

CURRENT ISSUES IN CORPORATE LAW
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FACULTY OF LAW, DALHOUSIE UNIVERSITY
COURSE OUTLINE & SYLLABUS
Winter 2011

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Appointments: You are welcome to phone or e-mail me to set up an appointment, or to drop by my office anytime that I am there and the door is open.

Classes: Tuesdays, 4:30 pm to 6:30 pm, Room L406.

Credit Value: Major paper course, 3 Credits.

I. Course Description

This seminar course examines current and enduring issues of corporate law, and its curriculum varies each year. For the 2010/2011 academic year the course will examine some fundamental ideas, legal issues, theories and law relevant to corporate governance.

If the importance of a subject can be judged by the number of government and industry reports it has generated in recent years, then corporate governance can certainly be said to have become, since 1995, the single, most important topic in all of corporate law. A subject that was once a matter of limited popular interest has become a matter of apparent urgency on the public agenda.

Modern Canadian securities guidelines relating to corporate governance represent an evolution of the 1994 Dey Report produced at the behest of the Toronto Stock Exchange. The Dey Report identified the principal objective of the direction and management of a business as being “to enhance shareholder value, which includes balancing gain with risk in order to ensure the financial viability of the business.” It took the approach that “effective corporate governance will, in the long term, improve corporate performance and benefit shareholders,” and that “improved corporate governance is not only in the best interests of shareholders but also serves the public interest generally.”

This hypothesis that improved corporate governance will not only be in the best interests of shareholders but also in the best interests of the public is based on the notion that while shareholders are the direct beneficiaries of corporate managerial prowess, well-run successful businesses also create employment opportunities, purchase goods and services from other businesses, pay taxes, and contribute to universities, hospitals, and other philanthropic causes. And, in a broader sense it is hoped that by generating wealth to meet people’s material needs, the operation of corporations will contribute to the betterment of society generally.

However, recent corporate scandals and the recent financial crisis have served as a reminder that individual officers and directors may have significant incentives to mislead investors and divert corporate value to themselves, harming not only shareholders but society as a whole.

Much has been written and said in the last couple of years about the role which the profit motive, greed, and self-interest have played in the corporate scandals of the last ten years and in precipitating the financial crisis of the past 24 months. We can think about a few of the infamous names connected with some of the scandals since in 2001 - Enron, Worldcom, Tyco, Adelphia, Hollinger, Lehman Brothers, for instance. Many have commented on the way in which the profit motive and the desire for high short term earnings drive executive compensation, and how these in turn have dominated corporate decision-making, for the benefit of managers and at the expense of all else, including customers, workers, the environment, and even investors.

Similarly, concern and ongoing discussions about climate change have focused attention on the contribution of the engines of industry and corporate decision-making to environmental problems, climate change and global warming. The resistance of industry to change, to spending the capital necessary to reduce emissions, has also been highlighted.

Perhaps less prominent in the news, but no less important, have been the inadequate occupational health and safety practices, driven by the need to save time and money, that contribute to workplace injuries and deaths - 60 workplace deaths in Nova Scotia alone in the last two years, 38 a year in Quebec, and so on.

Also, less prominent in the news but worthy of mention, is the issue of transnational corporations establishing factories, plants, call centers and other operations in developing countries where lower environmental and labour standards and lower wages result in lower production costs that assist such corporations by enabling them to sell their goods and services to consumers at home at very competitive prices.

All of these are important issues that make corporate governance a serious concern. Many question whether there is any connection between the principles of good corporate governance and ethical, moral or religious values.

In this course we will begin by reviewing the basic structure and principles of corporate governance in Canada. Then, using several articles written by American scholars, we will explore modern conceptions of corporate governance, including the shareholder primacy model, the team production model and the corporate entity model. Having done so, we will look more carefully at the implications of the decisions of the Supreme Court of Canada in the *Peoples* and *BCE* cases, with a view to determining what theory of corporate governance they reflect.

In subsequent classes we will explore several current issues in corporate governance including: the impact, if any, of corporate governance guidelines and codes of best practices on the profitability of corporations; whether institutional investors are having a positive impact on corporate governance; the relationship between corporate governance and corporate social responsibility; the role of the Board of directors in Executive compensation and the relationship between executive compensation and performance; and gatekeeper failure and reform.

The last 4 classes will be reserved for student paper presentations (four per class).

II. Required Materials

All students must acquire a copy of *Materials for Current Issues in Corporate Governance: An Exploration of Current Issues in Corporate Governance*, prepared by Professor Dawn Russell, Winter 2011, available in the University bookstore.

III. Evaluation

This course is intended to be participatory in nature. Students will be evaluated on the basis of their participation in class discussions, a class presentation of their paper topic, 2 short reaction papers and a major paper. The evaluation of the course will be weighted as follows:

Major Paper	65%
Class Presentation	15%
Class Participation	15%
Reaction Papers	5%

Major Paper: 65% Due: Friday, April 15, 2011, at 12 noon.

Each student is required to write a major paper for this course. The paper will be evaluated in accordance with the law school's Major Paper Guidelines. A copy of these guidelines appears in the Calendar. Accordingly, each major paper will be evaluated on the basis of the following criteria:

- (a) Research;
- (b) Organization: Logic/Coherence;
- (c) Analysis-Insight-Synthesis;
- (d) Literary Style; and
- (e) Originality.

Papers should involve in-depth research with legal emphasis in a limited field of inquiry. Discussions of a general descriptive nature will not meet the standards set out in the Guidelines.

- All students should meet with me to identify a suitable topic. A list of possible topics is provided in this syllabus. Students may write on other topics provided they are directly related to the subject of corporate governance.
- The deadline for choice of paper topic is **4:30 p.m. on Tuesday, February 8, 2011**, by which time you must provide me with a **brief written outline of your paper topic (1-2 pages) and a list of sources consulted to date**. Students are strongly advised to consult with me on their topic, before submitting their outline.
- The outline may be submitted in hard copy or electronically; however, with electronic submission, the student bears the risk of any problems with transmission.
- Major papers must be submitted in hard copy. Students should hand papers in to the reception desk and ensure they are date and time stamped and placed in my mailbox.

Please note students are also required to provide an identical electronic copy of their paper to the instructor by the due date.

- All papers must be typed, double-spaced, on one side only, on letter sized paper. The length of your paper (excluding appendices and bibliography) must not be less than 25 pages. Although there is no formal upper page limit, my expectation is that most papers in this course will be between 25 and 35 pages.
- Citations must comply with the McGill *Guide to Uniform Legal Citation*.
- Please refer to the Dalhousie Law School website for Major Paper Guidelines and the faculty regulations on late penalties.
- Please read the note below regarding plagiarism.

Class Participation: 15 %

Students are expected to come to class having read the materials and must be prepared to engage actively in class discussion. Participation will be evaluated based upon attendance and active participation in class discussions, to the extent that such participation is relevant and demonstrates an informed engagement with the assigned readings and the subject matter of the course.

Class Presentation: 15%

- Class presentations will be based on each student's paper topic.
- Presentations will be approximately 25 minutes (4 per class).
- Class presentations are not intended to be a "mini-lecture"; instead, the point is to generate discussion and explore ideas for your papers.
- Students may circulate readings or materials in advance of their presentation if they so choose, and can see me in advance to coordinate the details.
- In class on January 18, students will sign up for the date of their class presentation.

Reaction Papers: 5%

- Each student must write 2 reaction papers, each worth 2.5% (for a total of 5 %).
- These are brief (2 page) informal responses to the readings for an upcoming class; these do not require any additional research. You may decide which two sets of readings you wish to respond to.
- The **reaction papers** need not deal with all of the materials assigned for the two sets of readings you choose, but **must deal with the one reading in each set which has two astericks** beside it **and one of the other readings in the set with one asterick**.
- In the reaction papers, students must engage in a critical discussion of one or more aspects of the readings and should not simply summarize the readings.
- Reaction papers may be submitted in hard copy or electronically; however, with electronic submission, the student bears the risk of any problems with transmission.
- Reaction papers must be submitted by noon on the Tuesday for which the readings in question are assigned.

- I may sometimes use points from the reaction papers as the basis for discussion in class. If you do not want me to refer in class to a particular reaction paper that you write, make sure you indicate this on the reaction paper itself.

IV. Plagiarism and Academic Honesty

You are welcome and encouraged to discuss your paper topic with others, however, every student must write his or her paper independently.

All students in this course must read the University policies on plagiarism and academic honesty referenced in the Policies and Student Resources sections of the plagiarism.dal.ca website, and the law school policy on plagiarism, as set out in the law school regulations, available online at http://law.dal.ca/Current_Students/Course_Selection_Materials/Regulations_Handbook/index.php

Any paper or assignment submitted by a student at the Schulich School of Law may be checked for originality to confirm that the student has not plagiarized from other sources. Plagiarism is considered a serious academic offence which may lead to loss of credit, suspension or expulsion from the law school, or even revocation of a degree. It is essential that there be correct attribution of authorities from which facts and opinions have been derived. Prior to submitting any paper or other assignment, students should read and familiarize themselves with the policies referred to above and should consult with the instructor if they have any questions.

Ignorance of the policies on plagiarism will not excuse any violation of those policies.

V. Suggested Paper Topics

The following are a list of possible paper topics that students may wish to consider. This list is intended to be suggestive only and students are welcome to write a paper on a subject of their own choice, provided that the chosen topic is related to the course subject matter. Consultation with the professor regarding the selection of a paper topic is welcome and highly recommended.

These topics are stated neutrally; each student should frame his or her thesis in accordance with his or her own research findings and opinions.

1. The role of the Board of directors in corporate risk management and the impact of the risk of liability for outside directors on their management of various risks (such as injury or death to employees or consumers, environmental harm, or loss for investors).
2. The relationship between board composition and firm performance. Do outside directors make a difference? Does the presence of women on the board improve financial success or corporate social responsibility? Should corporate boards be more diverse?

3. A comparative analysis of corporate governance models in different countries such as Canada, the U.S., Germany, the U.K., Switzerland, or the EU. Are there some countries where employees participate in management and in corporate governance?
4. Would increasing shareholder power enhance corporate governance or are the benefits of shareholder control more imagined than real?
5. Private benefits and the regulation of controlling shareholders. Does the concentration of corporate ownership in public companies in Canada pose unique problems or issues that require special attention and regulation?
6. Does inherited wealth of second and third generation controlling shareholders in Canada have a negative impact on corporate governance of public companies in Canada at the expense of the investing public? One might do a case study of two or more such corporations.
7. How should the issue of controlling shareholders be managed by the Board of directors in a take-over bid situation? Compare the relevant case law on this subject in Canada and the US.
8. What, if any, is the relationship between the elements and principles of corporate governance and ethics, moral principles and/or religious values?
9. Should universal moral values be embodied in corporate codes of ethics?
10. Are boards of directors of Canadian public companies ensuring that there is an appropriate relationship between executive compensation and the long term value of the firm?
11. What impact has the Sarbanes-Oxley Act had on corporate governance in Canada? – on legislative or regulatory reform, on board processes and performance, and/or on executive management?
12. Good corporate citizenship and the decision of the SCC in *BCE*: a logical inference from prior case law, a welcome change, or a misguided development?
13. Is Canadian law doing enough to encourage corporate social responsibility?

VI. Tentative Class Schedule and Assigned Readings

The following provides an outline of the material to be covered in each class. Students are expected to have reviewed the material to be covered in preparation for each class. Classes will typically involve a presentation, either by the instructor or fellow students, followed by a class discussion. Students are encouraged to actively participate in all discussions.

The following is a tentative class and assignment schedule only. It may be necessary to amend, supplement or otherwise revise this tentative schedule, in whole or in part, as the term progresses. If this occurs, students will be informed in class of any such amendments or revisions, and the course website will be updated accordingly. If a student must be absent from

class, it is that student's responsibility to determine if any changes to the schedule have been announced.

Lecture # 1, January 4, 2011 Refresher and Introduction to Current Issues in Corporate Governance

There are no assigned readings for this lecture but students may wish to skim chapters 6, 7, and 8 of their Business Associations Casebook to remind themselves of the scope and fundamental elements of corporate governance. See also ss. 102-125 of the *Canada Business Corporations Act*.

Lecture # 2, January 11, 2011 The Shareholder Primacy Norm and Alternative Conceptions of Corporate Governance

Introduction to Lectures 2 and 3: In Whose Interests are Directors to Govern?
(Professor Russell)

Adolf A. Berle, "For Whom Are Corporate Managers Trustees: A Note" (1932), 45 Harv. L. Rev. 1365-72.

**Henry Hansmann and Reinier Kraakman, "The End of History for Corporate Law" (2001), 82 Geo. L.J. 439-68.

*Margaret M. Blair and Lynn A. Stout, "A Team Production Theory of Corporate Law" (1999), 85 Va. L. Rev. 247-328. (Excerpt only, pp.247-257 and pp. 276-287).

*Steven M. H. Wallman, "Understanding the Purpose of a Corporation: An Introduction" (1999), 24 J. Corp. L. 807-18.

Lecture #3, January 18, 2011 The SCC's Approach to Corporate Fiduciary Duties

Excerpt from *Peoples Department Stores Inc. (Trustee of) v. Wise* [2004] 3 S.C.R. 46.

*Excerpt from *BCE Inc. v. 1976 Debentureholders* [2008] 3 S.C.R. 560.

**Jeffrey G. MacIntosh, “BCE and the Peoples’ Corporate Law: Learning to Live in Quicksand” (2010), 48 C.B.L.J. 255-272.

*Edward Iacobucci, “Indeterminacy and the Canadian Supreme Court’s Approach to Corporate Fiduciary Duties” (2010), 48 C.B.L.J. 232-254.

Lecture #4, January 25, 2011 Are Institutional Investors Making a Difference in Corporate Governance?

“Institutional shareholders throw their weight around; Demand clarity; Activists able to change corporate agendas,” byline by Julius Melnitzer, *National Post*, Wed 22 Sep 2010, page LP6. (4 pages)

**Jeffrey G. MacIntosh, “Institutional Shareholders and Corporate Governance in Canada” (1996), 26 C.B.L.J. 145-88.

*Roberta Romano, “Less is More: Making Institutional Activism a Valuable Mechanism of Corporate Governance” (2001), 13 Yale J. on Reg. 174-251 (excerpt only, pp.174-187 and 222-233).

*Canadian Coalition for Good Governance, *2010 Building High Performance Boards*, March 2010, online:
http://www.ccg.ca/site/ccgg/assets/pdf/CCGG_Building_High_Performance_Boards_Final_March_2010.pdf

*****Lecture #5, Not in regular class time slot. Lecture moved to February 3, 2011 at 12 noon in room 104**

Are Corporate Governance Guidelines and Codes of Best Practices Making a Difference in the Bottom Line?

Guest Lecture by Purdy Crawford (Oslers’ Annual Business Law Forum)

Corporate Governance Guidelines and Best Practices, excerpt from 2009/2010 Business Associations Casebook, eds. Dawn Russell and Sarah Bradley, which includes a summary of the recommendations from the 1994 Dey Report.

*Institute of Corporate Directors, *Five Years to the Dey*, Report on Corporate Governance, 1999, Toronto Stock Exchange.(excerpt, pp. 1-6, 24-28, and 31-33).

Beyond Compliance: Building a Governance Culture*, **Final Report Joint Committee on Corporate Governance, November 2001 , Committee appointed by the Canadian Institute of Chartered Accountants, the Canadian Venture Exchange, and the Toronto Stock Exchange ,(often referred to as “The Saucier Report”), pp. 5-11, and 3 pages containing recommendations 2-15 extracted from the report.

National Instrument 58-101, *Disclosure of Corporate Governance Practices*, effective June 30, 2005, as amended December 31, 2007 and March 17, 2008, 28 O.S.C.B. 5377, 30 O.S.C.B. 10508, 31 O.S.C.B. 1009. (4 pages).

National Policy 58-201, *Corporate Governance Guidelines*, effective June 30, 2005, 28 O.S.C.B. 5383. (6 pages).

**Sanjai Bhagat and Bernard Black, “The Uncertain Relationship Between Board Composition and Firm Performance,”*54 Business Lawyer* 921 (1999).

Lecture #6, February 8, 2011 Corporate Social Responsibility

**Mark S. Schwartz and Archie B. Carroll, “Corporate Social Responsibility: A Three Domain Approach, in *Business Ethics and Strategy Volume I* (Burlington, Vermont, USA: Ashgate Publishing Company, 2007), pp.503-521 and 524-525.

Miscellaneous news articles on 2008 Maple Leaf listeria outbreak and on Feb. 2005 Walmart store closure following certification of store employees in Jonquiere, Quebec.

*Excerpt from Cynthia A. Williams, “The Securities and Exchange Commission and Corporate Social Transparency” (1999), 112 *Harv. L. Rev.* 1197, pp. 1199 and 1276-1311.

Canadian Securities Regulatory Requirements Relating to Disclosure of Social and Environmental Policies: sections 5.1 and 5.2 of Form 51-102F2, *Annual Information Form*, (1 page).

Lecture #7, February 15, 2011 The Role of Directors in Executive Compensation

Jacqueline Nelson, "Executive Compensation: Both eyes on the prize," *Canadian Business Magazine*, September 27, 2010.

**L. Bebchuk & J. Fried, *Pay Without Performance*, 15-58 and 81-94 (2004).

*Dan Eric Gabay, *Firms Performance and CEO Compensation in Canada*, Thesis, M.Sc. in Economics, University of Montreal, July 2005, Abstract, pp. 1-6, 13-17, 42-44.

Form 51-102F6, *Statement of Executive Compensation* (in respect of financial years ending on or after December 31, 2008). A completed Form 51-102F6 must be sent out by reporting issuers with the information circular for the AGM and in connection with a meeting at which directors are to be elected or at which the company's security holders will be asked to vote on a matter relating to executive compensation.

Lecture #8, March 1, 2011 Gatekeeper Failure

*Powers, et al., *Report of Investigation by the Special Committee of the Board of Directors of Enron Corp.* (Feb. 1, 2002) (Executive Summary).

**John C. Coffee, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms," 84 *B.U.L. Rev.* 301 (2004).

Frank Partnoy, *Strict Liability for Gatekeepers: A Reply to Professor Coffee.*

*Bernard Black, Brian Cheffins and Michael Klausner, "Outside Director Liability: A policy Analysis," *European Corporate Governance Institute, ECGI Working Paper Series in Law, Working Paper No. 59/2006, February 2006.*

Classes for March 8, 15, 22, and 29 are reserved for student paper presentations. (4 per class).

