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Corporate Governance / LAWF 3560

Winter 2022 **Tuesday and Thursday, 8:30 am to 10 am**

**Room OM 3782 (virus permitting) and streamed on Zoom (see link on Moodle)**

Professor Katie Sykes

**Welcome to Corporate Governance!**

Corporate governance is about the relationships and conflicts between different stakeholders who have a say in the way corporations are run and are affected by what corporations do: directors, executives, shareholders, investment managers, creditors, customers, workers, and the wider community.

In the last few years, there has been a fundamental change in prevailing ideas about corporate governance. Starting in about the 1980s, almost everyone involved in corporate governance used to believe in some version of “shareholder primacy”: the idea that the primary purpose of a corporation is to maximize returns to shareholders, who provide the corporation’s equity capital. More recently, a different view of corporate purpose is gaining ascendancy: corporations should be run to benefit a broader constituency of stakeholders, or the whole community. Many corporate governance experts welcome this shift as a much-needed corrective to a narrow focus on profits at the expense of corporations’ long-term sustainability and contributions to society. But some critics argue that it weakens the power of shareholders to hold management accountable – or, maybe even worse, that it just a rebranding exercise that entrenches corporate power and undermines democracy. This theme of the clash between “shareholder primacy” and “stakeholder” views of corporate purpose will run through the course.

We’ll look at some of the most high-profile topics in contemporary corporate governance debates, including how executive pay should be set and how companies should lead (or at least not impede progress) on issues like climate change and human rights abuses. We’ll also look at some prominent corporate governance failures and consider what we can learn from them. We will focus mainly on publicly traded companies.

Business Associations is a prerequisite or corequisite.

**FAQs**

|  |  |
| --- | --- |
| **Can I attend classes online?** | Yes. All classes will be streamed on Zoom and recorded, with the recordings made available on Moodle. You don’t need to ask permission or provide a reason to attend class online instead of in person. It is your right to stay safe. |
| **Where are the readings, and do I have to buy a textbook?** | All the readings are on Moodle and/or available through links in the outline below.  You don’t have to buy a book.  **Highly recommended (but not required): a subscription to the Globe and Mail.** We will read a lot of stories from the G&M Report on Business. If you are interested in or plan to work in business law, it’s great to get in the habit of following the business news.  There are constant new developments in this area, so we may have some late-breaking additions to the readings. |
| **Can I use this class for the international requirement?** | Yes, the Faculty of Law has listed this course as one of those that meet the international requirement. We will cover a substantial amount of US law, in addition to law from other jurisdictions and some international human rights issues. |
| **Can I use this class for the upper-year writing requirement?** | I think it should be possible to meet the upper-year writing requirement with your final memo, which is worth 50% of the final grade. If you want to do this, you should consult with the Associate Dean’s office and ensure that you have met the requirements, which are set by the administration. You will need to make sure your memo is long enough for the writing requirement (7,500 words). Please let me know if you want to do this, as 7,500 words is longer than the normal length for this assignment. |
| **Is there any grade penalty for not attending classes?** | No (at least not directly). There is a participation grade based on self-assessment. In your self-assessment, you’ll judge your own participation in the class taking into account your specific circumstances. If there are things that make it tough for you to attend some sessions in real time (as there are for lots of people), you can take that into consideration when you do your self-assessment. |
| **How do I reach the prof?** | The best way is e-mail: [csykes@tru.ca](mailto:csykes@tru.ca) |
| **Will there be guest speakers? And will they be awesome?** | Yes, and yes. The details are not finalized yet, so watch for announcements. When we do have guest speakers, it will be greatly appreciated if you make every effort to attend and participate actively. Guests give us their valuable time and expertise, and they enjoy it because they love interacting with you. Please come with questions! |
| **Will I need to know or read a lot of corporate law / securities law / [insert the thing you dread here] law?** | Well … there is definitely law involved. But the focus of the course is not primarily on legal technicalities – or at least, it doesn’t have to be (if you love legal technicalities, there are certainly some interesting ones you can get into in this area). Governance is mainly about how companies conduct themselves and are held accountable, and it intersects with significant social issues that you may have a particular interest in. It is a fascinating area, even if you don’t love the details of debentures or amalgamations. |
| **How’s my grade calculated?** | Your main assignment is a memo to the Board of Directors of a real public company advising on improvements that could be made to the company’s corporate governance. There are several other assignments during the semester, some of which are pass-fail. For more details, see “Assignments” below and the assignment instructions on Moodle. **Please note that in this course you will have to do assignments during the semester – you can’t leave it all till the end!** |
| **Is there an exam?** | No. |
| **When are office hours?** | Mondays and Thursdays, 11:30 am to 12:50 pm. |

**Course Outline and Readings\***

\*May be adjusted during the semester. Corporate governance is a fast-moving area with new developments all the time, and our topics and readings may be moved around to reflect that.

| **Date** | **Topic** | **Materials and Notes** |
| --- | --- | --- |
| Tue., Jan. 11 | Introductory class | No readings |
| Thu., Jan. 13 | The concept of corporate governance | [Peoples Department Stores Inc. (Trustee of) v. Wise](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2184/index.do)  [BCE Inc. v. 1976 Debentureholders](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/6238/index.do) |
| Tues., Jan 18 | Profit and purpose: what are corporations for? | Milton Friedman, [“The Social Responsibility of Business Is to Increase Its Profits”](https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html) (New York Times, 1970)  [Stakeholder versus shareholder capitalism: The great debate](https://www.sbs.ox.ac.uk/oxford-answers/stakeholder-versus-shareholder-capitalism-great-debate) – this is a recording of a debate on Zoom, about an hour long. Listen while you wash the dishes or exercise!  Annual letters from Larry Fink, the CEO of BlackRock, to CEOs: [2018](https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter) and [2019](https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter).  Lynn Stout, *The Shareholder Value Myth* 1-7, 15-35, 95-115 (on Moodle)  Joel Bakan, *The Corporation: The Unfortunately Necessary Sequel* (excerpts – on Moodle)  Carol Liao, “[A Canadian Model of Corporate Governance](https://deliverypdf.ssrn.com/delivery.php?ID=723089121105085081065004069080012023018031035064008038064102031004098091117001067094037026034111123061001011120100125015080108105082056047035121065121029127121076066040043085099007072031125108093110067084003083091011110066025105126088026070068067102004&EXT=pdf&INDEX=TRUE)” |
| Thu., Jan. 20 | Evaluating corporate governance: the Globe and Mail’s Board Games  Intro to the memo and presentation assignments | In this class, you’ll pick a company from the Globe and Mail Board Games list to focus on through the semester. Your final assignment (memo to the board) will be for the board of directors of this company.  The Globe and Mail’s [Board Games 2021](https://www.theglobeandmail.com/business/careers/management/board-games/article-the-globe-and-mails-comprehensive-ranking-of-canadas-corporate-boards/) (see also the searchable spreadsheet posted on Moodle).  David Milstead, [Board Games 2021: How we ranked Canada’s corporate boards](https://www.theglobeandmail.com/business/careers/management/board-games/article-article-canada-corporate-boards-ranked-2021/)  Jonah Perlin, [Making Your (Power)Point An Introductory Guide to Digital Presentation Design for Lawyers](https://alwd.org/lcr-archives/fall-2021-volume-18/620-making-your-power-point-an-introductory-guide-to-digital-presentation-design-for-lawyers) |
| Tue., Jan. 25 | Environment, Social and Governance (ESG) | Peter Dey & Sarah Kaplan, [“360º Governance: Where are the Directors in a World in Crisis?”](https://moodle.tru.ca/pluginfile.php/2250062/mod_resource/content/0/360Governance-Dey_Kaplan_FEB22.pdf)  Jeffrey Jones & David Milstead, “[Why boardrooms must be fluent in the ABCs of ESG](https://www.theglobeandmail.com/business/careers/management/board-games/article-corporate-canada-climate-change-esg/)” (The Globe and Mail)  [The Corporate Director’s Guide to ESG](https://corpgov.law.harvard.edu/2021/12/15/the-corporate-directors-guide-to-esg/)  [ESG: Hyperboles and Reality](https://corpgov.law.harvard.edu/2021/12/14/esg-hyperboles-and-reality/) |
| Thu., Jan. 27 | The ‘life cycle’ and seasons of corporations | [Proxy Advisors Update Voting Guidelines for 2022](https://corpgov.law.harvard.edu/2021/12/31/proxy-advisors-update-voting-guidelines-for-2022/)  [The Implementation of Corporate Governance in Pre-IPO Companies](https://corpgov.law.harvard.edu/2018/12/12/the-implementation-of-corporate-governance-in-pre-ipo-companies/)  [LegalZoom Prospectus (Form S-1)](https://www.sec.gov/Archives/edgar/data/0001286139/000119312521182939/d146270ds1.htm) – skim through, and focus especially on Risk Factors, Management’s Discussion and Analysis, and Executive and Director Compensation.  Company selection due Jan 28 |
| Tue., Feb. 1 | What powers do investors have? | Richard LeBlanc, “[The Corporate Governance Game Changer That Needs to Come to Canada”](http://rleblanc.apps01.yorku.ca/the-corporate-governance-game-changer-that-needs-to-come-to-canada/)  [Proxy Access in Canada — Another US Corporate Law Practice Makes Its Way Up North](https://mcmillan.ca/insights/proxy-access-in-canada-another-us-corporate-law-practice-makes-its-way-up-north/) |
| Thu., Feb. 3 | Executive compensation | David Macdonald, [“Another year in paradise: CEO pay in 2020”](https://www.policyalternatives.ca/publications/reports/another-year-paradise) (Canadian Centre for Policy Alternatives).  Disney shareholder litigation – Delaware Chancery Court and Supreme Court decisions (on Moodle). |
| Tue., Feb. 8 | Executive compensation | No additional readings |
| Thu., Feb. 10 | Rogers | [“The Rogers family feud: From a butt-dial to a B.C. Supreme Court case,](https://www.theglobeandmail.com/business/article-the-rogers-family-drama-from-a-butt-dial-to-a-bc-supreme-court-case/)…” (The Globe and Mail)  Jeffrey MacIntosh, [“B.C.’s law allowing directors to be appointed without a shareholder meeting must be changed”](https://www.theglobeandmail.com/business/article-bcs-law-allowing-directors-to-be-appointed-without-a-shareholder/)  Andrew Coyne, [“The Rogers family feud does not make dual-class shares a bad idea”](https://www.theglobeandmail.com/opinion/article-the-rogers-family-feud-does-not-make-dual-class-shares-a-bad-idea/)  [*Rogers v Rogers Communications Inc.,* 2021 BCSC 2184](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc2184/2021bcsc2184.html?autocompleteStr=rogers%20communications%20&autocompletePos=9) |
| Tue., Feb. 15 | Rogers-based CEO contract exercise | No additional readings – materials provided on Moodle |
| Thu., Feb. 17 | Debrief from exercise | No additional readings |
| Tue., Feb. 22 | Reading week – no classes | |
| Thu., Feb. 24 |
| Tue., Mar. 1 | Climate change | Hansell LLP, “[Putting Climate Change Risk on the Boardroom Table](https://law-ccli-2019.sites.olt.ubc.ca/files/2020/06/Hansell-Climate-Change-Opinion.pdf)”  “[Audit Committees and Effective Climate Governance](https://law-ccli-2019.sites.olt.ubc.ca/files/2020/12/CCLI-Guide-for-Audit-Committees-on-Effective-Climate-Governance.pdf)”, Canada Climate Law Initiative (December 2020)  [Canadian Securities Administrators’ proposed climate-related disclosure requirements](https://www.lexology.com/library/detail.aspx?g=e3cc17f0-a435-4f8f-82d4-93919cad795d&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-12-16&utm_term=)  [*Milieudefensie et al v Royal Dutch Shell*](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) (English version of ruling of The Hague District Court)  [*Sharma v Minister for the Environment*](https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0560?fbclid=IwAR17zXvBrYMYtiigGtqLr58dMBKzW1M6n1XFqJPGnT3_fFzXhaGEhHNtzLU) (Federal Court of Australia) |
| Thu., Mar. 3 | Human rights (moved up from March 15) | [*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5](https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html?autocompleteStr=nevsu&autocompletePos=2)  Assignments from the Rogers exercise are due on March 4. |
| Tue., Mar. 8 | Writing for business clients | Kenneth Roman & Joel Raphaelson, *Writing That Works* 1-42, 63-89, 111-135 (on Moodle). |
| Thu., Mar. 10 | Board diversity | David Milstead, [“After new federal rules came in, how many Canadian companies increased diversity on their boards?”](https://www.theglobeandmail.com/business/careers/management/board-games/article-corporate-canada-diversity-2021/) (The Globe and Mail).  Francesca Odell, Victor Hou, and James Langston, “[Shareholder Complaints Seek to Hold Directors Liable for Lack of Diversity](https://corpgov.law.harvard.edu/2020/08/11/shareholder-complaints-seek-to-hold-directors-liable-for-lack-of-diversity/)”  [US Corporate Journey Towards Gender Diversity](https://corpgov.law.harvard.edu/2021/12/06/u-s-corporate-journey-towards-gender-diversity/)  [Ninth Circuit allows challenge to California board gender diversity statute to go forward](https://cooleypubco.com/2021/06/23/ninth-circuit-allows-challenge-to-california-board-gender-diversity-statute-to-go-forward/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration) |
| Tue., Mar. 15 | Audit (moved up from March 15) | *[Deloitte & Touche v. Livent Inc. (Receiver of)](https://www.canlii.org/en/ca/scc/doc/2017/2017scc63/2017scc63.html?autocompleteStr=livent&autocompletePos=1)*, 2017 SCC 63  [*R. v. Drabinsky,* 2009 CanLII 12802](https://www.canlii.org/en/on/onsc/doc/2009/2009canlii12802/2009canlii12802.html?autocompleteStr=r.%20v.%20drabin&autocompletePos=5) (ON SC), paras1-210, 335-378, 508-512.  Spectacular Failures podcast, “[The curtain falls on a big Broadway company](https://www.spectacularfailures.org/episode/2020/08/17/the-curtain-falls-on-a-big-broadway-company)” (episode on Livent). |
| Thu., Mar. 17 | Student presentations | Draft memo due Friday March 18.  No readings |
| Tue., Mar. 22 | Student presentations | Creative assignment due March 25.  No readings |
| Thu., Mar. 24 | Student presentations | No readings |
| Tue., Mar. 29 | Student presentations | No readings |
| Thu., Mar. 31 | Student presentations | No readings |
| Tue., Apr. 5 | Predatory capitalism: MLMs OR possible panel discussion with guest speakers – stay tuned for updates. | MLM readings: Steven Davidoff Solomon, “[Ackman, Herbalife and Celebrity Short-Sellers](https://dealbook.nytimes.com/2013/01/01/ackman-herbalife-and-celebrity-short-sellers/?searchResultPosition=1)” (New York Times Dealbook, January 1, 2013).  Stephanie McNeal, “[Millennial Women Made LuLaRoe Billions. Then They Paid The Price](https://www.buzzfeednews.com/article/stephaniemcneal/lularoe-millennial-women-entrepreneurship-lawsuits)” (Buzzfeed News, February 22, 2020). |
| Thu., Apr. 7 | Guest speaker: Lisa DeMarco | Lisa may provide readings – stay tuned |
| Tue., Apr. 12 | Guest speakers: Warren Ragoonanan and Aladdin Diakun | Warren and Aladdin may provide readings – stay tuned |
| Thu., Apr. 14 | Wrap-up class | No readings |

**Assignments**

Submit assignments **on Moodle** **only**. Other methods of submitting, including e-mail, do not count. **If it’s not submitted on Moodle, it’s not submitted.** Specific instructions and grading rubrics are on Moodle.

| **Assignment** | **Due date** | **Weight / grade info** |
| --- | --- | --- |
| Company selection (for memo) | January 28 | 5%, pass/fail |
| Rogers executive compensation exercise: marked-up contract clause | March 4 | 5%, pass/fail, group mark |
| Rogers executive compensation exercise: reflection | March 4 | 5%, pass/fail |
| Draft memo to board | March 18 | 10% |
| Creative assignment | March 25 | 10%, pass/fail |
| Presentation | As scheduled (various dates in March – Powerpoint due 3 days before) | 10%, pass/fail |
| Self-assessment of class participation | April 29 | 5%, pass/fail |
| Final memo | April 29 | 50% |

**Late Policy**

**If you are having trouble making a deadline, let me know**. I am flexible about extensions. We can work something out. But please speak to me before it’s due, not after!

If assignments are late without an agreed extension, grades will be reduced as follows:

**Graded assignments**: The grade for assignments submitted late will be reduced by one grade band (e.g., from A- to B+) for each day or part of a day that the assignment is late.

**Pass/fail assignments:** Assignments submitted up to one day late get 50%; between one and two days late, 25%; more than two days late, 0.

***Course******description from calendar***

Students analyze, at an advanced level, contemporary debates in corporate governance particularly in light of recent North American and international developments. Particular attention is paid to how these developments are situated both within corporate governance theory and within the history of corporate governance laws and norms in Canada and internationally.

***Learning Outcomes***

After taking the course, students will be able to:

* Articulate the key legal rules and principles that relate to corporate governance;
* Understand these legal rules in their historical, social and economic context, as well as the values and purposes that underlie the rules;
* Demonstrate understanding of the major debates concerning corporate governance;
* Understand and articulate the policy, legal, and economic challenges that arise in designing and implementing a legal, regulatory and practical framework for addressing challenges associated with corporate governance;
* Identify areas in which the current regulatory framework is inadequate to achieve its intended purpose;
* Articulate alternative approaches or frameworks that could and should be considered by policymakers, regulators, judges, corporate directors and corporate management;
* Demonstrate proficiency in identifying, analysing, and resolving corporate governance issues

***Methodology***

A mix of lectures and group exercises.

***Policies***

Please read and be familiar with [**the TRU policy on Student Academic Integrity**](https://www.tru.ca/__shared/assets/ED_05-0_Student_Academic_Integrity36334.pdf), in particular Article VI (Forms of Academic Dishonesty). Please read and be familiar [**the TRU policy on Grading Systems**](https://www.tru.ca/__shared/assets/Grading_Systems5647.pdf) which incorporates detail specific to the Faculty (see the [**the Faculty’s Grading and Ranking Policy**](https://www.tru.ca/__shared/assets/TRU_Law_Faculty_Grading___Ranking_Policy_202153388.pdf) (2021)).

The Faculty of Law will provide reasonable accommodation to students on the basis of factors such as illness, disability, religious observances, family or personal emergencies or affliction, or other similar special needs, when such factors interfere with the ability of a student to attend or to complete assignments or examinations at regularly scheduled dates or in other circumstances. Students should feel free to consult me or the Associate Dean regarding such matters. Students facing more significant and long-term or recurring barriers should familiarize themselves with TRU’s policy on [Academic Accommodations for Students with Disabilities](https://www.tru.ca/__shared/assets/BRD_10-0_Academic_Accommodations42574.pdf) and confer with [Accessibility Services](https://www.tru.ca/as.html) as soon as possible. See also ‘[Health, Wellness and Student Support](https://www.tru.ca/law/students/wellness.html)’ on the Faculty of Law website.