

LEGAL & CORPORATE FICTION

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“The first thing we do, let’s kill all the lawyers”¹

According to A. Laurence Polak, “There is a tradition familiar to all readers of detection literature, that the criminal will sooner or later re-visit the scene of his crime.”² This principle has not become on legal fiction yet. According to Black’s Law Dictionary, legal fiction is:

“An assumption that something is true even though it may be untrue made esp. in judicial reasoning to alter how a legal rule operates. The constructive trust is an example of a legal fiction. Also termed fiction of law; fictio juris.”³

“I ... employ the expression “Legal Fiction” to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present.”⁴

“Legal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasure. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion.”⁵

“As per Britanica Encyclopedia – a rule assuming as true something that is clearly false. A fiction is often used to get around the ...”⁶

“The term “legal fiction” is not usually used in a pejorative way in spite of the negative connotation of the phrase, and has been likened to scaffolding around a building under construction.”⁷ However, amongst the contrary view Jeremy Bentham sharply criticized the notion of legal fictions, saying that, “fictions are to law what fraud is to trade.”

CORPORATE LEGAL FICTION:

¹ Shakespeare, *King Henry VI*, Part 2, Act IV, Scene 2.

² A. Laurence Polak (Reported by), and Diana Pullingir (Illustrated by) “*More Legal Fiction*” (a series of cases from Shakespeare) published by Stevens & Sons Limited, (London, 1946) p-11.

³ Bryan A. Garner (Editor-in-Chief), “Black’s Law Dictionary” (seventh edition – 1999, USA) p-804.

⁴ Henry S. Maine, “Ancient Law” 21-22 (17th edition. 1901) quoted from Ibid.

⁵ Morris R. Cohen, “*Law and the Social Order*”, 126 (1933) quoted from Ibid.

⁶ Britanica Encyclopedia

⁷ Fuller, “*Legal Fictions*”, 25 Illinois Law Review (1930, 1931), 363,519,877 (published in 3 parts)

⁸ See Daimler Co. V. Continental Tyre Co., Ltd., *Law Reports*; (London) [1916] 2 AC p. 307.

A corporate person/entity or a mosque can sue and be sued. They are treated as persons by legal fiction. A corporate personhood is of course different and distinct from a natural person. In this regard an interesting aspect will be that a corporate/ juristic person is itself incapable of hate or love, loyalty or enmity.

In *Daimler Co. V. Continental Tyre and Rubber Co.* it was observed, “I know not from what human beings that the character should be derived if the resort is not had to the predominant character of its shareholders.”⁸

Although, the nationality of a corporate/juristic person is considered of the place where it is incorporated, but, it can assume an “enemy character” if the persons in de facto control of its affairs are “alien enemies” irrespective of whether they are residing in the Israel or any other enemy territory. Thus, this is an other dimension of the concept of “Legal fiction”⁹

The Central idea of this test is called the “brain theory” of the corporate/juristic person, i.e. the determination as to whose brain is, in fact working behind or upon the corporation. The second test is to see the “locus” of the activity or activities of the juristic person. This is called the “locus theory”. Modern corporate jurisprudence considers the following factors while determining the “real”, not “benami”, nationality of a corporation/juristic person.

- i. The state, place, island, non-state territory of incorporation. How about a multinational company incorporated in Qandhar, Afghanistan – A food for thought.
- ii. The real principal seat of business and not benami principal seat of business. The principal seat of business stated in the certificate of incorporation or specified registered office is not good enough.
- iii. The real nationality of the shareholders not merely the nationality by passports or by residence of the main sponsors/principals and their families.
- iv. The nationality of overall investment/money. Fictionally speaking, the Israeli money may be being invested in, for example, oil refineries of the Kingdom of Saudi Arabia through companies incorporated in Bahamas or Isle of Man, etc.
- v. The nationality of the management. While considering this aspect, the point no. (iii) above must be taken into consideration.
- vi. The “real” persons controlling the business of the corporation.

A company incorporated under a particular national statute may acquire a foreign residence so as to be liable to be sued in a foreign country.¹⁰ It is no more difficult to reconcile under corporate jurisprudence that a company may have different domiciles in different countries. A company irrespective of where it is registered may have multiple residences. This is particularly true about the companies registered off shore. There is an interesting example in this context which I want to share with my readers. In North American broadcasting, a radio or television station has a

⁹ The concept of merely forming an offshore company having become old fashioned more complicated ways and places are being used for setting up a company.

¹⁰ See *Littauer Glove Corp v. Millington*, 44 *Times Law Reports* (746)

legal city of license which does not necessarily correspond to the location of its studios or the market that the station's programming is intended to serve. In the above, various dimensions of corporate fiction have been discussed. This discussion fortifies the idea that the legal fiction is not merely a Fictional Fiction but has been raised closer to a Factual Fact and necessitates to invoke the concept of "piercing through corporate veil."

SOME EXAMPLES OF GENERAL LEGAL FICTION:

1) Adoption of a Child – A Fiction

In the case of adoption of a child, when an order/judgment is passed by a court allowing adoption, the biological/natural parent(s) become a legal fiction while the adoptive parent(s) are legally considered to be the natural parent(s). A new birth certificate reflecting this is formally and legally issued.

2) Fiction of Survivor/Death

If two people die at the same time or in a manner that renders it impossible to tell who had died first, the older of the two is considered to have died first, subject to rebuttal by evidence demonstrating the actual order of the death.¹¹ This example, as a matter of fact, entails both the concepts i.e. "Legal Fiction" and "Legal Presumption."

Limitations of Legal Fiction:

Legal fiction has never been regarded as a source of law. It is an adhoc remedy to meet a harsh or unforeseen situation, but, still it has attained enough stability. A legal fiction should not be employed to defeat law or result in illegality nor should it be extended to lead unjust results. It is pertinent to note that there cannot be fiction upon a fiction.

Deeming Clause

"In construing scope of legal fiction, it would be proper and even necessary to assume all those facts on which alone such fiction could operate."¹² "The expression "deem" is commonly used to create legal fiction and introduce an artificial conception. Speaking generally, when legislature commands that a language is to be deemed to be something, obvious result is that in reality it is not that thing. What the Legislature requires it to be treated."¹³

Legal Fiction – A Case Study – Philip Staufen v. Attorney General of British Columbia¹⁴

"Philip Staufen, the name by which the petition goes, was diagnosed in November 1999, by a medical doctor in Toronto to be suffering from post concussion global amnesia. To this date, nearly 18 months later, Mr. Staufen has not recovered his memory. He deposes in his affidavit sworn on February 15th, 2001 that he has no memory of any events prior to waking up in the hospital in Toronto in November, 1999 where, according to what he was told by hospital staff he had lain unconscious for several days, unable to walk or speak. He does not know whether Philip

¹¹ In England and Wales: "Law of Property Act 1925", s.184

¹² M/S Tank Steel and Re-Rolling Mills (PVT) Ltd V. Dera Ismail Khan & other, "PLD 1996 Supreme Court 77 at p. 85"

¹³ Siraj Din & others V. Sardar Khan & others, "1993 SCMR 745 at p/ 749"

¹⁴ Staufen v. British Columbia (Attorney General) BCSC 779 (Can L II) (The judgment of Mr. Justice Scarth has been abridged, edited and summarized by the present author.)

Staufen is his real name, where he was born, or whether his correct date of birth is June 7th, 1975 as indicated on his Ontario hospital card.”

“In essence the petitioner wants this court to provide him with an identity. (Emphasis added) He applies by way of Amended Petition to the court for a declaration that he, the petitioner Philip Staufen, was born in Vancouver, British Columbia on the 7th day of June 1975, and for an order that the Attorney General of British Columbia issue a birth certificate in the name of Philip Staufen born in Vancouver, British Columbia on June 7, 1975.”

Authors’ Note:

There is No Evidentiary Basis for the Above Facts.

“In his affidavit Mr. Staufen deposes that he has no identity documents whatsoever except for an Ontario hospital card. He does not know the source of the date of birth shown on the card or who assigned the name Philip Staufen to him although the date of birth **seems to be right.**”

“As defined by the Oxford Canadian Dictionary a “legal fiction” is “an assertion accepted as true (though probably fictitious) to achieve a useful purpose, esp. in Legal matters”. In the Historical Introduction to English Law and its Institutions (3rd Edition)_by Harold Potler, the learned author, at p. 302, groups the Fictions used into three classes: (1) Fiction used to increase the jurisdiction of the courts; (2) Fictions designated to avoid cumbersome and archaic form of action; (3) Fictions having a false assumption of fact in order to extend the **remedy the court could grant.”**

“Jowitt’s Dictionary of English Law (2nd Edition) at p. 787 provides two examples in order to illustrate how the former practice and jurisdiction of the courts rested largely on fictions. Thus, the King’s Bench acquired jurisdiction in actions for debt by “surmising” “feigning” that the defendant has been arrested for a trespass which he had never committed and then allowing the plaintiff to proceed against him for debt. In the second example the court of Exchequer acquired jurisdiction by permitting the plaintiff in certain actions to plead that he was a debtor to the King and that by reason of the cause of action pleaded he has become less able to pay his wholly fictitious debt to the King.”

”Although fictions have been used extensively over the centuries to expand the jurisdiction of the courts and the nature of the relief, they can grant, I have not been referred to, and have not in my own research found, an instance where a fiction has been used by a court to invent the facts necessary to decide the very issue before it. Judges are frequently told by appellate courts not to speculate on the evidence. What is sought here would require the court to do more than speculate.” (Emphasis Added)

Two basic laws of Canada are directly attracted to the facts and circumstances of the present case which deal with the registering of births, deaths and marriages. The laws are:

- i. Vital Statistics Act
- ii. Vital Statistics Act Regulation

There has been a lot of discussion on the various provisions of these two laws by the Hon’ able Mr. Justice Scartch. Finally the judge came to the following conclusion/decision:

“It is not for the courts to over ride the clear intention of the legislature on the pretext of finding a “gap: in the legislation.”

The application must be dismissed.”

“W.B.Scarch j.”

After such a long intellectual exercise, the judge took resort in the basic principle of the Interpretation of Statue i.e. the courts are not to fill in the gaps in legislation.