

**CURRENT ISSUES IN CORPORATE LAW
FACULTY OF LAW, DALHOUSIE UNIVERSITY
FALL TERM 2008**

Mondays: 3:00 p.m. – 5.00 p.m.

Room 309

Instructor: Mohamed Khimji

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Course Description

This seminar examines current and enduring academic debates in corporate law. It is intended to provide deeper coverage of policy considerations and of special topics covered more lightly in other business courses; and to provide guidance and direction in selecting a paper topic and writing a longer paper. Topics to be covered include theories of the firm and capital markets, limited liability, corporate governance, comparative corporate law, and the production of corporate laws. The course aims also to inspire and stimulate endeavour, encourage scholarship, and leave students with positive memories of time spent here.

Course Materials

The following is **required**:

Roberta Romano, ed.; *Foundations of Corporate Law*; Foundation Press, 1993 (Textbook).

The Textbook contains extracts from academic articles designed to provide students with merely an introduction to some of the key issues that are relevant to this area of study. Naturally, a research-based course such as this requires more detailed inquiry with respect to specific issues; depending on the specific research topic chosen. To that end, the course timetable will list supplementary materials to assist students with their research.

Evaluation

- a) Major Paper – 60%
- b) Paper Presentation – 15%
- c) Reading Presentations – 15%
- d) Class Participation – 10%

a) Major Paper

Students will write a research paper of not less than 25 pages (including references but not bibliography) on a topic of their choice. The paper must be a policy analysis of a topic related to the law of corporations and approved by the instructor. Students may choose a topic from among those suggested on the course outline or they may design one. The suggested topics and topic areas are rather broad and will need to be refined. Choice and refinement of topic may require consultation with the instructor and students are advised to allow enough time for that process. Students must provide the instructor with an outline of their proposed paper by Friday, October 17th. The deadline for submission of the research paper is December 8th by 4.30 pm. A draft of the research paper may be submitted for feedback on or before November 17th.

The research paper must include proper citations and a bibliography. Students should use the *Canadian Guide to Uniform Legal Citation* (“*The McGill Guide*”) for all legal sources and the *Chicago Manual of Style* for all other sources. The research paper is to be handed into reception and date-stamped, with an electronic copy sent to mohamed.khimji@dal.ca. Students should consult the Dalhousie University Calendar for Major Paper Guidelines. The research paper will be evaluated on the basis of its substantive content, originality of ideas, organization, structure, and clarity.

b) Paper Presentation

Students will present their research papers to the class. The paper that is presented to the class need not be the completed version, but rather a work in progress. The paper presentation should include a discussion of your chosen paper topic and your research findings. It should be approximately 15-20 minutes.

Each student should provide the instructor with a copy of an outline for the presentation, which should be no longer than 2 pages, by noon on the Monday prior to the presentation. Also, this outline will be posted on the course web page. The paper presentation will be evaluated based upon its content, organization, structure and overall delivery to the class.

c) Reading Presentations

Students will sign up to present designated literature in the supplementary reading list. Students will be responsible for briefly summarizing the literature, presenting the central arguments and for leading the class discussion. Any reading presentation should be between 15-20 minutes.

Students will prepare a brief summary of the literature and some discussion questions, which should be no longer than 2 pages. This summary should be provided to the instructor by noon on the Monday prior to the presentation. Also, this summary will be posted on the course web page. The reading presentations will be evaluated based upon their content, organization, structure and overall delivery to the class.

d) Class Participation

Class participation will be evaluated on the basis of contribution to class discussions. Students are expected to have read the assigned reading and to attend class. Students should notify the instructor if they are unable to attend.

Penalties for Late Assignments

"The standard late penalty for a major paper is five points out of 100 per day of lateness or part thereof."

http://law.dal.ca/Current_Students/Course_Selection_Materials/Regulations_Handbook/Late_Penalties/index.php.

Students must apply to the Studies Committee for an exemption from this deduction.

Plagiarism and Academic Honesty**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 in hard copy from the Associate Dean's office and online at: http://law.dal.ca/current_students/course_selectin_materials/regulations_handbook/)
- the Orientation Handbook (provided to all first year students and available online at: http://law.dal.ca/Files/First_Year_Handbook_2007.pdf)

Any paper or assignment submitted by a student at Dalhousie Law School 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.

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

Students Requiring Accommodation

Professor Dianne Pothier is the Faculty Advisor to students with disabilities. Students with disabilities who wish to request accommodation regarding evaluation must make the request in writing to the Studies Committee. Material for the Studies Committee can be given to Tiffany Coolen-Jewers. For information about accommodation, students should speak to Assistant Dean Elizabeth Hughes or Associate Dean Michael Deturbide.

Course Timetable

The following provides an outline of the material to be covered in respect of each class. Students are expected to have reviewed the material to be covered in preparation for each class. This 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 **orally, in class**, of any such amendments or revisions. 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.

Note: in addition **TO THE READING SPECIFIED IN THE FOLLOWING SCHEDULE**, students are responsible **ALSO** for any additional supplementary updates that may be distributed or posted on the course web page.

September 8th Introduction

Required Reading:

Romano, (2005) After the Revolution in Corporate Law, 55 Journal of Legal Education 342

September 15th Theory of the Firm and Capital Markets

Required Reading:

Textbook: Chapter 1

Supplementary Reading:

The Firm as a "Separate Legal Personality"

Dewy, (1926) The Historic Background of Corporate Legal Personality, 35 Yale Law Journal 655

Pollock, (1911) Theory of Corporations in Common Law 27 Law Quarterly Review 219

The Firm as a “Nexus of Contracts”

Bainbridge, (1997) Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship, 82 Cornell Law Review 856

Bratton, (1989) The “Nexus of Contracts” Corporation: A Critical Appraisal, 74 Cornell Law Review 407

Easterbrook and Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1991)

Transaction Costs

Coase, (1937) The Nature of the Firm, *Economica*, 4(n.s.), 386

Coase, (1960) The Problem of Social Cost, 3 *Journal of Law & Economics* 1

Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985)

Agency Costs

Alchian and Demsetz. Production, Information Costs, and Economic Organisation 62 *American Economic Review* 777 (1972)

Berle and Means, *The Modern Corporation and Private Property*, rev. ed. (New York: Harcourt, Brace & World, 1968)

Blair and Stout, (1999) A Team Production Theory of Corporate Law, 85 *Virginia Law Review* 247

Property Rights

Armour and Whincop, (2007) The Proprietary Foundations of Corporate Law 27 *Oxford Journal of Legal Studies* 429

Grossman and Hart, (1986) The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration, 94 *Journal of Political Economy* 691

Hart, *Firms, Contracts and Financial Structure* (Oxford University Press, Oxford, 1995)

Hart and Moore, (1990) Property Rights and the Nature of the Firm, 98 *Journal of Political Economy* 1119

September 22nd

Legal Characteristics of the Corporation: Limited Liability

Required Reading:

Textbook: Chapter 2

Supplementary Reading:

Limited Liability

Halpern et al., (1980) An Economic Analysis of Limited Liability in Corporation Law, 30 University of Toronto Law Journal 117

Hansmann and Kraakman, (2000) The Essential Role Of Organizational Law. 110 Yale Law Journal 387

Corporate Groups

Landers, (1975) A Unified Approach to the Parent, Subsidiary, and Affiliate Question in Bankruptcy, 42 University of Chicago Law Review 589

Landers, (1976) Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy, 43 University of Chicago Law Review 527

Tort Creditors

Leebron, (1991) Limited Liability, Tort Victims, and Creditors, 91 Columbia Law Review 1565

Mendelson, (2002) A Control-Based Approach to Shareholder Liability for Corporate Torts, 102 Columbia Law Review 1203

Judicial Veil Piercing

Bainbridge, (2001) Abolishing Veil Piercing, 26 *Journal of Corporation Law* 479

Michell, (1999) Lifting the Corporate Veil in the English Courts: An Empirical Study, 3 Company, Financial and Insolvency Law Review 15

Ramsay and Noakes, (2001) Piercing the Corporate Veil in Australia, 19 Company and Securities Law Journal 250

Thompson, Robert B., (1991) Piercing the Corporate Veil: An Empirical Study, 76 Cornell Law Review 1036

September 29th

The Production of Corporate Laws

Required Reading:

Textbook: Chapter 3

Supplementary Reading:State Competition for Corporate Charters

Bebchuk, (1992) Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harvard Law Review 1435

Cary, (1974) Federalism and Corporate Law: Reflections upon Delaware 83 Yale Law Journal 663

Daniels, (1991) Should Provinces Compete: The Case for a Competitive Corporate Law Market 36 McGill Law Journal 130

Fischel, (1982) The 'Race to the Bottom' Revisited: Reflections on Recent Developments in Delaware's Corporation Law 76 Northwestern University Law Review 913

Kahan and Kamar, (2002) The Myth of State Competition in Corporate Law 55 Stanford Law Review 679

Winter, (1977) State Law, Shareholder Protection, and the Theory of the Corporation 6 Journal of Legal Studies 251

The Structure of Corporation Laws

Bebchuk, (1989) The Debate on Contractual Freedom in Corporate Law 89 Columbia Law Review 1395

Bebchuk, (1989) Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments 102 Harvard Law Review 1820

Black (1990) Is Corporate Law Trivial?: A Political and Economic Analysis 84 Northwestern University Law Review 542

Gordon, (1989) The Mandatory Structure of Corporate Law 89 Columbia Law Review 1549

Romano, (1989) Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws 89 Columbia Law Review 1599

October 6th**Financing the Corporation****Required Reading:**

Textbook: Chapter 4

Supplementary Reading:Capital Markets and Capital Structure

Cheffins, (2008) The Eclipse of Private Equity, (2008) 33 Delaware Journal of Corporate Law 1

Gilson and Kraakman, The Mechanisms of Market Efficiency, (1984) 70 Virginia Law Review 549

Gilson and Whitehead, (2008) Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets 108 Columbia Law Review 231

Jensen, Eclipse of the Public Corporation, Harvard Business Review (September-October, 1989)

Modigliani and Miller, (1958) The Cost of Capital, Corporation Finance, and the Theory of Investment, 48 American Economic Review 26

Modigliani and Miller, (1963) Corporate Income Taxes and the Cost of Capital: A Correction" 53 American Economic Review 433

Schwert, Using Financial Data to Measure Effects of Financial Regulation, (1981) 24 Journal of Law and Economics 121

Stout, Inefficient Markets and the New Finance, (2005) 14 Journal of Financial Transformation 95

Dividends

Bratton, (2005) The New Dividend Puzzle 93 Georgetown Law Journal 845

Brudney, (1980) Dividends, Discretion, and Disclosure, 66 Virginia Law Review 85

Fischel, (1981) The Law and Economics of Dividend Policy 67 Virginia Law Review 699

Dual Class Shares

Ben-Ishai and Puri, (2006) Dual Class Shares in Canada: An Historical Analysis 29 Dalhousie law Journal 117

Fischel, (1987) Organized Exchanges and the Regulation of Dual Class Common Stock 54 University of Chicago Law Review 119

Gilson, (1987) Evaluating Dual Class Common Stock: The Relevance of Substitutes 73 Virginia Law Review 807

Debt Financing

Asquith and Wizman, (1990) Event Risk, Covenants, and Bondholder Returns in Leveraged Buyouts 27 Journal of Financial Economics 195

Bradley and Roberts, The Structure and Pricing of Corporate Debt Covenants, working paper (2004), available at: <<http://ssrn.com/abstract=466240>>

Marcel, (1995) The Qualified Case against Mandatory Terms in Bonds 89 Northwestern University Law Review 565

Venture Capital

Bartlett, (2006) Venture Capital, Agency Costs, and the False Dichotomy of the Corporation 54 UCLA Law Review 37

Gilson, (2003) Engineering a Venture Capital Market: Lessons from the American Experience 55 Stanford Law Review 1067

October 13th Thanksgiving – No Classes

October 20th Internal Governance Structures

Required Reading:

Textbook: Chapter 5

Supplementary Reading:

Board Composition

Bainbridge, (2002) Why a Board? Group Decisionmaking in Corporate Governance 55 Vanderbilt Law Review

Baysinger and Butler, (1985) Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition 1 Journal of Law, Economics, and Organization 101

Bhagat and Black, (1999) The Uncertain Relationship Between Board Composition and Firm Performance 54 Business Lawyer 921

Sarbanes-Oxley Act of 2002

Cunningham, (2003) The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Might Just Work), 35 Connecticut Law Review 915

Mitchell, (2003) The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?, 48 Villanova Law Review 1189

Prentice and Spence, (2007) Sarbanes-Oxley as Quack Corporate Governance: How Wise is the Received Wisdom?, 95 Georgetown Law Journal 1843

Romano, (2005) The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 Yale Law Journal 1521

Executive Compensation

Bebchuck and Fried, (2005) Pay without Performance: Overview of the Issues 30 Journal of Corporation Law 647

Core, Guay and Thomas, (2005) Is U.S. CEO Compensation Inefficient Pay without Performance? 103 Michigan Law Review 1142

Jensen and Murphy, (1990) Performance Pay and Top Management Incentives, 98 Journal of Political Economy 225

Jensen and Murphy, (1990) CEO Incentives--It's Not How Much You Pay, But How 3 Harvard Business Review 138

Shareholders

Bebchuck, (2007) The Myth of the Shareholder Franchise 93 Virginia Law Review 675

Bebchuck, (2005) The Case for Increasing Shareholder Power 118 Harvard Law Review 833

Black, (1990) Shareholder Passivity Reexamined, 89 Michigan Law Review 520

Rock and Kahan, (2008) The Hanging Chads of Corporate Voting 96 Georgetown Law Journal 1227

Corporate Opportunities

Brudney and Clark, (1981) A New Look at Corporate Opportunities, 94 Harvard Law Review 998

Epstein, Contract and Trust in Corporate Law: The Case of Corporate Opportunity, (1996) 21 Delaware Journal of Corporate Law 5

Talley, (1998) Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, 108 Yale Law Journal 277

Corporate Social Responsibility

Engel, (1979) An Approach to Corporate Social Responsibility," 32 Stanford Law Review 1

Roe, (2001) The Shareholder Wealth Maximization Norm and Industrial Organization 149 University of Pennsylvania Law Review 2063

Smith, (1998) The Shareholder Primacy Norm 23 Journal of Corporation Law 277

Stout, (2002) Bad and Not-So-Bad Arguments for Shareholder Primacy, 75 Southern California Law Review 1189

Outside Directors

Cheffins and Black, (2006) Outside Director Liability Across Countries 84 Texas Law Review 1385

Gordon, (2007) The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices 59 Stanford Law Review 1465

Kaplan and Reishus, (1990) Outside Directorships and Corporate Performance 27
Journal of Financial Economics 389

Lin, (1996) The Effectiveness of Outside Directors as a Corporate Governance
Mechanism: Theories and Evidence 90 Northwestern University Law Review 898

Directors' and Officers' Liability Insurance

Romano, (1989) What Went Wrong with Directors' and Officers' Liability Insurance? 14
Delaware Journal of Corporate Law 1

Romano, (1990) Corporate Governance in the Aftermath of the Insurance Crisis 39
Emory Law Journal 1155

Institutional Investors

Coffee, (1991) Liquidity Versus Control: The Institutional Investor as Corporate Monitor
91 Columbia Law Review 1277

Gilson and Kraakman, (1991) Reinventing the Outside Director: An Agenda for
Institutional Investors 43 Stanford Law Review 863

Kahan and Rock, (2007) Hedge Funds in Corporate Governance and Corporate Control
155 University of Pennsylvania Law Review 1021

Rock, (1991) The Logic and (Uncertain) Significance of Institutional Shareholder Activism
79 Georgetown Law Journal 445

Controlling Shareholders

Gilson, (2006) Controlling Shareholders and Corporate Governance: Complicating the
Comparative Taxonomy 119 Harvard Law Review 1641

Gordon, (2003) Controlling Controlling Shareholders, 152 University of Pennsylvania Law
Review 785

Convergence/Divergence

Bebchuk and Roe, (1999) A Theory of Path Dependence in Corporate Ownership and
Governance, 52 Stanford Law Review 127

Branson, (2001) The Very Uncertain Prospect of "Global" Convergence 34 Cornell
International Law Journal 321

Cunningham, (1999) Commonalities and Prescriptions in the Vertical Dimension of
Global Corporate Governance 84 Cornell Law Review 1133

Cheffins, (1999) Current Trends in Corporate Governance: Going from London to Milan
via Toronto 10 Duke Journal of Comparative & International Law 5

Coffee, (1999) The Future as History: The Prospects for Global Convergence in
Corporate Governance and Its Implications 93 Northwestern University Law Review 641

Gordon, (1999) Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany 5 *Columbia Journal of European Law* 219

Hansmann and Kraakman, (2001) The End of History for Corporate Law, 89 *Georgetown Law Journal* 439

Rock, (1996) America's Shifting Fascination with Comparative Corporate Governance, 74 *Washington University Law Quarterly* 367

Empty Voting

Hu and Black, (2006) *The New Vote Buying: Empty Voting and Hidden Ownership*, 79 *Southern California Law Review* 811

Hu and Black, (2008) Equity and Debt Decoupling and Empty Voting II: Importance and Extensions 156 *University of Pennsylvania Law Review* 625

Close Corporations

Easterbrook and Fischel, (1986) Close Corporations and Agency Costs, 38 *Stanford Law Review* 271

Rock and Wachter, (1999) Waiting for the Omelet to Set: Match Specific Assets and Minority Oppression in Close Corporations 24 *Journal of Corporation Law* 913

The Role of Extra-legal Norms

Eisenberg, (1999) Corporate Law and Social Norms 99 *Columbia Law Review* 1253

Kahan, (2001) The Limited Significance of Norms for Corporate Governance 149 *University of Pennsylvania Law Review* 1869

Rock, (2001) Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation, 149 *University of Pennsylvania Law Review* 1619

October 27th

External Governance Structures: The Market for Corporate Control

Required Reading:

Textbook: Chapter 6

Supplementary Reading:

Theories and Evidence

Agrawal, Jaffe and Mandelker, (1992) The Post-Merger Performance of Acquiring Firms: A Re-Examination of an Anomaly 47 *The Journal of Finance* 1605

Healy, Palepu and Ruback (1992) Does Corporate Performance Improve After Mergers? 31 *Journal of Financial Economics* 135

Jensen, (1986) Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers 76 American Economic Review 323

Jensen, (1991) Corporate Control and the Politics of Finance 4 Journal of Applied Corporate Finance 13

Romano, (1992) A Guide to Takeovers: Theory, Evidence and Regulation 9 Yale Journal on Regulation 119

Management's Fiduciary Duty and Takeover Defences

Baysinger and Butler, (1985) Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation 71 Virginia Law Review 1257

Bebchuk, (1982) Comment: The Case for Facilitating Competing Tender Offers 95 Harvard Law Review 1028

Easterbrook & Fischel, (1982) Auctions and Sunk Costs in Tender Offers 35 Stanford Law Review 1

Oesterle, (1985) Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis 71 Cornell Law Review 53

November 3rd

Securities Regulation

Required Reading:

Textbook: Chapter 7

Supplementary Reading:

Disclosure Regulation

Bainbridge, (2000) Mandatory Disclosure: A Behavioral Analysis, 68 University of Cincinnati Law Review 1023

Black, (1991) Disclosure, Not Censorship: The Case for Proxy Reform 17 Journal of Corporation Law 49

Coffee, (1984) Market Failure and the Economic Case for a Mandatory Disclosure System 70 Virginia Law Review 717

Fox, (1999) Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment 85 Virginia Law Review 1335

Palmiter, (1999) Toward Disclosure Choice in Securities Offerings Columbia Business Law Review 1

Prentice, (2002) Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future 51 Duke Law Journal 1397

Insider Trading Regulation

Bainbridge, (1986) The Insider Trading Prohibition: A Legal and Economic Enigma 38 University of Florida Law Review 35

Comeau, (2006) The Hidden Contradiction Within Insider Trading Regulation 53 UCLA Law Review 1275

Dooley, (1980) Enforcement of Insider Trading Restrictions 66 Virginia Law Review 1

Easterbrook, Insider Trading as an Agency Problem in Pratt and Zeckhauser, eds., *Principals and Agents: The Structure of Business* 81 (Boston: Harvard Business School, 1985)

Goshen and Parchomovsky, (2001) On Insider Trading, Markets, and "Negative" Property Rights in Information 87 Virginia Law Review 1229

Manne, (1970) Insider Trading and the Law Professors 23 Vanderbilt Law Review 547

Manne, (2005) Insider Trading: Hayek, Virtual Markets, and the Dog that Did Not Bark 31 Journal of Corporation Law 167

Schotland, (1967) Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market 53 Virginia Law Review 1425

November 10th Paper Presentations

November 17th Paper Presentations

November 24th Paper Presentations

December 1st Paper Presentations