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The Controlling Mind in Company Law: An Examination of Corporate Identity and the Corporate Veil

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> ***"Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men.***
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> ***—Letter from Lord Acton to Mandell Creighton (5 April 1887)[1]***

Amid the gains garnered by commerce through the invention of legal personalities wise institutions have striven to provide checks and balances to the self-interested exercise of power. In the evolution of our commercial law, a recurring and unifying theme is that power begets responsibility. The theory of the "Controlling Mind" posits that many of the qualifications, exceptions, exclusions and restrictions that have been carved into the application of long-established legal doctrines can be explained as the application of sober second thought in the interest of promoting commercial morality. They have evolved predictably and will continue to arise as necessity dictates when useful constructs are enlisted for the wrong reasons.

The Heresy of Company Law: The Principle in *Salomon*

We begin by recalling the fundamental precept of corporate law laid down by the English House of Lords in *Salomon v. Salomon & Co. Ltd.* ("*Salomon*"),[2] that a company is a separate legal person independent and distinct from its shareholders and directors. The *Salomon* principle has been codified in both the *Canada Business Corporations Act*[3] ("CBCA"), and the *Business Corporations Act* (Ontario),[4] ("OBCA") s.15[5] as well as similar legislation throughout the provinces and territories of the country, the direct result of which is that shareholders and directors are generally accorded the advantage of limited liability.[6]

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[1] Acton, John Emerich Edward Dalberg Acton, Baron, 1834-1902; Figgis, John Neville, 1866-1919; Laurence, Reginald Vere, 1876-1934, Historical Essays and Studies, Appendix, p. 504. London : Macmillan, (1907) Also in Essays on Freedom and Power. Selections by Publisher, with contributions by John Emerich Edward Dahlberg-Acton. The Free Press, Boston, Mass. (1948).

[2] [1897] A.C. 22 (H.L.): "*A company is at law a different person altogether from the subscribers to the memorandum:*" *per* Lord Macnaghten.

[3] R.S.C., 1985, c. C-44

[4] R.S.O. 1990, c. B.16

[5] *Ibid*, s. 15.

[6] While the *Salomon* decision referred to immunity for shareholders, it has been interpreted and used in subsequent decisions to shield directors and officers from liability as well. The first clear statutory enactment of director liability was found in England's *Directors Liability Act*, 1890, 53 & 54 Vict. c. 64. Similar legislation was enacted in Ontario subsequently. See: *Directors Liability Act* 1891, 54 Vic. c. 34.

As with all overarching principles, the importance of *Salomon* is best appreciated in its exceptions. The courts, under ever-widening circumstances, have been willing to "pierce the corporate veil" and in those exceptional cases to hold a shareholder, director, or officer personally liable to third parties for some act, omission or contract of the corporation. While obviating on its face the very purpose for which the duality of the separate legal existence of the corporation from its shareholders, officers and directors was divined, this doctrine is a measured response to the fact that although a corporation is a separate legal entity, it can only act through human agency, with all of its attendant foibles. Contemporary mores encourage legal innovations for the protection of the vulnerable. Arguably, the inviolateness of corporate personality can produce pervasive mischief in the absence of rules and policies that promote honesty and reign in abusive actions instigated by the controlling minds of a company. The corporate cloak needs to be weighed against other equally legitimate considerations. After all, is there a good reason to support a policy that favours blanket protection from personal liability simply because an incorporation fee is paid to the government body responsible for administering these entities?

How does one reconcile this schizophrenia with commercial realities yet maintain reasonable harmony in the development of a coherent body of laws? Wherever one would wish to draw the line in piercing the veil, the competing drivers of commerce must be remembered. These require the protection afforded by a robust scheme of laws for the protection of the integrity of the separateness of the corporation from its representatives and shareholders. Daunting though this challenge may be, the principle of the controlling mind may be seen as the expression of a duty on the part of those who exercise a dominant influence on the affairs of the corporation to act lawfully, fairly and for no improper purpose.

Blurring the Lines: Personal Liability and Controlling Minds

The language of corporate distinctiveness is itself loaded, moving variously from a view of the company as an "entity,"[7] to a "person,"[8] to a device,[9]or artifice,[10] suggesting a purposive viewpoint that concerns itself with function over form, leaving the task to the legal scholar to explain what a company is while inviting the court to consider instead what it does. Thus has the door been opened to judgments about what might be legally acceptable in the deployment of this legal fiction. Although recently questioned, [11]a clear guideline for legitimacy has emerged and is uniquely personified: the standard, the writer would suggest, is that its use must comport with honesty, fairness, conscience, good faith and integrity, all personal qualities associated with the highest aspirations of commercial morality.

An important and pervasive theme in commercial law is the struggle between the needs of commerce and our fear and revulsion for fraud. Indeed, the prevention of fraud has driven everything from the rules associated with the open market to the *nemo dat* rule, from the law of

[7] Brian A. Garner, *Black's Law Dictionary*, 8th ed. (Thomson West: 2004): Entity is an organization (such as a business or a governmental unit) that has a legal identity apart from its members.
[8] *Ibid.* A person, *inter alia*, is defined as a human being, or a *natural person*.
Artificial person is an entity, such as a corporation, created by law and given certain legal rights and duties of a human being, or a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.
[9] *Ibid.* Device, *inter alia*, is defined as a scheme to trick or deceive; a stratagem or artifice, as in the law relating to fraud.
[10] *Ibid.* Artifice is a clever plan or idea, especially one intended to deceive.
[11] *Supra,* footnote 15.

offset of mutual debts to the compromise represented by systems for the disclosure of hidden interests by means of various registries whose rules mitigate the risk of fraud in ways which the common law was incapable of doing. But the law has not been completely impotent in its response to the misuse of the corporate shell to avoid personal liability by schemers and fraudsters. The removal or piercing of the veil ignores the fiction of corporate existence in order to reach the actors who choose to abuse the device to advance their own improper agenda.[12] In doing so, it is suggested, the courts have found a just and ready means of encouraging moral rectitude in commercial activity by exerting their influence directly upon the "controlling minds". At the root of this development is the broad recognition of moral hazard as a systemic cancer in the bowel of commerce.

It may still be safely asserted as a general rule that a corporation will alone be liable for the consequences of its acts or omissions. The principle of corporate independence means, quite simply, that the shareholders and directors cannot be held responsible for any debts incurred by the corporation. But, when the controlling participants of the corporation are guilty of directing a wrongful act or breach, the courts have been quite willing step in and impose personal liability in addition. As Thompson, J. stated in *Clarkson Co. Ltd. v. Zhelka*[13]:

> …If a company is formed for the express purpose of doing a wrongful or unlawful act, or if when formed, those in control expressly direct a wrongful thing to be done, the individuals as well as the company are responsible to those to whom liability is legally owed.[14]

In these cases, or where the company is a mere agent of the controlling shareholder, the "Principal-Agent Problem"[15] is often resolved by holding that the company is the *alter ego* of those in control.[16] Conjoining them renders it unnecessary to invoke principles of the law of agency which would protect the agent. Many difficulties arise under conditions of incomplete and asymmetric information and power when a principal hires an agent, such as the problem of moral hazard and conflict of interest, because the principal hires the agent specifically to pursue the principal's interests. This is exemplified in closely-held corporations that are created as a medium through which the business plans of the incorporator are implemented. Ways of mitigating or preventing mischief include the processes, customs, policies, laws, and institutions which impact the way a company is controlled. But more may be required in order to impose personal liability.

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[12] In *Woolfman v Strathclyde Regional Council* (1978) S.C. (H.L.) 90, their Lordships emphasized that it is only appropriate to pierce the corporate veil where the circumstances indicate that the company is merely a 'façade concealing the true facts', as was found in two excellent examples, *Gilford v Horne* [1933] Ch 935 (Eng. C.A.) ("Horne") and *Jones v Lipman* [1962] 1 WLR ("Lipman"). In Horne, the Court of Appeal found that the company was created as a 'cloak' to conceal Mr. Horne's business activities, which were in breach of non-competition and non-solicitation agreements with a former employer, and granted an injunction despite the fact that the sole shareholders of the company were his wife and a friend and neither they nor the company were in privity of contract with the plaintiff. Similarly, when Mr. Lipman attempted to escape from an agreement of purchase and sale of land by interposing a corporation on title to prevent the issuance of an order of specific performance, the court was not so easily thrown off-course and the requested relief was granted. Charles Pugh summarizes the approach taken by the Courts in Horne and Lipman in his article, published in Mondaq.com on April 10, 2012, *United Kingdom: Piercing The Corporate Veil—Recent Developments, (http://mondaq.com/x/171488):* "In each case the defendant's company was described as a 'sham', and it is this term which has become closely associated with the court's ability to pierce the corporate veil. Mr. Justice Russell explained why he felt able to grant the order against both Mr. Lipman and his company in the following terms: '*The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.*'

[13] [1967] 2 OR 565, [1967]; (1967) 64 D.L.R. (2d) (Ont. H.C.); O.J. No. 1054.

[14] *Infra.*, footnote 33, at para. 80.

[15] See footnote 35, *supra.*

[16] *Infra*, footnote 32, C. Pugh.

In *Ben Hashem v Ali Shayif,*[17] Mumby, J. stated that the courts have only taken the step of piercing the corporate veil when "*the company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely dehors the company*"[18]which, his Lordship explained, is a wrongdoing that is 'anterior or independent of it.' Arnold, J. expressly agreed with this formulation of the test and was sharply critical of other cases in which more laxity was shown.[19] Parenthetically, one cannot fail to take notice of the *identification* of the improper action with the 'controller' of the corporation, an expression that would include its officers and directors but is wider, permitting the exercise of a remedial jurisdiction over shareholders and other strangers to the contract. This is precisely what happened in the case of, *Gramsci.*[20]

Unquestionably a far-reaching application of the doctrine, in *Gramsci*, Burton, J. was asked to lift the corporate veil and grant judgment against five companies registered variously in the British Virgin Islands and Gibraltar to repay a loan made to them. He did so, but went even further and imposed joint and several liability for the loan on the *beneficial owner* of one of the companies, a Mr. Stepanovs, whom he described as a "*puppeteer*" in circumstances in which fraud was alleged. Although not a party to the loan agreements, the claimants successfully argued that he should be treated as if he were a signatory thereto so that the contracts could be enforced against him. Despite being a non-party, in law a stranger to the agreements, Justice Burton held they could be enforced against Mr. Stepanovs, yet, in an ironic twist, could not be enforced *by* him as a matter of public policy.

This concerned Arnold, J. greatly in *VTB Capita,l*[21] who wondered why the defendant should not be able to enforce a right of set off or cross claim in the action for repayment of the loan. In reaching the opposite conclusion, that the corporate veil could not be lifted to enable a purely contractual claim to be made against the malefactor, he questioned the result in *Gramsci* on the basis that Burton, J. appeared to have been heavily influenced by the defendant's attempt to conceal his identity by interposing a company. In coming to this conclusion Justice Arnold felt that Burton, J. had misunderstood the principles enunciated in another leading case, *Trustor,*[22]a case of breach of fiduciary duty by a company's owner, Mr. Smallbone, who received money rightfully belonging to the company but refused to account for it. Sir Andrew Morritt V.C. upheld the claim and said:

> "In my judgement the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individuals."[23]

Relying on *Trustor,* Burton, J. expressed the opinion that if the two conditions specified therein were satisfied, namely: (1) if there was a fraudulent misuse of the company structure, and (2) a wrongdoing committed '*dehors*' the company, the corporate veil could be pierced. Arnold, J. disagreed with this interpretation of the decision and explained that *Trustor* was simply a case of 'knowing receipt' by the controller of a company of property belonging to it and that in such

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[17] *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Eng. Fam.) *per* Mumby, J.
[18] *Supra.,*footnote 19, Pugh, Charles, United *Kingdom: Piercing The Corporate Veil—Recent Developments, (http://mondaq.com/x/171488),* referring to the judgment of Arnold, J. in *VTB Capital* [footnote 10] who quoted this passage from Mumby J. approvingly.
[19] *Ibid*, p.2.
[20] [2011] EWHC 333 (Comm).
[21] *Supra,* footnote 10, at p.101.
[22] *Trustor AB v Smallbone (No2)* [2001] 1 WLR 1177.
[23] *Ibid*, at para. 23, cited in Pugh, C. *Op Cit.,* footnote 19.

circumstances, the law has always regarded receipt by a company as the functional equivalent of receipt by the individual controlling it.

For our part, these decisions reveal a tidal drift in the language of the courts to distinguish between instances of pure control leading to an award of damages or judgment for repayment of a debt, and those simply involving the preservation of property. It is asserted, however, that the tainted exercise of control, not the mere beneficial ownership of property, explains them both.

The Canadian Experience

In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*,[24] Sharpe J. articulated the following criteria for disregarding the separate existence of a corporation using language substantially similar to that employed in England:

> …The courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct.
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> …The first element, "complete control," requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently…[25]
> The second element refers to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights?[26]

Personal Liability for Corporate Debts and Obligations: Beyond the Veil

It has been suggested above that both the statutory exceptions and the legal decisions can be more easily understood as manifestations of a general doctrine which rationalizes the narrowing of corporate and personal liability for wrongdoing in a corporate setting as a function of the improper influence of the "controlling mind." Such a theory is attractive to those who are confounded by the fact that companies cannot act or do anything otherwise than through their human agents. Sullivan calls this a "restricted version" of vicarious liability in that the company is simply deemed to be liable in the restricted circumstances of a sufficiently senior manager committing a crime.[27] There is no fiction that a company is acting in its own right as an "intelligent machine."[28] It is this simple fact that underscores the problems confronting a court when it is asserted that a particular act or omission is that of the company rather than its human agents. Likewise, the unfolding exceptions provide an incentive to sue the officers, directors, shareholders and even employees quite distant from management,[29]reinforcing the idea that the "controlling minds" must

[24] 28 OR (3d) 423.
[25] *Ibid*, at para. 27
[26] *Ibid*, at para. 28.
[27] Sullivan, G.R. (1996), "The Attribution of Culpability to Limited Companies" *Cambridge Law Journal* 515, at page 518.
[28] This expression is used by Clarkson, C.M.V. 'Corporate Culpability', first Published in (1998) *Web Journal of Current Legal Issues*, http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html in association with Blackstone Press Ltd., [1998] 2 Web JCLI.

[29] *Ibid*. Called the "Identification Doctrine", particularly in the context of criminal proceedings, in which an individual who is sufficiently senior within the corporate structure as to represent metaphorically the "mind" of the company commits a crime within the course of his or her employment and that act and *mens rea* are attributed to the company, which is then said to be "identified" with these acts, and both the company and the individual are held directly accountable. The doctrine was considered in a civil context in the significant Privy Council decision of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, where Clarkson, J. said: "In this case an investment manager invested in another company without making the necessary disclosures as he knew

account for their actions regardless of the manner in which their ability to exert a dominant influence arises.

The court in *Clarkson v. Zhelka,*[30] in refusing to find that lands held by a family of companies under the control of the bankrupt belonged to the bankrupt, put it this way:

> The cases in which the Courts, both in this Province and in England, have seen fit to disregard the corporate entity or personality, and instead to consider the economic realities behind the legal facade, fall within a narrow compass. The Legislature, in the fields of revenue and taxation, and particularly with respect to true subsidiaries, has made much greater departure in this respect. Such cases as there are, illustrate no consistent principle. The only principle laid down is that in the leading case of *Salomon v. Salomon & Co. Ltd.,* [1897] A.C. 22 and in general such principle has been rigidly applied…
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> *The exceptions would appear to represent refusals to apply the logic of the Salomon case where it would be flagrantly opposed to justice.* [31]

Clarkson v. Zhelka is frequently cited as authority for the "just and equitable" dictum, a broad principle that a court can lift a corporate veil if it would be "flagrantly opposed to justice" not to do so. This statement of broad principle has been challenged, however.[32]

In larger corporations where there may be hundreds or thousands of shareholders, the unity between management and share ownership widens. In such circumstances, where multiple shareholders have proportionately less control over how the corporation is run, creditors will generally be less able to seek relief against the general body of shareholders personally, but can redress wrongs perpetrated against them by those in *de facto* control – the directors and officers. Typically, it is in these larger corporations with diffuse share ownership that the directors or officers who perform, direct, or acquiesce in wrongful acts, are the persons who may, in certain circumstances, be held personally liable for wrongs done to certain stakeholders, including creditors (who are qualified to claim, among other things, the *oppression remedy* under provincial and federal corporations legislation.)[33] At the same time, it must be remembered that there is no

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he was obliged to do. Under the classic identification doctrine such an investment manager would not be sufficiently senior to represent the "mind" of the company. Lord Hoffman, however, refused to limit the identification doctrine to those legally representing the "directing mind and will" of the company. He stated (at p.507) that in each case the court had to "fashion a special rule of attribution for the particular substantive rule." The rule here was one requiring disclosure of substantial investments to the company and the stock exchange. The question was: "Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company?" In this case it was the investment manager who made the investments. He was the person authorised to do this. For the purpose of this rule his acts and knowledge could be attributed to the company. For other rules and purposes, for example, health and safety within the company, his acts and knowledge would not be attributed to the company:" *Ibid,* sub-heading 4(1). Clarkson distinguishes the Identification Doctrine from several other theories involving the intersection of corporate and personal liability, including: (i) the Aggregation Doctrine; (ii) Reactive Corporate Fault; (iii) Vicarious Liability; (iv) the Management Failure Model; (v) the Corporate *Mens Rea* Doctrine; and, (vi) from Specific Corporate Offences.

30 *Supra, Footnote 32*, *Clarkson Co. Ltd. v. Zhelka et al.* (1967), 64 D.L.R. (2d) 457 (Ont. H.C.) per Thompson, J., cited by Kiteley, J. in *Toronto Board of Education v. Brunel Construction 2000 Ltd*., [1997] O.J. No. 3783 (Ont. Gen. Div.)

31 *Ibid*, pages 469-470.

32 Shelly Minarik and Barb Cotton, *"An Overview of Cases Suggestive of When the Courts Will Lift a Corporate Veil to Find an Individual Behind the Corporation Jointly and Severally Liable for a Plaintiff's Damages,"* Bottom Line Research & Communications, www.bottomlineresearch.ca/articles/articles/pdf/corporate_veil.pdf

33 In Ontario, see for example OBCA, R.S.O. 1990, c. B-16, s. 248 and cases decided thereunder.

lack of judicial regard for the *Salomon* [34] principle which continues to draw support for respecting the independent legal personality of the corporation: a shareholder, officer or director will only be liable for the wrongs of the corporation in very limited circumstances.[35] Innovative thinking energizes the search for other ways to reach into deeper pockets.

Personal liability, if otherwise warranted, is more frequently placed on directors specifically because they have to manage, or supervise management and are required to abide by standards of behaviour that make them conspicuous.[36] In discharging this duty, directors have a fiduciary duty to act honestly and in good faith *with a view to the best interests of the corporation*, and a duty of care to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. [37]

Control Theory and the Oppression Remedy

In company law there are a variety of ideas centering about an axis defined by the 'best interests of the corporation,' as opposed to self-interest. Control theory is generally consistent with them in predicting liability arising out of dominance and improper purpose. Had the court found the directors guilty of pursuing an improper purpose, such as self-interest, or of unfairly disregarding or prejudicing the creditors specifically in making the arrangements for inventory acquisitions which were the subject of complaint in *Peoples*, there can be little doubt that the creditors would have succeeded, but on a different footing—under art. 1457 of the Civil Code, and in most common law jurisdictions, by means of the oppression remedy.[38]

Indeed, in order to invoke the oppression remedy it is not even necessary to find that the impugned conduct was undertaken with the intention to cause harm to the plaintiff. In *Downtown Eatery 1993 Ltd. v. Ontario,*[39] the Ontario Court of Appeal, on the specific facts of that case, granted judgment against the officers and directors personally for their failure to ensure the protection of the employees' interests. Even so, such failure may be regarded, in the language of control theory, as "improper conduct" and as such raises no insurmountable inconsistency. What does support the invocation of the court's jurisdiction to grant the oppression remedy, in the words of the Supreme Court of Canada in *BCE,*[40] is that the court has jurisdiction to enforce "not just what is legal but what is fair."[41]

While it may be the case that the scope of the statutory duty of care is constantly evolving, that does not necessarily signal a general retreat from the principles upon which the controlling minds of a corporation may be held personally liable for some act or omission of the company. Perhaps there is a difference in the required intent; or maybe there are policy reasons why the breach of a broadly-based duty of care should not give rise to personal liability. In *Peoples* it was argued that the directors owed a fiduciary duty to creditors of the company in the vicinity of insolvency, a notion and distinction which the Supreme Court found ambiguous, of little use in defining the

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[34] *Supra,* footnote 7.
[35] *Miquelanti Ltd. v. FLSmitdth & Co. (c.o.b. FL Smidth Krebs Inc.*), [2011] O.J. No. 2490 at para. 18 (Ont. Sup. Ct. of Just.).
[36] *Peoples Department Stores Inc. (Trustee of) v. Wise,*
[37] *CBCA* at s. 102(1).
[38] *Supra,* footnote 36; C*BCA*, s. 241; OBCA s. 248; See also *Palmer v. Carling O'Keefe Breweries of Canada Ltd.* (1989), B.L.R. 128 (Div. Ct.); *Brant Investments Ltd. v. Keep Rite Inc.* [1991], 3 O.R. (3d) 289 (C.A.) at p. 308; *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (Ont. C.A.).
[39] [2001] O.J. No. 1879, 54 O.R. (3d) 161.
[40] *BCE Inc. v. A Group of 1976 Debentureholders et al.* [2008] 3 S.C.R. 560 ["*BCE*"].
[41] *Ibid*, para. 58.

duty. In the writer's submission, a holding that the duty arises on the occasion of insolvency would confuse the fundamental protection of incorporation to shareholders and others in the corporate family in circumstances where there are other statutes (such as the *Bankruptcy and Insolvency Act*[42]) which protect creditors from commercial misconduct involving, among other things, reviewable transactions or fraudulent preferences, to name only two. As noted above, it is not easy to pierce or lift the corporate veil, but it must be understood that insulating those who engage in wrongful conduct from liability by yielding to the preservation of the corporate veil may not be in the best interests of a society with a growing dependence on commercial morality. As a policy choice, it is not simply a matter of choosing between the separateness of the corporate actors from their charges or favouring the protection of commerce from fraudulent conduct. Circumstances may require either point of view to dominate. A failure to lift the veil would encourage excessive risk-taking or unacceptable practices by controlling persons where they knew *a priori* that their conduct would not entail personal liability. Conversely, a blanket response to limited liability presented by an overly-robust doctrine of the corporate veil and the circumstances under which it will no longer protect the controlling minds would undermine the very purposes for which the distinctive personality of the corporation arose by legal invention and would smother entrepreneurial activity. Local tastes vary, however, and this has led to legislatures imposing direct liability on directors and officers under specific social service and remedial statutes. In other cases, the common law has alternately expanded and contracted as circumstances required to enshrine fairness in the exercise of corporate authority and to create an organic, doctrinally consistent response to the prevention of fraud.

Conclusion

The power of the controlling mind and its exercise has for many years been the subtext of the decisions which our courts have reached in a range of cases, on a remarkable scale, in regulating the affairs of debtors, creditors and others. At times there are explicit, statutory imperatives to prove that the conduct which is the subject matter of an action is proscribed and in such event compensation will be available to the injured party, or a transaction will be set aside, or a conviction may be entered and punishment inflicted if the defendant has acted with requisite intent or for a collateral purpose such as the pursuit of self-interest. Armed with an impressive and frequently overlapping array of common law, equitable and statutory tools, our courts have striven to fashion remedies that rise to the occasion, comport with prevailing values and satisfy an embedded requirement of good conscience in commercial activity.

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[42] R.S.C. 1985, c. B-3