CORPORATIONS IN WARTIME AND OTHER EMERGENCY CONDITIONS

Richard Bird* and John McEvoy**

I. Introduction

One sign that some multi-national corporations are anticipating the next war or emergency condition can be found in the private bills activity of the New Brunswick Legislature. Since the early 1960s, foreign corporations have been preparing to use New Brunswick as a safe haven from the risks of a future hostile environment in their countries of incorporation or business activity.[1] A recent and fairly representative example of this preparation is *An Act to Continue Griffin Trustees Limited*.[2] Griffin was incorporated in the British Virgin Islands in 1984[3] at the behest of the British accounting firm, Saffery Champness.[4] Upon proclamation of the New Brunswick Act, Griffin will be continued in New Brunswick as the Saffery Champness Trust Corporation "as if it had been incorporated under the laws of New Brunswick" and will be vested with all the property of Griffin and "all the rights, powers, authority and privileges" that were vested in Griffin as a trustee.[5] Presumably, it is intended to proclaim the Act in the future when some event makes Saffery in New Brunswick more desirable than Griffin in the British Virgin Islands. It is not clear that, if and when Griffin moves to New Brunswick, it intends to remain in New Brunswick. The Act authorizes Saffery, formally Griffin, to move on to another jurisdiction if authorized by

---

*Faculty of Law, University of New Brunswick.

**Faculty of Law, University of New Brunswick.

[1]For example, *An Act to Incorporate Sapac Corporation, Ltd.*, S.N.B. 1961-62, c. 161 enacted on behalf of F. Hochman-LaRoche & Company of Switzerland. For examples of recent activity, see: *An Act to Incorporate Kleinwort Benson International Trustees Limited*, S.N.B. 1993, c. 75; and *An Act to Amend An Act to Continue Pierson Management (Canada) Inc.*, S.N.B. 1993, c. 77; repealed by S.N.B. 1995, c. 54.

[2]S.N.B., 1991, c. 65.

[3]*Ibid.*, s.1. The definition of "Body Corporate" states that Griffin Trustees Limited was incorporated under *The International Business Companies Ordinance*, (No. 8 of 1984) on 17 August 1984.

[4]Saffery Champness, which can trace its founding to the year 1855, claims to be the oldest accounting firm in the United Kingdom. Its principal client base is the landed-estate aristocracy to whom it provides the full range of services, particularly in relation to inheritance tax, tax planning and trust administration. See: "Aristocrats' accountants plan for the future", *The Accountant* (May 1990, Issue No. 5837) 6. Saffery Champness is identified as the 20th largest British firm of accountants/auditors with total fee income of £16.3 million according to a 1994 survey published in *The Accountant - International Accounting Bulletin* and reproduced in *Key Note Market Review*, "Corporate Services in the U.K. - An Industry Sector Analysis", 25 July 1994 (Table 4.3) (I.C.C. Report No. 016773) (Nexis - UKCO file). The survey indicates that in 1994 Saffery Champness had 9 offices with 40 partners and a total staff complement of 360.

[5]*Supra*, note 2, s.17. The B.V.I. Ordinance, *supra*, note 3, s. 88(1) states "a company incorporated under this Ordinance ... may, by a resolution of directors or by a resolution of members, continue as a company incorporated under the laws of a jurisdiction outside the British Virgin Islands in the manner provided under those laws."

a special resolution of its shareholders.[6] In this regard, the legislation parallels the "export" provisions of the New Brunswick *Business Corporations Act*[7] except that the corporation is not required to establish that the move will not adversely affect its creditors or shareholders.

While in New Brunswick, Saffery has limited powers.[8] Although incorporated as a trust company, Saffery is generally prohibited from receiving deposits or lending money except in carrying out the terms of a trust under its administration.[9] Also, Saffery cannot accept an appointment to act as trustee for a resident of Canada, nor transact any trust business in Canada without the authorization of the Minister of Justice.[10] It is the exception to the prohibition on trust business activity which is the key to the whole Act:

> 16(3) The prohibition against transacting a trust business, acting in a fiduciary capacity or administering trusts in New Brunswick or elsewhere in Canada ... shall not prevent the Corporation from administering in New Brunswick trusts as a trustee or in another fiduciary capacity with or for persons who are not or have not been residents of Canada when there are reasonable grounds for believing that an *emergency condition* exists. A statutory declaration under the *Evidence Act* of an officer of the Corporation or of another person having knowledge, whether actual or based on information and belief,

---

[6] *Ibid.*, s.13(1).

[7] See *Business Corporations Act*, R.S.N.B. 1973, c. B-9.1, s.127(1). For other transfer provisions, see: *Canada Business Corporations Act*, R.S.C. 1985, c. 44, s. 188(1); *Corporations Act*, R.S.N. 1990. ch. C-36, s. 299(1); *Companies Act*, R.S.P.E.I. 1988, c. C-14, s. 86(1); *Companies Act*, R.S.N.S. 1989, c. 81, s. 133(5); *Companies Act*, R.S.Q. 1977, c. C-38, s. 123.131-139 (re interprovincial transfers); *Business Corporations Act*, R.S.O. 1990, c. B-16, s. 181(1); *Corporations Act*, R.S.C. 1987, c. C-225, s. 182(1); *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 182(1); *Business Corporations Act*, S.A. 1981, c. B-15, s. 182(1); *Company Act*, R.S.B.C. 1996, c. 62, s. 37 as amended by S.B.C. 1981, c. 2, s.5; *Business Corporations Act*, R.S.Y. 1986, c. 15, s. 191(1); *Companies Act*, R.S.N.W.T. 1988, c. C-12; s. 150.

[8] *An Act to Continue Griffin Trustees Limited*, *supra*, note 2, s. 3(1) confers the following powers upon the Corporation:

> the capacity, rights, powers and privileges of trust companies and trustees generally under the laws of the Province of New Brunswick and ... the capacity, rights, powers and privileges of natural persons incidental to trust companies and trustees.

Generally, trust companies under New Brunswick law have the capacity, rights, powers and privileges of a natural person, subject to any limitations imposed by their instrument of incorporation and the terms and conditions of their licence. See: *Loan and Trust Companies Act*, R.S.N.B. 1973, c. L-11.2, s.21. Just what this might mean for Saffery is unclear. In a super-abundance of caution, the *Act to Continue Griffin Trustees Limited*, ss.3(1)(a) to (cc) include a long list of special powers for Saffery that is reminiscent of incorporations of an earlier era. Before Saffery is permitted to transact any business, $100,000 must be placed and maintained in a depository in Canada insured by the Canada Deposit Insurance Corporation or comparable security acceptable to the Minister of Justice must be posted (per s.10(2)).

[9] *Ibid.*, s.15.

[10] *Ibid.*, s.16(1).

> that an *emergency condition* exists, shall forthwith be filed with the Minister. [emphasis added]

Upon filing this statutory declaration, the Minister may prescribe conditions for the administration of affected trusts by the corporation.[11] The critical term "emergency condition" is defined by the Act to cover a broad range of events from actual war to impairment of private property:

> "emergency condition" includes, but is not limited to, any of the following: war or other armed conflict; revolution or insurrection; invasion or occupation by foreign military forces; rioting or civil commotion of an extended nature; domination by a foreign power; expropriation, nationalization or confiscation of a material part of the assets or property of or under the control of Saffery Champness Limited, a corporation incorporated under the laws of the British Virgin Islands by memorandum and articles of association dated the 22nd day of February, 1991, or the Corporation; impairment of the institution of private property (including private property held abroad); the taking of any action under the laws of the British Virgin Islands (or elsewhere at a place having jurisdiction over the internal affairs of a body corporate which would for the time being be a holding body corporate of Saffery Champness Limited if Saffery Champness Limited was a body corporate to which the *Business Corporations Act* applied) whereby actions taken by persons resident in New Brunswick or elsewhere in Canada or by the directors, officers, agents or attorneys of Saffery Champness Limited or the Corporation, or the interests of persons with whom the Corporation stands in a fiduciary capacity, might not be recognized; or the immediate threat of any of the foregoing.[12]

The New Brunswick legislation only addresses the continuation of the corporate trustee in a safe haven to administer trusts for the benefit of foreign beneficiaries. The location, nature of the trust properties, ownership of the corporate trustee, its management, the residence of the beneficiaries of the trusts, and the instruments that created the trusts are not disclosed in the legislation. All of these matters have a role in determining the effectiveness of international estate planning during wartime and other emergency conditions. The effectiveness of the New Brunswick Act, and that of similar legislation, will depend on the determination of trust and corporate rules in private and public international law in relation to property rights, trust management and ownership, the residency and nationality of the beneficiaries, as well as the place of incorporation of the corporate trustee. The purpose of this article is to examine these issues to determine the degree to which the legislation in question provides a solution.

---

[11] *Ibid.*, s. 16(4).

[12] *Ibid.*, s.1.

II. General Principles of Private and Public International Law

(i) Rights in Property

Under private law it is often said that possession is nine-tenths of the law; the same is said in international law. Despite all the legal paper one might create, often the only law that governs rights to property is the law of the *locus* of the physical assets underlying all the deeds and documents. As a general rule of private international law, rights to property, whether movable or immovable, are governed by the *lex situs*.[13] Trust property is not an exception from this general rule. If the trust property is shares in a company which owns a manufacturing plant in a country that experiences an "emergency condition", continuing the corporate trustee in New Brunswick will not avoid the problem. If the government of the country experiencing the "emergency condition" takes possession and/or control of the manufacturing plant through confiscation, expropriation, nationalization, or requisition, the corporate trustee in New Brunswick will be left holding shares in a company the physical assets of which are beyond its control. Generally, a seizure of property located within the territory of the hostile government would not be protected by continuing the corporate trustee in New Brunswick, any more than it would be protected by the laws of the British Virgin Islands. It could, however, make a difference if the government of the *situs* is friendly to one territory and not the other. In such a situation, corporate migration of the trustee could be beneficial.

Corporate continuance by migration would not have accomplished anything at the time of the Russian Revolution in 1917. Rights to movable and immovable property in Russia after the October Revolution were determined by Russian law, and the new Russian government did not recognize foreign claims, nor did it acknowledge the debts of the previous regime. Neither the statutes of New Brunswick nor those of the British Virgin Islands could have altered the ownership of property, including trust property, in post-revolutionary Russia. One attribute of sovereignty is that one country cannot force another to recognize and enforce its laws. Thus, neither the laws of New Brunswick nor of British Virgin Islands can prevent the confiscation, expropriation, nationalization or requisition of property within the borders of another sovereign state.[14] Continuing the corporate trustee in New Brunswick would have accomplished nothing with regard to property in Russia.

---

[13]This rule is subject to public policy exceptions and applies to the transfer of the rights in the property. The underlying contract to transfer may be governed by the laws of another jurisdiction. This depends upon the determination of the proper law of that contract.

[14]A case may be presented on behalf of nationals before a regional or international tribunals such as the International Court of Justice. For an example of the problem of recognition or not of the decrees of the revolutionary Russian government, consider: *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1925] A.C. 150 (H.L.).

Continuance in New Brunswick may be useful where an "emergency condition" arises in the British Virgin Islands and the physical assets are located in a third jurisdiction. If the corporate trustee, Griffin, were to remain in the British Virgin Islands under these conditions, there is a risk that some states would recognize an expropriation, confiscation, or nationalization of property owned by the residents and nationals of the British Virgin Islands. By moving the corporate trustee to New Brunswick, the corporate trustee is no longer a resident or national of the British Virgin Islands. Any attempt by the new regime to seize property owned by non-residents or non-nationals and outside of the territory of the seizing state would generally not be recognized by the courts of other countries.[15]

In summary, assets of a corporate trustee such as Griffin/Saffery that remain in the place of incorporation, the British Virgin Islands, after an emergency condition arises may be lost through confiscation or otherwise. It is doubtful, however, that in relative terms, there is much at stake. The British Virgin Islands consist of 46 islands having a total area of only 153 square kilometres and a population in 1996 of only 13,195 persons.[16] It is probable that most of the assets of Griffin located in the British Virgin Islands could be packed in boxes and shipped to New Brunswick, or elsewhere, in a matter of hours. Data and financial assets could also be transferred in seconds by electronic mail. However, any assets left in the jurisdiction will be lost. The planner can only preserve the assets outside the physical grasp of a hostile regime. This, however, may be the primary purpose of Griffin/Saffery.

(ii) Trusts

To ensure that trust assets are beyond the reach of a hostile regime and that any proposed relocation of the corporate trustee accomplishes its intended purpose, the planner must ensure that he or she has not violated any private international law rules regarding the law of trusts. Simply continuing the corporate trustee in another jurisdiction may not also cause the law governing the trust to change. The question, therefore, is what law applies to the trust after a corporate trustee is continued in another jurisdiction?

At common law, trust administration is governed by the law of the place of administration. Normally, this is where the trustee resides or carries on the

---

[15]Nor will such a seizure be recognized if it is characterized by a court as penal in nature. See: P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law* (12th Ed.)(London: Butterworth, 1992) 122 *et seq*. There may also be recognition problems if the pretended applicable law involves a true conflict of laws in time, such as a retroactive law.

[16]*CIA World Factbook* estimate for July 1996 per website www.odci.gov/cia/publications/nsolo/factbook/vi.htm. *Whitaker's Almanack 1995* (London: J. Whitaker & Sons Ltd., 1994)(127th Edition), at 1067 indicates a 1991 population of 16,108 persons.

administration of the trust.[17] If this general rule is applicable, then the laws governing the administration of the trust will be the same as those governing the corporate trustee. It is not clear, however, that the general rule will always be applicable.

There is support for the rule that testamentary trusts be administered according to the law of the testator's domicile at the time of death and *inter vivos* trusts according to the law of the country with which the trust is most closely related.[18] Alternatively, the settlor or testator may designate the laws of a particular country to govern matters in relation to trust administration and the country so designated need not have any direct relationship with the trust property, the beneficiaries or the settlor/testator. Castel states that a change in the place of administration of a trust should be recognized only when authorized by the terms of the instrument creating the trust or by court order.[19] No authority is cited for this proposition though it would seem a clear warning to trust planners to include express provisions in the trust instrument permitting the trustee to transfer the administration of the trust to another jurisdiction. As part of any strategic plan, like that of Griffin/Saffery, it would be wise for the trust instrument to authorize the trustee not only to move to New Brunswick but also that the trust, like the corporate trustee, become subject to New Brunswick law.

Immovable property poses a special problem. Administration of a trust of immovable property is, at common law, governed by the *lex situs* of the property. Accordingly, the flexibility inherent in the general rules governing trust administration are not applicable to a trust of immovable property.

Seven Canadian provinces have clarified their conflicts rules by adopting the 1985 *Hague Convention on the Law Applicable to Trusts and on their Recognition* to govern issues pertaining to foreign trusts – that is, trusts not governed by the law of a Canadian province or territory.[20] Since the concept of trusts as developed in common law

---

[17]This rule is far from clear per J.G. Castel, *Canadian Conflict of Laws* 3d ed.(Toronto: Butterworth, 1994), 509 and [1986] Proceedings of the Uniform Law Conference of Canada 394, at 403-06. See: J.H.C. Morris *et al, Dicey and Morris on the Conflict of Laws* 9th ed.(London: Stevens & Sons Limited, 1973) 660 (later editions reflect the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, adopted by the *Recognition of Trusts Act*, 1987, c. 14 (U.K.). The following matters are properly within the scope of trust administration: "who may appoint, and be appointed, as a trustee or new trustee; the powers and duties of trustees; their liability for breach of trust and their rights of indemnity and contribution; trustee's investments; the distinction between income and capital; and the administrative powers of the courts". Castel, *ibid.*, at. 506.

[18]Castel, *ibid.*, at 509-510.

[19]Castel, *ibid.*, at . 509.

[20]Convention XXX, concluded 1 July 1985 and enacted as *International Trusts Act*, R.S.N. 1990, c. I-17; *International Trusts Act*, R.S.P.E.I. 1988, c. I-7; *International Trusts Act*, S.N.B. 1988, c. I-12.3; *The International Trusts Act*, S.M. 1993, c. 12; *The International Trusts Act*, S.S. 1994, c. T-23.1; *International Convention Implementation Act*, S.A. 1990, c. I-6.8; *International Trusts Act*, S.B.C. 1989, c. 6. The Saskatchewan Act, for example, is not expressly restricted to non-Canadian trusts.

Two provinces, New Brunswick and British Columbia, have adopted the *Conflict of Laws Rules for Trusts Act* as recommended by the Uniform Law Conference. See: S.N.B. 1988, c. C-16.2 and S.B.C. 1990,

systems was adopted "with some modifications" in other legal systems, the purpose of the Convention is to provide common rules for trusts and their recognition. The Convention provides that the validity, construction, effect and administration of a trust[21] is governed by the law chosen by the settlor and, in the absence of such choice, express or implied, by "the law with which it is most closely connected".[22] Close connection is determined by considering the place of administration designated by the settlor, the *situs* of trust assets, the place of residence or business of the trustee and the objects of the trust.[23] To date, the Convention has been ratified or signed by nine countries.[24]

(iii) Recognition and Continuance of Foreign Corporations

It has been assumed that continuation of a foreign corporate trustee in New Brunswick will subject the corporate trustee to the laws of New Brunswick and relieve it from the application of the laws of the place of incorporation. The matter is not free from doubt but there appears to be general acceptance of this proposition.

---

c. 17. See also: [1987] Proceedings of the Uniform Law Conference of Canada 326. The scope of this Act is limited to conflict of laws situations involving another province or territory of Canada. Consistent with both the common law and the *Hague Convention*, the uniform Act provides that trust administration may be governed by the law chosen by the settlor. In the absence of an express or implied choice, trust administration is governed by the law of the place "with which [the trust] is most closely connected". The place of administration may be chosen, expressly or impliedly, by the settlor and, in the absence of such choice, is the place of residence or business of the trustee or if there is more than one trustee, the place where the administration of the trust is principally carried out. See: ss. 4 and 5.

[21]Whether the trust is testamentary, *inter vivos*, or of movable or immovable property, the Convention generally refers to "trust assets" but article 12 specifies "movable or immovable".

[22]*Hague Convention on the Law Applicable to Trusts and on their Recognition*, *ibid*, articles 2, 6, 7 and 8.

[23]*Ibid.*, article 7. Under the rules of the Convention, unless the settlor has specifically authorized the transfer of the administration of the trust to New Brunswick, it is not at all clear that the laws governing the trust would automatically change to those of the jurisdiction selected as the place of continuance of the corporate trustee.

[24]As of April 1997, the Convention has been ratified by Australia, Canada, Italy, the Netherlands, and the United Kingdom; acceded to by Malta; and signed by France, Luxembourg, and the United States. See: Hague Conference on Private International Law, *Signatures and Ratifications of the Hague Conventions: Status Chart, 8 April 1997.*

In the United Kingdom, the Hague Convention has been adopted by statute and given effect in relation to both foreign and domestic trusts. See: *Recognition of Trusts Act*, 1987, 1987, c. 14 (U.K.).

In the European context, the 1968 European Community *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* is particularly relevant. See: OJ 1972, L299/32, amended final text OJ 1983, C97/2; see also Schedule I to the *Civil Jurisdiction and Judgments Act*, 1982 (U.K.), 1982, c. 27. Articles 5 and 53 of that Convention leave to the private international law rules of each contracting state the determination of the domicile of a trust and sets the jurisdictional rule that it is in that domicile that a person may be sued in his or her capacity as settlor, trustee or beneficiary of the trust. The *Civil Jurisdiction and Judgments Act* 1982, c. 27, s. 45 (U.K.), enacting the EC Convention as part of U.K. law, uses the "closest and most real connection" standard to determine in which country of the United Kingdom a trust is domiciled.

There are two general approaches used to select the law which governs issues of corporate existence, capacity and internal management. The first approach uses the laws of the incorporating jurisdiction, the "incorporation rule", while the second uses the law of the effective seat of management, the"effective seat rule". Despite the difference in rhetoric, the law of the place of incorporation is the significant factor in determining these matters. It follows that if the place of incorporation will permit a corporation to migrate to another jurisdiction and give up all control over the corporation in favour of the new jurisdiction, the laws of the new jurisdiction will determine such matters as corporate existence, capacity and internal management. One is tempted to make a comparison to an individual's domicile of origin and domicile of choice.[25] In common law jurisdictions, this analogy to the domicile of origin of a natural person found expression as the corporate domicile – an immutable domicile of origin in the place of incorporation that cannot be changed at the will of the corporation. Accordingly, as long as the country of domicile or incorporation retains jurisdiction over the corporate entity, it is that legal system which governs issues pertaining to ownership of corporate property and the appointment and authority of agents, including the board of management, to deal with that property.

Application of the concept of domicile to a corporation, in common law systems, is not free from criticism of a fundamental nature. As noted above, domicile is applied by way of analogy to natural persons, but corporations are not natural persons. Some authors argue that the analogy with natural persons is false and note that most legal matters governed by domicile in relation to natural persons do not apply to corporations.[26] For example, corporations do not marry, do not make wills, and are not concerned with various other matters for which a personal law determined by domicile is significant for a natural person.[27] In the view of such critics, the concept of a

---

[25]J.G. Castel, *Canadian Conflict of Laws* (3rd Ed.) (Toronto: Butterworths, 1994), at 533 *et seq.*; J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983), at 454 *et seq.*; and *Dicey and Morris on the Conflict of Laws* (12th Ed.)(London: Sweet & Maxwell, 1993) at 1103 *et seq.*

[26]For an early and influential criticism, see J.F. Francis, "The Domicil of a Corporation" (1929), 38 Yale L.J. 335.

[27]American Law Institute, *Restatement of the Law, Second, Conflict of Laws*(1986 rev.)(Philadelphia: The Institute, 1986), §11 provides a good summary of the criticism:

> When a domicil is assigned to a corporation, it is always in the state of incorporation. No useful purpose, however, is served by assigning a domicil to a corporation. Most of the uses which the concept of domicil serves for individuals (see Comments *c* and *d*) are inapplicable to corporations, which do not for example, vote, marry, become divorced, beget or bear children and bequeath property. Certain problems, as judicial jurisdiction and the power to tax and to regulate, are common both to individuals and corporations. But unlike an individual, a corporation has a state of incorporation.
>
> Attribution of a domicil to a corporation may lead to complications and confusion and should be avoided. There is the danger that the word "resident" in a statute will be construed to mean domiciliary as applied to corporations for no other reason than that it has previously been given that meaning in the case of natural persons. For example,

corporate domicile serves only to obscure legal analysis. They argue that the proper approach is simply to state the obvious and to refer to the law of the place of incorporation.

The second general approach to corporate law issues in private international law is that of civil law systems which use the "effective seat" rule to determine issues of status, capacity and management. Just as the place of incorporation is associated with domicile, the "effective seat" rule is generally associated with the "nationality" of the corporation. The law of the country in which the corporation has its central administration is its "effective seat" and it governs issues pertaining to the legal existence and internal affairs of the corporation.[28] An important limitation in many civil law countries is that the effective seat of a corporation must be established within the territory of the place of incorporation. As a corollary to this requirement, transfer of the effective seat from the place of incorporation results in the loss of legal personality and the corporation must be wound up.[29] Central control and management must remain in the jurisdiction of the place of incorporation. Thus, in many civil law jurisdictions, the required coincidence of the place of incorporation and the effective seat means that the incorporation rule is, for practical purposes, applicable.

Recently, the Court of Justice of the European Community confirmed that the right of establishment (or mobility) guaranteed by the *EC Treaty* does not include a right of a corporation to transfer its central management and control out of a member state and retain its legal personality.[30] In that case, the Daily Mail newspaper corporation

---

> a corporation which does all its business in state X, and therefore is most closely related to that state, might be held not to be a "resident" of X within the meaning of a statute if it was incorporated in state Y and hence "domiciled" there. Results such as this may best be avoided by determining, without regard to the concept of domicil, what meaning such terms as "resident" and "non-resident" should bear as applied to corporations in order best to effectuate the purpose of the statute in which they appear.

[28]E. Stein, *Harmonization of European Company Laws* (1971) at 29. See also, H. Battifol and P. LaGarde, *Traité de Droit International Privé* (Tome 1) (Paris: Librairie générale de droit et de jurisprudence, 1993) at 333 *et seq* where the "siège social" is defined as "le lieu où s'exerce la direction de la société, où résident les organes juridiques de la société, administrateurs, assemblées générales et où sont débattus les contrats et marchés se rapportant à la marche de l'entreprise" (at 335).

In the United States and in other jurisdictions, the effective seat rule has been recast as the "commercial domicile" of a corporation; that is, the "actual business headquarters" of the corporation. See: R.A. LeFlar, *American Conflicts of Law* (3rd ed.) (Indianapolis: The Bobbs-Merrill Company, Inc., 1977) at 23.

[29]*R.* v. *Daily Mail*, [1988] 3 C.M.L.R. 713 at 724.

[30]*Ibid.* The concept of "central management and control" of a corporation has long been recognized in common law systems in relation to the determination of corporate "residence", particularly for the purpose of imposing tax liability. See: L. Collins *et al* (ed), *Dicey & Morris on The Conflict of Laws* (11th ed.), *supra*, note 25, at 1132; and J. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983), at 459-60. Consider, for example: *De Beers Consolidated Mines* v. *Howe*, [1906] A.C. 455, at 458 (company held resident in England when incorporated in South Africa, general meetings and diamond operations conducted in South Africa but majority of directors resident in England, directors meetings conducted in England and practically all important business decisions made in England); and *Bradbury* v. *English Sewing Cotton Co.*, [1923] A.C. 744

attempted to avoid British tax liability by transferring its central management and control to the Netherlands to establish Dutch residence. The Court of Justice held that the *EC Treaty* does not include such a right of transfer without the consent of national authorities, in this instance, the British tax authorities. It is possible that, in some jurisdictions, a change in the effective seat at the will of the corporation results in an automatic change of the substantive law that governs the corporation but we are unable to identify such a jurisdiction.[31]

Globally, the general trend of recent years is to look to the place of incorporation to determine questions of corporate status and capacity. For example, the 1979 *Inter-American Convention on Conflicts of Laws Concerning Commercial Companies*, Article 2 provides that "[t]he existence, capacity, operation and dissolution of commercial companies shall be governed by the law of the place where they are constituted."[32] Similarly, the new Civil Code of Québec, art. 3083 provides that the "status and capacity of a legal person are governed by the law of the country under which it was formed".[33] In Switzerland, the 1989 Private International Law Statute declares the incorporation rule as the choice of law rule to govern issues of the

---

(American company formed by English company held resident in United States where management and control exercised).

There is some authority that "central management and control" may be divided between two or more locations so that a corporation may be held to be resident in more than one country for tax purposes. *Dicey & Morris on The Conflict of Laws*, *ibid.*, at 1132 referring to *Swedish Central Railway Co.* v. *Thompson*, [1925] A.C. 495 (company held resident in both England and Sweden when English incorporated company with registered office in England transferring control and management to Sweden). The editors of *Dicey & Morris on The Conflict of Laws* (12th ed.) conclude that as "the place of central management and control is the place of paramount authority ... it may be impossible in fact to identify one country as the place of central management and control since paramount authority 'may be divided or even, at any rate in theory, peripatetic.'" *Dicey & Morris* (11th ed.), *ibid*, at 1133. But see: P. Stone, *The Conflict of Laws* (London: Longman, 1995) at 107, fn.9 who states that the concept of a divided or "peripatetic" central management and control may be "obsolete". In such rare circumstances, a corporation would be held to have dual residence. Finally, "central management and control" is a concept heavily dependent on particular facts and no singular indicia of "central management and control" has been identified by courts as controlling.

[31]Belgian courts have recognized the continued legal personality of an English company which had moved its effective seat to Belgium, after the company had adapted its status under Belgian law. See, Battifol and LaGarde, *supra*, note 28, at 347. See also, Swiss Statute on Private International Law, article 163, *infra*, note 34, re transfer of a Swiss company from Switzerland provided it has satisfied "the requirements provided by Swiss law"; that its legal existence is continued under the foreign law; and that public notice has been given to creditors of the intended transfer.

[32]Reproduced in (1979), 18 I.L.M. 1222. Article 2 further defines the "law of the place where they are constituted" as "the law of the State where the formal and substantive requirements for the establishment of commercial companies are fulfilled."

[33]*Civil Code of Québec*, S.Q. 1991, c. 64, art. 3083. E. Groffier, *Précis de Droit International Privé Québecois* (4th ed.) (Cowansville: Les Éditions Yvon Blais Inc., 1990) at 148, concluded that the domicile of a corporation under the previous state of Québec law was the place of incorporation.

existence, capacity, and internal relations of a corporation, and the agency powers of persons acting for a corporation.[34]

Article 220 of the *European Economic Community Treaty* obliges member states to undertake "as far as is necessary" to enter into negotiations to secure "the mutual recognition of companies ... [and] the retention of legal personality in the event of transfer of their seat from one country to another."[35] In 1968, negotiations among the then six member states led to the adoption of the incorporation rule in the *Convention on the Mutual Recognition of Companies and Bodies Corporate*. This convention, which has not and may never come into force,[36] includes an important exception to the incorporation rule. The Convention permits a state to apply its own mandatory rules to a foreign incorporated corporation, regardless of the place of incorporation, if the foreign corporation has its effective seat in that state.[37] Implementation of the Convention could create a chaotic situation. Corporate rights could depend on the jurisdiction in which the action is brought, that of the place of incorporation or the place of the effective seat. It is impossible to accommodate both the incorporation and seat rules where the two are not coincident in the same country.[38]

---

[34]Arts. 154-55 (law of the state in which the corporation is organized) in (1989), 37 Am. J. of Comp. Law 193, at 233-34.

[35]"Treaty Establishing the European Economic Community", 25 March 1957, 298 U.N.T.S. 167 (1958), article 220.

[36]The Convention was ratified by five of the original six member states. See: R. van Rooij and M.V. Polak, *Private International Law in the Netherlands* (Deventer: Kluwer Law and Taxation Publishers, 1987), at 169; E. Stein, *Harmonization of European Company Laws* (Indianapolis: The Bobbs-Merrill Company, Inc., 1971), at 394 *et seq.*; and D. Wyatt and A. Dashwood, *The Substantive Law of the EEC* (London: Sweet & Maxwell, 1987) at 215-217.

[37]Battifol and LaGarde, *supra*, note 28, at 350 discuss an important lacuna in the Convention: that, for example, where a company is incorporated in the Netherlands but has its seat in Belgium, there is no provision permitting a French court to apply the mandatory laws of Belgium.

[38]The 1968 EC *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, OJ (1972), L299 at 32, amended final text OJ (1983), C97 at 2; see also Schedule I to the *Civil Jurisdiction and Judgments Act 1982* (U.K.), 1982, c. 27 which establishes the mutually exclusive adjudicative jurisdiction of member states, does not specifically address the issue. Using corporate domicile as the express basis for grounding adjudicative jurisdiction, the Convention attempts to satisfy both the "incorporation" and "effective seat" rules of member states by merely declaring the equivalency of the concepts of "domicile" and "seat". The Convention leaves to the courts of each member state the application of that state's private international law definition of domicile or seat. Article 53 of the Convention, *ibid.*, is as follows:

> For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.
>
> In order to determine whether a trust is domiciled in the Contracting State whose courts are seised of the matter, the court shall apply its rules of private international law.

As a result, the 1982 United Kingdom statute giving effect to the Convention states that a corporation has its seat in the United Kingdom "if and only if" (i) it was incorporated and has its registered office or other official address in the United Kingdom or (ii) the central management and control of the corporation is

It is now well accepted that the place of incorporation can release legal entities created under its law and accept legal entities created by the laws of other countries. This proposition is the basis of sections 187 and 188 of the *Canada Business Corporations Act*[39] which allow foreign corporations to continue in Canada and Canadian corporations to leave. As will be noted later in further detail, permission, both to go out and to come in, is essential. Modern Canadian corporate legislation uses the concepts of "continuance" and "discontinuance" to describe the process of transferring from one jurisdiction to another. This was preferred to the concept of "reincorporation" which might imply two governing jurisdictions and present a host of questions regarding the title to the property of the "reincorporated" organization and whether "reincorporation" necessitates a transfer of assets from the old corporation to the reincorporation. Articles of continuance imply that this is not necessary and the *Canada Business Corporations Act* makes this clear.[40]

III. An Illustration: The Carl Zeiss Stiftung Litigation

The history of Carl Zeiss Stiftung illustrates the courts' tendencies to resolve questions concerning the status and capacity of corporations and their ability to move from one jurisdiction to another by reference to the place of incorporation. The Carl Zeiss Stiftung (Foundation) was created in 1889 in the city of Jena, in the German state of Thuringia. The governing instrument provided that the foundation's domicile be in Jena and not be changed under any circumstances.[41] After World War II and the division of Germany into Allied zones of occupation, Thuringia and the city of Jena became part of the Soviet zone, later organized as the German Democratic Republic (East Germany). The board of management of the Foundation relocated to the city of Heidenheim in the Federal Republic of Germany (West Germany)[42] and purported to carry on the activities

---

exercised in the United Kingdom. See: *Civil Jurisdiction and Judgments Act 1982* (U.K.) 1982, c. 27, s. 42(3). This definition is similar to that provided under Swiss law, quoted above.

[39]R.S.C. 1985, c. C-44.

[40]See: *Canada Business Corporation, ibid.*, ss. 187(7) and 188(10).

[41]Herbert Bernstein, "Corporate Identity in International Business: The Zeiss Controversy" (1972), 20 Am. J. of Comp. Law 299.

[42]The relocation was described by Kitto, J. in *Re Carl Zeiss Pty., Ltd.* (1969), 122 C.L.R. 1, at 7-8 (Aust. H.C.) as follows:

> In June 1945 the American forces vacated Thuringia, the area of East Germany in which Jena is situated, taking with them certain material from the Carl Zeiss optical works, and they were followed by the members of the two boards of management which, under the governing body of the Special Board, of the Stiftung, had controlled the optical works and the glassworks respectively, and by some 120 members of the works' staff. (It was by the emigrating members of the board of management of the optical works that the new works at Heidenheim were established.) The Soviet forces thereupon occupied Thuringia and on the 30th October 1945 an Order No. 124 was promulgated sequestrating the Stiftung's optical and glass works (amongst others), that is to say

of the Foundation.[43] Applying the effective seat rule, the legal position on behalf of the board members was that the Foundation had moved to West Germany and became subject to its laws. As successor to the original foundation, it claimed the assets, mainly patent rights in the manufacture of binoculars and other optical equipment, located outside the Soviet Zone. This position was opposed by East German appointees in the Soviet Zone of control who argued, on the basis of the incorporation rule and the immutable domicile in Jena, that only the East German expropriation law was relevant in determining the status and capacity of the Foundation and, therefore, ownership of the patents and trademarks. The basic question presented for determination before courts in Germany, England, the United States and elsewhere[44] was which board, and consequently, which theory of corporate continuity, should be recognized to determine the rightful owner of title to the patents and trademarks.

The various courts were not consistent in their determinations of which board was the legitimate successor. East German courts, before which the West German organization did not appear, held that the expropriation of the Foundation was authorized by the Soviet Union as the occupying power, that it was effective throughout German territory, and that neither the patent rights nor the name Zeiss could be used by the West German board.[45] West German courts limited the territorial effect of the expropriation to the Soviet zone of occupation and recognized the West German board as the legitimate successor to the property and rights of the foundation in West

---

placing the works under the control of a nominated person, in this case a Dr. Schrade. Then followed, on 17th April 1948, an Order No. 64 which the parties agree was effective to expropriate the works from the Stiftung and to vest them, as "property of the people", in the V.E.B. as from 1st June 1948. No assets other than those comprised in the two works were ever expropriated, and as I have said, the applicant does not here contend that the Stiftung has been dissolved. On 16th June 1948 the German Economic Commission which had been set up in East Germany published a formal resolution expressly recognizing the continued existence of the Stiftung and the existence of certain rights and obligations of the V.E.B. "towards the Carl Zeiss Stiftung which are to be laid down in a newly framed statute for the Stiftung". The resolution further decreed that till the new statute should come into force the powers of all the organs of the Stiftung would be exercised by a State Commission to be appointed by the German Economic Commission. Such a State Commission was in fact appointed, and the person who formed it, a Professor Rompe, instructed the boards of management to go on as before. There has ever since been a board in at least de facto control of the Stiftung's affairs, the members of which have been or have included some or all of the persons exercising control over the optical works.

The proposed new Statute for the Stiftung was never brought into being, and the old statute has not been altered since 1948.

[43]Carl Zeiss Stiftung owns and operates two enterprise divisions with numerous subsidiaries. The Carl Zeiss division manufactures and sells optical equipment and the Schott Glaswerke division manufactures and sells glass products. In 1995-96, 28,335 persons were employed with the two divisions which enjoyed combined worldwide sales of DM 5.1 billion. Source: the Zeiss website at www.zeiss.de.

[44]Australia, India, Norway, Pakistan, and Switzerland. See: *Carl Zeiss Stiftung* v. *VEB Carl Zeiss Jena*, 433 F. 2d 686 (1970) (U.S.C.A., 2nd Cir.), at 700.

[45]*Supra*, note 41 at 301.

Germany.[46] It did not rule on assets located in the rest of the world. The decisions of the courts in both East and West Germany illustrate the degree to which a court may protect residents and property within its jurisdiction. The real test came when the two opposing parties each claimed property rights in a third country.

In the United States,[47] courts avoided the issue of corporate continuance on the basis of either the common law incorporation rule, which favoured the East German board, or the civil law effective seat rule, which favoured the West German board. Instead, the patent and trademark rights in that jurisdiction were awarded to the West German board on the grounds that: (i) as a matter of public policy, the United States does not recognize foreign expropriations without compensation and (ii) as the pre-war German law governing foundations was federal law, the West German authorities could change the domicile of the Foundation within Germany without the consent of authorities in East Germany.

In Australia,[48] the issue before the High Court was whether a trademark registered by the Foundation in 1907 should be struck off the register for non-use. The application was made by Carl Zeiss Pty. Ltd, an Australian company formed as a subsidiary by the West German board, and was opposed by the East German board which claimed the trademark. The issue of the possible succession to the trademark by the West German group was abandoned at an early stage in the proceedings. Kitto, J. concluded that the West German group had no legal or practical connection with the pre-war Foundation.[49] The question of a change in the effective seat of the Foundation was summarily rejected. In the end, the Court simply found that the trademark had not been used for three years as required by legislation and struck it from the registry.

When the litigation arose in the United Kingdom, the House of Lords rejected the effective seat argument on behalf of the West German board. In *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 2)*[50] the appointment of solicitors by the East German board on behalf of the Foundation in order the seek an injunction against the use of the Zeiss name by the West German board was challenged as having been made without authority. The House held that the question of continuance must be answered in

---

[46]*Ibid.*, at 300. This decision is consistent with the concept of the split corporation (spaltgesellschaft) recognized by West German courts as a practical response to the commercial problem created by the Cold War and Communist regimes in neighbouring countries. A company carrying on business in West Germany but subject to confiscation of its shares or assets in the country of its creation or seat was accepted by the West German courts as a split corporation successor. See: P.E. Nygh, "The Refugee Corporation" (1975-76), 12 U.W.A.L. Rev. 467 at 474.

[47]*Carl Zeiss Stiftung* v. *VEB Carl Zeiss Jena*, 433 F. 2d 686 (1970) (U.S.C.A., 2nd Cir.).

[48]*Re Carl Zeiss Pty., Ltd.*, *supra*, note 42.

[49]*Ibid.*, at 9.

[50][1967] 1 A.C. 853.

accordance with the law of the place of incorporation – the Soviet occupation zone of East Germany. Transfer of the effective seat was ineffective.

The Carl Zeiss Stiftung litigation demonstrates the interplay of public and private international law principles. The place of incorporation pointed to the law of East Germany as the governing law on the issue of the existence and continuance of the foundation. Public international law principles of state succession and the non-recognition of the East German state created additional elements of conflict. For the House of Lords, and most of the other courts, the issue was resolved as a private rather than a public law matter and application of the incorporation rule pointed to East German law as the *de facto* governing legal system (as delegate of the occupying power, the Soviet Union).

If East German law had granted the Foundation the power to emigrate and if West German law had authorized its immigration, presumably, the courts of all the countries in which the matter was litigated would have acknowledged the West German board as the proper representative of the continued Foundation and the ownership of the patents, at least outside the Soviet Zone, would have clearly belonged to the West German foundation. Presumably, any court in which an issue of corporate recognition arose would either directly recognize the continuation or re-incorporation in the second country or would treat the authorization to emigrate as an invitation to apply the private international law doctrine of *renvoi* (transmission or remission) and, thereby, achieve the same result.[51]

Any authority granted by a previous German regime to Carl Zeiss Stiftung to emigrate, of course, could be revoked by a subsequent government. It is essential that any transfer be effected before the authority to emigrate is revoked. In an ideal situation, the corporation would be authorized to leave by merely giving notice. Often, however, administrative approval to emigrate is required.[52] Accordingly, one of the key features of the *Griffin Trustees Act* is the speed with which the Saffery corporation is authorized to leave New Brunswick. Subsection 13(2) of that Act states: "Upon receipt of notice satisfactory to him that the Corporation has been continued under the laws of another jurisdiction, the Director shall file the notice and issue a certificate of discontinuance".[53] No approval, *per se*, is required other than that inherent in the requirement of a notice "satisfactory" to the Director.[54] Griffin can leave the British Virgin Islands in similar speed.[55] Had the Carl Zeiss Stiftung been similarly authorized

---

[51]See: Nygh, *supra*, note 46 at 470.

[52]See, for example, *Canada Business Corporations Act*, *supra*, note 39, s. 188(1).

[53]"Director" is defined as the Director under the New Brunswick *Business Corporations Act*, *supra*, note 7.

[54]A special resolution of the shareholders is required to authorize the corporation to seek continuance in another jurisdiction per s. 13(1) of the Act, *supra*, note 2.

[55]*Supra*, note 5.

to emigrate, there is no doubt that the transfer of the corporate entity to West Germany would have been effective. It is highly doubtful that the international community would have recognized any retroactive attempt on the part of East German or Soviet government officials to revoke that authority.

The Carl Zeiss Stiftung case illustrates a third practical consideration for effecting emigration. Not only must the physical assets, legal title and authority to deal with them be secure, but the board of management must also be beyond the control of the hostile government. Otherwise, force, coercion and intimidation of those in control may be used to obtain the assets for the benefit of the hostile regime. As for the *Griffin Trustees Act*, the directors and shareholders are authorized to meet anywhere in the world.

IV. Canada at War

International corporate and trust planning is much more complicated if Canada is hostile to the "emergency condition" which causes Griffin to move to New Brunswick, particularly if that hostility is formalized by a declaration of war. In such a situation, the role that Canada plays in the emergency condition could be a major factor in the operations of the corporation.

Prohibitions on trading with the enemy are firmly established at both common law and under statute:

> [O]ne of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. ... This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral State carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business.[56]

Today this policy is implemented by regulations enacted under the authority of the *Emergencies Act*,[57] the successor legislation to the *War Measures Act*.[58] The legislation's primary objective is the prevention of enemy use of assets and, in turn, to

---

[56]*Porter* v. *Freudenburg*, [1915] 1 K.B. 857 (C.A.) at 869

[57]R.S.C. 1985, c. E-4.5.

[58]R.S.C. 1970, c. W-2 (repealed by the *Emergencies Act*, *ibid.*).

make as much as possible available for use in Canada's interest. The policy has been carried out in the past by vesting the property of enemy aliens in a custodian. The custodian would then divert the property towards the war effort and the payment of war reparations, depending, of course, on the outcome of the war. The critical element is the definition of "enemy". During World War II, Canada's definition of enemy, as applied to foreign corporations, reflected general common law principles and merely referred to "any person or body of persons constituted or incorporated within, or under the laws of a State at war with His Majesty or a State the territory of which is occupied by an enemy".[59] In the United States, a two-pronged test was used to determine alien status of corporations.[60] The first declared all corporations registered under enemy law to be enemies. The second declared as "enemy" any domestic corporation with significant enemy ownership, defined as 25% of the shareholdings. If such a two pronged test were implemented in Canada, continuation in a friendly nation might be necessary to maintain friendly status, but the second prong would also be a very significant limitation. In a future war, it would be wise to consider both tests when making any decision to move a corporation from one jurisdiction to another.

The rules are usually the same for enemy occupied countries. Although the inhabitants of such countries may be personally loyal to Canadian interests, the fear of duress from the occupier has led most countries at war to confiscate all assets within its territory owned by the inhabitants of enemy occupied territory. This is often done for the purpose of preservation rather than to facilitate the war effort. Unlike the assets of the enemy used to make reparations at the end of the war, often assets of inhabitants of occupied countries are returned to their owners at the end of the hostilities.

The most recent Canadian example occurred during the Gulf War. When Iraq invaded Kuwait on 2 August 1990, one of the Canadian government's first legal actions was to issue regulations prohibiting banks from delivering Kuwaiti property, or the proceeds of sale thereof, to a third party. Rather than use the *Emergencies Act* as the legal source for the prohibition, the regulation declared that such transactions would constitute an unsafe or unsound business practice under the *Bank Act*.[61] These

---

[59]*Revised Regulations Respecting Trading with the Enemy (1943)*, s. 1(d)(v) in *Trading with the Enemy Act*, S.C. 1947, c. 24, Schedule. See generally: J.E. Magnet, "Transferring Business Operations to Canada During Wartime: Problems and Strategies"(1981-82), 6 Can. Bus. L.J. 23, at 23-24 and J.G. Castel, *Canadian Conflict of Laws* (3rd Ed.), *supra*, note 17, at 171.

[60]Executive Order No. 8389, "Regulating Transactions in Foreign Exchange and Foreign-owned Property, Providing for the Reporting of all Foreign-Owned Property" Section 5(D), (10 April 1940), U.S.C.A., Title 12 § 95a. Congressional authority for the executive order is found in *Trading With The Enemy Act*, 40 Stat. 411, U.S.C.A. Title 50 App. § 2 "enemy". See generally: Martin Domke, "Western Hemisphere Control Over Enemy Property: A Comparative Survey" (1945-46), 11 Law and Contemp. Prob. 3 at 8.

[61]R.S.C. 1985 (3d Supp.), c. 21, s. 3 adding s. 313.1 to the *Bank Act*, R.S.C. 1985, c. B.1; Direction issued by the Superintendent of Financial Institutions, 3 August 1990.

regulations were superseded a few days later by the *United Nations Iraq Regulations*[62] approved pursuant to the Governor-in-Council's authority under the *United Nations Act*[63] to implement decisions of the United Nations Security Council. The regulations did not purport to confiscate property held in Canada by either residents of Iraq or Kuwait, but merely attempted to prevent commerce between those two nations and Canada. Though extended to cover Canadian citizens outside of Canada, the regulations were neutral in relation to the question of corporate migration.

If we consider the possible application of the "significant enemy ownership" qualification, as invoked in the United States during World War II, to the Griffen/Saffery situation, the New Brunswick Act does not disclose any information about the ownership of the shares of Griffin Trustees Limited or of the beneficiaries of the trusts managed by Griffin Trustees. It is doubtful that either the shareholders or the beneficiaries reside in the British Virgin Islands. Their residency and nationality could be a significant factor in determining the success or failure of the purpose of the legislation. As stated above, the British colony probably serves Griffin as a "flag of convenience" in the same manner as will New Brunswick should the corporate trustee continue here. In this regard, nothing changes by moving to New Brunswick if the British Virgin Islands and New Brunswick are allies at the time of hostility or war. The New Brunswick legislation merely serves as a secondary haven to avoid both the confiscation of trust property and the negative impact of hostile governing laws should the British Virgin Islands fall into enemy hands. Of greater concern is potential conflicts between the territories where the real property or immovable assets are located and the residency of both the shareholders of the corporate trustee and the beneficiaries of the trusts.

Under war conditions, before Griffin, in the British Virgin Islands, becomes Saffery, in New Brunswick, management might want to make certain that the shareholders of the corporation reside in friendly or neutral territory. Otherwise, the trust property may vest in a custodian. Management might also want to keep in mind that a more stringent standard than the American 25% threshold test applied during World War II may be applicable during the next conflict. Similar considerations must be made regarding the beneficiaries of the trusts administered by the corporation. If the beneficiaries of the trusts are resident in enemy territory, it is likely that regulations will be enacted to confiscate their interests. To solve this latter problem, it is possible to incorporate companies in different jurisdictions. With a little foresight, one might be able to predict how the world will align itself and have Griffin only administer trusts of residents and nationals whose interests are expected to be on the side of Canada. A similar corporation could be established for emigration to a place friendly to "the other side" should the necessity arise. The spheres of influence approach was taken by some

---

[62]SOR/90-531 as amended by SOR/90-694 and published in (1990), 124 Canada Gazette Part II at 3629 and 4509, respectively.

[63]R.S.C. 1985, c. U-2, s. 2.

corporations in the past. For example, prior to World War II, Standard Oil of New Jersey, an American corporation and I.G. Farben, a German corporation, divided between them patents held by a jointly owned subsidiary. The American company took title to the rights for the United States, France and its possessions, and the British Empire. The German company took title to the rights in the rest of the world. A division of assets has its difficulties. Standard Oil and Farben attempted to resolve some of them with a "morally binding but legally unenforceable"[64] agreement to exchange financial information and correct any inequities when hostilities ceased. In the end, Standard Oil ran into another problem. The company pleaded *nolo contendere* to an antitrust charge under the *Sherman Act*.[65]

Any division of assets along the lines of Standard Oil/Farben, or a move similar to Carl Zeiss, presents a board of management with another possible dilemma. It is almost certain that, with large corporations, some shareholders will be harmed by a change of jurisdiction and will raise the argument of breach of fiduciary duty. The argument would be that management, by effecting the changes, has acted to the benefit of one group of shareholders, in the same or friendly territory as management, to the detriment of those remaining in the unfriendly or hostile territories. In Canada, this argument might be met with the increasingly doubtful proposition that management owes no fiduciary duty to owner/shareholders, that the fiduciary duties of management are only to the corporation itself, and that any move necessitated by the emergency condition was the only effective option open to the corporation. The success of this defence will have greater force if the competing forces are on the socialist/communist/capitalist level rather than a mere quest for political power in a capitalist society. The Russian Revolution and World War II type of emergencies may produce different results from the perspective of fiduciary obligations.

Further, it is doubtful that the "morally binding but legally unenforceable" agreement utilized by Standard Oil/Farben would save management from a fiduciary challenge at common law. What is more likely is that management will be protected by trading with the enemy legislation that bar suits by enemy aliens against the directors. Even if such suits were possible, any judgment would not be for the benefit of the enemy aliens but for a delegate of the sovereign, the custodian.

In a trust situation, if there is more than one beneficiary and the beneficiaries live in conflicting jurisdictions, any move to the detriment of one of the beneficiaries could be considered a fiduciary breach on the part of the trustee. Prudence would suggest the advisability of separate trusts for each beneficiary.

---

[64]H.A. Berman, "Cartels and Enemy Property" (1945-46), 11 Law & Contemporary Prob. 109 at 111 states:
> The parties believed that their arrangements would (in the words of a Standard official) 'leave us in full control of the situation without interference of any government as regards the processes in question for the United States, the British Empire, and the French Empire.'

[65]*Ibid.*

V. The Foreign Resident Corporations Act

Consideration of corporate planning in times of hostilities would not be complete without reviewing New Brunswick's *Foreign Resident Corporations Act*.[66] This statute, first enacted in 1963, appears to have as its object the provision of a safe haven by allowing foreign corporations to apply to transfer their registered offices to New Brunswick in times of conflict.[67] When the emergency is over, the legislation contemplates the corporation's return to its jurisdiction of origin.[68] In the meantime, the New Brunswick Act purports to control the effect of any laws of the jurisdiction of origin.[69] Central to the effectiveness of the legislation, from an international point of view, is whether a third country would recognize the application of the New Brunswick law over that of the jurisdiction of origin. In this determination, the legal effect of the transfer of the registered office (defined in the Act as the head office or chief place of business of a foreign corporation),[70] is critical.

As discussed above, the common law dictates that it is the place of incorporation and not the head office or effective seat that is controlling. The mere transfer of the head office is ineffective for any of the intended purposes outside of New Brunswick. At a minimum, articles of continuance are necessary.

If the jurisdiction of origin is a civil law rather than a common law jurisdiction, it is doubtful that the corporation will have any greater success. In civil law countries, the status and capacity of corporations are determined by the location of their effective seat and not the place of incorporation. However, the transfer of the effective seat involves both loss of nationality of the country from which the effective seat is transferred and loss of legal personality under the law of that country. Accordingly, as with the common law rule, the transferring company must reincorporate under the laws of its new effective seat. The only safe conclusion is that the *Foreign Resident Corporations Act* will not protect assets in any jurisdiction other than New Brunswick.

In contrast to New Brunswick, the Prince Edward Island *Foreign Resident Corporations Act*[71] is expressed in terms of the transfer of the corporate domicile, including the registered office of the corporation subject to the proviso that "the laws of the original jurisdiction do not expressly prohibit such transfer."[72] However, like that

---

[66]S.N.B. 1984, c. F-19.1.

[67]*Ibid.*, see ss. 1, 2, 3, 4.

[68]*Ibid.*, s. 4(2).

[69]*Ibid.*, s. 15(2).

[70]*Ibid.*, s. 1.

[71]S.P.E.I. 1992, c. 28.

[72]*Ibid.*, s. 2.

of New Brunswick, the Prince Edward Island legislation purports to control the effect of any subsequent laws of the jurisdiction of origin[73] until the corporation returns to that jurisdiction.[74] Two questions unanswered in the Prince Edward Island legislation are how one transfers corporate domicile and the legal consequences of the transfer. Though the legislation appears to treat the transfer of the head office and the transfer of domicile as synonymous,[75] it adds to this confusion by using the concept of domicile in its substantive provisions but the word "*Resident*" in its title. It is doubtful Prince Edward Island has done any more for the foreign corporation than has New Brunswick.

VI. Conclusion

This general survey of property rights of aliens, particularly in relation to trust property in time of war or other emergency situations, illustrates the limitations that surround the mere continuance of a corporation in another jurisdiction. Even if the corporation is successful in moving its corporate entity, property in hostile territory will probably be lost, at least temporarily. Its recovery may depend on the outcome of the war or other emergency situations. Depending on the share ownership, corporate migration may not be of any assistance at all. But then, not all emergencies lead to confiscation of alien property. Where anything less occurs, confiscation may not take place and corporate migration may be more beneficial. Canada's role in the 1991 Gulf War is a case in point.

---

[73] *Ibid.*, s. 15(2).

[74] *Ibid.*, s. 4(2).

[75] *Ibid.*, especially s.4.