

The Delist Debate: Shareholder Casualties in a Market War



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s over the years. Passed in 1868 following the US Civil War, it formed the basis for *Brown v Board of Education* (1954, attacking racial segregation), *Roe v Wade* (1973, abortion rights), *Bush v Gore* (2000, presidential election), and *Obergefell* (2015, same sex marriage).

What is less well known is that this amendment also is the basis for the US concept of “corporate personhood”, making the company distinct from the shareholders.

[Section 1 of the amendment](#) begins, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States...”. In that context, “persons” has been interpreted by the courts to include corporations.

This isn't just a US phenomenon. The United Kingdom landmark case of *Salomon*, dating to 1897 from the House of Lords, confirmed the 1862 statutory theory of corporate personality, meaning that the creditors of a company couldn't recover from the shareholders personally for the company's debts. Prior to becoming a Dominion in 1867, Canada imported Britain's laws, including that same 1862 *Corporations Act*.

This means a company is in law considered for most purposes to be a "person". It has rights and obligations. It can sign contracts in its own name, sue and be sued, buy and sell assets, hire and fire, pay taxes. Commerce continues.

When the company does well and its equity increases in value, the theory of corporate personhood means that the common shareholders are the winners. The converse is true as well, in that a decrease in equity value hurts those same shareholders.

Being able to buy and sell the shares of a company is important. It allows cash to flow to and from shareholders, in accordance with their separate needs and plans. This is the primary function of the world's stock exchanges – to enable buyers and sellers of those shares to meet in a credible marketplace. We call that "liquidity", in that the shareholders can liquidate their holdings into cash. (See here for a prior article on the current [liquidity crisis in the junior markets](#) and the [TSXV's response to it](#).)

The relentless war being waged through those stock exchanges and on the extractive sector generally has created a long list of casualties. Need proof of that war?

Freeport-McMoran Inc. is the world's largest producer of molybdenum and copper, and also produces gold, cobalt and silver. It's a good proxy for the global mining industry. In the summer of 2011 in the midst of the commodity superbull market, its shares were trading over \$50 [a share on the NYSE](#). Those same shares are currently trading around \$5.60 a share,

with a 52-week low of around \$3.50. Since FCX has 1.2B common shares outstanding, that plunge from \$50 represents a destruction of wealth of roughly \$50 billion.

But at least the shares are continuing to trade, and the shareholders have the opportunity to buy and sell as each sees fit. That opportunity is denied to shareholders of companies that delist from stock exchanges.

One example of this is [Rare Element Resources Ltd.](#) (REE on NYSE, at least for now). REE announced on Feb 1, 2016 that it will voluntarily delist its shares from the NYSE. Quoting from [the press release](#):

The Company's board of directors has determined that it would be in the best interest of the Company and its shareholders to voluntarily delist from the NYSE MKT exchange due to costs associated with the continued listing and NYSE MKT continued listing requirements... The Company intends to have its shares traded on the OTC Pink Current Information marketplace once the delisting from NYSE MKT is complete.

The NYSE is the world's largest stock exchange. On Feb 5, 2016 it saw 1,167,104,502 shares change hands through its platform at an average price of \$79.84, for traded value of over \$93B. That was in merely one day. The shareholders of REE had access to that liquidity and to the credibility that being listed on that global stage brings with it.

Those same shareholders will soon be facing the Pinks, where the traded volume that same day for all the OTC markets totalled \$797M, on only 92,000 trades. The REE shareholders will have to contend with limited liquidity and, in all likelihood, a more punitive bid-ask spread and less disclosure / compliance.

We're not picking on REE. It's a classic example of *The Rolling Stones* song, [I'm Gonna Walk Before They Make Me Run](#). REE is voluntarily delisting before it fails to meet the

NYSE's continuing listing requirements and gets punted off the exchange. In that context, it's a good decision for the company.

But it's an example of a decision that might be good for the company but not for the shareholders still holding shares. It's hard to see how that decision is "in the best interest of the shareholders" who are distinct from the company.

In writing this article I did some research on the insider trading history for REE. Some officers and directors sold their shares at prices far above today's 7 cents, others didn't. It's tempting to lash out at the sellers who took capital out of the market, but it would also be unfair. As long as they didn't mislead the marketplace or fail in their disclosure obligations, then the insiders of a company are just as entitled to sell as are the arm's length shareholders.

That, too, is part of the theory of corporate personhood. The officers and directors are distinct from the company itself. Their rights and obligations are related to but separate from the company's. The 14th Amendment enshrined these principles and they won't go away anytime soon.