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2009

Book Review: Christopher Nicholls' Corporate Law (EMP, 2006)

Mary Condon

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

Source Publication:

Canadian Business Law Journal 47:1, 2009

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Repository Citation

Condon, Mary, "Book Review: Christopher Nicholls' Corporate Law (EMP, 2006)" (2009). *Articles & Book Chapters*. 2782.
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Corporate Law, by Christopher C. Nicholls (Toronto, Emond Montgomery Publications, 2005, xvii and 477 pp., $100)

Professor Chris Nicholls is a distinctive voice in the Canadian corporate legal academy. A prolific scholar of corporate and securities law developments, he is one of a few Canadian corporate legal academics to have a wealth of legal practice experience to draw upon, and to understand from detailed first-hand experience of both realms how they differ in the questions that are asked and the way answers are formulated. These diverse experiences make him eminently qualified to prepare a text on Canadian corporate law for use not only by law students, but also legal practitioners wishing to understand the latest developments in doctrine and scholarly analysis. A further strength of this book is that the doctrinal analysis in it is deeply embedded in both legal and business history, making it of interest to well-established scholars in the field as well.

The author makes it clear in the preface that his primary purpose is to provide a basic education in the law of business corporations to law students. This means that the book's quality will stand or fall on issues such as whether the appropriate topics are covered in an adequate level of detail, whether the conceptual underpinnings of the area of law are well described, and whether the writing style is such that it will stimulate the interest of students in continuing to grapple with the material. On all of these counts the book succeeds admirably, as elaborated below.

With respect to the organization of the book and the coverage of topics, Professor Nicholls has more or less adopted the traditional format of corporate law teaching texts, which proceeds from analogizing the corporation to a human being and her or his life cycle. Thus almost all corporate law texts begin with describing the formation of the corporation (birth), its basic structure and fundamental characteristics (anatomy). They continue with the legal characteristics of, and constraints on, decision-making by corporations and their directors (maturity, autonomy and ongoing activities), arriving finally at shareholder remedies, including in the context of corporate transformations (conflict, death or rebirth).

Professor Nicholls does, however, experiment productively with this basic model in a number of ways. For one thing, he introduces the distinctive features of "public" and "private" corporations at an early stage, allowing readers the opportunity to reflect on whether a single set of corporate law norms is up to the task of regulating both types of

corporations. This opportunity also prompts a salutary reminder of the perhaps unglamorous reality that "(m)ost Canadian corporations are actually small enterprises with few shareholders".[1] For another, he includes in the book a concise and conceptually challenging chapter on the criminal and tortious liability of corporations (Chapter 8). This chapter is a major addition to the standard fare of corporate law textbooks, as it illuminates the tricky conceptual problems that arise in making corporate organizations liable for the behaviour of human actors. The material discussed here also opens up for reflection the extent to which there is productive overlap between the tenets of corporate law and criminal or tort liability. This is especially evident in the book's discussion of Bill C-45,[2] which introduced amendments to the Criminal Code.[3]

In this reviewer's opinion, a somewhat less successful experiment with the standard form of organizing a corporate law text is the relegation of legal issues around financing a corporation to a relatively late chapter in the book (Chapter 12). The fundamental differences between the forms of financial "lifeblood" of a corporation (debt vs. equity) and the legal characteristics of shares (with respect to dividends, voting rights and so on) are therefore not introduced until this point. Of course, the answer to this mild criticism is that instructors are not ultimately required to introduce teaching topics in the order in which they are discussed in the book.

A rather more pervasive problem is the relatively short shrift given in the book to the role of securities law — a set of legal norms with a prolific regulatory apparatus for enforcing them[4] — in regulating corporations in Canada.[5] It must be acknowledged that this is a self-serving assessment, as the author of this review teaches securities law and is therefore disposed to believe in its centrality.[6] Probably the strongest argument for not spending a great deal of time introducing

1. Nicholls, at p. 91.
2. Bill C-45, An Act to Amend the Criminal Code (criminal liability of organizations), 2nd Sess., 37th Parl., 2003 (as passed by the House of Commons, October 30, 2003), S.C. 2003, c. 21.
3. Criminal Code, R.S.C. 1985, c. C-46.
4. Most provinces in Canada have a well-funded regulatory agency charged with the administration and enforcement of a provincial Securities Act. More recently these provincial agencies have begun to act collectively (on the design of national rules and protocols on inter-provincial cooperation) under the rubric of the Canadian Securities Administrators.
5. The influence of the growing body of provincial securities law in Canada is discussed briefly by Nicholls, at pp. 43, 92, 99, 108-10, 128-30, 296-97 and 453-55.
6. This phenomenon is not dissimilar to the reported view held by 80% of parents that their children are "above average"!

material on the policy objectives and institutional activities of securities regulators is the one enumerated above, namely that most Canadian corporations are not public corporations and therefore are not regulated by provincial securities law.[7] On the other hand, there may have been an opportunity lost here to introduce law students and future practitioners of business law in Canada to the increasing blurriness of the distinction between the normative terrain of corporate law as opposed to securities law. For example, when securities regulators purport to "ratchet up" standards of corporate governance as they apply to publicly traded issuers,[8] to what extent will this ultimately put pressure on corporate law norms more generally to follow suit? Even more interestingly, when Supreme Court of Canada decisions like *Peoples Department Stores Inc. (Trustee of) v. Wise*[9] are interpreted as opening up a normative space for directors to consider the interests of corporate constituencies other than shareholders,[10] to what extent will this evolving jurisprudence run counter to the relatively single-minded pursuit of investor protection objectives by securities regulators in their rule-making and enforcement activities?[11]

Turning to the book's communication of the basic conceptual structure of corporate law, it is no surprise that Professor Nicholls does an admirable job here. The author has a compendious knowledge of the doctrines and cases related to corporate law, and employs his great learning to good effect in this book. He does a particularly impressive job of conveying a sense of the interplay between the common law and the ebb and flow of statutory reform of Canadian corporate law, as well as of evaluating the fortunes of the major attempt at a comprehensive re-writing of corporate statutory law, that is, the proposals of the Dickerson Committee.[12]

Professor Nicholls' appreciation for the historical legacy of current corporate law doctrines is very much in evidence. Examples

7. Professor Nicholls has also written extensively on the topic of securities law in other texts and articles, most notably: Jeffrey MacIntosh and Christopher C. Nicholls, *Securities Law* (Toronto, Irwin, 2002) and Christopher C. Nicholls, *Corporate Finance and Canadian Law* (Toronto, Carswell, 2000).
8. See NI 58-101 and CP 58-101, 28 O.S.C.B. 5377.
9. [2004] 3 S.C.R. 461, 244 D.L.R. (4th) 564.
10. In this respect, I note with great interest Professor Nicholls' careful and insightful discussion of *Teck Corp. v. Millar*, [1973] 2 W.W.R. 385, 33 D.L.R. (3d) 288 (B.C.S.C.). He argues for a cautionary re-reading of that decision despite its almost iconic status as a "stakeholder-positive" judicially endorsed development. See Nicholls, at pp. 277-80.
11. Securities Act, R.S.O. 1990, c. S.5, s. 1.1.
12. Robert W.V. Dickerson *et al.*, *Proposals for a New Business Corporations Law for Canada* (Ottawa, Information Canada, 1971).

here include the detailed discussion of the historical context in which the foundational *Salomon v. A. Salomon & Co. Ltd.*[13] case was decided,[14] as well as the close reading of *Ashbury Railway Carriage & Iron Co. v. Riche*[15] so as to correct misinterpretations with respect to the genesis of the *ultra vires* doctrine, and the exhaustive effort to trace the original provenance of the much-quoted assertion that corporations have "no soul to be damned, and no body to be kicked".[16]

On the other hand, the book does not purport to engage readers in a particularly systematic way with the prevailing intellectual trends in critiquing doctrinal developments in corporate law. While the first chapter of the book concisely introduces illuminating material on the law and economics approach to evaluating corporate law doctrines[17] and briefer accounts of both comparative corporate governance scholarship and "law and finance" approaches to doctrinal critique, this material does not reappear in any sustained way throughout the specific topic areas addressed in the book, though it is evident from footnote material that the author is very familiar with these bodies of scholarly literature.

On the question of whether this book is likely to achieve its goal of maintaining a student reader's interest in the material presented, in my view the answer is yes. The author writes with enviable clarity, precision and persuasiveness. A particularly helpful device in aiding student understanding of the topics discussed is the conceit of a section that appears early in many of the chapters, called "(F)raming the Issue". This introduces hypothetical examples illuminating the puzzles that the material discussed in the chapter are intended to address. This will assist readers to focus their attention on alternative resolutions to problems faced in statutory interpretation or adjudication.

Two basic approaches to devising teaching materials used in Canadian law schools are the "casebook" model and the "textbook" model. The former, in an unpublished or published version, presents the raw material of legal problem-solving (statutory material or cases), as well as a variety of commentary on that raw material, in excerpted or complete form. While students are required to navigate

13. [1897] A.C. 22 (H.L.).
14. See Nicholls, at pp. 65-74.
15. (1875), 7 L.R.H.L. 653. This case dealt with the doctrine of *ultra vires* as it applied to "memorandum corporations". See Nicholls, at pp. 178-82.
16. See Nicholls, footnote 1 of Chapter 8, at pp. 215-16.
17. Such as transaction cost theory, agency theory and the "nexus of contracts" theory.

more independently through this raw material (with guidance from a teacher), they obtain a sense of the diversity of influences and authorities out of which doctrines are moulded. Meanwhile the latter model provides the author's (or authors') summary account of the major principles of relevant law, often accompanied by sustained commentary or critique from that author. The advantage of this approach is that the reader gains insight into the relevant area of law by virtue of a consistent perspective on it from a scholar in the field. Students of corporate law in Canada will be well served by Professor Nicholls' presentation of the development, logic and utility of current norms of corporate law.

But the very cogency of that perspective, and the wealth of knowledge and experience that lies behind it, leads to a final point about the book. Students would also benefit a great deal from Professor Nicholls' willingness to be forthright about potential areas of policy or doctrinal reform in the corporate law area. For example, while the book discusses the existence of a separate close corporation statute in Delaware,[18] the author does not himself enter into the debate about whether such an innovation should be adopted in Canada. Similarly, when he concludes his detailed exegesis of the "corporate veil" cases (revealed either by lifting or piercing) in Chapter 7, he notes "what is needed is a more refined concept of why the law ought to respect... [the] proposition"[19] that a corporation is a separate legal person. Professor Nicholls himself is more well placed than most to develop that concept; it is to be hoped that it forms part of his future work in the field. In conclusion, the book is a most valuable addition to the library of corporate law scholarship in Canada, and its considerable appeal is likely to prove enduring.

Mary Condon*

18. See Nicholls, at pp. 119-21.
19. *Ibid.*, at pp. 213-14.

* Associate Professor, Osgoode Hall Law School, York University.