

# Law Reform in Corporate/Commercial Law in Manitoba: Pre-Incorporation Transactions—Part I

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D A R C Y L . M A C P H E R S O N \*

This is the first in what I hope may become a series of short articles suggesting law reform in Manitoba with respect to corporate and commercial law topics. In this first paper, my suggestion for law reform is simple: amend section 14 of the *Corporations Act*<sup>1</sup> to cover oral pre-incorporation transactions as well as written ones.<sup>2</sup>

While some of the arguments presented below are quite technical in nature, the basic thrust of the argument is this. Currently, the law treats written pre-incorporation transactions by statute and excludes oral transactions, which are left to the common law to resolve. While corporations can be formed very quickly, pre-incorporation transactions nonetheless remain a key part of any business-law practice. Therefore, if this area of law can be improved, in my view, an attempt should be made to do so.

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<sup>1</sup> RSM 1987, c C225 [*Corporations Act*].

<sup>2</sup> As the title reflects, there are other issues in the law of pre-incorporation transactions which I believe may be capable of improvement through reform. However, in order to keep the size of this first paper within reasonable bounds, these other issues will have to wait until another day.

Some justifications for the maintenance of the *status quo* are conceivable. However, in my view, none of these justifications stand up terribly well to genuine scrutiny. The statute is very certain in its application and tends to keep transactions enforceable. This is consonant with both the purpose of the statute as facilitative of transactions, and with the general law of contracts, which generally tries to accord with the reasonable expectations of the parties. The common law is not as successful in either facilitating transactions, or in meeting the reasonable expectations of the parties. The statutory approach is also more consistent with both the general law of contracts, as well as corporate law. Finally, the change to the statute necessary to accomplish this reform is minor, in that it is the removal of a single word from the statute.

## I. WHAT IS A PRE-INCORPORATION TRANSACTION?

A pre-incorporation transaction<sup>3</sup> is a transaction entered into by a person on behalf of a corporation that does not yet exist (such person is

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<sup>3</sup> The term “transaction” is chosen with care. Many of the statutory section dealing with this type of transaction specifically refer to “contracts”, as is the case in the *Corporations Act*, *supra* note 1. Such a choice of nomenclature has had an impact on previous case law. See, for example, *Westcom Radio Group Ltd. v MacIsaac* (1989), 70 OR (2d) 591, 63 DLR (4th) 433 (Div Ct). Even though the Court of Appeal for Ontario was given the opportunity to overrule *Westcom* in the subsequent case of *Szecket v Huang* (1998), 42 OR (3d) 400, 168 DLR (4th) 402, *per* the Court (McMurtry CJ, Laskin J and Borins J), it refused to do so. Professor Poonam Puri, in what could be considered a case of academic generosity by understatement, refers to this refusal as merely “troublesome”. See Poonam Puri, “The Promise of Certainty in the Law of Pre-Incorporation Contracts” (2001), 80 Can Bar Rev 1051 at 1060.

According to two authors, the term “transaction” is not entirely accurate either, as they claim that there are transactions that are not contractual in nature, and these are not meant to be caught by this area of law. On this point, see AJ Easson & DA Soberman, “Pre-Incorporation Contracts: Common Law Confusion and Statutory Complexity” (1992), 17 Queen’s LJ 414 [Easson & Soberman] at 416, n 5. While I agree that the term “transaction” can be very broad indeed, when combined with the term “pre-incorporation”, in my view, it becomes quite evident that non-contractual transactions are not the concern of either the statute or the common law in this area.

Interestingly, however, whatever the nomenclature, it is clear that the subject-matter of the transaction must be determined before the law of pre-incorporation transactions (whether it is the common law or the statute) can apply. In other words, the court must be able to discern the asset or other property to dealt with pursuant to the transaction, before it will apply the statute or the common law. On this point, see

often called the “promoter”<sup>4</sup>) with a party unrelated to the corporation (the “third party”). In other words, the corporation is not incorporated at the date of the entering into of the contract.<sup>5</sup> Following the entering into of the transaction, one of the alleged parties, either: (i) the promoter, (ii) the corporation, or (iii) the third party, seeks to enforce the alleged contract. The defendant resists enforcement, claiming either: (i) there is not an enforceable contract with anyone; or (ii) the existing contract is enforceable by the third party, but not as against the party currently before the court as the defendant. Instead, according to the current defendant, the transaction is enforceable only against the other party (the promoter or the corporation, as the case may be).<sup>6</sup>

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*Phelps Holdings Ltd. v Strata Plan VIS 3430*, 2010 BCCA 196 at para 16, 71 BLR (4th) 1, (BCCA) *per* Huddart J, for the Court.

Some jurisdictions, such as the federal government (see, for example, the *Canada Business Corporations Act*, RSC 1985, c C-44 [CBCA], s 14) have chosen to overrule *Westcom* by statute, making it clear that anything that purports to be a contract is also included. This is clearly an important distinction between Canadian common-law jurisdictions. It is equally clear that Manitoba has not yet followed this path. However, it is not the point of this paper to resolve which of the statutory formulations (“contract” or “purports to be a contract”) is better-suited to achieving the goals of the section, and so this too will have to be left for another day.

<sup>4</sup> See, for example, J Anthony VanDuzer, *The Essentials of Canadian Law – The Law of Partnerships & Corporations*, 3rd ed (Toronto: Irwin Law, 2009) at 186. Nonetheless, the *Business Corporations Act*, SBC 2002 c 57, s 20(1) [BCBCA] uses the term “facilitator” to describe the person carrying out these functions. This difference in nomenclature is unimportant for the point made in this paper.

<sup>5</sup> VanDuzer, *ibid*.

<sup>6</sup> I will leave aside situations where the corporation never comes into existence. Such situations raise different issues than where the corporation has been incorporated. On this point, see *Eidsvik v Canada*, 2006 TCC 253, [2006] 4 CTC 2288, (TCC) *per* Hershfield J, at note 9, which reads in part as follows:

“While Canadian legislation now sets out statutory provisions governing pre-incorporation contracts, it is unlikely, in my view, that any such provisions would apply in this case. Firstly, that the corporation never came into existence points to the application of common law principles. While the authorities are divided as to whether these statutory provisions only apply where a corporation comes into existence (compare for example the decisions of *Westcom Radio Group Ltd v MacIsaac* (1989), 70 OR (2d) 591, 63 DLR (4th) 433, (Div Ct) and *Szecket v Huang* (1998), 42 OR (3d) 400 (CA), in the circumstances of this case, I am compelled to conclude that the better view is that the common law applies. Secondly, even if the Canadian legislation is to be considered, the statutory provisions to be considered would be those with a

## II. THE STATUTORY SECTION

Section 14 of the *Corporations Act*<sup>7</sup> reads as follows:

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jurisdictional nexus to this case; namely, British Columbia's legislation. That legislation differs substantially from the governing legislation in other jurisdictions such as the legislation governing federally incorporated corporations. Under British Columbia's provisions it is unclear whether the Appellant would be entitled to the benefit of the contract. That being the case, applying that legislation would be of no assistance to the Appellant which is to say that my favouring common law gives the Appellant the benefit of any doubt."

Resolving the issues raised by this footnote are beyond the scope of this paper.

Similarly, this paper will not consider post-dissolution transactions. There are different statutory provisions that apply to it. On this point, see, for example, *Litemor Distributors (Ottawa) Ltd v W.C. Somers Electric Ltd* (2004), 73 OR (3d) 228, 49 BLR (3d) 143, (SCJ) *per* Panet J. Some cases also see the rules applicable to pre-incorporation transactions as applying to post-dissolution transactions as well. On this point, see, for example, *Dryco Building Supplies Inc v Wasylyshyn*, 2002 ABQB 676 at paras 24-29, 3 Alta LR (4th) 306, (Master) *per* Master Funduk [Dryco #1]; *Dryco Building Supplies Inc v Wasylyshyn* (2001) 288 AR 78 at paras 17-21 (Master), *per* Master Funduk [Dryco #2].

<sup>7</sup> *Supra* note 1. The language of the section, and perhaps even more importantly, its conceptual foundation are drawn largely, though not verbatim, from Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971), [The Dickerson Committee Report] Volume II: Draft *Canada Business Corporations Act* s 2.10 at 11-12.

The original modern attempt at reform in this area of corporate law (and Canadian corporate law generally) was made in the *Interim Report of the Select Committee on Company Law, Legislative Assembly of Ontario* (Toronto: Queen's Printer, 1967), informally known as the Lawrence Committee. On this point, see *Sherwood Design Services Inc v 872935 Ontario Limited* (1998), 39 OR (3d) 576 at 598-599, 158 DLR (4th) 440, (CA) *per* Borins J [Sherwood], dissenting, but not on this point of legal history, citing Ziegel, Daniels, MacIntosh and Johnston, *Cases and Materials on Partnerships and Canadian Business Corporations*, vol 1, 3d ed (Toronto: Carswell, 1994) at 283-84. The Lawrence Committee's findings are also cited in the fourth edition of the same text. See AD Harris *et al*, *Cases, Materials and Notes on Partnerships and Canadian Business Corporations*, 4th ed (Toronto: Thomson Carswell, 2004) at 195-196. By 1982, however, the Ontario statute largely followed the federal model. See both the OBCA, *infra* note 8, and MA Maloney, "Pre-Incorporation Transactions: A Statutory Solution?" (1985) 10 Can Bus LJ 409 at 410. Maloney does note that there are "a few variations" between jurisdictions. One of those variations is whether the statute includes within its ambit oral transactions. Ontario does so; the federal model does not.

- 14(1) Except as provided in this section, a person who enters into a written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof.
- 14(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt a written contract made before it came into existence, in its name or on its behalf, and upon the adoption
- (a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
  - (b) the person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.
- 14(3) Except as provided in subsection (4), whether or not a written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint and several or apportioning liability between or among the corporation and any person who purported to act in the name of or on behalf of the corporation, and upon the application the court may make any order it thinks fit.
- 14(4) If expressly so provided in the written contract, a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof.

According to the statute, section 14(1) establishes a default rule that the promoter is personally liable on the transaction until it is adopted by the corporation. All benefits and burdens of the transaction belong to the promoter.<sup>8</sup> The only exception to this general rule is contained in section

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<sup>8</sup> See *Fung v 3714994 Manitoba Ltd*, 2003 MBQB 249 at para 14, 179 Man R (2d) 47, (Man QB) per Shulman J. The case law out of Ontario is to the same effect. See, for example, *Pinehurst Woodworking Co v Rocco* (1986), 38 RPR 116 paras 43-44, 13 OAC 121, (Div Ct) per Sutherland J, for the Court. This principle was also applicable immediately before the passage of the *Business Corporations Act*, 1982, SO 1982, c 4 now RSO 1990, c B.16 (the "OBCA"). See *Business Corporations Act*, RSO 1980, c 54, s 19(3).

14(4). If the parties make sufficiently clear in writing<sup>9</sup> that they intend that the promoter not be liable, this choice will be respected.<sup>10</sup>

Under section 14(2), if the transaction is adopted,<sup>11</sup> following adoption, all benefits and burdens of the transaction belong to the

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<sup>9</sup> However, simply because there is a written indication of an intention by the promoter to rely on the exclusion provided for in s 14(4) does not mean, in and of itself, that the exclusion is available. For example, in *Szecket v Huang*, *supra* note 3, where the defendant alleged that the s 14(4) inclusion should be implied, because, in an earlier draft of the agreement, the parties had been specific that the defendant was taking personal liability for the agreement. This specific reference to personal liability was removed in the final version of the agreement. This was alleged to represent an acceptance of the exclusion of that liability. The Court disagreed. For the purposes of the quotation that follows, subsection 21(4) of the OBCA, is the equivalent of subsection 14(4) of the *Corporations Act*, *supra* note 1. The Court held as follows: “Counsel for the respondents [the plaintiffs], on the other hand, submitted that s 21(4) has no application to the circumstances of this appeal. He argued that s 21(4) requires that an express term be included in a pre-incorporation contract to limit the liability of a person signing it on behalf of a company to be formed. As there was no express term in the contract limiting the appellant’s liability, this contract did not fall within the class of contracts contemplated by s 21(4), with the result that Conant J. correctly found Mr. Huang liable for the breach of the contract pursuant to s 21(1). In our view, the submission of counsel for the respondents is correct.”

<sup>10</sup> On this point, see *1394918 Ontario Ltd v 1310210 Ontario Inc* (2002), 57 OR (3d) 607, 47 RPR (3d) 10, (CA) *per* Carthy J, for the Court. There is also case law to suggest that if the evidence shows that the promoter intended to continue its liability following the transfer of, for example, a mortgage to the corporation, this choice will be respected. On this point, see *Dawi v Armstrong*, (1992), 17 CPC (3d) 196, 36 ACWS (3d) 1102, *per* Desmarais J.

This decision was later affirmed by the Court of Appeal. See (1993), 17 CPC (3d) 196, [1993] OJ 3893, *per* McKinlay J, for the Court. However, this was affirmed on the basis that in fact the mortgagee was not made aware of the fact that the mortgagor was acting for a corporation yet to be incorporated, and that therefore, subsection 21(1) of the OBCA did not apply.

<sup>11</sup> There are no specific procedural requirements for adoption. In fact, adoption itself is not, strictly speaking, necessary. By its actions, the corporation need only show an intention to adopt. On these points, see, for example, *Sherwood* *supra* note 7 at 577, *per* Abella J, as she then was, for the majority. See also *Perovich v R*, [2000] 2 CTC 2466, 95 ACWS (3d) 582, (TCC) *per* Bonner J, holding that taking title in the name of the corporation at closing (after the incorporation) was sufficient for these purposes. The law of British Columbia is to the same effect, pursuant to the *Business Corporations Act*, *supra* note 4. On this point, see *Gurdev Holdings Ltd v Schmidt*, 2009 BCSC 551 at paras 28-32, *per* Pearlman J.

corporation. Assuming that the exclusion provided for under section 14(4) has not been invoked by the parties, if there is an attempt to mislead the third party, section 14(3) allows the Court to apportion liability between the promoter and the corporation.<sup>12</sup>

Subsection 14(1) makes clear that the statute itself is limited to written contracts. This leaves oral contracts to the vagaries of the common law on this subject. It is to the common law which we now turn.

### III. THE COMMON LAW

At common law, it is evident that a corporation can never be held liable on a pre-incorporation transaction.<sup>13</sup> An example of this can be found in the seminal case of *Kelner v Baxter*.<sup>14</sup> In this case, the plaintiff had purported to enter into a contract for the sale of wine with the defendant as the other signatory. According to the terms of the offer, the defendant was acting “on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited.” The company was later incorporated and even tried to ratify<sup>15</sup> the agreement. Some of the wine sold under the purported

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<sup>12</sup> Some readers may believe that the possibility of apportionment may lead to a lack of certainty in this area of the law. However, this is not in fact the case. No Act of the legislature, or provision thereof, should be used to perpetrate a fraud. Such attempts will be disallowed by the Court. On this point, see Darcy L MacPherson & Edward D (Ned) Brown, “Fraud and Knowledge of a Pre-Existing Security Interest under the *Personal Property Security Act*: Guidance for Manitoba Courts and Practitioners from Other Jurisdictions” 35(1) Man LJ, in which the authors attempt to develop a coherent explanation as to when the Court will refuse to apply the priority provisions of the *Personal Property Security Act* because to do so would allow the Act to become an instrument of actual or constructive fraud. With respect to case-law, see, for example, *Carson Restaurants International Ltd v A-1 United Restaurant Supply Ltd* [1989] 1 WWR 266, 72 Sask R 205 (Sask QB), per Grotsky J. As to the need for some misleading of the third party, see *Bank of Nova Scotia v Williams*, (1976), 12 OR (2d) 709 at 713 70 DLR (3d) 108 (HCJ), per Van Camp J. In other words, the apportionment remedy is only available if and when the court is convinced that to not apportion liability would allow behaviour that is tantamount to fraud to succeed. Such circumstances should be rare, and thus do relatively little damage to the certainty that is meant to be encouraged here.

<sup>13</sup> On this point, see VanDuzer, *supra* note 4, at 186.

<sup>14</sup> (1866), LR 2 CP 174 (Common Pleas) [*Kelner*].

<sup>15</sup> Ratification of a pre-incorporation is not available at common law. On this point, see,

contract was used in the hotel's business. However, the hotel later was unable to pay the amount due for wine delivered under the purported contract. When the company became insolvent, the plaintiff sued the defendant, claiming that the defendant was personally liable on the contract. The court agreed. The basic reasoning to arrive at this result was that the parties were both aware that the corporation did not exist at the time that the transaction was entered into. Nonetheless, they purported to contract. A non-existent entity cannot contract, and the parties would presumably be aware of this. Therefore, since the parties intended to contract, they must have intended to contract with someone. Since it cannot be the corporation, the contract must be between the promoter personally, and the third party.<sup>16</sup>

For a period, it was thought by many commentators that *Kelner* established a rule that in any pre-incorporation transaction, the promoter should be personally liable on the transaction.<sup>17</sup> A relatively straightforward justification for such an approach can be offered. It runs as follows. There is an implied warranty by the promoter that the promoter has the ability and the desire to bring into being the corporation that will become party to the contract.<sup>18</sup> Furthermore, the third party understands that the corporation will become party to the contract upon its incorporation. However, until this incorporation is complete, of necessity, the third party must deal with the promoter. Therefore, in a meaningful sense, until incorporation, the only parties with an economic

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for example, *York Region Condominium Corp No 921 v ATOP Communications Inc.* [2003] OJ 5255, 40 BLR (3d) 317 (SCJ), at para 5 (citing the dissenting judgment of Borins J in *Sherwood*, *supra* note 7), *per* MacDonald J.

<sup>16</sup> This can be seen as a process of elimination. If the corporation was not available as a proper person on whom to place liability for the contract, the only other potential candidate is the promoter personally.

<sup>17</sup> See, for example, Wifred M Estey, "Pre-Incorporation Contracts: The Fog Is Finally Lifting" (2000) 33 Can Bus LJ 3 at 7.

<sup>18</sup> The *Business Corporations Act*, RSA 2000, c B-9, s 15 uses the language of warranty by the promoter. This language is not used in other CBCA-model incorporation statutes. See *infra* note 42. The statute was designed to reverse the holdings in *Kelner*, *supra* note 14, *Newborne*, *infra* note 19, and *Black*, *infra* note 22. On this point, see, for example, *Canbar West Projects Ltd. (c.o.b. Can-West Projects Ltd.) v Sure Shot Sandblasting & Painting Ltd.* (2010) 28 Alta LR (5th) 201, 11 WWR 461 (QB) at para 32, *per* Yamaguchi J.



or other interest the transaction are generally the promoter and the third party. Given this reality, it seemed justifiable to many that the promoter ought to be fully on the contract, until at least the incorporation is complete.

However, cases from both the U.K. and Australia indicate that such a reading of *Kelner v Baxter* is too broad. In *Newborne v Sensolid (Great Britain) Ltd*, Newborne thought that he had incorporated a corporation which was to sell a quantity of spiced ham to the defendant at a specified price.<sup>19</sup> After the conclusion of the purported contract, the parties realized that in fact the alleged corporate party had not come into existence. Mr. Newborne claimed, based on the view of the rule in *Kelner* offered above, that he as promoter was liable on the purported contract between the parties, and could therefore sue the defendant for the defendant's failure of performance (that is, the obligation to pay for the goods). The English Court of Appeal disagreed. The Court limited the rule in *Kelner* to the facts of that case. The Lord Chief Justice, delivering the lead judgment, held that *Kelner* did not establish a general rule that, where the purported company was not in existence at the time of the making of the contract, the promoter was liable.<sup>20</sup> Lord Chief Justice Goddard continues:

The company makes the contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company's contract is authenticated by the signature of one of the directors. This contract purports to be a contract by the company; it does not purport to be a contract by Mr. Newborne. He does not purport to be selling his goods but to be selling the company's goods. The only person who had any contract here was the company, and Mr. Newborne's signature merely confirmed the company's signature. The document is signed "Yours faithfully, Leopold Newborne (London) Ltd.," and then the signature underneath is the signature of the person authorized to sign on behalf of the company.

In my opinion, unfortunate though it may be, as the company was not in existence when the contract was signed there never was a contract, and Mr. Newborne cannot come forward and say: "Well, it was my contract." The fact is, he made a contract for a company which did not exist. It seems to me, therefore, that the defendants can avail themselves of the defence which they pleaded and the appeal must be dismissed.<sup>21</sup>

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<sup>19</sup> [1954] 1 QB 45 (CA).

<sup>20</sup> *Ibid* at 50.

<sup>21</sup> *Ibid* at 51.

This approach to the issue of pre-incorporation transactions and the rule in *Kelner v Baxter* was later confirmed by the High Court of Australia in *Black v Smallwood*.<sup>22</sup> In this case, the plaintiff sought to sell a piece of land to a company known as Western Suburbs Holdings Pty. Limited. Two directors of the company, Smallwood and Cooper, signed the contract as directors of the company. Yet, unbeknownst to Black, Smallwood or Cooper, at the time that the contract was signed, the company had not yet been incorporated. In these circumstances, the plaintiff sought to hold the directors personally liable on the contract. The court declined to do so, holding as follows:

However in the present case the respondents did not contract, or purport to contract, on behalf of the non-existent company. They simply subscribed the name of the non-existent company and added their own signatures as directors in the belief that the company had been formed and that they were directors. The fact that their signatures appeared as part of the company's signature did not make them parties to the contract nor could, as was possible in *Kelner v Baxter*, an intention to be bound personally be imputed to them. The distinction between a case where the execution of a document by a company is effected by the subscription of the company's name followed by the signature of a director or directors as such and the case where the document is executed by an agent on behalf of a company is well illustrated by the observations made in the report of *Richardson v Landecker* (1950), 50 S.R. (N.S.W.) 250, at p. 259; 67 W.N. 149, at pp. 153-154. There the point was taken that a lease was inoperative because it had been executed on behalf of a company by an agent and he had not been "thereunto lawfully authorized in writing." The decision was that the lease had not been executed by an agent on behalf of the company; it had been executed by the company by the subscription of its name followed by the signature of a director as such. It is, in our view, clear from the written instrument that the respondents in this case did not enter into any contract; they were not parties to the contract as agents or otherwise and there is no basis upon which they can be held liable upon it.<sup>23</sup>

The Court then specifically holds that the case before it fell within the rule in *Newborne v Sensolid*, and confirms the correctness of the rule there espoused.<sup>24</sup>

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<sup>22</sup> (1966), 117 CLR 52 (HCA).

<sup>23</sup> *Ibid* at 60 [emphasis added].

<sup>24</sup> *Ibid*.

#### IV. THE IMPORTANCE OF GETTING IT RIGHT

Pre-incorporation transactions are not often a subject which provokes much interest in the legal community at large.<sup>25</sup> Though not universal, this perspective finds proponents whether one speaks of members of the practicing bar or legal academics. The argument in favour of such a perspective often runs as follows: Corporations can be formed very quickly and efficiently. Even when this is not fast enough for the needs of the client, most large law firms have a roster of ‘shelf’ companies<sup>26</sup> that would

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<sup>25</sup> There are also a limited number of cases on this topic. There are fewer than 30 cases dealing with the pre-incorporation transactions sections of the *Corporations Act*, *supra* note 1, the *Ontario Business Corporations Act*, *supra* note 8, and the *Canada Business Corporations Act*, *supra* note 3.

There are a number of potential explanations for this. One is that the first requirement for there to be litigation is that has to be disagreement between the parties. In other words, as long as the relationship is such that both sides wish for the transaction to go ahead, the corporation can still be incorporated and the contract novated with the now-existing corporation. This novation may occur by conduct. On this point, see *Heinhuis v Blacksheep Charters Ltd* (1988), 19 BCLR (2d) 239, 46 DLR (4th) 67 (CA), *per* McLachlin J, as she then was, and *Strata Plan VIS2968 v KRC Enterprises Inc*, 2007 BCSC 774 at paras 47-48, 74 BCLR (4th) 89, *per* Gerow J.

Also, as discussed in more detail below, the statute is quite clear and maintains transactions. Therefore, there is less reason to litigate under the statute. Also, given the problem that the corporation will never be liable on the transaction at common law, if the promoter has no money, once again there is little reason to litigate. In the end, a dearth of case law under the statute is not necessarily indicative of a lack of importance of this issue.

Finally, for the parties who have to confront this area of law (whether few or many), this issue is an all-or-nothing proposition. There is no middle ground. There is either an enforceable contract or there is not. Therefore, the potential for loss on both sides may encourage settlement over litigation. Nonetheless, the stark difference between these extreme potential results indicates to me that it is important that the law be as logically defensible and consistent with other areas of law as possible.

<sup>26</sup> A “shelf” company generally refers to a corporation that is that is created by a law firm or other professional and given the “bare bones” in terms of organization, and then put “on the shelf”. Typically, a lawyer, law clerk, or other professional is the first and sole shareholder, director, and officer of the corporation.

When a client needs a corporate vehicle to enter into a transaction, the professional simply takes the corporation “off the shelf”. This means, typically, the professional uses their power as the sole shareholder, director and officer of the corporation to tailor the vehicle to the needs of the client, by for example, altering the articles, and by-laws of the corporation to the specific needs of the client. This would

be ready and able to fill the void. Given this modern reality, why are we spending all of this time and effort on sorting out the law applicable to pre-incorporation transactions?

I do not subscribe to that perspective, for at least two reasons. First, pre-incorporation transactions have remained commonplace in the 21st century commercial environment. Wilfred Estey, a senior partner at one of Canada's largest commercial law firms, wrote as follows:

Pre-incorporation contracts should engage the attention of every corporate, commercial and real estate solicitor. Clients enter into these types of contracts on a daily basis.<sup>27</sup>

If corporate-law practitioners believe that pre-incorporation transactions remain an important part of business today, then, in my view, it follows that it is a worthwhile exercise to examine whether the law in this area can be improved. This article represents an attempt to suggest one such improvement.

The second flaw in the argument in favour of apathy to this area of the law is that it assumes that either: (i) people actually know the law, or

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include setting such mundane matters as the corporate seal, if any, the fiscal year of the corporation, the form of the share certificate, and the terms of the unanimous shareholder declaration, if any. Then, as officer, the professional would resign from the corporation. As the director of the corporation, the professional would appoint the client as the new officer, and resign as director. As the sole shareholder, the professional would appoint the client as the replacement director. Finally, the professional would transfer the only share of the corporation to the client, and ensure that the corporate records reflect the change of share ownership, and that all the necessary approvals (such as the approval of the board for the transfer of the share) are also properly recorded.

Because the corporation is in existence (that is, it is incorporated) at the time that the promoter entered into the transaction with the third party, s 14 of the *Corporations Act* would not apply, since, by its very terms, the section applies to transactions entered into "in the name of or on behalf of a corporation before it comes into existence". Questions involving shelf companies therefore often revolve around the application of agency principles, the most notable of which is the concept of antecedent actual authority, also called "ratification". On the elements of ratification, see GHL Fridman, *Canadian Agency Law* (Markham: LexisNexis Canada, 2009) at 41. Therefore, pre-incorporation transactions are dealt with quite differently than are those involving shelf corporations. The normative question of whether this should be so will be left to another day.

<sup>27</sup> Estey, *supra* note 17 at 5. The importance of such transactions is also acknowledged in academic commentary. See, for example, Puri, *supra* note 3.

(ii) have access to counsel prior to entering into a pre-incorporation transaction, and consult such counsel. While the law generally presumes that all adults are aware of its dictates,<sup>28</sup> this is a presumption designed to avoid the unacceptable situation that those ignorant of the law can actually be seen to benefit by such ignorance. At the same time, where society knows that people are being led into error by an obscure piece of the common law, in my view, such a result is to be avoided where possible. After all, the rules of the common law were never meant to be used as tools to allow the unscrupulous to dupe the unwary.<sup>29</sup> Yet, as will be discussed below, the current common law on pre-incorporation transactions may permit exactly this. Section 14 (and its equivalents) should be amended to avoid this.

## V. ANALYSIS

In this section, I begin by setting out what I believe are three potential justifications for maintaining the current *Corporations Act* provision. Then, I provide responses to these possible justifications, demonstrating why I believe that these justifications are insufficient, either individually or collectively, to maintain the status quo. I then turn to consider whether the current formulation of the section on pre-incorporation transactions actually achieves its goals. Finally, I point out that contracts are generally supposed to meet the reasonable expectations of the parties involved. Yet, the current distinction between written and oral contracts in this area of the law does not accomplish this, and may hinder it.

### A. Justifications for the Status Quo

In my view, there are at least three potential justifications for maintaining the current distinction between written and oral agreements with the respect to pre-incorporation transactions. The first is historical in nature; the second is based upon maintaining commonality between the

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<sup>28</sup> This maxim finds expression in a number of different contexts. See, for example, the *Criminal Code*, RSC 1985, c C46, s 19. With respect to the knowledge of the legislature of the common law, see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed, (Toronto: LexisNexis Canada, 2009) at 205.

<sup>29</sup> *Gallen v Allstate Grain Co Ltd* (1984), 9 DLR (4th) 496 at 510, 25 BLR 314, (BCCA) per Lambert J.

statutory provisions passed by the various provincial legislatures on this subject. The third justification is evidentiary. In this section, a brief explanation of each of these potential justifications is given.

### *1. The Historical Justification*

#### **i. The Statute of Frauds and section 6 of the Sale of Goods Act**

At least part of the justification for a distinction between written contracts, on the one hand, and oral ones, on the other, is historical. With the inclusion of the *Statute of Frauds*<sup>30</sup> in Manitoba law,<sup>31</sup> it was quite clear that certain types of contracts had to be in writing. If not, they were not necessarily enforceable.<sup>32</sup> Prior to the repeal of the *Statute of Frauds* in 1983,<sup>33</sup> section 6 of the *Sale of Goods Act* read as follows:

- 6(1) A contract for the sale of any goods of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer accepts part of goods so sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
- 6(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.
- 6(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not.<sup>34</sup>

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<sup>30</sup> *Statute of Frauds*, 29 Car 2 c 3 (UK), as amended by the *Statute of Frauds Amendment Act*, 9, Geo 4 c 14 (UK) [collectively, the “*Statute of Frauds*”].

<sup>31</sup> For a discussion of the means by which the English *Statute of Frauds* was received into Manitoba law, see Manitoba Law Reform Commission, *Report on the Statute of Frauds*, (Winnipeg: Queen’s Printer, 1980) [Law Reform Commission Report] at 1-2.

<sup>32</sup> RSM 1970, c S10.

<sup>33</sup> *An Act to Repeal the Statute of Frauds*, CCSM c F158, s 2.

<sup>34</sup> *Supra* note 32, s 6 [emphasis added].

This section would include some contracts for the sale of goods that might be purchased by a promoter on behalf of a corporation to be formed.<sup>35</sup>

Following the repeal of the *Statute of Frauds*, the same section was repealed.<sup>36</sup> When the laws of Manitoba were later re-enacted, the former section 7 became section 6.<sup>37</sup> The current section 6 reads as follows:

- 6(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods".
- 6(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.<sup>38</sup>

Until the repeal of the *Statute of Frauds* and the consequential amendment to the *Sale of Goods Act*, the historical justification would have been a powerful argument for coherence in the law of contracts.

## ii. Section 5 of the Sale of Goods Act

Section 5 of the *Sale of Goods Act* provides as follows:

Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties; but nothing in this section shall affect the law relating to corporations.<sup>39</sup>

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<sup>35</sup> For an example of a case where the Ontario equivalent to the Manitoba *Sale of Goods Act* (see *Sale of Goods Act*, RSO 1970, c 421) was applied to a sale of equipment between two sophisticated commercial parties, see *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426, at 448-449, 57 DLR (4th) 321, *per* Dickson CJ, for the majority of the Court. While this is not a case involving a pre-incorporation transaction, the case is important for present purposes because it shows that the *Sale of Goods Act* does not apply merely to consumer transactions, and can apply in large non-consumer bargains as well.

<sup>36</sup> See *Statute Law Amendment Act*, SM 1982-83-84, c 93, s 27.

<sup>37</sup> The substance of the two sections is identical, although the former subsections 7(1)-7(3) are now contained in the two subsections of s 6.

<sup>38</sup> RSM 1987 c S10.

<sup>39</sup> *Ibid* [emphasis added].

By including the final, italicized clause in the section, an argument can be made that the removal of the former section 6 of the *Sale of Goods Act* and the repeal of the *Statute of Frauds* were not meant to affect transactions entered into on behalf of corporations in any way. In other words, section 5 acknowledges that, for most contracts, a more equal footing is intended. But for corporate contracts, on the other hand, the legislature has decided to treat them differently. This different treatment could include maintaining the current distinction between written and oral transactions.<sup>40</sup> At the very least, in passing the *Sale of Goods Act*, the legislature was aware of the fact that contracts could be entered into through multiple mechanisms—as shown as the inclusion of the term “by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties”—and yet chose to leave the *Corporations Act* unamended.<sup>41</sup>

## 2. *The Commonality Justification*

Another potential justification for the differential treatment of written contracts from oral ones is that this is a distinction used in a number of jurisdictions. There are other major Canadian corporate statutes from common-law jurisdictions that make a similar distinction between written and oral contracts.<sup>42</sup> Uniformity between jurisdictions, as an extension of

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<sup>40</sup> Some may suggest that the closing words of s 5 were designed to ensure that other rules of corporate law were respected in spite of the opening words of section 5. One example of such a rule would be corporate formalities. So, for example, if a corporation, by its own internal rules requires that contracts be in writing, then it must be in writing to be enforceable. However, the response to such a suggestion would be as follows. First, in general, the rules on corporate formalities do not allow the corporation to avoid the effect of a transaction due to its own non-compliance. On this point, see the *Corporations Act*, *supra* note 1, s 18(a). Similarly, it is no longer presumed that third parties dealing with a corporation are aware of the contents of all documents that are filed publicly with respect to the corporation. On this point, see the *Corporations Act*, *supra* note 1, s 17.

Secondly, the argument made with respect to s 5 in this paper is not that the *only* reason for the inclusion of the closing words of the section. Rather, the argument is simply that: (i) one of the rationales for the closing words is to separate corporate contracts from other contracts; and (ii) this might be used to justify the maintenance of a written/oral distinction despite the repeal of the *Statute of Frauds*.

<sup>41</sup> *Supra* note 1.

<sup>42</sup> See, e.g., the CBCA, *supra* note 3, s 14; with respect to Alberta, see *supra* note 18;



comity, is a value to be fostered. This is particularly so where the issue arises between sister-provinces within the Canadian federation.<sup>43</sup> In other words, one of the justifications for the status quo is that other jurisdictions in common-law Canada have made the same choice, and Manitoba should not be out of step on this point.

### *3. The Evidentiary Justification*

Another part of the potential justification of differential treatment of oral contracts as compared to written ones is evidentiary in nature. With a written contract, the words used by the parties to define their respective obligations to each other are rarely in dispute. The written document makes the words used quite clear. At the same time, it is still for the Court to give meaning to the words chosen. But, the argument runs, in the case of oral contracts, there may be no clear agreement on the words used to express the bargain that was allegedly struck. Therefore, it is often very difficult for the court to determine the terms of the agreement, if any. If the terms of the agreement cannot be ascertained with any degree of certainty, the current division between oral and written transactions is justified.<sup>44</sup>

While each of these justifications has a place in our law, in my view, the strength of these justifications is insufficient to uphold the current state of the law in this area. It is these weaknesses to which we now turn our attention.

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*Corporations Act*, RSNL 1990 c C-36, s 26; *Business Corporations Act*, SNWT 1996 c 19, s 14; *Business Corporations Act*, SNWT (Nu) 1996 c 19, s 14, as adopted pursuant to the *Nunavut Act*, SC 1993 c 28, s 29; *Business Corporations Act*, RSS 1978 c B-10, s 14; *Business Corporations Act*, RSY 2002 c 20, s 17.

<sup>43</sup> See e.g., *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 76 DLR (4th) 256, per LaForest J, for the Court.

<sup>44</sup> Such a justification was put forward in the Dickerson Committee Report, *supra* note 7, Volume I: Commentary, at 22, para 69.

## B. Response to the Justifications

### 1. *The Historical Justification*

#### i. The Statute of Frauds and section 6 of the Sale of Goods Act

Clearly, at least some, if not all, of the force in the historical justification referred to above has been lost by subsequent developments. As mentioned above, the repeal of the *Statute of Frauds*, after the recommendation of the Manitoba Law Reform Commission in favour of abolition, is one such development. This repeal clearly places oral contracts on a more even footing with their written counterparts.

But the complexity of business transactions, and the speed and precision with which they are expected to be completed in the world of modern commerce is another modern development that undercuts the basis of the historical justification for the current formulation of the law of pre-incorporation transactions. Below, we will discuss in more detail technological change and its impact on this area of law. For now, it is sufficient to point out that expectations in the professions of both business and law have been “sped up” over the last three decades. This has necessitated a speeding up of transactions as well.<sup>45</sup> Therefore, transaction may be agreed to before the written transaction is ready for signature.

Technological change makes the distinction between oral and written transactions even less relevant today than it has been previously. Three decades ago, realities that are now virtually taken for granted simply did not exist. At that time, the answering machine, the fax machine, e-mail and personal digital assistants were either in their infancy or non-existent.

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<sup>45</sup> When I worked at a major law firm in 1998, I vividly recall a conversation with a partner about the differences between the current state of the practice of law and its state when he began practice in the early 1980s. He pointed out that client expectations of the speed of transactions was significantly increased over time, because clients now expect their lawyers to deliver the transaction on the schedule provided by the client. While part of this change is technological, in the view of this partner, this is also an expectation for performance regardless of personal cost. For example, when he began the practice of law, there was a limited expectation of work on weekends and late nights. This limit has been steadily eroded by increased client expectations of the speed with which transactions can and should be completed. While this evidence is at best anecdotal, targets for billable hours for both students and lawyers (particularly in larger law firms) are recent developments that confirm this general trend.

Many would certainly argue that e-mail is “written” for these purposes. I would agree with this assertion. However, given current technological advances, there is actually case-law to suggest that the line between written material and other forms of communication may not be so obvious. For example, in *Holwell Securities Ltd. v Hughes*,<sup>46</sup> the plaintiff was trying to exercise an option. The agreement creating the option required written notice to the other party for exercise of the option. The plaintiff had written a notice addressed to the defendant. The defendant was aware of this notice, but the plaintiff had never delivered it to the defendant. The defendant claimed that this writing and knowledge of its existence was insufficient to fulfill the requirements of the contract. The Court of Appeal agreed with the defendant. Lord Justice Russell, as he then was, held as follows:

Counsel for the plaintiffs argued that since the defendant knew that the plaintiffs were anxious to exercise the option, and there was in existence a written notice exercising it, therefore there was a “notice in writing to the defendant.” I consider this argument to be fallacious. A person does not give notice in writing to another person by sitting down and writing it out and then telephoning to that other saying “Listen to what I have just written.”<sup>47</sup>

Simply because the contract is sent by e-mail does not mean that the response will come in the same way.<sup>48</sup> Interestingly, with the current generation of “smartphones”, the exact same response (a simple “I agree”) delivered by the same instrument (the smartphone) may generate two very different responses in the eyes of the law. Quite clearly, if the answer comes by a return e-mail or a text message, this would be written. But at

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<sup>46</sup> [1974] 1 WLR 155 (CA).

<sup>47</sup> *Ibid* at 159, *per* Russell LJ, for the majority, Buckley LJ concurring.

<sup>48</sup> My point in raising *Holwell* was not to suggest that I believe that the case is wrongly decided. In fact the converse is true. However, the case is used to illustrate the rather fine distinction between writing something and delivering it by mail or messenger, on the one (which is “written” for these purposes), and delivering the same news telephonically (which is not “written” for these purposes).

As discussed in the next footnote, the contract in *Holwell* itself was quite clear on the point, and this should be, and generally is, respected. However, in the case of pre-incorporation transactions, at least one of the parties may not be aware of the vast difference between creating a transaction on the telephone (“oral” for these purposes) on the one hand, and by e-mail or text message, on the other. Since, unlike in *Holwell* parties could be misled, this should be avoided if possible.

the same time, if the same individual dialed the telephone number of the other party, this, according to *Holwell*, would not be in writing. Yet, there is little doubt that the choice between telephone call and text message is a relatively minor one. Therefore, in my view, the legal distinction between the two modes should not be out of proportion with the degree of thought that went into choosing it.<sup>49</sup> Therefore, in my view, the historical justification based on a particular reading of the *Sale of Goods Act* cannot justify the current bifurcation of the pre-incorporation transactions based on whether the transaction is written or oral.

## ii. Section 5 of the *Sale of Goods Act*

There are two responses to the concern that section 5 was actually meant to preserve a distinction between written and oral transactions. The first response entails a careful exercise in statutory interpretation. This exercise brings to light two separate, yet interrelated, interpretations of the closing words of section 5. Let us deal with each of these interpretations in turn.

First, on one view of the closing words, section 5 simply creates a hierarchy as to which legislative enactment governs with respect to corporate contracts. As between the *Sale of Goods Act* and the *Corporations Act*, the *Corporations Act* will govern. On this view, the closing words of the section do not affect the treatment of corporate contracts, other than to resolve operational conflict<sup>50</sup> between the *Sale of Goods Act* and the *Corporations Act*.<sup>51</sup> Therefore, the closing words of section 5 do not attempt

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<sup>49</sup> If the parties themselves have chosen the appropriate method of response in their own document (be it an offer, or the contract), this is to be respected, because the parties, having turned their minds to the issue, appear to have granted the method of response a degree of importance as between the two of them. The courts will generally respect this. On this point, see *Holwell*, *supra* note 46.

<sup>50</sup> On the meaning of this term, see, for example, Peter W Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed (Supplemented) (Toronto: Carswell, loose-leaf), vol 1, §15.5(a), at page 15-9. See also *Re Giffen*, [1998] 1 SCR 91, *per* Iacobucci J, for the Court.

<sup>51</sup> An example of possible operational conflict could be shown as follows. Two parties, one of them a corporation, seek to enter into a contract for the sale of goods (though not a pre-incorporation transaction). The value of the transaction is \$300,000. The corporate party has a requirement (in its unanimous shareholder agreement) of written approval by the corporation's largest shareholder prior to the creation of any

to indicate what the content of the law of corporations ought to be. It is important to recall that this paper makes an argument for law reform. It is sufficient to say that, in my view, the closing words of section 5 are not a barrier to such reform, because the *Sale of Goods Act* does not purport to impose limits on the law of corporations. Rather, the *Sale of Goods Act* acknowledges that it does not attempt to tread upon this area at all.

A second view of the closing words would suggest that they are simply inapplicable to oral pre-incorporation transactions in any event. Remember, at common law, there is no circumstance under which the transaction entered into between the promoter and the third party will ever bind the corporations, unless a new contract is created following incorporation. Therefore, at common law, pre-incorporation transactions are a matter of agency law (concerned as they are with the non-ability of the promoter to bind the non-existent corporation).<sup>52</sup> Therefore, section 5, which relates to “the law relating to corporations”, is not engaged by pre-incorporation transactions.<sup>53</sup>

The second reason that the justification for a distinction between written and oral contracts fails to provide any assistance is that the law of contracts has progressed beyond such a distinction. There have been many cases that held that a contract may be formed partially in writing, partially orally, and even partially by the conduct of the parties. On this point, see

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contract with a value greater than \$100,000. The non-corporate party is aware of this requirement. Nonetheless, the parties enter into the contract, without the shareholder approval. The corporate party refuses to complete performance under the contract. The non-corporate party sues for breach of contract. When the non-observance of corporate formalities by the defendant arises as a potential defence to the claim, the plaintiff raises s 5 of the *Sale of Goods Act*, arguing that the *Sale of Goods Act* specifically provides for oral transactions. Therefore, the argument would run that the non-observance of corporate formalities should be ignored.

In fact, s 18 of the *Corporations Act*, *supra* note 1, specifically deals with this scenario. If the third party (in this hypothetical fact scenario, the non-corporate party to the contract) is aware of the restriction, and it is not observed, this will entitle the corporate party to end the contract based on non-observance of corporate formalities. Therefore, despite the apparently broad wording of the *Sale of Goods Act*, the provisions of *Corporations Act* ought to govern. The closing words of s 5 of the *Sale of Goods Act* give a statutory basis for this result.

<sup>52</sup> See *Kelner*, *supra* note 14, *Newbome*, *supra* note 19, and *Black*, *supra* note 22. See also *Dryco #1*, *supra* note 6 and *Dryco #2*, *supra* note 6.

<sup>53</sup> Emphasis added.

*J. Evans & Son (Portsmouth) Ltd v Merzario (Andrea) Ltd*.<sup>54</sup> Section 5 itself specifically provides legislative support to this assertion. In other words, it would be very unusual for section 5 to be interpreted in two diametrically opposed fashions simultaneously. The opening words are a recognition of the reality acknowledged by the *Evans* case, but the closing words deny this interpretation with respect to corporate contracts. If this were the intention of the legislature, it could have been far more clearly expressed.<sup>55</sup>

## 2. *The Commonality Justification*

While many Canadian jurisdictions treat written pre-incorporation transactions differently than oral ones, this is not universally the case. The general incorporation statutes in British Columbia,<sup>56</sup> New Brunswick,<sup>57</sup> and Ontario<sup>58</sup> do not draw such a distinction.

Neither Nova Scotia nor Prince Edward Island has any statutory provision dealing with pre-incorporation transactions. Therefore, of the eleven Canadian common-law jurisdictions that treat the issue of pre-incorporation transactions statutorily, three draw no distinction between oral and written contracts. The remaining eight do draw such a distinction. The point of this article is to argue that the three jurisdictions actually have a more defensible position on this issue than do the others.

Notwithstanding the need for comity, if a change in the law is warranted, in my view, then the legislature should make the change, in the hope that other jurisdictions may choose to follow suit at a later date. One can see this type of development in commercial law with respect to secured transactions in the various advancements by statutory amendment to the provincial *Personal Property Security Acts* (PPSAs).<sup>59</sup> Interestingly, the

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<sup>54</sup> [1976] 2 All ER 930, (CA). In particular, see the judgment of Roskill LJ, as he then was.

<sup>55</sup> The opening words of s 5 clearly express the general rule on this subject. To the extent that the closing words are opposed to the opening words, the closing words are an exception to the general rule. It is a maxim of statutory interpretation that exceptions should generally be narrowly interpreted. On this point, see Sullivan, *supra* note 28, at 483.

<sup>56</sup> BCBCA, *supra* note 4, s 20.

<sup>57</sup> *Business Corporations Act*, SNB 1981 c B-9.1, s 12.

<sup>58</sup> OBCA, *supra* note 8, s 21.

<sup>59</sup> These are: *Personal Property Security Act*, RSA 2000 c P-7; *Personal Property Security Act*,

amendments to the PPSAs often create what some authors refer to as “generations” of the PPSA.<sup>60</sup> Changes to some of the PPSAs led to changes in other jurisdictions.

The classic example of such a change was with respect to the treatment of long-term leases under the Ontario PPSA. In its original form, long-term “true” leases (that is, where the “lease” nomenclature was not meant to disguise a sale of the asset to the “lessee” by the “lessor”) were not caught by the PPSA at all. Despite the fact that Ontario was the first province to pass the PPSA, other provinces did not follow suit with respect to long-term “true” leases. Other provinces believed that long-term “true” leases posed difficulties if left entirely outside the PPSA’s registration system. The difficulty would be that lenders might advance credit to the lessee of an asset believing that the lessee had title. There was nowhere that the lender could look to confirm that this was in fact the case. By requiring long-term “true” lessors to register their interest in the leased asset to protect that interest, the PPSAs were improved. In fact, in 2006, the Ontario PPSA was amended to adopt the approach of the other provinces.<sup>61</sup> In other words, an improvement in one or more jurisdictions may lead other jurisdictions to consider a similar change, and led to an overall improvement in the system.

In fact, this is possible in corporate law as well, given the common legislative base of a number of corporate statutes. The current versions of the business corporations statutes in Alberta,<sup>62</sup> Saskatchewan,<sup>63</sup>

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RSBC 1996 c 359; *Personal Property Security Act*, CCSM c P35; *Personal Property Security Act*, SNB 1993 c P-7.1; *Personal Property Security Act*, SNL 1998 c P-7.1; *Personal Property Security Act*, SNWT 1994 c 8; *Personal Property Security Act*, SNS 1995-1996, c 13; *Personal Property Security Act*, SNWT (Nu) 1994, c 8; *Personal Property Security Act*, RSO 1990, c P.10; *Personal Property Security Act*, RSPEI 1988 c P-3.1; *Personal Property Security Act* 1993, SS 1993, c P-6.2; *Personal Property Security Act*, RSY 2002, c 169.

<sup>60</sup> On this point, see Ronald CC Cuming, “Second Generation Personal Property Security Legislation in Canada” (1981-82) 46 Sask L Rev at 5 and Michael G Bridge, Roderick A Macdonald, Ralph L Simmonds & Catherine Walsh, “Formalism, Functionalism, and Understanding the Law of Secured Transactions” (1999) 44 McGill LJ 567.

<sup>61</sup> See RSO 1990 c P.10, s 2, as amended by *Ministry of Government Services Consumer Protection and Service Modernization Act*, SO 2006 c 34, Schedule E, s 2.

<sup>62</sup> *Supra* note 18, s 15.

<sup>63</sup> *Supra* note 42, s 14.

Manitoba,<sup>64</sup> the Northwest Territories,<sup>65</sup> Nunavut,<sup>66</sup> New Brunswick,<sup>67</sup> Newfoundland and Labrador<sup>68</sup> and the Yukon<sup>69</sup> were all based in large part on the *Canada Business Corporations Act*.<sup>70</sup> Clearly, the similarity of language does not prevent any legislative body from making any changes that it believes appropriate,<sup>71</sup> but changes in one jurisdiction, particularly ones based on solid principle (as opposed to those that may be based on the individual needs, or particularities, of a given jurisdiction) may encourage review of previously unquestioned legislative wisdom.

In the end, given that there are three schools of thought on pre-incorporation transactions,<sup>72</sup> two of which have received legislative approval in the common-law provinces.<sup>73</sup> Any legislative change in this regard would simply “transfer” Manitoba from one school of thought to another. It therefore follows that the commonality justification is not a terribly persuasive one. Whether the split is eight common-law jurisdictions (which maintain the distinction between written and oral transactions), and three others (that do not), or a split of seven jurisdictions to four, the change, in my view, does not put Manitoba any

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<sup>64</sup> *Supra* note 1, s 14.

<sup>65</sup> *Supra* note 42, s 14.

<sup>66</sup> *Ibid*, s 14.

<sup>67</sup> *Supra* note 57, s 12.

<sup>68</sup> *Supra* note 42, s 26.

<sup>69</sup> *Ibid*, s 17.

<sup>70</sup> *Supra* note 3, s 14.

<sup>71</sup> We have already seen that there is some variation between jurisdictions on the issue of pre-incorporation transactions. There is even variation between CBCA-style jurisdictions with respect to the statutory rules on this point. For one example of such variation, see the discussion of the *Alberta Business Corporations Act*, *supra* note 18, making an express reference to a warranty by the promoter.

<sup>72</sup> The first school is the one that uses the common law for all pre-incorporation transactions (two jurisdictions). The second school applies the statutory scheme to all pre-incorporation transactions, regardless of form (currently, three additional jurisdictions). The third school applies the statute to written transactions, but the common law to oral transactions. Manitoba is of course currently in the third category, and it is being proposed in this article that it be moved, by legislative edict, to the second category.

<sup>73</sup> These are the latter two schools, referred to *ibid*.



further “out of step” with its sister-provinces than does the status quo, to any appreciable extent.

### 3. *The Evidentiary Justification*

There are at least three responses to the evidentiary justification. The first is that just because a transaction is agreed to orally does not, in and of itself, mean that there is no objective evidence of what was agreed to. Earlier, a hypothetical example was discussed where a party had delivered a written transaction by e-mail and the response to the request had been provided by telephone. Imagine that the response went to voicemail. In such a case, the jurisprudence is relatively clear that this would not be considered a transaction in writing.<sup>74</sup> Nonetheless, objective evidence of all the necessary elements of the transaction exists in both the e-mail and the voicemail message. So, simply because the transaction is in not in writing for legal purposes, it does not necessarily invoke the evidentiary justification.

Secondly, even where the evidentiary justification might be thought to apply, the current state of the law actually does not respond to this “justification” at all. If the law were such that the contract was *never* enforceable at common law, then the court could avoid determining (or having to attempt to determine) the terms to which the parties agreed. An example of such an approach to a change in the law can be found in the case of *Barnett v Harrison*.<sup>75</sup> In this case, the Court was invited to reconsider the rule in *Turney v Zhilka*.<sup>76</sup> The question in these cases was whether one party could unilaterally waive a condition precedent to performance and, in essence, either (i) force the other party to perform the contract, or (ii) have the other party breach the contract. Justice Dickson, as he then was, for the majority, refused to overrule *Turney v Zhilka*.<sup>77</sup> Part of the reason for this approach was that if the Court had reversed *Turney v Zhilka*, other courts would have had to confront difficult questions of fact. Justice Dickson held as follows:

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<sup>74</sup> See *Holwell*, *supra* note 46.

<sup>75</sup> [1976] 2 SCR 531., 57 DLR (3d) 225. This judgment was rendered by a full panel of nine justices (Laskin CJC, and Martland J, Judson J, Ritchie J, Spence J, Pigeon J, Dickson J, as he then was, Beetz J and de Grandpré J) following a rehearing.

<sup>76</sup> [1959] SCR 578, 18 DLR (2d) 447, *per* Judson J, for the Court.

<sup>77</sup> *Supra* note 75.

Fourth, application of the rule in *Turney v Zhilka* may avoid determination of two questions which can give rise to difficulty (i) whether the condition precedent is for the benefit of the purchaser alone or for the joint benefit and (ii) whether the conditions precedent are severable from the balance of the agreement. I am inclined to the view in the present case that they are not.<sup>78</sup>

Therefore, if changing a principle of law would make the task of a trier of fact more difficult, this is a factor to consider in refusing to change the principle. However, as discussed above, the law of pre-incorporation transaction is not so simple. According to *Kelner*,<sup>79</sup> *Newborne v Sensolid (Great Britain) Ltd*,<sup>80</sup> and *Black v Smallwood*,<sup>81</sup> the court must still assess whether the parties to the alleged contract were in fact the promoter and the third party, despite the mention of the corporation. So, despite the common law's attempt to avoid this result (as the evidentiary justification seems to imply), the court is still left to figure out the terms of the agreement between the parties. Therefore, this rationale for maintenance of the *status quo* would not apply in the case of pre-incorporation transactions. A change to the law of pre-incorporation transactions would thus simplify the task of a trier of fact. Therefore, the same policy concern (simplicity for the trier of fact) that justifies the status quo in *Turney v Zhilka* also justifies a change to the law of pre-incorporation transactions.

Finally, and perhaps even more paradoxically, given that this is a question for the common law, the courts will generally look to prior cases to assist them in trying to answer this question. However, all of the major cases in this area deal with written contracts. For example, in *Black v Smallwood*,<sup>82</sup> the court was convinced that the parties did not intend for the promoter to be personally liable because the signature line showed "Smallwood, Director".<sup>83</sup> One would only sign as a director when one was intending to act on behalf of a corporation of which one was a director.

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<sup>78</sup> *Ibid* at 559.

<sup>79</sup> *Supra* note 14.

<sup>80</sup> *Supra* note 19.

<sup>81</sup> *Supra* note 22.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Supra* note 22 at 60.

Therefore, in *Black*,<sup>84</sup> the signature line was critical.<sup>85</sup> Of course, in an oral contract, there is no signature line.

Similarly, in *Kelner*, the use of the word “proposed” when referring to the corporation makes it clear that the parties were aware at the time that they entered into the transaction that the corporation did not in fact exist. In an oral contract, the exact words used will not be easily ascertained. So, few if any of the common-law precedents on pre-incorporation transactions can provide any guidance, when the court is confronted with an oral contract. Leaving the law at the *status quo* does not provide meaningful certainty to either courts or the parties who are entering into these transactions. In my view, then, to the extent that a change to the law will provide both more certainty in the law (in providing a more definite answer on liability issues, by virtue of the statutory provisions), and allow more transactions to remain enforceable, this is a positive development.

### C. The Purpose of the Section

If, as Estey claims, the point of the earlier reform was to facilitate transactions,<sup>86</sup> certainty of result and enforceability are exceptionally important in the commercial arena.<sup>87</sup> After all, if the parties cannot know in advance whether the result of their discussions will be legally enforceable, it is difficult to facilitate these transactions.

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<sup>84</sup> *Supra* note 22.

<sup>85</sup> See, for example *Easson & Soberman supra* note 3 at 420. Interestingly, the authors view *Black* as more concerned with intention than formalities. On this point, see *ibid* at 420, n 19, and associated text. However, in my view, it was the signature line that most informed the Court’s intention analysis. In other words, as far as it goes, *Black* is correct. Intention is the critical factor at common law. However, determining the intentions of the parties in *Black* was done on the objective basis of the signature line.

<sup>86</sup> Estey, *supra* note 17 at 5. Corporate legislation as a whole is viewed as facilitative. On this point, see *McClurg v Canada*, [1990] 3 SCR 1020 at 1047, 76 DLR (4th) 217, *per* Dickson CJC, for the majority. Although *McClurg* was decided under the *Saskatchewan Business Corporations Act*, RSS 1978, c B-10, it is quite clear that the *SBCA* is based on the *CBCA*. In fact, *McClurg* mentions both statutes (at 1060).

<sup>87</sup> Certainty in commercial law is epitomized by the *Personal Property Security Act*, CCSM, P35, and its counterparts in the common-law provinces. See Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *The Essentials of Canadian Law – Personal Property Security Law* (Toronto: Irwin Law, 2005) at 7.

In fact, a hard-and-fast rule would better serve this purpose. In the view of the author, a section equivalent to section 14—with the exception that it would also apply to oral transactions—generates a rule that is much easier to apply than is the common law on this subject. As soon as there is an agreement with respect to a pre-incorporation transaction, both parties know that the promoter is immediately liable.<sup>88</sup> This would remain the case, until there was an adoption of the transaction by the corporation under subsection 14(2). Beyond this, the only requirements that the court establish are as follows: (i) there was an agreement; (ii) the agreement related to a pre-incorporation transaction; and (iii) the transaction has not been adopted by the corporation. If the answer to the first two issues is in the affirmative, and the third is in the negative, the promoter would be liable. This is a much more certain rule than the current common law formulation.

## D. The Reasonable Expectations of the Parties

It is quite clear that at least significant parts of the law of contracts are based on giving effect to the reasonable expectation of the parties to the parties. One commentator has even gone so far as to argue that this is the organizing principle for the law of contracts.<sup>89</sup> While I do not personally subscribe to this (in my opinion) overly-expansive view, I do agree that there is a role for the reasonable expectations of the parties in the law of contracts.<sup>90</sup> Two questions therefore present themselves for discussion:

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<sup>88</sup> If one were to adopt an equivalent to the Ontario statute (*supra* note 8), the ability of the promoter to exclude the liability provided for under s 21(1) (by virtue of s 21(4)) would be nullified, because such an exclusion of liability must be in writing. Therefore, at the time that the transaction was entered into, the promoter would always be liable if the transaction were oral.

<sup>89</sup> See Angela Swan, *Canadian Contract Law*, 2d ed (Toronto: LexisNexis Butterworths, 2009) at §1.27. However, not all commentators would agree with this assessment. For a view contrary to that put forward by Swan, see Geoff R Hall, “A Study in Reasonable Expectations” (2007) 45 Can Bus LJ 150 (a review of the first edition of Swan’s text). Although Hall does not entirely discount the importance of the reasonable expectations of the parties, he does not subscribe to Swan’s expansive view, with the reasonable expectations of the parties being the central organizing theme of the law of contracts.

<sup>90</sup> See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KBD), *per* Denning J, as he then was, where the Court laid out that reasonable reliance on a representation of the other contracting party is necessary to establish a claim of

- i. Does the common law accord with the reasonable expectations of the parties?; and
- ii. Would the application of current statutory scheme to oral transactions accord with the reasonable expectations of the parties?

Let us consider each of these in turn.

### *1. The Common Law*

As Estey<sup>91</sup> points out, pre-incorporation transactions are often entered into by the parties without the immediate assistance of counsel.<sup>92</sup> So, the more specific question then becomes: Would a reasonable businessperson (who is aware of the basics of the law, but is not necessarily aware of its details) expect that, if they enter into an oral agreement today for a company that does not exist, there was a very high likelihood that the agreement would not be enforceable? It is often said that there are never enough hours in a day. As mentioned earlier, one can hardly conceive of an arena in which this statement would be more self-evident than in the modern business environment. With that as background, therefore, why would businesspeople choose to sign an agreement that is unlikely to be legally enforceable?

Put another way, if the third party were fully aware of the implications of the current common-law formulation, would a pre-incorporation transaction be entered into by the third party? In my view, the answer to the question is actually given by the question itself. In a pre-incorporation transaction, the third party intends to end up with an agreement with the corporation. Yet, as discussed above, at common law, this is impossible. Even in *Kelner*,<sup>93</sup> where liability was imposed, it was only on the promoter personally, and not on the corporation. As discussed above, the court found that this was the intention of the parties. But the court only gets to this result by virtue of a process of elimination.<sup>94</sup> Therefore, one could view the result in *Kelner* as an attempt by the Court to ensure someone would be liable on the transaction.<sup>95</sup> Yet, the subsequent case law does not

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promissory estoppel.

<sup>91</sup> *Supra* note 17.

<sup>92</sup> *Ibid* at 10.

<sup>93</sup> *Supra* note 14.

<sup>94</sup> See *supra* note 16.

<sup>95</sup> Some could view this approach as “results-based judging”. When dealing with

pick up this thread, and instead adopts a very rule-based approach. Nonetheless, this does not change the fact that the thread is present in *Kelner*, nor does this preclude the argument made here that in fact the rules offered by the statute are in fact better-suited to achieve certainty for the parties in these transactions. It is to this last point to which we turn attention in the next section.

## 2. The Statutory Formulation

The previous section makes the argument that the common law does not accord with the reasonable expectations of businesspeople. But even if this argument were accepted, this does not end the matter. It is equally important to show that the statutory formulation would be better in this regard. As a starting point, I return to consider once again the case of *Barnett v Harrison*.<sup>96</sup> Immediately following the excerpt from *Barnett* quoted earlier, Justice Dickson, as he then was, for the majority, continues to justify his retention of the rule in *Turney v Zhilka* in the following statement:

Finally, the rule in *Turney v Zhilka* has been in effect since 1959, and has been applied many times. In the interests of certainty and predictability in the law, the rule should endure unless compelling reason for change be shown. If in any case the parties agree that the rule shall not apply, that can be readily written into the agreement. *Genem Investments Ltd. v Back et al.* [[1969] 1 O.R. 694], and *Dennis v Evans* [[1972] 1 O.R. 585.] are examples of cases in which the contract expressly provided that a condition could be waived by the party for whose benefit it had been inserted.<sup>97</sup>

From this excerpt, it can be seen that the rule in *Turney v Zhilka* was sustained at least in part on the basis of a principle that has been referred to already, that is, certainty in the law. It was also sustained at least in part on freedom of contract, that is, if the parties wish, they may reverse the rule by a clear indication of an intention to do so in their agreement.

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statutory interpretation, this is often referred to as “consequentialist analysis”. On this point, see, for example, Sullivan, *supra* note 28, at 299. In the view of the author, the *Corporations Act*, *supra* note 1, does not provide sufficient ambiguity to invoke many of the tools of statutory interpretation referred by Sullivan directly (because the statute, as currently drafted, is abundantly clear that it does not apply to oral transactions), these interpretive techniques can and should inform a request for a change in the law.

<sup>96</sup> *Supra* note 75.

<sup>97</sup> *Ibid* at 559.

Let us deal with the latter of these first. The only way that the parties can reverse the rule that applies to oral pre-incorporation transactions is by putting their agreement in writing. Other than this, reversal of the rule is not possible. There is also a factual difference at play. Both *Barnett v Harrison* and *Turney v Zhilka* involved real estate transactions, which typically involve legal assistance, particularly where a lender is providing financing for a purchase. Therefore, if the parties wish to avoid the application of the rule in *Turney v Zhilka* (in least in the arena where this issue often arises), there is the necessary legal assistance available to ensure that an enforceable contract is created. But, as given above, the current rule on oral pre-incorporation cannot be reversed by the promoter or the third party.

On the other hand, the statute is a fairly comprehensive code. I say “fairly comprehensive”, being that the case law<sup>98</sup> shows that there are significant areas where disagreements can arise. Nonetheless, section 14 makes the following exceptionally clear:

- (i) The promoter is personally liable on the transaction from the moment it is entered into;
- (ii) The promoter can avoid this liability by expressly doing so in writing in the transaction;
- (iii) This avoidance standard is unavailable with an oral transaction;<sup>99</sup> and
- (iv) This liability can be put to an end by two steps:
  - (a) the corporation must be incorporated; and
  - (b) the corporation, once incorporated, must indicate the intention to adopt the transaction;
- (v) The Court has the ability to adjust the allocation of liability between the promoter and the corporation where the third party has been misled by the

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<sup>98</sup> See, for example, *1394918 Ontario Ltd v 1310210 Ontario Inc*, *supra* note 10, and *Sherwood*, *supra* note 7.

<sup>99</sup> I am not suggesting that the avoidance standard ought to apply to oral transactions. Some might believe that this is inconsistent with the overall position of this paper. In my view, this is not the case. There is a justification for this distinction. But part of this justification is that an argument that there are both conceptual and practical problems with subsection (4). As mentioned earlier, these issues will be left to another day. This is not because these issues are unimportant. On the contrary, these issues are sufficiently important to warrant their own forum, instead of being given less than full discussion here.

words or actions or actions of the promoter, and the promoter has not invoked the avoidance standard.

This leads to certainty for all parties as to: (i) who starts with liability under the transaction; (ii) the circumstances under which that liability shifts to another person; and (iii) to whom that liability shifts. Also, the transaction generally remains enforceable against either the promoter or the corporation, thereby according with the general expectations of the parties to the transaction. Interestingly, this is also consistent with the effect of a mistaken identity of a party in contract. The Master of the Rolls explains:

I think the true principle is that which underlies the decision of this court in *King's Norton Metal Co Ltd v Eldridge, Merrett & Co Ltd* and of Horridge J in *Phillips v Brooks Ltd*, which has stood for these last 50 years. It is this: when two parties have come to a contract - or rather what appears, on the face of it, to be a contract - the fact that one party is mistaken as to the identity of the other does not mean that there is no contract, or that the contract is a nullity and void from the beginning. It only means that the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired rights under it.<sup>100</sup>

Lord Denning points out that it is reasonable for a person to believe that they are dealing with the person in front of them to whom the transaction is being proposed. In the case of a pre-incorporation transaction, the person in front of the third party is the promoter. Therefore, the application of this principle would mean that the transaction would at least begin with a transaction between the promoter and the third party. Of course, as discussed above, section 14(1) of the *Corporations Act* accomplishes this, by placing liability on the promoter.

If the presumption referred to by Lord Denning, MR, is insufficient for these purposes, the same conclusion is also supported by the indoor management rule. Originally put forward in *Royal British Bank v Turquand*,<sup>101</sup> the indoor management rule holds, among other things, that those in charge of a corporation must ensure that its internal procedures with respect to a transaction are met. The burden should not fall on the third party to ensure that the corporation is allowed, by the corporation's

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<sup>100</sup> *Lewis v Averay* [1972] 1 QB 198 at 207 (CA), per Lord Denning, MR, for the Court (Phillimore LJ and Megaw LJ concurring).

<sup>101</sup> (1856), 119 ER 886, 6 E & B 327 (Ex Ch).



own internal processes, to go ahead with the transaction. The indoor management rule finds statutory expression through section 18 of the *Corporations Act*.<sup>102</sup> At least part of the reason for this rule is that where the execution of an act is solely within the control of one party, the other party should not have to be responsible for causing the first party to do what is within their control. Instead, the obligation is placed on the party within whose control it is to accomplish this to in fact do so.<sup>103</sup> In the case of a pre-incorporation contract, the process of incorporation is within the control of the promoter. No governmental<sup>104</sup> or other permission is necessary for an incorporation in Manitoba.<sup>105</sup> There is generally nothing to prevent a promoter from incorporating the corporation.<sup>106</sup> Therefore, by analogy to the indoor management rule, a promoter cannot rely on his or her failure to perform the incorporation in a timely way as a reason why the third party cannot seek recourse against the corporation, assuming it has sufficient assets to make such a suit worthwhile.<sup>107</sup>

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<sup>102</sup> *Supra* note 1.

<sup>103</sup> See *Dawson v Helicopter Exploration Co* [1955] SCR 868 at 874, [1955] 5 DLR 404, *per* Rand J (Fauteux J, as he then was, concurring).

<sup>104</sup> Governmental permission to incorporate is required in some jurisdictions. In Canada, it is required in the one jurisdiction which continues to rely on a letters patent system for incorporations, namely, Prince Edward Island. See *Companies Act*, RSPEI 1988 c C-14, s 4. The section provides that:

“The Minister may by letters patent, grant a charter to one or more persons who apply therefor, constituting that person and others who may become shareholders in the company thereby created, a body corporate and politic for any purposes or objects to which the legislative authority of the Legislature extends, except trust companies and insurance companies.” [Emphasis added].

The use of the word “may” provides discretion in the Minister to refuse to issue the letters patent. See also VanDuzer, *supra* note 4 at 92.

<sup>105</sup> The statutory division of powers model in force in Manitoba provides no discretion with respect to incorporation. As long as the correct documents are properly completed, and the requisite fee paid, incorporation is provided as of right. See *Corporations Act*, *supra* note 1, ss 5-6. See also VanDuzer, *ibid* at 96.

<sup>106</sup> There are two exceptions to this general rule. Those who are less than 18 years of age or bankrupt cannot incorporate. See *Corporations Act*, *supra* note 1, s 5(2). Other incorporating statutes also exclude persons who both (i) have been judged by a court to be of unsound mind and (ii) who continue to be so. See CBCA, *supra* note 3, s 5(1)(b). See also, the OBCA, *supra* note 8, s 4(2)(b).

<sup>107</sup> In *Sherwood*, *supra* note 7, the plaintiff had agreed with three individual defendants

One other element is worthy of mention at this point. The change to the wording of the statute to accomplish the piece of law reform suggested here would be small indeed. If the legislature wished to make the change advocated for herein, legislators need only remove the word “written” in the opening line of section 14(1). In other words, this change would not be a massive re-writing of the *Corporations Act*, the effects of which are likely to be felt across the statute book. To use another analogy, this would be surgery with a laser, not a dull axe. Therefore, there should be less concern about wide-ranging ripples causing unintended changes in other areas of the law through the change suggested herein. This is an incremental change<sup>108</sup> to a statute, which will rationalize the section at issue and bring it into line with both the facilitative purpose of the statute as a whole, and the modern commercial reality in which the statute (and the section) are generally designed to operate.

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that a corporate vehicle would be used to complete the transaction. A man named Nichols, a lawyer at a Toronto law firm working on behalf of the individual defendants, then sent a letter to the plaintiff, indicating that the corporate defendant would be the vehicle used to complete the transaction.

A man named Fuller, who was the sole director of the corporate defendant, was a partner in the law firm. Apparently, Fuller was aware of the transaction in a general way, but not its specific terms. Nichols had sent the letter to the plaintiff vendor in his capacity as solicitor for his clients. The transaction did not close. The plaintiff sold the assets to another party. Subsequently, the law firm used the corporation named in the letter for the purposes of another transaction. The other clients of the law firm that were using the corporation for the second transaction placed assets in the corporation for the purpose of completing that second transaction. Therefore, since the corporation now had assets, it was worthwhile for the plaintiff to sue.

The majority of the Court found that the suit by the plaintiff was well-founded, given that the corporation had signalled an intention to adopt the transaction. The fact that the shareholders at the time of the suit were not the three individual defendants was, in the view of the majority, irrelevant. The corporation was bound, and it was both the defendant and in breach with respect to the transaction. Therefore, according to the majority, liability followed.

<sup>108</sup> Even the common law, with its emphasis on the value of precedent, views incremental change based on solid principle as a positive development. On this point, see, for example, *London Drugs Ltd v Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299, 97 DLR (4th) 261, *per* Iacobucci J, for the majority (L’Heureux-Dubé J, Sopinka J and Cory J, concurring).

## VI. CONCLUSION

In the end, the thesis of this article is a simple one: pre-incorporation transactions deserve the same treatment regardless of whether they are written or oral. The change to the *Corporations Act* necessary to make this a reality is minor. The law of contracts generally has moved away from many distinctions previously considered important between contracts in writing, on the one hand, and those not reduced to writing, on the other. The justifications that could be raised in defence of the current bifurcation of the law in this area are not terribly convincing. The general law of corporations seeks to facilitate transactions. The general law of contracts seeks to respect the reasonable expectations of the parties. The statutory section is better-suited to both of these goals than is the common law of pre-incorporation transactions. The certainty of the statutory section creates an opportunity to both create and fulfill the reasonable expectations of the parties. The statutory approach is also more consistent with other jurisprudence drawn from the law of contracts and corporations.

The next step rests in the hands of the legislature. Until the legislature decides to provide the clarity that reform offers in this area of the law, the courts of Manitoba will have to struggle with a bifurcated system for pre-incorporated transactions. If the legislature does act, this will be one small step to ensure that business can operate with more confidence in the enforceability of these types of transactions.

