

Course Outline

COURSE:	LAWS 4202A – Accountability of Management
TERM:	Fall 2014
PREREQUISITES:	LAWS 3201
CLASS:	Day & Time: Wednesday 11:35am-2:25pm
	Room: Please check with Carleton Central for current room location
INSTRUCTOR:	Prof. Alberto R. Salazar V.
CONTACT:	Office: C470 Loeb Building
	Office Hrs: Wednesdays 3:00-4:30 pm
	Telephone: 613-520-2600 x. 3269
	Email: alberto.salazar@carleton.ca

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: 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: <http://www2.carleton.ca/equity/>

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: <http://www2.carleton.ca/equity/>

Academic Accommodations for Students with Disabilities: The **Paul Menton Centre** for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or 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 to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (*if applicable*) at <http://www2.carleton.ca/pmc/new-and-current-students/dates-and-deadlines/>

You can visit the Equity Services website to view the policies and to obtain more detailed information on academic accommodation at <http://www2.carleton.ca/equity/>

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:

<http://www.carleton.ca/studentaffairs/academic-integrity/>

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://www.carleton.ca/law/student-resources/department-policies/>

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 and securities regulation. It also examines the role of institutional shareholder activism and 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.

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 (12-15 pages): 60 % Deadline: December 3, 2014 (last class)

Class Participation: 20 %

Reading Presentation: 20 %

RESEARCH PAPER

The Final Product

While the emphasis will be placed on the novelty of the argument and the critical analysis thereof, the papers 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 at the outset (ideally in the introduction), 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 5 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. introduction, development of argument by articulating the key claims with supportive references, conclusion
9. Style: clarity, flow, avoid long sentences and paragraphs, correct citation format (any but be consistent e.g. APA¹, McGill or the like) and grammar.
10. Length: maximum 12-15 double-spaced pages. 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: December 3, 2014 (last class)
12. Submission: students must hand in their final essays by the deadline and in class. Email submissions of final papers are not permitted. Late submissions will be penalized.

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 presentation. A paper plan must include a narrow topic, 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. 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: October 8 and 15, 2014

Presentations of First Paper Draft: November 12, 19 and 26, 2014

Submission of Final Paper: December 3, 2014

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

¹ Students can find examples of APA citation format on the internet. See e.g. <http://www.lesley.edu/library/guides/citation/apa.html>

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 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 and informed contribution to the class discussions. 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 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

Alberto R. Salazar V., editor, *Accountability of Corporate Management* (Carleton University, 2014), available via ARES.

Readings for Week 6 to 11 are taken from R. L. Campbell, editor, *Accountability of Corporate Management, Canadian legal studies series* (Captus Press Inc., 2013).

SCHEDULE OF TOPICS AND READINGS

I. INTRODUCTION

Week 1- Sept. 10: Introduction

II. THEORETICAL PERSPECTIVES ON CORPORATE GOVERNANCE

Week 2-Sept. 17: 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-Sept. 24: 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-Oct. 1: 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-Oct. 8: 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-Oct. 15: Why Control of Management is Necessary: Provide specific reasons and examples.

- Edward S. Herman, “Corporate Control: Background and Issues” from Edward S. Herman, *Corporate Control, Corporate Power: A Twentieth Century Fund Study*

- (Cambridge: Press Syndicate of the University of Cambridge, 1981), ch.1, at pp.1-9
- Bryan S. Schaffer, “Board Assessments of Managerial Performance: An Analysis of Attribution Processes” (2002) 17:2 *Journal of Managerial Psychology* 95.
 - Renée Adams, Benjamin E. Hermalin, Michael S. Weisbach, “The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey” (2010) 48:1 *Journal of Economic Literature* 58 at 58-59, 64-67, 96-102 (total 13 pages).
 - P.M. Vasudev and Susan Watson, “Corporate Governance – An Overview” from P.M. Vasudev and Susan Watson, eds., *Corporate Governance after the Financial Crisis* (UK: Edward Elgar Ltd., 2012), Introduction at 1-5.
 - Donald Nordberg, “Corporate Governance in Theory” (2010) from “Unfettered Agents? The Role of Ethics in Corporate Governance” in H. Kent Baker and Ronald Anderson, ed., *Corporate Governance: A Synthesis of Theory, Research and Practice* (Hoboken, NJ: John Wiley & Sons, Inc., 2010) Chapter 10 at pp.177-183 (total 7 pages).
 - Christopher D. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90:1 *Yale Law Journal* at pp.1-7, 76-77 (total 9 pages).
 - Daniel J. Morrissey, “Toward a New/Old Theory of Corporate Social Responsibility” (1989) 40:3 *Syracuse Law Review* at pp.1005-1011, 1032-1039 (total 15 pages).
 - Leon Getz, "Discretion of Corporate Management To Do Good at the Expense of Shareholder Gain-Canadian Corporate Law" (1988) 13 *Canada-United States Law Journal* 1 at pp.1-6 (total 6 pages).
 - Christopher S. Axworthy, "Corporate Law as if Some People Mattered" (1986) 36 *University of Toronto Law Journal* 392 at pp.392-399 (total 8 pages).
 - "The Objective and Conduct of The Corporation" excerpts from Part II from *Principles of Corporate Governance: Analysis and Recommendations*, Volume 1, (Philadelphia: The American Law Institute, 1994) Article 2.01 (Analysis and Recommendation) at pp.55-58, 60-66.
 - Richard Tudway and Ana-Maria Pascal, “Corporate governance, shareholder value and societal expectations” (2006) 6:3 *Corporate Governance* 305 at 307-311.
 - *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* [1906] 2 Ch. 34 at 41-43.
 - *Olson v. Phoenix Industrial Supply* (1984) 9 D.L.R. (4h) 451.

IV. SOME GOVERNANCE MECHANISMS

Week 7-Oct. 22: 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?

- Oliver Hart "An Economist's View of Fiduciary Duty" (1993) 43 University of Toronto Law Journal 299 at pp.299-313 (total 15 pages).
- Victor Brudney, "Revisiting the Import of Shareholder Consent for Corporate Fiduciary Loyalty Obligations" (2000) 25 Iowa J. Corp. L. 209 at pp.209-219, 239-240 (approx. 12 pages).
- Victor Brudney, "Contract and Fiduciary Duty in Corporate Law" (1997) 38 Boston College Law Review 595 at pp.595-600, 664-665 (total 8 pages).
- **Best Interest of the Corporation**
 - *Re Smith & Fawcett, Ltd.* [1942] 1 All E.R. 542 at 543-45 (C.A.)
 - *Re W. & M. Roith Ltd.* [1967] 1 All E.R. 427
 - *Parke v. Daily News Ltd.* [1962] Ch. 927
 - Tuvia Borok, "A Modern Approach to Redefining "In the Best Interests of the Corporation"" (2003) 15 Windsor Review of Legal and Social Issues 113 at 127-136 (Part VI and VII).
 - "The Interests Represented by the Board" from "Where Were the Directors? Guidelines for Improved Corporate Governance in Canada", Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada (December 1994) at pp. 20-21.

Week 8-Oct 29: NO CLASSES (FALL READING WEEK: Oct 27-31)

Week 9-Nov 5: 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 10-Nov. 12: 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. (4th) 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 11-Nov. 19: Securities Regulation: How are securities regulated in Canada? To what extent does Canadian securities regulation control misconduct by directors and officers of corporations?

- John A. Campion, “Litigation - Securities Recent Developments of Importance” (2001) Recent Legal Developments, Canadian Legal Lexpert Directory (LEXD/2201-42). Toronto: Silrun Information Services Limited. Print Out from Quick Law, pp.1-4 (from Subtitle “The Regulatory Framework to Class Actions: Secondary Distribution)
- Patrick Moyer, “The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States” (1997) 55(1) University of Toronto Fac. of Law Rev. 43 (use pp.43-47, 57-64, 75-76; total 15 pages)
- Andrew L. Bab & Sean P. Neenan, “Poison Pills in 2011” (March 16, 2011) 3 (5) Executive Action Report 1-10. Director Notes Series. Available at SSRN: <http://ssrn.com/abstract=1843474>.
- *Re Cartaway Resources Corp.* 2004 SCC 26, (2004) 1 S.C.R. 672, (2004) 238 D.L.R. (4th) 193.
- *Donnini v. Ontario Securities Commission* (2005), 76 O.R. (3d) 43; (2005) 250 D.L.R. (4th) 195 (Ont. C.A.)
- *Rowan v. Ontario Securities Commission* 2012 ONCA 208 paras. 1-27, 54-88
- Sukanya Pillay, “Forcing Canada's hand? The effect of the Sarbanes-Oxley Act on Canadian Corporate Governance Reform” (2004) 30 Manitoba Law Journal 285-314. Use pp.285-294, 298-302, 305-307.
- *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 126-131.

Week 12-Nov 26: Institutional Shareholder Activism and Executive Compensation:

How is excessive executive compensation controlled? Are active institutional shareholders capable of controlling excessive executive compensation? Are pension funds in a position to control excessive executive pay?

- Benjamin Alarie, “Executive Compensation and Tax Policy: Lessons for Canada from the Experience of the United States in the 1990s” (2003) 61 (1) University of Toronto Faculty of Law Review 39 (pp. 39-75).
- 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-Dec. 3: Role of Workers in Governing Corporations and Management:

What are the typical forms of workers’ participation in governing the corporation and its management? Do the interest and voices of workers really matter in corporate decisions? **(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).

END OF THE COURSE