**TYPES OF BIZ ORGS**

**SOLE PROPRIETORSHIPS** – not legally sep entity; person gets all benefit/liab’y; person req’d to file reg stmt

***PA***, s. 88(1) Duty of SP to file reg stmt: person engaged in biz for trading, manuf, mining and who is not assoc’d in p’p w/ anyone but uses as biz name some name/desig other than own name or “and Co” must file w/ reg w/in 3ms of name

**PARTNERSHIPS** – GP, LP, & LLP; **Partnership = decision of *law***, not choice; **= *relationship*** (not new legal entity)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Reg’n** | **Creation** | **Rights/Obligs** | **Dissolution** |
| **GP** | Maybe | Op of law | -Partners & ROW undifferentiated  -ROW-friendly  -Each person has **unltd *pers* liab’y** 🡪Corp offers more protection (SH only liable for his share, can sue corp but not you BUT = bureau’c) | -EASY 🡪 stop biz; s/o dies/retires; 3 and 1 leaves, 2 remaining create *new* p’p |
| **LP** | Yes | Choice & op of law | -For GPs works as above  -For **LPs** // SHs (can buy into op; **liab’y ltd to extent they buy in** – set in advance; no say in mgmt. of p’p 🡪 if they attempt, switched to GP, becomes LL to ROW re: dcns taken in attempt to be part of mgmt.) | -De-register or by operation of law |
| **LLP** | Yes | Choice & op of law | -Ps & ROW have diff liab’y (exc neg)  -Ps each pers’lly liable (exc neg) | -EASY 🡪 de-register |

**Definition –** Key relationships: b/t Partners, and b/t Parntership and ROW

***PA***, **s. 1** **“gen p’p”** = p’p w/ BC as gov’g jrdx, not LP or LLP; rules of equity/CL still apply; “firm” = ppl in p’p

**S. 2 P’p b/t 2 or more carrying on biz in common w/ *view to profit*** (over time, don’t have to *make* profit)

**S. 3** Corp does NOT = Partnership, but corp can be *one of Ps* in p’p (partnership = b/t persons; corp = person)

**S. 4** **Defining Partnership**: **a)** JT, TiC, etc does not = p’p (need ongoing) **b)** sharing gross returns does not create p’p (only = profit) **c)** rcpt of profits presum’ly = p’p even w/o say in biz (rebut’le presump that prof sh’g = Pp) (*Pooley*)

* Is there a partnership? Usu formed by K but **can be ‘*accidentally*’ created** 🡪 be careful when **profit sharing**!

**S. 7** **Partner = agent of firm**, acts may bind firm unless P has no auth in matter or person P dealing w/ knows P has no auth or doesn’t believe him to be P

**S. 91** Rules of equity/CL app’ble to p’p continue exc where inconsis w/ prov’s of Act

***AE LePage Ltd v Kamex Dev’ts Ltd*** – **Joint ownership ≠ Partnership** (so ≠ joint/several liability; depends on intent)

-Jointly owned prop, jt dcns, rt of 1st refusal i/s; decided to sell; one P approached RE agent, neg’d K where REA would get some profits of excl lstg agrmt (*w/o* consent of others); others found out; breach of K, w/? B/t REA &…?

-Was there p’p? Who pays for loss (indiv or e/o?)🡪Jt own’p NOT = p’p; depends on *intent* (RP, not subj) 🡪 CA: mere fact of co-own’p does NOT = Ps; intent to maintain rts as co-own’s clear; **no p’p** so no jt/svrl liab’y (indiv to pay)

***Pooley v Driver*** – **Creditor-Debtor rlnsp can cross into partnership** if roles Cs gain rights/control of capital //Ps

-Biz agrmt, div’d capital to Ps and others // creditors (w/ certain rts); P’p owed obligs to Cred1 that were unpaid, C1 came to next C2 claiming C2 was P/should pay; C2 D claimed he was just creditor 🡪 Ct looks to details of agrmt/rlnsp (***PA* s. 4**), creditors had all sorts of rights, control over capital (unusu for lenders) 🡪 rlnsp // Partners 🡪**IS partnership** (imp to maintain roles, creditor/lender-debtor rlnsp can cross into P’p, other partners can come after you)

**Legal Personality of Partnership – P’p = *Relationship* (not sep legal entity) 🡪** all Ps pers liable for P’p debts/obligs

***PA***, **s. 1.1** **“PP property”** = prop/rts/intrsts in prop: (a) brought into p’p stock, or (b) acq’d by purchase or o/w, or (c) acq’d for biz during PP (prop of P = prop of PP!); **PP**=name for **rlnsp**, “firm” =fact rlnsp exists; can K prop *out* of PP

**S. 16** **Estoppel by Representation**: Person who by words/conduct *reps self as Partner* liable as Partner to a/o who on faith of reps gave credit to firm – must prove *reliance* (can’t deny you’re partner, have liabilities); Partner in cert cases re: ROW but *not* internally; so: remove yourself from documents if you leave partnership!

**S. 81(1)** All PP members must register registration stmt (unless reg’d as LLP)

**S. 89(1)** Registrar must not file cert/reg w/ **name** of existing corp or so nearly resembles name of one to confuse

***Thorne v New Brunswick (WCB)*** – No separate legal entity of PP from partners themselves

-**Cannot be an employee and partner at same time** (can’t be emp of own PP) 🡪 if you *are* emp of PP, you’re emp of Ps (can’t be employee of self!); **refusal of CL to recog PP as sep legal entity**; T doesn’t get WCB claim (not ‘emp’)

**Relationship of Partners to each other**

***PA***, **s. 7** **Liab’y of Ps**: P = agent of firm/Ps, acts of P bind firm unless no auth; Partnership = ***agency*** rlnsp

**S. 16 Person repping self as P** can be liable as P to extent P would be, even if they never were one

**S. 21** **Variation of Rts/duties by consent**: Mutual R&Ds of Ps may be varied by consent of all Ps (express or inferred/implied), but can’t K out of fiduc rlnsp (ss. 2 and 7: agency/fiduc rlnsp)

**S. 22** **Fairness/GF:** P must act w/ F&GF twd other mem’s of firm in biz of firm; i.e. PP = **fiduciary** rlnsp;

**S. 23(1)** **PP prop** must all be held/applied by partners exclusively for purp’s of PP in acc’ce w/ PP agrmt

**S. 24** **Prop** bought w/ firm $ deemed bought on acct of firm unless contrary intention appears

**S. 27 Rights/Duties of Ps:** Subj to agrmt b/t Ps (K), interests of P in PP **prop**, rights/duties determined by rules

**(a)** share = in profits/losses **(e)** particip in mgmt. of biz **(g)** Adm of new Ps must be unanimous **(i)** access to PP books

**S. 28** **Maj’y cannot expel P** unless power to do so conferred expressly by Ps (unanimous!) and power ex’d in GF

**S. 29 Ending PP**: If no set term, any P may end PP any time on N to other Ps (can K out of this ability though)

**S. 31** Duty to render each other true accts and full info of all things affecting partnership

**S. 35 Dissolution**: of PP by any event making it unlawful for biz of firm to carry on or for mem’s to carry it on in PP

**S. 36** Dissol’n by bankruptcy, death, dissolution of P or charging order

**S. 37** **Dissol’n by event making biz unlawful** (doing s/t illegal can cause PP to dissolve)

**S. 38(1) Power of Ct to decree dissolution** in certain cases (court orders dissol’n)

**Relationship of Partners to 3Ps** – P jointly liable for all debts and obligs of firm

**S. 11** **Liab of Ps for firm debt**: P liable jointly for all (K) *debts/obligs* *vol’y* incurred while P (estate severally liable)

**S. 12** **Liability of firm**: Act/omission of Partner acting in course of biz that causes injury/loss to non-partner 🡪 firm liable to same extent as partner (i.e. for wrong involuntarily incurred)

**S. 14** **P jointly/severally liable w/ Ps** for everything which firm, while he is P, becomes liable under s. 12 or 13

* JL = all Ps liable for full amt of oblig, creditor can go after all for entire amt but only recover entire amt from 1
* SL = all Ps liable for oblig in proportion to their interest in PP
* J&SL = creditor can pursue 1 P for entire oblig, P can then pursue re-payment from other Ps via SL

\*\***Presumption** is re: allocation of liab’y for claims *internally* (vs. when those claims come externally) 🡪 statute assumes that if it is a tort (i.e. not a K liab’y) that internally you want person resp to bare burden (several liab’y – who is actually resp? If can’t ID, e/o =’ly resp, can claim against e/o); if it is *K liab’y*, we don’t allocate resp, it’s not tort, just claim to be paid (if tort is paid out, presume internally want to apportion liab’y *equally internally*)

* Can CHANGE this (e.g. e/o has to shoulder burden)

**LIMITED LIABILITY PARTNERSHIPS – changes exposure to/shields from some claims of liab’y from ROW**

-Eliminates exposure to o/s world

***PA***, **ss. 94** “LLP”= PP reg’d as LLP under Act; “PP oblig” = debt/oblig/liab’y of PP other than those of Ps as among themselves or as among themselves and PP

**S. 95** Bulk of law applying to PPs applies to LLPs (but *not* ss re: extent of liab’y)

**S. 96** **App for registration** – can’t accidentally have LLP (registration required)

**S. 97** **Prof PPs** – prof LLPs must be expressly auth’d under gov’g statue, meet pre-reqs

**S. 102** **Change in PP does not affect status** as LLP

**S. 104** **LL of Ps:** P in LLP a) NOT pers liable for PP oblig just b/c you are P, b) not pers liable for oblig under agrmt, not pers liable to P or PP (does not shield from your share of PP prop

**S. 105 Ps subj to same obligs as corp Ds**: Ps in LLP pers liable for PP oblig if/to same extent they would be if a) oblige was oblig of copr and b) they were Ds of that corp; **(2)** doesn’t impose *duties* of Ds (just liab’y, for e.g. wages)

**S. 106** **Previous obligs**: Nothing in Part limits liab’y of Ps in LLP re: PP oblig that a) arose before PP became LLP or b) arose out of K entered into before PP became LLP (can’t use LLP to get out of previous obligs or Ks pre-PP)

**LIMITED PARTNERSHIPS – Creature of statute; adv = tax; don’t need to be involved; not gov’ by Sec’s Act**

* **GP** has **usual exposure (total) to liab’y** same as in GP; usu 1 GP, several LPs; as long as there is *at least one of each*
* **LP** invests but *does not manage*, has **no liab’y as owner**/P 🡪 if limits exceeded into mgmt. role, can become liable
* LP’s exposure to o/s claim ltd to amt of investment/contrib to firm; can’t be involved in running of biz (***Pooley***)
* In LP P’s rts/resp’s changed inside AND w/ respect to ROW (impact internal and external *vs. only re: ROW in LLP*)
* In LP, people inside and outside PP must know who is GP vs. LP

***PA***, **s. 49** Provisions of Act must, in case of LPs, be read subject to this Part

**S. 50 (1)** LP may be formed to carry on biz that PP w/o LPs may carry on

**(2) LP = (a) 1 or more GPs & (b)** **1 or more LPs** 🡪 At least 1 GP and 1 LP

**S. 51** **Formation of LP**: file cert w/ reg’r w/ name, nature of biz, name/add of Ps, term of existence, value, contribs

* Can’t accidentally form Limited Partnership (formed by filing declaration)

**S. 52** **G&LPs:** **(1)** Person may be GP and LP *at same time* in same LP

**(2)** Person who is LP & GP at same time has same rts/powers/restr’ns as GP but re: contrib as LP has rts against other Ps as he would if NOT GP; (LP internally, GP externally, can take biz dcns internally)

**S. 55 Contribs of LP** (1) LP may contrib $/property but not services (2) LP’s interest in LP is personal property

**S. 56** **Rights of GP**: All usu rights of GP *except no auth (w/o wrttn consent) to*: a) acts making it imposs to carry on biz of LP b) consent to jgmt against LP c) possess LP prop/dispose of rts to LP prop d) admit person as GP or LP

e) continue biz of LP on bankruptcy, death, retirement, ment incomp, dissolution of GP unless rt given by certif

**S. 57** **Liability of LP**: not liable for obligs of other LPs except re: amt of prop he agrees to/contrib to capital of LP

* LP liable only to extent they agree to/contribute to capital of Limited Partnership

**S. 58** **Rights of LP; S. 59** **Share of profits** – LP better positioned than GP b/c as long as $ there you get it

**S. 61 LPs’ rights b/t selves**: **(1)** Share LP assets re: claims for capital, profits, compens’n prop’te to their amt of claims **(2)** Unless provided o/w in PP agrmt

**S. 62(1)** **Return of LPs contrib**: LP can get contrib back at end of PP (LPs don’t get prop until all LP liab’s paid)

**S. 64** **Liab’y to Creditors**: LP not liable as GP unless he takes part in mgmt. of biz

**S. 67** **Dissol of LP**: Bankr’y, rtrmnt, death, ment incomp, or dissol of GP dissolves LP exc if GPs continue it

***Haughton Graphic Ltd v Zivot*** – LP held liable as GP if they’re Directing Mind, represent self as mgmt.

-**If LP takes part in control of biz, becomes liable as GP, has unltd personal liability (*PA* s. 64)** 🡪 NOT reliance-based (doesn’t matter if no one was misled); outcry re: lifting corp veil (making s/o in corp pers liable)

-3Ps must be aware of which partners are limited

***Nordile Holdings Ltd v Breckenridge***

-N vendor claimed right to recover on default of mortgage by Co, wanted B&R LPs to be found liable as GPs 🡪 NO

-**LP NOT liable as GP *unless* takes part in mgmt. of biz** (**s. 64 *PA***) 🡪 B&R were Ds/Os *but not as LPs*, not liable

-In BC we won’t easily make Os/SHs in corp’s personally liable; keep roles clear, don’t mislead

**BUSINESS CORPORATIONS** – view to make ***profit*;** corp = *process* of bringing body into **separate** legal existence

-Can choose which jrdx’s law to incorp under (e.g. BC 🡪 mgmt. friendly); corp = artificial person, same R&Rs

-Corp: can own, must be owned (SHs), subj to neg and crim claims, complex reg proc/ongoing reporting

-Creature of stuate, can’t be accidental; **Corp = sep legal entity from subscribers** (not agent/trustee) **(*Salomon*)**

**EVOLUTION OF CORP LAW & NATURE OF CORP PERSONALITY**

**HISTORY OF CDN BIZ CORPS LAW**

**-K model**: Entity has powers given by ppl K’ing (look to K for roles/resp’s); **BC**, NS; **mgmt. friendly** (makes corp/mem’s immune); in BC SHs have more liberty to K in and out of certain things

**-Admin model**: E/w else but BC, NS, PEI; came in to protect SHs, creditors, o/s’rs and their interests; done by reg’n

***BC BCA s. 3(1)*** **Co recog’d** under Act a) when **incorp’d** under Act b) if Co results from **conversion** or corp into Co after Act came into force c) if Co results from **amalg’n** of corps under Act when amalg occurs or d) if Co results from **continuance** into BC of foreign corp under Act when cont’n occurs

-**Amalgamation**: When 2 artificial entities brought together, continue as new corp entity

**BCA s. 30**: Capacity/power of Co: Co has capac/rts, powers priv’s of indiv of full capacity

***Salomon v Salomon & Co Ltd*** – Personality of Corp’s/**Co has distinct exist’ce from ppl involved in it**

-S was owner, SH, in K w/, D, creditor, *and* maj SH of corp (OK)

-Q = if, given all those roles, it’s poss to merge S back w/ Co to make him pers liable (as in PP) for debt owed to trade creditors 🡪 NO (corp = separate person), no fraud, Co is legit/not agent for S (who thus can’t be held pers liable)

-Vol’y creditors deemed to know risks (if you don’t take security, too bad!)

-Co attains maturity at birth (diff from subscribers); corp is *not* agent (of SH), subscribers not liable exc as under stat

-One way K’l creditors of corp can protect selves given SH ltd liab’y is demanding security interest in corp’s assets as collateral/cond for extending credit

**Limited Liability and Creditor Protection**

**\*\*SH is *not* liable for the obligations of the corporation\*\* (Corp does not enjoy limited liability)**

***BCA***, **s. 87**(1) No SH of Co pers liable for debts, oblig, defaults, acts of Co (only liable to extent of cost of their shares)

***CBCA***, s. 45(1) SHs of corp not, as SHs, laible for any liab’y, act default of corp exc as under ss. 38(4), 146(5), 226(5)

**Creditor Protection – Alternative sources** (ways to make corp liable for your debts; shift claim to diff area of law)

* Neg misrep; fraud; deceit; invol creditors may be aided by statute (if you can’t get $ from Co, go after SHs, Ds)
* ***Cautionary Suffix*** required by Cdn law – add’n to name so you’re *warned* that you’re dealing w/ corp, i.e. ltd liab’y entity (but mgmt. can be pers liable if not clear to you dealing w/ corp): **BCA s.23**
* ***Capital maintenance requirement*** (corp req’d to keep certain lev of liquidity/assets; ensures pymts not made to SH if it would leave corp w/ insufficient assets to meet obligs to creditors 🡪 mostly dealt w/ thru securities law)
* ***Publicity*** (mat’l filed on corp: location, names of D; but better source of info = records kept for security)
* ***D&O liability*** (make mgmt. responsible 🡪 unremitted taxes, unpaid wages)
  + **Tort** committed by D, O, emp – not protected from pers liab’y: ***AGDA*** – K b/t P Co and own emp’s
    - ***Said v Butt***: O of Co could not be sued for procuring breach of K b/t Co and other K’g party 🡪 doesn’t apply as in *AGDA*, only applies to existing Ks (SEE BELOW)
* ***Oppression remedy*** (oppressed by transaction, whoever involved in deceit should be resp, corp or ppl assoc’d)
* Duties in vicinity of insolvency (prioritize int’s of creditors ahead of SHs)
* ***Piercing Corp Veil*** (ignore sep entities, hold SH resp for debts/obligs of Co, or more rarely vice versa)

**Liability in Tort**

***ADGA Systems Int’l Ltd v Valcom***

- P Co suing D Co for ‘raiding’ employees

-Q: can dir and employee Ds be sued for acts as indiv’s/held pers liable (or are they protected by incorp) 🡪 YES

-Claim here = claim against Co (not sep tort of employee; emp’s duty owed to Co, not 3P)

-K broken not one w/Co 🡪 when K is b/t 2 entities (not Co) you can be pers liable for tort of inducing breach of K

-Possible in some cases for D/O/E to be pers liable for actions as indivs caused corp to engage in tort of IBoK

***Said v Butt*** – Ds *not* liable as indiv’s of corp

-Opera ticket (K), access denied; P sues employee, tort of IBoK (emp’ee pers resp for causing Co to breach K) 🡪 NO

-When indiv carrying out duties in int’s of Co, *not* resp for tort of IBoK (Co may be liable for breach but not for inducing it 🡪 employees and Co not one/same for purpose of tort)

**Piercing the Corporate Veil –** Hold SHs liable for obligs of corp

**-3 forms: Claimant; Corp; s/o behind corp (SH, D, emp’ee)**; rarely successful @ BC

-Piercing = impos’n of liab’y on SHs for obligs of corp; non-recog of sep pers’y of corp where stat/legal std requires

-Lifting CV = **disregarding gen rule that corp is legal entity distinct from SHs by regarding Co as mere agent/puppet of controlling SH or parent corp** (ignore LL status of corp, *hold Ds, Os, SHs pers liable* for its debts)

-Veil *only* lifted for *that* claim (corp still exists to e/o else)

***Clarkson Co v Zhelka*** (opposite of *Salomon*; here going after *corp* through *indiv*) – NOT LIFTED (not sham)

-Case of creditor of *indiv* wanting to go after *corp* assets (usu vice versa); **court** **refuses to lift corp veil**

-S’s Co bought prop, transferred to sis Z who defaulted; his TiB P wants to say land is held in trust for S, use to satisfy cred’s (treat assets of Co as those of S) 🡪 is conveyance fraudulent? Should CV be lifted, land sold back to pay creds?

-If it can be shown that Co is mere agent of controlling corporator, Co could be sham (agency must be flagrant)

-No E here that Co used to *defraud* cred’s or as sham 🡪 it is legit Co (conveyance fraudulent but trust goes back to Co)

-**SHAM/ALTER EGO TEST** for whether CV should be lifted 🡪 **IF SHAM THEN LIFT/PIERCE CV**

* Starting assump: *Salomon*: Co & those acting for it separate, assume *not* a sham
* If Co formed to do unlawful act, corp form ignored to make those intiating wrongful act resp
* If corp sham, goes beyond indiv acting as agent (acting for own purp/hide own int’s) ignore/lift CV

-No Cdn case has found Co to be agent of SHs\*\*

-**If Co formed for express purpose of doing wrongful/unlawful act, or, if when formed those in control expressly direct wrongful thing to be done, indivs AND Co are resp for those to whom liability is legally owed**

***Lee v Lee’s Air Farming Ltd*** – **Employment** (not sham) – Corp can K w/ its own Ds/SHs if it’s not sham/mere agent

-Corp has sep legal personhood and so can K w/ self (vs. *Thorne*: to be emp’ee, have to K w/ self, can’t cuz you’re P)

-W’s H killed flying plane as emp’ee of Co, W wants $ under WCB 🡪 can you be D and emp’ee of Co? YES

-He was clearly acting as worker not D when killed 🡪 person can make K w/ another legal person even if they are same person technically and even if that is only D/SH (no rsn to preclude K of emplmt) 🡪 he was emp **&** D

***De Salaberry Realities Ltd v MNR*** – **Tax** context – tax appeal board (pyramid fam Co’s) 🡪 CV LIFTED

-Are these Co’s just agents of larger Co? As such should CV be lifted? (Taxed as one or corp by corp?)

-You don’t have to prove sham/fraud *per se* just prove one organism (for tax purposes should be treated as such)

-Free Will idea: entities not separate, just depts. of 1 big entity (no room for FW on part of sis Co’s, they are directly instruments of parent Co, indirectly of grand-p Co’s 🡪 greater tendency to lift CV

-Factors to consider: did indiv Co’s have $ to operate on own; do ppl go to g-p, p, or Co as customers; making purchases way more $$ than value of shares; all vertical dealings (no horiz b/t Co’s), BOD apptd by parent Co’s

-Legal indiv’s in eyes of law but for tax purposes Ct looks at whole (veil lifted)

* Separate personalities may not be upheld where corp controlled by same DM and no substantial separation

***Lynch v Segal*** – **Family** law context 🡪 easiest way to get CV lifted 🡪 CV LIFTED/PIERCED

-S using corp structure for sole purp of hiding property so his family would have no claim against him

-Here = sham transaction, scheme to conceal assets/prevent fair op of fam law

-S ben’l owner of lands, they are fair target (for transfer to L in app for child/spousal supp)

-More flexible approach applied in situations where **justice** and **fairness** require it (less so in commercial context)

* Separate personality of corp will not be upheld where it would produce results “flagrantly opposed to justice”

**Criminal Liability –** extent to which you can make corp (or s/o connected w/ corp) liable for crimes

-Tough to do b/c of MR req’t of crimes (how can artif body have intent?); s/t special stigma nec (civ sanctions insuff)

**CCC**, **s. 22.1 – Re: neg O**, **(a)** org is party to O if, acting w/in scope of auth’y, **(i)** a rep is party to O or **(ii)** multiple reps act/omit such that if it had been only one rep, rep would be party AND **(b)** Sr O resp for org’s activities relevant to O *departs markedly* from SOC rsnbly expected in circs to prevent rep being party to O

**S. 22.2** – **Re: MR Os** (org party to O if *w/ intent* at in part to benefit org Sr O **(a)** acting w/in scope of auth’y party to O **(b)** having MR req’d to be party, acting w/in scope, directs work of rep/org so they do act/omission of O or **c)** knowing rep is/about to be party to O *does not take all rsnbl measures* to *stop* them from being party to O

**S. 718.21 –** consider factors: adv realized by org, plan/delib, attempt to conceal assets, impact of S on econ viab’y, cost to pub auth’s, any reg’y penalty imposed, prev convictions, penalty to rep by org, reduction measures taken by org

***Cdn Dredge & Dock Co Ltd v R***

-Corp charged w/ conspiracy: rigging bid for dredging K ($ diverted to Sr Os and to corps); corp G of MR O?

-If act complained of can be treated as that of Co, corp crim resp for all such acts it is capable of committing

-If DM(s) of corp are crim resp and are acting in scope of auth’y then corp can be crim resp 🡪 here, **guilty**

-3 options for MR crimes for making corp resp for indiv’s action:

1. Total vicarious liab’y – as long as crim act done in course of emplmt by *any* employee, even insignif
2. No crim liab’y – unless act in Q was at request of corp (if so, = MR); unlikely that Co would be liable
3. MEDIAN RULE – crim conduct attrib’d to Co as long as emp/agent in position that s/he reps *de facto* **directing mind** of corp, so corp ID’s w/ act of indiv

**JURISDICTIONAL AND CATEGORIZATION CONSIDERATIONS**

**INTRODUCTION AND PLACE OF INCORP**

-Feds and provs have concurrent jrdx to incorp corps (corps choose but doesn’t mean it’s only jrdx that has say in how corp run – if it’s tort/K depends where committed; if corp’s does biz in another jrdx then that jrdx’s corp stat applies

***BCA***, s. 2 How to bring corp into exist’ce; Part 3 Way to bring $ into corp (capitalize/finance; sell shares; debt instr’ts)

Part 4 How shares operate; Part 5 Mgmt (who runs corp; ppl w/ resp to mng: D&Os); Part 8 Remedies (s. 227)

**CLASSIFICATION OF CORP’S**

**Widely held (public)**: Many shares, many SHs; would not use dissent, require corp to buy out (just sell on stock exch!)

**Closely held corp (private)**:E.g. 1mil shares all held by 1 person

**“Widely-held” (“public”) and “Closely-held” (“private”) Corp’s**

***BCA***, **s. 1** **“Public Co”**= rep’g issuer, RI equiv, has reg’d securities under *SEA*, USA, has securities traded thru SecExch, or has it’s sec’s rep’d thru facilities of quotation and trade rep’d sys

**Corp**=Corp under Act or pre-existing co, body corp, incorp’d assoc or soc but does **not = municipality or corp sole**

**LLC**=biz entity that was org’d in jrdx other than BC, is recog’d as legal entity in jrdx in which it was org’d, is not a corp, and is not a PP, incl w/o lmt’n a LP or LLP

***CBCA***, s. 2(1) “distributing corp”

**One-Person Corp’s**

1-person corp: only issue re: legal validity is holding mtgs (usu = >1 person! 🡪 but, **CBCA ss. 114(8), 139(4)**)

**Community Contrib Co’s** – special corp that can be brought into exist’ce; ppl like idea of corp (generate profit) but uncomfortable w/ profit b/c it’s distributed to ppl who don’t really need it and corp can do whatever it wants

-CCCs have strict constraints on what it can do/what direction it can go in (middle gd; profit but not too much)

***BCA***, ss. 51.91-51.94, 51.97

S. 51.91(1) “Comm’y purp” = purp beneficial to a) society, or b) segment of society broader than gp of pl in CCC, and incl w/o lmt’n, purp of prov’g health, soc, enviro, cult, educ, other serv’s but no prescribed purp (constrained)

**EXTRA-PROVINCIAL LICENSING AND FILING REQUIREMENTS Ss. 374-379**

**\*\***If you’re doing biz in BC, must reg, become EPCo (**s. 375** tells you when you have to reg in BC as foreign corp)

***BCA*, s. 1** Corp = any artificial entity brought into exist’ce (broad); **“company”** = type of corp (Co = corp in CBCA)

**“Extra-prov Co”** = foreign entity reg’d as extraprov Co or almalg’d EPC

“Foreign entity” = foreign corp, LLC or extraprov soc

“Foreign corp” = corp that is not a Co, has issued shraes, is not reqd reg’d, was incorp’d, continued, amalg’d

“LLC” = biz entity org’d in jrdx other than BC, is recog’d legal entity in that jrdx, is not a corp, not PP (LP or LLP)

**S. 375 Foreign entities req’d to be reg’d** w/in 2ms of beginning to carry on biz in BC; (2) carry on biz = a) name in phone dir’y, b) name in adv’t, c) has rez agent or office/place of biz, or d) o/w carries on biz (?!)

**S. 376** **App for reg** **(1)** EPC must provide registrar records/info, a) reserve name b) apt attorney c) submit registration stmt and records to registrar **(2)** Section does NOT apply to fed corps (easier to move around under CBCA = benefit)

* If fulfilled, registrar MUST for fed corp and MAY in other cases file reg stmt/reg foreign co as EPC (**s. 377**)

**S. 378 Effect of reg** **(1)** Not’n on corp register that for entity reg’d as EPC is *conclusive E* that it has been duly reg’d; **(2)** ECP may on biz *in BC*, ex in BC powers in/permitted by charter/record (i.e. once reg’d in BC to extent own dom’c laws allow, you can biz things in BC too **(3)** but **can’t avoid home jrdx laws** or violate own charter by moving to BC)

**(4)** No act of FE doing biz in BC invalid merely b/c it contravenes (3) or FE not reg’d as EPC at time (3P protection)

**Amalgamation**🡪Easier if both corps gov’d by same laws; decide where, migrate to BC, become BC corps, amalg

**S. 379 Amal of EPC** w/in 2ms of eff’ve amalg, provide reg w/ rec’s/info, N of amalg, name, etc

**CONTINUANCE UNDER THE LAW OF ANOTHER JRDX – 2 Step Process: 1. Export 2. Import**

-**Continuance =**abil of corp to ‘continue’ ex’ce under law of another jrdx (tax adv, desire to amalg, better corp climate)

-If you want to be BC Co even if doing biz elsewhere (but rules don’t differ too much so uncommon to move around – *usu it is b/c there will be amalgamation* 🡪 in BC both Co’s have to be in BC so might have to migrate)

**1)** ‘**Export’** 🡪 emigrating corp obtains consent of auth’s in jrdx of incorp (i.e. requires consent of original jrdx)

**2)** **‘Import’**🡪must meet requirements of fed/prov Act under which continuance sought (i.e. in receiving jrdx)

***BCA***, **s. 269(b)** **Amalgmation** permitted (both must be Co’s in BC 🡪 prior continuation often required)

**S. 275(1)(b)** If any of amalg’g corps are foreign corps, must provide docs/proof registrar wants to effect amalg

**S. 284(1)** Amalg into foreign jrdx’s

**S. 285(1)** Amalg doesn’t affect prior obligs, prop rts, invlvmt in legal prcdgs pending pre-amalgamation

**S. 302** **Continuation** ***into* BC** **(1)** Co must file app, provide info, 1+ Ds sign art’s they will have **(2)** cont’n app req’ts

**S. 303 (1)** When foreign corp cont’d **(2)** what registrar and **(3)** Co must do once continued in BC as Co

**S. 304** Foreign corp may give *N of withdrawal* of app before it is continued

**S. 305** **Effect of continuation** **(1)** doesn’t affect prior obligs, prop rts, invlvmt in legal prcdgs pending pre-continuance **(2)** If noted as cont’d co in corp reg, = conclusive E that FE duly continued on date/time shown

**S. 306 Shares** issued pre-cont’ce *deemed* to be issued in compliance w/ Act & Co’s art’s; rts of shares preserved

**S. 307 (a) Articles** of Co are those that 1 or more Ds signed during application

**S. 308** Co may apply for **continuation *outside of* BC** if auth’d by SHs by spec reso (2/3+ usu, *&* registrar must auth)

**S. 309** SH may **dissent** from s. 308 reso (then corp must buy them out before moving)

**S. 310** When continuation in BC is prohibited

**THE CORPORATE CONSTITUTION**

**CORPORATE NAMES –** *BCA*, SS. 21-29, 263 Ensures public not misled by confusingly similar corporate names

**S. 21 Name of** Co: Co recog’d under Act has name as shown on app if name reserved for Co and reserv’n in effect or name created by adding “BC Ltd” or “BC CCC Ltd”

**S. 22 Reservation of name** **(1)** Person wishing to reserve name must apply to registrar…**(4)** Reg’r must NOT reserve name unless name complies w/ prescribed req’ts (can’t be too sim to another; can’t infringe another’s IP rights)

**S. 23 Form of name** Must have *cautionary suffix*: word “Ltd, Incorp’d, or Corp” as part (or French or abbrev)

**S. 24 Restrictions on use of name** Can’t use abbrev’s Ltd, Incorp’d, Corp unless = corp entitled/req’d to, w/in mng

**S. 25 Multilingual Names** Must be in one or both of Eng/Fr; can translate/be designated o/s Canada if set out in NoA

**S. 26 Assumed names** If name contravenes req’ts, foreign entity must reserve assumed name and s. 22 applies (i.e. go back and start again if you want to be reg’d at EPC); 3) EPC that adopts assumed name MUST acquire all prop, rts, int’s in BC under that name, may sue or be sued in own name or assumed name or both

**S. 27 Name to be displayed** **(1)** must display name (or adopted one for EPC) in legible Eng or Fr (a) in conspicuous position at each place it carries on biz in BC (b) in all Ns/offic pub’s (c) on all Ks, biz letters etc (d) all bills of exch, prom notes, cheques, **(2)** if Co has seal, ust have name on it (liability if not displayed: **s. 158**, p. 16)

**S. 28 Registrar may order name chg** if contravenes req’ts (name change req’s changes to NoA: **s. 263**)

**S. 29 Other changes of name**

**\*\*S. 384 Liab’y if name of extraprov Co not displayed**: D or O of EPC who knowingly permits EPC to contravene s. 27(1) pers liable to indemnify ppl who suffer loss/dmg as result of being misled by contravention

**CREATING THE CORP**

**\*BC** has old Eng way – some parts gov’d by ***K*** (K as basis of entity 🡪 a/t not covered taken care of by K law)

\****Ultra Vires* Doctrine**: Corp had no legal capacity to act in way not auth’d by incorp’g docs

**\*Need 3 docs upon/for creation** besides permission to use name (in BC basic action = K, not letters patent)

* **Incorporation agreement** (public doc; doesn’t exit in (all) other jrdx’s): **s. 10(2)**
  + Must contain agrmt of each incorp’r, name, 1 or more shares, sig, date, Co name reserved, e) NoA
* **Notice of Articles s. 11** Public doc; used to = ‘memorandum’ of articles 🡪 BC = memorandum jrdx
  + Must be in proper form, set out name, Ds’ names/adds, mailing add, records office, name translation, share structure (g), any spec rts/restr’ns for each class/series, date Co recog’d (//**s. 6**)
  + **S. 53** **Descr of auth’d share struc**: NoA must set out ID’g name of each class/series of shares, kind w/in each, max # of each Co auth’d to issue (or none), set out par value for those w/ PV, ID those w/o
    - NOTE: If no class/series ID’d at outset, all SHs per share will have same rts (voting, dividends, share of assets on wind up)
    - PAR VALUE: Shares must be issued for certain value; incorp’r sets out PV but can be chgd
  + **S. 19 Eff of NoA and art’s**: Co and SHs bound by articles/NoA from time Co recog’d (K!)
* **Articles s. 12** themselves (laws gov’g your corp; supplement statute), kept to Co, detail conduct/restrictions
  + W/o them you’re in breach of stat as soon as you’re brought into ex’ce (vs. CBCA bylaws not nec @ outset in theory: ss. 102, 103: duty of Ds to m/a/r bylaws; 103 unless art’s, bylaws, or USA o/w says, Ds may by reso make/amend/repeal bylaws, 5) SH entitled to vote may propose amdmt/repeal)
  + **S. 259 (1)** Co can **alter art’s** by reso spec’d under Act or in art’s or spec reso; Can alter art’s re: **(2)** what = maj in spec reso (must be b/t 2/3 and ¾) and **(3)** Re: what = maj w/in class of shares to pass spec reso (b/t 2/3 and ¾), *if SHs approve by spec reso* (// **s. 173**: change in art’s req’s spec reso)
  + **S. 263** Name change requires changes to NoA

**S. 10(1)** ≥1 ppl may **form Co** by (a) entering incorp agrmt (b) filing w/ reg’r incorp app & (c) complying w/ Part

**S. 13** Co incorp’d when app filed w/ registrar or at time and/or date in app, and reg *must* issue certif of incorp (// **s. 9**)

**S. 14** Incorporator or oter approp person can file N of withdrawal for app of incorp before Co incorp’d

**S. 15** Completing party must examine and deliver all appropriate documents (+ other requirements)

**S. 17 Effect of incorp**: SHs are, for as long as they are SHs, Co w/ name set out in NoA, can ex f’ns of incorp’s Co w/ powers/liab’y on part of SHs as prov’d in Act

**Fed** – Unlike **BC** *no* incorp agrmt (no K)

***CBCA***, **s. 2(1) “articles”** are art’s of incorp, amalg, cont’ce, reorg’n, arrgmt, dissolution, revival

**S. 5** Incorp’rs = more than 1 indiv, none of whom: are <18, of unsound mind, is bankrupt

* NOTE: Creditors can bring corp into ex’ce w/o intention of being SHs (*not* poss under BC BCA s. 10(2))

**S. 6**: AoI must also set out a) name, c) classes/max# auth’d, rights/privs of classes, d) restr’s on issue/transf/own’p of shares, f) restr’s on biz corp can carry on

* **S. 6(1)(b)** AoI must set out *province* where reg’d off will be (do NOT have to decide this in BC obvi)

**S. 9** Corp comes into existence on date shown in certificate of incorporation

\*\*CBCA Articles of Incorporation = BC BCA Notice of Articles

\*\*CBCA Bylaws = BC BCA Articles

**CONCEPT OF RESTRICTIONS**

***Ultra vires* doctrine** held that corp had no legal capac not auth’d by incorp’g docs 🡪 ltd by stat, now unless corp power explicitly restr’d, assumed corp has powers of natural person: **s. 30** (liable for acts of agent if **agent** has auth’y)

**S. 32** BC Corp’s can carry on **biz o/s BC** and accept powers/rts re: corp’s biz and powers o/s BC from lawful authority

**S. 33 Restr’d biz/powers**: Co must NOT carry on biz/ex power restr’d by or in manner inconsis w/ memo/Art’s; BUT **(2)** no act of Co, incl transf of prop/rts/int’s to or by Co invalid merely b/c it contravenes 1) (i.e. **3P protection**)

* O/s’rs protected (Co not *supposed* to do act’y but if they do, prob is internal, causer may be liable, but o/s’rs don’t have to investigate capac’s of Co before dealing, don’t pay price) 🡪2) eliminates *uv* doctr for ext purp’s

**S.** **228(3)(c)** **Compliance/restraining Ord’s:** Ct may make approp order incl req’g re: K made contrary to s. 33, that *compensation* be paid to Co or any other party to K; under (2) if Co/D/O/SH etc is about to/contravene Act/NoA/art’s, C may apply for Ct order for person to comply w/refrain from contravening; i.e. Ds can be liable to pay if restr brchd

**S. 259** Allows change to articles; by reso spec’d in art’s or if not, by spec reso (e.g. 3) to chg maj of votes red’d for SHs to pass spec reso, must be 2/3 maj, not >3/4 votes casts in reso)

* You can change restrictions by changing art’s 🡪 BUT triggers **s. 260** (SH may dissent, = dissent remedy)

**S. 260 SHs may dissent:** any SH may send Co NoD re: any reso under s. 259(1) to alter restr’s on powers or biz of co

**S. 378 (2)** EPC can ex powers permitted by its charter from home jrdx as long as doesn’t break BC laws or this Act

**(4)** 3P Prot’n: No act of foreign entity (e.g. transfer of prop) invalid merely b/c violates gov’g docs or entity not reg’d

**PRE-INCORPORATION CONTRACTS**

**\*\***Need certain things in place before setting up corp: employees, place of biz, hire Os (need Ks in place o/w delay)

\*\*Company not yet incorporated can’t enter K, negotiations must be **b/t 3P and *promoter***:

* **3P** either knows of non-existence of corp, or does NOT know b/c of misrep
* **Promoter** either aware Co doesn’t exist, or NOT aware that Co does not exist

\*\*2 options if/when Co exists: Co **adopts** K or does **NOT** adopt/ratify pre-incorp K

* Must first know if K exists b/t 3P & promoter (If so, who is liable/why? What happens to liab’y once Co exists?)

\*\*If there *is* K, liab’y is in K (but don’t need K for rem’s in tort: misrep, restitution: fiduc/no-fiduc, other: estoppel)

\* **AGENCY**: To enter into transaction, Co must operate thru person 🡪 indiv enters K for Co, K binds entity not indiv

* **Actual agency** 🡪 express auth; princ & agent have agency K (can’t work in PIK context since there’s no princ!)
* **Usual agency** 🡪 auth’y b/c of job (*but* pre-corp person doesn’t have it; others don’t know of restraint on UA)
* **Apparent agency**
* **Ostensible agency** 🡪 agent but w/o certain powers; in pos’n, *placed their by entity*, appears to o/s you have auth (then to ROW you *do* have authy, can bind corp; but indiv may still be liable in tort if misled 3P); op’s via estop
* **Estoppel-based agency**

**\*\***NOTE: UA and OA req corp in existence (can’t be agent for s/o who doesn’t exist)

**COMMON LAW** – Corp cannot adopt PIK @ CL

\***PIK cannot be K w/ corp that doesn’t exist**; **corp can NEVER adopt K**; liab of promoter/agent to 3p (BoWoA)

* K that *does* exist is w/ promoter 🡪 = **warranty of auth’y** (collateral K; guarantee by proclaimed agent)
  + If promoter mistaken (didn’t know no corp), liab’y to 3P entirely thru collat K (that is extent of it)
  + If P KNEW corp didn’t exist, liable under collat K for BoWoA *AND* liable for deceit (fraud misrep)

\*\*CL says K b/t P and 3P *only* said to come into ex’ce when *neither* party mistaken (both knew no corp; pers liable (but if either/both unaware/mistaken, NO main K (no one on other side!), only collateral K/WoA)

\*\* WoA = promise operating in either K and/or tort

***Kelner v Baxter*** –main K only (*not* WoA, **No Mistake – both parties know no corp**); wine merchant sale/unpaid

-All parties to K to buy wine *aware* corp doesn’t exist; brought into ex’ce later after K entered, Co purports to adopt it but Co fails and Kelner never got paid for wine, claims as 3P Co Ds are personally liable, wins

- When all parties to PIK are aware corp doesn’t exist/no one is mistaken, indiv’s *on both sides* must have intended K to be entered by Ds on other (corp) side *personally* (they were NOT agents of corp, had no principal)

* Where person Ks for non exist’t principal, he himself is pers liable on K (bsd on assumed intent of both parties)
* NOTE: **overruled** by statute, **CBCA s. 14(2)**

-Co cannot ratify K that came into existence before corp was in existence

***Black v Smallwood*** – **Common Mistake** (vs. *Kelner*) (not argued on BoWoA)

-Corp not in ex’ce; promoters enter mortgage, corp never comes into ex’ce; parties *both* mistaken (Ps didn’t know corp didn’t exist, 3P relied on that, also mistaken 🡪 = CM re: exist’ce of corp)

-If there is a CM re: fund’l part of K, K is void/none exists if result of CM 🡪 purported **K is nullity** (no SP ordered)

-Would be contrary to principle to hold man pers liable on K when he did not intend pers’ly to K

***Wickbert v Shatsky*** – **Unilateral Mistake** (promoters knew no corp, 3P manager hired did not); basis for BC BCA

-Co never came into existence, 3P terminated, sues to make promoters liable (they knew no corp @ K = UM)

-Is there main K? Breach of WoA? 🡪 // *Black*:

* Mistake as to existence of corp vitiates K (never existed, Prom’s not liable under main K for wrgfl dism’l)
  + NOTE: case bsd on bad auth’y of UM (UM does not make K void!!); unfairly rewards trickster Pr’s
* BUT Prom’s liable for BoWoA 🡪 knew no corp in ex’ce, other party didn’t; BUT, no losses (only losses are re: *termination* of K, not its creation 🡪 BoWoA only deals w/ *creation* of K 🡪 no basis for dmgs)

**STATUTORY REFORM** – For both BC BCA and CBCA statutes, must have corp *brought into existence*

\*\*Corp ***can adopt*** K entered before it existed under both Acts (vs. CL where you couldn’t)

\*\*Statute preserves FW 🡪 **BC BCA s. 20** adds possibility of **corp adopting PIK** = main change BCA adds to CL

* WoA = CL concept; BCA just packages it up and tells us about damages

\*\***Major change** is from **CBCA s. 14(1)** – when promoter claims s/t, then unless *expressly* said o/w under (4), they will be liable under main K when it DOES come into ex’ce (this corp must be a *CBCA* corp for this to apply)

***BCA*, s. 20** **PIKs** (WoA) **(2)** if before Co incorporated, s/o purports to enter K for Co, a) they are deemed to warrant to 3P that Co will i) exist ii) **adopt** K; b) person liable to 3P to K for dmgs for BoW; c) dmgs same as if i) Co existed, ii) pers had no auth’y, and iii) Co refused to ratify

**(3)** Co *may* adopt PIK w/in rsnbl time via any act/conduct signifying intention to be bound by it

**(4)** Upon adoption of PIK, Co bound, entitled to benefits (retrosp), facil’r ceases to be liable for PIK (// **s. 14(2)**)

**(5)** If Co *doesn’t* adopt PIK w/in rsnbl time, party to K can apply to Ct for order that new Co give them bnfts under K

BUT **(8)** Facil’r *not* liable under 2) re: PIK if PIK parties expressly agreed in wrtng (**codifies *Kelner, Black***) (//s. 14(4))

* S. 20 can’t operate ***if corp never comes into existence*** 🡪 fall back on CL

***CBCA***, **s. 14 Personal Liability** (makes Promoters pers liable = comfort to 3Ps) **(1)** subj to section, person who purports to/enter ***wrttn* K** for corp before it exists is *personally bound* by K, entitled to its benefits (can’t get off hook w/ (4); if oral K, no mechanism for corp to adopt, P remains only/always liable unless precluded under (4))

**(2)** PIKs and pre-almag Ks: corp may w/in rsnbl time adopt wrttn K made before it came into ex’ce by any act/conduct signifying intent to be bound, a) then bound, entitled, b) promoter ceases to be liable (// **ss. 20(3) & (4)**)

**(4)** Exmptn from pers liab’y: if *expressly* prov’d for in wrttn K, prom’r who entered K for corp NOT bound/entitled

**MANAGEMENT AND CONTROL OF THE CORP**

**INTRODUCTION**

-Separation of ownership and control 🡪 Ds run/control corp (under both stat’s), SHs *own* it

* SHs 🡪 Controlling (mgmt. and non mgmt.) & non-controlling
* Mgmt 🡪 Inside (Ds & Os) and Outside
* Employees 🡪 Mgmt & o ther
* Creditors 🡪 Have big say (divest, don’t raise wages; implicit/practical control but no actual control: *Salomon*)
* ROW 🡪 Gov’s, consumers, others

-**Profit** 🡪 Corp must run to generate profit; how do you know whether profit made?

* When? ST/LT; For whom? SHs/others; How? $/other; Distrib’d? Wage, dividends, invest’t value, asset distrib

-**Control Mechanisms**

* When? In advance (regs), consent K, non-consensual; Who pays? Corp, indiv, public

-Bigger corp 🡪 more distinct mgmt. & SHs 🡪 more **risk**: mgmt. more apt to take risk/less likely to face conseq’s!

-When Corp controlled by owner-mgrs less/no **agency conflict** (danger that agents use deleg’d auth to pursue own goals at expense of corp)

**S. 128(3)** Co can ***remove D*** before term over by (a) spec reso or (b) acc’g to method/reso specified in articles

**S. 109** SHs can remove Ds by ord reso @ spec mtg (or if right to elect held only by 1 class of shares, @ their mtg)

**S. 136 Powers/functions of Ds** Ds of Co MUST mng/supervise mgmt. of biz/affairs of Co (can’t be changed), vs…

* **S. 137** If prov in art’s or is added later by spec reso, art’s can transfer some/all D’s power to mng to 1+ other

**S. 102(1) Duty to mng/supervise mgmt.** *subj to any USA*, Ds SHALL mng *or* supervise mgmt. of biz/affairs of corp

**(2)** Corp has to have at least 1 D, but if it is distrib’g corp/public Co and has shares held by >1 person, has to have *at least 3 Ds*, at least 2 of whom are NOT Os or employees of corp or affiliates (i.e. pub Corp must have at least 2 o/s Ds)

**S. 143, s. 116** Even if there is irreg in their election/apptmt or defect in qualif’n, act of D or O *still valid*

**S. 142(1), s. 122(1)** Ds & Os owe: **1.** **Fiduciary duty**/duty of loyalty (act honestly, in GF w/ view to BIoCorp) and

**2. Duty of Care** (standard of reasonably prudent individual in comparable circumstances)

**S. 142(3), s. 122(3)** Can’t K out of these duties or liab’y for neg, default, breach of duty/trust or relieve liab via articles

**CORPORATE RESPONSIBILITY – Old**: Corp exists for SHs; **Modern**: FD owed only to corporation

**Old Cases** (*Dodge* + *Parke*: corp designed to make profit; $ to be returned to SHs; **corp exists for SHs**)

***Dodge v Ford Motor Co*** – Old approach; excluded certain ppl’s interests entirely; modified slightly in *Parke*

-P = min SH; D Co grew/made huge profits; P wanted dividends to open rival Co; D said hell no 🡪 some div’ds could be declared but most profits retained/used to increase capital in corp, improve things for workers (wages, ben’s, etc)

-P claimed Ds in breach of duty to corp, acting o/s powers (purp of corp = gen profits *and* distrib to SHs)

-Court sides w/ P SH – some profits can be retained but large amts must be distrib’d to SHs

-**Biz corp org’s/carried on 1° for *profit of stockholders*, powers of Ds to be used for that end**

-Discretion of Ds to be ex’d in choice of means to attain that end (altruistic ends can be pursued *to extent it ben’s SHs*)

***Parke v Daily News Ltd*** – Corp is one/same w/ SHs

-2 NPs, neither profitable (vs. *Ford*), Ds decide to sell – what to do w/ profits? To whom is duty owed?

* Ds wanted balance $ to go to employees; can min SHs object/insist that is *uv*/illegal/breach of duty?

-Corp may distrib benefits to outsiders as long as it can be show this will at least indirectly benefit SHs/corp 🡪 can’t just do good deeds to non SHs, **have to be justified,** **benefit SHs**; if Ds take action, must run through **TEST**:

1. Is transaction rsnbly incidental to carrying on Co’s biz?
2. Is it a *bona fide* transaction?
3. Is it done for **benefit/to promote prosperity of Co? (Ultimate test: what is necessary for carrying on biz)**

**\**Dodge, Parke*:Core of duty is FD Ds owe to corp (loyally, in GF, in BIoCorp)**

**New Cases (Modern Approach)**

\*There are ***other parties besides SHs* whose int’s MAY be taken into acct** (bigger Q = *why* corp brought into ex’ce?)

* E.g. ***Peoples***: Ds took dcn, bankrupted Co, TiB comes in as new mgmt.; when old Ds exercised FD to corp, were they req’d to take into acct interests of various SHs? Is this part of FD? Court says YES
* E.g. ***BCE***: O/s gp (DH creditors) brings claim against corp for breach of duty to them when Ds broke duty to corp; Duty that corp owes to outsiders (creditors) is duty *not to oppress* them
  + Duty of Ds to act in BIoCorp includes duty to treat indiv stakeholders equitably and fairly

**BCA s. 142 Duties of Ds and Os: 1)** D or O of Co, when ex’g powers/perf’g f’n of D/O of Co, **MUST** **a)** act honestly and **in GF** w/ view to **BIoCorp**, **b)** ex care, dilig, skillthat **rsbly prudent** indiv would ex in comp circs (// **s. 122(1)**)

***RE PEOPLES Dept Stores Ltd (1992) Inc*** – Creditors claiming breach of FD but duty not owed to them!

-Wise bros own 1 corp, buy Peoples in buyout (now = Ds of both), probs merging inventory; loaded assets onto Peoples to shift indebtedness; didn’t work, both went under, creditors complain (not paid b/c of bankruptcy)

-Do Ds owe FD to Co’s creditors akin to stat duty owed to Co?

-B/c SHs & creditors transfer $ to care of Ds, they owe stat FD *to Co* to mng assets/make rsnbl biz dcns to Co’s adv

-Int’s of SHs not nec consis w/ int’s of Co (partic @ insolvency); in gen, Ds legit consider int’s of gov, enviro, employees, creditors, SHs, consumer (in this case, no E of breach of FD to corp; SHs have opp rem avail)

-**There is a DOC but not an FD or stat duty to creditors or SHs**

* **S. 142(1)(a) duty owed ONLY to corp** (not SHs, creditors; what is in BIoCorp changes over time)
  + Moving target in reality makes it hard to hold mgmt. to acct (easy for them to escape resp’y)
* At all times purp of mgmt. = create ‘better’ corp (NOT favour int’s of 1 gp over another)

-Case = **reformulation of basic duty owed by mgmt.**; uncoupling of corp from SHs (joined by other parties/int’s)

***Re BCE Inc*** – NO oppression of DHs found

-Cred’s claiming corp not run properly (mgmt. made dcns that didn’t properly take acct of their StH interests, mgmt. should be resp for their losses)

-Co in trouble $’ly, parties get together, decide on plan of arrgmt whereby profitable subsidiary (Bell Can) take on indebtedness of parent Co and mgmt. agrees 🡪 most cred’s agree, but not part bringing action, claiming move is in BIo*fam* of Corp’s but NOT in BIoBC – they are DHs in BC; value of their debt goes down, not happy, trying to hold mgmt. to acct 🡪 How??

* **Oppression** = remedy AND duty 🡪 **BC BCA s. 227(2)** SH may apply to Ct for order on gds that **a)** affairs of Co conducted or powers of Ds ex’d in manner oppressive to 1 or more SHs incl applicant, or **b)** act of Co done/threatened or reso of SHs passed/proposed is unfairly prej’l to 1 or more SHs incl app
* **S. 227(3)** lists all things court can do (wind up Co, order sale of shares, order damages, etc)

-Ds, in ex’g duty, must act in BIoCorp (s/t int’s of stakeholders are co-extensive, other times not)

-In considering BIoCorp, Ds *may* look at int’s of SHs, employees, gov, consumers, enviro etc to inform dcn

* Can disregard some ppl, emph on *unfair* disregard; must be defensible balance, in acc’ce w/ Ds FD
* **Fair Treatment** = central theme in oppression jurisprudence (what stakeholders entitled to expect)
* Ds not under dir duty to indiv StH’s, only BIoCorp (may be obliged to consider impact = **good corp citizen**)

-**Confirms *Peoples*: Ds’ duties owed to corp, only need ‘take acct’ other parties (FD broad, LT)** (*may* not must)

**SHAREHOLDER INPUT** – SHs put Ds in place, can take out/replace (difficult); mgmt. owes duty to corp not SHs

***Bushell v Faith***

-SH struc of corp did NOT allow for SHs to remove mgmt. (voting sys makes it impossible: 1 share, 1 vote, *except* in reso to remove D, if D is SH, his shares get *3* votes 🡪 w/ only 3 SHs, assuming D votes in own favour, can’t oust)

-Does voting struc making it virtually imposs to remove D defeat purp of idea that SHs should be able to oust mgmt.?

* Nothing inapprop; may be difficult to get rid of D in place

-Upjohn L: **Parliament never sought to fetter right of Corp to issues share w/ certain voting rights/restrictions**

* **Nothing in statute to prohibit special weighting of votes** (Article provision gives corp unfettered rights to do so, prov upheld, D remains D) 🡪 *this is still the law, but the oppression remedy would be available*

-Dissent: Basically undoes statute

***Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame***

-Dcn to divest of assets approved by maj of SHs in *ord* reso (not extrao’y reso as req’d by art’s) 🡪 Ds refused

-Ps claim D in breach of duty to corp for not implementing, court disagrees

* **Dcn to buy/sell = mgmt. dcn** 🡪 simple maj = “just a suggestion”; Ds said sale wasn’t for benefit of corp
* Ds protected by articles which req *spec* reso to override Ds “mgmt. and control” of biz
* SHs bound by incorp’g docs (art’s said SH override req’d *extraord’y reso* – vote only simple maj)
* Supposedly protects minority but really just protects mgmt. from claims they’re not doing what SHs want

-If mandate of Ds to be altered, can only be under machinery of memorandum and articles themselves

* **S. 259**, **s. 173** 🡪 SHs could have amended articles, or…
* **S. 128(3)**, **s. 109** 🡪 removed Ds in favour of more compliant ones

**Sale of the Undertaking – gives SHs veto over Ds** (but can’t make Ds do s/t on their own)

-If mgmt. proposing to **get rid of *core biz* of corp**, must run by SHs 🡪 if SHs disagree, mgmt. can NOT implement but if *does* pass, SHs can dissent/be paid out (power of dissent not ltd to those who can vote: **s. 301(5)**, **s. 189(6)**)

***BCA***, **s. 301 Power to dispose of Undertaking** **(1)** Co must not sell/lease, o/w dispose of substantially/all its UT unless **a)** does so *in ord course of biz* or **b)** has been auth’d by *spec reso* (// **s. 189(3)**)

**(2)** If contravene, court, on app of SH, D, cred, *may* do any of: enjoin prop’d disp’n set it aside, make any other order **(3)** disposition of substantial/all of UT of Co *not invalid merely b/c* co contravenes 1) if disp’n is a) for valuable consid to person dealing w/ Co in GF or b) rat’d by spec reso (**3P Protection**)

**(4)** despite any special reso to auth/ratify disp, D may abandon w/o further SH action (// **s. 189(9)**)

**(5)** SH may send **NoD** **(6)** Exceptions (e.g. security interest, lease of >3yrs, to parent co, etc) vs. ***no CBCA exemptions***

***CBCA*** Greater ability for SHs to get abil to vote (in BC, if you can’t you can’t! Only rem = dissent: s. 301(5))

**S. 189 (1)** Unless art’s/bylaws or USA o/w provide, Ds of corp may, *w/o auth of SHs*, **a)** borrow $ on credit of corp **b)** issue/sell etc debt obligs of corp **c)** give guarantee **d)** mortgage or o/w create sec int in any/all corp prop

**(2)** Unless art’s/bylaws/USA o/w prov, Ds may by reso delegate powers in 1)…

**(3)** Sale/lease/ex of corp prop other than in ord course of biz req’s apprvl of SHs in acc’ce w/ ss.4-8

**(4)** N re: SH mtg sent (w/ summary of sale/lease, dissent buy out option)

**(5)** At mtg SHs may auth sale/lease/exch, may fix/auth Ds to fix terms/conditions

**(6)** Each share of corp carries right to vote re: sale, lease, or exchange ref’d in 3) *whether or not* it o/w carries rt to vote

**(7)** Holders of shares of class/series entitled to vote sep as class/series re: sale/lease if aff’d by sale diff’ly than others

**(8)** S/L/E adopted when holders of each class/series entitled to vote have approved it by spec reso

**(9)** Ds of corp may if auth’d by SHs approv’g prop’d sale/lease, subj to rts of 3Ps, abandon s/l/e w/o further SH apprvl

**USAs (and equivalent) –** Way for SHs take over mgmt. or restrict powers of D to manage (alter rlnsp b/t SHs and Ds)

|  |  |
| --- | --- |
| **BC BCA does not have USA approach**  **S. 137**: Articles of Co may *transfer* in whole/part, powers of D to mng/sprvs mgmt. of biz/affairs of Co – may be incl in art’s at time of incorp or added later by spec reso  -Drafters didn’t want 1 SH to be able to interrupt abil of indivs to take over control of mgmt. for certain purposes 🡪 done through *articles* (to change art’s, have mtg w/ normal maj process, need 2/3 votes of ppl who can/do vote in spec reso to do so 🡪 stat does not give power to vote to ppl who do not normally have it)  -Starts w/ K at heart; once K of Co in place, don’t have Ks allowing some indiv’s to take over mgmt.  \*\*May want to incorp in BC to avoid troublesome SHs!  -Allows transfer of mgmt. powers to ANYONE | **CBCA s. 146 – USA**: 1) o/w lawful wrttn agrmt among all SHs that restricts partly/wholly powers of Ds to mng or supervise mgmt. of giz/affairs of corp is *valid* 2) same if s/o owns *all* shares 3) purchaser/transferee of shares to USA deemed party to it 4) unless no N, p/t can rescind transaction acq’g shares w/in 30 days 5) parties given power to mng/sprvs under USA have all rts/powers/duties and liab’s of D 6) nothing prevents SHs from **fettering discr** when ex’g powers of Ds under USA (vs. orig Ds who can NOT prom crtn dcns while in office) – can predict dcns\*\*  -Gives power to every SH b/c they have veto rt (might not usu have share in vote 🡪 powerful for min SH: person w/ 1 share can prevent it from being agreed upon)  -Brings in K later on  -Allows transfer of mgmt. powers ONLY to corp SHs |

**S. 247** If s/o should be but not complying w/ USA (e.g. D, O, emp, trustee), court can order compliance/prohibit breach

**\*\***Mgmt might *initiate* course of action but can’t implement until SHs give approval 🡪 those who *don’t* approve can be bought out (**dissent remedy** – must give N, tell corp of plan to dissent if dcn taken = threat mechanism)

***Bury v Bell Gouinlock Ltd*** – you *might* be able to do some things via USA but even w/ that there are controls

-Mand’y sale of shares if SH no longer worked for Co but USA says Co can delay sale for 12ms (sneaky way to restrict emp’s from working at competing Co, can only hold stock in one brokerage at a time) 🡪 = oppression?

-P wanted to sell back, was party to USA, mgmt. triggers clause (12ms delay), P claims oppression

**-S/o party to USA can nonetheless claim to be oppressed by USA** (P badly affected by mgmt. dcn taken pursuant to USA to which he was a party 🡪 = poss lmt’n on use of USA): Courts can amend USA if it is oppressive

* Use of delay prov was oppressive (P wins) 🡪 Co would not face $ difficulty, gave no reason, P penalized

**THE INDOOR MGMT RULE – PROTECTING 3P RELIANCE**

**Constructive N:** outsiders deemed to be familiar w/ contents of corp’s Con/related docs filed in public off, vs…

**IMR:** Constructive N doctrine confined to actual restrictions on corp agent’s authority; does NOT require outsider to satisfy himself that internal regulations of corp have actually been complied w/ (protects 3Ps)

***BCA***, **S. 146 Persons may *rely* on authority of Companies and their Ds, Os, and agents**

**(1)** Subj to 2), Co, guarantor of oblig of Co, or person claiming thru Co may NOT assert against person dealing w/ Co (or person who acq’d rts from Co) that:

(a) Co’s memo/NoA/art’s have not been complied w/ (b) indivs shown as Ds in corp reg not Ds of Co (c) pers held out by Co as D/O/agent i) is not, or ii) has not auth to ex powers/perform duties of D/O/A (d) record issued by any D/O/A of Co w/ actual/usu auth to issue rec is not valid/genuine or (e) record kept by/for Co not accurate/complete

**(2)** Does not apply re: pers who has knowl or, b/c of their rlnsp w/ CO, *ought* to have knowl of (a)-(e) (// **s. 18(1)**)

***CBCA***, **S. 17 No Constructive Notice**: No person is affected by/deemed to have N/knowl of contents of doc re: corp by rsn only that doc filed by D or is avail for inspection at off of corp (*// BC BCA, no big diff, = core princ of corp law*)

**S. 18 Auth’y of Ds, Os, Agents**: No corp/guar of obli may assert agst pers dealing w/ corp/who acq’d rts from corp…

***Sherwood Design Service Inc v 872935 Ontario Ltd*** – Ct uses IMR to deal w/ PIK (not really what IMR designed for)

-Agrmt to buy assets of P signed by KM & P in trust for to-be-incorp’d Co (= PIK); $ and prom note should deal fall through; KMP incorp to purchase assets but didn’t 🡪 S sold to others, KMP reassigned by purchasers to law firm of other clients; S vendor claimed failure to complete trans’n = breach of K; Can S claim against them for prom note?

* K doesn’t exist at CL; under stat when corp incorp’d, if it adopts K, it DOES become bound, so does other party

-IMR: Co may not assert that person held out as agent does not have auth to ex powers usual for such an agent (i.e. letter from L binds Co to agrmt to purchase S) – party dealing w/ corp entitled to adopt terms of letter @ face value

* Can use IMR to take care of PIK, to cause wrong person to say words on behalf of corp that adopts PIK (even though meant to be rule dealing w/ corp already in ex’ce where wrong person doing the job)

**THE AUDIT COMMITTEE – PROTECTING OUTSIDE DIRECTORS**

***BCA***, **S. 223** **Application** –large/widely held/public Co’s and financial institutions require apptmt of AC (// **s. 217**)

**S. 224** **Appointment and procedures of AC** – **(1)** Ds must at 1st mtg elect AC **(2)** w/ *at least 3 Ds*, maj must not be Os/emp’s 3) quorum for AC mtg = maj of Comm membs who are not Os/emp’s of Co 4) must elect chair 5) auditor must get rsnbl N of/rt to appear at mtg of Co’s AC 6) on req of aud’r, chair of AC must convene mtg of AC to consid any matter A believes should be brought to attn. of Ds/SHs

**S. 225** **Duties of AC** – review/rep to Ds on Co’s $ stmts, aud report (assess $ stmtms which corp to place before SHs)

**S. 226 Provision of $ stmts to AC** – Ds must provide AC w/ $ stmt and aud’rs report in sufficient time to allow Comm to rev/rep on them as req’d (auditors need access to records in order to be useful)

**DUTIES OF DIRECTORS AND OFFICERS** (i.e. mgmt.)

**3 categories of duties** (overlap; single action could fit into/break all 3, not watertight)

1. Personal liability (K type duties; clear who is involved: stat tells us)
2. Care and Skill (basically neg, //tort-like duty, // remedies; unclear, could be owed to a/o; relief = dmgs)
3. Fiduciary Duties (restitutionary, focus on gain of pers in breach; open-ended, many rem’s)

**DIRECTORS (AND OFFICERS) – GENERAL**

***BCA***, **S. 120 # of Ds** – Co must have at least 1 S; ***Public Companies must have at least 3 Directors***

***CBCA***, **S. 102 Duty to mng/supervise mgmt.**

**(1)** Subj to any USA, Ds shall mng or sprvs mgmt. of biz/affairs of corp

**(2)** Corp shall have 1 or more Ds but ***distributing corp***, any of issued securities of which outstanding and held by >1 person, shall have ***not fewer than 3 Ds*** at least 2 of whom are not Os or emp’s of corp or affiliates

**S. 103** Subj to art’s/bylaw/USA, **Ds can *make/amend/repeal* bylaws**, submit to SHs at next mtg, eff’ve until SHs confirm/reject/amend reso

**S. 121 First Ds** (appntd; subseq elected) **(1)** 1st Ds of Co hold office from time of recog until cease under s. 128(1)

**(2)** No design as 1st D valid unless a) in case of Co incorp’d under Act i) indiv is incorp’r who signed art’s or ii) consents to be D in acc’ce w/ s. 123

**S.122 Succeeding Ds** – Ds other than 1 Ds in 1st term must be elected/appointed in acc’ce w/ Act and w/ memo/art’s

**S. 124 Person disqualified as Ds** **(1)** Person must not become/act as D of Co unless = *indiv* who is qual’d **(2)** Indiv not qual’d to become/act as D if indiv is a) <18 b) incap of mng’g indiv’s affairs c) bankrupt d) convicted re: O of prom/form/mgmt. of corp/unincorp’d biz or O re: fraud unless i) Ct orders o/w ii) 5yrs elapsed

**(3)** D who ceases to be qualified must resign

**S. 105 Qualifications of Ds** (*NOTE: No non-fraud req’t vs.* BCA s. 124(2)(d))

**(1)** Ppl disqual’d from being Ds: a) a/o <18 b) a/o of unsound mind c) person who is not indiv d) bankrupt

**(2)** Unless articles o/w say, D or corp not required to hold shares issued by corp (i.e. doesn’t have to be SH) (// **s. 125**)

**(3)** Residency: at least 25% of Ds of corp must be rez Cdns (if <4 Ds, at lst 1 Cdn)

**S. 125 Share Qualif’n** – Unless memo/art’s provide o/w, D of Co not req’d to hold shares issued by Co (// **s. 105(2)**)

**S. 126** Register of Ds – Co must keep a register of its directors

**S. 128** **Ds cease to hold office (1)** when (a) term expires in acc’ce w/ i) Act/memo/art’s or ii) terms of elec/apptmt

(b) D dies/resigns, or (c) D removed in acc’ce w/ ss. 3 or 4

**(2)** Resignation takes effect on later of a) time wrttn resignation provided to Co and b) specified date in resignation

**(3)** Co may remove D before expir’n of D’s term of off subj to 4) by a) spec reso (2/3) or b) if memo/art’s provide D can be removed by reso of SHs entitled to vote at GMs passed by less than spec maj or other method

**(4)** If SHs holding shares of class/series have excl rt to elect/apt 1 or more Ds, D so elected can only be removed a) by spec sep reso of those SHs or b) if memo/art’s provide that such D can be removed by sep reso of those SHs passed by maj of votes less than maj needed for spec reso or other method

**S. 136 Powers/F’ns of Ds: 1)** Ds of Co must (subj to Act, regs, memo/art’s) mng/supervise mgmt. of biz/affairs of Co

**2)** Lmt’n/restr’n on powers/f’ns of Ds NOT eff’ve agst person who does not have knowl of lmt’n or restriction

**S. 137 Powers of Ds may be transferred**

**1)** Art’s of Co may transfer in whole/part powers of Ds to mng/supervise mgmt. of biz/affairs of Co to 1 or more ppl

**S. 140 Proceedings of Ds: (1)** D entitled to participate in, incl vote at, mtg of Ds or of Comm of Ds may participate a) in person or b) unless memo/art’s provide o/w, by phone/comm’n medium if all Ds in mtg able to comm w/ each other

**(2)** D who participates in mtg under 1)b) is deemed for purp of Act and memo/art’s to be present at mtg

**(3)** **Reso** of Ds or Comm of Ds (a) may be passed **w/o mtg** i) in case of reso to approve K/transaction that D disclosed he may have disclosable interest in ii) re: reso if each of Ds entitled to vote consents in writing

* **S. 117** Reso in writing w/o meeting is valid if signed by all Ds entitled to vote on it

**(4)** If Co has only 1 D, that D may = mtg

**(5)** Reso passed at mtg of Ds is deemed passed on date/time passed

**(6)** Minutes must be kept of all prcdgs at mtgs of Ds or Comm of Ds

**\*\**Statute silent on how mtg called, who gets to speak, how vote held, what vote you have to have to pass***

***(Statutory presumption = simple majority)*\*\***

**S. 141 Officers** **(1)** Ds may apt Os and may specify their duties **(2)** Unless memo/articles say o/t (a) any indiv incl D may be appointed to any office of Co and (b) 2 or more offices of Co may be held by same individual

**(3)** **Indiv not qual’d to be D not qual’d to act as O either** **(4)** Unless memo/art’s say o/w, Ds may remove any O

**(5)** Rmvl of O is *w/o prejudice to O’s K’l rights* or rights under law BUT appmt of O does not itself create any K rights (*just = status that Ds give/take away*)

**CBCA s. 121 Officers** Subj to art’s/bylaws/USA, **(a)** Ds may designate offices of corp, appoint Os persons of full capac, specify their duties, delegate them powers to mng biz/affairs of corp, *except powers in s. 115(3)*; **(b)** D may be apptd to any off of corp and **(c)** 2 or more offices of corp may be held by same person

**S. 142: DUTIES OF Ds *& Os* (FIDUCIARY DUTIES):**

**(1) Do *or O* of Co, when ex’g powers/performing f’ns of D/O of Co must**

**(a) act honestly and in GF w/ view to BIoCo (*= FD*)**

**(b) ex care, diligence, skill that rsnbly prudent indiv would ex in comparable circs (*= DOC*) (// s. 122(1))**

(limits subj defence from *City Equitable* w/ obj component)

**(c)** act in acc’ce w/ Act and regs and **(d)** act in acc’ce w/ memo/art’s 🡪 *(c) and (d) = “abide by statute”*

**(2)** This is in add’n to *and not in derogation of* any enactment/ROL or equity re: duties/liab’s of Ds and Os of Co

**(3)** No prov in K, memo/art’s relievs D or O from **(a)** duty to act in acc’ce w/ Act/regs or **(b)** liab’y that would o/w attached to D or O re: neg, default, breach of duty/trust of which D or O might be G (can’t K out of obligs; // **s. 122(3)**)

\*\*Be careful under BC BCA appointing Os (*Senior* Os) as statute imposes duties on them (vs. none in CBCA)

**S. 143 Valid’y of act of Ds/Os**: Act of D/O not invalid merely b/c of irreg in election/apptmt, defect in qualif (//**s.116**)

**S. 146 Persons may rely on auth’y of Co’s and their Ds/Os/As** **(1)** Co, guarantor of oblig of Co or person claiming thru co may not assert against person dealing w/ co that **(a)** Co’s memo/NoA/art’s have not been complied w/ **(b)** indivs shown as Ds in corp reg NOT Ds of Co **(c)** person held out by Co as D/O/A i) is not such or ii) has no auth’y to ex powers/perform duties that are customary in biz of Co or usual for such D/O A

* **Agency** principle: assumption that principle is bound b/c of actual, usual, or ostensible authority
  + S. 146(1)(c)(i) = USUAL authority, and
  + S. 146(1)(c)(ii) = OSTENSIBLE authority

**DIRECTORS – PERSONAL LIABILITY**

**Director’ liability**

**BC BCA s. 154: (// CBCA s. 118)**

**Ds’ liability** (no obligs on Os)**: (1)** Ds of Co who *vote for or consent to* reso authorizing Co to do any of following are jointly *and* severally liable to restore Co any amount paid or distrib’d as result and not o/w recovered by Co:…

**(5)** D or Co *present at mtg* of Ds is *deemed to have consented* to reso ref’d to passed at mtg unless D’s dissent is a) recorded in minutes b) put in wrtg by D, prov’d to secretary c) wrttn/deliv’d to Co’s reg’d office right after mtg

* **DISSENT**: be careful if you’re D and NOT at mtg 🡪 read minutes, actively dissent (// s. 123(3) CBCA)

**(9)** Limitation 🡪 2yrs after date of resolution

S. 156 Legal proceedings on liability

\*\*Under CBCA duties owed by Ds *and* Os but ONLY Ds can be excused (s. 123)

**CBCA s. 118** **Ds’ liability (1)** Ds of corp who vote for/consent to reso auth’g: issue of share under s. 25 for consid other than $ are jointly and severally or solidarily liable to corp to make good any amt by which consid rcvd is less than fair = of $ corp would have rcvd if share had been issued for $ on date of reso 2) Other liab’s…

**(7)** Limitation 🡪 2yrs after date of reso authorizing action complained of (// s. 154(9))

**(9)** D won’t be liable if they prove they didn’t/couldn’t have know share issued for less consid that fair = of $

**S. 119** **Liability of Ds for wages** (*NOT in BC BCA*)

**S. 122(1) DOC of Ds and Os** (DOC/FD)

**(2)** Stat duties; duty not just to comply w/ stat and art’s/bylaws but ALSO w/ any USAs; *not* party to agrmt by virtue of status as D or O but if there *is* USA, as D or O, you have duty to abide by that USA (*this is NOT in BC BCA*)

**(3)** Subj to s. 146(5) (USAs) no provision in K or bylaws for reso relieves D or O from duty to act in accordance w/ statute or from liability and can’t go thru byalws/K to get D or O off hook nor through reso after

* Vs. BC where there is nothing to say you can’t get SHs together, pass reso excusing D or O from liab’y *after* fact

**S. 157 Limitations on Liability** (provisions for Ds to escape liability or be said to have complied – *not* for O)

**(1)** (// **CBCA s. 123(5)**)D (*not O*) of Co not liable under s. 154 and has complied w/ duties under s. 142(1) if the D relied in GF on: **a)** $ stmts of Co rep’d to D by O of Co or in wrttn report of auditor of Co to fairly reflect $ position of Co **b)** rep of L/acct/engineer etc whose prof lends cred’y to stmt **c)** stmt of fact to D by O **d)** rec/info/rep ct finds rsnbl

**(2)** D of Co not liable under s. 154 if D did not know and could not rsnbly have known that act done by D or auth’d by reso voted for/consented to by D was contrary to Act (this catchall ss. has no = under CBCA)

S. 158 Liability if Co’s name not displayed – D pers liable for loss/dmg to purchaser/supplier as a result

NOTE: **Ss. 154, 157** **applies *only* to Ds (no way to make Os pers liable** as in s. 154); **S. 142** is for *both* Ds & Os

* I.e. Os have FD but no exculpatory provision
* Liability under s. 154 excused by s. 157(1)

**CBCA S. 123(4) Defence – reasonable diligence** 🡪 *excuses breach of s. 122(2) (duty to comply)*

D not liable under s. 118 or 199 and has complied w/ duties under s. 122(2) *if D ex’d care, diligence, skill that rsnbly prudent person would have ex’d in comp circs* incl reliance in GF on a) $ stmtm of corp rep’d to D by O of corp or in wrttn rep of auditor of corp b) rep of person whose prof lends cred’y to stmt

**(5) Defence – Good faith** D complied w/ duties under s. 122(1) if D relied in GF on $ stmtm, auditor, rep (// s. 157(1))

* Breach s. 122(2) duty to comply w/ statute 🡪 excused by s. 123(4)
* Breach s. 122(1) DOC/FD 🡪 excused by s. 123(5) good faith

**CARE AND SKILL** – CL historically lax on Ds and Os re: DOC to corp (then stat reform)

**Common Law**

***Re City Equitable Fire Insurance Co Ltd*** – *locus classicus* on Ds’ DOC (**SOC = RP** given indiv D’s expertise)

-Co ordered to wind down, big deficit but large trading profits; mng’g D had been investing depreciating sec’s, diverting funds to another Co; jailed for fraud, liquidator brought action against Ds and aud’rs for neg, breach of DOC (they should have known what other D was doing) 🡪 Ct finds some neg but short of willful misconduct, no liab’y

-Can Ds be liable for not stopping him? 🡪 Ds in trust-like position, some DOC owed (but not = trustee)

**1) D need not exhibit greater degree of prudence and skill than may be rsnbly expected from s/o w/ his knowl/exp (subj no 1 std,** but changes in *Peoples*) **🡪 not liable for mere errors of judgment**

**2)D’s duties intermittent** (continual attendance/attn. to Co not req’d

**3)** D, in absence of grounds for suspicion, justified in treating O w/ delegated auth’y to perform duties honestly, can rely on others in carrying out DOC (this princ is negated by CBCA s. 123(5))

-**In discharging duties, D must act *honestly* (FD), ex skill/diligence (DOC)**; extent req’d determined by extent of duty alleged to have been neglected 🡪 doesn’t have to be gross neg; SOC = “reasonable care”

**Statutory Reform**

***BCA***, ss. 142(1)(b), (2)(3), s. 154, s. 157(1) (s. 123(5)) – page 16

***CBCA***, ss. 118, s. 122(1)(b), (2)(3), 123(4)(5) – page 16

***Re Peoples*, QCCA** – **FD vs. DOC** (breach of FD = issue on appeal); meeting FD not sufficient to meet DOC

-**FD** does ***not*** ref to quality of Ds’ mgmt. but to their personal conduct (law imposes duty on them twd those who entrust them w/ mission to mng pool of assets, relates more to motiv than conseq’s of Ds)

-**DOC** defines liab’y of Ds in light of quality of their dcns 🡪 old mgmt. acting *incompetent* by running 2 Co’s together

-TiB (replaces BOD in bankruptcy prcdgs so =, // action by Peoples against own Ds) 🡪 alleged that Wise Bros breached **duty of loyalty** (CBCA s. 122(1)(a)) *and* DOC (CBCA s. 122(1)(b)) (only FD dealt w/ @ SCC)

* **FD 🡪 Personal conduct** (*not* mgmt.); **motivation** of Ds (*not* conseqs)
* **DOC 🡪 Consequences**

-Not enough for D to say “did best” (=subj), but std also not prof one nor neg std

* **DOC: SOC contains both obj and subj elements** (RP w/ skill and in comp circs as D) 🡪 gen basic lev of competency ought to have as D or O (not expert but some expertise re: what you’re doing in corp; = floor)
* = breach of DOC to take position if you DON’T have degree of competency req’d (once you’re in position, subj elements kick in)

-In this case, initial dcn to adopt buying sys *met* SOC (no breach)

**The Business Judgment Rule**

- BJR fuses DOC and DOC, gives **Ds *presumption* of having acted in GF and w/ due care**

- Cts reluctant to subst’ly rev merits of jgmts made by Ds (= jdcl 2nd guessing; inhospitable to eff’ve biz DM’ing)

* Unfairness may result to Ds: after-the-fact eval of dcns, hindsight always 20/20

-Once s/o is D as long as they report, have rsns for dcns, Ct unlikely to 2nd guess (hard to establish breach of DOC)

* *Peoples* 🡪 def shown to dcns even if they turn out wrong; **onus** on claimant to show on Bal/P D acting incompetently in taking dcn

-BJR colours determination of liability in context of FD and DOC

* BJR = ‘safe harbour’ rule; if Ds/Os fulfill certain conditions, escape liability (if BJR applies, no breach)

***UPM-Kymmene Corp v UPM-Kymenne Miramichi Inc*** – DOC can’t be owed to o/s’rs

-Lrg bonus to Os (golden parachute), corp ruined, new mgmt. put in place to challenge it 🡪 not breach of *F*D, just incomp dcn (= **breach of DOC**) 🡪 Ds should be made liable for conseq’s of their dcn (no def to dcn of Ds, no BJR)

-Ds argued only did what told by compensation Comm (expertise/advice) but Ct looks at *what* advice was asked for on – advisor did not know circs/did not address, can’t point to that report (did not ex rsnbl jgmt in relying on it)

-**While Ct will normally defer to biz jgmt of Ds & Os** (who are entitled to retain advisors/rely on expertise; BUT must ex rsnbl diligence) 🡪 **BJR protects Ds’ dcns; Ds must make *rsnbl* not perfect dcns BUT BJR cannot apply when *uninformed* rec made** (not unrsnbl for BOD to assume Comm had done good job, this did NOT relieve Ds of their *indep oblig* to make informed dcns on rsnbl basis)

-**Just b/c Ds rely on expert’s opinion, does not relieve them of their oblig to ex rsnbl jgmt in relying on that op** (o/w in breach of DOC)

Remedies: Injunction; damages (CL so must be CL breach); restitution of prop (equity); acct of profits; rescission of K

\*\*Must tie duty breach to partic rem (can’t assume rem available just b/t their was a breach)

**FIDUCIARY DUTIES**

**Introduction**

-FD has no single meaning, depends on context (*Regal Hastings*)

* Strictest re: takeover (hardest to show approp lev of care taken); lowest re: CoI

-Employment K cannot limit FD in advance; BJR may limit finding of breach

-In rare circs you may not be in breach of FD if relying on certain reports, but usu it’s for DOC *not* FD

-Trustee (D/O) has 3 duties to Co (see statute)

1. Loyalty/**No CoI** 🡪 no divided loyalty (not split b/t Co and self or 1 Co and another, = CoI)
2. Information/**Disclosure** 🡪 Duty to actively find/relate info that benefic’y (Co) needs to know
3. Disgorgement/**acct’g** 🡪 Beneficiary gets *all* benefits, don’t keep any for self

-**Duties play out in 4 contexts** (stat silent on some, lots on 1. though; o/w look at CL then stat for a/t else)

1. **Self Dealing**: K’ing w/ beneficiary (D/O 🡨 K 🡪 Corp), mostly dealt w/ through CL
2. **Corp Opportunities**: Corp had chance to make $ (w/ or from 3P) but you made/took it instead even though it’s your duty to *inform* corp so they can benefit (D/O K w/ 3P, no K w/ Corp & 3P)
3. **Competition**: Actual CoI (e.g. w/ another Co – you’re D of 2 diff corp’s, may have to decide whose int’s to put first but have FD to both, inevitably have to breach it to one, can be other duty besides FD)
4. **Hostile Takeover Bid**: S/o coming it to try and take over existing mgmt. but you’re aware they’re involved (incl in making dcns to reveal info, choose 1 bid over another, give info to SHs etc)

***BCA***, **s. 142(1), *CBCA***, **s. 122** D or O of Co, when ex’g powers/perf’g f’ns of Co D/O MUST **(a)** act honestly/in GF w/ view to BIoCorp, **(b)** ex care, dilig, skill that rsnbly prudent invid would ex in comp circs (\*\*can/t K out (3), (3))

**To Whom is the FD Owed**

***Re BCE Inc*** – FD of Ds = act in BIo***Corp*** (often BIoSHs co-extensive, but if conflict, **Ds’ duty is to corp**: *Peoples*)

-FD *not* owed to SHs; others may be able to claim deriv or pers action or oppression remedy

-DHs failed to est rsnbl exp’n that Ds would protect either inv’t grade rating or mark value of debentures

**1. Self-Dealing (Contracting w/ the Corp)**

The Common Law

-Self-dealing transaction involve Ks/transactions b/t Ds/Os of corp directly or thru interest in another entity and corp itself (e.g. sale of asset to corp by D/O at price exceeding asset’s FMV, or purchase from corp by D/O *below* FMV)

-Danger of SDTs: when insider Ks w/ corp, risk of diversion of corporate wealth is clear

Legislation

**Ss. 147-151** (// **CBCA s. 120**) How **self-dealing** context works, what you have to do 🡪 BC more mgmt. friendly

**S. 147**: **Disclosable Int 1) D/Sr O of Co holds discl int in K/trans’n if a) K mat’l to Co b) Co has entered K, & c) i) D/Sr O has mat’l int in K *or* ii) D/Sr O is D/Sr O of/has mat’l int in pers who has mat’l int in K;** **4)** D/Sr O does *not* hold disc lint in K merely b/c (*but doesn’t say what WOULD make it a DI*) **b)** K relates to indemnity/insurance **c)** K relates to remuneration of D or Sr O in capac as D/O/emp/agent of Co (*i.e. if it relates to your own pay, no DI*)

***CBCA***, **s. 120(1) Disclosure of interest** (only deals w/ self-dealing) D or O of corp *shall* disclose to corp, in wrtg or by rqstg to it entered in minutes, nature/extent of any int s/he has in *material* K/trans’n whether made or proposed w/ corp if D/O **a)** is party to it **b)** is D/O/indiv acting in sim capac of party to K *or* **c)** has mat’l int in party to K/trans’n

**2)** **Time of disclosure** basically reveal as soon as it comes up (WHEN to disclose by D) **3)** When O should disclose

**5) Voting** can’t vote on reso unless it fits certain exceptions (// BC BCA)

**7) Avoidance standards** K/trans for which disclosure required under (1) is NOT INVALID and D/O *not* accountable to corp or SHs for any profit realized from K/trans b/c of D’s/Os’ interest in K or b/c D present/counted to determine if quorum existed if **a)** *disclosure* of int was made in acc’ce **b)** Ds *approved* by maj K/trans AND **c)** K/trans ***rsbl & fair***

(*can’t just get approved, must justify why fair/rsnbl, vs.* BC BCA *where you DON’T have to justify*)

**7.1)** **Confirmation by SHs** Even if 7) not met, D/O acting H&iGF not accountable to corp or SHs for profits if a) K approved/confirmed by spec reso at SH mtg b) disclosure of interest made to SHs in suff manner and c) K/trans fair and reasonable to corp when approved/confirmed

(*Under CBCA* ***neither Ds nor SHs*** *are supreme b/c you can always go to court!)*

\*\***Diff in CBCA is** ***how you get it approved***: when you have DI is more or less same, so is what you have to reveal, but process for getting it approved is different 🡪 under CBCA if you get other Ds to approve it, you’re in ss. 7

**S. 148(1) *Core provision*** that e/t else modifies/orbits around: **Oblig to acct for profits: D/Sr O liable to account to Co for any profit that accrues to D or Sr O under or as result of K/transaction in which D/Sr O holds DI**

(*I.e. if you make profit, don’t reveal your interest, have to acct; look after (1) to see when you DON’T have to*) …

**(2)** D/Sr O of Co NOT liable to acct for and may retain profit in circs: a) DI was *diclosed* before Act b) K *approved* by Ds in acc’ce w/ s. 149 other than s. 149(3) c) K approved by *spec reso* under 149 after nature/extent of DI has been disclosed to SHs entitled to vote on reso… (See s. 120(7))

**(4)** Gen stmt in writing provided to Co by D/Sr O of co sufficient discl of DI re: any K Co proposes to/enter if stmt declares D/Sr O is D/Sr O or has mat’l int in, pers w/ whom Co proposed to/etner K

(*= only guidance on what exactly has to be disclosed!*)

**S. 149 Approval of Ks/transactions 1)** K/trans re: which disclosure made may be approved by Ds or by spec reso

**2)** Subj to (3) D w/ DI in K/transaction *not* entitled to vote on reso in (1) to approve… *unless weirdly*…

**3)** If all Ds have DI in K/trans, any or all of them may vote on Ds’ reso to approve (?!)

**4)** Unless memo/articles say o/w, D w/ DI in K/trans who is present at mtg of Ds where K/trans considered for approval may be counted in quorum @ mtg whether or not he votes on any/all reso’s at mtg

(***Might want to put that in articles that this is s/t you DON’T want*)**

**S. 150 Powers of Court** (*whatever it wants!*) **1)** On app by Co or D/Sr O/SH/ben’l owner of shares of Co, court may, if it determines K/trans in which D/Sr O has DI was fair and rsnbl to CO a) order D/Sr O *not* liable to acct for any profit and b) make any order considers approp, BUT *(Ct can prevent K from being entered)*

**(2)** Unless K/trans in which D/Sr O has DI has been approved, Ct may, on app, make 1 or more orders if K/trans NOT F&R to Co: a) enjoin Co from entering b) order D/Sr O liable to acct for profit c) a/t else

*(Then K not nec valid, but not rendered auto invalid either)*

**S. 151 Validity of Ks/transactions**: K not invalid just b/c there was DI that was not revealed (i.e. can’t use *uv* doctrine to make K void just b/c it wasn’t revealed; could still argue voidable/get rescinded though)

**S. 152**: **Limitation of obligs of Ds/Sr Os**:No need for disclosure exc w/in 147-152; to what extent can D or K enter K and then to what extent do you have to hand over bonuses to corp (limits info you have to *reveal* to corp re: K w/ others, extent to which you have to acct for profits from those Ks); unless s. 153 applies, don’t have to disclose but that is only *part* of FD; (No = in CBCA, have to reveal under CBCA)

**\*\*S. 153** **Disclosure of conflict of office or property**: Explains when you have to disclose (as *part of* FD)

**(No equiv in CBCA)** 🡪 If D/Sr O of Co holds any office or possesses any prop/rt/int that *could* result in/directly in creation of duty/int that *materially* conflicts w/ that indiv’s duty/int as D/Sr O of Co, **must** disclose nature/extent of conflict\*\*; 2) must be made promptly

**2. Corporate Opportunities** **–** has D usurped auth’y granted by SHs to acquire “unbargained for” personal benefit?

-When s/o closely connected to Co takes biz opp instead (personally or thru another Co)

-Ppl w/ FD to corp invest in proj that corp could have acq’d, diverting valuable opps from corp to D/Os in pers capac

-Can’t take adv of opp on own; if you do, must disgorge

\*\*CBCA straightforward; BC complicated, has FD (ss. 152, 153 deal w/ what you have to reveal; see above)

***Regal (Hastings) Ltd v Gulliver*** – When D comes by info by rsn of pos’n as corp D, = breach of FD, liab to acct

-**A fiduciary cannot profit by using their fiduciary position** 🡪 no req’t of bad faith, fraud, or for Co to be able to take adv of opp 🡪 = High water mark (‘you can’t take any opp even if Co couldn’t take it itself)

-Rule of equity: Those who, by use of fiduc pos, make profit, are liable to acct for profit *by mere fact of profit*

-**Ds who obtained shares by rsn *and only by rsn of* fact they were Ds are liable to acct for profit**

**-No one w/ FD can retain profit from enggmt where pers int may/conflict w/ those of princ to whom duty owed**

-Strict liab’y: if profit made, purchase not permitted, no matter how honest the circs; no harm needs to befall corp (it’s breach of fund’l princ of how fiduc rlnshp works)

*(****In BC could use s. 152 as defence*** *but NOT for CBCA corp 🡪 no equiv)*

***Peso Silver Mines v Cropper***

-D approached for opp *previously* offered to corp 🡪 NOT breach of FD (apprchd in *pers* capac as indiv, not D)

* **If corp *rejects* deal, D may take it up personally (not CoI b/c corp had no interest)**

-Diff than *Regal*, D did **not** obtain int ***by rsn of fact that he was D*** *or in course of that office* 🡪 D under no liab’y

-There is line b/t illegal approp’n of corp opp and permissible comp’n, = whether opp was “essential to success of Co”

-Dcn frowned upon, makes it too easy for Ds (actually appears he probably did use info gathered as D to own adv)

***Canadian Aero Services Ltd v O’Malley*** – Guyana mapping case (Prez & VP set up own Co, compete, win bid)

-Ds were Prez and VP (not Ds) but still in fiduc rlnsp re: P, precluded from obtaining secretly or w/o apprvl of Co any prop/biz adv belonging to Co or for which it has been negot’g 🡪 **reaping of profit by person at Co’s expense is adequate ground upon which to hold D accountable; Ds’ breach of FD survived their resignation**

* Just b/c corp *can’t afford* deal *doesn’t mean it’s rejected*/no longer interested 🡪 Sr O who undercuts own Co to swoop in on deal will be held liable b/c this = CoI 🡪 Doesn’t overrule *Peso*, tries to reconcile them
* **Even though fiduc *position* has ended, *duty* doesn’t end** (FD ongoing for “rsnbl time” will depend on…)

-General **standard of loyalty, GF, avoidance of conflict** of duty and self-interest to which Ds/Sr O’s conduct must conform tested by many FACTORS:

* Position held, nature of corp, its ripeness/specificness, Ds relation to it, amount of knowledge possessed, circumstances in which obtained, whether spec or private, etc

**3. Competition – aka CoI** (CL doesn’t ask much, depends what you’ve done while wearing both hats)

-E.g D serving on BOD of 2 competing Co’s, operating comp biz, having mat’l int in competing entity = CoI

-CL allows person to sit on Boards of 2 (competing) Co’s w/o breaching duty to either

* No disclosable interest here so s. 152 technically would not apply

***BCA***, **s. 153 Discl of conflict of office or prop** *See above under Self-Dealing* (if D/O holds off/possesses rightt etc that could in/directly result in duty/int that materially conflicts w/ duty/int as D/O of Co, *MUST* disclose promptly

\*\*WHERE YOU HAVE 2 HATS, DISCLOSE IT\*\*

***London and Mashonaland Expl Co Ltd v New Mashonaland*** – divided loyalties

-2 Co’s w/ same obj (= rivals), same D of both, P Co seeks injunction to stop D being appointed D of 2nd Co

-No sign D was about to disclose any conf info to 2nd Co; insufficient damage shown, no case made out

-**In and of itself there is nothing wrong with D being D of 2 Co’s (CoI *may* arise but isn’t inherently problematic – only if there is *misuse* of position)** – have to keep info separate/not transfer from one role to other to ben some party

-D can serve as D for competing corps as long as he keeps knowledge bases separate (don’t use knowl gained as D of 1 in way prejudicial to other) and as long as it’s not prohibited by K or articles

***Slate Ventures Inc v Hurley*** – D of 1 slate quarry Co bought 2nd Co for own acct w/o informing 1st Co; corp opps

-**2 Part Test: CoI and connection w/ FD**

-D did NOT acquire info re: opp to purchase 2nd Co *b/c of his position as D* of 1st Co, came by it *independently* (vs. *Regal* where corp opp came to Ds by way of their pos as Ds/in exec of that office)

-Corp Ds not prohibited from competing w/ their corps BUT D in breach of CL FD (had *actual* CoI re: 2nd Co)

* If acctble (for profit) should not use it pers’lly even if *pot’l* for corp to use info, shouldn’t
* To avoid CoI, ensure corp has *NO interest at all* (only then can D pers move fwd for opp)

-***Potential* CoI sufficient (no *ab initio* right to compete w/ corp of which he is D in absence of K stip to contrary)**

***Cranewood Fncl Corp v Norisawa*** – **When is it permissible/breach for D to compete w/ corp?** (Relies on ***Slate***)

**1)** Was there *actual or pot’l CoI* by D taking corp opp? If YES 🡪 liable to acct

**2)** Was opp pursued/acq’d by D *by virtue of his position as D*? Even if NO to 1), if YES to 2) 🡪 liable to acct

**Even where there is no actual *or* potential CoI but info/opp acquired by virtue of fiduc position, D liable to acct**

|  |  |  |
| --- | --- | --- |
| Actual Conflict | Acquired by Fiduciary Position | Clearly Accountable |
| Acquired Independently | Accountable |
| Potential Conflict | Acquired by FP | Accountable for Profit |
| Acquired Independently | Not Accountable for Profit |
| No Conflict | Acquired by FP | Accountable |
| Acquired Independently | Clearly NOT Accountable |

\*\*REMEMBER: This can all be avoided by simply getting **SH Approval**!

(These issues come up when Ds just do things, end up in CoI 🡪 any *benefits* must then be given up and given to corp)

**4. Hostile Take-Overs and Defensive Tactics by Target Mgmt**

Introduction (pp. 401-406)

-HTB enables o/s acquirer to obtain control of target corp w/o having to attain assent of target mgmt. (threat!)

-Acquirer makes bid (usu above market price of shares) to target SHs for some/all voting shares; if req’d # of shares tendered by SHs into bid w/in prescribed time, shares “taken up” by acq’r and bid completed

-Existing Ds in poss CoI b/c if they ex power/votes, can raise fiduc concerns 🡪 acting in own int (keep job!), not Co’s

* Preventing 3P takeover may not be in BIoCorp but rather in BI of Ds (save their own skin!)

-Not much in stat aside from s. 142(1)(a) and (b) – more relevant in securities law

-**Poison Pill** plans to protect SHs from coercive tactics of acq’r; defense tactics (shark repellent, sale of crown jewels, scorched earth, pac man D, white knight D) 🡪 Poison Pill: if acq’r tenders enough shares, there is issuance of rts, option to existing SHs (not acq’r) to buy +shares @ discount 🡪 dilutes TOB share value & own’p tender, = $$ to TO

Common Law

-Historically mgmt. frozen re: takeover – not allowed to get involved, issue shares 🡪 changed in *Teck*

* Now mgmt. *can* get involved, but have to show did so *for proper purpose* (I.e. Not just to save selves. How to show this? Record details as “proof” or set up indep Comm w/in mgmt. to make dcns: *Pente*)

***Teck Corp v Millar*** – **Court imports “rsnbl gds” req’t to test for propriety of Ds’ conduct @ HTB**

-Is it breach of FD for D to act against takeover by maj SH? ***Ds must act in BIoCorp in fending off HTB***

* Ds challenged both for issues shares and info 🡪 = breach of FD?
* If purp *not* to serve Co’s int’s, then = improper purp (impropriety dep’s on truth, not nat of SH rights)

-Ds ought to be able to consider *who* is seeking control via HTB and *why*

*­*-Board not prohibited from *issuing shares to frustrate take-over bid* but it must be shown that it was in BIoCorp

-In acting to defeat control position, **Ds must act in GF, must be rsnbl gds for belief** (i.e. subst’l dmg to Co’s int’s) 🡪 **o/w Ds actuated by improper purpose** (vs. stat FD under CBCA: req’s Ds to “act H&iGF w/ view to BIoCorp, no mention of rsnbl gds for Ds’ beliefs); onus on P throughout

* **IMPROPER PURPOSE TEST** re: FD broken:
  + **GF**, but need s/t more than mere assertion of GF 🡪 **and**
  + **Rsnbl gds** for belief that TO would cause corp subst’l dmg 🡪 if those 2 met, then = improper purpose

***Pente Inv’t Mgmt Ltd v Schneider*** – S fam only wanted TO by Smith, *not* P, took steps to ensure; = in BIoCorp?

-Ds’ mandate: mng Co acc’g to **best jgmt**, must be *informed*, w/ *rsnbl basis* (if no, Ct justif’d in finding improp purp)

-No breach of FD as dcn made by **spec committee** of o/s’rs, gathered lots of info, made it pub avail

* Here set up of spec comm OK b/c incl phys sep’n and strict controls (neutral role, min overlap, CoI)
* BJR: deference to biz dcns as long as w/in range of reasonable alternatives

-Auction of shares 1 way to prevent CoIs that may arise w/ chg of control (req’s Ds act neutral) – no oblig or pub exp’n of auction here (would assume risk; already undertook market canvass to see if higher bids could be elicited, no)

-Nothing improper; spec comm info came from CEO closely conn’d w/ S fam but gathered *lots* was pub avail, OK

-Fact that alternative transaction rejected by Ds irrelevant unless shown that alt’ve was clearly more beneficial to corp

**Relief from Liability**

-Either complied w/ duty or s/o else pays for conseq’s of breach

-Ds can simply declare what their interest is 🡪 get D or SH or both to approve then = breach cured!

Common Law 🡪 allows ratification (SH approval) of act by Bd/indiv Ds that would o/w = breach of FD

***North-West Transportation v Beatty* – Over-ruled by s. 233(6)**

-PC allows maj of SHs to sanction what would o/w have been their own breaches of duty (ratif and abs of CL deriv action leaves min SHs in bad position! 🡪 if maj SHs ratify alleged wrong, indiv SH has no legal redress for breach)

-Votes of D as fiduc should not confirm dcn but rather those of disint’d SHs 🡪 = oppressive (but here, was SH maj)

-K entered into by Ds could not have been enforced against Co at instance of D but was within competency of SHs at mtg to adopt/reject (they **adopted by maj, that must prevail** unless adopt’n was by unfair/improper means)

-*At this time* **only limit to CL principle of ratification = must not be brought about by unfair/improp means or be illegal/fraudulent/oppressive twd SHs who oppose it**

*(vs. statute 🡪 BC BCA recog’s SHs are not Co, not determ’ve that SHs can ratify; s. 233(6) overrules NWT)*

**-SHs can ratify s/t that would o/w = K breach**

-Ratif valid if supported by mere maj and adoption not improper/fraud/opp’ve twd opposing SHs (= FoM exc to *Foss*)

-SHs are supreme, no rsn why SH can’t vote as they like (not bound to bring D’s duties into SH role)

* Can’t vote on own fraud (but that’s not what happened in this case)
* BC BCA preserves this; CBCA changes it by *not* allowing this

Statute

-Starting proposition = **SH can have a vote**

* CBCA cannot make breach of duty go away through this though
* BC BCA has no prohibition against resolutions (approving breach)

***BCA***, **S. 142(3) Duties of Ds and Os** No provision in K/memo/articles relieves D/O from a) duty to act in acc w/ Act or b) liab’y that would o/w attach re: neg, default, breach of duty of which D/O may be G re: Co

**S. 157 LMT’NS ON LIAB’Y** **(1)** D not liable/has complied w/ duties if relied in GF on a) $ stmt of Co b) wrttn rep of expert c) stmt of fact re’d to d by O to be true d) rec/info/rep courts finds rsnbl **(2)** D not liable if did not/could not rsnbly have known act done/authorized by reso voted for/consented to was contrary to Act

**S. 234 Relief in legal prcdgs** If in legal prcdg against D/O etc of Co Ct finds he is/may be liable, Ct must take into consideration circumstances of case, incl person’s election/apptmt, may relieve person wholly/partly from liab’y *on terms Ct consid’s nec* if it appears despite liab’y person acted honestly and rsnbly and ought fairly be excused

\*Above provisions control circumstnces wherein Ds’ improper actions can or can’t be ratified

**S. 233(6) Powers of Ct re: Deriv Actions** No app made or legal prcdgs prov’d/def’d under s. 232 or this section may be stayed/dismissed *merely b/c* it is shown that **alleged breach** of right/duty/oblig owed to Co has been or might have been **approved by SHs** of Co, but E of that approval or possible approval may be taken into acct by Ct in making order under s. 232 or this section

***CBCA***, **S. 122(3) DOC of Ds & Os** No provision in K/articles/bylaws/reso relieves D/O from duty to act w/ Act or regs or relieves them from liability for breach

**S. 123 Dissent (4) Defence – Rsnbl dilig** D not liable/has complied if ex’d care/dilig/skill that rsnbly prudent person would have ex’d in comp circs incl reliance in GF on a) $ stmt of corp b) rep of person whose prof gives cred’y

**(5) D of GF** D has complied under s. 122(1) if relied in GF on a) $ stmt b) report of pro w/ cred’y

**S. 242(1) E of SH approval not decisive** cannot be sole basis for stay/dismissal of action for breach

|  |  |
| --- | --- |
| **BC BCA** | **CBCA** |
| **S. 142(3)** can’t escape liability through K, articles, bylaws *BUT says nothing about special reso’s!*  **S. 157**  **S. 233(6)** just b/c action has been approved by SH reso *not determinative under deriv action* (**but says nothing of oppression rem**); E of approval can be taken into acct by court  **S. 234** can apply to court to make breach of duty go away (in part, fully, etc 🡪 fully through SH reso)  (**no equiv in CBCA**) | **S. 122(3)** statute itself allows relief but can’t escape liab’y through K, articles, bylaws, or special reso  **S. 242(1)** can’t make breach of FD go away through SH mtg/vote BUT outcome of vote may influence court to give one remedy or another (so despite having no influence in moment, can be useful later on) |
| **Basically under BC BCA you *can* cure breach (SH reso) and under CBCA you *cannot* cure breach of FD by Ds**  (Seems useless to have SH vote under CBCA but it’s NOT b/c court can take vote into acct for deriv action and OR)  (And under BC BCA even though SH reso can make breach go away, E of apprvl can also be used in Ct for DA only) | |

**Remedies**

**CBCA:** 2 big ones:

* **Derivative Action** 🡪 claim not being brought against D/O by corp so rem allows person to take over, bring action against them *on behalf of corp*
* **Oppression Remedy** 🡪 actions of corp were opp’ve (D breached duty to corp which in turn oppr’d s/o else)

**Indemnification and Insurance (see chart)**

-If none of above works to save Ds, can still try to **make 3P pay (insurance)**

**-Cannot get indemn’n for FD, *only DOC***; spec duty may not be covered under ins’ce (know what is/not covered!)

***BCA,* S. 159** Eligible party = any D or O or equiv of Co/affiliate

**S. 160** Indemnification and payment permitted

**S. 161** Mandatory payment of expenses

**S. 162** Authority to advance expenses

**S. 163 Indemnification prohibited** **(1)** Co must not indemnify elig party/pay expenses of EP if **(c)** EP did not act H&iGF w/ view to BIoCorp (// s. 124(3)(a))

**S. 164** Court ordered indemnification (// s. 124(7)), **S. 165** Co can buy D/O Insurance for eligible party (// s. 124(6))

***CBCA***, **s. 124 Indemnification** **(1)** Co may indem D/O or former D/O or indiv wo acted as D/O at corp’s request or sim capac against *all costs, charges, expenses, incl amt paid to settle action/satisfy jgmt, rsnbly incurred by indiv re: any civ, crim, admin, investig’ve, or other prcdg* in which indiv involved b/c of assoc w/ corp **(3)** Corp may not indem indiv unless he **(a)** acted H&iGF w/ view to BIoCorp (// s. 163(1)(c))

|  |  |
| --- | --- |
| **BC BCA ss. 159-165**  -Cannot indemnify s/o for what they were awarded for their breach of FD **or** if action brought by corp directly against D (usu DOC situations)  -Duty to reimburse D/O expenses for defending themselves (wholly or substantially successful) | **CBCA s. 124**  - Cannot indemnify s/o for what they were awarded for their breach of FD  - Here you can only reimburse expenses if not actually guilty of any breach |

**SHAREHOLDERS, SHARES AND SHAREHOLDERS’ RIGHTS**

**INTRODUCTION**

-In setting up corp 🡪 set out authorized share structure in constituting document to allow for growth, future SH’g (even though you never have to issue them, just makes life simpler if structure is there in advance)

-**BC BCA** Original constituters must take **at least 1 share each**

-**CBCA** usually shares issued from start but **NOT mandated** (possible to have corp but no SHs)

**SHARES**

***BCA***, ss. 1(1) “authorized share structure,” “shareholder”

**Ss. 52** Set out type of info to include for ASS; **52(1)(a)** ASS *must* consist of **(i)** 1 or both of 2 types

* **(A) Par value shares**: when corp issues, have to be sold @ at least PV but can be sold for more by holder (just not *issued* for less than that amt, = floor price; no limit on sale price), and
* **(B) Non par value**: don’t have to issue value set in adv, value has to be decided on issue-by-issue basis by Ds
  + **CBCA** ***only* allows NPV shares**

**(ii)** 1 or more **classes** (*typical but not nec to have series w/in classes; if no classes/series, all shares same*), and

**(b)** may on/after recog of CO incl 1 or more series of shares in any class if spec rts/restr’s att’d to shares of that class

**(2)** Each class must consist of shares of same kind and for shares w/ PV, same PV

**(3)** PV of shares w/ PV must be expressed in ref to currency (if not CAD, type must be stated)

**S. 6(1)(c)** Fed corp must declare from outset in art’s of incorp the classes and max # of shares corp can issues; and if there are 2+ classes, the rights/restrictions/conditions of those and of any series

**CBCA s. 24(3)** Summarizes basic **rights attached to shares** (**BC BCA** does NOT have this but would be same 🡪 if no classes/series, then all have same attrib’s/rts):

**(a)** Right to **vote** (each share = re: vote) **(b)** Received any **dividends** (if profits, if declared; shares have = access)

**(c)** Receive any remaining prop (**assets**) of corp when wound up (distrib’d =’ly among SHs if only one class)

* If you have classes, they have diff rts to vote/dividends/assets but **all 3 must belong to at least 1 class**
* Usu differentiation is re: voting rights and/or rcvg div’ds
* *W/in* series, rights of shares are identical (diff *across* series’ usu re: voting rts)

**Common shares**: shares that get to vote, tend not to have spec rts re: dividends

**Preferred shares**: No voting rts (exc where stat requires) but spec access to div’ds (paid 1st/pref’l amt) 🡪 esp in closely-held corp’s may want capital to come in w/o diluting existing voting power

-When, how, by whom **shares issued** TBD by Ds

* **BC BCA s. 62** deals w/ issue of shares (subj to s. 64, pre-ex’g Co Prov’s if applic, memo or NoA, and art’s, shares of Co may be issued at same times, and to persons that Ds may determine
* **S. 63(1)** Issue price for share w/o PV must be set **(a)** acc’g to memo/art’s or **(b)** if not in memo/NoA **(i)** for pre-ex’g Co by spec reso or **(ii)** o/w/ by Ds’ reso; **(2)** Issue price for share w/ PV must be **(a)** set by Ds’ reso and **(b)** = or > PV of share
* **S. 64** Payment for price of shares; **(2)** sets up basic prop in Cdn corp stats: **share must be issued until it is fully paid** (Ds’ duty to ensure!) (// s. 25(3)); **(3)** consid for issue of share can be one or more of: (i) past serv’s (not uncommon), (ii) prop (rare), (iii) $ (easiest); shares can also be issued via div’d (way of distrib’g profits)

-If shares issued, also registered in **registry**

* **s. 111** requires that Co maintain central securities reg
* **S. 49** (1) person can apply to Co to get list of names/add’s of SHs as rec’d @ CSR if they say why (2) if seeking to know who SH is, have to do so by affidavit (3) rsns *why* you can seek list of SHs (must not use list exc re: 1 of 5: influence voting of SHs, acquire/sell sec’s/shares, effect amalg, call mtg, ID SHs in other corps)

**RESTRICTIONS ON TRANSFER**

-SHs issued shares w/o **restrictions** can do whatever they want with them, sell to whomever, rights remain (fixed)

-Common esp in priv/CHCs to have restrictions on what SH can do w/ shares re: transferring to s/o else (guard who is in, keep shares w/in gp present @ outset) 🡪Restrictions must be **carefully drafted**

* E.g. Restrictions subject to D approval (rare); offer to o/s buyer 1st, then w/in corp; offer to corp to buy back (common))

-Share transfer/transm’n needed for many **rsns**: preserve owner int’s, resolve deadlock, ensure continuity of biz, etc.

**-Transfer** 🡪 SH voluntary sells/transfers share to another person to be holder, vs…

**-Transmission** 🡪 Law for some reason *causes* shares to be transferred to s/o else (e.g. if SH goes bankrupt, dies)

***BCA***, **S. 11(h)** Restrictions must be worked out in adv: Art’s of Co must set out spec rts/restr’s attached to shares

**S. 57(3)** Assuming there is one, share certificate must also **set out restrictions** attached

* // **s. 6 CBCA**, but s. 6 **limits ability to use restrictions** where you have shares in distributing/**public Co** whereas BC does *not*, restr’s can be for *any* corp pub or priv

Cases If restriction = D must approve transfer to s/o else, what is std for Ds to **justify dis/apprvl** of restr on transfer?

***Re Smith & Fawcett Ltd*** – leading case on scope of Ds’ discretion to refuse to register transfer of shares

-SH had a few 1000 shares, Ds ***refused to transfer*** unless SH willing to sell 2000 to named D @ certain price, = prob

-SH claims that D caused corp to break duty owed to SH (*not* FD) 🡪 Did Ds ex correctly powers under restr?

-**Ds must only show *good biz rsn* why restriction imposed** (byd that, no duty)

-When chlg’g indiv’s motives, hard to convince Ct w/ only affidavit E (need C-E) 🡪 **BJR** kicks in esp re: affidavit E

-**BJR = presump that competent dcn made** (burden on party arguing breach); BJR can also be used re: FD

-No grounds to show Ds refusal due to anything but *bf* consid of BIoCo 🡪 restriction on transfer OK

***Case v Edmonton Country Club Ltd*** – more modern context

-**As long as Ds can be said to have acted in GF, that’s only std they’re held to re: restriction (apprvl)**

- Priv club set up, sale of shares req’d D apprvl 🡪 do Ds have to show more than traditionally req’d (i.e. GF)

-Maj: confirms existing law; **Ds have uncontrolled discretion, can impose restr’s as long as can show GF**, = valid ex of jrdx, don’t have to explain restr’s further to SH on whom they’re being imposed

-Dissent: concern re: what this means re: preserving exclusivity for inappropriate reasons

**VOTING RIGHTS** - **CBCA s. 140(1), BCA s. 173(1)** if articles silent on VRs, each share carries **1 vote**

-**SH voting** = way to reg SH prefs (sep of control/own’p means min’l SH oversight of mgmt.)

* RtV = fundamental right of SHs, distinguishes b/t SHs and creditors
* RtV attaches to *share*, not person pers’lly (1 person could = ‘maj vote’ if they hold enough shares)

-**VRs presumptive**, can be displaced by articles (art’s also call for diff class/series, each of which can have diff VRs)

-Just b/c s/o has spec VRs doesn’t mean vote where you can ex them will take place 🡪 rights attached to shares are identical, just in partic vote, vote can be diff depending on person using it

* Shares in series have same VRs for e/o but doesn’t mean re: certain vote they will have same rights (depends on nature of vote – 1 SH may be able to use votes and another might not)

**S. 173(8)** Unless o/w in Act/memo/art’s, any action that must/may be taken/auth’d by SHs, may be do *by ord reso*

**S. 174 Particip @ SH mtgs** Unless art’s prohibit, can vote by phone etc, not nec in person

Cases: *Jacobsen*, *Bowater* 🡪 can’t differentiate b/t shares in same series or among shares where there is only 1 class

***Jacobsen v United Canso***

-No person can vote >1000 shares no matter how many you have 🡪 = *unlawful*, contravenes CBCA, is invalid

-**Can’t deprive shares of VRs on basis of # of shares s/o holds**

* **Can only differentiate VRs via diff *series* of shares but not within a class**

-Can’t have benefit of legislation in ex’ce @ time Co created – once amalg’d, gov’d by this/current/our law

***Bowater v RL Crain and Craisec Ltd***

-Different’n among orig SHs then change: if shares transf’d, transferee only gets 1 vote (orig got 10; “step down”prov) 🡪 NO, b/c they are **shares w/in same series, must have same VRs**

**SHAREHOLDER AGREEMENTS –** one of most imp rts of SH = RtV, **join w/ other SHs** **to *combine VRs***

***BCA***, s. 175 🡪 Permits **Pooling Agreement** to vote in a certain way

***CBCA***, s. 145.1 🡪 Agreements among 2 or more SHs as to how shares shall be voted are permitted (subj to qualification that agrmts must be for *lawful purp*; can’t unlawfully attempt to fetter ex of Ds’ discretion if SHs *qua* Ds)

\*\*Under both, breach of agrmt will = breach of K and remedies might be provided for in agreement

\*\*This is in contrast to Ds who CANNOT agree to vote in certain way, = illegal **fettering**

***Ringuet v Bergeron*** – At CL, agrmts among SHs as to manner in which they will vote their shares are lawful

-**SHs have right to combine int’s/VRs to secure control** of Co, ensure Co mng’d by certain ppl in certain way

-Fact that agreement may be to detriment of minority doesn’t render it contrary to public order or illegal

**SHAREHOLDERS’ MEETINGS –** SHs *vote* at mtgs

-Dcn made through voting = **resolution** (motion arises, is *resolved* in certain way)

-2 types of meetings

1. **Annual (General) Meeting** (BCA s. 182) 🡪 Ds must call it (CBCA s. 133(1))
   1. Must be held each year, w/in 15ms of last AM: CBCA s. 133(b), BCA s. 182(1)(b)
   2. Must discuss 3 things (everything else = “spec biz” or “suggested matters”):
      1. Electionapptmt/removal of Ds: CBCA s. 106(3)
      2. Approval/Apptmt of auditors: CBCA s. 162(1)
      3. Pres’n/apprvl of $ stmts and aud’rs reports to/by SHs: CBCA s. 155(1), BCA s. 185(1)
2. **Special Meeting** 🡪 may be called by Ds if imp biz arises b/t A(G)Ms (CBCA s. 133(2))

-**How** is mtg held?

* Ds call it (this is usual way; e.g. AGM: CBCA s. 133(1), BCA s. 182)
* **SHs** requisition (**spec) mtg** (SHs w/ not less than 5% issued shares w/ RtV at mtg sought): s. 143, s. 167
* Court orders mtg (rare)

-Mtgs held at partic **location**: s. 132: Canada as stated in bylaws or TBD by Ds; s. 166: in BC unless art’s say o/w

-Mtgs to be held on partic **date**

-**Notice** of mtgs req’d: CBCA s. 135: N to each SH, D, aud’r; BCA s. 169: at least 2ms before to SHs and Ds, s. 170: SHs can waive N req’t, agree to lesser one, need not be in wrtg

-Req’d **quorum**: s. 139(1): holders of maj shares to vote @ mtgs present or rep’d by proxy (can be/usu is changed by bylaw); s. 172: quorum = as est’d in memo/art’s (if not, 2 SHs who can vote, if less, all SH entitled to vote at mtg)

-**Procedure**: s. 173(1) Unless o/w in art’s, SH has 1 vote/share, vote in person/by proxy (2): usu show of hands; s. 174: up to chair to proceed issue to issue, call vote, but before vote held, SHs entitled to particip @ SH mtg (i.e. discuss); s. 176 reso passed when passed! s. 178: there must be a chair; s. 179: minutes but be kept at all prcdgs at SH mtgs (= E)

-**# of votes to win**: ord reso = presumption, maj prevails; spec reso (SEE CHART); tie vote preserves status quo

**“Ordinary reso”** BCA, s. 1(1) = reso a) passed at GM by *simple maj* of votes cast by SHs voting shares that carry RtV @ G (// CBCA s. 2(1)); or by wrtn reso by spec maj of b/t 2/3 and ¾ (vs. CBCA s. 2(1) which requires wrttn reso be *unanimous*)

\*\*NOTE: Easier to pass ord reso under BC BCA than CBCA

**“Special majority”**: BCA s. 1(1) = req’d to pass spec reso @ GM, at least 2/3, no more than ¾ votes cast;

**“Special reso”**: BCA s. 1(1) = 2/3 of votes of votes/ppl who *do* vote; CBCA s. 2(1) reso passed by maj of min 2/3 votes cast by SHs who voted or signed (wrttn) by ALL SHs entitled to vote on reso

|  |  |  |
| --- | --- | --- |
| **BC CBA** | **Ordinary Resolution** | **Special Resolution** |
| **In person** | 50% of actual votes cast (identical to CBCA) | Spec maj: 2/3 of actual votes cast (// CBCA) |
| **In writing** | Spec maj: 2/3 of potential votes (vs. CBCA, req’s unanimity) | Unanimous (// CBCA) |

**Unanimous and Consent SHs’ Resolution**

***BCA***, **s. 1(1)** **“Consent reso”**🡪 re: reso that may be passed by ord reso, passed unanimously; in any other case, unanimous reso; in case of reso of Ds, res pass under 140(3)(a) (reso can’t pass w/o mtg)

**“Ordinary reso”**🡪 reso passed by simple maj or in wrtg by at least special maj (usu 2/3)

**“Unanimous reso”**🡪 reso passed in writing, consented to by all SHs entitled to vote

**S. 180** Consent reso of SHs deemed prcdgs @ mtg of SHs and to be avalid/eff’ve as if passed @ mtg that follows rules

**S. 182** AGMs: SHs can vote by UR to hold AGM later than req’d, consent to all biz, or waive holding it

***CBCA***, s. 142(1)(a) Reso in Writing signed by *all* SHs (i.e. unanimous) entitled to vote on reso at mtg valid as if passed @ mtg; i.e. can have reso in lieu of meeting

***Eisenberg v Bank of NS*** – re: **Form** **of Unanimous SHs’ Reso**; what kind of unanimous auth’n of SHs is sufficient

-As long as there is **written E,** don’t need formal meeting (// s. 142)

-Sole SH of Co needed loan, got corp to guarantee him loan in pers capac; as collateral to lender corp gave corp assets; there was default; lender came after corp assets; corp in $ trouble b/c assets gone, goes bankrupt; TiB apptd (i.e. new mgmt.), tries to figure out where to get resources, argues D (only SH) acted in breach of duties as D

* D was in CoI – having corp do pers favour, basically dispos’n of assets 🡪 for that you must have SH *vote*
* Dispos’n of assets req’s *consent of SHs*, he never had mtg to formally propose/move BUT had **written notes to secretary approving 🡪 Court accepts as wrttn E that he ageed, = USA** (even though form suspicious)
* Inside mgmt. rule protects innocent 3Ps when they deal w/ s/o who misrep’s self as auth’y
* When Ds & SHs basically same person, is forgone conclusion they would ratify dcn = E of consent/unanimity

**Conduct of Meetings**

***Wall v London and Northern Assets Corp* – *Minority cannot tyrannize***

-SHs who want to dominate, # of ppl wanting to say same thing 🡪 up to chair to reign in discussion, call Q, cut off discussion 🡪 ppl have ability to be heard but **minority cannot obstruct biz, chair can put them down**

-Maj must not be tyrannical but also, min must not be obstructive; maj should listen to rsnbl argmts for rsbnl time

**Shareholders’ Proposals – in BC only available to PUBLIC Co’s (s. 187(3))**

-S/t must be on **agenda** to be voted on🡪Ds make agenda (which determines e/t); **use SHP to get s/t on agenda**

-Possible to get item on agenda even if D not willing:

* **SH proposal**: stat innov’n 🡪 SHs make prop’l, get items consid’d by/at mtg, done in 2 ways:
  + **Piggyback** on existing mtg already to be held; preferable, but if rejected, SH can…
  + Call spec mtg to consider issue = **requisition mtg** (SH takes over agenda); down side = may be forced to pay cost of mtg (stat says vice versa, corp pays unless ppl vote against, likely 1st thing they’ll do!)
* Either way, Ds do NOT have to implement what SH gets passed
* SHPs only apply to certain types of corps
  + BC BCA s. 187: Rules 🡪 (3) SHP method of getting issues on agenda for mtg to decide only applies to ***public*** companies (o/w you have to requisition mtg)
    - Section separates out SH req’ns and proposals whereas the CBCA does not
    - **“Valid” prop’l** only means they’ll consider putting it on agenda; valid if signed by qual’d SHs, who, together w/ submitter, are at time they do so, owners of shares of aggregate that = 1/100th of shares in Co that carry RtV at GMs: s. 188(1)
    - S. 188(1)(c) to be valid prop’l must be rcvd at reg’d off of Co at least **3ms** before anniversary of previous year’s annual ref date and (d) be accompanied by decl from submitter and supporters, signed, w/ name, address, #/class/series shares carrying RtV, name of reg’d owner of shares
    - S. 188(2) prop’l *may* be acc’d by 1 wrttn stmt of support (3) of no more than 1000wds
  + **CBCA s. 137**: Silent; seems any corp allows SHs to make prop’l to get item on agenda (achieves sim result by proxy solicitation); can have supporting stmt but has max *500wds* (short than BC)
  + **S. 137(5)** Mgmt. may refuse to circulate if prop’l a) not w/in prescribed # of days, b) purp = enforce pers claim, b.1) does not relate to biz/affairs of corp c) person failied to present d) same prop’l already submitted e) rights being abused for publicity (// s. 189(5))
* **S. 189 Rts & Obligs re: prop’l (1)** Co rcvg prop’l must send text to ppl entitled to attend AGM w/in time prd **(3)** Co must allow submitter to present it in person/by proxy at AGM subj to

**(4)** If Co receives >1 SHP on subst’lly same topic, must comply w/ (1)-(3) for 1st one but not others

* **S. 189(5)** Test before sending out by Ds: Co need not process prop’l if (// s. 137(5))

(a) Ds called AGM to be held after date prop’l rcvd by Co and have sent N

(b) prop’l not valid or exceeds max length

(c) subst’lly same prop’l submitted to SHs in N of mtg (repetitious) (// s. 137(5)(d))

**(d)** clearly appears prop’l *does not relate in signif way to biz/affairs of Co* (// s. 137(5)(b.1))

**(e)** 1° purp of SHP = i) secure publicity or ii) enforcing pers claim or redressing pers grievance (// s. 137(5)(b))

(f) prop’l already subst’lly implemented,

(g) if implemented would caused Co to commit O,

(h) deals w/ mattrs byd Co’s powers to implement

* + NOTE: (f), (g), (h) not in CBCA s. 137(5) but likely there inferentially\*\*
* **S. 191(1)(b) Refusal to Process Proposal** Co that does not intend to process prop’l b/c s. 189(5) applies must w/in 21 days of rcvg prop’l send to submitter wrttn explan’n as to Co’s rsns for dcns incl ref to prov of s. 189 Co is relying on in refusing to process
* **S. 191(2)** Submitter may apply to Ct to review dcn, **(3)** Ct may restrain holding of AGM

***Varity Corp v Jesuit Fathers of Upper Canada***

-SHs of JFUC tried to get item on agenda re: apartheid regime (that Co end investments in SA); it didn’t get on, = breach? 🡪 Call to divest probably meant to *embarrass* corp

-While prop’l sort of relates to biz/affairs of corp, 1° purp is abolition of apartheid, NOT w/in biz of corp 🡪 Court looked to supporting stmts; lesson = be *neutral* in prop’l (then when actually @ mtg, dress it up/raise issues!)

-**If 1° purp of SHP is s/t o/s biz/affairs of corp, mgmt. can’t be compelled to distribute**: s. 189(5)(d), s. 137(5)(b.1)

(Under *old provisions*, if purp was for promoting gen econ, poli, racial, religious, soc causes, Co could refuse)

**Requisitioned and Court-Ordered Meetings**

-If you req’n mtg, there may be **cost**; but if mtg called, costs borne by corp (not SHs who req’ned it)

-If you got thru process and Ds refuse to call mtg, you can still **call mtg yourself** but may have to pay cost (AND whatever you’re raising likely to be defeated!)

**BCA, S. 167(2)** **Req’n for GMs** For prop’l you need 1/100th of voting shares, but if you want corp to have *cost/nuisance* of holding spec mtg to hear from you, you need 1/20th of voting shares!

**(5)** On rcvg req’n, Ds must call GM for no more than 4ms after req’n rcvd (*not fast – for quicker, need court order*)

**(8)** If D do not, w/in 21 days of rcvg req’n, send N of GM, req’ng SHs or any one or more of them holding aggregate more than 1/40 of issued shares w/ RtV may send N of GM

**(9)** GM called under (8) by req’g SHs must be held w/in 4ms of req’n date, c) be conducted // GM called by Ds

**(10)** Unless SHs resolve o/w by ord reso at GM called by RSHs under (8), Co must reimburse req’g SHs for expenses actually and rsnbly incurred in req’g, calling, holding mtg

(*= potential penalty 🡪 reason to bypass Ds, call mtg yourself, most likely to get rid of D – still need 5% to start process, but if Ds refuse, single SH can call it but bears risk*)

***CBCA***, **S. 143** You need 5% to ask Ds to call mtg; but assuming Ds *don’t* call mtg (4) says if Ds don’t w/in 21 days call mtg, *any* SH who signed can call mtg (*MUCH easier here to req’n mtg*) (// s. 167(8))

S. 168 No liab’y: no Co or person acting for Co incurs any liab’y merely b/c Co/person complies w/ s. 167(5)(b) or (6)

S. 186 Powers of Court

**S. 144(1) Mtg called by Court** – Ct on app of D or SH entitled to vote @ SHs mtg, may order mtg of corp to be called, held, conducted in manner court direct

***Air Industry Revitalization Co v Air Canada*** – unlikely court will help you until you’ve *exhausted all options*

-SHs wanted Air Can to consider bid; mgmt. didn’t want to, called mtg but issue not on agenda; mtg called at time that would not allow issue to be dealt w/ in timely way

-Court says it is inapprop refusal to put item on agenda, in fact mtg should have been called to deal w/ it specifically

-SHs wanted Ct to call mtg but court said NO 🡪 there is procedure, SHs haven’t exhausted poss’y of calling on their own (**Court won’t step in/order mtg under s. 144 before SHs have tried to call mtg on own, exhausted all opps** 🡪 might not be the case under BCA since calling mtg subj to exemptions not included in CBCA)

**Removal of Directors**

**BCA**, **S. 128(3)** **When Ds cease to hold office** Co may remove D before end of D’s term a) *by spec reso* or b) if mem/art’s provide that D may be removed by reso of SHs entitled to vote at GM passed by less than spec maj etc

**(4)** If SHs holding shares of class/series have excl rt to elect/appt 1 or more Ds, D so elected/appted may be removed a) by spec sep reso of those SHs or b) if memo/art’s say such D may be removed o/w…

**CBCA**, **S. 109 Removal of Ds** SHs may *by ord reso at spec mtg* remove any D from office (or if righ to elect held only by certain class of shares, then at mtg of that class of shares)

**S. 131**a)If **vacancy** b/c D removed, can be filled by SHs at SH mtg; if not, by SHs or remaining Ds b) or remaining Ds

**SHAREHOLDERS’ REMEDIES AND RELIEF**

**INTRODUCTION**

-Some remedies used by SHs but not *soley/exclusively* open to SHs

-Point to **SPECIFIC DUTY** breached; TO WHOM is duty owed? WHO can complain? (Not always just rt holder)

-What is **REMEDY**? What does it DO? (Restore s/t? Prevent s/o from doing s/t? Provide $ substitute/compensate?)

-Are remedies **CUMULATIVE**? (Can you get more than 1 at once? Usually not)

-E.g. **Personal Action** (CL or stat)**, Derivative Action** (bring action in name of corp)**, Oppression Action** (in BC only SHs can bring it, under CBCA broader array can seek it, any “complainant”)

-BC has prov that allows *mgmt.* to go to Ct for remedy (none under CBCA) 🡪 BC more mgmt. friendly

**\*\*Be clear whether you’re talking about CL or STATUTORY deriv action or oppression remedy\*\***

**THE DERIVATIVE ACTION**

**Introduction**

- Ct allows s/o else to take over action ***in name of corp***to rectify wrongdoing comm’d against corp for which mgmt. did not seek redress (usu b/c one of their mem’s was alleged wrongdoer)🡪 get Ct to approve, then proceed as usual

-Court has greater ability to award interim COSTS, greater inclination to give directions re: how to proceed

-To END litigation, also need court’s approval

-Not only remedy, can also be used to DEFEND claim against corp

-Under **CBCA do *not* use CL version of deriv action** (statute takes over)

-Some scope in BC where based on idea of K b/t orig SHs to use CL derivative action

**Common Law – The Rule in *Foss v Harbottle*** (extreme app of *Salomon*)

-RULE premised on **separate legal personality of corp** and on **majority rule** in internal corp affairs

* If corp = legal person sep from mem’s, for wrong done to corp, **corp itself is *only proper P***

-FD and other duties owed to corp, no one else owed those duties – therefore those people have **no standing** to complain if those duties breaches (only corp and those auth’d to act for corp can)

* If you’re interests affected as SH indirectly by harm done to corp, no standing in pers capacity to bring claim

-No need to show you had s/t personally on the line (vs. oppression remedy in BC)

-**EXCEPTIONS**: Circs where you *could* bring claim in name of corp, claim duty to corp broken 🡪 find duty owed not just to corp but *also* to you in your pers capacity, but can’t get rem for corp (e.g. duty of competency, DOC) 🡪 exceptions worked out to give SHs aggrieved by unrem’d wrong to Co access to Cts to sue on behalf of Co

* ***Edwards v Halliwell* = CL EXCEPTIONS to rule in *Foss***
  + ***Ultra vires* Act** 🡪 Wher act complained of is wholly *ultra vires* Co or assoc and cannot therefore be confirmed by majority, rule has no app
  + **Fraud on Minority** 🡪 Wrongdoers themselves are in control of Co, rule relaxed in favour of aggrieved minority who are allowed to bring minority SHs action on behalf of themselves/others; majority causing corp to do s/o undermining int’s of minority; (usually proprietary wrong)
  + **Special Majorities 🡪** indiv member not prevented from suing if matter one which could be validly done/sanctioned not by simple maj of mem’s but only by some *spec* maj (i.e. can sue if act could only be sanctioned by special majority)
  + **Personal Rights** 🡪 where pers/indiv rts of membership of P have been invaded rule has no app

**The Statutory Derivative Action**

**BCA, S. 232 Deriv Action**: Only ppl who can go to Ct, seek permission to proceed w/ deriv action are **SHs**, beneficial owners (BO), or a/o court deems approp person(need standing)

* O/w 3 parts: asked Ct to consider you as proper person; convince Ct to proceed w/ deriv action; take action

**S. 238** Must be **complainant** (current SH/BO of corp/affil, former SH, D/O or former D/O, or a/o court says approp)

**S. 233 Criteria for leave** to commence DA (what court can do in lead up): **(1)** Ct ***may*** grant leave under s. 232(2) or (4) on terms it considers approp if a) compl’t has made *rsnbl efforts* to cause Ds of Co to prosecute/defend legal prcdg

b) *N* of app for leave given to Co and any other person court orders (not in CBCA); c) C acting in *GF*, and

d) it appears to Ct that it is in *BIoCo* for legal prcdg to be prosecuted or defended

* Vs. **S. 239(2) CBCA** no rsnbl N req’d; but sev cond’ns must be satisf’d (give Ds N of intent to apply to Ct 14 days out, acting in GF, bringin action must appear to be in IoCorp)
* **BC more mgmt. friendly** 🡪 less likely court will grant leave for o/s’r non-mgmt person to bring deriv action

**(4)** (//CBCA s. 240) What court can do on final disposition (incl costs) – **court may make any order** it considers approp incl order that:

a) person to whom costs are paid repay Co some/all of costs

b) Co or other party to prcdg indemnify i) complainant ii) person controlling conduct of prcdg for costs incurred

c) complainant or person controlling conduct of prcdg indemnify 1 or more of Co, D, O for expenses, incl legal costs that they incurred as result of prcdg

**(5)** No legl prcdg prosecuted via deriv action can be discontinued, settled, dismissed w/o court approval

**S. 240 Orders court may make** (// s. 233(4)) re: DA a) let person control action b) order directing conduct of action c) order payment to defendant go to security holders not corp (*no equiv in BC BCA*) d) order req’g corp pay C’s legal fees

* *Any* order it thinks fit, *any* time
* CBCA allows payment of damages to SH from corp

\*\*No guarantee under either statute that court will let action proceed

\*\*No guarantee you’ll be one designated to control action if allowed

\*\*No guarantee re: remedy/awards of costs (at discretion of court; set out in CBCA but not as of right)

**S. 242(1)** indicates SH apprvl of alleged wrongdoing not conclusive but may be taken into acct

**(2)** req’s Ct’s apprvl of any settlement or discont’n of action; allows court to order corp to pay interim costs to C

\*\***Adv of CL = can claim it as RIGHT, don’t have to go to Ct, let them decide if you qualify** (argue that statute should SPECIFY that it supplants CL)**, can do it w/o Ct**

***Re North West Forest Products, Ltd***

-Ds of NW sold assets at undervaluation, SHs petitioned Ds to vote Co’s shares to set aside sale but wouldn’t

* Does that = *pf* breach of SOC by Ds? YES, applicants put fwd *sufficient E to disclose failure* by Ds

-What do N and “rsnbl efforts” req’t mean? 🡪 **N requires some knowledge of corp law**

-Must tell Ds what you think was done wrong, what harm was done to corp 🡪 have to show s/t went wrong, what corp should be doing AND that it’s in BIoCorp that action proceed (not easy given BJR)

-Applicant must be able to show some E that *pf* shows it’s in BIoCorp (don’t have to prove/give E of *pf* case)

***Re Bellman and Western Approaches***

-B are min SHs (3 Ds) & Duke gp maj (5 Ds); Duke gp got loan to buy all common shares, gaining all control over Ds

-Does it appear to be in IoCo to allow deriv action? 🡪 Mgmt using info re: corp to undermine/exclude others in corp and to tie corp’s hands 🡪 should be aired in public, easy to convince Ct deriv action should proceed

-**CBCA s. 232(2) has 3 req’ts to bring action: rsnbl N, GF, IoCo**

* There was rsnbl, if not express N; there was GF although pers action would have been possible, deriv is rsnbl
* Considering whole of E, J could conclude that Ds did stand in dual relation preventing them from ex’g unprejudiced jdgmt 🡪 appears to be in int of Co that action be brought

-Court must merely be satisfied it’s in BIoCorp, arguable case must exist, discretion broad; rsnbl N does not require every possible CoA be included (failure to specify *all* will not invalidate N as whole)

***Turner v Mailhot***

-P and wife owned 30% of shares, balance held by D, disagrmt, P locked out, terminated; P obtained leave to bring deriv action seeking return to Co of lost income diverted to D; D applied for indemnity for costs (CBCA s. 242(4))

-You’re not *guaranteed* costs (although it’s usual to get s/t)

-Ct will look at what occurred, **what remedies given to corp**, to what extent complaining **SHs actually benefit** from action (esp if dmgs given to them personally, maybe not rsn to give them costs, if already sufficiently compensated)

-Here 1° ppl to benefit are min SHs who took action (not Co as whole) 🡪 they are subt’l stakeholders, stand to benefit

-Q of costs in deriv action 🡪 if corp successful, they’ll likely get costs (stat really about person who initiated action and whether they’l get costs paid) 🡪 never becomes action of person who initiated (it’s corp’s) so if person wants costs, has to go through sep proc under statute

-Purpose of derivative action NOT to benefit P more than Co – litigation costs should not be recovered for pers matters

**Comments and *Re BCE Inc*** – poss’y of creditor bringing deriv action

- Normally only beneficiary of FD can enforce duty but in corp context this is not comforting – Ds controlling corp unlikely to bring action against selves 🡪 SHs cannot act instead of corp, only power = oversee Ds via votes as SHs

* CL developed remedies to protect SH/stakeholders interests (affirmed/modified by statute)
  + **Deriv action** – lets StHs enforce Ds’ duty to corp when Ds unwilling (w/ leave of ct, complainant may bring action in name of/on behalf of corp to enforce rt of corp incl rt correlative w/ Ds’ duties to corp)
  + **Civ action for breach of DOC** (CBCA s. 122(1)(a)(b)) 🡪 (b) does not explicitly name benef’y of DOC, suggests likely owed to creditors too
  + **Oppression action** – focuses on harm to legal/equitable int’s of StHs aff’d by oppressive act of corp/Ds (not aimed at enforcing rt of corp like deriv action)
* Is CL derivative action still available despite existence of statutory derivative action?
  + *Farnham v Fingold* ONCA – NO
  + *BCE Inc* SCC – DOC under s. 122(1)(b) does not ground private right of action so maybe CL deriv action still available (not clear what E must be adduce to show harm to corp)

**THE PERSONAL ACTION – Remedy = Damages**

-Cases in which **Ds act improperly** and involve not only breach of duty by agent but causing of Co to perform corp act in improper/irreg manner to **direct detriment of SHs**, for which they ought **personally be able to sue**

-Can bring both deriv *and* pers action for same thing if there are 2 separate wrongs: to you and to corp (have to make out in claim that duty owed to not just corp but also to you personally: *Goldex*)

-To extent indiv has pers claim, more likely to argue it as oppression claim

***Goldex Mines Ltd v Revill*** – can you claim both deriv and pers action? (This is CL action)

-No reason why Ds’ act can’t be both breach of duty owed to you personally AND to corp (but in this case pers claim dismissed, no argmt re: why pers duty existed)

-**Where legal wrong done to SHs by Ds (or other SHs), injured SHs who suffer *personal* wrong, may seek redress in personal action** (vs. deriv action: wrong done to Co) – breach of DOC by Ds can found *personal* action for SH

***Hercules Management Ltd v Ernst & Young***

-Accountants w/ stat oblig to audit 2 Co’s, Ps are SHs who argue neg in prep of $ stmts causing losses

-No DOC owed to SH individually by auditors to prep non neg $ stmts (audit rep’s prep’d for approval *by* SHs but *for* corp, duty to prep w/ care owed *to corp* – if not then can’t be said to be in breach of DOC to SHs personally)

-SH reliance on neg’ly prep’d audit rep’s in making dcns = wrong to corp for which SHs as indivs can’t recover (deriv action would have been proper method: Rule in *Foss v Harbottle*) – loss re: neg stmt action only corp could bring

-**SHs cannot raise indiv claims where wrong done *to corp* (= limit in *Foss*; = deriv action)**

**THE STATUTORY OPPRESSION REMEDY**

-Has CL roots, tied up w/ **fraud on minority** (corp being controlled for ben of 1 gp at expense of another) 🡪 where there was FoM, said to be ***oppression*** of min by maj, case could be brought in name of corp but also pers claim

-Duty is in the remedy, in oppression provision

-**Must be person *to whom duty owed*** (varies under 2 statutes, range of ppl who can claim – broader under CBCA, 3 ways vs. only 2 in BC, but in reality not much diff b/c Cts interpret broadly who is “approp person”, just = extra step)

* **CBCA s. 238**: def’s and indiv’s who can bring action, **who = complainant** (vs. **BC s. 227(1)** where only existing beneficial owner of shares of Co or a/o else ct consid’s approp person can bring action w/o extra proc’l step); uniformity re: who is poss complainant (NOT present in BC, complainants *diff* for each rem)
* **CBCA s. 242**: procedural constraints common to remedies (vs. BC) – e.g. (1) E of SH apprvl not decisive; extent to which app allowed; (2) can’t be discontinued w/o ct apprvl

-**Who is *oppressor*?**

* Depends on rts you’re claiming infringed, look at basis for claim (what ought to have been done, whoever caused that = defendant)

-**Must show duty *broken*** (easier under CBCA, just have to show *an* interested party was oppr’d, BC is has to be *you*)

\*\*But once you get remedies, BC actually has *more*, bigger array of remedies\*\*

-**Must show what your *expectations* were in context of who you are**

-Can’t claim OR in BC unless can show you were involved in oppression (had s/t personally on the line 🡪 this is NOT req’d for deriv action) 🡪 under CBCA could go to Ct as activist SH despite not being directly affected

-**Broader gen’lly under CBCA** – more ppl can bring act’n, more acts captured, more circs incl’d (unfairly disregards)

**BCA, s. 227 Complaints by SH** **(1)** SH incl ben owner of share of Co & any other pers ct consid’s approp to make app **(2)** SH may apply to court for order on grounds that

(a) affairs of Co are being/have been conducted/powers of Ds ex’d ***in manner oppr’ve*** to 1 or more SHs incl app or (b) act of Co done/threatened, reso of SHs passed/prop’d that is ***unfairly prej’l*** to 1 or more SHs incl app

**Vs.**

**CBCA, S. 241** If it’s powers of Ds being complained of, Ds should be defendants; don’t have to point to partic instance

**App to Ct re: Oppression** (vs. BC where stat does not *call it* oppression)

**(1)** Complainant may apply to Ct for order under this S. (*3: opp’ve, unfairly prej’l, OR unfairly disregards*)

**(2) Grounds** If on app under (1) ct satisfied that re: corp *or any of its affiliates* (incl subsidiaries, NOT case in BC)

**(a)** any act or omission (BC = act only) of corp or any aff’s effects a result

**(b)** biz or affairs of corp/affil’s are/have been carried on/conducted in manner (*can be broad/general*) **or**

**(c)** powers of Ds or corp/afill’s are/have been ex’d in manner **that is *oppressive or unfairly prej’l or that unfairly disregards interests* of ANY security holder, creditor, D, or O**, court may make order to rectify

**Cases**

***Re BCE Inc*** – What does **oppression** mean? What must you show to succeed? **2-part approach**

-DHs claim Ds acted in oppressive manner in approving sale of BCE; dismissed at trial

* Value of DHs’ debentures went down due to dcns of corp
* Court examind to see how dcns taken, whether Ds carried out fiduc obligs in making dcns

-**3 bases for bringing oppression claim (CBCA)**

1. Oppressive
2. Unfairly prejudicial
3. Unfairly disregards interests

-Do we merge into overarching concept of ‘inapprop conduct’? 🡪 To certain extent (court interprets s. 241(2))

-**2-PART APPROACH**

1. **ID rsnbl exp’ns:** Look first @ princ’s underlying OR (**rsnbl exp’ns**: who are you, what are your exp’ns re: your invlvmt in corp) 🡪 if breach of RE est’d, then…
2. **Conduct oppressive?** Consider if conduct amounts to oppression, unfairly prej’l, or unfair disregard

-No guidance in stat re: REs 🡪 depends on size, health, nature, stage of corp (not uniform *across* corp, or corp’s)

-**Oppression = equitable remedy** (ensures fairness, what is just and fair from all perspectives; fact specific)

* What is **just & equitable** is judged by **rsnbl exp’ns** of StHs in context and in reard to rlnsps at play

-**REs objective** 🡪 actual exp’n of SH *not* conclusive; REs depend on circ’s; RE is for *fair treatment*

* Corp has other interests besides those of SH to consider; complexity, tempers REs

-In this case Ds owed FD to corp and only corp (BIoCorp) but bearing in mind REs of StHs

\*\*Argued in context of *unfair disregard* (unfair prej usu = *quantifiable* harm, specific conseq – so if DHs could ID value decrease; in BC this would have been unfair prej since BCA doesn’t incl unfair disregard)

\*\* This is case of *unsuccessful* oppression claim in *large* corp (oppression most often successful in *small* corp, fewer competing int’s, easier to argue yours were singled out, harder to use BJR: *Ebrahimi*)

***First Edmonton Place Ltd v 315888 Alberta Ltd*** – wide array of ppl incl creditor can be proper claimant under **CBCA**

-Q = is applicant “complainant” w/in mng of stat? **Can creditor = proper claimant in OR?** NO, not here…

- FEP = LL; gave deal (3ms free, allowance for reno’s, etc.) to Co tenant, tenant moved in for 3ms, took $, declared dividend and left 🡪 First Edm brings action for oppr against corp for having unfairly prej’d/disreg’d int’s in dcns

-Lessor can be proper person to bring claim under CBCA as long as they’re a creditor (have certain expectations) BUT *not* in this case (not reg lease – they were giving out $, now *owed* anything!)

* **Creditors (ppl owed $) can be “proper person” for claiming OR** (but not this LL, absurd deal, no $ owed)

-Security holder does NOT = *any* credit holder – must be capable of being *registered* (as w/ DHs, mortgage holders)

-To encourage ppl to want to become creditors, better protect them as complainants

* In BC, you’d have to dress this up as “unfair prejudice” since unfair disregard does not exist 🡪 must point to specific action/reso that has occurred or been threatened (vs. w/ oppression in BC, don’t have to point to specific act; in CBCA you don’t have to point to specific act for *any* of them)
* **Reasonable expectations** apply the same across oppression, unfair prejudice, and unfair disregard

***Ebrahimi v Westbourne Galleries Ltd*** – meaning of J&E; winding up order (*not* oppression case)

-1 person squeezed out of small priv Co (knew ahead of time other 2 could combo votes, no voting proc viol’d, but resulted in 3rd person’s exclusion) 🡪 is there anything law can do when rules have been complied w/? (No fraud)

* Rules are CL/stat FW for oper’n of corp BUT there is *equitable* overlay on top: equit exp’ns re: how corp runs
* Person can go to Ct, ask that corp be **wound up on basis it would be J&E to do so**

-Sets out formula for what’s J&E (p. 511) 🡪 Ct subjects ex of legal rts to equitable consid’s of pers charac arising b/t 1 indiv and another which may make it unjust to insist on legal rts or ex them in partic way (= basis for stat OR)

\*\*This case looks like palm tree justice (just equity writ large)

***Ferguson v Imax Systems Corp*** – this is usual scenario for OR to be successful (CHC)

-3 couples, Hs w/ VRs; 1 excluded from CHC, others used VRs to exclude her, convert shares

-Q = can she go to Ct, claim OR? (// *Ebrahimi*, certain exp’ns: that even though she didn’t have VRs, would still have access to pref’l dividends, wouldn’t be squeezed out) YES, she is entitled to order prev’g implem’n of oppr’ve reso

-**OR available to such a CHC** (Co’s powers must be ex’d subj to gen princ’s of law/equity, in way req’d by law but also *bf* for ben of Co as whole, must not be exceeded) 🡪 impugned corporate action not *bona fide*, = oppressive

**BC BCA s. 227 Complaints by SHs**

**(3)** Ct may rev, w/ view to rem’g, ***make any interim or final order it consid’s approp***

a) directing/prohibiting any act b) reg’g conduct of Co’s affairs c) appointing rcvr or rcvr mgr

d) directing issue or conversion/exch of shares e) apptg Ds in place f) removing any D

g) directing Co to ***purchase some or all of shares of SH*** (common to get corp to buy s/o out)

h) directing SH to buy some/all of shares of any other SH (ct can order *a/o* to buy out your shares)

i) directing Co or any person to pay SH any/all $ paid by SH for shares

j) varying/setting aside trans’n to which Co is party

k) vary/setting aside reso…

***Naneff v Con-Crete Holdings Ltd*** – CHC (dad and 2 sons)

-N had fam biz, 2 sons A&B were holders of all equity; A disowned, removed as O of Co, excluded from mgmt., income cut off 🡪 TJ found fam conduct **oppressive**, orderd biz publicly sold w/ any/all fam entitled to buy (wind up)

-CA reviews, appeal successful 🡪 wasn’t fair, but A never had much say to begin w/, rem was over reaction (son had stake in *some* value but treatment rendered his stake valueless, priv co, can’t sell stake on market)

* **In determining whether oppression occurred AND approp rem, must be done in context of *reasonable expectations* of parties** (consider relationship b/t parties)

-In this case, more approp that son be *bought out* (corp can continue, he gets $); there was oppr’n but rem too strong

**-Any rectification of matter complained of can only be made w/ respect to person’s interests as SH, cred, D, O**

-REs: TJ’s rem would have given son as SH s/t he never could have rsnbly expected! And overly punitive to N

***Bury v Bell Gouinlock Ltd***

-Mandatory sale of shares if SH no longer worked for CO, but USA sys Co can delay sale for 12ms (restrict emp work)

-Can P bring action for oppression? YES – use of delay prov by corp was oppressive (no reason for use of provision, seems corp just trying to penalize applicant, restrict his employment)

-**Oppression Remedy does give court power to override a USA; court can override/amend USA if it is oppressive**

-Co required to pay applicant appropriate amount for his shares

**THE APPRAISAL REMEDY (DISSENT PROCEEDINGS)**

-Appraisal rem more of a *proceeding* **(dissent during vote) 🡪 remedy = you get bought out**; available *only* to SHs

-1st must ID whether rem available, b/c partic type of vote triggers it

-Even if you don’t have a say (VRs), and you object, you can be bought out

* If you *do* have RtV (as is usually case under CBCA), and you vote in *favour*, you cannot dissent
* Vote must be consis w/ dissent

-In BC, even if you can’t vote, you can still dissent

-You’re supposed to receive **Notice** of matter on which you could dissent (even if you don’t have RtV on it)

* If you’re given N, you’re expected to let corp know of your intent to dissent
* If you don’t give N, you can’t dissent under both statutes
* Even if you give NoD, can still change mind, but corp should be aware of intentions
* If corp makes dcns w/o N, you can still dissent, don’t have to set out intent in advance

-**When SH dissents, corp will have to buy them out** (N gives corp idea of # of dissenters, may decide to cancel transaction on basis of pot’l cost of buy out, but they usu know in adv how many will agree or not

-If corp proceeds and you dissent, must **agree re: buy out**, payment forewith; must be **bought out *entirely***

* **CBCA s. 190** **No partial dissent** w/ respect to *class* of shares (dissenting SH may only claim under section w/ respect to ALL of shares of class (vs. ALL SHARES in BC BCA s. 238(2)(c)) (3) get FMV 🡪 conceivable under CBCA to dissent w/ respect to one class of shares but not another
  + **(26)** **Limitation**: Corp shall not make payment to dissenting SH if there are RGs to believe a) corp is/would after payment be unable to pay liabilities as they became due b) realizable value of corp’s assets would thereby be less than aggregate of liabilities
* **BC BCA s. 238 Right to Dissent** You don’t have to be able to vote (but if you were able to you have to have done so) **(1)** Rsn you can dissent **(2)** Req’ts re: N, ID shares **(c)** have to dissent re: ALL shares reg’d in name

-Dissent rem avail in any corp setting (priv or pub, but no one uses dissent rem in pub b/c you can just sell on market)

\*\*May be easier to use Oppression – then court just ***orders*** amt to be paid rather than having to **negotiate buy out**

**S. 240** N of resolution 🡪 when certain types of votes are afoot; when N sent out, should be told that it is type of vote that carries RtD w/ it; if measure passed w/o you being told, you don’t have to have indicated you N of intent, can still dissent w/in spec’d prd after

**S. 241** N of court orders

**S. 242** N of dissent – proc’l req’ts for sending in N (2 days before dcn taken)

**S. 243** N of intent to proceed – corp req’d to let you know it’s proc’l nonetheless despite your N of intent to dissent

**S. 244** Completion of dissent

**S. 245** Payment for N shares (usu not contentious but sets out how Ct can decide)

**S. 246** Situations where you lose RtD: if before pymt made, s/t happens (until you have $ in hand, don’t count on it!)

**(a)** matter abandoned (mgmt. decides not to proceed) **(b)** vote lost/failed **(g)** w/ respect to shares, dissenter consents or votes in favour of reso (can’t blow hot and cold) – *any* vote in favour (must dissent re: *ALL* your shares)

\*\*CBCA gen gives you vote on matters that trigger dissent – *any* SH has right to dissent (NOT true under BCA)

\*\*No gen right to vote under BCA if you don’t o/w have VRs (narrower gp of SHs who can get vote than w/ CBCA)

**COMPLIANCE AND RESTRAINING ORDERS (= INJUCTIONS)**

**-Injunction** = Court ordering someone to do something (order becomes duty owed to court; if you breach it, could be in contempt of court; rare but potentially powerful)

-Injunction = **corrective** remedy (makes prob go away), vs. other remedies

-Usually used as *interim/interlocutory* order (s/o fesses up, says did a wrong, court corrects it, avoid DA, OR, etc) 🡪 usually used in adjectival way to other remedies (*Goldhard*)

-**Restraining Order = Prohibitive Injunction**

-Imp’ce of statute not remedy itself but for facilitating status one has to seek (in equity to have to have oblig owed to you directly to get injunction re: existing/pot’l breach 🡪 stat broadens category of ppl who can go to Ct/claim)

-Can get them *in advance* prohibiting breach, or *after* ordering s/o to do s/t they haven’t done

**BCA, ss. 19(3)** Memo/art’s, when reg’d, shall bind Co, mem’s as if signed/sealed by each

**S. 228 (1)** Usual def of **complainant**: SH or *a/o court considers approp*; **(2)** allows you to get injunctions where various indivs (D, O, SH, emp, agent, trustee, etc) have done s/t contrary to what they’re supposed to under stat or CL; **(3)** on app Ct may make *any order it considers approp* incl a) compliance/refrain from contravening prov b) enjoingin Co from selling/disposing of prop/rts/int’s c) req’g re: K that comp be paid to Co or any other pary to K

**CBCA, S. 238 Def of Complainant** (if not listed, can claim you’re ‘proper person’) – only diff in CBCA is to take account of certain differences in QC; and USA mentioned (Ct can make any order it thinks fit)

**S. 229 Remedying Corp Mistakes: (1)** Allows for correction of “corp mistake”; ct may make order to correct CM = omission/defect/error/irreg by Co that leads to a) *breach* of Act, b) default in compliance w/ memo/art’s, c) renders ineff’ve SHs’ or Ds’ mtg

**(2)** Despite any other prov’s of Act (*powerful!!*), court, either on own motion or app of *any* int’d party (*don’t even have to be SH!)*, may make an order to correct/cause to be corrected, to negative, modify or cause to be modified conseq’s in law of corp mistake or to validate any act, matter, thing alleged to be/rendered invalid b/c of corp mistake and may give ancillary or conseq’l directions it considers nec (*= palm tree justice!*)

* Courts have declined to be too creative here despite breadth; more or less in line w/ *Goldhar*

**(3)** Court must, before making ord, consider effect it might have on Co, Ds, Os, creditors, SHs, ben’l owners of shares

**(4)** Unless Ct orders o/w, order under (2) does not prej rts of any 3P who acq’d those rts a) for vlbl consid and b) w/o N of corp mistake (i.e. **3P protection** for who acquires rights for valuable consid and w/o N of corp mistake)

**S. 247** Allows compl’t or creditor to seek C/RO against variety of ppl re: abrogations of stat, regs, art’s, bylaws, USA

***Goldhard v Quebec Manitou Mines Ltd***

-Argmt that Ds broke duty to corp, acted in *own* interests rather than BIoCorp 🡪 rem sought through inj’n (C&RO)

-Provision not intended to provide summary method (i.e. quick procedural method) for trying kinds of Qs meant to be decided under claims that are derivative action, breach of FD, OR

* **Injunction meant to cure minor actions** (s/o missing a date, sending s/t to wrong add) – BC follows this
* BUT, stat doesn’t *say* inj’n only for minor matters (can press court on this, nothing *requires* use of DA, OR)

-Common for court to give *interim* injunction (e.g. in process of seeking DA or OR, can get II to freeze it, dcns prevented from being taken in interim, = combo of rem’s in that sense)

**INVESTIGATIONS** – fairly common; report prepared, goes to corp, but court can order it sent to a/o else too

**BCA, S. 248 Apptmt of inspector by Ct (1)** You can apply to court, but have to be *actual* SH to meet pre-req AND you have to hold at least 1/5 (you and whoever is joining you) of issued shares of Co (do NOT have to be voting shares); court may a) appt inspector to conduct invest’n of Co b) determine manner/extent of invest’n

**(3)** tell court WHY you’re seeking invest’n 🡪 Ct can make order if it appears there are rsnbl *pf* gds that there is

a) oppression, b) fraud, or d) persons connected are acting fraudulently

* //**CBCA s. 229:** Security holder can seek to have invest’n (easier here than under BC BCA); sec holder not confined to SH, incl investor holding bonds, debentures etc (o/w 2 stat’s sim)

**S. 253** Court ordered inspector must make report for Ct and send copy to Co and whoever else Ct orders

**S. 254** Inspector’s report admissible in any legal proceedings as E of opinion of inspector

**S. 230 (1)** Court can order whatever it sees fit **(2)** Requires report be sent to D

**WINDING UP = liquidated and dissolved**

-Corp may come to end 🡪 may wind itself up, put itself out of existence BUT also *remedy* that can be ordered

-Court can order corp that is solvent to be wound up (not only insolvent corps get wound up!)

-Winding up usually done in OR context 🡪 Court doesn’t have to look at these prov’s if oppression est’d (can just order winding up) BUT if court will still look at prov’s to determine if it’s *approp* to make order in circs

-“J&E” rule 🡪 each case to be decided on facts, construed liberally since it is equitable remedy

\*\*2 usual circs are: it’s basically a PP (s/o being squeezed out) or Deadlock (can’t do it on own, mgmt. frozen)

-**2 statutes fairly similar**

**BCA, s. 324** On app made re: Co by Co itself, or by SH/D/creditor/anyone who is approp person, court can order that Co be liquidated and dissolved if 1 of 2 things:

1) Art’s say Co supposed to be liquidated (i.e. if Co has restricted purp that has been achieved and mgmt. has disappeared/couldn’t be bothered to wind up)

2) Court considers it J&E to do so (more common; = trad’l equit rem) and so orders winding up

**CBCA, s. 214** Not ltd to “J&E” ground; Court may order liquid’n/dissolution of corp on app of SH if court satisfied that any act/omission of corp resulted in, biz affairsbeen conducted in manner, or powers of Ds ex’d in manner oppressive, unfairly prej’l to, or that unfairly disregards interests of any sec holder, creditor, D or O, of if USA entitles complaining SH to demand dissolution, or it is J&E

**Qs:**

* Is it a **partnership** (what kind?) or **corporation** (BC or fed?)? Public or private? EPC, continuance/amalg?
* Any PIKs? Breach of DOC or FD by Ds or Os? Disclosable int? Corp opp? CoI? HTB?
* Who is liable? To whom? For what?
* Can/did SHs or D/Os approve K/transaction/decision?
* Remedy? (Derivative, personal action, oppression, dissent, injunction)

**CONSIDER:**

* What are the legal **cause(s) of action?**
  + **Who** has a claim? (SH, minority, 3P, etc.)
  + Against **whom**? (D, O, corp)
* Any **procedural steps** that could remove/alter causes, who might take such steps
* What **remedy/remedies** are available to complainants?
* BC BCA vs. CBCA