

**Course Outline**

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| <b>COURSE:</b>                    | <b>LAWS 4202A – Accountability of Management</b>  |
| <b>TERM:</b>                      | <b>FALL 2019</b>  |
| <b>PREREQUISITES:</b>             | <b>LAWS 2908, LAWS 2201, LAWS 2202 and Fourth-Year Honours standing</b>   |
| <b>CLASS:</b>                     | <b>Day &amp; Time: Mondays, 6:05 p.m. – 8:55 p.m.</b><br><b>Room: Please check with Carleton Central for current room location</b>  |
| <b>INSTRUCTOR:<br/>(CONTRACT)</b> | <b>Carey Thomson, LL.B.</b>   |
| <b>CONTACT:</b>                   | <b>Office: B442 Loeb Building (Contract Instructor’s Office)</b><br><b>Office Hrs: Tuesdays 3:30 p.m. – 4:30p.m. by appointment or by drop-in, on a first come, first served basis, after scheduled appointments are concluded. Email communications from students are also welcomed during this time slot.</b><br><b>Telephone: N/A</b><br><b>Email: carey.thomson@carleton.ca</b> |

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**CALENDAR COURSE DESCRIPTION**

Role, function, and legal regulation of persons managing business enterprises. Status, social responsibility, fiduciary obligations and rights. Control and accountability of managers, obligations owed to the enterprise unit itself, constitutional rights of members, standards imposed by statutory regulation.

**COURSE DESCRIPTION**

This course discusses the problem of governing corporations and corporate management in particular. It examines problematic issues in corporate governance and the reasons for controlling corporate directors, officers or managers in Canada. It also reviews some of the legal and non-legal regulatory mechanisms that seek to govern the actions of the corporation and its management in capitalist societies.

The course has three main sections. The first section offers a theoretical introduction to corporate governance. It critically reviews corporate governance theories, the merits of the shareholder primacy model and the current debate on the convergence or divergence of corporate governance models.

The second section presents the reasons for controlling corporations and management.

The third section discusses some legal and non-legal mechanisms that seek to control corporate activity and corporate management. It reviews the Canadian legal framework of the duties of directors and officers, the oppression remedy, institutional shareholder activism and the role of workers.

The course objectives are twofold. First, it seeks to provide students with an opportunity to undertake a critical analysis of the problems of, and regulatory solutions to, governing corporations and their management. Second, it also aims to help students develop their critical, analytical and research skills in the area of corporate law in context.

**TEACHING METHOD**

The course is largely based on class discussions. The professor will provide an introduction to the topics explaining the central issues and presenting provocative questions. This will be followed by students' reading presentations. In every session, two students will discuss the readings under the guidance of the professor. The discussions will clarify, illustrate (with examples and modern applications) and criticize the claims made by the authors. This method seeks to engage students in an intensive discussion of the materials, which in turn will help them develop their critical skills.

**READING MATERIALS**

Readings are available via ARES (Carleton University)

**EVALUATION**

**All components must be completed in order to get a passing grade.**

Standing in a course is determined by the course instructor subject to the approval of the Department and of the Faculty Dean. This means that grades submitted by the instructor may be subject to revision. No grades are final until they have been approved by the Department and the Dean.

- Research Paper (Times New Roman or Arial, 12 font, 12-15 pages, excluding the bibliography):  
60%  
*Deadline: Monday, Dec. 9<sup>th</sup>, 2019 at 5 p.m.*
- Class Participation: 20%
- Reading Presentation: 20%
- **Total: 100%**

**RESEARCH PAPER****The Final Paper**

While the emphasis will be placed on the novelty of the argument and the critical analysis thereof, the papers (in Word Document format, Times New Roman or Arial, font 12)) will be graded on the basis of the following considerations:

1. Topic: free topic but must be related to the course topics, relevant, very narrow!
2. Thesis: clear statement of argument and support at the outset (in the executive summary/introduction – the 'spoiler alert'), novelty!
3. Research: breadth and depth of research focusing on argument.
4. Analysis: critical, interdisciplinary, depth, focus on argument, logic, balance
5. Originality: novelty, insight, thought-provoking.
6. Evidence: primarily scholarly references to support claims; avoid quotations, instead paraphrase authors' ideas using your own words and citing source.

7. Readings: a minimum of 3 readings from the required material must be cited. References to course readings do not necessarily have to be central to the paper argument. In part, this requirement is to confirm whether students are familiar with the course materials and class discussions. Outside readings are welcome.
8. Organization: clear structure throughout paper i.e. executive summary/introduction, development of argument by articulating the key claims with supportive references, conclusion – thoughtful not just perfunctory
9. Style: clarity, flow, avoid long sentences and paragraphs, correct citation format (McGill format is preferred) and grammar.
10. Length: **maximum** 12-15 double-spaced pages, excluding bibliography. Do not waste space and time describing the topic without developing your argument or discussing issues that are not central to the argument of your paper.
11. Deadline: **Monday, December 9<sup>th</sup>, 2019 at 5 p.m.**
12. Submission: students must submit their final essays by the deadline *via the course cuLearn drop box identified for such purpose. Late submissions will be penalized* (i.e. deduction of *one grade per day up to a two-day maximum* – for example, B+ to B, B to B-, etc. for a one-day penalty; B+ to B-, B to C+, etc. for a Final Paper that is late by two or more days).

### **The Process of Writing the Paper**

The process of writing the paper involves three main steps. First, every student will submit and present her or his paper plan (1-2 pages) on the day scheduled for small group presentation. A paper plan must include a narrow topic related to a topic in the course outline, potential or working argument, ideas about how the argument will be developed and some initial sources.

Second, students will also submit and present a full-written, well-referenced draft of their papers in small groups. This first draft must be submitted to the professor 2 days before the day scheduled for presentation. Students must highlight the thesis/argument statement and at least 2-3 key points and references that develop and support the thesis throughout their paper drafts. The discussion of paper drafts in class should provide important feedback that students should seriously consider in order to improve their papers.

***Students that have specific questions about their draft or the professor's feedback should consider emailing the professor to seek assistance.***

The third and last step involves the submission of the revised research papers on the deadline. While the submission of paper plans and drafts do not have a separate grade, compliance with these requirements will be factored in the final grade for the papers. The schedule is as follows:

Presentations of Paper Plans: September 30th and October 7<sup>th</sup>, 2019  
 Presentations of First Paper Draft: November 18<sup>th</sup>, 25<sup>th</sup> and December 2<sup>nd</sup>, 2019  
 Submission of Final Paper: Monday, December 9<sup>th</sup>, 2019 at 5 p.m.

The schedule of presentations of paper plans and paper drafts will be confirmed in the first class.

### **READING PRESENTATIONS**

Every student will give one presentation on the readings. This presentation will take the form of a summary of, or a

critical response to, the assigned readings. For every class, there will be, at least, two students presenting on the readings.

The first student will provide a brief summary of ALL the readings assigned for the relevant session. The summary should focus on analyzing the central claims and supportive evidence of the authors.

The second student (the respondent) will criticize the authors' claims and provide comments on the presentation of the summary. This response must articulate a view as to whether the respondent agrees with the authors' claims and the presenter of the summary. Drawing on the readings, the strength of the summary presentation and the response should lie in the ability to examine or challenge the authors' views.

Participants are encouraged to use examples, counter-examples, outside readings, audio-visual materials or other evidence to support their positions on the issues. Both the presenter and the respondent must submit by email a brief written statement (1-2 pages) of their respective presentations 2 days before the day scheduled for presentation. Both the summary presentation and the response will be graded as part of the 20% portion of the total grade. This grade will mainly reward the serious effort made by the student to examine the materials. While students will take the materials seriously, there is no expectation that students will understand all of the details of the readings.

The schedule of reading presentations will be confirmed in the first class. There are approximately 11-12 sessions in the term and it is expected that every student will have the opportunity to give a presentation.

## **CLASS PARTICIPATION**

This portion of the grade will be based on weekly attendance (for the entire class – no partial marks will be awarded for late arrivals to and/or early exits from class) and informed contribution to the class discussions. It is both a quantitative and qualitative assessment. It is assumed that students will attend the sessions having read the materials assigned for each class. Every student must be prepared to provide informed comments on the readings.

The professor will verify this by informally asking students to comment on the readings before or during the class discussion.

Students' participation will be evaluated throughout the term. Students should consider multiple ways of actively engaging in the class discussion such as raising issues for discussion, asking questions, agreeing or disagreeing with the authors and class presentations, providing answers to important problems, taking minutes of the discussion or presenting examples or counter-examples (e.g. business or political news) to support a position.

## **LAPTOPS AND CELLPHONES IN CLASS**

Students are expected to use technology respectfully in class and to consider the impact of their actions on their fellow students and on my ability to deliver a lecture or conduct a class discussion. If a student is using technology in a way that interferes with the learning environment, I may ask the student to curtail the use of cell phones or laptops in class.

## **REQUIRED MATERIALS**

Readings are available via ARES (Carleton University).

Readings for Weeks 10 and 11 are taken from R. L. Campbell, editor, *Accountability of Corporate Management, Canadian legal studies series* (Captus Press Inc., 2013).

Students *may* also find it helpful for general background/contextual knowledge to purchase or rent Robert W. Sexty, “*Canadian Business and Society – Ethics, Responsibilities, & Sustainability*”, Fourth Edition [2017] (Available in the Carleton University Bookstore).

## SCHEDULE OF TOPICS AND READINGS

### I. INTRODUCTION

**Week 1 (Class 1) – Sept. 9<sup>th</sup>: Introduction**

### II. PERSPECTIVES ON CORPORATE GOVERNANCE

**Week 2 (Class 2) – Sept. 16<sup>th</sup>: The Shareholder Primacy Model and its Problems:** Explain the main elements of the shareholder primacy model. Why is the shareholder primacy model problematic?

William W. Bratton, “Enron and the Dark Side of Shareholder Value” (2002) 76  
Tulane Law Review 1275 at 1340-1358.

Paddy Ireland, “Shareholder Primacy and the Distribution of Wealth” (2005) 68 (1) *The Modern Law Review* 49 pp. 49-81. Lynn A. Stout, “Bad and Not-So-Bad Arguments for Shareholder Primacy” (2002) 76 *Southern California Law Review* 1189 pp. 1189-1209.

**Week 3 (Class 3) – Sept. 23<sup>rd</sup>: Forms and Varieties of Capitalism:** What are the main differences between liberal market economies and coordinated market economies? How are corporations governed in liberal market economies and coordinated market economies?

Peter A. Hall & David Soskice, “An Introduction to Varieties of Capitalism” (2001) in Peter A. Hall & David Soskice, ed(s)., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001) pp 1-67.

**Week 4 (Class 4) – Sept. 30<sup>th</sup>: Convergence and Divergence of Corporate Governance Systems:** Have all countries converged to the Anglo-American shareholder model of corporate governance? Why do Germany and Japan represent a distinct corporate governance model? Are the German and Japanese corporate governance systems superior to the Anglo-American shareholder model?

Henry Hansmann & Reiner Kraakman, “The End of History for Corporate Law” (2001) 89 *Georgetown Law Journal* 439

Gregory Jackson, “The Origins of Non-Liberal Corporate Governance in Germany and Japan” (2001) in Wolfgang Streeck and Kozo Yamamura (eds.), *The Origins of Non-Liberal Capitalism: Germany and Japan in Comparison* (Ithaca, NY: Cornell University Press, 2001) pp 121-170.

Mark J. Roe, “Modern Politics and Ownership Separation” (2004) in Jeffrey N. Gordon & Mark J. Roe, eds., *Convergence and Persistence in Corporate*

*Governance* (Cambridge: Cambridge University Press, 2004) pp. 252–290.

### III. THE PROBLEM OF GOVERNING THE CORPORATION AND MANAGEMENT

**Week 5 (Class 5) – Oct. 7<sup>th</sup>: Separation of Ownership and Control:** What is the separation of ownership and control? What are the typical measures that can be taken to control agents (directors, officers or managers)? Are the interests of non-shareholder stakeholders (e.g. workers, suppliers, consumers) important when controlling agents?

Marks, Stephen G. “The Separation of Ownership and Control” from Boudewijn Bouckaert & Gerrit de Geest, eds., *Encyclopedia of Law and Economics*, vol 3: *The Regulation of Contracts* (Edward Elgar Publishing Ltd., 2000) pp. 692-710. Electronic access: <http://encyclo.findlaw.com/>

Henry Hansmann and Reinier H. Kraakman, “Agency Problems and Legal Strategies” in R. Kraakman, P. Davies, H. Hansmann, G. Hertig, K. Hopt, H. Kanda, and E. Rock, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2004) pp. 21-31, available at SSRN: <http://ssrn.com/abstract=616003>.

Jonathan R. Macey, “Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective” (1998) 84:5 *Cornell Law Review* 1266-1281.

**Week 6 – No Class – Thanksgiving Day Statutory Holiday**

**Week 7 – No Class – Fall Reading Week Break (October 21<sup>st</sup> – October 25<sup>th</sup>)**

**Week 8 (Class 6) – Oct. 28<sup>th</sup>: Why Control of Management is Necessary: The Example of Excessive Executive Compensation in Canada.** Is Executive Compensation in Canada excessive? How big is the Gap between Executive Pay and Worker Salaries in Canada? Do Mismanagement and Abuse of Power by Directors and Officers explain the Excessiveness of Executive Compensation in Canada?

Salazar, Alberto and Raggiunti, John, “Why Does Executive Greed Prevail in the United States and Canada but Not in Japan? The Pattern of Low CEO Pay and High Worker Welfare in Japanese Corporations” *American Journal of Comparative Law* (2016), forthcoming; Osgoode Legal Studies Research Paper No. 73/ 2014. Available at SSRN: <http://ssrn.com/abstract=2321493> or <http://dx.doi.org/10.2139/ssrn.2321493>

Hugh Mackenzie, “Glory Days. CEO Pay in Canada Soaring to Pre-Recession Highs” (January 2, 2015) Canadian Centre for Policy Alternatives, online: <https://www.policyalternatives.ca/publications/reports/glory-days#sthash.ARIRrg43.dpuf>

### IV. SOME GOVERNANCE MECHANISMS

**Week 9 (Class 7) – Nov. 4<sup>th</sup>: Duties of Directors and Officers (I):** What duties do directors and officers of corporations have? Why are these duties important in governing corporations? What is fiduciary duty according to Canadian corporate law? To whom are fiduciary duties owed?

Jeff Mackintosh, “Directors' Duties in Canada: Paintings in a Stream?” in Adolfo Paolini, editor,

*Research Handbook on Directors' Duties* (Edward Elgar, 2014 hardback), pp.44-71.  
 Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, 2010), Chapter 6: "Sensitizing Boardroom Obligations to Corporate Social Responsibility", pp 197-228

### **Fiduciary Duties: Best Interest of the Corporation**

- *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 (CanLII), [2008] 3 SCR 560

**Week 10 (Class 8) – Nov. 11<sup>th</sup>: Duties of Directors and Officers (II):** What is a duty of care according to Canadian corporate law? To whom are the duties of care owed? Are the legally required duties of directors and officers effective in preventing managerial misconduct and protecting the interests of shareholders and stakeholders?

### **Skill, Care and Diligence**

- *Re City Equitable Fire Insurance Co.* [1925] 1 Ch. 407.
- Russell Lynn Campbell, "Directors' Diligence Under the Income Tax Act" (1990) 16 Can. Bus. L.J. 480 at pp.480-501 (total 22 pages).
- *Soper v. Canada* (1997) 149 D.L.R. (4th) 297 at 300-302, 318-325.
- *Peoples Department Stores Inc. (Trustee of) v. Wise* (Continued) 2004 SCC 68, [2004] 3 S.C.R. 461, (2004) 244 D.L.R. (4th) 564.
- Russell Lynn Campbell, "The Supreme Court's Decision in Peoples: A New Standard of Directors' Liability?" (2007) 55: 3 Canadian Tax Journal 465 at pp. 466-69, 475-80 (total 10 pages).
- *Canada v. Buckingham* 2011 FCA 142 paras. 4-15, 30-60.
- *Kerr v. Danier Leather Inc.* 2007 SCC 44, (2007) 87 O.R. (3d) 398, (2007) 286 D.L.R. (4th) 601.
- *Canada Business Corporations Act*, R.S.C. 1985 c. C-44, ss. 122–125

**Week 11 (Class 9) – Nov. 18<sup>th</sup>: Oppression Remedy:** What is the Oppression Remedy according to Canadian corporate law? Is the Oppression Remedy effective in protecting minority shareholders and non-shareholder stakeholders?

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ss. 241-242  
*820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 178-80, 191, 197, 216-22 (Ont. Ct. [Gen. Div.]).  
*Deluce Holdings Inc. v. Air Canada* (1992), [1993] 12 O.R. (3d) 131 at 134-36, 142-48 (Ont. Ct. (Gen. Div.) ).  
*Budd v. Gentra Inc.* (1998) Ont. C.A. File No. C25588  
*Dylex Ltd. (Trustee of) v. Anderson* (2003) 63 O.R. (3d) 659 (Sup. Ct.)  
*UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (Trial)* (2002) 214 D.L.R. (4<sup>th</sup>) 496, (2002) 19 C.C.E.L. (3d) 203 (Ont. Sup. Ct.)  
*UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (Appeal)* (2004) 250 D.L.R. (4th) 526, (2004) 32 C.C.E.L. (3d) 68 (Ont. C.A.)  
*Icahn Partners LP v. Lions Gate Entertainment Corp.* (2011) BCCA 228 paras. 1-9, 39-42, 66-90.

**Week 12 (Class 10) – Nov 25<sup>th</sup>: Institutional Shareholder Activism: The Example of Pension Funds in Canada.** What is Institutional Shareholder Activism? Are active institutional shareholders such as pension funds capable of controlling mismanagement or abuse of power by directors and officers?

- Edward J. Waitzer & Douglas Sarro, “The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees” (2012) 91 (1) Canadian Bar Review 163 (pp. 163-209). ISSN: 0008-3003. Available at SSRN: <http://ssrn.com/abstract=2222836> or <http://dx.doi.org/10.2139/ssrn.2222836>

**Week 13 (Class 11) – Dec. 2<sup>nd</sup>: Paper Draft Submissions (last group) and Discussions**

**\*Week 13 (Class 12) – Dec. 6<sup>th</sup>: Make up Class due to Thanksgiving Day Holiday –Individual Advice on the Final Paper**

**Week 13 (Class 12) – Dec. 6<sup>th</sup>: Role of Workers in Governing Corporations and Management:** Do the interest and voices of workers really matter in corporate decisions? What are the potential forms of workers’ participation in governing the corporation and its management? (LAST CLASS)

- Harry W. Arthurs & Claire Mumme, “From Governance to Political Economy: Insights from a Study of Relations between Corporations and Workers” (2007) 45 (3) Osgoode Hall Law Journal 439 (pp 439-470).

## **ACADEMIC ACCOMMODATIONS**

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

**Pregnancy obligation:** Please contact me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details, visit the Equity Services website: <https://carleton.ca/equity/accommodation/academic/students/>

**Religious obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details, visit the Equity Services website: <https://carleton.ca/equity/accommodation/academic/students/>

**Academic Accommodations for Students with Disabilities:** If you have a documented disability requiring academic accommodations in this course, please contact The Paul Menton Centre (PMC) at 613-520-6608 or [pmc@carleton.ca](mailto:pmc@carleton.ca) for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your Letter of Accommodation at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (if applicable). After requesting accommodation from PMC, meet with me as soon as possible to ensure accommodation arrangements are made. Please consult the PMC Website for their deadline to request accommodations for the formally-scheduled exam (if applicable). <https://carleton.ca/pmc/students/accommodations/>

## **Plagiarism**

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own.



Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence.

More information on the University's Academic Integrity Policy can be found at:

<https://carleton.ca/registrar/academic-integrity/>

### **Survivors of Sexual Violence**

As a community, Carleton University is committed to maintaining a positive learning, working and living environment where sexual violence will not be tolerated, and survivors are supported through academic accommodations as per Carleton's Sexual Violence Policy. For more information about the services available at the university and to obtain information about sexual violence and/or support, visit: <https://carleton.ca/sexual-violence-support/>

### **Accommodation for Student Activities**

Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation must be provided to students who compete or perform at the national or international level. Please contact your instructor with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. <https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf>

For more information on academic accommodation, please contact the departmental administrator or visit:

<https://carleton.ca/equity/accommodation/academic/>

### **Department Policy**

The Department of Law and Legal Studies operates in association with certain policies and procedures. Please review these documents to ensure that your practices meet our Department's expectations.

<http://carleton.ca/law/current-students/>