In the Case of Equal Fault: Corporate Fraud, Professional Liability and a Canadian Introduction to the *In Pari Delicto* Defence

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Scandals involving management's fraudulent misrepresentation of a corporation's financial position are nothing new. Corporations, or those standing in their shoes, such as trustees, receivers and liquidators, are increasingly bringing actions against their outside professional advisors in an attempt to recover what are arguably the corporations' self-inflicted losses. Frequently, the basis for the claim is that the advisor merely failed to detect the fraud. Should such advisors be held liable in these circumstances or should a corporation's own fraudulent behaviour bar it from relief?

In many US States, the answer lies in the *in pari delicto* defence. The doctrine of *in pari delicto* ("equal fault")[2] is a powerful defence to an action in which a corporate plaintiff, or a party standing in its shoes, is at least equally responsible for the wrongdoing on which the claim is based. This complete defence permits the dismissal of a claim at an early stage of the litigation even in regimes that otherwise apply comparative negligence. Such a defence saves the time and expense of a trial.

While defendants in Canada appear to be unaware of the modern *in pari delicto* doctrine, there is good reason to believe that it may be available to them. This article is an introduction to *in pari delicto* and its application in the US, and suggests that in Canada the doctrine of *ex turpi causa* ("a base cause")[3] may already provide the grounds for such a defence to be adopted into Canadian law.

THE ORIGIN OF *IN PARI DELICTO*

In pari delicto is rooted in the long-standing principle that courts will not resolve a dispute between two wrongdoers because "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing."[4] Such a policy prevents the wrongdoer from profiting from misconduct and deters illegality.[5]

Commentators and courts have traced *in pari delicto*'s most notable early expression to the 1893 unreported English decision known as the *Highwayman's Case*.[6] Two highwaymen were arrested and charged with robbery. One sued the other in equity for an accounting of the gains of their criminal enterprise. The court, unimpressed with the petition, dismissed the action. The court drew on the "unclean hands" precedents of the Ecclesiastical Courts and the *in pari delicto* precedents of the Chancery Courts, stating that the courts were not to be used by one intentional wrongdoer to recover from another. The criminals were ultimately hanged and their lawyers were held in contempt of court, fined and committed to Fleet Prison pending payment of the fine.

While the modern doctrine of the *in pari delicto* defence is more often employed in cases of corporate fraud, the fundamental principle that courts are not to be used by one intentional wrongdoer to recover from another remains the root of the defence.

THE MODERN DOCTRINE: CORPORATE ATTRIBUTION

The modern *in pari delicto* doctrine stems from two common law principles: the principle of agency, by which a corporation is understood to act through the instrumentality of its officers and duly authorized agents; and the doctrine of corporate attribution, whereby the identity of the corporation is said to coincide with that of its directing minds.

One of the earliest expressions of these principles is found in *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*:

> ... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation ... For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself ...[7]

The above passage describes what is known in the US as the "corporate imputation" doctrine[8] and in Canada as the "corporate identification" doctrine.[9] In Canada, the doctrine applies where an individual, or group of individuals, has "decision-making authority on matters of corporate policy"[10] and is "carrying out [their] assigned function in the corporation."[11] Where corporate officers or directors are acting within the scope of their authority, their knowledge and actions are presumptively attributable to the corporation, even if they do not communicate their knowledge to the corporation.

Under *in pari delicto*, the claim of a person or corporation is estopped where that person or corporation already has knowledge of a fraud, either directly or by attribution, and later seeks relief from a third party based on reliance on the third party's failure to expose the fraud. This defence applies equally to the claims of entities stepping into the shoes of a fraudulent corporation, such as trustees, receivers, and liquidators because they are generally subject to the same rights and defences that would have been available to the corporation itself.[12]

EXCEPTIONS TO THE *IN PARI DELICTO* DEFENCE

The Adverse Interest Exception

The *in pari delicto* defence is not limitless. The "adverse interest exception" is based on the distinction between fraud committed *on behalf* of a corporation and fraud committed *against* a corporation.[13] Where the fraud of corporate officers or directors can be said to be wholly adverse to the interests of the corporation, they should not be attributed to the corporation and the defence of *in pari delicto* does not apply. Acts that are wrongful vis-à-vis third parties remain attributed to the corporation.[14]

While it is clear that the adverse interest exception applies to outright theft or embezzlement from a corporation, there is disagreement about what else falls within the exception. Certain leading American jurisdictions have adopted a narrow "total abandonment" standard, under which a corporate agent's acts will be attributed to the principal unless the agent "totally abandoned his principal's interests and [acted] entirely for his own or another's purposes."[15] Other jurisdictions have taken a less stringent approach, applying the adverse interest exception where the "wrongdoing is done primarily for personal benefit of the officer and is 'adverse' to the interest of the company"[16] or where there is *any* benefit to the corporation regardless of the agent's subjective motivations.[17] The latter approaches insert a degree of uncertainty to situations where there may be benefit to both the insider and the corporation.

There is also disagreement among American courts as to the relevant time to assess the harm to the corporation for the purposes of the exception. Some courts have stated that the relevant time is the time of the corporate agent's malfeasance, which means that a corporation's ensuing bankruptcy is not determinative of adversity. These courts consider fraud that enables a corporation to survive, attract new investors or raise funds to be a benefit to the corporation despite the harm that results, *e.g.*, bankruptcy, when the fraud is discovered.[18] Other courts have focused on a resulting bankruptcy, stating that acts which extend a corporation's life past the point of insolvency, *e.g.*, fraudulent inflation of corporate revenues, cannot be considered a benefit to a corporation.[19] In Canada, the *Canadian Dredge* logic would appear to favour the former, more narrow, approach: "The continued existence of a corporation must be presumed to be a benefit to that corporation, even if ultimately the position of some or all of its shareholders is eroded."[20]

Limits to the Adverse Interest Exception

Some American courts have created exceptions to the adverse interest exception, thereby upholding the *in pari delicto* defence. The "sole actor exception" provides that where a sole shareholder wholly owns and exercises complete control over a corporation, the corporation may not rely on the adverse interest exception. Where the sole shareholder and directing mind is "self-dealing", knowledge of the fraud will be attributed notwithstanding the adverse interest.[21] The sole actor exception has been expanded by some courts to include wrongdoing by individuals who, although not sole shareholders, nonetheless exercise complete control or domination over the corporation.[22]

Several courts have found that the sole shareholder exception will not apply where there were other stakeholders who were innocent and unaware of the wrongdoing (the "innocent decision maker exception"). The rationale for this exception is that to attribute an agent's wrongful conduct to a corporation when there are innocent stakeholders punishes them unfairly.[23] Generally, however, the "innocent decision maker" exception has been rejected with some courts considering the presence or absence of innocent decision makers under the sole actor analysis.[24] In *Canadian Dredge*, Estey J. rejected a similar line of argument: "While it is true that this penalty will feed through to the stockholders, who may well be totally innocent as in the case of a large public company, it may be seen as a risk or cost associated with the privilege of operating through the corporate vehicle."[25]

THE OPERATION OF *IN PARI DELICTO* IN THE US

The *in pari delicto* defence in the US is governed by state law and accordingly the subject of significant jurisdictional variation.[26] Case

law reveals at least three approaches to the scope of the defence: i) applying the defence broadly; ii) narrowing the defence to negligence; and iii) effectively precluding the defence altogether.

i) Broad Application in *Kirschner* and *Teachers*

In 2010, the majority of the Court of Appeals of New York in two companion cases, *Kirschner v. KPMG LLP*[27] and *Teachers' Retirement System of Louisiana and the City of New Orleans v. PricewaterhouseCoopers LLP*,[28] ruled that the *in pari delicto* defence should be strictly applied. The court stated that the adverse interest exception is narrow and does not apply where there is a benefit to both the insider and the corporation. The court declined to follow earlier decisions of Philadelphia and New Jersey courts, discussed below, which had carved out additional exceptions to the defence.

In *Kirschner*, the bankruptcy trustee of Refco, a brokerage and clearing house, claimed against KPMG for failing to detect the concealment of millions of dollars in uncollectable debt orchestrated by Refco's President and CEO. In *Teachers*, shareholders filed a derivative suit on behalf of American International Group ("AIG") against PricewaterhouseCoopers ("PwC") for failing to detect the senior officers' fraudulent scheme to misstate the corporation's financial performance.

In *Kirschner*, the court found that the adverse interest exception did not apply because Refco received "substantial benefits" from the insiders' alleged fraud. Assets were sold at inflated prices because of the fraud, thereby harming the purchasers and benefitting the corporation. Likewise, in *Teachers*, the allegations in the complaint established that AIG's officers did not "totally abandon" AIG's interests such as to trigger the adverse interest exception.

As a matter of policy, the court declined to create exceptions to *in pari delicto* to protect innocent shareholders. To immunize shareholders of corporations while holding "innocent" shareholders of the defendant auditors liable would create a double standard. The court stated "why should the interests of innocent stakeholders of corporate fraudsters trump those of innocent stakeholders of the outside professionals who are the defendants in these cases?"[29] The court justified a strict rule on the basis that corporate principals, rather than third parties, are in the best position to monitor their agents. Limiting the defence would not deter professional misconduct by auditors and other professionals who already face liability from shareholders.[30]

Both the litigation trustee and the derivative plaintiffs proposed that the intent of the wrongdoing agents determine the adverse interest exception, applying where insiders intended and were able to benefit themselves personally and/or that the company received only short term benefits but suffered long term harms.[31] This approach was rejected by the majority because: "it would encompass every corporate fraud prompting litigation";[32] "a company victimized by fraud is always likely to suffer long-term harm once the fraud becomes known";[33] and the subjective intent of fraudulent agents will almost always be to benefit themselves in some way. Thus, the fact that Refco eventually filed for bankruptcy as a result of the fraud did not satisfy the harm requirement of the adverse interest exception.

Although the court did not directly address the issue of a colluding defendant, the majority stated that *in pari delicto* is not limited to the protection of merely negligent defendants and is also available when both the plaintiff and defendant acted wilfully.[34]

ii) Negligence Approach in *AHERF*

In *Official Committee of Unsecured Creditors of Allegheny Health Education and Research Foundation (AHERF) v. Price Waterhouse Coopers, LLP*,[35] the management of a large non-profit healthcare facility operator, artificially inflated financial results to conceal the corporation's insolvency and poorly-conceived growth strategy. Upon discovery of the fraud and the corporation's ensuing bankruptcy, a committee of unsecured creditors stepped into the shoes of the corporation to bring a claim against PwC, alleging that PwC had colluded with senior management by issuing a clean audit report despite knowledge of the wrongdoing.

The Supreme Court of Pennsylvania, on certification of a question concerning the scope of *in pari delicto*, focused on the equitable nature of the defence and limited its availability to those auditor defendants that had acted in good faith and had not colluded in the corporation's fraud. The court defined the purpose of the defence as the protection of innocent third parties where the agent acts within the actual or apparent authority delegated to them by the corporation.[36] Accordingly, third parties who have been negligent should be protected, to the extent that they acted in good faith and had not colluded.[37]

Therefore, in Pennsylvania, *in pari delicto* has been effectively limited to claims of negligence, and is unavailable as a defence to claims based on a defendant's active participation in the wrongdoing. The court noted that the defence would likely be justified, despite collusion, in the case of a corporation controlled by a single individual claiming against a sole-proprietor auditor.[38]

iii) Precluding the Defence in *NCP*

The decision of the Supreme Court of New Jersey in *NCP Litigation Trust v. KPMG LLP*[39] effectively precludes the *in pari delicto* defence, emphasizing instead external corporate monitoring and prioritizing the protection of innocent shareholders.

In *NCP*, two officers of a software corporation intentionally misrepresented the corporation's financial status by concealing millions of dollars in losses. KPMG, the corporation's auditors, failed to detect the misrepresentations for several years. When subsequent audits finally revealed the fraud, NCP's share price fell by 70 per cent and the corporation eventually filed for bankruptcy. The corporation's litigation trust sued KPMG in negligence.

The majority of the court stated that *in pari delicto* does not bar a claim, even one based on negligence, by innocent corporate shareholders against a defendant who contributed to the misconduct.

The court stated that the tort objectives of compensation and deterrence are not served by protecting negligent auditors against all shareholders. In large corporations, the ability to influence board elections may require substantial share ownership and most shareholders are not able to monitor management effectively. Instead, they reasonably rely on third parties who are retained to monitor corporate activity. Extending protection to auditors would frustrate the purpose of the attribution doctrine, which is "to protect the innocent."[40] Further, the law must also discourage fraud and negligence by auditors. Therefore, in contrast to New York's approach in *Kirschner*, New Jersey law has preferred the policy of promoting external corporate monitoring.

The court added that attribution would still apply where shareholders themselves engaged in fraud or should have been aware of the fraud because of their role in the corporation or ownership of controlling shares.

EX TURPI CAUSA: DEFENDING AUDITORS IN THE UNITED KINGDOM AND CANADA

In the United Kingdom and Canada, the result of the US *in pari delicto* defence could be achieved under the *ex turpi causa* principle. In *Hall v. Hebert*, McLachlin J. (as she was then), writing for the majority of the Supreme Court of Canada, defined *ex turpi causa* as the principle that "permits judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of the justice system."[41] Her reasoning strikes similarity to Lord Mansfield's original formulation of the doctrine in the 18th century.[42] She stated:

> The power is a limited one. Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law. Its use is not justified where the plaintiff's claim is merely for compensation for personal injuries sustained as a consequence of the negligence of the defendant.[43]

McLachlin J. described *ex turpi causa* as an affirmative defence, stating "[l]ike a lapsed limitation period, it represents a reason why a cause of action, which might otherwise be fully made out, should not succeed."[44]

In the following two decisions, the concept behind *in pari delicto* was applied as *ex turpi causa* in the UK and Canada.

i) *Stone & Rolls Ltd. v. Moore Stephens*

In *Stone & Rolls*,[45] Stojevic used the appellant corporation, of which he was the sole directing mind and beneficial owner, as a means of defrauding financial institutions. The liquidator of the appellant corporation sued its auditors for alleged negligence in failing to detect the fraud. Raising *ex turpi causa* as a defence, the auditors sought to have the claim struck out on summary judgment.

By a bare majority, the House of Lords struck out the claim. There was variance in opinion even within the majority itself. Lord Walker of Gestingthorpe, who gave the leading speech, accepted that in principle, *ex turpi causa* should be available as a defence in an action of this type. He stated simply: "No one can found a cause of action on his own criminal conduct",[46] relying on the approach of McLachlin J. in Hall.[47] He found that there is an adverse interest exception to the *ex turpi causa* principle, stating that "there was a company which was the victim of a fraud or serious breach of duty … it was not to be prejudiced by the guilty knowledge of an individual officer who could not be expected to disclose his own fault."[48] He also stated that there is a sole actor exception to the adverse interest exception where "denial of attribution on 'adverse interest' grounds would not serve the ends of justice".[49]

He ultimately found that knowledge of the fraud could be attributed to the corporation, citing with approval the *Canadian Dredge* decision.[50] He rejected the idea that giving effect to the sole actor exception was an impermissible lifting of the corporate veil as it was solely a matter of ascribing a dishonest state of mind to the corporation.[51]

Lord Brown of Eaton-under-Heywood agreed with Lord Walker, but noted that different considerations might arise where innocent shareholders seek to mount an action against a corporation's auditors.[52] Lord Phillips concurred in the result reached by Lord Walker but based his decision on the finding that the auditors owed no duty of care to ensure that the corporation was not used as a vehicle for fraud. Lord Phillips also took a slightly different view, relying on *Canadian Dredge* to conclude that because the corporation had received benefits – substantial amounts of cash – from Stojevic's fraud, the adverse interest exception did not apply.[53]

ii) *Hart Building Supplies Ltd. v. Deloitte & Touche*

While there is little Canadian authority to date regarding the use of *ex turpi causa* in this context, the Supreme Court of British Columbia's decision in *Hart Building Supplies*[54] is a good example of the potential of this defence. This decision concerned a summary trial of an action by a corporation against its auditor for a failure to detect a fraudulent overstatement of inventory, which had been made by a director of the corporation, Larson, who "had more authority than any other officer or employee."[55]

Baker J. applied the corporate attribution doctrine set out in *Canadian Dredge*[56] and, given that the adverse interest exception has been narrowly construed in Canada, dismissed the negligence action:

> Larson was Hart's directing mind and its alter ego. Hart may not benefit from its own fraud. Hart, in the person of Larson, deliberately misrepresented the true state of its financial affairs to Deloitte, in contravention of the agreement it entered into with Deloitte by virtue of the representation letters Larson, acting on behalf of Hart, signed. Hart knew that the audited financial statements were incorrect, because Hart provided false information with the knowledge and intention that the auditors would rely on that false information in preparation of the statements.57

Hart Building Supplies goes further than *Stone & Rolls* in making the *ex turpi causa* defence available to auditors. Larson held only 15 per cent of the shares in Hart whereas Stojevic was a sole actor. Despite receiving some strong academic criticism,[58] this decision is consistent with the scope of the attribution principle stated in *Canadian Dredge*: the acts and knowledge of corporate officers are those of the corporation, unless totally in fraud of the corporation.

THE FUTURE OF THE *IN PARI DELICTO/EX TURPI CAUSA* DEFENCE IN CANADA

Hart Building Supplies represents a step in the right direction. Canada should continue to develop *ex turpi causa* as a defence available to outside professional advisors otherwise it risks falling out of line with other leading jurisdictions such as the US and the UK.

In fact, Ontario courts may soon have the opportunity to decide whether the *ex turpi causa* defence is available and, if so, under what circumstances. In August 2011, a $6.5 billion class action was launched against Canadian listed Chinese forest corporation, Sino-Forest, and its outside advisors. In June 2011, Muddy Waters LLC released a report by mysterious American short-seller Carson Block, alleging, among other things, that the corporation had fraudulently overstated its timber inventories. The Ontario Securities Commission ("OSC") then launched an investigation, which led to the suspension of trading in Sino-Forest shares and the resignation of its CEO. Before trading was suspended in Toronto and New York, shares in the corporation plummeted from $25 to under $5.

Regardless of the outcome of the OSC investigation, if Sino-Forest is liquidated and shareholders bring a derivative action or if a claim over is made by the corporation against its outside professional advisors, the advisors will presumably raise the *ex turpi causa* defence. If so, this could be a "Made in Canada" opportunity for *in pari delicto*/*ex turpi causa* to be adopted in Ontario law. ■

1. Many thanks to Louise Moher and Paul Daly without whose significant contribution this paper could not have been completed.
2. *In pari delicto potior est conditio defendentis* ("in a case of equal or mutual fault, the position of the defending party is the better one").
3. *Ex turpi causa non oritur actio* ("a claim cannot arise from a base cause").
4. See e.g., *Woodworth v. Janes*, 2 Johns 417, 423 (NY, 1801).
5. See e.g., *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 938 N.E.2d 941 at 950 (CA, 2010) ["*Kirschner*"].
6. Notes, "*The Highwayman's Case* (*Everet v. Williams*)" (1893), 9 L.Q. Rev. 197. See e.g., Ronald R. Peterson, "Hang 'Em High: Recent Developments in the Doctrine of *In Pari Delicto* and Its Application to Trustees in Bankruptcy" (American Bankruptcy Institute – 29th Annual Spring Meeting).
7. [1915] A.C. 705 at 713-714, per Viscount Haldane.
8. Restatement (Third) of Agency §5.03.
9. *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 at para. 20 ["*Canadian Dredge*"]. See also *R. v. St. Lawrence Corp.*, [1969] 2 O.R. 305 at 320 (CA).
10. *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497 at 527 ["*Rhône*"]. See also *R. v. ACS Public Sector Solutions Inc.*, 2007 A.B.P.C. 315; *R. v. Safety-Kleen Canada Inc.*, [1997] O.J. No. 800, 145 D.L.R. (4th) 276 (CA); *Scotia McLeod Inc. v. Peoples Jewellers Ltd.*, [1995] O.J. No. 3556, 26 O.R. (3d) 481 at 492-493 (CA).
11. *Canadian Dredge* at para. 21.
12. See Frank Bennett, Bennett on Bankruptcy 11th ed. (2011) at p. 69 (trustees); Winding-up and Restructuring Act R.S.C., 1985, c. W-11, ss. 33-35 (liquidators); and Kevin P. McElcheran, Commercial Insolvency in Canada (2005), pp. 18-19 (receivers).
13. *Cenco Inc. v. Seidman & Seidman*, 686 F. 2d 449 at 454-456 (7th Cir., 1982).
14. See *Bank of Montréal v. Ernst & Young Inc.*, 2002 SCC 81 at para. 23 ["*Bank of Montréal*"]: "The wrongfulness of an officer's act in relation to a third party does not negate that act's attribution to the corporate body."
15. See e.g., *Center v. Hampton Affiliates*, 66 N.Y. (2d) 782 at 784-785 (CA, 1985); In *re Bennett Funding Group, Inc.*, 336 F.3d 94 at 100 (2nd Cir., 2003); *CBI Holding Company, Inc. v. Ernst & Young Inc.*, 529 F.3d 432 at 453 (2nd Cir., 2008).
16. *Baena v. KPMG LLP*, 453 F.3d 1 at 7 (1st Cir., 2006) ["*Baena*"].
17. See e.g., *Nisselson v. Lernout*, 469 F.3d 143 at 156 (1st Cir., 2006) ["*Nisselson*"].
18. *Kirschner* at 953; *Baena* at 7-8; In *re Parmalat Securities Litigation*, 659 F.Supp.2d 504 at 523 (SDNY, 2009), aff'd in part, vacated in part on other grounds, 2011 WL 135825 (2nd Cir.).
19. *Schacht v. Brown*, 711 F.2d 1343 at 1350 (7th Cir, 1983); *NCP Litigation Trust v. KPMG LLP*, 187 N.J. 353, 901 A.2d 871 at 888 (S.C., 2006); *Thabault v. Chait*, 541 F.3d 512 at 528-529 (3rd Cir., 2008).
20. *Hart Building Supplies Ltd. v. Deloitte & Touche* (2004), 41 C.C.L.T. (3d) 240 at para. 56 (BCSC); *Canadian Dredge* at para. 65.
21. 21. In re Mediators, Inc., 105 F.3d 822 at 827 (2nd Cir., 1997). See also *Stone & Rolls Ltd. v. Moore Stephens*, [2009] UKHL 39, [2009] 1 A.C. 1391.
22. *Nisselson* at 154-155; *Official Committee of Unsecured Creditors v. R.L. Lafferty & Co.*, 267 F.3d 340 at 359-360 (3rd Cir., 2001).
23. See e.g., In *re Adelphia Communs. Corp.*, 365 B.R. 24 at 47-49 (Bankr., SDNY, 2007).
24. In *re CBI Holding Co. Inc., v. Ernst & Young, LLP*, 311 B.R. 350 at 373 (Bankr., SDNY, 2004), rev'd on other grounds, 529 F.3d 432 (2nd Cir., 2006); In re 1031 Tax Group, LLC, 420 B.R. 178 at 202-207 (Bankr., SDNY, 2009).
25. *Canadian Dredge* at para. 33.
26. It has been described by the U.S. Court of Appeals for the Third Circuit as "an ill-defined group of doctrines" and "a murky area of law": *A.H.E.R.F. Creditors' Committee v. PwC*, 2010 WL 2134619 at 2, n.2.
27. *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 938 N.E.2d 941 at 950 (CA, 2010) ["*Kirschner*"].
28. *Kirschner* [cited to North Eastern Reporter].
29. *Kirschner* at 958.
30. *Kirschner* at 958-959.
31. *Kirschner* at 954.
32. *Kirschner* at 955.
33. *Kirschner*
34. *Kirschner* at 950. See also *Baena*, in which *in pari delicto* was available to an auditor despite the allegation that the auditor had knowingly tolerated improper accounting practices in order to retain the corporation as a client.
35. 989 A.2d 313 (Sup. Ct. Penn., 2010) [*AHERF*].
36. *AHERF* at 305.
37. *AHERF* at 306-307.
38. *AHERF* at 299-300.
39. *NCP Litigation Trust v. KPMG LLP*, 187 N.J. 353, 901 A.2d 871 at 888 (S.C., 2006) ["*NCP*"] [cited to *Atlantic Reporter*].
40. *NCP* at 372.
41. [1993] 2 S.C.R. 159 at 179 [*Hall*].
42. *Holman v. Johnson* (1775), 98 E.R. 1120 at 1121.
43. *Hall* at 179-180. See similarly *British Columbia v. Zastowny*, 2008 SCC 4, [2008] 1 S.C.R. 27.
44. *Hall* at 183. For some examples of applications of the principle in Ontario, see *Buda v. Plyplatis*, 2004 CanLII 48870 (Ont. SCJ); Di Manno Estate v. Valenzisi, 2007 CanLII 57463 (Ont. S.C.); *Pupiec v. Dereniowski* (1998), 39 O.R. (3d) 150 at para. 7 (CA).
45. [2009] UKHL 39, [2009] 1 A.C. 1391 ["*Stone & Rolls*"].
46. *Stone & Rolls* at para. 128.
47. See *Stone & Rolls* at paras. 7 and 128.
48. *Stone & Rolls* at para. 144.
49. *Stone & Rolls* at para. 159.
50. *Stone & Rolls* at paras. 165-168.
51. *Stone & Rolls* at para. 118 (Lord Scott of Foscote's dissenting speech)
52. Stone & Rolls at para. 203.
53. Stone & Rolls at paras. 54-56.
54. (2004), 41 C.C.L.T. (3d) 240 (B.C. S.C.) ["Hart"]. See also *Dixon v. Deacon Morgan McEwen Easson* (1990), 70 D.L.R. (4th) 609 (BCSC) rev'd on other grounds (1993), 102 D.L.R. (4th) 1 (BCCA); *Mutual Construction (2000) Ltd. v. Hardwick*, [2009] B.C.J. No. 183 at para. 55 (SC).
55. *Hart* at para. 9.
56. *Hart* at para. 54.
57. *Hart* at para. 63.
58. See *Darcy MacPherson*, "Emaciating the statutory audit - a comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*" (2005) 41 Can. Bus. L.J. 471.