminating the problem of monopoly and the corruption of the legislative process that was associated with special charters. A.B. Johnson, “The Legislative History of Corporations in the State of New York, or, The Progress of Liberal Sentiments,” *Hunt’s Merchants Magazine* XXIII (December 1850) 610-14 in Carter Goodrich, ed., *The Government and the Economy, 1785-1861* (Indianapolis: Bobbs-Merrill, 1967), 396-405 at 401.

such individual liability of the corporators, and other means prescribed by law.”²⁵

The subsequent 1846 election returned a Whig government, which was given the task of implementing the new constitution. The Senate committee on manufactures, still chaired by Thomas Barlow, was mandated to consider the question of general incorporation and its March 1847 report reflected the producerist critique of the corporation. It began by noting the ambiguity of the constitutional provision, neither imposing full personal liability nor allowing for personal liability to be dispensed with entirely, which, therefore, required a consideration of first principles. While recognizing the great importance of manufacturing to “our prosperity as a people” the report noted, “[I]abor and the fruits of labor...constitute the grand capital of the people as a whole, and the only sources of living and comfort to the individual constituents of the great community.”²⁶ The report then noted that most stockholders “are not mechanics or manufacturers in fact; they merely invest their money to profit by the labor and property of others. ...It is difficult for your committee to see upon what principles worthy of recognition, in an honest business world, a class of men can come forward and ask the right of employing laborers, and of purchasing and receiving the property of others, without being required to stand liable and pay fully for the same.”²⁷

Following an exposition on the history of incorporation and limited liability, the report turned its attention to the evils that would flow from exonerating capitalists from liability to pay honest debts. “What class shall be thus favored, in whole or in part? ...Shall it be the farmer, the merchant, the blacksmith, the day laborer, the lawyer, the doctor, the

²⁵ New York State Constitution (1846), Art. 8, § 1-2; William G. Bishop and Willaim H. Attree, eds., Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York (Albany, NY: Evening Atlas, 1846), 975-79, 1013, 1020-21; Lincoln, Constitutional History, 184-95.

²⁶ New York State Senate, Report On so much of the Constitution as relates to manufacturing corporations, No. 53 (4 March 1847), 3.

²⁷ *Ibid*, 4.

carpenter, the mechanic of any kind? No, not any one man, nor men in common, but the capitalists, and those of all others best able to pay their debts.”²⁸ The report also rejected the view that limited liability was justified because shareholders did not personally make the corporations’ contracts or incur its debts.

If they do not do it in person, they do by officers or agents of their own choosing, for whose acts they are justly responsible...If men are not to be held responsible for the act for the acts of their agents, then they may submit their business to others, receive the benefits and avoid all risks...Large tears may be dropt in their advocacy, but they roll from the eyes of the hungry crocodile. In short, corporate rights are hostile to the very spirit of our institutions, unjust and oppressive to the rights of individuals.²⁹

The Senate subsequently approved general incorporation legislation that made shareholders personally liable for the general debts of the corporation up to an amount equal to their initial investment (double liability) and that made them personally liable without limit for debts owed to workers providing service to the corporation.

The stockholders of any company organized under the provisions of this act, shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants and apprentices, for services performed for such corporations.³⁰

²⁸ Ibid, 17.

²⁹ Ibid, 20-1.

³⁰ New York State Senate, Report, No. 143 (22 Nov. 1847), 17, 19.

The Assembly accepted unlimited shareholder liability for unpaid wages,³¹ but rejected personal shareholder liability for other debts once the shares were fully paid in.

Manufacturing interests and towns in western New York launched a vigorous lobbying effort to support the Assembly's position, arguing that the promotion of manufacturing would bring prosperity to New York and that the proposed law gave small investors the same access to the advantages of incorporation that previously were only available to the wealthy. The Albany Argus also emphasized that the law blended the interests of capital and labour by securing "to the Operative the reward of his labor under every conceivable contingency."³² Opponents replied that "it will probably be some time before the producing classes will submit to be so grossly humbugged as to rally with any great zeal an ardor in favor of the passage of a law to exempt corporate capitalists from the payment of honest debts."³³ The Senate resisted the manufacturers' lobbying³⁴ and, in the absence of an agreement with the Assembly, no general incorporation statute passed.

The elections of 1848 returned another Whig-dominated state government. In his opening address to the legislature, Governor Young called for the enactment of general incorporation legislation modeled on the Assembly's bill. In his view, New York's future prosperity lay with the development of industry, "[b]ut that this object can only be obtained under laws that will invite the investment of capital." The governor, however, also noted

³¹ "The...principle that they shall be liable to the classes of creditors who from the nature of the service they render are compelled to give credit until the service is performed, is founded in justice and sound policy..." New York State Assembly, Report No. 240 (18 Nov. 1847), 6. Also see New York State Senate, Report No. 116 (29 September 1847).

³² Albany Argus, 9 October 1847, quoted in Gunn, Decline, 235.

³³ Letter to the editor, E., "The Manufacturing Bill at Oswego" Albany Evening Atlas, 9 October 1847, 2.

³⁴ New York State Senate, Report, No. 143 (22 November 1847), 6-9. Also see Albany Evening Argus, 19 November 1847, 2 for an account of the Assembly debate.

the Assembly's "jealous regard for the interests of labor" manifested, *inter alia*, in the wage liability provision.³⁵ Later that term, the Assembly's version of the general incorporation act passed with little opposition. The principle of full limited shareholder liability was embraced, *except* in the case of workers' wages.³⁶

B. THE CANADIAN DEBATE

Republicanism did not hold the same sway in Canada as it did in the United States. Nevertheless, strains of a producerist worldview resonated in the discourse of political reformers in the early decades of the nineteenth century. For example, William Lyon Mackenzie aimed to advance the welfare of "the people" defined as "the honest yeoman," "the self-respecting honest mechanic," and the "freeman of Upper Canada" in opposition to the "parasites and sycophants." As Mackenzie became more radicalized in the 1830's, influenced in part by American ideas, he embraced a labour theory of value and attacked special privileges. Clause 56 of his draft Constitution for the State of Upper Canada provided: "There shall never be created within this state any incorporated trading companies, or incorporated companies with banking powers. Labour is the only means of creating wealth." The draft Constitution also declared that "in all laws made, or to be made, every person shall be bound alike, neither shall any...charter...confer any exemptions from the ordinary

³⁵ Messages from the Governors of New York, Vol. 4, 400, Jan. 4 1848, cited in Ronald E. Seavoy, The Origins of the American Business Corporation, 1784-1855 (Westport, CT: Greenwood Press, 1982), 194. Albany Evening Atlas, 4 January 1848, 2. On the background to the 1848 election and its results, see Charles W. McCurdy, The Anti-Rent Era in New York Law and Politics (Chapel Hill: University of North Carolina Press, 2001), 280-81.

³⁶ An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes, Laws of New York, 1847, Chap. 40. Editorial comment divided along predictable lines. See "The General Manufacturing Bill," Daily Albany Argus (12 February 1848), p.2 (favorable) and "Individual Liability – Remarks of Senator Hawley," Albany Evening Argus, 11 February 1848, 2.

course of legal proceedings and responsibilities whereunto others are subjected.” Thus corporations, and especially but not exclusively bank corporations, were objectionable because they involved state conferral of special privileges, including limited liability, on a select few who were not direct producers of wealth.³⁷

After the defeat of the 1837 rebellions, moderates emerged to lead the reform movement and focused more narrowly on the achievement of responsible government than on more radical social and economic reforms. Yet, many moderate reformers remained opposed to the extension of limited liability to private enterprise, a position that was shared by some supporters of the weak conservative government in power during the mid-1840s. As Professor Fecteau noted, opposition was rooted in the ambiguous relationship between the corporate form, including the combination of capital it facilitated and limited liability, and classical liberal principles of free competition and personal responsibility and was manifest in the debates and actions of the Legislative Assembly of the Province of Canada during the 1840s.³⁸

The decade began with enormous promise and rapid economic growth, fuelled by demand for Canadian wheat and lumber, but ended with a severe economic recession, leading Canadian businessmen and politicians to seek strategies to promote renewed growth, including industrialization

³⁷ Constitution for the State of Upper Canada, quoted in R.A.McKay, “The Political Ideas of William Lyon Mackenzie,” Canadian Journal of Economics and Political Science 3 (1937): 1-22 at 19. Also, see Lillian F. Gates, “The Decided Policy of William Lyon Mckenzie,” Canadian Historical Review 40 (1959): 185-208; Donald Creighton, The Empire of the St. Lawrence (Toronto: Macmillan, 1956), 278-80; Carol Wilton, Popular Politics and Political Culture in Upper Canada, 1800-1850 (Montreal: McGill-Queen’s University Press, 2000).

³⁸ Jean-Marie Fecteau, “Les ‘petites républiques’: les compangnies et las mise en place du droit corporatif moderne au Québec au milieu du 19^e siècle,” Histoire Sociale – Social History 49 (1992): 35-56 at 45-50. The Province of Canada was formed by united Upper and Lower Canada, which became officially known as Canada West and Canada East. After Confederation in 1867, the provinces assumed their present names of Ontario and Quebec. To limit confusion, I use the designation of Upper and Lower Canada when discussing events in the pre-Confederation period.

and the construction of railways.³⁹ The question of access to incorporation and limited liability, however, remained controversial and the debate crossed party lines and divided the business community. Its first iteration arose in the context of special legislation in 1843 to incorporate a company authorized to carry out fishing and mining activities in the Gaspé region of Lower Canada. Thomas Aylwin, a lawyer from Lower Canada and a reformer, raised the concern that the incorporation statute would grant private British investors monopoly powers, thus enabling them to “lord it over the whole district, and render the people subservient to its views and interests,” while the Inspector General, Francis Hincks, a moderate Reformer from Upper Canada, objected specifically to the limited liability clause. Nevertheless, supporters, such as Thomas Merritt, a reform sympathizer from Upper Canada, won the vote, arguing that in the absence of limited liability corporations it would be impossible to raise the capital necessary to develop the country’s resources.⁴⁰

The issue resurfaced in 1845 during the course of lengthy debates over the enactment of special legislation incorporating two limited liability cotton-manufacturing companies and a forwarding company in Lower Canada. Proponents of the cotton-manufacturing bills, such as Lewis Thomas Drummond, a Lower Canadian politician aligned with the reform opposition, argued that limited liability was necessary to promote local manufacturing that, among other benefits, would counter the problem of young girls migrating to factory jobs in the United States and keep them “within hearing the bell of their native villages, and within the reach of the vigilance and protection of their parents,” while opponents, such as Robert

³⁹ J.M.S. Careless, The Union of the Canadas (Toronto: McClelland and Stewart, 1967), 104-09; A.A. Den Otter, The Philosophy of Railways (Toronto: University of Toronto Press, 1997), 34-64; R.B. Sullivan, Lecture Delivered before the Mechanics’ Institute of Hamilton on the Connection between the Agriculture and Manufactures of Canada (Hamilton: Ruthven, 1848).

⁴⁰ Debates of the Legislative Assembly of United Canada (8 November 1843), 725-29; S. Prov. Can. 1843, c. 45, s. 19. There was also a debate about limited liability in bank charters that focused on the risks to depositors. It was resolved by imposing double liability on shareholders, initially at the insistence of the Colonial Office. See S. Prov. Can. 1849, c. 84 (no wage liability) and A.B. Jamieson, Chartered Banking in Canada (Toronto: Ryerson Press, 1957), 7.

Baldwin, the leader of the reform opposition in Upper Canada, emphasized the principle of individual responsibility and the need to contain harmful speculation. Both bills passed.⁴¹ In the course of considering the legislation for the forwarding company, witnesses from the Montreal business community appeared before the assembly. While James Dean, a director of the company, testified in favour of limited liability, Thomas Cringan, the vice president of the Montreal Board of Trade, expressed the view that “it [is] objectionable that any commercial company should be incorporated without making them liable to the full extent of their means” and John T. Brondergest, a merchant and former president of the board of trade, felt that limited liability was necessary in certain cases that directly benefit the public, such as banks and railways, but should not be granted to enterprises conducted purely for commerce.⁴² The bill was withdrawn and a revised one re-introduced, which provided for triple liability by stockholders and other securities, but this still did not satisfy opponents and the bill failed to pass. Another attempt made the following year met the same fate following an acrimonious debate.⁴³ Given the level of opposition to granting private entrepreneurs limited liability, a bill introduced that session to incorporate an Upper Canadian manufacturing company was amended by adopting the Quebec civil law partnership en commandite arrangement, which allowed for quiet investors to be liable only to the extent of their investment, while leaving active partners – the directors – personally liable for the debts of the partnership.

⁴¹ Debates (20 January 1845), 1005-11; (6 March 1845), 1950-55 (quote at 1954). S. Prov. Can. 1845, c. 91 & 92. The bills were reserved by the Governor, E.G. Metcalfe, on the ground that they were inconsistent with English policy not to grant corporate status to enterprises that did not require substantial capital, but the Colonial Office took no action on the ground that the resulting inconvenience would be too great, especially given that the matter had been already considered locally. See Fecteau, “Les ‘petites républiques,’” 52-53. More generally on debates over limited liability in Canada during this period, see Risk, “Nineteenth-Century Foundations,” 295-98.

⁴² Debates (3 March 1845), 1856-58.

⁴³ Debates (5 March 1845), 1940-41, (28 April 1846), 1016-18.

Although some members remained opposed to this compromise arrangement, the bill easily passed.⁴⁴

In 1847 several bills were introduced to incorporate limited liability mining companies, sparking yet another round of debate. Robert Baldwin, endorsed “the old fashioned principle that men were bound in conscience, and ought to be bound in law to pay all their debts,” but the majority of the Tory-dominated assembly accepted the judgment of William Boulton, a Toronto Tory lawyer and prominent Orangeman, that the denial of limited liability to corporations “would discourage the investment of capital, in the country...that it was an antideluvian (sic) doctrine altogether.”⁴⁵ Still, views on the issue crossed party lines. Later that session, for example, a general partnerships bill for manufacturing companies that provided for limited liability was withdrawn after the Upper Canadian government leader, Henry Sherwood, a prominent Tory, objected, stating that while he was in favour of “liberal legislation in matters of commerce” he was “not in favour of extending liberality so far as to excuse persons from paying their debts. This Bill went beyond liberality. It out heroded Herod.”⁴⁶

The 1847-48 elections returned a Reform government, jointly led by Baldwin and Louis-Hippolyte La Fontaine from Lower Canada. The issue of limited liability arose again in an 1849 debate over the incorporation of a Lower Canadian warehousing company. Henry Sherwood reiterated his objection to limited liability in the absence of compelling reasons for granting it. He feared that if the assembly approved limited liability in this case, it would soon become the norm for business. Robert Baldwin

⁴⁴ Debates (14 May 1846), 1451-52. S. Prov. Can. 1846, c. 94, s. 14. One Upper Canadian reform newspaper, The Examiner, opposed this compromise, in part based on a misunderstanding of the extent of directors’ liability, but more fundamentally because of their radical reform outlook which associated the rise of corporations with the creation of a situation in which “labour becomes subservient to capital” and “the few are privileged and the many wronged.” The Examiner, “The Personal Liability Principle,” (20 May 1846), 2 (quote), and “Individual Liability,” (27 May 1846), 2.

⁴⁵ Debates (16 July 1847), 1083. S. Prov. Can. 1847, c. 69, 70, 71 & 72.

⁴⁶ Debates (24 July 1847), 1125. Also, see The Examiner, 21 July 1847, 2.

expressed similar concerns. “Charters might be necessary in some cases, but unless a stop were put to it, there would be nothing but Corporations from one end of the country to the other.” Supporters of the bill, such as William Buell Richards, a reformer and close friend of Richard Baldwin, pointed to the success of New York warehouses, which enjoyed limited liability. The Inspector General, Francis Hincks, was also opposed limited liability, but offered as a compromise the commandite principle granting limited liability to shareholders but making directors personally liable to the full extent of their property. This was acceptable to all concerned.⁴⁷

Later that session, the Legislative Council, the appointed branch of the legislature, adopted a general incorporation bill for manufacturing, mining, mechanical and chemical concerns, modeled on the recent New York statute, and referred it to the Assembly for its approval. The bill provided that shareholders were personally liable for debts of the corporation until their stock was paid up, but afterwards their liability was limited to their investment, with one exception: as in New York shareholders remained personally liable for servants’ wages. The bill faced considerable opposition from those who objected to the extension of limited liability and although it received three readings, the motion to declare that the bill passed was put over for further debate. In the interim, the bill was lost when the Parliament buildings were burned down over the Rebellion Losses bill and the Assembly was prorogued before further action could be taken.⁴⁸

⁴⁷ Debates (15 March 1849), 1347-49. S. Prov. Can., c. 192, s. 3, 4. Later that session the legislature passed without debate a statute providing for the creation of limited partnerships in Upper Canada. S. Prov. Can. 1849, c. 75. It followed the commandite principle, limiting the liability of passive investors to the amount of their investment, but keeping active partners personally liable for the debts of the partnership.

⁴⁸ Debates (9, 16 & 18 April 1849), 1788-90, 1895, 1956; Journals of the Legislative Assembly of the Province of Canada (10 May 1849), 287; Currie, “First Dominion,” 391. That session general incorporation statutes were passed for companies engaged in the construction of roads, bridges, piers and wharves but neither provided for stockholder liability. See, S. Prov. Can. 1849, c. 56 & 84. . As well, a limited partnership statute for Upper Canada was passed that permitted partnerships with general partners, who were personally liable for the partnership’s liabilities, and special partners who were not. See S. Prov. Can. 1849, c. 75.

The issue came before the Legislative Assembly the following year, but the lapse of time had not changed anyone's views. Francis Hincks spoke of the unfairness of allowing small capitalists to enter into competition with mechanics when they were relieved of responsibility for their debts while mechanics were not, and Henry Sherwood insisted that active managers should be held responsible for the corporation's liabilities, while supporters of the legislation pointed to its beneficial effects in promoting prosperity in the United States. The bill passed, including the provision making shareholders personally liable "for all debts that may be due and owing to all or any of the laborers, servants and apprentices thereof, for services performed for such Company." Personal liability, however, only arose after a judgment obtained against the company could not be executed.⁴⁹ The enactment of this statute effectively put to an end parliamentary debate over the principle of limited liability,⁵⁰ and radical populists, who became known as the Clear Grits, turned their attention to other matters.⁵¹

The Canadian economy entered into a period of strong growth in the 1850s, fuelled by the rising demand for Canadian staples and the rapid expansion of the railway network. As well, Canadian manufacturing also began to make advances in textiles, agricultural implements and woodworking.⁵² Prior to Confederation in 1867, however, only a small

⁴⁹ Debates, (10 & 27 June, 15, 22 & 24 July 1850), 464-67, 1204-05; Currie, "First Dominion," 391-93; S. Prov. Canada, 1850, c. 28, s. 11.

⁵⁰ There was a confused debate in 1855 over a bill to incorporate the Montreal Locomotive Manufacturing Company. A number of members objected to limited liability because the objects of the company were broadly defined so as to allow it to compete with small producers who lacked this protection. The matter was resolved by limiting the company's area of business. No provision was made for either shareholder or director liability for workers' wages. See Debates (12 April 1855), 2745-47; S. Prov. Canada 1855, c 221.

⁵¹ Careless, Union, 166-84; "Our Platform," The North American, (3 January 1851), 2.

⁵² Careless, Union, 132-49; John McCallum, Unequal Beginnings: Agriculture and Economic Development in Quebec and Ontario until 1870 (Toronto: University of Toronto Press, 1980); Graham D. Taylor and Peter A. Baskerville, A Concise History of Business in Canada (Toronto: Oxford University Press, 1994), 170-85.

minority of businesses adopted a corporate form, mostly in the areas of transportation and finance, activities that were not covered by the general incorporation statute of 1850, which initially could be used to create companies engaged in manufacturing, ship building, mining, or the mechanical and chemical business.⁵³ Entrepreneurs carrying on covered activities, however, were not compelled to incorporate under the general act and could and, indeed, did seek to incorporate through special acts of the legislature, as of course did those engaged in businesses outside the scope of the act. A complete survey of these special incorporation statutes has not been conducted, but a sampling indicates that railway and steamship companies were typically incorporated without provision for personal liability for unpaid workers' wages, while mining and manufacturing statutes either made no provision for personal liability or made directors liable for unpaid workers' wages.⁵⁴ Shareholders were rarely made liable for unpaid workers' wages in special incorporation statutes.⁵⁵

The shift from shareholder to director liability was strengthened by an 1860 statute that allowed industries covered by the existing general incorporation scheme to also incorporate by judicial decree and again by

⁵³ For data on incorporation in Upper Canada, see Risk, "Nineteenth-Century," 304-05. The scope of the general incorporation statute was expanded over the decade to include, among others, public hotels, the supply of gas and water, road construction, timberworks and fishing. See S. Prov. Can. 1853, c. 122, 124, 190, 191; S. Prov. Can. 1858, c. 90.

⁵⁴ For example, the Montreal and Kingston Railway Co. (S. Prov. Canada 1851, c. 143), the Montreal Ocean Steamship Co. (S. Prov. Can. 1854, c. 44), and the Collingwood Cotton Manufacturing Co. (S. Prov. Can. 1859, c. 110) made no provision for personal liability, while the Megantic Mining Co. (S. Prov. Can. 1854, c. 49), the Shipton Slate Works Co. (S. Prov. Can. 1854, c. 53) made directors personally liable for unpaid workers' wages. A number of general incorporation statutes for public utilities were also enacted in the 1850s, none of which included director or shareholder liability for workers' wages. For example, see S. Prov. Can. 1852, c. 10 (telegraphs); S. Prov. Can. 1853, c. 124 (harbours), c. 173 (gas and water works), c. 190 (river improvements).

⁵⁵ For example, see S. Prov. Can. 1851, c. 64. For an overview of liability provisions, as well as a table that breaks down incorporations in Upper Canada prior to 1867 by year, industry and type of incorporation, see Risk, "Nineteenth Century," 295-98, 304-05..

an 1861 statute that standardized the terms under which covered industries became incorporated by special statute. Indeed, that statute also reinforced wage protection by making director liability for unpaid workers' wages a standard term of future special incorporation statutes at a time when legislative practice varied considerably.⁵⁶ One blip in this picture was the 1864 statute that created a procedure for incorporation by letters patent, which made no provision for personal liability for workers' wages. This omission, however, seems to have been an oversight rather than a conscious change of policy since director liability for unpaid workers' wages was included when the letters patent regime was adopted five years later in the first post-confederation Canadian general incorporation statute.⁵⁷

Research to date has not uncovered any discussion of the switch from shareholder to director liability during this period. Christopher Dunkin, a Conservative lawyer elected to represent a riding in the Eastern Townships of Lower Canada, introduced the 1860 and 1861 general incorporation statutes providing for director liability, but there is no record of any legislative debate or of his motivations.⁵⁸ Hence we are largely left to speculate both as to the reasons for the switch and for the apparent absence of any controversy over the change. For those concerned about the unfairness of allowing some businesses to operate without responsibility for their debts, it is probably safe to presume that they cared little about whether it was shareholders or directors who were held personally

⁵⁶ S. Prov. Can. 1860, c. 31, ss. 47, 48, and 53; S. Prov. Can. 1861, c. 18, ss. 33, 34 and 39. For a discussion of these changes and the uncertainty surrounding the motivation, see Currie, "First Dominion," 396-98.

⁵⁷ S. Prov. Can. 1864, c. 23; S.C. 1869, c. 13. Director liability for workers' wages was also made a standard term of post-confederation Canadian special incorporation statutes. S.C. 1869, c. 12.

⁵⁸ On Dunkin, see entry in Dictionary of Canadian Biography Online <http://www.biographi.ca/EN/index.html> (5 March 2007). Previous researchers have noted the dearth of materials on the background to these various incorporation statutes. For example, see Currie, "First Dominion," 396-98; F.W. Wegenast, The Law of Canadian Companies (Toronto: Burroughs, 1931), 21.

responsible, as long as some corporate actors were. The 1850 statute was modeled on the New York State law, which contained shareholder liability, and so that is why shareholder liability was first adopted. However, as noted, earlier legislation had adopted the limited partnership model in which managing partners were personally responsible for the debts of the partnership, an arrangement that also satisfied the opponents of limited liability incorporation. Moreover, it was a notable feature of all of these incorporation statutes was that directors were required to be shareholders,⁵⁹ and so director liability for unpaid workers wages simply meant placing personal responsibility for unpaid workers' wages on the shoulders of the sub-set of shareholders who managed the corporation.

While the above may provide a plausible explanation for the absence of opposition to the shift from shareholder to director responsibility for unpaid workers' wages, it does account for why it occurred. Given that the practice of holding directors liable for unpaid workers wages became widespread in special incorporation statutes for mining and manufacturing companies and was later adopted in general incorporation statutes for private industry, it is fair to assume that incorporators and their lawyers were either indifferent between shareholder and director liability, and merely followed a precedent once it was set, or that they actively preferred director liability to shareholder liability. The problem with the first scenario is that the default statutory position after 1850 was shareholder liability and so we would need to determine how and when the precedent subsequently and unintentionally changed. It is more probable that director liability was preferred for a number of reasons, the most important likely being that it facilitated the participation of passive investors in the corporation by absolutely their liability to the amount of their initial investment. While this may not have been a major concern for the family controlled firms that predominated in most of the sectors covered by the 1850 legislation and its extensions, it would have been for the small

⁵⁹ S. Prov. Can. 1850, c. 28, s. 4; S. Prov. Can. 1860, c. 31, s. 18; S. Prov. Can. 1861, c. 18, s. 9.

minority of large companies that hoped to raise capital through the sale of shares to outside investors.⁶⁰

A second and related but more abstract consideration may have been that shareholder liability was viewed as less consistent with the principle that the corporation had a distinct legal personality from that of its owners than was director liability. This principle had no basis in common law but had to be created by statute, including the grant of limited liability to shareholders.⁶¹ The immunity of directors, however, was rooted in the common law of agency insofar as directors were construed as agents and not as principles of the corporation. Indeed, incorporation statutes did not grant directors limited liability, but rather imposed personal liability on directors for a variety of actions that harmed creditors' interests. Thus the imposition of director liability for workers' wages was an incremental addition to a regime that already recognized the legitimacy of holding directors personally liable for some actions of the corporation.⁶² In short, while incorporators presumably would have preferred no personal liability for workers' wages, they operated in a political environment in which that option was not usually available to private enterprise and so settled on directors' liability as being marginally preferable to shareholder liability.

⁶⁰ On the predominance of small firms and the slow growth of the Canadian securities market during this period, see Taylor and Baskerville, Concise History, 181-85, 217-25 and Ranald C. Michie, "The Canadian Securities Market, 1850-1914," Business History Review 62 (1988): 35-73.

⁶¹ It should be noted, however, that by virtue of the 1849 Interpretation Act, limited liability was enjoyed by all corporations unless express exception were made. See, S. Prov. Can. 1849, c. 10, s. 5(24). This did not change the practice of making express provision for limited shareholder liability in both general and special incorporation statutes.

⁶² The distinct legal foundations of limited liability for shareholders and directors' liability was one that was not always clearly recognized and is still often overlooked in current jurisprudence and debates. See Robert Flannigan, "The Personal Tort Liability of Directors," Canadian Bar Review 81 (2002): 247-322 at 248. For example of director liability, see S. Prov. Can. 1850, c. 28, s. 14 (paying dividends out of capital).

In any event, director liability became the norm in most pre- and post-Confederation private enterprise incorporation statutes.⁶³

In sum, at least until the mid-century the principle that shareholders were entirely separate from the corporation and should not be responsible for its debts was not fully accepted. Incorporation with limited liability for investors was still considered a privilege granted by the state to promote public purposes. By the mid-nineteenth century, however, legislators were increasingly accepting the view that it was justifiable to grant this privilege to private entrepreneurs because it facilitated investment in capital-intensive enterprises. Nevertheless, they also recognized that servants were not in a position to protect themselves contractually against the risk of non-payment of wages, especially since master and servant law compelled them to provide service on penalty of prosecution.⁶⁴ In these circumstances, making shareholders or directors personally responsible for

⁶³ For example, see S.Q. 1868, c. 25, s. 48; S.C. 1869, c. 12, s. 40; S.C. 1869, c. 13; S.O. 1874, s. 52; S.M. 1875, c. 28, s. 52; Companies Ordinance, N.W.T. 1901, c. 20, s. 54 S.S. 1915, c. 14, s. 103. The issue of limited liability corporations also arose in Nova Scotia. Early reformers Joseph Howe and William Young unsuccessfully opposed limited shareholder liability for banking corporations in the 1830s, but it became increasingly common for the legislature to insert some form of shareholder liability into incorporation acts passed during the 1830s and 1840s. In 1851 Nova Scotia enacted a limited partnerships act based on the commandite principle (R.S.N.S. 1851, c. 79), but the general incorporation statute, passed the same year, made no provision for limited investor liability (R.S.N.S. 1851, c. 87. In S.N.S. 1862, c. 2, the principle of double liability was adopted, but even this form of limited liability was omitted in its general incorporation act of 1873 (S.N.S. 1873, c. 13. Full limited liability for shareholders only became a permanent feature of Nova Scotia corporation law in 1883 and was accompanied by director liability for unpaid workers' wages (S.N.S. 1883, c. 24, s. 69). Special incorporation statutes, however, contained a variety of liability provisions. The 1883 act was not repealed, but a footnote to the 1900 Revised Statute Act stated that it was effectively superseded by the chapter "of Joint Stock Companies" published as R.S.N.S. 1900, c. 128. For discussion of nineteenth-century developments, see Patton, "From State Action" and Davidson, "Industry and the Development."

⁶⁴ Indeed, in 1847 the government enacted a master and servant statute applicable in Upper Canada to make it clear that workers could be prosecuted and punished for breaching their contracts. S. Prov. Can. 1847, c. 23; Paul Craven, "The Law of Master and Servant in Mid-Nineteenth Century Ontario," in David H. Flaherty, ed., Essays in the History of Canadian Law I (Toronto: Osgoode Society, 1981), 175-211.

unpaid workers' wages owed by the corporation was adopted as a condition of granting limited liability to private investors in for-profit corporations. The switch to director liability may have reflected a change in view about the appropriate allocation of responsibility within the corporation, but not about the principle that workers' wages must be protected by the imposition of personal liability on some set of corporate actors.⁶⁵

III. FROM CONDITION TO EXCEPTION: JUDICIAL SUBORDINATION OF WAGE PROTECTION TO THE NORM OF LIMITED LIABILITY, ROUND 1

The understanding that shareholder or director liability for workers' wages was a condition of the statutory grant of the privilege of limited liability to for-profit corporations was, for the most part, lost or ignored by the judiciary they came to interpret the legislation. Instead, judges constructed an inverted view of that relationship, making limited liability the dominant legal norm and shareholder or director liability for workers wages an exceptional privilege to be narrowly construed. This inversion, however, was neither immediate nor total. A minority of judges gave priority to workers' wage claims and this produced some controversy and inconsistency.

The conflict between wage protection and limited liability primarily played itself out in a series of cases that raised the question of the personal scope of wage protection.⁶⁶ This was a problem because employment statutes in the nineteenth and often continuing into the twentieth centuries were written in the idiom of master and servant law, repeating its

⁶⁵ Banking corporations were an exception, as well some corporations providing public utilities. For example, see S. Prov. Canada 1850, c. 21 (banking); S. Prov. Can. 1853, c. 173 (gas and water). Also see Labrie and Palmer, "Pre-Confederation History," 53-60.

⁶⁶ A second issue was the technical preconditions that had to be satisfied before shareholders or directors could be held liable.

classification of service providers. The New York general incorporation statute was typical. It extended wage protection to “laborers, servants and apprentices.” This language was copied in pre- and post-confederation Canadian general incorporation statutes, and was later modified in federal and some provincial statutes by the addition of “clerks” to this list.⁶⁷ It is unclear, however, to what extent legislators were cognizant of the traditional meaning of these categories. For example, in 1847 the Province of Canada enacted a local master and servant law for Upper Canada after a judicial decision cast doubt on whether the relevant English law had been received in the colony. That act applied to “servants and labourers.”⁶⁸ Questions were subsequently raised about whether the law covered skilled workers and to remove any doubt the statute was amended in 1855 to specify that it applied to “journeymen or skilled labourers in any trade, calling, craft or employment.”⁶⁹

As the above example indicates, the development of a unified legal category of “employee” and of a general concept of a contract of employment followed a slow and tortuous path, as the content and social underpinnings of master and servant law were being transformed. Between 1850 and 1920, Canada and Ontario in particular, underwent two industrial revolutions. The first was characterized by the growth of factory production, which entailed large concentrations of workers, mechanization and a more refined division of labour, while the second was marked by the concentration of ownership in large corporations, the development of mass production techniques with a reduction in the dependence of skilled labour, and increased managerial control over production.⁷⁰ As a result, in the late nineteenth and early twentieth

⁶⁷ S.C. 1877, c. 43, s. 69. The Act also reduced director liability from one year to six months’ wages. This language was used in the Northwest Territories legislation (N.W.T. 1901, c. 20, s. 54) and kept in the subsequent Alberta legislation.

⁶⁸ S. Prov. Can. 1847, c. 23, s. 1.

⁶⁹ S. Prov. Can. 1855, c. 136.

⁷⁰ Gregory S. Kealey, Toronto Workers Respond to Industrial Capitalism 1867-1892 (Toronto: University of Toronto Press, 1980), 18-34; Brian D. Palmer, Working-Class Experience (Toronto: McClelland & Stewart, 1992), 81-87, 117-21, 155-63; Craig Heron,

centuries it was increasingly difficult to determine the legal meaning of traditional master and servant categories. In England, where the hold of master and servant law was arguably greater than in British North America,⁷¹ courts were often confronted with the question of the personal scope of both disciplinary and protective legislation that invoked its categories. According to Simon Deakin, the outcome was commonly determined on the basis of the type of legislation and the view of the judges of its appropriate scope.⁷²

Disputes over the coverage of employment legislation were neither as pervasive nor severe in the United States and Canada as they were in England, but the issue grew in importance in the late-nineteenth and early-twentieth centuries. Indeed, in 1908 C.B. Labatt, the associate editor of the Canada Law Journal and the author of a three-volume treatise on Anglo-American master and servant law published in 1904, wrote a lengthy article on the scope of wage protection statutes, in which he described the state of the decisions as “extremely conflicting.”⁷³ When

“The Second Industrial Revolution in Canada, 1890-1930,” in Deian R. Hopkins and Gregory S. Kealey, eds., Class, Community and the Labour Movement: Wales and Canada 1850-1930 (Wales: LLAFUR/CCLH, 1989), 48-66.

⁷¹ On England, see Douglas Hay, “England,” and “Master and Servant in England,” in William Steinmetz, ed., Social Inequality in the Industrial Age (Oxford: Oxford University Press, 2000), 227-64. On Canada, see Paul Craven, “Canada,” 1670

⁷² Simon Deakin, “Legal origins of wage labour: the evolution of the contract of employment from industrialization to the welfare state,” in Linda Clarke, Peter de Gijssel, and Jörn Janssen, eds. The Dynamics of Wage Relations in the New Europe (Boston: Kluwer, 2000), 32-43; “The Contract of Employment: A Study of Legal Evolution,” Historical Studies in Industrial Relations 11 (Spring 2001): 1-36. Also see Simon Deakin and Frank Wilkinson, The Law of the Labour Market (Oxford: Oxford University Press, 2005), ch. 2 and Robert J. Steinfeld, Coercion, Contract, and Free Labor in the Nineteenth Century (New York: Cambridge University Press, 2001).

⁷³ C.B. Labatt, “What Persons Are Within the Purview of Statutes Affecting the Enforcement of Claims for Services,” Canada Law Journal 44 (1908): 369-427, at 370. C.B. Labatt, Commentaries on the Law of Master and Servant (Rochester, NY: Lawyers Cooperative Publishing, 1904). A greatly expanded second edition was published in 1913.

faced with the interpretation of such provisions, the courts had a choice of interpretive starting points. To greatly simplify, on the one hand, they could resort to rules of statutory interpretation to help resolve ambiguities. The problem, however, was that judges faced a choice from among a number of inconsistent rules. For example, as Labatt noted, judges could either adopt the rule of *noscitur a sociis* according to which a general word was to be read restrictively if it appeared in a phrase surrounded by narrower terms, or they could start from the presumption that each word in a phrase has been used to express a distinct idea.⁷⁴ As well, they also had the choice of defining the terms in relation to increasingly archaic distinctions drawn from English master and servant law or interpreting them in light of the emerging more general category of employment. The interpretive choices made by judges, however, were only partially driven by their preferences among competing canons of statutory interpretation or views about the meaningfulness of traditional service categories. At least as important, were two inter-related substantive differences: first, whether the judge viewed limited liability as a statutory privilege or as a basic legal norm and second whether the judge saw shareholder or director liability for workers' wages as a penal or as a remedial provision.

The issue of the coverage of shareholder liability for workers' wages first arose under the New York law and because that jurisprudence influenced early Canadian cases it is appropriate to start the analysis there. The earliest reported decision in New York, *Conant v. Van Schaick*, took an expansive view of the statute, holding that the term "servant" included engineers, master mechanics, and conductors as well as "the man who shovels gravel."⁷⁵ The only exceptions were corporate officers and agents. Moreover, the court also found that the workers' cause of action was assignable. This facilitated the ability of some merchants who extended credit to workers to sue when the corporation defaulted on wages. Subsequent decisions confirmed the exclusion of officers and agents from protection, and also held that shareholders were not liable under the act for

⁷⁴ Labatt, "What Persons," 370-71.

⁷⁵ (1857) 24 Barb. 87 at 99.

debts owed by the corporation to large and small contractors.⁷⁶ More controversial was the status of professional and supervisory employees. In one early case involving a special incorporation statute that limited shareholder wage liability to laborers and operatives, the court excluded a professional engineer on the ground that the law and underlying policy aimed to protect manual laborers, not professional men who were well qualified to look after themselves.⁷⁷ This decision was distinguished in subsequent cases involving a working overseer, bookkeeper, civil engineer, and reporter/assistant editor.⁷⁸

Judgments in two later cases, however, opted decisively for a narrower view of the term “servant.” The second of those cases, Wakefield v. Fargo, included a claim by a bookkeeper/general manager. In support of his argument that the plaintiff did not come within the ambit of the statute, the lawyer for the shareholders characterized the statutory imposition of liability for workers’ wages as “a penalty and nothing else” and argued that the provision should be strictly construed. As well, the lawyer claimed the statute was “designed to protect persons unable to protect themselves by reason of the character of the laborer, as a class supposed and assumed to be ignorant, careless and weak.”⁷⁹ Danforth J., speaking for the court, agreed.

⁷⁶ Richardson v. Abendroth (1864) 43 Barb. 162 held that an officer could sue, but was overruled by Coffin v. Reynolds (1868) 37 NY Rep. 639. Hill v. Spencer (1874) 61 NY Rep. 274 and Dean v. De Wolf (1878) 16 Hun. 186 (excluding agents); Aikin v. Wasson (1862) 24 NY Rep. 482 (excluding contractors). The distinction between servants or employees and independent contractors then as now is a difficult one to draw.

⁷⁷ Ericsson v. Brown (1862) 38 Barb. 390 at 392.

⁷⁸ Hovey v. Ten Broeck (1865) 3 Rob. 316 (overseer and bookkeeper); Williamson v. Wadsworth (1867) 49 Barb. 294 (civil engineer); Harris v. Norvell (1876) 1 Abb. N.C. 127 (reporter, assistant editor).

⁷⁹ Wakefield v. Fargo et al. (1882) 90 NY 213, at 215. The earlier case, Krauser v. Ruckel (1879) 17 Hun. 463 disallowed a claim by a superintendent of mine works.

A stockholder is not liable for the general debts of a corporation, if the statute creating it has been complied with. The clause in question creates a privileged class, into which none but the humblest employees are admitted.... It is plain we think, that the services referred to are menial or manual services – that he who performs them must be of a class whose members usually look to the reward of a day’s labor, or service, for immediate or present support, for whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day’s work, or a stated job under the direction of a superior.⁸⁰

Danforth J. continued with an expostulation on the hierarchy of service relationships drawn from Blackstone and earlier New York cases. He admitted that the word servant might be read broadly to include all who provide service “in this instance, from the one who dips or bottles the water, to the president” but quickly added that “this would manifestly be too general.” He then turned to the other service classifications:

“Laborer or apprentice” are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service...They necessarily exclude persons of higher dignity....A statute which treats of persons of an inferior rank cannot by any general word be so extended as to embrace a superior. The word “servant” must be construed by its associates. It stands between “laborer” and “apprentice,” and can represent no higher degree of employment.⁸¹

⁸⁰ Wakefield, *ibid.* 217-18.

⁸¹ *Ibid.* 219.

Thus we see a complete inversion of the idea that limited liability is a privilege granted to shareholders on condition that they remain personally responsible for the payment of workers' wages if the corporation defaults. In Danforth J.'s view, wage protection is a privilege only given to a narrowly defined segment of workers located at the bottom end of an eighteenth-century hierarchical ordering of service relations. As a practical matter, Danforth J.'s approach meant that those covered by the statute were unlikely to benefit from it since the class of protected workers would, by his definition, not be owed more than a day or two of wages, while skilled, managerial and professional employees who could benefit from the statute because of the larger amount of wages paid in arrears were not covered.⁸²

Although business failure was a common occurrence in Canada during the second half of the nineteenth century, for reasons that are not apparent there are no reported Canadian cases interpreting wage liability provisions until the 1890s.⁸³ Even before cases reached the courts, however, limited liability was becoming entrenched as a basic legal norm. For instance, by the time Montreal lawyer Charles Henry Stephens authored a treatise on joint stock companies in 1881, the idea of limited liability as a privilege conferred on condition that workers' wages were protected was so alien that Stephens thought it would "require some ingenuity to discover" why directors should be personally liable in respect of wages more than in connection with matters within the scope of their duties. Fortunately, in

⁸² I have not traced the development of New York case law on shareholder liability beyond Wakefield, however, it is worth noting that Labatt's global assessment of American jurisprudence was that it narrowly construed shareholder liability because it was in derogation of the common law, imposed new liabilities, or was penal in nature. See Labatt, "What Persons," 407.

⁸³ On the rate of business failure, see Taylor and Baskerville, Concise History, 173. In part the absence of earlier case may reflect the slow rate at which Canadian entrepreneurs took advantage of the corporate form, although almost 4,000 firms incorporated in Ontario between 1867 and 1906. See Fecteau, "Petites Républiques," 53-54 and Michie, "Canadian Securities," 42. It is possible that there were previous lower court judgments that went unreported, however, research to date has not identified any discussion of director liability in any published legal source, apart from Stephens, Law and Practice, see below.

his eyes, their liability was hedged with so many conditions that there would be very few cases in which directors would be “condemned to pay.”⁸⁴

Stephens’ view proved to be correct when the first case on the issue reached the high courts in 1895. Mr. Welch was engaged as a foreman engaged the British America Starch Works to superintend a construction project at the company’s factory in Brantford, Ontario. When the company failed to pay he sued and obtained judgment, but when the execution was returned nulla bona, he brought an action against the shareholders. Welch’s agreement with the company stipulated that it would employ the men necessary for the work but that he would pay them out of pocket and be reimbursed every fortnight. As well, the company agreed to pay him \$5.00 a day and another \$2.00 a day for the use of a steam pump he provided. When work was completed, the company failed to pay \$225.55 owing to Welch. He sued, recovered judgment by default and, after unsuccessfully attempting to collect from the company, he brought an application against Ellis, a director of the corporation. The trial judge held that Welch was not a labourer, servant or apprentice within the meaning of the statute, and Welch appealed.

His lawyers argued that the provision in question ought to be broadly construed since it aimed to protect persons who could not protect themselves. They also argued that the term servant “is as wide a term as can be used to define a person employed by another.”⁸⁵ Ellis’s lawyers countered that Welch was neither a workman nor a labourer, but rather a contractor who was not protected by the Act. In the alternative, they submitted that even if Welch was a servant in the wide sense of the term, its meaning in the statute was restricted because it was used in conjunction with the terms “labourer” and “apprentice,” thereby connoting an intent to

⁸⁴ Charles Henry Stephens, The Law and Practice of Joint Stock companies under the Canadian Acts (Toronto: Carswell, 1881), 367-69. He suggested tongue-in-cheek that it might serve as “a check upon the tendency to make money by the appointment of relations at good fat salaries.”(368). The entire passage is reproduced in C.A. Masten, Canadian Company Law (Toronto: Canada Law Book, 1901), 262.

⁸⁵ Welch v. Ellis (1895), 22 O.A.R. 255, at 257.

include only servants whose substantial occupation was the performance of manual labour.⁸⁶

The Ontario court of appeal agreed with Ellis's lawyers. Osler, J.A. noted that the provision was borrowed from the New York statute and then quoted Wakefield for the proposition that the act only covered servants performing menial or manual services. In Osler, J.A.'s view the maxim noscitur a sociis applied and it did not matter that Welch was paid by the day. MacLennan, J.A., wrote a separate concurring opinion that took a purposive approach to statutory interpretation, albeit one bereft of any historical or policy analysis. Rather, MacLennan, J.A. asserted, "it is evident to my mind that it was not intended to give this suretyship to any but the humblest class of wage earners, the loss of whose wages might be productive of great distress to themselves and their families." But as the judgment continued, MacLennan, J.A. invoked another policy reason for reading the statute narrowly. It "cast the burden of suretyship upon persons not otherwise liable; in fact imposes upon the directors a penal liability for the default of the company, though they may have been guilty of no wrong whatever."⁸⁷

The characterization of the act as "penal" did not go unchallenged in subsequent judgments and it is instructive to explore these differences. In Ontario, Riddell J.'s opinion in Lee v. Friedman voiced the strongest alternative to Welch. That case was not about the scope of coverage, but rather raised the question of whether there could be an equitable assignment of the wages to a third party who could then recover against directors if the company failed to pay the workers. In this case, the plaintiff, Lee, was a local merchant who made an arrangement with the Wilbur Iron Ore Co. and its employees whereby he provided goods to the employees on credit and the employees agreed that the company would deduct the amounts they owed to Lee from their wages and pay Lee directly. Riddell J. articulated a different interpretive starting point than the one in Welch:

⁸⁶ Ibid.

⁸⁷ Ibid, 262.

No doubt from the point of view of the directors, the Act may be somewhat drastic-but what of the workmen? The Legislature had to face this situation: when a company fails and does not pay its workmen, are the workmen, who had nothing to do with the management of the company, and could not know anything about the company's prosperity, to suffer, or are those who had all to do with the management, either directly or through the man they appointed, and who knew or ought to have known all about its financial condition?

The answer given by the Legislature is that the directors must bear some part of the loss at least – and while it is “penal” as regards the directors, it is highly remedial as regards the workmen.⁸⁸

Thus, while Riddell J. did not challenge the norm of limited liability, he recognized that it was in conflict with the legislature's remedial purpose of protecting workers who are unable to protect themselves. In the result, the court refused to read narrowly the scope of protection and held that in the circumstances of this case an equitable assignment had occurred and that the assignee of the wages could collect against the directors.

This interpretive approach, privileging the remedial thrust of wage protection over the norm of limited liability, ultimately failed to displace the strict constructionist approach in Ontario. Subsequent decisions of the Ontario courts on the issue of assignment distinguished Lee on its facts,⁸⁹ while those on scope of employment held that actors and working managers were not covered.⁹⁰ Riddell J. participated in many of these

⁸⁸ Lee v. Friedman (1909), 20 O.L.R. 49; cited to [1909] O.J. No. 5 at paras. 42-43.

⁸⁹ Olson v. Machin (1912), 8 D.L.R. 188 (Ont. Div. Ct.) (company deducted wages at source and paid directly to boarding house keeper); Coveney v. Glendenning (1915), 22 D.L.R. 461 (Ont. S.C.) (similar arrangement for storekeeper).

⁹⁰ Ryan v. Wills (1918), 43 O.L.R. 624 (S.C. (A.D.)) (actress under contract); Domanski v. Wilson, et al. [1935] O.R. 400 (C.A.).

later decisions but never again invoked the remedial purpose of the act to allow wage protection to trump limited liability.⁹¹

Quebec judges also split on the nature of the provision. In the first reported Quebec case, Fee v. Turner, the court adopted a purposive approach, taking the view that the act aimed “to protect to a limited extent those who were employed by such companies in positions which do not enable them to judge with any special intelligence what is the company’s real financial position.”⁹² Since directors did or should have knowledge of the danger of a financial collapse, it was “not inequitable” to hold them responsible for the wages of workers whose services they continued to utilize. This obligation, however, did not extend to managers, accountants or other employees who could know whether the company’s operations were being successfully carried out.⁹³ This analysis, however, was not applied in subsequent decisions, which reached inconsistent results. Thus in Pilote v. Leclerc et al.⁹⁴ and Leclerc v. Beaulieu et al.⁹⁵ the court held that the director liability provision of the Quebec general incorporation

⁹¹ Cases in which Riddell was involved include Olson, Ryan, and Domanski, (above). as well as Mullen v. Millar (1924), 55 O.L.R. 563 (S.C. H.C.J.) aff’d at [1925] 2 D.L.R. 321 (S.C. (A.D.)) (prospectors retained by company but never instructed to go into field unable to collect from directors on judgment against company for breach of its agreement to pay them for their travel and waiting time). Claimants lost in each of these cases. Riddell had a lengthy judicial career, but is perhaps best remembered as a prolific legal historian who wrote across a wide range of topics, mostly in a descriptive manner. For example, see William Renwick Riddell, “Labor Legislation in Canada,” Minnesota Law Review 5 (1921): 243-52. For a short biographical sketch and a partial list of his writings, see an obituary, E-Fabre Surveyer, “The Honourable William Renwick Riddell, Revue du Barreau 5 (1945): 526-29.

⁹² (1904), 13 Quebec K.B. 435 at 446.

⁹³ *Ibid*, 446-47. The plaintiff in this case was found to be a manual worker with some supervisory responsibilities and, therefore, covered by the act.

⁹⁴ (1917), 52 C.S. 127 at 130.

⁹⁵ (1924), 63 R.J.O., C.S. 90 at 91, 93

statute was penal in nature, while in Dallaire v. Leclerc et al.⁹⁶ it concluded it was civil.

Courts in Alberta initially adopted a broader view of the scope of their act's coverage, which included the term "clerks." For example, in Yellowhead Pass Coal & Coke, Beck, J. did not find the rules of statutory interpretation very helpful and held that the statute covered a mine superintendent, bookkeeper, and company doctor, but not the auditor.⁹⁷ In a subsequent case, Crowder v. Coleman, the Alberta Court of Appeal, relying on Yellowhead, held that a mine manager was covered because he had nothing to do with the financial management of the business. Yet the court also held there must be strict compliance with the requirements for returning a judgment unsatisfied because the statute "gives an extraordinary remedy" (Beck J.A.) and because the remedy against the directors was "purely statutory (Clarke, J.A.). Although Stuart J.A. was of the view that the statute was remedial and should be interpreted flexibly "to meet the clear intent of and spirit of the enactment, he reluctantly concurred with his colleagues."⁹⁸ A similar approach was adopted in Stevens v. Spencer et al., with a similar result. Tweedie J. held that a mining engineer hired to superintend the construction of a mine was a servant, but the conditions precedent to recovery against director must be strictly performed because it was "an extraordinary right."⁹⁹ There was no suggestion either that incorporation as a limited liability corporation was a statutory privilege or that the wage liability provision was remedial and therefore entitled to a liberal construction.

⁹⁶ (1918), 53 C.S. 201 at 207.

⁹⁷ Re Yellowhead Pass Coal & Coke Company, Ltd. (1917), 12 Alta. L.R. 144, at 149-50. Also, see Crew v. Dallas (1908), 9 W.L.R. 598 (miner paid by results is covered).

⁹⁸ Crowder v. Coleman et al. [1924] 1 D.L.R. 849 (Alta. S.C.) at 854, 861, 863.

⁹⁹ Stevens v. Spencer et al. [1929] 4 D.L.R. 838 (Alta. S.C.) at 855-56; aff'd [1930] 3 D.L.R. 993.

The judgment that most fully embraced this alternative view was that of Albert Elsworth Richards,¹⁰⁰ in Macdonald v. Drake, a decision of the Manitoba Court of Appeal. The case did not deal with the scope of coverage, but rather with a claim by the defendants that they were not liable as directors because they each lacked a prescribed qualification to be a director. The court unanimously rejected this technical defense as well as the claim that the statute should be strictly construed. According to Richards, J.A.:

The claim that the liability under s. 33 is a penalty seems to me incorrect. Providing that such liability shall exist on the part of directors is, I think, withholding from them, in respect of wages, the freedom which the statute would otherwise give them from personal liability for debts of the Company.

...[P]ersons doing business jointly together without the benefit of a limited liability Act, are each liable for all the debts of the joint concern. That is the ordinary position. The limited liability granted by some statutes to shareholders in corporations is a special privilege, abrogating the ordinary liability of each for all debts. In granting such limit to liability there is nothing unjust in providing that the ordinary liability shall again exist in certain cases. That is all the Legislature has done by enacting section 33.¹⁰¹

Although this judgment was followed in the only other reported Manitoba case on director's liability prior to World War II, courts in other provinces

¹⁰⁰ Albert Elsworth Richards was the grandson of William Buell Richards who as reform member of the Legislative Assembly of the Province of Canada supported the enactment of the general incorporation statute in 1849 and again in 1850. For a brief biography, see Dale Brawn, The Court of Queen's Bench of Manitoba, 1870-1950: A Biographical Sketch (Toronto: University of Toronto Press, 2006) (I am thankful to Professor Brawn for giving me pre-publication access to this material).

¹⁰¹ Macdonald v. Drake (1906), 16 Man. L. Rep. 220 at 224.

did not cite it, although a 1916 treatise on Canadian company law by Montreal lawyer Victor E. Mitchell adopted the Manitoba position without reference to contrary views.¹⁰²

In sum, by the 1930s, despite some variation, the predominant approach of the courts was to treat limited liability as the norm and director liability for workers' wages as the exception. This view was most clearly articulated by F.W. Wegenast in his treatise on company law, published in 1931, which became the standard work on the subject for many years. In his opinion, the idea that director liability for workers' wages merely withheld from directors the immunity that they otherwise would have been granted by statute was "[h]istorically and logically" inapplicable to a chartered company.¹⁰³ He did not elaborate on this argument, but rather referenced an earlier discussion in the treatise where he explained limited liability as a logical extension of the corporation's separate legal personality and not as a statutory privilege.¹⁰⁴ This perspective exemplified the triumph in the first decades of the twentieth century of what David Millon describes as the "natural entity theory of the corporation." Unlike the earlier theory, which viewed the corporation as an artificial entity created by the state to promote public policy objectives, the new theory naturalized the corporation as a legal person, no different in principle than a natural person vested with rights like those of ordinary citizens. In a similar vein, Paddy Ireland notes that in late-nineteenth century England, the law

¹⁰² Schumacher v. Moore [1934] 4 D.L.R. 585 (Man. C.A.) (upholding constitutionality of director liability provision in federal incorporation statute). Victor E. Mitchell, A Treatise on the Law Relating to Canadian Commercial Corporations (Montreal: Southam Press, 1916), 1077-78.

¹⁰³ F.W. Wegenast, The Law of Canadian Companies (Toronto: Burroughs, 1931), 385. Wegenast represented the Canadian Manufacturers Association at a royal commission hearings looking into workers' compensation from 1911-13. For a discussion of his role, see R.C.B. Risk, "This Nuisance of Litigation: The Origins of Workers' Compensation in Ontario," in David H. Flaherty, ed., Essays in the History of Canadian Law, Vol II (Toronto: Osgoode Society, 1983), 418-91. Carswell, a Canadian legal publisher, reprinted Wegenast's corporate law treatise in 1979.

¹⁰⁴ Wegenast, Law of Canadian Companies, 5.

increasingly viewed corporations as entities made by people, not of them.¹⁰⁵ As the courts naturalized the separate legal personality of the corporation and the limited liability of the human beings who created and managed them, the idea that these were privileges faded from view. Although not all judges and commentators accepted this approach,¹⁰⁶ most did.

The coverage of wage protection legislation was only legislatively expanded to reflect the emergence of a more general conception of the category of employment after World War II. For example, in Ontario the definition of protected workers was expanded by the addition of the words “and other wage earners” after “apprentice” in 1953 when the Companies Act was substantially revised and recast as the Corporations Act, and it was only in 1970 that the term “employee” was inserted to delineate who was entitled to claim against directors for unpaid wages. Even then the break with the idiom of master and servant was incomplete as the act further stipulated that coverage was limited to employees “to whom the Master and Servant Act applies.”¹⁰⁷ That qualification was dropped in a

¹⁰⁵ Millon, “Theories of the Corporation,” 211-16; Ireland, “Capitalism without Capitalists,” 47. The Canadian business press publicized the emerging English view. For example, the Monetary And Commercial Times (1871) 4:28, 549, reprinted an excerpt from an English business publication: “The doctrine of limited liability has at length become familiar to Englishmen. It has been adopted as the law of the land, and the tendency of legislation is rather to extend than diminish its operation. It is well understood that when a contract is made with a limited liability company or joint-stock company, the persons who compose the company are not made liable beyond the amount of the unpaid shares they hold.”

¹⁰⁶ See, for example, Marie-Louis Beaulieu, “De la Responsabilité des Directeurs de Compagnies pour le Salaire des Employés,” Revue du Droit 9 (1930-31): 218-23, 483-91, at 220-21: “Disons donc que le législateur a simplement mis de côté, en faveur de l’ouvrier, le privilege accordé aux directeurs de ne pas être responsables des dettes de la compagnie....Et il n’y a là rien d’injuste, non plus.”

¹⁰⁷ S.O. 1953, c. 19, s. 73(1); Ontario Business Corporations Act, S.O. 1970, c. 25, s. 139.

1982 overhaul.¹⁰⁸ Federally, the term “employee” only displaced the list of protected workers in 1974.¹⁰⁹

By this time the courts also accepted the broadened scope of personal protection. In 1974, the Ontario Court of Appeal was dismissive of the authority of Welch. Arnup J.A., speaking for the court, wrote: “In construing a law that is ‘always speaking’, I am not prepared to be bound by the construction placed upon an 1874 statute in 1895.” Arnup accepted that the provision was a remedial one to which s. 10 of the Interpretation Act applied, entitling it to “such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.”¹¹⁰ The court, however, refused to articulate a “general rationale” and based its conclusion on the circumstances of the particular case and on the 1953 amendment in force at the time.¹¹¹ This brought to an end litigation over who was covered but, as we shall see in the next section, the clash between the remedial thrust of the director liability provision and the judicially entrenched norm of shareholder and director limited liability was soon to raise its head again, this time in relation to the question of what was covered.

¹⁰⁸ S.O. 1982, c. 4, s. 131. The master and servant act was renamed the Employer and Employee Act in 1990. R.S.O. 1990, c. E.12.

¹⁰⁹ S.C. 1974-75-76, c. 33, s. 114.

¹¹⁰ It is interesting to note that the Baldwin-Lafontaine government first passed the Interpretation Act in 1849, the year following their election. They distrusted the judiciary composed largely of Tory appointees. On the checkered history of s. 10 of the Interpretation Act, see Eric Tucker “The Gospel of Statutory Rules Requiring Liberal Interpretation According to St Peter's,” 35 University of Toronto Law Journal 35 (1985): 113-53.

¹¹¹ Zavitz v. Brock et al. (1974), 3 O.R. (2d) 583 (C.A.).

IV. THE TRIUMPH OF LIMITED LIABILITY OVER WAGE PROTECTION ROUND II: DIRECTOR LIABILITY FOR TERMINATION AND SEVERANCE PAY

The 1850 Province of Canada statute made shareholders liable for “all debts that may be due and owing ...for services performed for such Company.” Subsequent legislation limited the amount a worker could claim to either one year’s or six-months’ wages.¹¹² This formulation has remained essentially unchanged until today, yet the scope of a workers’ entitlement was not the subject of dispute until the 1980s when the question of director liability for termination and severance pay began to be litigated.

Why had such claims not surfaced earlier? After all, even in the nineteenth century, Canadian common law held that contracts of indefinite hiring were terminable by giving notice and that a worker who was fired summarily without cause could sue for wrongful dismissal and be awarded pay in lieu of notice--that is termination pay. As well, workers who were hired on fixed term contracts could sue if they were terminated without just cause prior to the end of their contracts.¹¹³ Yet prior to the 1980s there is no reported case of workers suing directors for unpaid termination pay. The most likely reason for the absence of litigation on this point is that very few claims were made for wrongful dismissal and nearly all of them were by managerial and professional employees, exactly the group of workers held not to be covered by the statute. Moreover, even if an hourly paid worker had claimed wrongful dismissal it is likely that a court would have found that the notice to which the worker was entitled was so short as to make the exercise futile.

¹¹² S. Prov. Can. 1850, c. 28, s. 17. The first limitation appeared in S. Prov. Can. 1860, c. 61, s. 53.

¹¹³ McGuffin v. Cayley (1846), 2 U.C.R. 308 (Q.B.); Raines v. The Credit Harbour Company (1844), 1 U.C.Q.B. 174; Broughton v. Corporation of Brantford (1869), 19 U.C.C. P. 434; McIntyre v. Hockin (1890), 16 O.A.R 498, 501 (C.A.).

A number of developments in the 1970s dramatically changed the social and legal landscape. As already noted, director liability provisions in corporation statutes were amended to extend their coverage to all employees. As well, the growth of the standard employment relationship following World War II meant that there were more long-term employees whose greater seniority entitled them to longer notice periods. By the 1970s, however, the long post-war boom began coming to an end, producing a harsher labour market climate featuring mass lay-offs, factory closures, and increased precariousness for all workers.¹¹⁴ Business bankruptcies also increased dramatically from around 3000 annually in 1974 to nearly 11,000 in 1982. Then, following a brief economic recovery, the number of annual bankruptcies peaked in 1996 at about 15,000.¹¹⁵ Not only did the increase in bankruptcies result in larger numbers of employees with unpaid wage claims,¹¹⁶ but the harsher economic climate generally also led to an increase in the amount of termination and severance pay to which individual workers were entitled as downsized supervisory and managerial workers who faced an uncertain labour market claimed longer notice periods and found a sympathetic

¹¹⁴ On the return of mass unemployment in Canada in the 1970s and 80s, and its implications for state policy, see Stephen McBride, Not Working (Toronto: University of Toronto Press, 1992). On the rise and decline of the standard employment relation in Canada, see Leah Vosko, Temporary Work (Toronto: University of Toronto Press, 2000).

¹¹⁵ Office of the Superintendent of Bankruptcy Canada, An Overview of Canadian Insolvency Statistics to 2004 (Industry Canada, 2006), 22, online at [http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/StatsBooklet2006-EN.pdf/\\$FILE/StatsBooklet2006-EN.pdf](http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/StatsBooklet2006-EN.pdf/$FILE/StatsBooklet2006-EN.pdf) (5 March 2007). (Thanks to my colleague Professor Ben-Ishai for referring me to this source.)

¹¹⁶ A government commissioned study conducted in 1981 covering the years 1976-80 estimated that there were roughly 25,000 bankruptcies over this period and that unpaid wage claims were made in 9.3% of the cases. The average employee was owed \$900. At the time, unpaid employees were given a limited priority over other unsecured creditors, but the increase in security financing reduced the effectiveness of this form of wage protection. See Committee on Wage Protection in matters of Bankruptcy and Insolvency, Wage Protection in Matters of Bankruptcy and Insolvency (Ottawa: Minister of Supply and Services, 1981).

judiciary.¹¹⁷ Moreover, in response to political pressure to address this development, many governments enacted statutory notice provisions covering most employees. In Ontario, for example, notice and termination pay were first introduced into the Employment Standards Act (ESA) in 1970 and in 1974 additional requirements were imposed in the case of mass terminations. Then in 1981 the legislature also granted terminated employees in larger firms an entitlement to severance pay.¹¹⁸ As a result of these changes, the amount of unpaid termination and severance pay was typically far greater than the amount of unpaid salary and wages when firms became insolvent, and so their recovery from directors became an important objective. But these claims also clearly raised the stakes for directors--who were jointly and severally liable regardless of whether the company was closely held or publicly traded, or whether they were major shareholders, active managers, or outside directors--and the question of their liability for these claims was soon before the courts.¹¹⁹

Before turning to the cases, it will be helpful to identify the three sources of entitlement to termination and severance pay, since that sometimes affected the court's judgment about whether the money owing was a debt for services rendered to the corporation. First, employment standards laws in every province now provide minimum notice periods for most employees or for payment in lieu of notice. In Ontario and the federal jurisdiction, the legislation also provides for an additional payment, known as severance pay, to long-term employees who are terminated by large employers. Second, the terms of an individual contract of employment or a collective agreement may stipulate the entitlement of employees who are

¹¹⁷ Geoffrey England, Individual Employment Law (Toronto: Irwin, 2000), 244-45 ("The general trend since the 1950s has been for courts to lengthen the reasonable notice period, the paramount objective being to help employees withstand the financial blow of unemployment.")

¹¹⁸ S.O. 1970, c. 45, s. 4; S.O. 1974, c. 112, s. 40; S.O. 1981, c. 22.

¹¹⁹ Also, many statutes make directors absolutely liable for unpaid wage claims, while others allow a due diligence defence. See Industry Canada, Efficiency and Fairness in Business Insolvencies (2001), 6-7 available online at http://strategis.ic.gc.ca/epic/internet/incilp-pdci.nsf/en/h_cl00197e.html (5 March 2007).

terminated without just cause, provided that the amount is not less than the statutory minimum. Third, at common law there is an implied right to reasonable notice of termination in contracts of indefinite hiring and a worker who is summarily dismissed without notice or pay in lieu of notice can sue for wrongful dismissal. There is no separate claim for severance pay under Canadian common law.¹²⁰

The first case in which the liability of directors for unpaid termination and severance pay arose was Mesheau v. Campbell et al., a 1982 decision of the Ontario Court of Appeal. A terminated employee won a common law wrongful dismissal action against his corporate employer and when he could not collect on the judgment he sued the directors under the Canada Business Corporations Act (CBCA). The court denied the claim. A brief judgment held that damages for wrongful dismissal are not a debt for services performed for the corporation.¹²¹ This approach was followed in subsequent Ontario cases, involving express contractual obligations as well as ESA-based claims for termination and severance pay.¹²² The court of appeal in Alberta reached a similar conclusion based on its interpretation of the province's business corporations act.¹²³ Courts of appeal in two other jurisdictions, however, viewed the matter differently. In Saskatchewan, the court held that common law damages for wrongful dismissal fell within the statutory definition of wages because they are "compensation for personal services due to the employer." As wages, they

¹²⁰ For an overview, see England, Individual Employment, ch. 9.

¹²¹ (1982), 39 O.R. (2d) 702. The court cited Welch for the history of the section, but not for its approach to statutory interpretation.

¹²² Mills-Hughes et al. v. Raynor et al. (1988), 63 O.R. (2d) 343 (C.A.); Vopni v. Groenwald (1991), 84 D.L.R. (4th) 366 (Ont. Gen. Div.). In the former case, the contract stipulated the severance payable under it was not for past services). In the latter, the McKeown J. stated expressly that the statute created a liability that was an exception to the rule that there is no personal liability of directors for corporate debts and so, therefore, the liability should be interpreted strictly (at 369).

¹²³ Audia v Ng [1993] A.J. No. 251.

are a debt for services performed and, therefore, directors are liable.¹²⁴ In Manitoba, the court of appeal upheld a labour board decision that found directors liable for severance pay owed pursuant to a contractual agreement.¹²⁵ Finally, the Québec court of appeal split on the issue. In Schwartz v. Scott the court held that severance payments due under a collective agreement formed part of the employees' remuneration and, therefore, was a debt due for services rendered, even though it also held that director liability provisions should be narrowly interpreted because they derogate from the norm of limited liability.¹²⁶ Five years later, another panel of the Quebec court of appeal distinguished Schwartz and followed Meshau in a civil damages case.¹²⁷

The question of directors' liability for unpaid termination and severance pay reached the Supreme Court of Canada in Barrette v. Crabtree, a case from Québec, which arose out of a civil action by 29 managerial employees who had been terminated without notice. They were awarded \$300,000 for wrongful dismissal, which they sought to collect from the directors of their federally incorporated employer when the company defaulted. L'Heureux-Dubé J. wrote the court's unanimous judgment denying the claim on the ground that damages for failure to give adequate notice is not a debt for services performed for the corporation.¹²⁸

The judgment exemplifies the juridical triumph of limited liability over the remedial thrust of labour and employment law and so merits careful scrutiny. It begins by recognizing that the director liability provision of the CBCA, s. 114(1), is ambiguous and that different rules of statutory

¹²⁴ Meyers v. Walters Cycle Co. (1990) 71 D.L.R. (4th) 190. (C.A.)

¹²⁵ Francis v. Fruck [1992] M.J. No. 520.

¹²⁶ Schwartz v. Scott [1985] Que. C.A. 713.

¹²⁷ Turcot c. Conso Graber Inc. [1990] A.Q. No. 1030.

¹²⁸ (1993), 101 D.L.R. (4th) 66.

interpretation could be applied to produce different results.¹²⁹ L'Heureux-Dubé then turns to the statute's history. She correctly identifies its origin in the 1848 New York State statute, but misses completely the debates that preceded its enactment in New York or in pre-confederation Canada.¹³⁰ Perhaps for this reason, her judgment never considers the view that that protecting workers' wages through shareholder liability was a condition of granting investors the privilege to form limited liability corporations.

Of course, L'Heureux-Dubé recognizes that the purpose of director liability is to protect employees in the event of a bankruptcy or insolvency of a corporation and she also accepts that employees are entitled to more protection than ordinary creditors because of their special vulnerability.¹³¹ However, she positions these observations against "the specific legal framework of s. 114(1). ...In terms of the general principles governing company law, the provision is exceptional... First, the rule departs from the fundamental principle that a corporation's legal personality remains distinct from that of its members. In so doing s. 114(1) C.B.C.A. creates an exception to the more general principle that no one is responsible for the debts of another. It is against this background that the present appeal must be considered."¹³²

Thus we see the inversion triumphant. L'Heureux-Dubé J.'s interpretation constitutes as legal bedrock the corporation's separate legal personality and the principle of limited liability, which combine to shield shareholders and managers of corporations from any personal responsibility for its debts. From there it follows that director liability for workers' wages is

¹²⁹ Ibid, 71.

¹³⁰ Ibid, 71-75. Indeed, the judgment misses the pre-Confederation roots of the Canadian law.

¹³¹ Ibid, 75-77.

¹³² Ibid, 77-78. She also notes that director liability under this section of the statute is exceptional because there is no due diligence defence and because it imposes a positive obligation.

exceptional and, therefore, to be interpreted narrowly. Against this interpretive background, L'Heureux-Dubé J. characterizes termination and severance pay as damages arising from non-performance of a contractual obligation to give sufficient notice, rejecting the alternative view that entitlement to termination pay flows from the performance of service to the corporation.¹³³

Having made a series of interpretive choices, L'Heureux-Dubé J. concludes the judgment by implausibly denying that the court had any agency in the matter.

However much sympathy one may feel for the appellants, who have been deprived of certain benefits resulting the contract of employment with their employer, that does not give a court of law the authority to confer on them rights which Parliament did not intend them to have...Only Parliament is in a position, if it so wishes, to extend these benefits after weighing the consequences of so doing. This, in the final analysis, remains a political choice and cannot be the function of the courts.¹³⁴

But even as the court denies that it is making choices in the interpretation of an admittedly ambiguous legislative provision, its judgment uses language that vindicates the alternative view that it rejected, for if these workers are being “deprived of certain benefits resulting from the contract of employment” then surely it is also fair to conclude that the amount owing was a debt for a service provided. The provision of service is, after all, the consideration that makes enforceable the implied contractual duty to provide notice of termination or pay in lieu.¹³⁵

¹³³ Ibid, 81.

¹³⁴ Ibid, 83.

¹³⁵ See Patrick Mackelml, “Developments in Employment Law: The 1992-93 Term” (1994), 5 Sup. Ct. L.Rev. (2d) 269-335 at 285-86 (recognizing this alternative view and

In this regard, it is interesting to note that in other contexts where courts have been asked to consider the juridical character of termination and severance pay, they have concluded that these are wages payable as compensation for services performed for the employer. For example, prior to Barrette, courts of appeal in Saskatchewan and British Columbia had held that termination and severance pay were wages for the purposes of their employment standards legislation. In both cases, the court based its determination on the statutory definition of wages, which in neither case made specific reference to these types of payments.¹³⁶ In the British Columbia case, McLachlin J.A. (now the Chief Justice of the Supreme Court of Canada), unreservedly declared: “Severance pay is a contractual obligation of the employer incurred in exchange for the employee’s services or labour. As such, it constitutes compensation payable for those services or labour.”¹³⁷

As well, since Barrette the Supreme Court of Canada considered the juridical nature of termination and severance pay in Wallace v. United Grain Growers.¹³⁸ The issue arose in the context of determining whether a bankrupt could pursue a claim for damages for wrongful dismissal. The outcome hinged on whether these damages came within a statutory exception for “salary, wages or other remuneration from a person

suggesting that L’Heureux-Dubé J.’s choice may be due to her view of employment as status rather than contract based).

¹³⁶ Bott v. Mel City Electric Ltd (1988), 64 Sask. R. 218 (C.A.); Citation Industries Ltd. v. British Columbia (Director of Employment Standards) (1988), 52 D.L.R. (4th) 347 (B.C.C.A.).

¹³⁷ Citation Industries, 352. Also, see Re Telegram Publishing Co. Ltd. v. Zwelling (1973), 1 O.R. (2d) 592 (ON Div. Ct.), 626, where the court found “with some doubt” that severance pay, like other fringe benefits, should be regarded as wages under the ESA. That part of the decision was not challenged in the appeal. See 11 O.R. (2d) 740 (ON C.A.).

¹³⁸ (1997), 152 D.L.R. (4th) 1 (S.C.C.).

employing the bankrupt.”¹³⁹ Speaking for the majority, Iacobucci J. accepted that the bankrupt was entitled to sue.

As I see the matter, the underlying nature of the damages awarded in a wrongful dismissal action is clearly akin to “wages” referred to in s. 68(1)....

The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. As an award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice.¹⁴⁰

In a dissenting judgment concurred in by two other judges, McLachlin J. (as she then was), agreed with Iacobucci J.’s conclusion on this point.¹⁴¹

Not surprisingly in light of this holding, a case was recently brought in Ontario, Englefield v Wolf,¹⁴² seeking to have directors held liable for unpaid termination and severance pay. Cullity J., however, declined the invitation to hold that Wallace effectively reversed Barrette. Apart from the natural reticence that a lower court judge might feel in making such a determination, Cullity also sought to reconcile the two cases. He accepted that the protection of workers’ wages was the underlying policy consideration in both the director liability and the bankruptcy exemption provisions. The difference was that under the CBCA “other considerations become relevant when it is sought to make directors – and

¹³⁹ Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 68(1).

¹⁴⁰ Wallace, 24-25.

¹⁴¹ *Ibid*, 38 (“Damages in lieu of reasonable notice constitute “salary, wages or other remuneration” for the purposes of bankruptcy legislation and hence are recoverable.”)

¹⁴² [2005] O.J. No. 4895 (Sup. Ct.)

not the employer – liable.” Cullity then quoted L’Heureux-Dubé’s view that director liability was a major exception to the fundamental principles of company law, demonstrating once again the work that the inversion continues to perform in limiting wage protection.¹⁴³

IV. CONCLUSION

In this article I argue that at least until the mid-nineteenth century, the idea that investors should be able to pool their capital and not be personally responsible for the obligations of their joint enterprise was not widely accepted. A particular concern was that the employees of limited liability corporations would be unprotected in the event the corporation became insolvent. Legislatures responded to this sentiment by making shareholders and then directors personally responsible for workers’ wages in the event the corporation defaulted. This was a condition of granting investors the privilege of forming limited liability corporations. Within a short time, however, the courts inverted this understanding, asserting that separate corporate personality and the limited liability of shareholders and directors were basic norms and that wage protection was a special privilege. This became an important basis for reading narrowly the personal scope of the director liability provision and underpins the Supreme Court of Canada’s determination the legislation does not make directors personally liable for termination and severance pay.

It is not a given, however, that the protective dimensions of labour and employment law must always give way to the norms of capitalist legality. The dilemma is, indeed, a recurring one. Thus, it is always possible that the Supreme Court of Canada will revisit the issue of director liability for termination and severance pay and reach a different conclusion in light of its decision in Wallace. Also, legislatures may

¹⁴³ Ibid, par. 44. Barrette has also been followed in Brown v. Shearer [1995] M.J. No. 182 (C.A.) (denying liability for severance pay due under the contract of employment) and Westar Mining Ltd. (Re) (1996), 136 D.L.R. (4th) 564 (B.C.C.A.) (justifying narrow interpretation of director liability provision in employment standards legislation, resulting in denial of liability for vacation pay).

strengthen wage protection rights in response to narrow judicial interpretations of existing provisions. For example, as we saw earlier, although it took many years legislation was enacted in the post-World War II era to overcome the effects of Welch v. Ellis and its progeny and make directors liable for all employees' wages, not just those of the most subordinate. As well, legislation in a few Canadian jurisdictions is currently interpreted to impose personal liability on directors for termination and severance pay.¹⁴⁴ Finally, the claim there needs to be an effective mechanism to insure that workers will be paid the wages owed to them when their corporate employer becomes insolvent remains strong¹⁴⁵ and proposals to end director liability for workers wages have not been successful.¹⁴⁶ Indeed, at a time when well-publicized scandals have undermined the legitimacy of the corporation, the norms of separate legal personality and limited liability may be less secure than in the recent past.¹⁴⁷

¹⁴⁴ For a recent and comprehensive overview of director liability for wages, see Janis P. Sarra and Ronald B. Davis, Director and Officer Liability in Corporate Insolvency (Markham, ON: Butterworths, 2002), ch. 5.

¹⁴⁵ For example, see the recent federal amendments establishing the wage earner protection fund. S.C. 2005, c. 47. The law, however, has not yet been declared in force and it is doubtful that the current minority Conservative government will do so.

¹⁴⁶ For a discussion of these developments in Canada, see Ronald B. Davis, "The Bonding Effects of Directors' Statutory Wage Liability: an Interactive Corporate Governance Explanation," Law & Policy Review 24 (2002): 403-32. Also, see Industry Canada, Efficiency and Fairness and Canada Business Corporations Act Discussion Paper Directors' Liability (1995) available online at <http://dsp-psd.pwgsc.gc.ca/Collection/C2-280-7-1995E.pdf> (5 March 2007).

¹⁴⁷ For example, see Glasbeek, Wealth by Stealth; Joel Bakan, The Corporation: The Pathological Pursuit of Profit and Power (New York: Free Press, 2004). It is notable that since the 1970s there has been an enormous increase in the number of federal and provincial statutes imposing liability on corporate directors. For example, in Ontario alone by the mid-1990s there were over 100 federal and provincial statutes imposing liability on directors. See Ronald J. Daniels, "Must Boards Go Overboard? An Economic Analysis of the Effects of Burgeoning Statutory Liability on the Role of Directors in Corporate Governance," Canadian Business Law Journal 24 (1995): 229-58, 230. Also, on the role of judicial piercing of the corporate veil, see Janis Sarra, "The Corporate Veil

The imposition of liability on directors may not be the optimal or even a very effective way of protecting workers' wages.¹⁴⁸ The point of the chapter, however, is not to defend director liability, but rather to show historically that when the ground of capitalist legality was in formation it was shaped in part by popular resistance to some of its features. Shareholder and director liability for workers' wages is an example of that phenomenon. Within a matter of years and with the active assistance of the judiciary, the soft ground of capitalist legality was solidified into the bedrock of the legal system, narrowing the spaces that resistance had created for workers' rights and insuring that in the future carving workers' protection out of that bedrock would be hard work.

Lifted: Director and Officer Liability to Third Parties," Canadian Business Law Journal 35 (2001), 55-71 and Jason W. Neyers, "Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation," University of Toronto Law Journal 50 (2000), 173-240. The doctrine has not been used to recover workers' wages.

¹⁴⁸ See Davis, "Bonding Effects," (supports); Marcia T. Moffat, "Director's Dilemma – An Economic Evaluation of Directors' Liability for Environmental Damages and Unpaid Wages," University of Toronto Faculty of Law Review 54 (1996): 293-326 (too harsh and leads to over deterrence); Kenneth B. Davis Jr., "Shareholder Liability for Claims by Employees," Wisconsin Law Review [1984]:741-67 (favoring repeal of shareholder liability in New York and Wisconsin). On the availability of directors' indemnification and insurance for these liabilities, see Canada Business Corporations Act Discussion Paper Directors' Liability, 26-39, available online at <http://dsp-psd.pwgsc.gc.ca/Collection/C2-280-7-1995E.pdf> (5 March 2005) and Daniels, "Must Boards," 249-53.