

## Vi. A New Model Based On Corporate Reputation



## **Chapter 26: Sentencing a Corporation: Imbedded Auditors, Secured Bonds, and Other Creative Strategies**

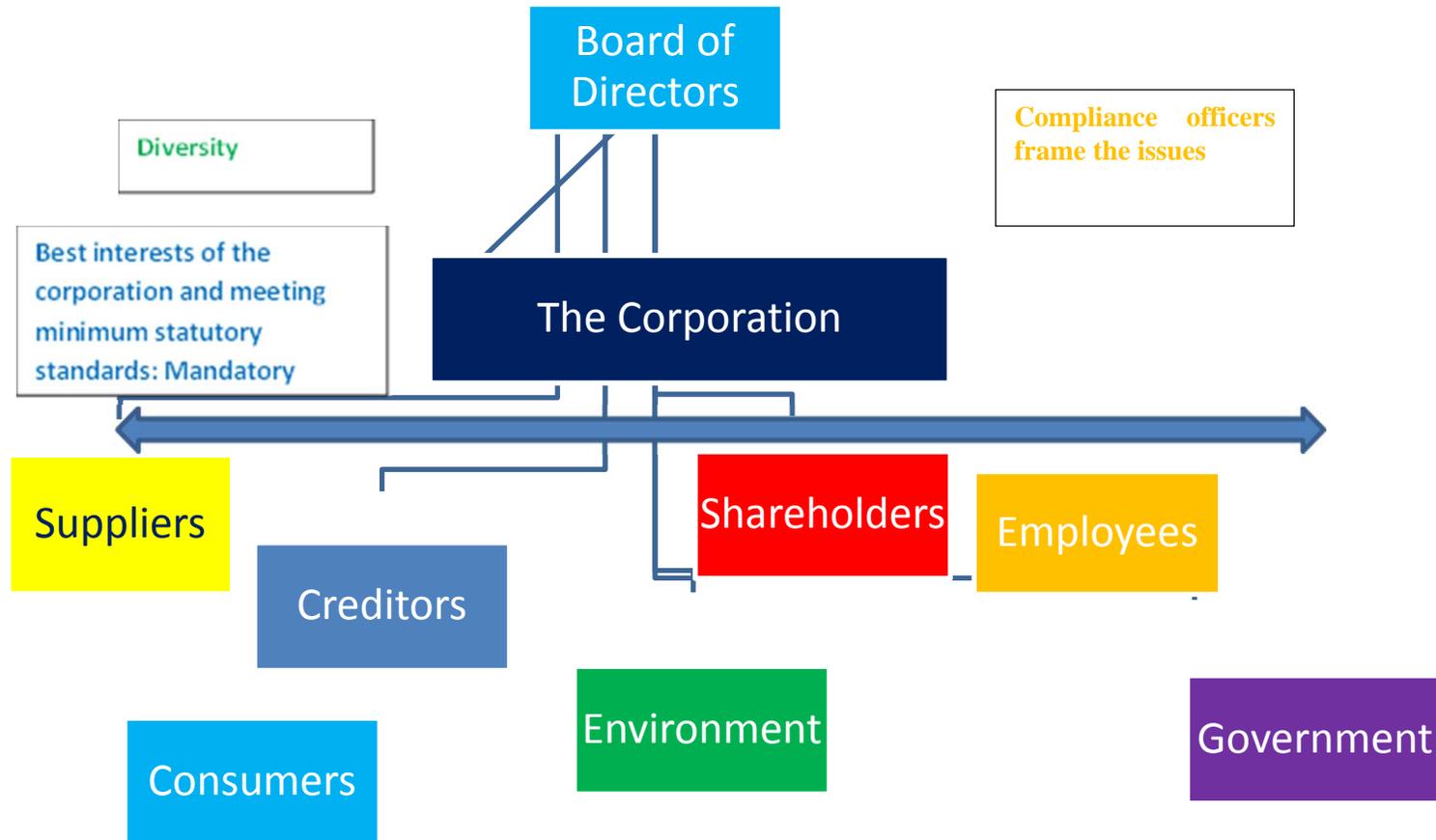
**Kenneth Jull**

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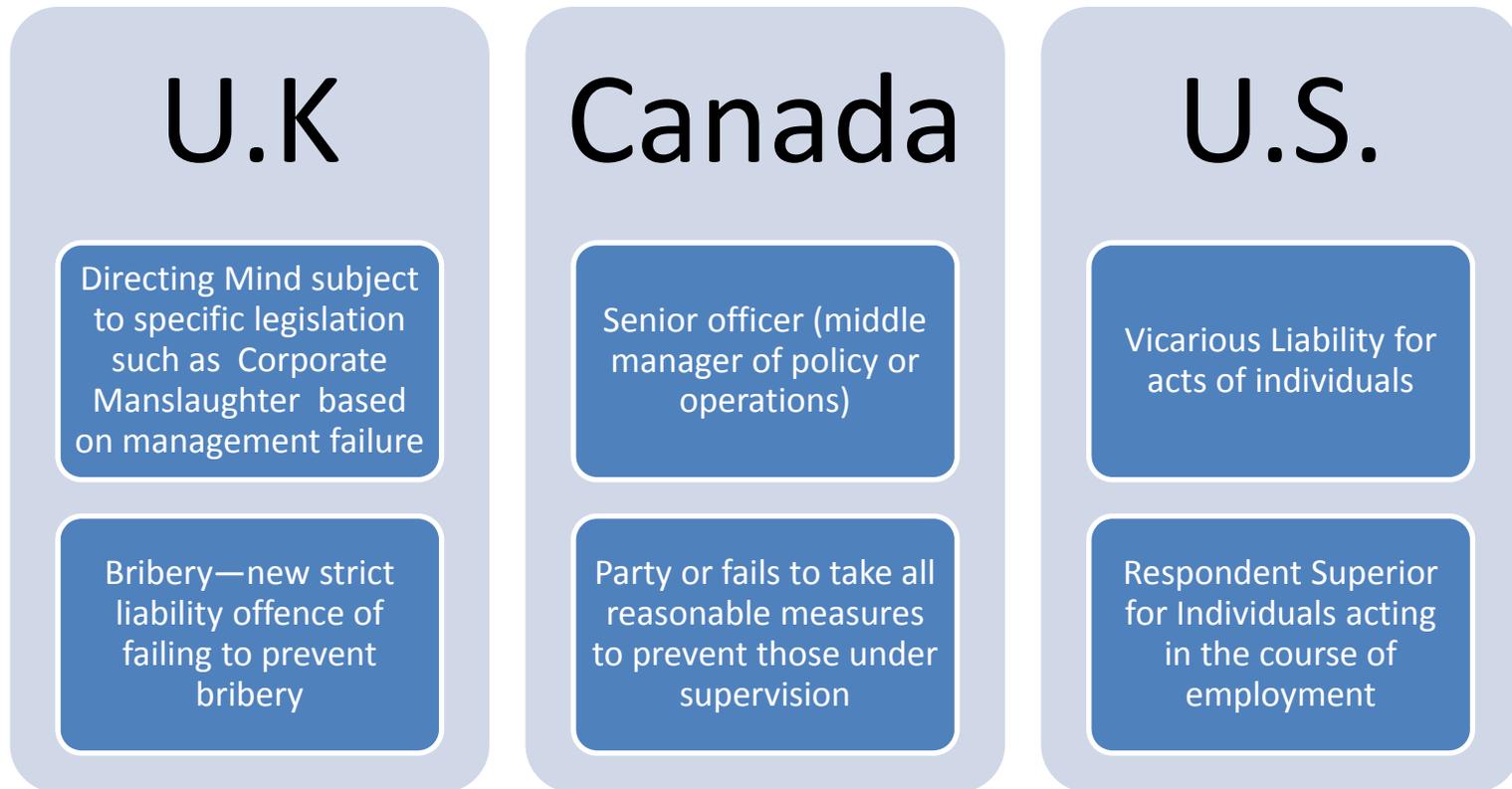


## § Appendix 27A Risk Management Flowchart, Steps 1, 10



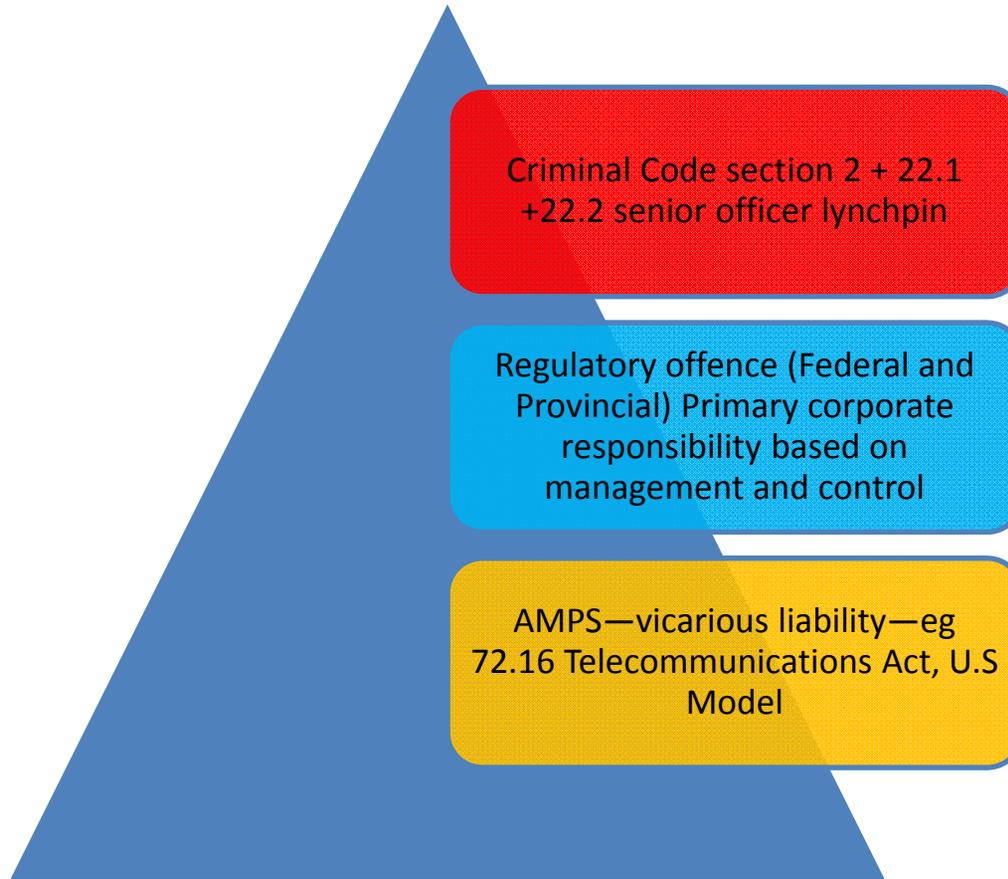
## Spectrum of Models

### § 10:1. Generally

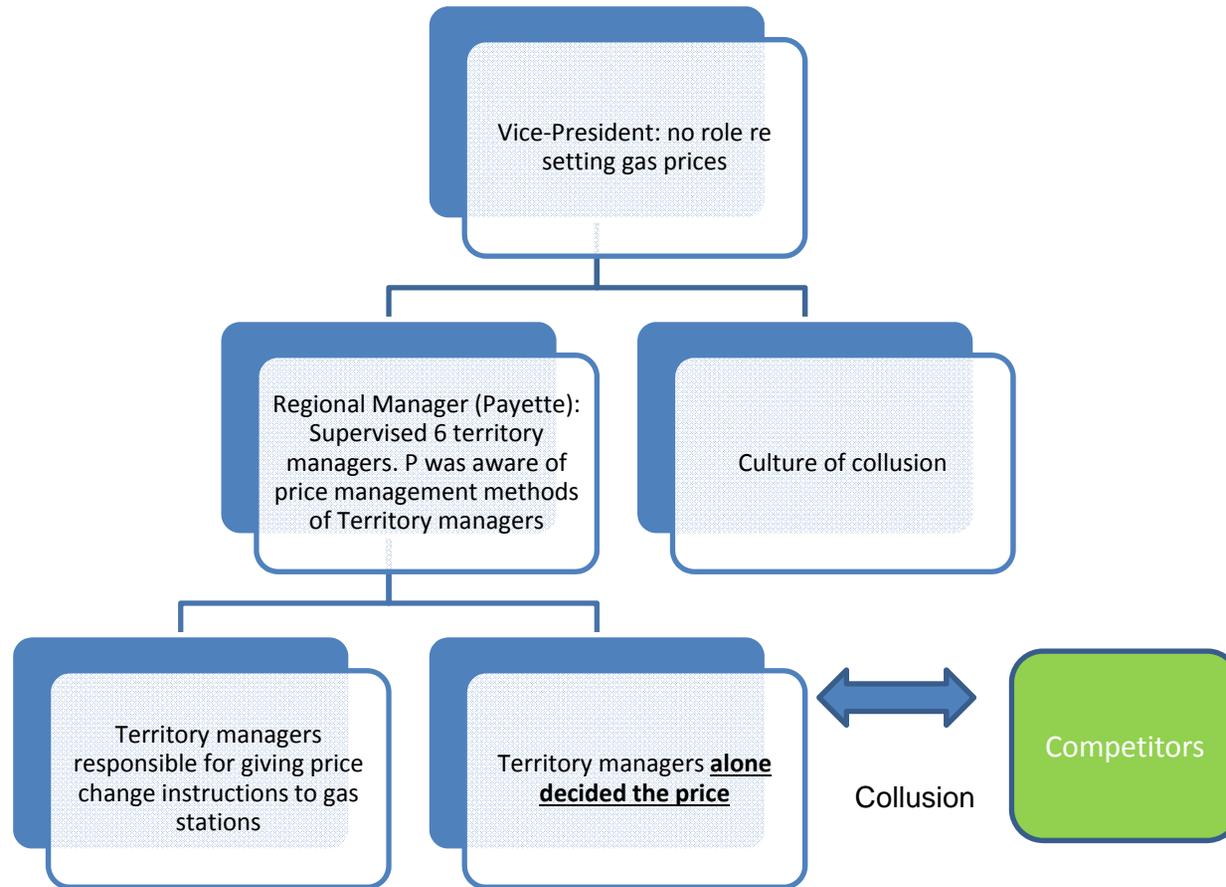


## Types of Corporate Liability

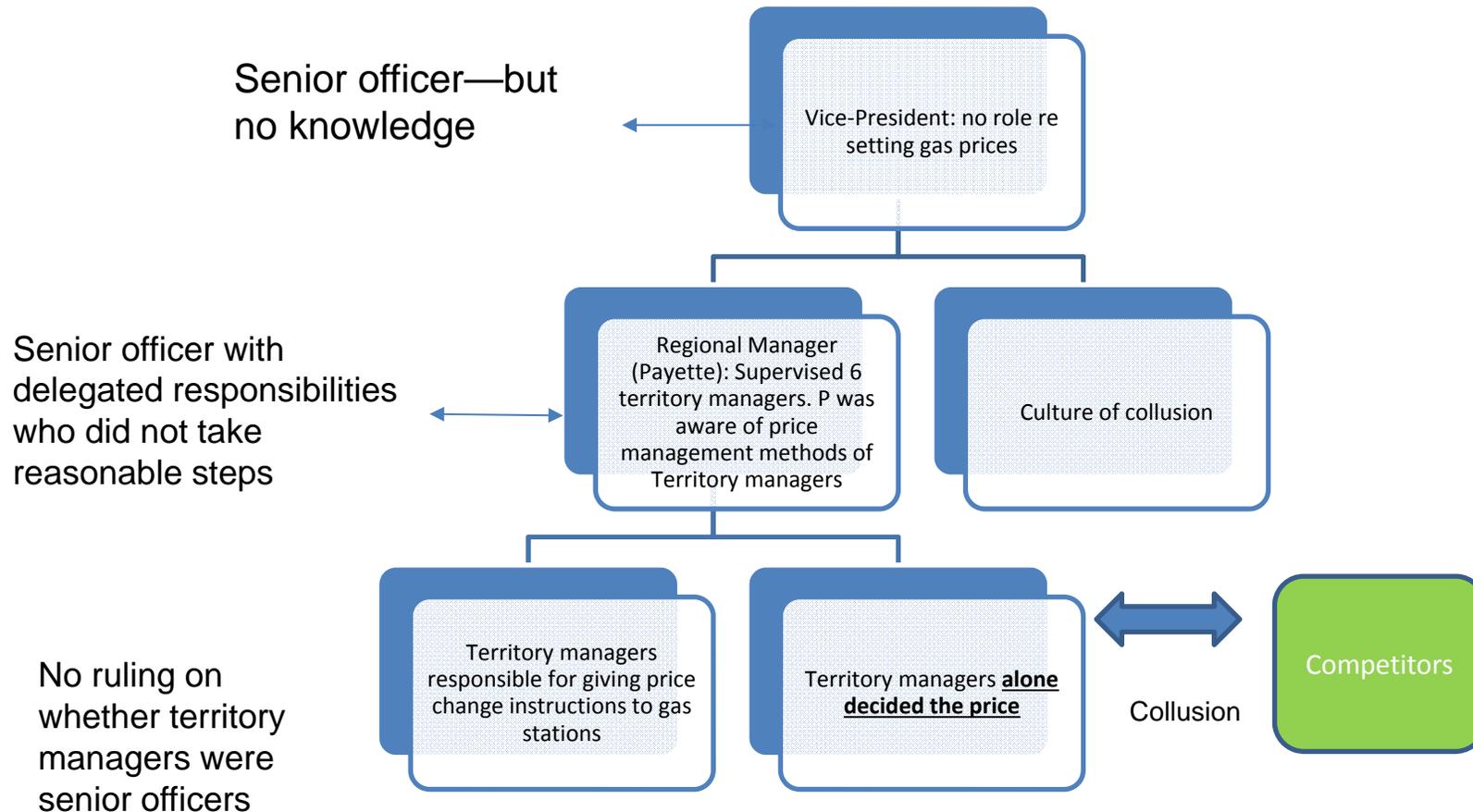
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## Global Fuels Example



# Archibald, Jull — The New Law Of Expanded Organizational Criminal Liability



## § 10:27 Wilful Blindness

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SNC-LAVALIN CONSTRUCTION INC. (FORMERLY SOCODEC INC.)

AGREED STATEMENT OF FACTS Para 34:

- **Between September 2001 and January 2011, on behalf of SLCI, SLII paid a total of approximately \$127,245,937 CAD to both Duvel and Dinova with respect certain projects listed above in paragraph 27 of this Agreed Statement of Facts of which**
- **(i) \$47,689,868 CAD was paid, by Duvel and Dinova, to Saadi GADHAFI for exercising his influence as the son of the Libyan dictator Muammar GHADAFI for securing contracts for the benefit of SLCI, and (ii) \$73,582,219 CAD was paid, by Duvel and Dinova, for the personal benefit of BEN AISSA and BEBAWI.**

## § 26:17. Corporate Governance and Reputation

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- *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, 395 C.C.C. (3d) 1, 451 D.L.R. (4th) 367 (S.C.C.) <https://canlii.ca/t/jbf0p>

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- In [Quebec \(Attorney General\) v. 9147-0732](#) [Québec inc.](#),<sup>1</sup> the Supreme Court of Canada unanimously agreed that [s. 12 of the Canadian Charter of Rights and Freedoms](#) does not protect corporations from cruel and unusual punishment or treatment.
- The crux of the matter centered on whether the word “cruel” could apply beyond human beings to corporations.

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- The court ruled that “cruel” denotes human pain and suffering, either physical or mental.<sup>2</sup> A corporation, as a non-human entity, cannot be subject to human pain or suffering. In other words, the legal fiction of a corporation benefitting from legal personhood does not mean that the corporation can be subject to cruelty. Therefore, the court ruled that cruel and unusual punishment cannot apply to corporations given their inability to feel human pain or suffering.

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- In this case, at first instance 9147-0732 Québec inc. was found guilty before the Court of Québec for carrying out construction work without a proper licence, contrary to the provisions of the [Building Act](#).<sup>1</sup> The Court of Québec imposed a mandatory minimum fine, as mandated under the [Building Act](#), against 9147-0732 Québec inc. totalling \$30,843.<sup>2</sup> The corporation appealed, challenging the mandatory minimum fine as unconstitutional under s. 12 of the *Charter*, which protects against cruel and unusual punishment.

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- However, Justices Brown and Rowe, writing for the majority in *Quebec (Attorney General) v. 9147-0732*, seem to leave the door open when they write that under s. 12 of the Charter, “excessive fines (which a corporation *can* sustain), *without more*, are not unconstitutional”.<sup>9</sup>
- For [s. 12](#) to be triggered, fines must be incredibly excessive so as to be indecent and “abhorrent or intolerable”, and that each are anchored in human dignity.<sup>10</sup>

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- We propose that s. 12 should apply to smaller, closely held corporations where an excessive fine might have severe consequences for the physical persons behind the corporation.
- These persons would not have any recourse under such a situation, since after the Supreme Court's ruling the company would rightly not be able to raise a cruel and unusual punishment argument, and the physical persons are not themselves charged. Each factor results in these physical persons not having proper standing to pursue recourse

## § 26:16. Reverse Piercing of the Corporate Veil

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- As Justice Carole J. Brown wrote in [\*Choc v. Hudbay Minerals Inc.\*](#):
- Ontario courts have recognized three circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced: (a) where the corporation is ‘completely dominated and controlled and being used as a shield for fraudulent or improper conduct; ... (b) where the corporation has acted as the authorized agent of its controllers, corporate or human ... and (c) where a statute or contract requires it.

## § 26:16. Reverse Piercing of the Corporate Veil

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- In [Yaiguaje v. Chevron Corporation](#),<sup>2</sup> the Ontario Court of Appeal has affirmed that corporate separateness is the governing rule subject to the exception where the corporate form is being abused to the point that the corporation is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct.
- The Supreme Court of Canada has denied leave to appeal in *Chevron*.

## § 26:16. Reverse Piercing of the Corporate Veil

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- Nichols and Khimji conducted empirical analysis of the veil piercing cases in an article entitled “Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study”.<sup>4</sup>
- Government entities were the most successful with their claims at 45.76% success whereas shareholder, corporation, and related corporation piercing claims were the least successful.

## § 26:16. Reverse Piercing of the Corporate Veil

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- If it is appropriate to pierce the corporate veil to do justice on behalf of a government regulator, the mirror situation should also be considered by way of a reverse piercing argument.
- Imagine, for example, a large corporation which has created shell companies to hide assets offshore to evade taxes, hide incoming funds, pay bribes, or for other purposes contrary to criminal or regulatory law. If the corporation is being used to facilitate fraudulent or improper conduct, the Chevron test gives regulators the ability to pierce the corporate veil in order to associate shell companies with the parent company.

## § 26:16. Reverse Piercing of the Corporate Veil

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- Now, imagine a family-run construction business comprised of three people. The family members have poured all their life savings into ensuring the business gets off the ground and becomes viable. As newcomers to the construction and business worlds, the family members are relatively unsophisticated businesspeople.
- The company becomes caught up in a quasi-criminal or regulatory offense and gets fined \$1,000,000, a fine which represents the loss of life savings that each family member poured into the corporation for its launch.



## § 26:16. Reverse Piercing of the Corporate Veil

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- If there is a bright-line rule that bars the physical persons behind corporations from bringing a claim under s. 12 for this fine levied against the corporation, then these physical persons may not have an ability to challenge the fine in court—despite the fact that the fine may be disproportionate to the regulatory offense committed and may in fact rise to the level of cruel and unusual punishment against those few persons who closely hold the family-run corporation.
- Unlike what the Supreme Court asserts,<sup>5</sup> a corporation cannot always sustain such excessive fines when it is smaller and closely held—indeed, the people behind a corporation sometimes certainly cannot.

## § 26:16. Reverse Piercing of the Corporate Veil

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- Allowing a reverse-pierce would allow the physical persons to go to court, so that the persons can argue that even though the business operates in a corporate form, the composition is really only the three people who cannot sustain such a disproportionate fine. This reverse-pierce of the corporate veil would allow the physical persons behind the corporation to have standing to make the argument that the fine is cruel and unusual treatment *for them*, the physical persons, even as the fine was directed towards the corporation.

## § 26:16. Reverse Piercing of the Corporate Veil

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- *Quebec (Attorney General) v. 9147-0732* should be interpreted as leaving the door open to harsh economic treatment rising to the level of triggering s. 12 protection. While the Court does specify that s. 12 does not apply to corporations and thus cannot protect corporations from high economic penalties,<sup>15</sup> the court also draws on [Boudreault](#) to clarify that surcharge punishments can violate s. 12 of the *Charter* when that penalty causes certain harms to individuals.

## § 26:17. Corporate Governance and Reputation

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- The recognition of corporate reputation in some ways paints a picture of corporations as almost human. Indeed, the advertising of many companies draws on human-like comparisons to evoke a bonding process with consumers. Sixteen years ago, Spike Jonze directed a quirky little ad for Ikea that quickly became a classic of modern advertising. “Lamp 1” played on your heartstrings, while amping up the melodrama of an old lamp being tossed onto the street by its owner. By the end of the spot, you actually felt sorry for the lamp.

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- ..... until Swedish actor Jonas Fornander wanders onscreen and admonishes the viewer for being so easily manipulated.
- “Many of you feel bad for this lamp”, he says in one of the great rug-pulls in ad history. “That is because you're crazy. It has no feelings, and the new one is much better.”<sup>5</sup> “The genius was in how it so quickly was able to establish an emotional connection between the viewer and a lamp, then hilariously douse it all, with actor Jonas Fornander dropping a ... truth bomb.”

## § 26:17. Corporate Governance and Reputation

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- Ikea Canada decided to resurrect the story for a sequel, while putting a modern twist on the sad little lamp's end. Made with agency Rethink Canada and directed by Mark Zibert, “Lamp 2” picks up where the original left off, but instead of the landfill, we get a serving of responsible consumerism when a little girl finds another use for our hero. Earnest optimism replaces the original wisecrack, but we still get Fornander dropping back in, this time to remind us that it is not crazy to reuse things.

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- If a corporation can have emotional intelligence, and if corporate images can evoke powerful emotional reactions, is it not a logical extension that those same corporations could “suffer” from a cruel and unusual sentence that would damage that very corporate reputation? This is an issue that goes far beyond the narrow constitutional argument about whether a corporation can argue that it has been subjected to cruel and unusual punishment. We need to start thinking about new corporate roles, and maybe even new corporate paradigms.



**Questions?**



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