

Supreme Court Confirms Shareholders Cannot Sue Professional Advisors for Corporation's Losses

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SUPREME COURT CONFIRMS SHAREHOLDERS CANNOT SUE PROFESSIONAL ADVISORS FOR CORPORATION'S LOSSES

Posted by [Sahar Cadili](#) – 1/23/19

Just a few weeks ago, the Supreme Court of Canada released a decision which confirmed that shareholders cannot sue third parties such as accountants or lawyers for negligent advice that causes losses to the corporation they own (*Brunette v. Legault Joly Thiffaults.e.n.c.r.l.*, 2018 SCC 55 (*Brunette*)). In this blog post I outline the Court's decision and offer some key takeaways that shareholders should consider.

In Brunette, the appellants were trustees of a trust that was the sole shareholder of a holding corporation. The holding corporation controlled corporations that owned and operated seniors' residences. The corporations received tax advice from several practicing lawyers and accountants (the respondents). In their claim, the appellants alleged that the respondents gave the corporations bad tax advice which caused them to structure their tax liabilities in a way that did not comply with tax legislation and which ultimately lead to the corporations' bankruptcy. As a result, the appellants lost the value of their shares. They sought to recover their losses from the respondents.

The claim was commenced by the trustees of the trust rather than in the name of the bankrupted corporations. The respondent lawyers and

accountants sought to have it dismissed on the basis that the appellants did not have standing in the dispute because it was the corporations that actually suffered the alleged losses resulting from the alleged faulty advice.

The respondents were successful in having the claim dismissed. The case was ultimately appealed to and heard by the Supreme Court of Canada.

Supreme Court Sides with Respondents

The Supreme Court of Canada found that in order for shareholders to be successful in such a claim, the shareholders must adequately allege a breach of an obligation owed to them that is distinct from the obligations owed to the corporation itself. The Court said that the shareholders must also allege personal and direct losses flowing from that breach that are distinct from losses suffered by the corporation. Although the case originates from Quebec, the Supreme Court's ruling is binding across Canada. It is also consistent with prior decisions such as its decision in *Houle v. Canadian National Bank*, [1990] 3 SCR 122 (Houle).

In *Brunette*, citing an earlier Supreme Court decision, the Supreme Court of Canada stated that a shareholder "having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to 'blow hot and cold' at the same time."

Importance of Ensuring Corporation is Receiving Proper Professional Advice

Brunette is a good reminder to shareholders to try their best to ensure that the corporation receives proper professional advice and that the advice is implemented properly by the corporation. This is important because any losses sustained by the corporation as a result of faulty advice can only be recovered by the corporation itself.

In a situation where there is only one director who is also the sole shareholder, an action can easily be commenced by the corporation against the negligent professional advisor and the decision in *Brunette* does not come into play.

However, in a situation where there are several directors and shareholders in the same corporation who disagree on whether the corporation should sue for the faulty advice or worse yet, if one of the directors is also the party that gave the faulty professional advice, the shareholders would have to bring a derivative action on behalf of the corporation. A derivative action requires the court's permission to be brought and is sure to cause a division in the corporate governance of the corporation and/or between the board of directors and the shareholders. Undoubtedly, this later example can be disruptive to the business operations of any corporation and may have long term repercussions.

Ultimately, the key to avoiding such consequences is to ensure that corporations receive proper professional advice and that the advice gets implemented properly by the corporation.

What are your thoughts on the Supreme Court of Canada's ruling? I welcome your feedback and questions on the Court's ruling that shareholders cannot sue professional advisors for corporation's losses. Please post your comments on our LinkedIn page at: Dickinson Wright Canada, on Twitter at: @DWrightCanada or on my personal LinkedIn page at: [linkedin.com/in/saharcadili](https://www.linkedin.com/in/saharcadili)

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