# Is this a sole proprietorship, partnership, LP, LLP or corporation?

# Sole Proprietorships – person engaged in business of trading, manufacturing or mining and uses something other than own name for business name (*PA* 1, 88)

* One owner who has both the prerogative and responsibility of making all ultimate decisions concerning the business
* **Attractions:** Ease to commence and dissolve, modest expense to start up
* **Disadvantages:** the unincorporated owner is fully liable (100% personal liability) for all debts and other obligations incurred by the business
* Name must not be the same/similar to another BC business – the registrar has discretion to refuse a name (***PA* 89(1)**)

# Partnerships – relationship between persons 1) carrying on business 2) in common 3) with a view to profit (*PA* 2)

* **Persons** includes a corporation, **carrying on business** likely involves ongoing activity – co-ownership leading to profits alone is not sufficient (***Kamex***), and **view to profit** doesn’t mean profits actually need to be generated
* Rooted in common law – codified by *PA* and ***PA* 91** states rules of equity and common law still apply, unless they are inconsistent with the *PA*.
* **Advantages:** ease of formation and dissolution, great flexibility in designing the internal managerial structure
* **Disadvantages:** unlimited liability of each partner, jointly, or jointly and severally (default position ***PA* 14**), for all the debts and other obligations of the partnership as agents of the firm and of each other (***PA* 7(1), (2)** UNLESS a) and b))
  + Partner could limit liability by becoming a limited partner, but then they can’t play any part in the direction of the business
  + Representing, or allowing yourself to be represented, as a partner could hold you liable as a partner even if you’re not one: ***PA*** **16**
  + A partner is jointly liable for firm debts when they’re alive, and severally liable when they’re dead: ***PA* 11**
  + The firm is liable for injuries/losses to a person who isn’t a partner or any penalties incurred because of a wrongful act or omission by a partner: ***PA* 12**
  + ***PA* 19** outlines the liability of a new, retired or retiring partner

## Is There a Partnership? *PA* 4

* Generally formed by contract, but could “accidentally” create a partnership – be careful when profit sharing!
* **a)** owning property in common doesn’t, by itself, create a partnership, even if profits are shared
* **b)** sharing gross returns doesn’t, by itself, create partnership (ex: consignment)
* **c)** rebuttable presumption that sharing profits is proof of a partnership
  + THEN LISTS EXCEPTIONS i), ii), iii), and [iv) (***Pooley***)]

## What is the Legal Personality of a Partnership?

* No separate legal personality from the partners themselves: ***Thorne*** (a partner can’t be employed by the partnership)
* Collective term for people in a partnership is a “firm” (***PA* 1**), but the name “firm” is a matter of convenience and has no substantive legal consequence (ie. no separate personality): ***Thorne***

## Partnership Property

* All partnership property is held/used exclusively for the partnership and in accordance with the agreement: ***PA* 23(1)**, but often varied by the partnership agreement
* Property bought with firm money is deemed to be bought on account of the firm, absent contrary intention: ***PA* 24**

## What is the Relationship between Partners?

Rights and duties of partners are outlined in ***PA* 27**

Based on four principles:

* **Equality**:
  + Partners’ rights and obligations to share equally in profits and losses (***PA* 27(a)**)
  + Right to participate in the management of the business (***PA* 27(e)**), to have access to the partnership books (***PA* 27(i)**)
  + Duty to render to each other true accounts and full information of all things affecting the partnership (***PA* 31**).
* **Consensualism:**
  + Rights and duties of partners can be expressly or impliedly varied with unanimous consent (***PA* 21**)
  + Admission of new partners must be unanimous (***PA*** **27(g)**)
  + Changes to the fundamental character of the partnership agreement must be agreed upon unanimously – ordinary matters can be decided by majority (***PA*****27(h)**)
  + Subject to the existence of an agreed upon set term, a partner can end the partnership whenever by giving notice (***PA* 29(1)**)
  + Unless the power to do so is expressly in the partnership agreement, no majority of partners can expel a partner (***PA* 28**)
* **Utmost good faith** (fiduciary character)**:** partners have the duty to act with utmost fairness and good faith to other partners in the business of the firm (***PA* 22(1)**)
  + It’s a duty of finest loyalty – a very high standard that the courts are unwilling to lower: ***Meinhard v Salmon***
* **Personal character of the partnership contract:** many of the provisions can be contracted out of in a partnership agreement

## Dissolution of a Partnership:

* Subject to the existence of an agreed upon set term (ie. undefined term), a partner can end the partnership whenever by giving notice (***PA* 29(1), 35(1)(c)**)
* Subject to an agreement, a partnership is dissolved if there is an existing set term that expires (***PA* 35(1)(a)**) or if the adventure/undertaking for which the partnership was entered into ends (***PA* 35(1)(b)**)
* Death, bankruptcy or dissolution of partner A: partnership dissolved if 2 partners (***PA* 36(1)(a)**) or dissolved between partner A and the rest, subject to partnership agreement (***PA* 36(1)(b)**)
* Partnership is dissolved if there’s an event making business unlawful to be carried on: (***PA* 37**)
* ***PA* 38** outlines when a court can decree dissolution
* Partners are entitled to apply partnership property to debts/liabilities of firm and then have surplus assets: ***PA* 42(1)(a)&(b)**

## What is the Relationship of Partners to Third Parties?

* A new partner to an existing firm doesn’t become liable for any debts/liabilities incurred before they became partner: ***PA* 19(1)**
* Retirement doesn’t exonerate a partner from debts incurred by the firm before retirement: ***PA* 19(2)**
* A partner is jointly liable for all debts and obligations of the firm: ***PA* 7, 11, 12, 14**
* A person can be held liable as a partner to the extent that a partner would be, even if they never were one, if they hold themselves out, or allow themselves to be held out, as a partner: ***PA* 16**

# Types of Partnerships

## General Partnership – one governed by BC law that isn’t an LP or LLP: *PA* 1

## Limited Liability Partnership

* A partner in an LLP isn’t liable for other partner’s shit just because they’re a partner (**(1)(a)**) or for an obligation between the partnership and another person (**(1)(b)**) and isn’t liable to the partnership or partner for either scenario (**(1)(c)**), just for their own negligence or negligence of someone under their direct supervision/control (**(2)(a)**) or if they knew of the other partner’s shit and didn’t take reasonable actions to prevent it (**(2)(b)(i)&(ii)**): ***PA* 104**
* Can’t accidentally have an LLP – registration is required: ***PA* 96**
* Professional LLPs must be expressly authorized under their governing statute and meet any pre-requisites: ***PA* 97**
* A change in partnership doesn’t affect the LLP status: ***PA* 102**
* Partners are subject to the same obligations as corporate directors with regards to personal liability for payments (ex: unpaid wages): ***PA* 105(1)**
  + Doesn’t create a fiduciary duty or duty of care: ***PA* 105(2)**
  + IF A CORPORATION IS A PARTNER IN AN LLP: directors are jointly and severally liable for any obligations imposed on the corporation under **(1)** or **104(2): *PA* 105(3)** unless the director dissented or took reasonable actions to prevent the act/omission that resulted in the liability: ***PA* 105(4)**
* Can’t use an LLP to get out of **a)** previous obligations of the partnership before it became an LLP or **b)** contracts entered into before it was an LLP: ***PA* 106**

## Limited Partnership

* At least one general partner and one limited partner: ***PA* 50(2)**
  + One person can be both (rights/powers/restrictions of a general, but has limited partner rights against the other partners), but you need at least two actual people: ***PA* 52**
* Can’t accidentally form an LP – formed by filing a declaration: ***PA* 51(1)**
* LPs don’t have a separate legal personality: ***Kucor Construction***
* A general partner has all the rights and powers of a regular partner (***PA* 56**) and a limited partner can contribute money and property, but not services since they can’t contribute by being part of the running of the business (***PA* 55(1)**) and their interest is limited to person property (***PA* 55(2)**)
* Limited partners will be held liable as general partners if they’re the directing minds and represent themselves to be management: ***Haughton Graphics*** – participate in management of business: ***PA* 64**
  + Weren’t liable in ***Nordile Holdings*** because they didn’t hold themselves out to be management – acted in their capacity as directors and officers of the general partner (exclusion clause)
* A limited partner is only liable to the extent they agree to or contribute to the capital of the LP: ***PA* 57**
* Limited partners share capital and profits in proportion to their contributions, and everything else equally: ***PA* 61(1)**, unless provided otherwise in the partnership agreement: ***PA* 61(2)**
* Limited partners don’t get property until all liabilities of the LP are paid: ***PA* 62**

# Corporations – creature of statute – can’t accidentally create one

## Limited Liability and Creditor Protection

* Corporations are a separate legal entity from the subscribers – not an agent or a trustee for them: ***Salomon v Salomon & Co***
* A shareholder is not liable for the obligations of the corporation: ***CBCA* 45(1)** and  ***BCBCA* 87(1)**
  + The corporation does not enjoy limited liability
* **Ways to Protect Creditors**
  + Capital Maintenance Requirements: The corporation is required to maintain a certain level of assets – dealt with mostly through securities law
  + Cautionary Suffix: Corporations must have a cautionary suffix in their name to warn creditors that they are dealing with a limited liability entity (shareholders): ***BCBCA* 23**
    - ***Wolfe v Moir***: court held M personally liable (through estoppel) because there was nothing to indicate that the usual corporate formalities were gone through
  + Publicity: must file corporate and securities documents in a public office
  + Officers’ and Directors’ Liability: allows liability to attach to individuals instead of the corporation for their own acts/omissions
    - Unremitted taxes
    - Unpaid wages – whether or not directors were negligent
    - **Torts** committed by directors, officers, or employees: ***ADGA Systems, London Drugs v Keuhne***
      * ***Said v Butt* –** an officer of a company could not be sued for procuring breach of contract between the company and the other contracting party – but doesn’t apply, as in ***ADGA***, where contract is between plaintiff company and its own employees – only applies to existing contracts
  + Oppression Remedy

## How do you Hold Someone other than the Corporation Liable?

Piercing the Corporate Veil

* Hold shareholders liable for the obligations of the corporation
* Non-recognition of the separate personality of a corporation where the correct construction of a statutory or other standard requires
  + Using unit of analysis beyond the corporation in isolation: look to its parent, subsidiary, shareholders – joining affiliated, subsidiary, etc companies together: ***BCBCA* 2** outlines these corporate relationships
* Separate personality of a corporation will not be upheld where it would produce results “flagrantly opposed to justice”: ***Clarkson Co v Zhelka***
  + Company formed for the purpose of wrongful/unlawful acts
  + Where the corporation is a sham, cloak or alter ego – company is a mere agent of the principal shareholders
  + Whether company is an individual’s agent is a question of fact of each case – look to the realities of the situation: ***Jodrey Estate v Nova Scotia***
    - Controlling/total share interest is not *prima facie* evidence to establish agency: ***Lee v Lee’s Air Framing Ltd***
    - No lifting in ***Clarkson*** as it wasn’t a case where corporation was set up to avoid existing liabilities/obligations
  + Corporation can contract with its directors/shareholders as long as it’s not a sham or mere agent: ***Lee v Lee’s Air Framing Ltd***
* Separate personalities may not be upheld where the corporations are controlled by the same directing mind and there is no substantial separation: ***De Salaberry***
  + Potential indicators of cascading entities that are not necessarily separate:
    - Are the profits treated as parent company profits? Are the persons conducting business appointed by parent company? Was the parent company the head/brain of trading venture? Did the parent company govern the venture/decide what should be done/what capital should be used? Did the parent company make the profits by its own skill/direction? Was the parent company in effectual and constant control? Is the directing mind and will of the parent company reaching into/through the corporate façade of the subsidiary? Is there thin capitalization of the subsidiaries?
  + ***Jodrey Estate v Nova Scotia***: Grandfather created corporations to leave property to his grandchildren in a way to avoid having them pay succession duties – the corporations never engaged in any business activities and had the same shareholders and directors – it was a mere conduit pipe linking the parent company to the estate – veil is lifted
* A more flexible approach will be applied in situations where justice and fairness require it: ***Lynch v Segal*** – more flexible in family law, more strict in commercial context – deadbeat dad set up corporations to disguise his assets and get out of paying child support and alimony

## Theorizing Corporate Personality

* **Fiction** **Theory**: corporate personality is a legal creation – “an artificial being, invisible, intangible and existing only in the contemplation of law”
* **Real** **Entity** school: “when a group reaches a sufficient level of organization, when it can make decisions and when it has a continuity of experience, then a new personality has actually come into existence” – a natural person essentially
* **Contractian** school: agree with fiction theorists that corporate personality is a fiction, however, rather than emphasizing the role of the state in bringing corporations into existence, contractarians view the corporation as a web of transactions, or “contracts”, among shareholders, creditors, employees, management, and the board of directors. It is not a special privilege, but a mere notional convenience – “nexus of contracts”
  + *BCBCA* view, whereas the *CBCA* views corporations law as an administrative function

# Jurisdictional and Categorization Considerations

Definitions: ***BCBCA* 1**

* Company: **a)** a corporation recognized as a company under this Act or **b)** a pre-existing trust or insurance company
* Corporation: company, body corporate, body politic and corporate, an incorporated association or society, but not a municipality or a corporation sole
* Extra-provincial company: foreign entity registered under 377 or 379
* Foreign entity: foreign corporation (not a company and has issued shares), limited liability company (organized outside of BC, not a corporation or partnership of any kind), or an extraprovincial society – doesn’t have to be a corporation!

## Jurisdictional Considerations

* Jurisdictional shopping: incorporators can elect to incorporate where they want – none of the corporations Acts require the incorporators to be residents of that province/territory – happens much less in Canada than the US because the Acts are generally uniform (ie: Delaware phenomenon)
  + Some Acts impose Canadian nationality and/or residency requirements for directors
* Foreign entities must register to carry on business in BC (with exceptions): ***BCBCA* 375** 
  + Step one is to reserve your company name and then if approved, file a registration statement: ***BCBCA* 376**
  + If **376** is fulfilled, the registrar must, if it is a federal corporation, and may, in any other case, file the registration statement and register the foreign entity as an extraprovincial company: ***BCBCA* 377**
* Effects of Registration:
  + If it’s noted as an extraprovincial company in the corporate register, it is conclusive evidence that the foreign entity has been duly registered on the date and time shown in the register: ***BCBCA* 378(1)**
  + As long as it doesn’t break any laws in BC or this Act, the company can exercise any powers from its home jurisdiction according to its charter: ***BCBCA* 378(2)**
  + The foreign entity must still comply with its governing documents: ***BCBCA* 378(3)**
  + Third party protections – no act of foreign entity (ex: transfer of property) is invalid merely because it violates its governing documents or the entity wasn’t registered at the time: ***BCBCA* 378(4)**
* ***BCBCA* 379** governs the requirements regarding amalgamation of an extraprovincial company

## Continuance under the Law of Another Jurisdiction

* Two Step Process: 1) **EXPORT** – requires the consent of the original jurisdiction and 2) **IMPORT** – must meet the requirements of the receiving jurisdiction’s Act
* Effect of continuance: tax advantages, better corporate climate, useful for friendly takeovers, but [doesn’t affect prior obligations, property rights or involvement in legal proceedings pending before continuance: ***BCBCA* 305(1)**, same for amalgamation: ***BCBCA* 285(1)**]
  + If it’s noted as a continued company in the corporate register, it is conclusive evidence that the foreign entity has been duly continued on the date and time shown in the register: ***BCBCA* 305(2)**
* If any of the amalgamating corporations are foreign corporations, they must provide whatever documents and proof the registrar wants to effect an amalgamation: ***BCBCA* 275(1)(b)**
* If a company wants to continue in BC it must file a continuation application, provide whatever info the registrar wants and have one+ director sign the articles they will have once continuing: ***BCBCA* 302(1)**
  + ***BCBCA* 302(2)** outlines the requirements of the continuation application
* ***BCBCA* 303** outlines **(1)** when a foreign corporation is continued, **(2)** what the registrar and **(3)** the company must do once it is continued in BC as a company
* The foreign corporation may give notice of withdrawal of application before it is continued: ***BCBCA* 304**
* Shares that have been already issued before continuance are deemed to be issued in compliance with the Act and the companies articles as per **307** and rights of the shares are preserved upon continuing: ***BCBCA* 306**
* The articles of a company are those that one or more directors signed during the application: ***BCBCA* 307(a)**
* A company may apply for continuation out of BC so long as it is authorized by its shareholders by a special resolution (2/3 or higher depending on company constitution) and the registrar must authorize the company to continue (export) if they are satisfied with the application: ***BCBCA* 308**
* A shareholder can dissent to the special resolution from **308**: ***BCBCA* 309**
* ***BCBCA* 310** outlines when continuation out of BC is prohibited

## Classification of Corporations

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* ***BCBCA*** **1**: public company, ***CBCA* 2(1)**: distributing corporation

# The Corporate Constitution

## Corporate Names

* Ensuring that the public not be misled by confusingly similar corporate names
* Statutes generally speak of a likelihood of deception, confusion, etc, regardless of any intention to deceive (***FP******Chapple******Co, Re***)
* Specific characteristics of the class of purchasers will be taken into account in assessing potential for deception (***CC******Chemicals******Ltd****,* ***Re***)
* There is also common law protection concerning passing off (TORT) and federal trademark legislation
* Where a lawyer is advising an unsophisticated or high-risk client, and fails to convey the importance of using the full corporate name, the lawyer will be liable to this client for breach of the duty of care: ***Turi v Swanick***
* The name of the company is whatever if it has been reserved (through the application process in ***BCBCA* 22**) and the reservation is still in effect at the time the company is recognized: ***BCBCA*** **21**
* Corporations must have the cautionary suffix as per ***BCBCA* 23** and the name must be either English or French, and can use another language outside of Canada if it is set out in the articles: ***BCBCA* 25**
* A person can’t use certain abbreviations that connote a certain type of company if it is not that type: ***BCBCA* 24**
* If the name of a foreign entity contravenes any of the prescribed requirements/the Act, it must reserve an assumed name to be registered as an extraprovincial company and must acquire property/rights/interests in that assumed name and can sue under either: ***BCBCA* 26**
* The company must display its name in a conspicuous position at the place of business, on its documents, seals, etc: ***BCBCA* 27**
* The registrar may order the change of name if the name of a company or extraprovincial company contravenes the prescribed requirements/the Act: ***BCBCA* 28**
* A company must alter its notice of articles according to ***BCBCA* 257** and must do so by director or ordinary resolution and all other requirements are outlined in ***BCBCA* 263**

## Creating the Corporation

* Definition of “articles”: ***BCBCA* 1**: Documents/articles as prescribed by ***BCBCA* 12** and includes articles of a pre-existing company and the bylaws of a company incorporated.
* ***CBCA* 2(1):** articles are articles of incorporation, amalgamation, continuance, reorganization, arrangement, dissolution, revival
* ***CBCA* 5** 1) requires incorporators to be 18+, not of unsound mind as found by a court and not bankrupt OR 2) bodies corporate
* Under ***BCBCA* 10** – the memorandum is replaced by a document called the “notice of articles”, the articles will no longer be publicly filed, and the incorporators will enter into a brief “incorporation agreement” intended to preserve the contractual basis of the memorandum corporation
* A company is recognized as a company **(1)** when it’s **a)** incorporated, **b)** converted, **c)** amalgamated or **d)** continued in BC under this Act or **2)** when it’s **a)** incorporated, **b)** converted, **c)** amalgamated or **d)** continued in BC under a former Companies act. **3)** A pre-existing trust/insurance company is recognized under a former Companies Act when it became that trust or insurance company: ***BCBCA* 3**
* One or more can form a company by **a)** entering into an incorporation agreement and **b)** filing an application with the registrar: ***BCBCA* 10 – 2) and 3)** outline the requirements of the application
* The notice of articles has bare bones information and is filed with the registrar: ***BCBCA* 11**
  + name of company & directors, address of records office, share structure, including special rights/restrictions with each class/series of shares
* The bare bones articles set out the registered office, share structure, number of directors, business restrictions, etc: ***CBCA* 6**
* Articles are kept by the company and detail conduct and restrictions: ***BCBCA* 12**
* A company is incorporated when the application is filed with the registrar or at the specific time/date or just date in the application and the registrar must issue a certificate of incorporation: ***BCBCA* 13**
* A corporation comes into existence on the date shown in the certificate of incorporation: ***CBCA* 9**
* An incorporator or other appropriate person can file a notice of withdrawal for the application of incorporation before the company is incorporated: ***BCBCA* 14**
* A completing party must examine and deliver all appropriate documents – other requirements are outlined: ***BCBCA* 15**
* The corporation and the shareholders are bound by the articles and notice of articles from the time of recognition: ***BCBCA* 19** – doesn’t expressly say that each member is deemed to contract with the company, but it has been held to this effect: ***Hickman v Kent or Romney Marsh Sheepbreeders’ Association***
* A company can only alter its notice of articles in accordance to the act, by a court order, resolution specified by the act or articles, or by special resolution if nothing is specified, and must file a notice of alteration with the registrar: ***BCBCA* 257**
* CHANGE? **1)** A company can alter its articles by a resolution specified by this Act or its articles, or else by special resolution. **2)** Can alter its articles in regards to what constitutes a majority in special resolutions (must be between 2/3 and 3/4) if the shareholders approve by special resolution. **3)** Can alter its articles in regards to what constitutes a majority within a certain class of shares to pass a special resolution (must be between 2/3 and 3/4) if the shareholders approve by special resolution and that class of shareholders consent by separate special resolution: ***BCBCA* 259**
* CHANGE? A change in the articles requires a special resolution – the section lists what kind of changes must be made by special resolution: ***CBCA* 173**
* A name change requires changes to the notice of articles: ***BCBCA* 263**

## Scope of the Contract in Articles

* At common law, articles didn’t constitute a contract between the corporation and non-members
* The corporation and the shareholders are bound by the articles and notice of articles from the time of recognition: ***BCBCA* 19**– doesn’t expressly say that each member is deemed to contract with the company, but it has been held to this effect: ***Hickman v Kent or Romney Marsh Sheepbreeders’ Association***
  + Mutually enforceable contract/both sides are bound to each other: ***Wood v Odessa Waterworks Co***
* *Ultra Vires* doctrine: a corporation had no legal capacity to act in a way not authorized by its incorporating documents

## Concept of Restrictions

* Corporations can do whatever natural persons of full capacity can do: ***BCBCA* 30**
* BC corporations can carry on business outside of BC and accept powers/rights concerning the corporation’s business and powers outside of BC from a lawful authority: ***BCBCA* 32**
* A company mustn’t carry on business restricted in its articles or exercise any powers inconsistent with its articles: ***BCBCA* 33**
  + THIRD PARTY PROTECTION: **2)** No act is invalid merely because it is inconsistent with its articles
* If the company pays compensation as a result of breaking **33(1)**, any director who voted/consented to a resolution authorizing that action is SOL and is jointly and severally liable to pay the company anything it can’t recover: ***BCBCA* 154(1)(a)**
* The court can order compensation be paid to the company or party for a contract contrary to **33(1)**: ***BCBCA* 228(3)(c)**
* A corporation can change its restrictions via special resolution (2/3 present and voting, unless articles state otherwise): ***BCBCA* 259**
* A shareholder can send a notice of dissent to the company regarding any resolution to alter the restrictions on the power or type of business the company can carry on: ***BCBCA* 260**
* An extra-provincial company can exercise the powers permitted by its charter from its home jurisdiction, so long as it doesn’t break any BC laws or contravene this Act: ***BCBCA* 378(2)**
  + THIRD PARTY PROTECTION – no act of foreign entity (ex: transfer of property) is invalid merely because it violates its governing documents or the entity wasn’t registered as extra-provincial at the time: ***BCBCA* 378(4)**

# Pre-Incorporation Contracts

## Three Common Law possibilities:

* **Both parties know the corporation is not yet in existence:** the agent will be personally liable if there is the intention that they will be personally liable, even if the corporation later ratifies the contract once it becomes incorporated: ***Kelner v Baxter***
* **The agent is aware of the corporation’s non-existence, but the other party does not:** the agent is not liable for the contract if the intention to be personally bound is not there, but could be liable for breach of warranty of authority or fraud: ***Wickberg v Shatsky & Shatsky***
* **The agent mistakenly believes the corporation exists and the other party relies on that representation:** the contract is void if it is the result of a mutual mistake: ***Black v Smallwood*** (Australian)
* If the corporation NEVER comes into existence, ***Black*** still applies as there is no statutory solution

## Statutory Reforms since *Kelner* didn’t Consistently Protect Parties

* PROVINCIAL: written and oral contracts, FEDERAL: written contracts
* The presumption is that a person who enters into a written contract for a corporation before that corporation even exists is personally bound by the contract (also gets its benefits): ***CBCA* 14(1)**, unless it straight up says otherwise in the written contract: ***CBCA* 14(4)**
* The presumption is that the person entering in to the contract for the corporation is warranting that the company will be incorporated within a reasonable time and that it will adopt the contract and will be held liable for breach of that warranty to the extent as if the company existed at the time of the contract, they had no authority to enter the contract and the company refused to adopt it: ***BCBCA* 20(2)**, unless it straight up says otherwise in writing: ***BCBCA* 20(8)**
* A corporation can adopt such a written contract within a reasonable time by doing something to signify its intention to be bound by that contract, thereby being bound and being entitled to its benefits and the person who originally entered into that contract will no longer be bound by it: ***CBCA* 14(2), *BCBCA* 20(3)&(4)**
* A party to the contract could apply to apportion some of the liability and benefits of the pre-incorporation contract between that party and the corporation – [and then the court can make whatever order it wants: ***BCBCA* 20(7)**]**,** ***CBCA* 14(3)**
* Regardless of adoption, the facilitator, or any other party to the contract can apply for an order to **a)** set the obligations of the company and the facilitator as joint, or joint and several, or **b)** apportion the liability: ***BCBCA* 20(6)**
* If the company doesn’t adopt the pre-incorporation contract within a reasonable time, the facilitator or any other party to the contract can apply to the court for an order that the new company give any benefits it received under the contract to them: ***BCBCA* 20(5)**

# Management and Control of the Corporation

* Definitions: ***BCBCA* 1(1)**
  + A director of a company is someone who has been elected/appointed to the board
    - Someone is appointed if they’re appointed in accordance of this Act or the articles, designated by the articles or declared by the court to be a director: ***BCBCA* 1(3)**
  + A first director is someone who is designated as a director on the notice of articles
* Definitions: ***CBCA* 2(1)**
  + A director is someone appointed under **260**
  + An officer is someone appointed under **121**, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices
* **Agency costs:** danger that the agents will use their delegated authority to pursue their own goals at the expense of the corporation (the principals)
  + When corporations are controlled by owner-managers, there is much less/no agency conflict
* **Ways to get around agency costs:**
  + Managerial market: where the services of the corporate managers are traded – the threat of having to compete in this market encourages managers to act in the principal’s best interest
  + Product market: product failure can bankrupt a company and even if the company successfully reorganizes, it could lead to replacement of managers
  + Market for corporate control: operates by transferring control of mismanaged corporations to owners more willing or able to discipline self-serving managers using hostile takeover bids
* A company can remove a director before their term is over by **a)** special resolution or **b)** according to the method or resolution specified in the articles: ***BCBCA* 128(3)**
* Shareholders can remove directors by ordinary resolution at a special meeting or if the right to elect is held exclusively by a certain class of shares, then at a meeting of that class of shares: ***CBCA* 109**
  + A company can set up its articles in regards to weight of particular shares for votes – all the statute said was that the vote had to be a special resolution, so the articles can allow whatever it wants for how the votes are to be valued: ***Bushell v Faith***
* If there are no directors someone authorized by the shareholders/incorporators by an instrument in accordance with **2)** can call a meeting to elect/appoint directors and can appoint interim directors OR an appointment at the annual general meeting can be affected in the various ways outlined in **3)**: ***BCBCA* 135**
* \*\*\***1)** The **directors** of a company must, subject to this Act, manage or supervise the management of the business and affairs of the company, subject to the statute and articles **2)** A limitation or restriction on a power or function of a director doesn’t apply to someone who doesn’t know about that limitation or restriction: ***BCBCA* 136, *CBCA* 102(1)** – (subject to a USA)\*\*\*
  + A corporation has to have at least one director, **but if it is a distributing corporation/public company and it has shares held by more than one person**, it has to have at least three directors, at least two who aren’t officers or employees of the corporation or its affiliates: ***CBCA* 102(2)**
* If there is a provision in the articles at the time of incorporation, or if it is subsequently added by special resolution, and the provision clearly indicates the intention to transfer, the articles can transfer some or all of a director’s power to manage the business to one+ other persons: ***BCBCA* 137**
* If a person is performing the functions of a director, but isn’t a director, the Act applies as if they were a director, but doesn’t apply to those participating in management under the director/control of a shareholder, director or senior officer, if they’re a lawyer, a trustee in bankruptcy or a receiver/creditor: ***BCBCA* 138**
* \*\*\*Directors and officers owe **a)** a fiduciary duty/duty of loyalty (act honestly/in good faith with a view to best interests of the CORPORATION, and **b)** a duty of care (standard of a reasonably prudent individual in comparable circumstances) ***BCBCA* 142(1), *CBCA* 122(1)**
  + You can’t contract out of these duties or liability for negligence, default, breach of duty or breach of trust, or relieve liability by writing so in the articles: ***BCBCA* 142(3), *CBCA* 122(3)**
* Subject to the articles, by-laws, or USA, directors can make/amend/repeal by-laws and must submit these to the shareholders at the next meeting – these will be effective until shareholders confirm, reject, or amend the resolution: ***CBCA* 103**
  + Shareholders who can vote can make a proposal to make/amend/repeal by-laws: ***CBCA* 103(4)**
* Even if there is an irregularity in their election/appointment or defect in their qualification, the act of a director or officer is still valid: ***BCBCA* 143,** ***CBCA* 116**
* Shareholders are bound by the incorporating documents: the articles stated that shareholders could only override directors by extraordinary resolution and the vote in this case was by simple majority – D’s decision not to sell the assets because they felt it didn’t benefit the company was upheld: ***Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame***
  + The shareholders could have amended the articles under ***BCBCA* 259, *CBCA* 173** or removed the directors in favour of more compliant ones under ***BCBCA* 128(3), *CBCA* 109**

## Indoor Management Rule

* A company or guarantor for the company can’t assert against a person dealing with the company that the articles haven’t been complied with, that the directors on the corporate register aren’t actually the directors, that someone held out to be a director, officer or agent isn’t actually one of those or that they don’t have the authority to exercise the powers that normally come with those positions, or that a record wasn’t supposed to be issued or isn’t authorized – a person may rely on the authority of the company and their directors, officers and agents: ***BCBCA* 146(1)**
  + This doesn’t apply to someone who knows, or because of their relationship to the company, ought to know about one of those situations: ***BCBCA* 146(2)**
* Common law constructive notice rule doesn’t apply anymore – constructive knowledge isn’t applied simply because documents have been filed: ***CBCA* 17**
* A corporation or guarantor for the corporation can’t assert against a person dealing with the company that the articles haven’t been complied with, that the directors on the notice aren’t actually the directors, that someone held out to be a director, officer or agent isn’t actually one of those or that they don’t have the authority to exercise the powers that normally come with those positions, that a document wasn’t supposed to be issued or isn’t genuine or a sale/lease/exchange of property wasn’t authorized: ***CBCA* 18**
  + This doesn’t apply to someone who knows, or because of their relationship to the company, ought to know about one of those situations: ***CBCA* 18(1)**
* A party dealing with the corporation is entitled to adopt the terms of letter at face value because the solicitor held out authority as an agent of the corporation and he had the authority to speak for his clients: ***Sherwood Design Services Inc***

## Corporate Responsibility

* Historically, directors were held accountable if decisions did not directly benefit the corporation or shareholders
  + Business corporations are organized primarily for shareholder profit and directors’ discretion should be employed to that end – how that profit is pursued and over what time frame is a managerial decision they can make – altruistic ends can be pursued, but to the extent that it benefits the shareholders: ***Dodge v Ford Motor Company***
  + ***The law does not say there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.*** Three part test: 1) is the transaction reasonably incidental to the carrying on of the company’s business? 2) Is it a *bona* *fide* transaction? 3) Is it done for the benefit and to promote the prosperity of the company?: ***Parke v Daily News***
* The modern approach is that a fiduciary duty is owed to the corporation only, but other considerations can also be legitimate
  + When determining if an act is in the best interest of the corporation, directors MAY (not must) take into account, *inter alia*, interests of shareholders, employees, suppliers, creditors, consumers, etc - ***BCBCA* 142(1)** and ***CBCA* 122(1)** are owed to the corporation only: ***Re Peoples***
  + The duty of directors to act in the best interest of the corporation includes a duty to treat individual stakeholders affected by corporate actions equitably and fairly: ***Re BCE Inc***
* Factors to consider when thinking about a corporations level of corporate responsibility:
  + Where in the corporate lifecycle the company is
  + Public vs private?
  + Nature of the business

## The Audit Committee

* The function of the auditor is to assess the financial statements which the corporation proposes to place before the shareholders and to report on the preparation and accuracy of those statements: ***BCBCA* 225**
* To be useful, auditors must be guaranteed appropriate access to records: ***BCBCA* 226**, must be independent, and must be properly qualified.
* Large/widely held/public corporations or financial institutions require the appointment of an audit committee: ***CBCA* 217, *BCBCA* 223**, to be elected at their first meeting held on or after each annual reference date: ***BCBCA* 224(1)**
  + Must be comprised of not fewer than 3 directors, a majority of whom shall not be officers or employees of the company: ***BCBCA* 224(2)**
* Allows directors who aren’t involved in the day-to-day operations to say informed

## Sale of the Undertaking

* A company can’t sell or get rid of all or most of its undertaking unless it does that as its business or it has been authorized by special resolution: ***BCBCA* 301(1), *CBCA* 189(3)** (***CBCA* 189(4)-(8)** outline the process for approval)
  + Otherwise, by application, the court can stop the disposition: ***BCBCA* 301(2)**
  + Even if it has been passed by special resolution, the directors can abandon the disposition if they want: ***BCBCA* 301(4), *CBCA* 189(9)**
* THIRD PARTY PROTECTION: a disposition contrary to **301(1)** won’t be invalid if it is **a)** for valuable consideration and in good faith OR **b)** if it is ratified by a special resolution after the fact: ***BCBCA* 301(3)**
* Shareholders can dissent to any of these special resolutions: ***BCBCA* 301(5)**
* Exceptions to **301(1)** are listed in ***BCBCA* 301(6)** – security interest, lease of >3years, to a subsidiary, to a parent company, to an affiliated company, to 100% shareholder of the corporation or subsidiary
  + NO *CBCA* EXEMPTIONS!

## USAs (and Equivalent)

* A USA must be one that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation
* ***Duha Printers (Western) Ltd v Canada***: ranks on par with the corporation’s articles and bylaws
* The Court has authority under the oppression remedy to make an order “creating or amending a USA”: *CBCA* s241(3)(c)
* If there is a provision in the articles at the time of incorporation, or if it is subsequently added by special resolution, and the provision clearly indicates the intention to transfer, the articles can transfer some or all of a director’s power to manage the business to one+ other persons: ***BCBCA* 137**
* A USA isn’t effective against a transferee of a security who has no actual knowledge of it unless it has been noted on the security certificate: ***CBCA* 49(8)(c)**
* Presumption that a lawful written agreement between all the shareholders (or including one+ persons who aren’t shareholders) that restricts some or all of the directors’ power to manage the business is valid: ***CBCA* 146(1)**
* A purchaser/transferee of shares subject to a USA is deemed to be a party to that agreement: ***CBCA* 146(3)**, but has 30 days to rescind the transaction of acquiring shares if they were not given notice of the existence of that agreement: ***CBCA* 146(4)**
* If someone who should be (ex: director, officer, employee, trustee, etc) isn’t complying with the USA, they can make an application to the court to order them to comply or prohibit them from breach it and the court can make the order and whatever other order it wants to: ***CBCA* 247**
  + Courts can amend a USA if it is oppressive: ***Bury v Bell***

# Duties of Directors and Officers

* Must be at least one director (***BCBCA* 140(4)** allows for a meeting to constitute of the sole director), and if it’s a public company, it must have at least 3: ***BCBCA* 120**
* \*\*\***1)** The **directors** of a company shall manage or supervise the management of the business and affairs of the company, subject to a USA ***CBCA* 102(1)**\*\*\*
  + A corporation has to have at least one director, **but if it is a distributing corporation/public company and it has shares held by more than one person**, it has to have at least three directors, at least two who aren’t officers or employees of the corporation or its affiliates: ***CBCA* 102(2)**
* A first director is set at the recognition of the company and must be an incorporator who signed the articles or consented to be a director in accordance with **123**: ***BCBCA* 121**
* Subsequent directors must be appointed/elected as per the articles and no election/appointment is valid unless the individual consents to be a director or it’s made at meeting where the individual is present and they don’t refuse: ***BCBCA* 122**
* Disqualifications: under 18, incapable of managing own affairs, undischarged bankrupt, convicted of an offence dealing with a corporation or fraud (lists the exceptions to this): ***BCBCA* 124**
* Disqualifications: under 18, found by a court to be of unsound mind, not an individual or bankrupt: ***CBCA* 105**
  + Subject to the articles, a director doesn’t have to be a shareholder: ***BCBCA* 125**, ***CBCA* 105(2)**
  + Subject to other requirements in **3.1-3.3)** at least 25% of directors must be Canadian residents, or if there are less than 4 directors, at least one: ***CBCA* 105(3)**
* An appointed/elected director is not deemed to be a director unless they were present at that meeting and they didn’t refuse the office, or if they weren’t present, they consented in writing within 10 days of the election/appointment or they were a director already: ***CBCA* 106(9)**
* A company must keep a register of its directors: ***BCBCA* 126**
* Incorporators must send a notice of directors to the Director and the Director must file it – each director named will hold office until the first shareholders’ meeting: ***CBCA* 106(1)&(2)**
* Shareholders will by ordinary resolution at the first meeting and every annual meeting when necessary have an election of directors whose term is no longer than 3 annual meetings following the election: ***CBCA* 106(3)**
* A director ceases to hold office when their term ends, they die or resign, or they’re removed: ***BCBCA* 128**
* A company can remove a director before their term is over by **a)** special resolution or **b)** according to the method or resolution specified in the articles: ***BCBCA* 128(3)**
* Shareholders can remove directors by ordinary resolution at a special meeting or if the right to elect is held exclusively by a certain class of shares, then at a meeting of that class of shares: ***CBCA* 109**
* A vacancy is to be filled according to **131-135** unless the articles provide otherwise: ***BCBCA* 130**
* If there is a vacancy because a director has been removed, it can be filled by the shareholders at a shareholder meeting, or if it is a casual vacancy, it can be filled by the remaining directors: ***BCBCA* 131**
* If a vacancy results in the loss of quorum, directors can appoint people to be directors to make up those numbers or call a shareholders’ meeting to fill those vacancies: ***BCBCA* 134**
* If there are no directors someone authorized by the shareholders/incorporators by an instrument according to **2)** can call a meeting to elect/appoint directors and can appoint interim directors OR an appointment at the annual general meeting can be affected in the various ways outlined in **3)**: ***BCBCA* 135**
* A director is deemed to be present at a meeting if those that are entitled to participate/vote attend in person or by some other communication method so long as all present directors can communicate with one another (unless the articles prohibit this): ***BCBCA* 140**
* Subject to the articles or by-laws, directors can meet anywhere and on such notice as the by-laws require, though there are Canadian resident director requirements as outlined in **3)** and **4)**: ***CBCA* 114**
* After the certificate of incorporation is issued, an organization meeting of directors must be held to make by-laws, adopt records, authorize issue of securities, appoint officers and an auditor, making banking arrangements and deal with other business issues, and can be called by giving at least 5 days notice by mail to each director, stating time and place of meeting: ***CBCA* 104**
* A resolution can be passed without a meeting of directors in the circumstances outlined in ***BCBCA* 140(3)**
* A resolution in writing without a meeting is valid if it is signed by all directors entitled to vote on that resolution: ***CBCA* 117**
* If you’re not qualified to be a director (see disqualifications **124**), you can’t be an officer: ***BCBCA* 141(3)**
* Subject to the articles, directors may appoint and specify the duties of officers, and they can appoint anyone, including a director, as well as can appoint one person to 2+ offices: ***BCBCA* 141(1)&(2)**
* Subject to the articles, directors can also remove officers without prejudice to their contractual or legal rights, but the appointment doesn’t of itself create any contractual rights: ***BCBCA* 141(4)&(5)**
* \*\*\*Directors and officers owe **a)** a fiduciary duty/duty of loyalty (act honestly/in good faith with a view to best interests of the CORPORATION, and **b)** a duty of care (standard of a reasonably prudent individual in comparable circumstances) ***BCBCA* 142(1), *CBCA* 122(1)**
  + You can’t contract out of these duties or liability for negligence, default, breach of duty or breach of trust, or relieve liability by writing so in the articles: ***BCBCA* 142(3), *CBCA* 122(3)**
* Even if there is an irregularity in their election/appointment or defect in their qualification, the act of a director or officer is still valid: ***BCBCA* 143,** ***CBCA* 116**
* A corporation can authorize someone to act as their representative if the corporation holds shares of another corporation at that corporation’s shareholders’ meetings and if the corporation is a creditor of another corporation, at the other corporation’s creditors’ meetings: ***BCBCA* 145**
* Directors can appoint a managing director and delegate any director powers to them or a committee, except for the powers outlined in **3)**: ***CBCA* 115**
* A company or guarantor for the company can’t assert against a person dealing with the company that the articles haven’t been complied with, that the directors on the corporate register aren’t actually the directors, that someone held out to be a director, officer or agent isn’t actually one of those or that they don’t have the authority to exercise the powers that normally come with those positions, or that a record wasn’t supposed to be issued or isn’t authorized – a person may rely on the authority of the company and their directors, officers and agents: ***BCBCA* 146(1)**
  + This doesn’t apply to someone who knows, or because of their relationship to the company, ought to know about one of those situations: ***BCBCA* 146(2)**
* Subject to the articles, by-laws, or USA, directors can make/amend/repeal by-laws and must submit these to the shareholders at the next meeting – these will be effective until shareholders confirm, reject, or amend the resolution: ***CBCA* 103**
* A defendant found responsible for a financial loss is liable to the plaintiff by apportionment of fault, but the court can reallocate an uncollectable amount to the other defendants within a year of the judgment, by multiplying the uncollectable amount by the corresponding degree of fault, but not for an amount more than 50% of the original amount owed: ***CBCA* 273.3**
* If there was fraud or dishonestly established, a plaintiff can recover the whole amount from any of the defendants who were held responsible for financial loss, but that defendant is entitled to claim contribution from the others that were held responsible: ***CBCA* 273.4**

## Personal Liability of Directors

* If, by application, the court determines the director/senior officer had a disclosable interest that was fair and reasonable to the company, they can make an order that they will not be liable to account for profits and whatever other order the court wants, or vice versa if they find the interest to not be fair and reasonable: ***BCBCA* 150**
* Directors who vote in favour of a resolution are jointly and severally liable for the corporation’s monetary payments as a result of an action contrary to the various sections listed: ***BCBCA* 154**
  + A director who is present at the meeting is deemed to have consented to a resolution passed unless their dissent is in the minutes, put in writing and given to the secretary before the end of the meeting, or delivered/mailed to the company’s registered off “promptly after the end of the meeting”: ***BCBCA* 154(5)**
  + A director who isn’t present at the meeting is deemed to consent to the resolution if, in the case that the resolution was passed at a director’s meeting, they were a director at the time or, if it was passed at a meeting of a committee of directors, they were a member of that committee: ***BCBCA* 154(7)**
    - But this doesn’t apply, if within 7 days of becoming aware of the resolution, delivers or mails a written dissent to the company’s registered office: ***BCBCA* 154(8)**
  + LIMITATION: 2 years after the date of the resolution: ***BCBCA* 154(9)**
* A director who votes for or consents to a resolution to issue of a share for consideration other than money will be jointly and severally, or solidarily, liable to the corporation if the consideration received is less than the fair equivalent of the money value: ***CBCA* 118(1)**
  + A director won’t be liable if they prove they didn’t or couldn’t have reasonably known that the share was issued for consideration less than the fair equivalent of money: ***CBCA* 118(9)**
  + A director will be jointly and severally, or solidarily, liable to the corporation to restore any amounts distributed or paid for a listed action contrary to the various sections: ***CBCA* 118(2)**
  + LIMITATION: 2 years after the date of the resolution authorizing the action complained of: ***CBCA* 118(7)**
* Directors are jointly and severally, or solidarily, liable for up to 6 months of unpaid wages and a director who satisfies a claim under this section is entitled to contribution from other directors who were liable for this claim: ***CBCA* 119**
* A director found liable under **154** is entitled to contribution from the other directors who also voted in favour: ***BCBCA* 156**
* A DIRECTOR isn’t liable under **154** if they complied with their fiduciary duty and duty of care and relied in good faith on **a)** financial statements of the company, **b)** a written report by a credible professional, **c)** a statement of fact represented by an officer to be correct, or **d)** any other record the court deems to be appropriate, whether or not there was fraud involved: ***BCBCA* 157(1), *CBCA* 123(5)**
* A DIRECTOR isn’t liable under **154** if they didn’t know and couldn’t have reasonably known that the act done or authorized by the resolution was contrary to the Act: ***BCBCA* 157(2)**
* A director is personally liable to purchasers, suppliers, security holders for loss/damage as a result of the director knowingly allowing the company name to not be displayed, as well as issuing/authorizing the issue of an instrument that doesn’t have the company name, unless the company duly pays it: ***BCBCA* 158**

## Care and Skill – Common Law

* A director must act honestly and with some degree of both skill and diligence. The standard of care is “reasonable care”: ***Re City Equitable Fire Insurance***
  + 1) A director doesn’t need to exhibit more skill than the reasonable person and is not liable for mere errors of judgment
  + 2) They are not bound to give continuous attention to the company and
  + 3) can, absence grounds for suspicion, rely on officers to honestly conduct/report business.

## Care and Skill – Statutory Reform

* Directors who vote in favour of a resolution are jointly and severally liable for the corporation’s monetary payments as a result of an action contrary to the various sections listed: ***BCBCA* 154**
  + A director who is present at the meeting is deemed to have consented to a resolution passed unless their dissent is in the minutes, put in writing and given to the secretary before the end of the meeting (***CBCA* 123(1)(b)**), or delivered/mailed to the company’s registered off “promptly after the end of the meeting”: ***BCBCA* 154(5)**
    - A director who votes for or consents to a resolution can’t dissent: ***CBCA* 123(2), *BCBCA* 154(6)**
  + A director who isn’t present at the meeting is deemed to consent to the resolution if, in the case that the resolution was passed at a director’s meeting, they were a director at the time or, if it was passed at a meeting of a committee of directors, they were a member of that committee: ***BCBCA* 154(7)**
    - But this doesn’t apply, if within 7 days of becoming aware of the resolution, delivers or mails a written dissent to the company’s registered office: ***BCBCA* 154(8),** or causes the dissent to be placed in the minutes of the meeting: ***CBCA* 123(3)**
  + LIMITATION: 2 years after the date of the resolution: ***BCBCA* 154(9)**
* A DIRECTOR isn’t liable under **154** if they complied with their fiduciary duty and duty of care and relied in good faith on **a)** financial statements of the company, **b)** a written report by a credible professional, **c)** a statement of fact represented by an officer to be correct, or **d)** any other record the court deems to be appropriate, whether or not there was fraud involved: ***BCBCA* 157(1), *CBCA* 123(5)**
* A DIRECTOR isn’t liable under **154** if they didn’t know and couldn’t have reasonably known that the act done or authorized by the resolution was contrary to the Act: ***BCBCA* 157(2)**
* A director who votes for or consents to a resolution to issue of a share for consideration other than money will be jointly and severally, or solidarily, liable to the corporation if the consideration received is less than the fair equivalent of the money value: ***CBCA* 118(1)**
  + A director won’t be liable if they prove they didn’t or couldn’t have reasonably known that the share was issued for consideration less than the fair equivalent of money: ***CBCA* 118(9)**
  + A director will be jointly and severally, or solidarily, liable to the corporation to restore any amounts distributed or paid for a listed action contrary to the various sections: ***CBCA* 118(2)**
  + A director won’t be liable under **118** or **119** and will have complied with their duties under **122(2)**, if they exercised the care, diligence and skill of a reasonably prudent person in comparable circumstances, including reliance in good faith on **a)** financial statements of the corporation represented by an officer or the auditor to be fairly accurate or **b)** a report made by a credible profession: ***CBCA* 123(4)**
  + LIMITATION: 2 years after the date of the resolution authorizing the action complained of: ***CBCA* 118(7)**
* Directors must show fair and reasonable diligence in managing the company and act honestly, they need not have special knowledge – ***CBCA*** **122(1)(b)** is objective-subjective: ***Re Peoples***
  + Satisfying the fiduciary duty is not sufficient to satisfy the duty of care

## The Business Judgment Rule

* When there is no evidence of fraud, illegality or conflict of interest in respect of a given corporate action involving business judgement, the directors are presumed to have acted in good faith and on a reasonable basis (***Shlensky v Wrigley***) – thus, no liability for duty of care or duty of loyalty
  + Onus of proof is shifted to the plaintiff
* The court, when using the business judgment rule, will look to see if the directors made a reasonable decision, not a perfect one – their decisions are not subject to scrutiny with perfect hindsight – a board is entitled to get advice, but it doesn’t relieve them of their obligation to exercise reasonable diligence: ***UPM-Kymmene Corp***
* The question is whether the directors of the target company successfully took steps to avoid a conflict of interest, if so, the rationale for shifting the onus to the directors may not exist – the burden of proof may not always rest on the same party when a change of control transaction is challenged: ***Pente Investment***

## Fiduciary Duties

* Ensure corporate actors carry out their respective duties with the utmost good faith, don’t put themselves into a conflict of interest situation, and don’t derive secret profit from their office – heart and soul of corporate law
* Non-shareholder welfare is protected by other mechanisms (ex: employment standards for employees)
* Conflict rule: even potential conflict of interest caused the contract or transaction to be voidable, profit rule: if a director or officer made any profit as a result of their position in the corporation, then the fiduciary duty was breached
* Directors and officers could enter into contracts with their company or have material interests in other parties with whom the company was dealing, so long as full disclosure was made and the interested party refrained from voting on any matter involving their conflict of interest
* Common law was put into an explicit provision in the statute – “good faith” standard
* Canadian courts have tended to apply different standards in different contexts
  + Typically a subjective standard but in hostile takeover bids the courts require that there be some objective evidence to back up the managers’ normally self-serving statements that they were acting in the best interest of the corporation
  + “Structural” conflict of interest, insofar as the target managers will be tempted to fight off a hostile bid (because they lose their jobs), even if it is in the best interests of the shareholders/corporation
    - The directors must act in good faith and there must be reasonable grounds for their belief
* Interaction between Fiduciary Duty and the Business Judgment Rule:
  + Business judgment rule is, in essence, a “safe harbour” rule: if directors and officers fulfill certain conditions – mostly involving the procedural integrity of the decision-making process – they will tend to escape liability – the court will find no breach of duty
* \*\*\*Directors and officers owe **a)** a fiduciary duty/duty of loyalty (act honestly/in good faith with a view to best interests of the CORPORATION, and **b)** a duty of care (standard of a reasonably prudent individual in comparable circumstances) ***BCBCA* 142(1), *CBCA* 122(1)\*\*\***
  + You can’t contract out of these duties or liability for negligence, default, breach of duty or breach of trust, or relieve liability by writing so in the articles: ***BCBCA* 142(3), *CBCA* 122(3)**

## Fiduciary Duties – Self-Dealing (Contracting with the Corporation)

* Self-dealing transactions involve contracts or transactions concluded between the directors and officers of a corporation, either directly or through their interest in another entity, and the corporation itself
* The risk of diversion of corporate wealth is clear – a form of agency cost
* A director or senior officer holds a disclosable interest if the contract or transaction is material to the company, the company has entered/proposes to enter into the contract or transaction and either the director/senior officer has a material interest in the contract or transaction OR they are the director or senior officer of someone who has a material interest in it: ***BCBCA* 147(1)**
* A director or senior officer shall disclose in writing the nature and extent of any interests they have in a material contract/transaction, whether made or proposed, with the corporation if they are a party to the contract, is a director or officer of a party to the contract or has a material interest in a party to the contract: ***CBCA* 120(1)**
  + ***CBCA* 120(2)** outlines when disclosure should be made in the case of a director
  + ***CBCA* 120(3)** outlines when disclosure should be made in the case of an officer who is not a director
* If a material contract/transaction is one that normally wouldn’t require approval of directors/shareholders, a director or officer shall disclose in writing the nature and extent of their interest immediately after they become aware of the contract/transaction: ***CBCA* 120(4)**
* ***BCBCA* 147(2)** outlines circumstances where a director or senior officer do not hold a disclosable interest
* A director or officer does not hold a disclosable interest merely because **b)** the contract/transaction relates to an indemnity or insurance, **c)** it relates to the remuneration of the director or senior officer, **e)** it has or will be made with or for the benefit of a corporation affiliated with the company and the director or senior officer is also a director or senior officer of that corporation: ***BCBCA* 147(4)**
* A director or senior officer is liable to account for profits accrued as a result of a contract/transaction which they had a disclosable interest: ***BCBCA* 148**
* ***BCBCA* 148(2), *CBCA* 120(7)&(8)** outlines scenarios in which a director/senior officer isn’t liable to account for profits and may keep them
* A general statement in writing is sufficient disclosure of a disclosable interest: ***BCBCA* 148(4)** – the solution of what you have to reveal in **153**
* A contract/transaction in which disclosure has been made may be approved by the directors or by special resolution: ***BCBCA* 149**
  + A director with the disclosable interest can’t vote to approve it, unless all the directors have a disclosable interest, then any or all of them can vote to approve it
  + Subject to the articles, a director who has a disclosable interest who is present at a meeting counts towards the quorum whether they can vote or not
  + A director required to make disclosure can’t vote to approve it unless the contract/transaction relates to their remuneration, is indemnity or insurance or is with an affiliate: ***CBCA* 120(5)**
* If the court determines the disclosable interest was fair and reasonable to the company, it can make an order that the director or senior officer won’t be liable to account for profits or any other order it wants: ***BCBCA* 150**
  + Unless it was approved, if it finds it wasn’t fair and reasonable, it can order the director or senior officer be liable to account for profits, stop the company from entering the contract/transaction or any other order it wants
* A court may, on application, set aside the contract or require the director or senior officer to account for profits if they have complied with this section: ***CBCA* 120(8)**
* A contract/transaction isn’t invalid merely because a director/senior officer had an interest in it, didn’t disclose the interest or the interest hadn’t been approved: ***BCBCA* 151** – presumptively tries to save contract for third parties/the company
* Unless it’s provided for in this Act, a director or senior officer has no obligation to disclose of any interests or account for any profits as a result of a disclosable interest: ***BCBCA* 152**
* If a director or senior officer holds any office or property, rights, interests that COULD result, directly or indirectly, in a conflict of interest/duty, then they must disclose the nature and extent of the conflict and it must be done promptly to the directors after they become a director or senior officer, or when the conflict is acquired: ***BCBCA* 153**

## Fiduciary Duties – Corporate Opportunities

* Problems arise when person operating in a fiduciary relationship to the corporation independently invest in a project that could have been acquired by the corporation
* Key issue is whether the director or manager has usurped the authority granted to them by the shareholders of the corporation in order to acquire some “unbargained for” personal benefit
* Liability arises from the mere fact of a profit having been made – the profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account. The profiteer isn’t allowed to take the opportunity, even if the corporation couldn’t: ***Regal Hastings Ltd***
* To come within the rule, the impugned transactions must be by reason of the fact, and *only by reason* of the fact, that they were directors and in the course of the execution of that office: ***Regal Hastings Ltd***
* Directors can take an opportunity where the corporation made an informed refusal: ***Peso Silver Mines***
* Unless modified by statute or contract, the officers owe a similar duty to corporation as directors: ***CanAero***
* It was irrelevant that the opportunity taken was different from that offered to the corporation: ***CanAero***
* Fiduciary duty can be ongoing – even after the respondents quit: ***CanAero***
* General standard of loyalty, good faith, and avoidance conflict duty/self-interest (profit/conflict rule) tested each case by factors: ***CanAero***
  + 1) position or office held
  + 2) the nature of the corporate opportunity (ripeness, specificness, the director’s or managerial officer’s relation to it)
  + 3) the amount of knowledge possessed, the circumstance in which it was obtained and whether it was special or private
  + 4) the factor of time in the continuation of the fiduciary duty if the alleged breach is after terminating the relationship
  + 5) the circumstances under which the relationship was terminated (retirement, resignation, discharge).

## Fiduciary Duties – Competition

* Competition includes:
  + A director serving on the boards of two competing corporations
  + A director or officers operating a business that competes with the corporation
  + A director or officer having a material interest in an entity that competes with the corporation
* If a director or senior officer holds any office or property, rights, interests that COULD result, directly or indirectly, in a conflict of interest/duty, then they must disclose the nature and extent of the conflict and it must be done promptly to the directors after they become a director or senior officer, or when the conflict is acquired: ***BCBCA* 153**
* You can serve as a director for competing corporations as long as you keep your knowledge base separate – don’t use the knowledge gained as a director of one in a prejudicial way with the other – and as long as you are not prohibited by contract or the articles: ***London and Mashonaland***
* ***Bell v Lever Bros***: a director can be party to a contract in which his company is not interested.
* There are cases in which a director can be breaching his fiduciary duty to Company A merely by acting as a director of Company B – especially in cases when the companies are in the same line of business and where acting as a director of Company B will harm Company A.
* You can apply either the doctrine of corporate opportunities or doctrines related to competition where a director or officer starts up a business that competes with the corporation and earns a profit.
* Propositions on the current law on fiduciary liability: ***Slate Ventures Inc v Hurley***
  + **Actual** conflict of duty and interest + acquiring information or opportunity **by** **virtue** of the fiduciary’s position = liable for any profits
  + **Potential** conflict of duty and interest + acquiring information or opportunity **by** **virtue** of the fiduciary’s position = liable for any profits
  + **No** **conflict** of duty and interest + acquiring information or opportunity **independently** = no liability for profits
  + **Potential** conflict of duty and interest + acquiring information or opportunity **independently** = no liability for profits
  + **Actual** conflict of duty and interest + acquiring information or opportunity **independently** = liable for any profits
  + **No** **conflict** of duty and interest + acquiring information or opportunity **by** **virtue** of the fiduciary’s position = liable for any profits
* Two question to ask when determining whether there was a breach of fiduciary duty: 1) was there an actual or potential conflict of interest? 2) Were the opportunities acquired by virtue of their position as a director or officer?: ***Cranewood Financial Corp***
* DO NOT APPLY *CBCA* S120 TO SITUATIONS INVOLVING COMPETITION – IT ONLY APPLIES TO SITUTIONS WITH A CONTRACT OR TRANSACTION

## To Whom is the Fiduciary Duty Owed?

* ***Peoples*** – the directors’ duty is clearly to the corporation – they must consider the best interests of the corporation, but it may also be appropriate although not mandatory, to consider the impact of corporate decisions on shareholders or other particular groups of stakeholders. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests: ***Re BCE Inc***
* Subjective duty

## Hostile Take-Overs and Defensive Tactics by Target Management

* Typical hostile takeover: acquirer will make a bid (almost always at a premium) for voting shares of a company. If a requisite number of shares are tendered to gain control, the acquirer will use a “two tier” approach attempting to force out the remaining shareholders at a discount.
* Management discipline approach: Acquirer can realize a profit by displacing opportunistic management for a more dedicated and efficient management team, maybe even acquirer themselves
  + If management discipline hypothesis is correct, it falls well within fiduciary duty.
    - Conflict of interest in trying to keep managerial job and forgoing shareholder value maximization. Arguably, defense tactics should be allowed when there is a threat to society and/or shareholders.
    - A counter argument of why should law/statute favour shareholders over acquirers

## The Common Law

* Defense tactics: sale of crown jewels, scorched earth/poison put, Pac Man, white knight, poison pill
* The “poison pill” or pedestrian name of “shareholder rights plan” dominates defense tactics landscape in Canada
  + If an acquirer tenders enough (the “flip in” event/ownership threshold typically @ 20%) shares, there is an issuance of rights – an option to existing shareholders (not the acquirer) to purchase an additional share at a discounts (often @ 50%) 1 option for every share.
  + The net effect is diluting the takeover bids share value and diluting their ownership tender, making it expensive and/or extremely difficult to take over.
* Canadian poison pills usually have permitted bid feature – allows bidder to cross ownership threshold without trigger pill as long as requirements are met by bidder
  + Holds bid open for longer period of time than required by securities regulation
  + Proceed only if 50% or more of shares not already held by the bidder are tendered into the bid
  + Allow shareholders to withdraw their tenders at any time before the shares are taken up by the bidder and paid for
  + Extend the bid for a further 10 days once 50% of the shares are tendered
  + May additionally require bidder to make an “any-or-all” offer (impose no limit on number of shares that will be purchased) rather than partial bid
* A board is not prohibited from issuing shares to frustrate a takeover bid, but it must be shown that it was in the view of the best interest of the corporation: ***Teck Corp v Millar***
  + **Test**: directors must act in good faith and there must be reasonable grounds for their belief – they need to provide objective evidence of their good faith and these reasonable grounds; some sort of documentation of their consideration.
* The fact that alternative transactions rejected by directors is irrelevant unless can be shown that particular alternative available and clearly more beneficial than chosen one. Question is whether directors took successful steps to avoid conflict of interest (e.g. special committee): ***Pente Investment***

## Relief from Liability – Common Law

* Little reason to expect that shareholders of widely held corporations will examine ratification issues any more closely than other corporate action requiring their approval, the value of ratification, especially when it is in the form of a bare shareholder majority, is suspect
* ***Foss v Harbottle*** – if a majority of shareholders either had ratified a corporate wrong, or might at some point in the future ratify the wrong, than an individual shareholder had no standing to assert any breach of fiduciary duty – no common law derivative action
* A ratification is valid if it is supported by a mere majority of shareholders and its adoption not brought about by unfair or improper means; not illegal or fraudulent or oppressive towards opposing shareholders (fraud on the minority exception to *Foss*). Subject to the articles, directors are not precluded from also acting as shareholders and voting regarding the ratification: ***North-West Transportation v Beatty***
  + THIS IS OVERRULED BY STATUTE ***BCBCA* 233(6)**

## Relief from Liability – Statute

* You can’t contract out of the fiduciary duties or duty of care or liability for negligence, default, breach of duty or breach of trust, or relieve liability by writing so in the articles: ***BCBCA* 142(3), *CBCA* 122(3)**
* A DIRECTOR isn’t liable under **154** if they complied with their fiduciary duty and duty of care and relied in good faith on **a)** financial statements of the company, **b)** a written report by a credible professional, **c)** a statement of fact represented by an officer to be correct, or **d)** any other record the court deems to be appropriate, whether or not there was fraud involved: ***BCBCA* 157(1), *CBCA* 123(5)**
* A director won’t be liable under **118** or **119** and will have complied with their duties under **122(2)**, if they exercised the care, diligence and skill of a reasonably prudent person in comparable circumstances, including reliance in good faith on **a)** financial statements of the corporation represented by an officer or the auditor to be fairly accurate or **b)** a report made by a credible profession: ***CBCA* 123(4)**
* A DIRECTOR isn’t liable under **154** if they didn’t know and couldn’t have reasonably known that the act done or authorized by the resolution was contrary to the Act: ***BCBCA* 157(2)**
* No derivative action or application may be stayed or dismissed merely because it alleged breach was or might have been approved, but evidence of that approval can be taken into account by the court: ***BCBCA* 233(6)**
* Evidence of shareholder approval should not be the sole reason for staying or dismissing a derivative action: ***CBCA* 242**
* Even if the court finds a director, officer, receiver, receiver manager or liquidator of a company liable for negligence, default, breach of duty or trust, the court can make an order to excuse the person if it appears to the court that they acted honestly and reasonably and it would be fair to excuse them: ***BCBCA* 234**

## Indemnification and Insurance

* Due to the different coverage of indemnification and D&O (Directors and Officers) insurance, corporations typically purchase two types of D&O insurance: Corporate reimbursement coverage (for losses from indemnification of a director) and personal coverage for liability of a director in which they are not indemnified
* Definitions: ***BCBCA* 159**
  + **Associated corporation:** an affiliated company, partnership, trust, joint venture
  + **Eligible party:** someone who is/was a director or officer of a company or associated corporation, and their heirs or legal representatives
  + **Eligible penalty:** a judgment, penalty, or fine awarded/imposed in an eligible proceeding
  + **Eligible proceeding:** a proceeding which an eligible party, by reason of them being or having been a director or officer, the company or associated corporation is or could be joined as a party or liable for a judgment, fine, penalty
* A company is allowed to indemnify eligible parties against eligible penalties as well as pay the expenses incurred reasonably for that proceeding: ***BCBCA* 160, *CBCA* 124(1)**
  + But an individual is entitled to indemnity if they were not held at fault by the court: ***CBCA* 124(5)**
* A company must pay the expenses actually and reasonably incurred if the eligible party hasn’t been reimburse and they’re successful or substantially successful in the outcome of the proceeding: ***BCBCA* 161**
* A company can pay expenses incurred in advance of the final disposition of an eligible proceeding, but must not do so unless the party gives the company a written agreement that they will repay the amounts advanced if it is determined that indemnification is prohibited under **163**: ***BCBCA* 162, *CBCA* 124(2)**
* A company can’t indemnify if **a)** at the time of the indemnity agreement, it was prohibited by the articles, **b)** if indemnity is made other than under an agreement, it was prohibited by the articles at the time, **c)** if in relation to the subject matter of the proceedings, the party didn’t act honestly and in good faith with a view to the best interest of the company or **d)** if it is an eligible proceeding other than a civil proceeding, if the party didn’t have reasonable grounds to believe that what they did was lawful: ***BCBCA* 163(1)**
* A company can’t indemnify an individual unless they acted honestly and in good faith with a view to the best interests of the corporation and in the case of a criminal or administrative action, the individual had reasonable grounds to believe their actions were lawful: ***CBCA* 124(3)**
* If an eligible proceeding is brought against an eligible party by the company, the company can’t indemnify or pay expenses for them: ***BCBCA* 163(2)**
* Despite all these sections, the court can order indemnification, payment for expenses, order enforcement of an agreement of indemnification, pay for expenses incurred in seeking this order and whatever else it wants to order: ***BCBCA* 164, *CBCA* 124(7)**
  + An applicant shall give the Director notice of the application to the court: ***CBCA* 124(8)**
* A company can purchase director/officer insurance for an eligible party against any liability that may be incurred by that party being a director or officer: ***BCBCA* 165, *CBCA* 124(6)**

# Shareholders, Shares and Shareholders’ Rights

## Shares

* Definitions: ***BCBCA* 1(1)**
  + Authorized share structure: the kinds, classes and series of shares, and the limits, if any, on the number of shares of those kinds, classes and series of shares, that a company is authorized, by its articles, notice of articles or memorandum, to issue
  + Shareholder: a person whose name is entered in a securities register of a company as a registered owner of a share of the company
* One or more can form a company by **a)** entering into an incorporation agreement (**2)a)** which must include the agreement of each incorporator to take one+ shares of the company) and **b)** filing an application with the registrar: ***BCBCA* 10 – 2) and 3)** outline the requirements of the application
* The notice of articles has bare bones information and is filed with the registrar: ***BCBCA* 11**
  + Name of company & directors, address of records office, **share** **structure**, including special rights/restrictions with each class/series of shares
  + Description of the authorized share structure: It must set out the name of the class/series of shares and the kinds of shares that class has, the maximum number of shares the company can issue of that class or state there is no max, set the par value and identify any non-par value shares: ***BCBCA* 53**
  + The company can change its authorized share structure in accordance with this section by changing its notice of articles or articles, if necessary, and if not, either by a resolution specified by the articles or a special resolution if nothing is specified: ***BCBCA* 54**
* Federal corporations must declare from the outset in the articles of incorporation the classes and maximum number of shares that the corporation can issue and if there are 2+ classes of shares, the rights/restrictions/conditions of those classes as well as the rights/restrictions/conditions of any shares to be issued in series, with the authority of directors to fix the numbers of shares in the series: ***CBCA* 6(1)(c)**
* A list of shareholders must be maintained – names/last known addresses and the number of shares of each class held by them – but can only be requested for limited reasons: ***BCBCA* 49**
* A company must have one or both of par value and non-par value shares and one+ classes of shares: ***BCBCA* 52**
* A share in a company is personal estate: ***BCBCA* 56** (ex: just because the corporation owns land doesn’t mean a shareholder has a land interest)
* The requirements for the contents of the share certificate are outlined in ***BCBCA* 57**
* If a company doesn’t provide in the notice of articles and articles different classes of shares, the default is a single class of shares: ***BCBCA* 59(2)** and each share in a class must have the same rights and restrictions as the rest in that class: ***BCBCA* 59(4)**
* You can have differentiated shares within a class if you specify a series of shares, but you can’t have differentiation on the basis of dividends or asset distribution: ***BCBCA* 60**
* Directors can determine when and to whom to issue shares, subject to **64/28**, articles, by-laws, USAs: ***BCBCA* 62, *CBCA* 25(1)**
* The issue price for non-par value shares must be set according to the articles or by a directors resolution: ***BCBCA* 63(1)**
* The issue price for par value shares must be set by directors’ resolution and can’t be issued at less than par value: ***BCBCA* 63(2)**
* Shares must not be issued until it is fully paid: ***BCBCA* 64(2), *CBCA* 25(3)** and is fully paid when consideration of past services, property or money is provided to the company and the value of consideration equals or exceeds the issue price: ***BCBCA* 64(3)**
  + In satisfying themselves of whether the aggregate value of considerations equals or exceeds the issue price, directors must not attribute a value that exceeds fair market value of those considerations: ***BCBCA* 64(4)**
    - Directors may take into account reasonable charges and expenses that have been incurred by the person providing the consideration and are reasonably expected to benefit the company: ***BCBCA* 64(5), *CBCA* 25(4)**
* Subject to its charter, a company can declare a dividend and pay that dividend by issuing shares and in property, including money, but must not declare or pay a dividend if the company is insolvent or paying the dividend would render the company insolvent: ***BCBCA* 70**
  + THIRD PARTY PROTECTION: a dividend is not invalid merely because it is declared or paid in contravention of this section: ***BCBCA* 70**
* A share can be certificated or, in the case of an unlimited liability company, be uncertificated: ***BCBCA* 107**
* A company must maintain a central securities register in which is registers the shares issued by the company and lists the required information as set out in ***BCBCA* 111**

## Voting Rights

* Two categories of votes:
  + The approval of shareholders are needed in response to proposals by the directors
  + The shareholders want something done that isn’t be doing (rare and usually hostile)
* Adolf Berle and Gardiner Means: separation of ownership and control in the modern public corporation spelled the end of effective shareholder oversight of corporate managers
* Variety of market mechanisms that serve to constrain managerial behaviour and ensure that managers do not depart too far from profit maximizing behaviour
  + Legal restraint – managerial fiduciary duty
* Shareholder voting both a device for registering shareholder preferences on important business decisions and for controlling managerial diversion, slack and risk-shifting
  + Also statutorily empowered to vote on fundamental changes
* Shareholders with large blocks of shares will have much better incentives to use their voting power effectively to ensure that individuals with proven track records are elected as directors
* Voting class of shareholders facilitates replacement of management through hostile takeovers
  + Also through proxy battles – vote for an alternate slate of directors nominated by the dissident shareholders
* Some empirical evidence suggests shareholder voting has little to no positive effect on corporate activity
  + Most of the time shareholders vote by proxy – appoint someone to be their proxy-holder and vote for them by means of the written instrument
  + Management is required to send shareholders a form of proxy on which management designates its nominations for directors – also allows the shareholder to endorse management’s slate of candidates by nominating as proxy-holder a person designated by management who will vote for their choices
  + Problem of rational shareholder apathy: costs of becoming sufficiently informed are quite large – generally just vote for whatever or not at all
* Criteria to have effective shareholder proxy voting (Carol Hansell):
  + Investors must be in position to make an informed decision
  + Rules of the voting system must be sufficiently explained to shareholders
  + An investor’s vote must have full weight at shareholder meeting
  + Votes attached to securities must be cast by those who have an economic interest attached to the security
  + System must be transparent enough to inspire confidence
* Unless the articles provide otherwise, a shareholder has one vote per share and can vote in person or by proxy: ***BCBCA* 173(1)**
* Voting must be by poll, if demanded, or in a manner that adequately discloses the intentions of the shareholders or by a show of hands: ***BCBCA* 173(2)**
* Unless a poll is required or demanded, a declaration of the chair that the resolution is carried by the necessary majority or is defeated is conclusive evidence of the fact without proof of the number or proportion of votes recorded: ***BCBCA* 173(3)**
* A shareholder/proxy holder can demand a poll or inspect the ballots and the company must keep each ballot cast for at least 3 months: ***BCBCA* 173(4),(5)&(6)**
* Subject to the articles, a shareholder/proxy holder can participate by phone or other communication mediums, so long as all other shareholders are able to communicate with each other – and if they participate this way, they are deemed to be present at the meeting: ***BCBCA* 174**
  + The company isn’t obliged to facilitate this

## Shareholder Agreements

* Right to join with other shareholders to combine voting rights
* At common law, agreements among shareholders as to the manner in which they will vote their shares is lawful: ***Ringuet v Bergeron***
  + The fact that the agreement may potentially involve detriment to the minority doesn’t render it illegal or contrary to public order
* Agreements must be for a lawful purpose though: ***Motherwell v Schoof***
* Two+ shareholders can agree via a written agreement to exercise voting rights according to the agreement: ***BCBCA* 175, *CBCA* 145.1**– a breach of such will result in a breach of contract and the remedies might be provided for in the agreement

## Shareholders’ Meetings

* Types of meetings – annual and special
* Company must hold annual meeting (within 15 months of last one) each year: ***CBCA* 133(1)(b)**
* At least three items of business must be transacted at the annual meeting:
  + Election of directors (***CBCA* 106(3)**) but might not occur every year because a director’s term is 3 years
  + Appointment of auditors (***CBCA* 162(1)**)
  + Presentation of financial statements and auditor’s report to the shareholders (***CBCA* 155(1)**)
* Special meetings can be called if important business comes up between annual meetings – ***CBCA* 143, *BCBCA* 167** allows holders of 5% or more of shares that can vote may requisition a shareholders meeting
* Definitions: ***BCBCA* 1(1)**
  + **Meeting of shareholders**: general meeting, a class meeting, a series meeting, etc
  + **Special resolution:** a resolution passed at a general meeting where notice was given specifying the intention to propose the resolution at least the prescribed number of days before the meeting, the majority of votes were cast in favour of the resolution and the number of votes constituted at least a special majority OR a resolution passed in writing, consented to by all the shareholders entitled to vote at general meetings
    - Resolution passed by a majority of at least 2/3 or signed by all shareholders entitled to vote on that resolution: ***CBCA* 2(1)**
  + **Special majority:** whatever the articles specify between 2/3 and 3/4, or if not specified, 2/3 of the votes
  + **Ordinary resolution:** a resolution passed by simple majority or passed in writing by at least a special majority
    - A resolution passed by a majority: ***CBCA* 2(1)**
* A general meeting must be held in BC or subject to the articles, in a place outside of BC if it is approved by the registrar: ***BCBCA* 166**
* Notice must be sent with date, time and location of meeting at least the prescribed number of days but not more than 2 months before the meeting to each shareholder entitled to attend the meeting and to each director, but if this is accidentally not done, it doesn’t invalidate any proceedings at that meeting: ***BCBCA* 169**
* Entitlement to notice can be waived, or the period of time reduced and does not need to be in writing. Further, attendance in person at a meeting is deemed to be waiver unless the person is attending expressly to object to transacting any business because the meeting was not lawfully called: ***BCBCA* 170**
* A quorum for the transaction of business at a meeting is whatever is established by the articles, or if none is established, then 2 shareholders entitled to vote, or if less, then all shareholders entitled to vote at the meeting, whether present in person or by proxy: ***BCBCA* 172**
  + Subject to the articles, if there is no quorum, shareholders entitled to vote can adjourn the meeting to a set time and place, but can’t do any other business
  + If there’s only one person entitled to vote, that shareholder can constitute that meeting
* Subject to the by-laws, a quorum is present if the holders of a majority of shares entitled to vote at the meeting are present in person or by proxy: ***CBCA* 139**
  + If there’s a quorum at the start of the meeting, the shareholders can proceed with business of the meeting, subject to by laws, even if a quorum is not present throughout the meeting
  + If there isn’t a quorum at the start of the meeting, the shareholders can adjourn the meeting to a fixed time and place, but not any other business
  + If there’s only one shareholder, that shareholder can constitute a meeting
* Unless the articles provide otherwise, a shareholder has one vote per share and can vote in person or by proxy: ***BCBCA* 173(1)**
* Voting must be by poll, if demanded, or in a manner that adequately discloses the intentions of the shareholders or by a show of hands: ***BCBCA* 173(2)**
* Unless a poll is required or demanded, a declaration of the chair that the resolution is carried by the necessary majority or is defeated is conclusive evidence of the fact without proof of the number or proportion of votes recorded: ***BCBCA* 173(3)**
* A shareholder/proxy holder can demand a poll or inspect the ballots and the company must keep each ballot cast for at least 3 months: ***BCBCA* 173(4),(5)&(6)**
* Subject to the articles, a shareholder/proxy holder can participate by phone or other communication mediums, so long as all other shareholders are able to communicate with each other – and if they participate this way, they are deemed to be present at the meeting: ***BCBCA* 174**
  + The company isn’t obliged to facilitate this
* A resolution is deemed to have passed when it is actually passed (duh): ***BCBCA* 176**
* If a subsidiary is a shareholder of its BC holding corporation, the subsidiary can’t vote at a shareholders’ meeting: ***BCBCA* 177**
* Minutes must be kept for shareholders’ meetings and if purported to be signed by the chair of that meeting or the next meeting, is evidence of the proceedings, and unless the contrary is proven, if the minutes have been signed, the meeting is presumed to have been duly held/convened, the proceedings are deemed to have been duly taken, all elections and appointed are deemed to be valid: ***BCBCA* 179**
* Rules applicable to general meetings apply to other shareholders’ meetings as well: ***BCBCA* 181**
* Annual general meeting must be held at least once a calendar year and not more than 15 months after the last annual meeting (and within 6 months of the end of the preceding fiscal year) – the first one ever must be held within 18 months of the company being recognized: ***BCBCA* 182, *CBCA* 133(1)**
  + Shareholders can vote by unanimous resolution to hold the AGM later than is required, consent to all business required to be transacted at that meeting, or waive holding it at all – if it doesn’t pass, the registrar can exercise discretion to hold it later than required as well: ***BCBCA* 182**
  + Directors can call a special meeting any time and can apply to the court for an extension for calling an AGM: ***CBCA* 133(3)**
* Notice of the time and place of the meeting must be sent within the prescribed period to each shareholder able to vote, each director and the auditor – if it’s not a distributing corporation, the prescribed time may be shorter according to the articles: ***CBCA* 135**
  + Notice of a meeting where special business (everything other than financial statements, auditor reports, election of directors/auditors) will be transacted must state the nature of business in enough detail for a shareholder to make a reasoned judgment and the text of any special resolution that will be submitted
* Directors must provide the annual financial statements and possibly any auditor’s reports to shareholders before the AGM takes place: ***BCBCA* 185**
* The court can call a court-ordered meeting of shareholders and give directions it considers necessary if it is impracticable for the company to call/conduct a meeting according to the Act or its articles, if the company fails to hold the required meeting or for any other reason that court feels like – the court can also vary and waive the requirements for quorum or notice of the meeting: ***BCBCA* 186**
* A corporation, shareholder or director can apply for a court review of an election/appointment of a director or auditor: ***CBCA* 145**
  + **2)** list several possibilities of what orders the court may make, but it can make any order it wants

## Unanimous and Consent Shareholders’ Resolution

* Definitions: ***BCBCA* 1(1)**
  + **Consent resolution:** in the case of a resolution that may be passed by ordinary resolution, which is passed unanimously, in any other case, a unanimous resolution, and in the case of a resolution of directors or a committee of directors, a resolution passed in accordance with **140(3)(a)** (resolution can be passed without a meeting)
  + **Ordinary resolution:** a resolution passed by simple majority or passed in writing by at least a special majority
  + **Unanimous resolution:** a resolution passed in writing, consented to by all the shareholders entitled to vote
* A consent resolution is deemed to be a proceeding at a shareholders’ meeting and to be valid and effective if it has been passed at a meeting that follows all the rules: ***BCBCA* 180**
* Shareholders can vote by unanimous resolution to hold the AGM later than is required, consent to all business required to be transacted at that meeting, or waive holding it at all – if it doesn’t pass, the registrar can exercise discretion to hold it later than required as well: ***BCBCA* 182**
* A resolution in writing signed by all the shareholders entitled to vote is valid as if it had been passed at the meeting and satisfies all the requirements of this Act in relation to shareholder meetings for matters required by this Act to be dealt with at a meeting: ***CBCA* 142**
  + A copy of every resolution above shall be kept with the minutes of the meeting and, unless a ballot is demanded, an entry in the minutes declaring a resolution to be carried or defeated, is, absence evidence to the contrary, proof of the conclusion of the resolution, even without proof of the number or proportion of votes
* Shareholders can approve an *ultra vires* transaction and in this case, the formalities of a meeting and a resolution in writing was unnecessary because president/director as the sole shareholder and it was a foregone conclusion that he would have consented to the loan since he instigated it (evidence of consent/unanimity): ***Eisenberg v Bank of NS*** – HOWEVER, ***CBCA* 142** requires these resolutions to be in writing
  + Could possibly be some flexibility in the statutory rule where it would create an absurdity to require records be kept, written files, etc, but always advise your client to follow the statutory requirements – although common law could also be used to possibly get around the writing requirement

## The Conduct of Meetings

* The majority is bound to listen to the opposition but it doesn’t mean that a minority bend on obstructing business and resolved on talking forever shouldn’t be stopped. The majority shouldn’t by tyrannical, but they aren’t bound to listen until everybody is tired of talking and has sat down. The majority should listen to reasonable arguments for a reasonable time: ***Wall v London and Northern Assets Corp***

## Shareholders’ Proposals

* Shareholder proposals becoming popular is Canada but most have little chance of being successfully passed since majority of public companies are controlled by an individual or small group, making it impossible for minority shareholders to secure enough votes
* ***CBCA* 137** allows shareholders to make proposals to be considered at shareholders’ meetings
* Four categories of proposals:
  + Proposal that the articles be amended: ***CBCA* 175(1)**
  + That a by-law be made, amended or repealed: ***CBCA* 103(5)**
  + Shareholders holding at least 5% of shares or 5% of a class of voting shares may make nominations for the election of directors: ***CBCA* 137(4)**
  + Residual category – proposals that do not fall into the category of business or affairs of the corporation (normally managers can refuse) but they’re fine as long as they don’t violate the technical limitations in ***CBCA* 137(5)**
* Support from other shareholders can count towards meeting those eligibility requirements: ***CBCA* 137(1.1)(b)**
* ***CBCA* 137(5)(b.1), *BCBCA* 189(5)(d)** allows management to omit a proposal that does not relate in a significant way to the business or affairs of the corporation
  + Old provision said they could refuse if it was primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes – it doesn’t matter that there was a more specific purpose or target, the overall purpose is what is at issue: ***Varity Corp v Jesuit Fathers***
    - NOTE: The company would have had to do argue this very carefully in BC since *BCBCA* does have the same enumeration of “economic, political, racial, religious, social or similar causes”
  + It must, within the prescribed period, send a notice to the person submitted and give reasons for the refusal: ***CBCA* 137(7)**
* Is it binding on management? Depends on the proposal (ex: if it is a nomination for directors – a nomination is just that, nothing more and nothing less)
* *CBCA* doesn’t explicitly deal with the effect of shareholder proposals dealing with articles, but ***CBCA* 175(2)** suggests by clear implication that a properly passed proposal to amend the articles is binding
* Definitions: ***BCBCA* 187**
  + **Proposal**: a written notice setting out what the submitter wants considered at the next AGM
  + **Qualified shareholder:** in relation to a propose, someone who is a registered/beneficial owner of one+ shares that carry the right to vote at a general meeting and has been for at least 2 consecutive years before the signing of the proposal
    - Doesn’t include someone who failed to present, within the last 2 years, in person or by proxy, at an AGM, an earlier proposal of which the person was the submitter and in response to which the company complied with **189**
    - Is a person who is the registered holder/beneficial owner of at least the prescribed number of shares for at least the prescribed period or must have the support of persons, who in the aggregate, meet those requirements: ***CBCA* 137(1.1)**
  + THIS STUFF ONLY APPLIES TO PUBLIC COMPANIES
* A proposal is valid if it is signed by the submitter and qualified shareholders who, together with the submitter, are registered/beneficial owners of shares that constitutes at least 1% of the issued shares that carry the right to vote or have a fair market value in excess of the prescribed amount: ***BCBCA* 188(1)(a)&(b)**
  + **c)**&**d)** outline the other requirements for a proposal to be valid
  + **2)&3)** A proposal may be accompanied by one written statement supporting the proposal, and if it is submitted, together with the proposal must not exceed 1000 words in length, but doesn’t include the signatures or declarations referred to previously in this section
* A proposal must be accompanied with the name and addresses of the person and supporters and the number of shares those people hold and when they were acquired: ***CBCA* 137(1.2)**
  + A company can request proof of these requirements: ***CBCA* 137(1.4)**
* A company that receives a proposal must send the text of the proposal and the names and mailing addresses of the submitter and supporters, and the text of any accompanying statement to all persons who are entitled to notice of the AGM: ***BCBCA* 189(1)**
  + This information must be sent either in the notice, or within the time for sending it, of the applicable AGM or in the company’s information circular/equivalent, sent in respect of that AGM: ***BCBCA* 189(2)**
* A company must allow the submitter to present the proposal, in person or by proxy, at the AGM, as long as the submitter is a qualified shareholder at the time of that meeting: ***BCBCA* 189(3)**
* A registered holder or beneficial owner of shares entitled to vote at the AGM may submit notice of any proposal and can discuss the matter at the meeting: ***CBCA* 137(1)**
* If the company receives more than one proposal for the same AGM dealing with substantially the same thing, the company must comply with **1)-3)** for the first proposal received and not the other ones: ***BCBCA* 189(4)**
* ***BCBCA* 189(5)** outlines circumstances in which the company doesn’t need to process a proposal in accordance with **1)-4)**
* No company or agent of the company will incur any liability merely because they complied with **189**: ***BCBCA* 190**
* If the company doesn’t intend to process the proposal in accordance with **189** because **189(5)** applies, they must send a written notice of the refusal and a written explanation for its decision, with specific reference to the provision in **189** that the company is relying on within 21 days to the submitter: ***BCBCA* 191(1)**
  + The submitter can apply to the court to review the company’s decision: ***BCBCA* 191(2), *CBCA* 137(8)** and can make orders according to **3)&4)** or whatever it thinks is appropriate
  + An applicant must give the Directors notice of the application to the court: ***CBCA* 137(10)**

## Requisitioned and Court-Ordered Meetings

* Shareholders may requisition directors to call meetings under the ***CBCA* 143, *BCBCA* 167**. This right is limited to shareholders of 5% or more of the issued shares.
* When the requisition is received, the directors must call a shareholders meeting as soon as possible – ***CBCA* 143(3)** (some exemptions apply) – within four months of the requisition being received: ***BCBCA* 167(5)**
  + If the meeting is not called within 21 days, the shareholder that signed the requisition or anyone holding more than 1/40 of the issued shares may call the meeting: ***BCBCA* 167(8), 143(4)**
  + The business that can be conducted at the shareholder meeting is limited in the same way as shareholder proposals are (***CBCA* 102**)
* These meetings are often used in hostile takeovers to remove management, particularly when the acquirer cannot afford to wait until the next annual meeting.
* The court, by application, can order a meeting be called/held/conducted if it would be impracticable to call the meeting within the time or in the manner in which those meetings are supposed to be called, if it is impracticable to conduct the meeting in the manner required by this Act or by-laws or if the court thinks the meeting should be handled within the time or in the manner the court directs. The court can also vary and waive the requirements for quorum or notice of the meeting: ***CBCA* 144**
* A meeting of shareholders (***CBCA* 143(3)(b),** similar to ***BCBCA* 167(7)(a)**) entails a meeting at which a requisitioners’ business may be considered. Amendments to articles can be the subject of requisition meetings. Even if the directors correctly do not call the meeting under an exemption, the requisitioning shareholders can call it themselves – might not be the case under ***BCBCA*** because calling a meeting is subject to exemptions that are not included in the *CBCA*: ***Air Industry Revitalization Co v Air Canada***

## Removal of Directors

* A company can remove a director before their term is over by **a)** special resolution or **b)** according to the method or resolution specified in the articles: ***BCBCA* 128(3)**
* Shareholders can remove directors by ordinary resolution at a special meeting or if the right to elect is held exclusively by a certain class of shares, then at a meeting of that class of shares: ***CBCA* 109**
* If the right to elect/appoint one+ directors is exclusive to a certain class or series of shares, then a director so appointed/elected can only be removed by a special resolution of those shareholders or if the articles provide that such a director can be removed by a majority vote of less than that required for a special resolution, or removed by some other method, then by that resolution or method specified: ***BCBCA* 128(4)**
* If there is a vacancy because a director has been removed, it can be filled by the shareholders at a shareholder meeting, or not filled by the shareholders, then by the shareholders or by the remaining directors: ***BCBCA* 131(a)**

# Shareholders’ Remedies and Relief

* **Derivative**: where all shareholders are affected equally by the impugned conduct and the real plaintiff is the corporation
* **Personal**: when certain shareholders have some grievance that is peculiar to themselves
* **Oppression**: shareholder can commence an action of either a personal or derivative nature under the oppression remedy
* All shareholder-initiated litigation suffers from a “free rider” problem – benefits of a successful suit are likely to be realized by some or all of the shareholders
  + Where the substantive rights of shareholders are broadly drawn, there is a greater incentive to sue, overcoming, to a degree, the free rider problem

## The Derivative Action

* Often the wrongdoing is attributable to management and therefore not redressed – for this reason derivative actions are a tool of accountability.
* **Pros** = accountability and remedial instrument. **Cons** = litigation costs, procedural costs, minimal gains sought for large action. EX: The litigation itself could hurt the company and cause potential lost opportunity. The mechanism can potentially be abused.
* Potential way of policing management and reducing agency costs
* Two steps: apply for leave to bring derivative action; then bring action in corporations name

## Derivative Action – Common Law – The Rule in *Foss v Harbottle*

* The Rule: The corporation itself is the proper complainant and it is up to the shareholders at a general meeting to determine whether to bring suit
  + Extreme application of ***Salomon***
* Internal affairs were a matter for the majority – the decision whether or not to bring suit in the company name belongs, at common law, to the general meeting where majority rules
  + Four exceptions to “majority rules”: ***Edwards v Halliwell***
    - **Where an act is *ultra vires*:** the transaction can't be confirmed by the majority
    - **Fraud on the minority:** a very narrow exception – where the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders action
    - **Special majorities:** an individual could sue if the matter was something that could only be properly done with the assent of some special majority
    - **Personal rights:** where the personal and individual rights of membership of the plaintiff have been invaded – majority rules has no application

## The Statutory Derivative Action

* ***CBCA* 239(1)** allows a complainant to apply to a court for leave to bring an action in the name and on behalf of a corporation
  + Complainant must first give directors notice of intent to apply to the court at least 14 days before application is made
  + Second, complainant must be acting in good faith
  + Third, bringing of the action must **appear** to be in the best interests of the corporation
* Court has a large degree of judicial discretion
* ***BCBCA* 232, 233:** criteria to bring an action includes reasonable efforts by the complainant to cause the directors to commence the action, notice, good faith and the requirement that the legal proceeding appear to the court to be in the best interest of the company
* **Complainant** under ***BCBCA* 232** is a shareholder, director, beneficial owner of a share or the company or any other person whom the court considers an appropriate person, under the ***CBCA* 238** a current or former registered holder/beneficial owner of a security of the corporation or any of its affiliates, a current or former director or officer of a corporation or any of its affiliates, the director or any other person the court deems a proper person to make an application
* The court can make whatever order it wants to with a derivative action, including, an order authorizing the complainant to control the conduct of the act, an order giving directions for the action, an order that any amount payable by the defendant should go directly to any present and former security holders and an order requiring the corporation or subsidiary pay reasonable legal fees incurred by the complainant: ***CBCA* 240**
  + ***BCBCA* 233** may cover legal fees and disbursements
* Evidence of shareholder approval should not be the sole reason for staying or dismissing a derivative action: ***CBCA* 242**
* The court can order the corporation or its subsidiary to pay the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for those on final disposition of the action: ***CBCA* 242(4)**
* The applicant must be able to show some evidence which *prima facie* shows that it’s in the best interest of the corporate – don’t have to prove or give evidence of a *prima facie* case: ***Re North West Forest Products Ltd***
* The Court merely has to be satisfied that it appears to be in the best interest of the corporation. An arguable case must exist and discretion is broad – the court can use common law logic. Reasonable notice does not require every possible cause of action to be included – the failure to specify all possible causes of action will not of itself invalidate the notice as a whole: ***Re Bellman and Western Approaches***
* Don’t have to be a shareholder when the acts complained of occurred, just when you bring the application for leave for a derivative action: ***Greenshields of Canada Ltd v Kalmacoff***
* The purpose of derivative action is not to benefit the plaintiff more than the company – litigation costs shouldn’t be recovered for personal matters: ***Turner v Mailhot***

### Jeffery MacIntosh, “*BCE and the People’s Corporate Law: Learning to Live on Quicksand”*

* Until *Peoples* and *BCE,* derivative actions defined as shareholders hurt co-equally and indirectly
  + Reflective of “the corporation” meaning shareholders – since it was brought on behalf of the corporation
* In contrast, personal actions arise when single shareholder or subset of shareholders injured
* However, after *BCE* corporation was not to be confused with any single subset of stakeholders
  + How can one demonstrate injury to corporation then?
  + It was obviously not enough show injury to one constituency
* What evidence must be adduced to show harm to the corporation? Which constituencies and how many of them?
  + Not answered clearly in *BCE*

## The Personal Action – remedy = damages

* The fictional legal entity is viewed by the courts as an unbreachable barrier behind which the directors are safe from personal shareholder attack – but directors act in a variety of capacities
* Directors can act improperly not just in a breach of duty by the agent, but in causing the company to perform a corporate act in an improper or irregular manner to the direct detriment of the shareholders
* ***Smith v Fawcett***: no question of the standing of the individual plaintiff to challenge the directors’ actions
* ***Piercy v Mills, Smith v Fawcett, Galloway v Hale Concerts Society***: in causing the company to do certain acts which are primarily of an internal nature and which primarily affect shareholders, directors assume a fiduciary obligation toward the company as a whole
* In the US directors and sometimes majority shareholders owe a fiduciary duty to shareholders – but this isn’t the case in the Commonwealth
* A breach of the duty of care can found a personal action – where a legal wrong is done to shareholders by directors or other shareholders, the injured shareholder can bring a personal action: ***Goldex Mines***
* Auditors had no duty of care to individual shareholders (policy reasons – remember torts!), and this loss from the correct preparation of financial statements was an action only the corporation could bring – where, however, a separate and distinct claim can be raised with respect to a wrong done to a shareholder, a personal action could exist simultaneously: ***Hercules Management***

## The Statutory Oppression Remedy

* Cohen Committee recommended giving the court power to put an end to an act of oppression – four situations where the remedy would be appropriate:
  + Where controlling directors unreasonably refuse to register transfers of the minority’s holdings to force a reduced sale price
  + Where directors award themselves excessive remuneration that diminishes the funds for dividends
  + To prevent the issue of shares to directors and others on special/advantageous terms
  + Refusal to declare non-cumulative preference dividends on shares held by the minority
* ***CBCA* 241**: requires the applicant show that the conduct is oppressive or unfairly prejudicial to or that it unfairly disregards the interests of any security holder, creditor, director, or officer – not necessary to establish that grounds for winding-up the corporation exists
  + Applies to isolated acts and does not require continuing course of conduct
* ***BCBCA* 227** offers protection from threatened acts, but doesn’t list the ground of “unfairly disregards” and is arguably narrower in scope
* Conduct of officers not explicitly countenance by the oppression provision, but it does embrace any conduct of the corporation that is oppressive (acts of senior officers are acts of the corporation)
  + Acts of officers that are breaches of fiduciary duty are also drawn into the oppression remedy
* Oppression remedy is swallowing up the law of fiduciary duties:
  + Any breach of fiduciary duty is almost certain to be characterized as oppression
  + Oppression remedy offers a broader substantive cause of action
  + Remedies available under oppression remedy are broader
  + Courts have allowed derivative type actions to proceed under oppression remedy
* **Complainant** under ***BCBCA* 227** is a shareholder, director, beneficial owner of a share or the company or any other person whom the court considers an appropriate person, under the ***CBCA* 238** a current or former registered holder/beneficial owner of a security of the corporation or any of its affiliates, a current or former director or officer of a corporation or any of its affiliates, the director or any other person the court deems a proper person to make an application
* An oppression action can be brought on the ground that the affairs of the company or the powers of the directors are being exercise in a manner oppressive to one+ shareholders including the applicant, or that some act of the company, or some resolution has been passed that is unfairly prejudicial to one+ shareholders, including the applicant: ***BCBCA* 227(2)**
  + ***BCBCA* 227(3)** outlines the various remedies/orders the court can make, but it can make whatever order it considers appropriate
* Evidence of shareholder approval should not be the sole reason for staying or dismissing a derivative action: ***CBCA* 242**
* The court can order the corporation or its subsidiary to pay the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for those on final disposition of the action: ***CBCA* 242(4)**
* Two stage test: 1) look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. *Does the evidence support the reasonable expectation asserted by the claimant?* 2) If a breach of a reasonable expectation is established, one must consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in *CBCA* s241(2). *Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms of a relevant interest?*: ***Re BCE Inc***
* Oppression is an equitable remedy – it gives a court broad, equitable jurisdiction to enforce not just what is legal, but what is fair: ***Wright v Donald s Mountgomery Holdings Ltd*** – the court should look to business realities (***Scottish Cooperative Wholesale Society***). What is just and equitable is judged by the reasonable expectations of stakeholders in the context and in regard to the relationships at play – it is fact specific.
  + Court seem to conflate oppression remedy and the duty of loyalty
  + Concept of acting in the best interests of the corporation is imported from s122(1)(a) into the oppression remedy
  + The two have independent purposes – acknowledged by the courts
  + The oppression remedy establishes a different, and lower threshold for liability than s122(1)(a)
  + The drafting of the oppression remedy doesn’t permit a complainant to succeed by showing harm to the corporation – only harm to a security holder, creditor, director or officer
  + Same drafting expressly forbids a court from taking into account the full range of interests that the SCC hints might be considered by directors in prosecuting their duty to the corporation
  + Parliament drafted these provisions differently and so shouldn’t be conflated by the courts
* Wording grants the court a broad power to do justice and equity in the circumstances, where a person, who otherwise would not be a “complainant” ought to be permitted to bring an action.
  + Two possible reasons to allow creditors standing (not exhaustive): 1) The act/conduct of management constitutes using the corporation as a vehicle to commit fraud on the applicant, 2) The Act/conduct of management constitutes a breach of underlying expectation arising from the circumstances of the applicant’s relationship (like the *BCE* test) – must be a registered or secured creditor – the oppression remedy is broad, but not meant to be available to everyone: ***First Edmonton Place Ltd***
  + Other applicants deemed “proper persons” included the widow of a deceased shareholder (***Lenstra v Lenstra***), a trustee in bankruptcy (***Olympia & York Developments Ltd (Trustee of) v Olympia & York Realty Corp***) and a custodian of funds set up for immigrant investors (***HSBC Capital Canada Inc v First Mortgage Alberta Fund Inc***)
* Why would a person bring an oppression action over an ordinary civil claim?
  + Oppression remedy may be commenced by way of application, without pleadings or discovery
  + The relief that a court can provide under the oppression remedy is broader and more flexible
  + Blurry state of Canadian law on the nature and type of fiduciary duties owed to non-shareholder stakeholders has created the need for an alternative flexible remedial option
  + At common law, what was oppressive or “fraud on the minority” was restricted to takings of property or other clearly egregious interferences with minority shareholder rights or expectations
    - ***Elder v Elder & Watson***: the conduct complained of should at least involve a visible departure from the standards of the fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely
* Oppression is not simply a codification of the common law standard – it is broader and should be interpreted as such in an enabling manner. Each case turns on its own facts – what is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another. The relationship between the parties is important (***Naneff v Con-Crete Holdings Ltd***) – look to the history of transactions, is the impugned corporate action *bona fide*?: ***Ferguson v Imax Systems Corp***
* The court has discretion to grant a remedy for oppression, but it must rectify the oppression – not tip the balance in favour of the hurt party. The court should do as little as possible and only to the extent necessary to redress the unfairness. Further, as per ***Re HR Harmer*** it is only the interest of a shareholder as such that is protected – an applicant may also have personal interests, but it is only their interests as a shareholder which we must be concerned with. A remedy that rectifies cannot be a remedy which gives the shareholder something that even he never could have reasonably expected: ***Naneff v Con-Crete Holdings Ltd***

## Compliance and Restraining Orders

* ***CBCA* 247** allows a complainant or creditor to seek a compliance or restraining order against a variety of persons relating to abrogations of the statute, regulations, articles, by-laws, or a unanimous shareholder agreement
* ***BCBCA* 229** allows for the correction of a corporate mistake – court may make an order to correct an omission, defect, error or irregularity in the conduct of the company that leads to a breach of the Act, causes non-compliance with the memoranda or articles or renders ineffective a shareholders’ or directors’ meeting – court has wide powers to rectify such a mistake
  + Unless the court orders otherwise, there is protection for third parties who acquire rights for valuable consideration and without notice of the corporate mistake: ***BCBCA* 229(4)**
* The corporation and the shareholders are bound by the articles and notice of articles from the time of recognition: ***BCBCA* 19**
* If a company or any director, officer, shareholder, employee, agent, auditor, trustee, receiver, receiver manager or liquidator of a company contravenes or is about to contravene this Act, articles, regulations, etc, a complainant may also apply to the court for an order that the person contravening comply with or refrain from contravening: ***BCBCA* 228**
* The compliance provision does not confer any alternative, concurrent, or complimentary rights to those contained in the derivative action – if the corporation is the proper entity to be bringing the action, then the compliance provision can’t be used and a derivative action must be sought. The compliance remedy is limited merely to mechanistic provisions: ***Goldhar v Quebec***

## The Appraisal Remedy (Dissent Proceedings)

* The right of a shareholder to require the company to purchase his shares at an appraised price if the company takes certain “triggering” actions from which he dissents
* As a rule, it will only arise in situations involving major structural changes, often described as fundamental changes, and while the enterprise is continuing
* May lead not only to minority relief, but also to more diligent efforts by management and the controlling shareholders
* Leading critic of the remedy – Manning:
  + It ill-serves the shareholder who uses it since the legal technique is laborious, slow, technical and expensive and the awards are unpredictable (but so are many other legal proceedings)
  + Argues that the corporation is ill-served by an appraisal right because it creates a drain on cash flow at a critical time, frightens creditors and suppliers and uncertainty is created by the unknown number of dissenters
* Some argue it should be limited to private companies since publically held companies have more remedies available
  + Private company shareholders can only sell to the majority and public shareholders have the market
* Serves as a check on management to force the insiders to tailor their plans to minimize the number of dissenters by getting the best deal possible
* Most difficult task is to define the appropriate class of triggering events
* Key question: what is the value of the dissenting shareholder’s shares?
  + ***Domglas Inc v Jarislowsky, Fraser & Co***: four approaches to valuation:
    - Market value – market price
    - Assets approach – analyzes the fair market value of the net assets of the corporation
    - Earnings or investment value approach – expected earnings of the corporation
    - Mix of each
  + ***Smeenk v Dexleigh Corp***: valuation principles:
    - The court must itself value the shares – no onus on the applicants
    - The court must proceed on the basis of evidence offered by the parties
    - Valuation of shares under s190 of the *CBCA* is a matter of assessment in accordance with the facts of the particular case
    - The advantages of hindsight are not available to the court or the applicants
    - The applicants are not entitled to obtain the benefits of the amalgamation, having dissented from the transaction
* Court has discretion to select a valuation method to use
* Definitions: ***BCBCA* 237**
  + Dissenter: shareholder who is entitled to do so, sends a notice of dissent as per **242**
  + Notice shares: the shares in respect of which dissent is being exercised under the notice of dissent
  + Payout value:
    - Dissent of a resolution: fair value that notice shares had immediately **before** the resolution passed
    - Dissent of an arrangement approved by court order under **291(2)(c)**: fair value that the notice shares had immediately **before** the resolution passed adopting the arrangement
    - Dissent of an arrangement approved by any other court order: fair value that the notice shares had at the time specified by the court order
      * Doesn’t include appreciation or depreciation in anticipation of the corporate action approved or authorized by the resolution/court order, unless exclusion would be inequitable
    - A dissenting shareholder is entitled to be paid by the corporation the fair value of the shares determined as of the close of business on the day before the resolution was adopted or the order was made: ***CBCA* 190(3)**
* A shareholder of a company, even if they don’t have voting shares, is entitled to dissent as per ***BCBCA* 238(1)**
* A shareholder may dissent in the scenarios outlined in ***CBCA* 190(1)**
* A shareholder wanting to dissent must prepare a separate notice of dissent for themselves and each person who beneficially owns shares registered in the shareholder’s name and on whose behalf the shareholder is dissent: ***BCBCA* 238(2)**
* A dissenting shareholder should send a written objection at or before any meeting at which a resolution from **1)** or **2)** is to be voted on, unless the corporation didn’t give the shareholder notice of the purpose of that meeting and their right to dissent: ***CBCA* 190(5)**
* A beneficial owner who wants to dissent must dissent with all their shares where they are both the registered and beneficial owner and cause each person who is the registered owner of their beneficial shares to also dissent with those shares: ***BCBCA* 238(3)**
* A shareholder can’t waive their right to dissent generally, but can, in writing, waive the right to dissent to a particular corporate action: ***BCBCA* 239(1)**
* If a resolution is one which a shareholder is entitled to dissent, the company must, at least the prescribed number of days before the meeting, send to all the shareholders, regardless of right to vote, a copy of the proposed resolution and a notice of the meeting containing a statement advising of the right to send a notice of dissent: ***BCBCA* 240(1)**
  + If the resolution is to be passed as a consent resolution or as a resolution of directors and the earliest possible date it could be passed is specified in the resolution, the company may, at least 21 days before the specified date, send to all the shareholders, regardless of right to vote, a copy of the proposed resolution and a statement advising of the right to send a notice of dissent: ***BCBCA* 240(2)**
  + If a resolution was or is to be passed as a resolution of shareholders or directors and didn’t comply with **1)** or **2)**, the company must, before or within 14 days after the passing of the resolution, send to all the shareholders who didn’t consent or vote in favour, regardless of right to vote, a copy of the resolution, a statement advising right to dissent and if the resolution passed, notification of that and the date it passed: ***BCBCA* 240(3)**
  + The corporation must send the dissenting shareholder notice that the resolution has been adopted within 10 days of its adoption, unless those shareholders voted for the resolution or withdrew their objection: ***CBCA* 190(6)**
* If a court order provides right to dissent, the company must within 14 days of the company receiving a copy of the order, send to each shareholder who has the right of dissent a copy of that order and a statement advising of their right to send a notice of dissent: ***BCBCA* 241**
* ***BCBCA* 242** outlines the requirements of the notice of dissent, including the prescribed number of days it must be sent in specific scenarios
* A company that receives a notice of dissent must send a notice indicating intention to act on the authority of the resolution or court order or a notice that they have already done so: ***BCBCA* 243**
* If a dissenter receives a notice under **243** and intends to proceed with the dissent, they must send to the company, within a month after the date of the notice, a written notice that the dissenter wants to company to buy all its notice shares, the certificates of those shares: ***BCBCA* 244**
  + If they do this, the dissenter is deemed to have sold their notice shares and the company is deemed to have purchased those shares ***BCBCA* 244(3)**
* Within 21 days of receiving a notice under **(6)** or of learning of the adoption if there was no notice, a dissenting shareholder must send the corporation a written notice with their name and address, the number and class of shares that they dissent with and a demand for payment of fair value: ***CBCA* 190(7)**
* A company and dissenter who has complied with **244** may agree on the payout value and then the company must promptly pay that amount or if **(5)**, send a notice to the dissenter that the company is unable lawfully to pay dissenters for their shares: ***BCBCA* 245(1)**
  + If they don’t agree on the payout value, the company may apply to the court to determine the amount and then the company must promptly pay that amount or if **(5)**, send a notice to the dissenter that the company is unable lawfully to pay dissenters for their shares: ***BCBCA* 245(2)&(3)**
  + A company must not make a payment if there are reasonable grounds for believing the company is insolvent or the payment would make the company insolvent: ***BCBCA* 245(5)**
  + A company must not make a payment if there are reasonable grounds for believing the payment would leave the company unable to pay its liabilities or the value of their assets is less than the aggregate of its liabilities: ***CBCA* 190(26)**
* No later than 7 days after the action approved by the resolution is effective or when they receive notice from **(7)**, send to each dissenting shareholder who sent a notice a written offer to pay for their shares in an amount the directors consider to be fair value, with an explanation of how that value was determined, or a notification that it can’t pay for their shares if **(26)** applies: ***CBCA* 190(12)**
* ***BCBCA* 246** outlines the events that would cause a loss of the right to dissent
* Shareholders are entitled to the return of their shares and rights in the various scenarios in ***BCBCA* 247**

## Investigations

* Effective exercise of shareholder remedies requires possessing the relevant information
* Statutory aid: court-ordered investigation of the corporation’s affairs where the shareholder-applicant can satisfy the court that there are circumstances that warrant the court order
  + Should be distinguished from the shareholder-appointed investigations which are mounted by a shareholders’ resolution
* Main role of an inspector is to discover facts
* Courts have been reluctant to order an investigation, especially where it appears that some other source of information is available
* An investigation may be authorized in connection with an oppression action: ***CBCA* 241(3)(m)**
* The court may, on application of one+ shareholders who together hold at least 20% of the issued shares of a company, appoint an inspector and determine the manner and extent of the investigation: ***BCBCA* 248(1)**
* A security holder or the Director may apply to a court having jurisdiction where the corporation has its registered office for an order for an investigation of the corporation or any of its affiliates: ***CBCA* 229(1)**
  + The reasons for which the court may make this order are outlined in ***BCBCA* 248(3), *CBCA* 229(2)**
  + The court can order whatever it thinks fit including those outlined in ***CBCA* 230(1)**
* A court ordered inspector must make a report for the court and send a copy to the company and whoever else the court orders: ***BCBCA* 253**
  + ***CBCA* 230(2)** just requires it be sent to the Director
* An inspector’s report is admissible in any legal proceedings as evidence of the opinion of the inspector: ***BCBCA* 254**

## Winding-Up

* “Just and equitable rule” – each case must be decided on its facts and is construed liberally as it is an equitable remedy
  + No general rule can be laid down as to when winding-up is ordered
* ***Baird v Lees*** – discretion is not unbounded – must be judicially exercised and the grounds must be given which can be examined and justified
* Well-recognized reluctance on the part of the courts to interfere in the internal affairs of a corporation – business judgment rule, etc – unless its conduct is so gross as to shock the conscience of the court
* What circumstances constitute “just and equitable grounds” for winding-up?
  + Loss of substratum: ***re German Date Coffee Company*** – that there was an impossibility of carrying on the business of the company, as the objective contemplated in the formation of the company
  + Justifiable lack of confidence: ***Loch v John Blackwood*** – there must lie a justifiable lack of confidence in the conduct and management of the company’s affairs – lack of confidence must be grounded on the conduct of the directors in regard to the company’s business
  + Deadlock: ***Re Yenidje Tobacco Co Ltd*** - a complete deadlock between the two parties, that the corporation could not continue to function
  + The Partnership Analogy: ***Re Yenidje Tobacco Co Ltd*** – where the relationship between the parties to a corporation is essentially that of a partnership, the principles for dissolution of a partnership should apply
* ***CBCA* 214** is not limited to the “just and equitable” ground
* In a company that is analogous to a partnership, a lack of trust and cooperation between “partners” may act to incapacitate the company in the same sense that actual voting deadlock could
* On a winding-up application, the court is not limited to a decision between winding-up and doing nothing – can also order a remedy for relief as applicable under the oppression remedy
* A company, shareholder, beneficial share owner, director or any other person, including a creditor, that the court considers to be an appropriate person, may make an application and the court may order the company be liquidated and dissolved if an event occurs that the articles states leads to the company being liquidated and dissolved or the court otherwise considers it just and equitable: ***BCBCA* 324**
* A court may order the liquidation and dissolution of a corporation on the application of a shareholder if the court is satisfied any act or omission of the corporation have resulted in, the business affairs have been conducted in a manner or the powers of the directors have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer or if a USA entitles a complaining shareholder to demand dissolution or it is just and equitable: ***CBCA* 214**