# Answer Map

**IF THE DIRECTORS HAVE FUCKED UP**

X likely wants [remedy], can argue argue [doctrines]. However, before X can get [remedy] from these doctrines, they must show they are able to bring the complaint and that there are grounds for the complaint. Argue:

1. They breached their FD/DOC
   1. Discuss what the FD/DOC is
2. Directors can be liable under [sections of the statute]
3. How did they breach their FD/DOC
   * self-dealing
   * competition
   * corporate opportunity

3. Argue doctrines DA/OR

Are they a complainant?

Do they have a claim?

What can the court do?

4. Argue personal remedy

5. Argue appraisal

6. Argue restriction, compel order

7. Directors can argue sections for relief from liability

**IF THE CLIENT WANTS TO CREATE A CORPORATION**

1. Discuss corporations generally
2. Determine which jurisdiction—BCA or CBCA
   * if BCA—>sign k of incorporation
   * if CBCA—>register
3. Identity of incorporators
4. Name
5. Registration
6. Notice of articles, contents of articles
7. Any restrictions?
8. Follow specific rules for continuing on in BC or elsewhere

**IF THERE IS A K, BUT NO CORPORATION AT ALL—CL**

What kind of mistake?

* + if no mistake as to existence of company—>k is between facilitator and third party personally (Kelner)
  + common mistake—>k is void (Black, maybe not good law?)
  + unilateral mistake + no intention of knowledgeable party to be personally bound—>k is void (Wickberg)
    - if there is intention to be personally bound—> k between parties personally

**NB: if dealing with the CBCA and the k oral—>USE THE COMMON LAW**

**IF THERE A PRE-INCORPORATION K, BUT COMPANY EXISTS—STATUTES**

# Partnerships

## Sole Proprietorships

**Partnership Act ss 1, 88, 89(1)**

* SP when person engaged in business for trading, manufacturing, mining—not associated in partnership **but uses some name or designation to indicate plurality of members**
  + must register within 3 months

## General Partnerships

* Two or more people merged together carrying on business with view to profit over a period of time (**s 2 PA**)
  + business includes every trade, occupation, and profession (**s 1(1) PA**)
  + **s 1** definitions
    - GP, business\
    - governing jurisdiction: jurisdiction that governs interpretation of partnership k
* Rights and responsibilities of general partnership
  + presumed total equality between partners, basic fiduciary relationship
    - partnership gets any opportunities, no k to avoid
    - property and liability shared jointly
* **s 4**: interrelation of parties determines whether there is a business being run in common
  + (a) collective ownership if property does not PF indicate partnership
  + (b) sharing gross returns does not make it a partnership
  + (c) rebuttable presumptions of partnership
    - receipt of share of profits—**not** creditor getting paid back, **not** k for remuneration of employee
* **s 7**: partners bind each other for liability unless bad partner acted without authority, other person knows they had no authority or didn’t think they were a partner
* **s 91**: rules of equity apply to partnerships
* Objectively ascertained intention required to determine whether there is a partnership (**LePage**)
  + right to be consulted over management decisions likely leads to being a partner (**Pooley**)

**AE LePage Ltd c Kamex Developments Ltd**

F: Building sold during an exclusive listing arrangement to another agent.

I: Partnership?

H: No

R: Mere fact that property is owned in common and that profits are derived therefrom does not constitute co-owners as partners. Whether or not position of co-owners becomes that of partners depends on their intention as disclosed by all the facts of the case.

**Pooley v. Driver**

F: Partnership agreement to carry on manure business, partnership liquidated and creditor seeks payment—Ds were not in the agreement but held partnership and shared in profits.

I: Liable as partners?

H: Yes

R: Rely on the whole character if the transaction to determine partnership or not.

#### Legal Personality of partnership

* **s 1.1 partnership property**
  + whatever partners bring to partnership is part of partnership property, presumptively share in the property equally (can modify through k)
    - ROW can access property, but partners have no personal claims against each other
* **s 16(1)**: partner is someone who represents themselves as such through words or writing—>liable through estoppel by representation
* Partnership is not a separate legal person from the partners (**Thorne)**

**Partnership Act s 1.1, 16, 81(1), 89(1)**

**Thorne v. NB (WCB)**

F: Guys enter into partnership agreement, T gets injured on the job and applies to WCB claiming he is a workman.

I: Was he a workman employed by the partnership?

H: No

R: A partnership not a persona juridica, separate and distinct from the individuals composing it.

#### relationship of partnership to each other and third parties

* **s 11**: partner liable jointly for all debts and obligation incurred while being a partner
* **s 14**: jointly and severally liable for things under s 12 and 13
  + **s 12**: wrongful act or omission done by partner for business of firm, on authority as partner
  + **s 13**: misappropriation of property
* **s 22**: partner owes FD to firm, cannot k out
* **s 23**: partnership property should be used only in accordance with partnership agreement, can k out
* **s 28**: majority cannot expel one partner unless there is express agreement and done in good faith
* **s 29:** any partner can end partnership with notice of intention (if no express term)
  + **s 35**: partnership dissolves on expiration of term or notice of intention to dissolve
  + **s 36**: dissolution by death or bankruptcy
* **s 27**: partnership agreement
  + (a) entitled to share equally in capital, contribute equally towards firm’s losses (but not firm business)
  + (b) indemnify partners for personal liability incurred through business
  + (c) may take part in management, but not required to
  + (f) not entitled for remuneration in acting for partnership business
  + (g) all partners must consent to new partner
  + (h) ordinary matters may be decided by majority agreement (change in business needs unanimity)

PA ss 7, 11, 12, 14, 16, 19, 22, 23(1), 24, 27, 28, 29, 31, 35, 36, 37, 38(1), 42

#### General Partnership Law Write up

A partnership is composed of two or more people merged together, carrying on business with a view to profit over a period of time (s 2 PA). This business includes every trade, occupation, and profession (s 1(1) PA). The governing jurisdiction of a partnership is the jurisdiction that governs the interpretation of the partnership k (s 1(1) PA).

**General Partnerships**

A general partnership is defined in s 1 of the PA as a partnership that is neither an LLP or an LP. A “firm” is the collective term used to refer to persons who have entered into a partnership (s 1). A GP presumes total equality between partners, who owe each other a basic fiduciary relationship of utmost good faith. Therefore, property and liability are shared jointly. Collective ownership alone is not sufficient to prove a partnership exists (s 4(a)), nor will sharing gross returns in the profits (s 4(b)). Rather, there must be an objectively ascertained intention between the would-be partners to prove a partnership exists (LePage). Thus, whether or not individuals are in a partnership depends on the whole character of the transaction and relationship (Pooley). If a partnership exists, whatever the partners bring to the partnership becomes partnership property, and the partners presumptively share in the property equally (s 1.1 PA). Section 27 contains the requirements of a partnership agreement. The rules in s 27 are default provisions and stipulate that (a) all P’s must share equally in the capital/profits, (b) every firm must indemnify on the basis of several liability, (e) every P can take part in management, and (h) an ordinary matter will decided by a majority.

*Who is a partner?*

A partner is someone who represents themselves as such through words or writing, and will be liable through estoppel by representation. An individual with the right to be consulted over management decisions may be deemed a partner (Pooley). The partnership itself is not a separate legal entity from the partners (Thorne). Therefore, a partner cannot be an employee of the partnership.

*Liability of general partners*

A partner is liable jointly for all debts and obligations occurred while a member of the partnership (s 11). A partner is further j/s liable under s 14 for wrongful acts or omissions done by other partners for business of the firm on their authority as partner (s 12) and for any misappropriation of property (s 13). Partners owe a fiduciary duty to the firm, and cannot k out of this duty (s 22). Furthermore, the partnership property should only be used in accordance with the partnership agreement, and partners cannot k out of this requirement (s 23).

*Ending the partnership*

According to s 29, any partner can end the partnership with notice of intention if there is no express term in the partnership agreement that determines the process of termination. A partnership dissolves upon the expiration of the term within the partnership agreement or on notice of intention to dissolve (s 35). Dissolution will also occur upon death or bankruptcy of a partner (s 36).

## Limited Liability Partnerships

* s 11 and 14 (including 12 and 13) do not apply to LLPs (**s 95(2)**)
* **s 96**: must apply to create an LLP
* **s 97**: only certain professions can register as LLPs
* **s 102**: change in partnership does not change it being an LLP
* **s 104(2)**: personal liability when partner is (a) negligent, (b) another partner/employee is negligent and you knew about it and did not reasonably prevent it
* **s 105**: similar liability to directors of a corporation

An LLP restricts liability under the PA by making ss 11 and 14, which includes ss 12 and 13. Under s 104(2) a partner in an LLP may is still liable when the partner is (a) negligent, or (b) when another partner/employee is negligent and the partner knew about the negligence and did not reasonably prevent it. LLP can only be created through an application (s 16), and only apply for certain professions (s 97).

## Limited Partnerships

* **s 50**: must be at least one general and one limited partner
* **s 51**: must state what the business and details about the general partner
  + (2)(d) must state the term for which the GP exists
  + also describe the LP’s stake in the enterprise
* **s 52**: can be GP and LP at the same time
  + (2) has same rights and powers as GP, but also has rights against other partners as LP
    - with respect to third parties GP/LP is liable, but have ability to participate in management + preferential treatment on investments
* **s 57**: LP not liable for obligation except in amount of contribution
* **s 64**: LP not liable as GP unless they take part in management of business
  + **Haughton, Nordile**: test looks to the role the LP took and whether they were involved in management

**Haughton Graphic Ltd v. Zivot**

F: LP promoted magazine, goes bankrupt and creditors sue limited partners personally.

I: Are limited partners personally liable because they took part in business?

H: Yes

R: Overwhelming evidence that both evidence that limited partners took part in control of partnership. If limited partner takes part in the control of the business, he becomes liable under the statute as a general partner—unlimited liability to the extent of his assets. Statute applies if two conditions are met: person is a limited partner and takes part in the control of the business.

**Nordile Holdings Ltd v. Breckenridge**

F: B is limited partner of ARP/minority GP and director of AA; AA is GP of ARP—>creditor of ARP sues B personally

I: Liable?

H: No

R: When B participated in direction of AA, was solely in capacity of director, which is sufficient to exclude liability under s 64.

In an LP, there must at least one general and one limited partner (s 50). The application for an LP must statute the nature of the business venture and details including, including the term of the partnership and the limited partner’s stake in the enterprise (s 51(2)(d)). An individual can be a GP and an LP simultaneously with the the same rights and powers of a GP as well as the right against other partners as an LP (s 52). In this scenario, with respect to third party outsiders the GP/LP is liable, but has the ability to participate in the management and will have preferential returns on investments. A limited partner is not liable for any obligation except the amount of their initial contribution (s 57), and are not liable as a GP unless they take part in the management. Whether an LP is sufficiently involved with the management to cross over into being a GP depends on the role the LP took an active part in the control of the business (Haughton, Nordile).

# So you Want to Create a Corporation: WTF does that Even Mean?

* Creature of statute, not CL—> basic idea is to shield shareholders by creating a separate legal personality
  + corporation is a separate and independent entity from its members (**Salomon**)

**Salomon v. Salomon & Co Ltd**

F: Salomon sold business (40,000 shares for one pound each) to limited company—only shareholders in the company were him and his family. Total sale was 38,000 pounds. Creditor claimed company was mere alias of Salomon.

I: Can creditor sue Salomon personally?

H: No

R: Nothing in statute requiring subscribers to memo of incorporation to be independent from the company. Company at law at law is a different person from the subscribers to memo. Company at law is not an agent of any subscribers or managers/directors. Subscribers as members not liable except how statute provides. Corporation’s legal personality is separate and independent from members’ personalities.

## Limited Liability and Creditor Protection

* **BCA s 87, CBCA s 45(1)**: shhs not personally liable subject to limited circumstances
* Directors, officers, employees personally liable for tortious conduct (**ADGA**)
  + **Said exception**: if employee shows they acted BF in interests of corporation, cannot be sued for inducing breach of k
* Corporation is separate legal personality—directors can be employees/managers of them (**Lee**)

**ADGA Systems Int’l Ltd v. Valcom**

F: P claims D raided its employees.

I: Are D’s directors personally liable?

H: Yes

R: Once legally incorporated, a company must be treated like any other independent person with rights and liability appropriate to itself. If P wants an independent cause of action against principles, no danger of corporate veil. Officers, directors, and employees of corporations are personally responsible for their tortious conduct even though that conduct was directed in BF manner to best interests of the company, subject Said exception.

**Corporations generally**

A corporation is a separate and independent legal entity from its directors and shhs (Salomon). Therefore, shhs are not personally liable for actions of the corporation, subject to certain circumstances (BCA s 87, CBCA s 45). Directors, officers, and employees of a corporation are personally liable for their tortious conduct (ADGA). However, if the employee shows they acted bona fide in the interests of the corporation, they will not be personally liable for inducing breach of k (Said). Because a corporation is a separate legal personality, directors can employees of the corporation (Lee).

#### Piercing the Corporate Veil

* Court can lift veil on case by case basis, no single test because it is an holistic analysis
  + Corporation is separate legal personality—directors can be employees/managers of them (**Lee**)
  + if company is formed for the express purpose of doing a bad thing, or those in control expressly direct a bad thing to be done, can lift the veil (**Zhelka**)
  + court may be willing to lift the veil in tax assessment context (**Salaberry**)
  + family law context: where corporation is completely controlled by one spouse for that spouse’s benefit and no third parties involved—>appropriate to lift the veil (**Lynch**)

**Clarkson Co. v. Zhelka**

F: Guy’s corporation sells land to his sister, guy goes into bankruptcy and creditor tries to go after sister’s land saying she held as trustee for her brother as a person.

I: Pierce the veil?

H: Yes

R: There is a RT between sister and the brother’s corporation, which was a one-man corporation. In questions of property and capacity, the company is always an entity distinct from its corporators. If a company is formed for the express purpose of doing a wrongful or unlawful act, or if those in control expressly direct a wrongful thing to be done, the individuals and corporation are liable.

**De Salaberry Realties Ltd v. MNR**: can pierce the veil for tax assessment

**Lynch v. Segal**

F: Appellants incorporated on behalf of unnamed beneficial owners

I: Pierce veil?

H: Yes

R: More flexible approach in family law context where corporation is completely controlled by one spouse, for that spouse’s benefit, and no third parties are involved—appropriate to pierce the veil.

**Lee v. Lee’s Air Farming Ltd**

F: Husband was sole shareholder, master and servant relationship between and him and the company. Dies while serving company, widow applies for WC.

I: Was deceased an employee of the corporation?

H: Yes

R: Mere fact that someone is a director of a company is no impediment to entering into a k to serve the company. Company and deceased were separate legal entities, so deceased could be an employee of the corporation.

Generally, the directing minds of the corporation can be shielded from liability by corporation’s separate legal personality. The court may lift this corporate “veil” on a case by case basis. There is no single test to lifting the veil because the courts undertake an holistic analysis. A court may be willing to lift the veil if the corporation has been expressly formed to achieve an improper purpose, or if those in control of the corporation expressly direct an improper thing to be done (Zhelka). Furthermore, the court may lift the veil in the tax assessment context (Salaberry), or in the family law context where the corporation is completely controlled by one spouse for that spouse’s sole benefit without the involvement of any third parties (Lynch).

# How to Create a Corporation

## Corporate Names (BCA)

**BCA ss 21-29, 263**

* **s 21**: provisions for naming the company
  + **s 22**: check name against registry—name will be rejected if it includes restricted elements, or looks too similar to a name already registered
    - can reserve name for up to 56 days
  + **s 23, 24**: must use words in s 23, can use French version
    - cannot use words like limited unless you are actually a corporation
  + **s 25**: name of company must be in English or French or both, has to be in Roman alphabet

## Creating the Corporation (BCA)

**BCA ss 1, 3, 10-19, 256-259, 263**

* **s 3**: company recognized when it is incorporated under the BCA
* **s 10:** one or more person may form company by (a) entering into incorporation agreement, (b) file application with registrar, (c) anything else in the part
  + (2) incorporation is k to take shares and identify themselves
    - ks were not recognized at CL, so shhs will have very difficult time suing each other under breach of k for CL damages
  + (3) application for incorporation composed of notice of articles
* **s 11**: notice of articles
  + (b) has to set out name of company, (c) name and addresses of directors, (d) office of company address, (g) authorized share structure
    - **s 53**: authorized share structure (must be contained in notice of articles)
      * (a) name of each class/series of shares and the kind of shares (if any)
      * (b) maximum number in class/series (if any)
      * (c),(d): whether shares are going to be par value (ie if they have a minimum sale price)
* **s 16**: if there are no articles, deemed to have articles set out in table 1
* **s 12**: articles must (1) set out rules for its conduct, (2) list every restriction
* **s 13**: incorporation occurs when name, agreement, and notice of articles are filed with registrar
* **s 14**: can withdraw application
* **s 17**: effect of incorporation—once incorporated, company capable of exercising functions set out in statute

## Creating the Corporation (CBCA)

**CBCA ss 2(1), 5-9, 173**

* **s 5**: incorporators sign articles of incorporation and file bylaws—must be at least 18, of sound mind, not bankrupt
  + (2): other corporations can bring a corporation into existence and be incoporators
* **s 6**: contents of articles of incorporation
  + (1)(e) minimum and maximum number of directors
  + (1)(a) name, (1)(b) where in Canada the registered office is located
  + (1)(f) restrictions on the business
    - start with presumption that corporation has all of the powers of a natural person, that they can enter into a k—if the k is vires, **does not make the k void**
      * other party can enforce a vires k

## Restrictions (BCA)

**BCA ss 30-33, 154(1)(a), 228(3)(c), 259, 260, 378(2), 378(4)**

* **s 30**: company has capacity, rights, powers, privileges of an individual (subject to s 12 restrictions in articles)
* **s 33**: company cannot carry on business that is restricted in articles
  + (2) no act is invalid just because it violates (1)—**preserves liability even when there is vires action**
* **s 257**: company can change notice of articles
* **s 259**: company can change articles
  + in 257 and 259, can take a shh vote or get court order
* **s 263**: company can change company name through directors resolution or ordinary shh resolution

# How to bring a Corporation to BC (BCA)

Place of incorporation

* **BCA**: company describes a corporation that is incorporated under BCA or to describe a corporation brought into BC—corporation describes all other entities not governed by statute
* **CBCA**: only uses the word corporation, does not distinguish as to where the thing was incorporated

## Extra-Provincial Licensing and Filing Requirements

**BCA ss 1 defintions, 374-379**

* **s 1**: company means corporation recognized by statute
* **s 375**: foreign entities must register as extra provincial company within 2 months of beginning operations in BC
  + (2) deemed to carry on business in BC if
    - (a) name is in phone directory,
    - (b) name + address or phone number appears in BC advertisement or
    - (c) has BC resident for an agent, or warehouse/office
  + (3),(4) exclusions—does not apply to banks, railway companies, company that is a limited partner in an LP carrying on business in BC; principal business consists of operation one or more ships, entity does not maintain BC warehouse, office, etc
* **s 376**: must reserve name with registrar
* **s 378**: effect of registration
  + (1) whether or not the requirements have actually been complied with, if you are registered then this is conclusive proof
  + (2) EPC may exercise in BC powers contained in its own governing document, subject to BCA
    - (3) registration as EPC does not entitle company to do things its governing document restricts
  + (4) no act of EPC is invalid just because it violates (3) or did not register
    - protects consumers, preserves liability

## Continuance in Another Jurisdiction

**BCA ss 269(b), 275(1)(b), 284(1), 302-311**

* **s 308**: BC company wishing to continue on in another jurisdiction
  + provide information to BC registrar and get registrar’s approval
  + shhs must approve continuation
    - special resolution—2/3 majority
* **s 302**: foreign entity wanting to come to BC
  + have to get approval from home jurisdiction, then provide records to BC registrar
* **s 305**: effect of registration
  + act applies to company just as though the company had been incorporated in BC

## Classification of Corporations

**Widely held (public)**: over 50 shhs, at least three directors (**BCA s 120**)

* securities are traded through stock exchange, must file prospectus

**Closely held (private)**: less than 50 shhs, 1 or more Ds (**BCA s 120**)

* no limit on share transfer, no prospectus required, but cannot self shares to the general public

**One person corporations**: single shh and director (same person)

# You Thought You created a Corporation, but You Didn’t: Pre-Incorporation Contracts

## Common Law

* **Kelner**: both parties have knowledge that company did not exist—k was between parties personally
* **Black**: neither side was aware the company did not exist (common mistake)—k is void
  + personal liability as agent is only a strong presumption when individual knew s/he could not be an agent at all
* **Wickberg**: one party knew company did not exist (unilateral mistake)
  + law in BC is that if both parties are mistaken, there is no k when the other party has shown no intention to be personally bound
    - if neither party is mistaken, k exists
* if the corporation never comes into existence, must use CL rules
  + if the corporation is later created, use statute

**Kelner v. Baxter**

F: P is “director” of non-incorporated company, enters into an agreement before incorporation—company folds after incorporation.

I: Ds personally liable for k?

H: Yes

R: Ds were not agents to begin with because there was no corporation to be a principle.

**Black v. Smallwood**

F: Preincorporation k, but all the signing parties believed it to have been incorporated at the time of the k.

I: Personally liable?

H: No

R: K from Kelner demonstrated they believed themselves to be personally bound. There was no intention to be bound personally in this case.

**Wickberg v. Shatsky (BC CASE)**

F: Ds are “directors”, hire P to be manager—k of employment.

I: Personally liable?

H: No

R: P thought the corporation existed, Ds knew it did not. Not the intention of the parties to be personally liable.

## Statutory Reform (BCA)

**BCA s 20 (applies to all ks)**

* (2): if there is a preincorporation k
  + (a) facilitator deemed to warrant to company will come into existence within reasonable time, adopt k
  + (b) liable to other parties for breach of warranty of authority
  + (c) measure for damages for breach of warranty of authority is as though company had existed
* (3) if company is incorporated, can adopt k through any act or conduct
* (4) upon adoption, company is (a) bound and entitled
  + (b) facilitator ceases to be liable under (2)
    - NB: facilitator may still be liable under CL warranty of authority

## Statutory Reform (CBCA)

**CBCA s 14 (only applies to written ks—>if oral k, use CL)**

* (1): promoter of pre incorporation k is personally bound and entitled to its benefits (preserves **Kelner**)
* (4): if expressly provided, individual not by k or entitled to its benefits (preserves **Wickberg**)
* (2): corporation can adopt preincorporation k within a reasonable time

## Pre-Incoporation Ks Write Up

There are three possibilities at common law. First, if both parties know the corporation does not exist, the facilitator/agent will personally liable, provided there is clear intention on the agent’s part to be personally bound (Kelner). The second possibility occurs when the agent knows the corporation, but the other party does not. In this situation, the agent is not liable for the k if there is no intention to be personally bound, which there clearly would never be,, but could still be liable in tort for breach of warranty of authority (Wickberg). This approach represents the law in BC. A third scenario is taken from Black v Smallwood, an Australian case, the application of which is limited in BC CL. The situation from Black contemplates the agent mistakenly believing the corporation to exist, and the other party relying on this representation. Here, the k is void if it is the result of common mistake—ie the parties are both mistaken the corporation existed, such that the agent never intended to be personally bound by the k. The Black approach is only operative at CL if the corporation never comes into existence.

Statutory protection under the BCA regarding pre-incorporation ks applies to written and oral ks, while the protection in the CBCA only applies to written ks. Therefore, if there is an oral k in the CBCA, the CL continues to apply.

The presumption in the CBCA is that a person who enters into a written k for a corporation before the corporation exists is personally bound the k and can reap its benefits (s 14(1)) unless the written k says otherwise (s 14(4)).

The BCA presumes that the person entering into the k for the corporation is warranting that the company will be incorporated within a reasonable time, that the k will be adopted, and that the company will be liable for breach of warrant to the extent as if the company existed at the time of the k. This is because the agent had no authority to enter the k and the company refused to adopt it (s 20(2)) unless the k says otherwise (s 20(8)).

A corporation can adopt a pre-incorporation k within a reasonable time by something to signify its intention to be bound by the k. The corporation will then be entitled to its benefits, and the agent who originally entered into the k will no longer be bound it (CBCA s 14(2), BCA s 20(3), (4)).

A party to the k can apportion some liability and benefits of the pre-incorporation k between that party and the corporation (BCA 20(7), CBCA 14(3)). Regardless of any adoption, pursuant s 20(6) of the BCA, the facilitator or any other party to the k can apply for a court order to set aside the obligations of the company and the facilitator as joint, j/s, or apportion the liability. If the company does not adopt the pre-incorporation k within a reasonable time, the facilitator/any other party to the k can apply to the court for an order that the new company give any benefits it received through the k back (s 20(5)).

# So You Need Someone to be in Charge of this Shit: Management and Control of the Corporation

* focal point of controlling administration is on directors, sometimes the officers
  + directors are the first people who have to answer
* corporations are for monetary profit interest—benefit shhs and creditors
  + want to prevent misdirection of the corporation and maximize the profits legally
  + owners (shhs) have stake in getting returns, managers in theory do not have a stake—fundamental tension between risk averse shhs and ambitious directors
* shhs own corporation and make decisions—can vote to make various decisions for different resolutions
  + **Bushell (UK)**: ordinary resolution of shhs only require bare majority
  + **Automatic Self-Cleansing (UK)**: management makes the crucial decisions, not shhs
    - shh votes are tantamount to strong suggestions unless vote is of sufficient magnitude to require something be done (ie special resolutions)

**Bushell v. Faith (UK law)**

F: There directors—in the event of removing a director, this director would get triple votes, so basically no one could ever be removed.

I: Can the votes be weighted like this?

H: No

R: An ordinary resolution can be passed by a bare majority. Parliament left it open to companies and their shareholders to allocate the voting rights as they pleased.

**Automatic Self-Cleansing Filter Syndicate Co Ltd v. Cunninghame (UK)**

F: Articles provided management was vested with directors subject to regulations made by special resolution. Meeting was called, regulation passed by simple majority, directors object.

I: Can the resolution pass?

H: No

R: According to articles, if it is desired to alter the powers of the directors, must be done by an extraordinary resolution. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles.

## Directors (BCA)

**BCA ss 1(1) definitions, 1(3), 128(3), 135-138, 143**

* **s 1: director** is an individual who is a member of the board as a result of having been elected or appointed
  + **senior officer**: officer who performs a policy making function and has capacity to influence the corporation
* **s 136**: directors must manage or supervise the management of the business and affairs of company
* **s 135:** provisions if no director is in office
* **s 128**: cease to be directors when they die, term expires, resign, removed, cease to be qualified
  + **(3)** shhs can remove director by special resolution (2/3 majority)
* **s 137(1)**: articles can transfer in whole/part powers of director to one or more person
  + **(4)**: need a special resolution to change the articles

## Directors (CBCA)

**CBCA ss 2(1) definitions, 102, 103, 109, 116**

* **s 2(1) director** is a person
  + **officer** is an individual appointed as an officer under s 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 corporati**on** similar to those normally performed by an individual occupying any of those offices
* **s 108, 109**: cease to be directors when they die, term expires, resign, removed, cease to be qualified
* **s 146(1)**: shh USA can take over management either entirely or for a particular purpose
  + shares will carry notation of USA

## Indoor Management Rule

* CL: parties dealing with corporation in good faith and without knowledge of irregularity are entitled to assume the the company’s policies have been followed and complied with (**Sherwood**)
  + the 3rd party is entitled to rely on the authority of the person representing the corporation
    - **BCA s 146**
    - **CBCA ss 17, 18**

**Sherwood Design Services Inc v. 872935 Ontario Ltd.**

F: Agreement to buy assets of Sherwood, D incorporated as a shell company for purchasers of Sherwood’s assets—transaction falls through and D is reassigned to other clients.

I: Can Sherwood sue D for the original promissory note?

H: Yes

R: Indoor management rule prevents corporation from disputing ostensible authority of Jan 11 letter from solicitor because solicitor had ostensible authority to speak for his individual clients.

## Corporate Responsibility

* Directors must generate profit for shhs only—cannot run business for the benefit of employees or other parties than shhs (**Dodge**)
* Corporations can have liberal dealings with non-shhs, but must satisfy test for specific payment
  + **whether, in addition to bona fides, action was within the ordinary scope of the business and reasonably incidental to the business for the benefit of the company** (**Parke)**
* **Peoples**: Fiduciary duty owed only to the corporation, not shhs
  + FD is to maximize the value of the corporation
    - directors may be in breach of FD if they did not take into account of various stakeholders such as shhs, employees, public, creditors, environment—priority depends on the circumstances
  + court will look to any honest and good faith attempt to redress financial problems—ie if directors can show they tried their best, might not be in breach of FD
* **BCE**: duty not to oppress or unfairly prejudice the interests of stakeholders
  + directors may be within the confines of FD, but decisions might cause corporation to do something that is oppressive to stakeholders—subsequent breach of FD?

**Dodge v. Ford Motor Company (SCC)**

F: Henry Ford wants to plough dividends back into company to expand it—increase salaries, expand factories. Minority shareholders dissent.

I: Can Ford use the dividends like this?

H: Yes, because ultimately the proposed plan would benefit the shareholders.

R: Ford did have altruistic purpose in assigning the portion of dividends back into the company. A corporation is carried on primarily for the benefit of shareholders, directors are employed for this end. Not within the lawful powers of a board to shape and conduct affairs of a corporation for the merely incidental benefit of shareholders and primary purpose of benefitting others.

**Psrke v. Daily News Ltd. (UK)**

F: Newspapers not profitable and begin to get wound up—directors decide the sale price should be used exclusively for employee payments, pensions—shareholders dissent.

I: Can directors do this?

H: No

R: Directors can only spend money if they are using it for the purposes which are reasonably incidental to the carrying on of the business within the reasonable scope of the business in good faith. Remunerating employees cannot be justified in a company being wound up.

**Re Peoples (SCC)**

F: Wise buys Peoples, shifts its debts into Peoples—Peoples goes bankrupt and TIB sues Wise for breach of FD.

I: Breach of FD to creditors?

H: No

R: Statutory FD requires directors to act in faith vis a vis the corporation, not outsiders. Best interests of corporation, however, is not simply best interests of shareholders, but the maximization of corporation’s value. Any honest and good faith attempt to redress a corporation’s financial problems will be okay, whether successful or unsuccessful.

**Re BCE (SCC)**

F: Leveraged buyout added debt to Bell Canada, a subsidiary of BCE—Bell Canada’s shareholders sought oppression remedy.

I: Oppression?

H: No

R: A share includes rights to a proportionate part of the assets of the corporation upon winding up and the right to oversee the management of the corporation via votes and meetings. Directors subject to two duties: FD to corporation, duty to exercise care, due diligence, and skill of a reasonably prudent person in similar circumstances (DOC). Oppression remedy recognizes the corporation is an entity that encompasses and affects various individuals who may have conflicting interests. Stakeholders fundamental entitled to expect fair treatment. Duty of directors is to act equitably and fairly, but there are no absolutes.

Directors must generate profit for the sole benefit of the shhs, and cannot run the business for the benefit of employees other than the shhs (Dodge). Directors may have liberal dealings with non-shhs, such as specific payments, but must be able to show that the action was (1) bona fides, (2) within the ordinary scope of the business, and (3) reasonably incidental to the business for the benefit of the company (Parke).

Directors owe their fiduciary duty to the corporation, rather than the shhs (Peoples). This fiduciary duty is to maximize the value of the corporation. Directors may breach their FD if they do take into account the interests of various parties such as shhs, employees, the public, creditors, and the environment. The priority of these stakeholders depends on the context of the particular breach. The court will look to any honest and good faith attempt to redress the corporation’s financial issues when determining whether the FD was breached. Therefore, if the directors can show they tried their best, they may not be in breach of the FD (Peoples).

The FD encapsulates the duty not to oppress or unfairly prejudice the interests of stakeholders (BCE). Even if a director acts within the confines of his or her FD, their decision may cause the corporation to do something is oppressive to the stakeholders. This indirect infringement may give rise to an oppression remedy claim and an according breach of FD (BCE).

## Audit Committees

* corporations will usually have auditor—someone from the outside to look at books and present at AGM
* audit committee: some directors need to be protected from liability because do not have equal access to the information or decision making power
  + if company is **public (BCA**) or **distributed** (**CBCA**), must have AC
    - purpose is to ensure there is at least one committee where outsider directors are in the majority
      * composed of at least three directors, majority cannot be officers

**BCA ss 223-226, CBCA s 171**

* must have at least 3 directors that review financial statements and the auditor’s report

## Sale of the Undertaking (BCA)

**BCA s 301**

* (1) company cannot sell, lease, or otherwise dispose of its undertakings unless (a) this is ordinary course of business, (b) authorized by special resolution

http://open.spotify.com/user/%40/new-playlist

* + (6) disposition does not mean giving security interest or leasing property
  + (5) shh may dissent, must do so before the vote and give notice—required use of appraisal remedy
  + **(13) difference with CBCA:** disposition is not invalid if a third party if BFPV or disposition is ratified by special resolution after it has happened

## Sale of the Undertaking (CBCA)

**CBCA s 189(3)-(9)**

* (3) sale, lease, exchange of all or most of property other than in ordinary course of business requires shh approval
  + (6) each share carries right to vote, regardless of whether it normally carries voting rights
* **s 190**: shh can give notice of dissent after voting against the resolution

## Unanimous Shareholder Agreements

**BCA s 137, 138**

* articles can be changed to give power to people other than directors
  + doesn’t have to be unanimous, not allowed to fetter discretion of new management

**CBCA ss 49(8), 146, 241(3)(c), 247**

* **s 49(8)(c)**: USA must be listed on share
* **s 146(1)**: USA that restricts management is valid
  + (3) subsequent purchasers are party to USA
  + (5) shhs allowed to take over management, but the same management constraints apply to shhs
  + (6) shhs can fetter their discretion—can be required to vote in a certain way (not the case with directors)
* **s 241(3)**: court can overturn USA
  + even if shh is party to USA, can argue that it is oppressive (**Bury**)

**Bury v. Bell Gouinlock Ltd (CBCA)**

F: P former employee and shareholder of D who goes to work for competition—>D has agreement that departing shareholders have to sell their shares at fixed prices—>USA says company can delay this sale by 12 mos and restrict former employee’s move to competition.

I: Can P use oppression remedy?

H: Yes

R: Facts clearly show D was penalizing P. Court in ON can override USAs.

# What the People in Charge SHOULD Be Doing: Duties of Directors and Officers

## CBCA Duties

* **s 102**: directors shall manage or supervise management of business
  + (2): distributing (ie public) corporation must have at least 3, 2 of whom are not officers/employees
* **s 103**: unless there is USA, directors can make and repeal any bylaw
  + (2) have to get approval from shhs
  + (4) shhs have veto
* **s 104**: requirements of first directors meeting
* **s 105**: eligibility of being director
  + (1) have to be 18, of sound mind, an individual (corporations cannot be directors), not bankrupt
  + (2) directors do not have to hold shares
  + (3) at least 25% of directors must be resident Canadians—if >4, at least one has to be r. Canadian
* **s 106**: directors have to report that they have taken office
  + (2) first directors in office until first shh meeting
  + (5) if no stated term, ceases to hold office after AGM—>have to be reelected
  + (9) elected or appointed director has to be present at meeting or get consent otherwise
* **s 108**: directors cease to hold office on death, removal, disqualification
* **s 109**: shh ordinary resolution can remove any director
* **s 114**: directors can meet anywhere as the the bylaws require, quorum is in articles
  + (3) cannot transact business unless majority of directors or 25% of Canadian resident directors present
* **s 116**: act of D/O valid notwithstanding irregularity in election/appointment, defect in qualifications
* **s 121**: subject to articles, bylaws, USAs directors appoint officers

## BCA Duties

**BCA duties of directors and officers**

* **s 136:** directors must manage affairs of company
* **s 120**: company must have one director, but public company must have at least three directors
* **s 121(2)**: directors are incorporators who signed the articles of incorporation or consents to be director
* **s 122**: subsequent directors must be elected or appointed
* **s 124**: qualifications of director
  + (2) cannot be a director is (a) under 18, (b) found by court incapable of managing own affairs, (c) bankrupt, (d) convicted of fraud unless pardoned or five years have passed
  + (3) unqualified director must resign
* **s 125**: director not required to hold shares
* **s 126**: must register who the directors are (no residency requirement like the BCA)
* **s 128(3)**: shhs can remove directors by special resolution
  + NB: much greater majority needed in BC to remove directors than CBCA (2/3 vs 50%)
* **s 140**: directors make decisions in meetings either in person or by other media
  + (4) one director can constitute a meeting
* **s 141**: subject to articles, directors can appoint officers and specify their duty
  + individual who is not qualified under s 124 is not qualified to be an officer
  + directors can remove any any officer
  + (5) removal of officer is without officer is without prejudice to officer’s k rights, rights under the law
    - ie if officer is an employee, termination of being an officer does not terminate employment k
      * junior officers might be covered by labor legislation

## Personal Liability of Directors (BCA)

**BCA s 154, 156-158**

* **s 154:** J/S liable if cause company to do restricted act, etc
  + (2) directors who vote/consent to resolution authorizing release of shares in violation of statute are j/s liable to compensate company, shh, beneficial owner of share
* **s 157**: can limit liability if D relied in good faith on statements presented by officer, written report of lawyer, statement of fact by officer, any representation, etc
  + (2) not liable if D did not know, could not have known action was contrary to statute
* **s 158**: director/officer who knowingly permits violation of s 27 (displaying company’s name) is personally liable to indemnify enumerated persons who suffered a loss

## Personal Liability (CBCA)

**CBCA ss 118, 119, 122**

* **s 118**: directors who vote or consent to resolution authorizing issue of share for non$$ consideration jointly/severally liable if consideration received is < value of shares
  + (2) liable to restore corporation any amount in list
* **s 119**: directors J/S liable to employees for all debts not exceeding 6 months
* **s 122:** every director and officer of a corporation shall
  + (a) act honestly and in good faith with view to bettering the corporation (FD)
  + (b) exercise care, diligence, and skill that reasonably prudent would exercise in circumstances (DOC)

## Care and Skill

#### Common Law

* Fiduciary duties: directors must put corporation’s interests before their own—anticipate what corporation needs
  + not in k, not ever agreed to, but implicit in becoming a director
* Duty of competence: care and skill of reasonably competent person in similar situation
  + objective—cannot claim you are well meaning if you are simply incompetent
* **City Equitable**: directors need not exhibit greater skill than similarly situated person
  + directors justified in trusting other officials to perform delegated duties
  + DOC also applies to officers
* **Peoples (QCCA)**: DOC for directors is an objective duty

**Re City Equitable Fire Insurance Co Ltd (UK)**

F: Insurance company being wound up, investigation reveals massive fraud and managing director goes to jail—liquidator sues directors and auditors for negligence.

I: Negligence?

H: No

R: In discharging duties, manager must behave honourably and use skill/diligence. Director need not exhibit a greater degree of skill than may reasonably be expected of a similarly situated person. Director not bound to give continuous attention to the affairs of the company. Director can properly delegate duties and can be justified in trusting the delegation will be done honestly.

**Re Peoples Department Stores Ltd (QCCA)**

R: Law imposes on directs a duty towards those who entrust them with the mission of managing the pooled assets. Integrity and good faith are gauged according to the reasons that motivate directors to act, not in light of the concrete results of their actions.

Directors must observe their FD by putting the corporation’s interests before their own by anticipating what the corporation requires. The FD is not contained in k, and is never explicitly agreed to. The FD is implicit in becoming a director. The duty of competence embellishes the FD. The DOC requires the director to demonstrate the care and skill of a reasonably competent person in a similar situation. The DOC is measured objectively (Peoples QCCA), which prevents remiss directors from escaping liability if they were well-meaning but utterly incompetent. Directors need not exhibit a greater skills than a similarly situated individual holding a director position (City Equitable). This duty of care also applies to officers (City Equitable).

#### Statutory Reform BCA

**BCA ss 142(1)(b), (2), (3), 154, 157**

* **s 157**: can limit liability if D relied in good faith on statements presented by officer, written report of lawyer, statement of fact by officer, any representation, etc
  + (2) not liable if D did not know, could not have known action was contrary to statute
* **s 142(1)(a)**: fiduciary duty
  + (b) DOC
  + (c), (d) obligations to comply with statute
  + (3) no provision in k or memo of articles relieves D/O from liability from statute or from negligence

#### Statutory Reform (CBCA)

**CBCA ss 118, 122(1)(b), (2), (3), 123(4)(5)**

* **s 122:** every director and officer of a corporation shall
  + (a) act honestly and in good faith with view to bettering the corporation (FD)
  + (b) exercise care, diligence, and skill that reasonably prudent would exercise in circumstances (DOC)
* **s 123(4)**: A director is not liable, exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on
  + (a) financial statements by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
  + (b) a report of a person whose profession lends credibility to a statement made by the professional person
* **s 123(5)**: business judgment rule
  + (1) must comply with FD and duty of competency
  + (2) must comply with statute and bylaws

## Business Judgment Rule

* when directors make decisions, law assumed decision made by exercising duty of competency
  + the court will usually defer to business decisions if they fall within the range of reasonable alternatives
    - onus is on P to show decision was bad, but D/O may have to also show they acted with a basic level of skill and attention
* **UPM**: BJR determine whether the decision was reasonable, not perfect
  + directors only protected to the extent that their action evidence business judgment
  + BJR does not apply to uninformed decisions

**UPM Kymmene Corp v. UPN Kymmene Miramichi Inc.**

F: Compensation agreement is opposed by management, causes many directors to resign in protest—agreement is ridiculous and would bankrupt the corporation—shareholder sues directors for breach of FD.

I: Breach of FD?

H: Yes

R: DOC is when directors make decisions that will affect shareholders, they must make these decisions on an informed and reasonable basis. Advisors can be used, but the use of an advisor does not relieve directors of the obligation to exercise reasonable diligence. Business judgment rule is whether the decision was reasonable, doesn’t have to be perfect, but directors are only protected insofar as their actions actually evidence their business judgment. Business judgment rule does not apply if the board acts on an uninformed decision.

## Breach of Fiduciary Duties

* directors must act honestly and in good faith with view the best interests of the corporation (**s 141(1)(a) BCA, s 122(1)(a) CBCA)**
  + FD is owed to the corporation alone (**BCE**)

#### Self-Dealing

##### BCA Self-Dealing

**BCA ss 147-153**

* **s 152**: except as provided, director/senior officer not obligated to disclose interest in a k or transaction
* **s 153**: if director/senior officer holds any rights or interests that could result in creation of a duty/interest that materially conflicts with the interest as director/senior officer, **must disclose**
  + when director has interest that might materially conflict with company—>disclose
    - NB: nothing in statute that requires more than general disclosure **unless the interest fits into self dealing**
* **s 148**: accounting provision
  + (1): director/senior officer liable to account for any profit that accrues or results from k in which they hold an interest
  + (2) director/senior officer not to account for profit in following circumstances
    - if k is approved by directors after interest has been disclosed
    - k or transaction is approved by shh special resolution
  + (4) exceptions to (1)
    - (b) if k relates to indemnity or insurance
    - (c) if k/transaction is for remuneration
    - (a), (d): k is an arrangement of security granted by company for money lent to director for benefit of the company
* **s 149**: approval of ks or transactions
  + (1) k or transaction can be approved by directors majority or shh special resolution
  + (3) if all directors have interest, can vote—**NB can still be in violation of FD if they do this**
  + (2) director cannot vote to approve their own k
  + (4) unless articles say otherwise, director with disclosable interest who is present at meeting can count towards quorum
* **s 150**: powers of court
* **s 151**
  + (1) k with company not invalid simply because director has a disclosable interest and did not disclose it or interest was not approved

According to s 152 of the BCA and except as provided elsewhere in the statute, a director or senior officer is not obligated to disclose an interest in a k or a transaction. However, if the director/senior officer holds any rights or interests that could result in a duty or interest that amounts to a conflict of interest towards the company, they must disclose this conflict (**s 153**).

A director/senior officer is liable to account for any profit that accrues or results from a k in which they hold an interest (s 148(1)). Despite this general provision, there need not be an account for profit if the disputed k is approved after the interest was disclosed, or if the k/transaction was approved through shh special resolution (s 148(2)). Furthermore, if the potential conflict relates to indemnity or insurance, is a k for remuneration, or is an arrangement of security granted by the company for money lent to the director for security of the company, the director/senior officer need not account for profit (s 148(4)).

Section 149 authorizes ratification through director majority or shh special resolution. A director cannot vote to approve his or her own conflict (s 149(2)), however if all of the directors are party to the conflict of interest, they apparently may hold a vote to approve the interest (s 149(3)). Despite this somewhat generous provision, if this scenario were to occur, it is very likely the directors would be in breach of their FD for voting in such a way rather than remitting the ratification to the shhs for a special resolution. The director with a disclosable interest who is present at the meeting cannot vote on the particular motion to ratify the interest, but can count towards quorum (s 149(4)). A k with the company is not invalid simply because the director has a disclosable interest and either the director failed to make disclosure or the interest was not approved by the directors or shh special resolution (s 151).

##### CBCA Self-Dealing

**CBCA s 120**

* director shall disclose nature and extent of any interest he has in a material k or transactions whether already made or proposed in the future
  + triggered when director/officer is party to k or transaction OR has a material interest in the k or transaction
* (1) information has to be in a material k or material transaction (CBCA does not elaborate on materiality)
* (2), (3) disclosure must be made as soon as possible
* (5): director required to make the disclosure **cannot vote to approve transaction/k** unless it relates primarily to their remuneration as director/officer/employee or is an indemnity situation
* (6): general notice to the directors that a director is to be regarded as interested in transaction is sufficient notice for an indirect interest
  + applicable if director is a director/officer of an interested party (one removed)
* (7) transaction requiring a disclosure is not invalid and the director is not liable for profit **if**
  + (a) the disclosure was made in accordance with subsections (1) through (6),
  + (b) the directors approve the k or transaction, **and**
  + (c) k/transaction was reasonable or fair when it was approved
    - **NB: (c) is not required in BCA**
* (7.1) can have k approved and confirmed by special resolution at shh meeting—still has to be justifiable

In a CBCA corporation, a director shall disclose the nature and extent of any interest he or she has in a material k or transaction that has either already been made or is proposed for the future (s 120). The provision is triggered when the director/officer is party to a k or transaction OR has a material interest in a k/transaction (1). However, the CBCA does not elaborate further on the content of “materiality”. The director/officer must make the disclosure as soon as possible (2), (3). The disclosing director cannot vote to approve the transaction or k unless it relates to their remuneration or involves their indemnity (5). If a director has an indirect interest (ie is one removed from the issue), the interested director need only give general notice to the other directors (6). The dispute k or transaction requiring disclosure is not invalid if the disclosure was made in accordance with s 120 (1) through (6), the directors approve the transaction, AND the transaction was reasonable or fair when it was approved. **BIG DIFFERENCE WITH BCA**. Finally, the k or transaction can be approved by shh special resolution, but it must be justifiable (7.1).

#### Corporate Opportunities (CL)

* director takes something for themselves that should have gone to the corporation
  + ie director enters into a k for herself rather than letting corporation benefit from the deal
* **Regal Hastings**: just because directors were acting with good will when taking a corporate opportunity is irrelevant—can still be liable for disgorgement
* **Peso**: exception that if director only takes opportunity after presenting the opportunity to the corporations and corporation does not take it—>not liable
* **Canaero**: limits proposition in Peso—>even if corporation not likely to take the opportunity does not get director off the hook
  + if information comes to the director solely through director’s office, any benefits belong to the corporation
  + does not matter if the opportunity is slightly altered, still liable
  + FD does not end with termination of holding office
    - general standard of loyalty, bona fides, avoidance of conflict (not exhaustive) tested in each individual case
      * factors include position/office held, nature of opportunity (ripeness, specificity, and relation to the opportunity), the amount of knowledge possessed, the timing, circumstances of terminating the position within the corporation

**Regal Hastings Ltd v. Gulliver (UK)**

F: Company formed subsidiary company, landlord forces the company to take shares in the subsidiary. The directors take the shares for themselves. New management sues old directors.

I: Breach of FD?

H: Yes

R: Liability arises from mere fact of a profit having. The profiter, however honest and well-meaning cannot escape liability. Directors could have, if they wished, protected themselves by a resolution. No one who has fiduciary duties is allowed to enter into engagements where there is a conflict of interest. Plaintiff has to establish that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their duties, and what they did resulted in profit to themselves.

**Peso Silver Mines v. Cropper (SCC)**

F: Prospector offers to sell to Peso, but Peso refuses. Director of Peso forms a private company to acquire the claims. During a later acquisition, Cropper (rogue director) has to disclose his interest, but refuses to turn over the interest.

I: Breach of FD?

H: No

R: No doubt Cropper had an FD, no doubt he acted in good faith. An out and out bona fide rejection by the company would be best evidence that any later dealing with the property would not be against the company’s interests. Impugned transaction must have come to the director only by reason that they were a director and in the course of the execution of that office.

**CanAero v. O’Malley (SCC)**

F: Prior to resigning, three directors form a business venture in same field as their current company. New company gets coveted k to survey Guyana, the proposal of which had come work the directors did at Canaero.

I: Breach of FD?

H: Yes

R: Director or senior officer is precluded from obtaining for himself either secretly or without approval of the company any property or business advantage either belonging to the company or for which it has been negotiating. There may situations where profit must be disgorged, although not gained at the expense of the company on the ground that the director cannot use his position to make a profit even if it was not open to the company. Each case will differ depending on the nature of the office held, the nature of the opportunity, its ripeness, its specificness and the director’s relation to it, the amount of knowledge possessed, and the circumstances in which it was obtained.

A director who takes an opportunity for himself or herself that should have been given to the corporation will likely be in breach of their FD. Acting with good will when taking the corporate opportunity is not enough to relieve the director from liability (Regal Hastings). The director may argue against liability if he or she only took the opportunity after it was presented to the corporation and the corporation rejected it (Peso). Canaero limits this proposition in Peso, and states that even if the corporation was unlikely to have taken the opportunity, the director may still be liable. If the information comes the director solely through the director’s position as a director, any benefits derived from the information belong to the corporation. The director will still be liable for breach of FD even if the opportunity is slightly from that which was presented to the corporation. This is because the FD does not end with the termination of holding office. Directors are held to a high standard of loyalty, bona fides, and avoidance of conflict. Each individual case will involve weighing factors including the position/office held, the nature of the opportunity including its ripeness, specificity, and relation to the opportunity, the amount of knowledge possessed, the timing, and, if applicable, the circumstances of termination within the original corporation (Canaero).

#### Competition

* director has divided loyalty by owing FD to two entities that cannot be satisfied
  + ie director of two companies that are directly competing
  + have to decide which entity gets an opportunity—issue if both could take advantage of it
* if information came from corporation or could have been used to benefit the corporation—>serious problem
  + possible that if information comes not in capacity of director, could be used by both corporations and have to disclose the information
* **London**: being a director of two corporations at once is not automatically a conflict of interest
* **Slate**: gain information by virtue of director position—>definitely a breach
  + only way to not break FD is to prove that corporation would not have used the information
* **Cranewood**: two questions for breach of FD: (1) actual/potential conflict of interest, (2) opportunities acquired by position as director

**BCA s 153: must disclose position**

**London and Mashonaland Expl Co Ltd v. New Mashonaland (UK)**

R: Nothing in the articles that prohibited him from acting as a director of another company. Nothing wrong with being a director of another company if there is no express agreement being breached or possibility of disclosure/harm.

**Slate Ventures Inc. v. Hurley (NL—>CBCA clone)**

F: Director of company that operated slate quarries purchased a slate quarry for himself and did not tell company.

I: Breach of FD?

H: Yes

R: Director did not acquire opportunity by the virtue of his office. Where information or an opportunity is acquired independently, directors may compete, but must account if there is an actual conflict. Company was able to show there would be harm resulting from the competition, so director is liable.

**Cranewood Financial Corp v. Norisawa (BCA authority!)**

R: A determination of whether there has been a breach of FD comes down to two questions: was there either an actual or potential conflict of interest and (2) were the opportunities acquired by virtue of position as director? If there is potential or actual conflict, liable. Even if there is no potential or actual conflict, but the opportunity was acquired by virtue of the office, liable.

Competition may be a breach of FD when the director has divided loyalty between two entities that cannot be satisfied. For example, a director of two companies who are directly competing with each other will likely have breached his or her FD to at least one of the entities. However, it is at least possible that if the information comes to the director outside of his or her capacity as a director, there may be no liability. Simply being a director of multiple corporations simultaneously is not enough to find a breach of FD (London Mashonaland). However, if a director gains the information by virtue of the director’s office, there will mostly likely be a breach of the FD (Slate). The only way to not breach the FD in this particular situation would be to prove that the claiming corporation would not have used the disputed information (Slate). A reviewing court will ask two questions when determining whether there was a breach for competition: (1) was there an actual/potential conflict of interest, and (2) whether the opportunities were acquired through the director’s office (Cranewood).

#### Fiduciary Duty Owed to the Corporation

**Re BCE**

R: FD of director is to act in the best interests of the corporation—if interests of shareholders conflict with interests of the corporation, the corporation wins out. May sometimes be appropriate to consider the impact of corporate decisions shareholders/stakeholders, but not mandatory. Corporation and shareholders entitled to maximize profit, but not by treating individual stakeholders unfairly.

#### Hostile Takeovers

* directors try to preserve their own positions during a takeover where an outside party wants to replace the management—>can put in impediments to prevent the takeover like a poison pill provision
* **Teck**: directors comply with FD and DOC when they take certain steps such as issuing shares or choosing another outsider if they genuinely were not acting solely out of self-preservation
  + impropriety lies in the directors purpose
    - must be reasonable grounds for believing takeover would substantially damage the corporation
* **Pente**: technique to protect directors is to set up a committee of independent management to insulate special directors

**Teck Corp v. Millar (BCSC, BCA authority!!)**

F: Directors resist hostile takeover.

I: Breach of FD?

H: No

R: If directors’ purpose of not to serve the company’s interest, then it is improper. Impropriety depends on the proof that directors were actuated by a collateral purpose, not the shareholders’ rights. Directors ought to be allowed to consider who is seeking control and why, as long as they are acting in good faith. There must be reasonable grounds their belief that there will be substantial damage to the company’s interests. Onus is on P.

**Pente Investment Management Ltd v. Schneider Corp (ON case)**

F: Company held by family who owned 70% of shares and 17% of non-voting shares. Rival company announces its takeover bid. Independent non-family directors review the offer and seek alternatives. Family wants an American buyer, but the rival company offers a high price for shares. Family vetoes rival’s offers.

I: Breach of FD?

H: No

R: Directors’ judgement must be informed with a reasonable basis. Directors are not the agents of shareholders, can contravene express wishes of shareholders. Directors have the onus of satisfying the court they were adequately informed and acted reasonably. With a takeover resistance, question is where the directors of target company successful took steps to avoid a conflict of interest.

Directors may put in various impediments to prevent a takeover of an outside party who wishes to replace the management—the “hostile takeover”. These measures may include a poison pill provision in the articles, which essentially makes takeover more expensive and/or difficult to an outsider. The directors may also seek to protect their interests through a “white knight”—a friendlier outsider who does not wish to change management. However, the directors may be in breach of their FD or DOC when taking certain steps such as issuing more shares or choosing another outsider if they were only acting out of self-preservation rather than in the best interests of the corporation (Teck). Therefore, there must be reasonable grounds for believing the takeover would substantially damage the corporation to escape liability (Teck). A useful technique for avoiding liability by taking preventative measures is to establish a committee of independent management to insulate the inside directors from such decisions (Pente).

## Relief from Liability

#### Common Law

* **Northwest**: historically, could get transaction or interest ratified to relieve directors for liability
  + this is more or less preserved in statute or eliminated

**Northwest Transportation v. Beatty (SCC)**

F: Claim to set aside sale of steamer to one of the directors. One shareholder suing. Resolution was passed by majority of votes that the director himself controlled.

I: Uphold ratification?

H: Yes

R: Unless some provision to the contrary is in the chatter, the majority of duly convened shareholders is binding on the minority. Self-dealing can be affirmed or adopted by the company. Constitution of the company properly enabled the director to acquire his voting power.

#### Statutory Relief from Liability (BCA)

**BCA ss 142(3), 157, 233(6), 234**

* **s 149**: basic FD
  + (3): no provision in k or articles relieves director from acting accordance with statute or any liability that attaches from negligence, etc
    - ie: cannot get out liability through making a k or changing articles
    - nothing in statute that says you can’t make a resolution to save the director, but can’t have a resolution to change the articles
* **s 233(6)**: no application or proceeding under section may be stayed or dismissed just because there was ratification, but will be taken into account
  + NB: section only applies to derivative action, statute silent for oppression remedy
* **s 234**: relief by court order (more management friendly approach in BC)
  + if court finds that the director may be liable, must consider all the circumstances of the case including those connected with election and appointment
    - may relieve wholly or in part from liability on whatever terms if it appears that despite the breach, the person acted honestly and reasonably and ought fairly to be excused
      * —>**MANAGEMENT FRIENDLY BCA**

Section 149 contains the basic FD, and maintains that nothing in a k or article can relieve a director from acting in accordance with the statute or any liability that attaches from their negligence (3). However, there is nothing in the BCA to state that a shh resolution cannot absolve a director—it simply states that there cannot be a resolution to change the articles to save the director. As per s 233(6), no application or proceeding for relief **under the derivative action** may be stayed or dismissed simply because there was ratification, but the court will take this factor into consideration. The court, upon finding potential liability, must consider all of the circumstances of the case including those connected with the director’s election and appointment (s 234). The court may relieve either wholly or in part on whatever terms if it appears to the court that the director acted reasonably, honestly, and ought fairly to be excused.

#### Statutory Relief from Liability (CBCA)

**CBCA ss 122(3), 123(4)(5), 242(1)**

* **s 122:** subject to USA, no provision in k, articles, bylaws, or resolution relieves a director/officer from liability or from complying with statute—>precludes a resolution from saving the day
* **s 242**: action brought shall not be stayed or dismissed only by reasons that alleged breach of right has been or may be approved by the shhs
  + evidence of ratification is a factor for court to consider for granting relief

Subject to any USA, no provision in a k, articles, bylaws, or resolution can relieve a director/officer from liability or from complying with the statute (s 122). Furthermore, an action shall not be stayed or dismissed simply for the reason that the alleged breach has been or may be approved by the shhs, but evidence of ratification is a factor the court will consider when determining whether or not to grant relief (s 242).

#### Indemnification and Insurance (BCA)

**BCA ss 159-165**

* **s 159**: definitions (eligible party, penalties, eligible proceeding, expenses)
* **s 163**: restrictions on indemnification
  + (1)(a)(b) if articles prohibit it
  + (1)(c) if breach of FD
  + (1)(d) if crim or admin proceeding
  + (2) **if corporation brings action, including derivative action**
* **s 161:**  expenses only if wholly successful for any reason or substantially successful on the merits (required)
* **s 160(a)**: penalties/potential penalties permissive
  + (b) final expenses
* **s 162**: interim expenses if agree to pay back and not restricted under (3)
* **s 164**: court can order payment if action brought by corporation
* **s 165**: company can purchase insurance

Section 159 provides relevant definitions including eligible parties, penalties, eligible proceedings, and valid expenses. Indemnification is restricted if the articles prohibit it (s 162(1)(a), (b)), if there was a breach of FD (1)(c), if the director is the subject of administrative or criminal action (1)(d), or if the corporation brings an action, including a derivative action (2). A party may only receive expenses if they are wholly successful for any reason or are substantially successful on the merits of their case (s 161). A company is permitted to purchase insurance (s 165).

#### Indemnification and Insurance (CBCA)

**CBCA s 124**

* **s 124(6)**: company can purchase insurance
* (3), (4): restrictions on indemnification
* (5) expenses only if not restricted under (3) and did not commit any breach
* (1) penalities and expenses incurred due to association with corporation
  + (2) can advance expenses but may pay them back
* (4) court can do whatever it wants

# Shareholders

## Shares

**BCA s 1 definitions, 10, 11, 49, 52-54, 56, 57, 59, 60, 62-64, 70, 107, 111**

* **s 1**: definitions
  + **authorized share structure:** kind/class/series of shares authorized by notice of articles
  + **shareholder**: registered owner of share and an incorporated
* s 11(g): notice of articles of a company (public document) has to be set out in ASS of company
* **s 53:** if there is a share structure, have to file
* **s 52**: ASS must consist of one or more par/without par value, one or more class of shares
  + presumption that shares will be the same, but not required to do this
  + (2) each class of chafes must consist of shares of the same kind
* **s 56**: a share is a personal estate—claim against corporation, but not title or interest in any specific property
* **s 107**: share with a certificate is a certified share
* **s 111**: share registry, shhs entered as owner of shares
* **s 49:** certain individuals are allowed to apply for a list of shhs
  + (3) must not use the list except in connection with influencing votes, buying shares, reorganizing the company, and organizing a shhs meeting
* **s 59, 60**: types of shares
* **s 62, 63**: issuance of shares
* **s 137**: special resolution for transfer of directors’ powers, change of articles
  + **s 259**: articles can stipulate a different type of resolution for change to articles than SR

**CBCA s 6, 25**

* **s 6**: classes and series, max number of shares, and restrictions in articles of incorporation must be described on the share
  + **s 24:** if no classes, shh rights are equal, but classes are allowed (4)
* **s 2(1):** ordinary resolution is majority of voting shares in person
  + special resolution is 2/3 or written consent of all voting shares
* **s 142(1)**: can be a resolution in lieu of a meeting for any resolution, but requires consent of all voters
* **s 25:** directors issue shares

## Voting Rights

**BCA ss 173, 174**

* **s 173**: presumption that every share has one vote associated with it (clearly not the real case), presumption that an ordinary resolution will suffice unless articles or statute say otherwise
  + (2) methods are by secret poll or show of hands (difficult if votes are weighted), but shh can demand a vote by show of hands (4)
* **s 174**: can participate in vote through phone or other medium, and deemed to be present at meeting

**CBCA s 140-145: same as BCA**

## Shareholder Agreements

**BCA s 175**

* allows shh pooling agreements—>internal k that binds shhs together
  + shh pooling agreements are presumptively valid (**Ringuet**)

**CBCA s 145.1**

Same as BCA

**Ringuet v. Bergeron (SCC)**

F: Six shareholders each hold 50 shares, agree to get 50 shares and divide them among the parties to get control of the company, agreed to vote specific people in as management, provided for penalty if they breached the voting agreement.

I: Invalid agreement?

H: No

R: Agreement was no more than an agreement among shareholder owning or pros posing to own the majority of a company to unite upon a course of policy or action. Nothing illegal or CPP about this type of an agreement.

## Shareholders’ Meetings

**BCA ss 1 definitions, 166-186**

* **s 166**: location of the meeting is presumptively held in BC
* **s 169:** minimum 2 months notice requirement of shh meeting
* **s 170**: notice can be waived if the shhs unanimously agree
* **s 171**: record date fixes who the shhs who will receive the materials for the meeting and who can vote at the meeting including the number of votes they will be allotted
* **s 172:** quuorum for the meeting
  + (a) established by the articles
  + (b) 2 shhs entitled to vote, if not specified in the articles
  + (c) the only shh if there is only one
* **s 178**: there must be a chair present at shh meeting
* **s 185**: annual meeting
  + basically same as CBCA, but no requirement of appointing directors (only approve financial statements and appoint an auditor)
* **s 173(8**): ordinary resolution is presumptive types of resolution

**CBCA s 2(1) definitions, 133, 135, 139, 145**

* **s 139**: quorum is half the eligible votes
* **s 135(5): AGM**
  + have to appoint new directors, approve financial statements, and appoint an auditor
* **s 135, 136**: any business at annual meeting that is not three required things is special business

#### Unanimous and Consent Shareholders’ Resolutions

* **Eisenberg**: no particular form needed to show shh agree, but must show written evidence
  + if ratification has been given, even informally, the ratification cannot be invalid on this basis alone

**BCA ss 1 definitions, 180, 182**

* **s 1:** must get written consent of all shhs entitled to vote
  + consent resolution: resolution passed in writing
  + for ordinary resolutions to pass if voting is done in person, have to get majority
    - for ordinary resolution if voting is by consent, have to get special majority (2/3)
  + unanimous resolution: consented to in writing by all shhs who are entitled to vote

**CBCA s 142**

* (1) must be get written consent all shhs entitled to vote

**Eisenberg v. Bank of NS (SCC)**

F: TIB wants to recover assets the bankrupt bank pledged as security for a loan to two brothers. One brother was director/sole shareholder of corporation, instigated the loan—no meeting of shareholders.

I: Can shareholders approve ultra vires transactions?

H: Yes

R: A corporation, when a matter is ultra vires, cannot be heard to deny a transaction to which all the shareholders have given their assent even when such assent be given in an informal manner.

#### Conduct of Meetings

**Wall v. London and Northern Assets Corp (UK)**

F: General meeting resolution approves sale of assets, shareholder sues because the meeting was irregular.

I: Invalid resolution?

H: No

R: Nothing vexatious or arbitrary on the part of the majority. Majority must sometimes listen to the minority for a reasonable time.

#### Shareholders’ Proposals

**BCA ss 187-191**

* **s 187**: only qualified shhs can put items on the agenda—not qualified if you fail to attend the meeting
* **s 188**: shhs can make proposal to be put on the agenda—must be supported by 1% of other shhs
  + **(1)(d):** proposal must contain contact information of the submitter
  + up to 1000 words can be submitted with the proposal
* **s 189(5)**: company does not have to include the proposal on the agenda if
  + (a) directors have called AGM and already sent out notice
  + (b) proposal is invalid (not signed, exceeds 1000 words)
  + (c) basically the same proposal as one submitted in the last 5 years (requisition period)
  + (d) clearly appears that proposal does not relate to the company
  + (e) clearly appears the the primary purpose of the proposal is to secure publicity or enforcing a person claim or redressing a personal grievance
  + (f) the proposal has been substantially implemented
  + (g) proposal would cause the company to commit offence
  + (h) beyond the powers of the company to implement it
* **s 189**: directors must send out the text of the proposal and put it on the agenda

**CBCA s 137**

* **s 137:** shh can submit a proposal of something to be added to the agenda

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

F: Application for an order not to include in its mailing to shareholders for AGM a proposal that the company end its investments in South Africa due to apartheid.

I: Include the proposal?

H: No

R: Proposal has a specific purpose that is directly relevant to the corporation. **If the primary purpose is one those listed however commendable the specific or general purpose may be, the company cannot be compelled to pay for taking the first step towards achieving it because it was politically motivated.** Company cannot be compelled to distribute the proposal.

**Differences between BCA and CBCA**

* in BC, proposal has to be considered at next AGM
  + federal allows proposal to be considered at special meeting because AGM only deals with three meetings
* in BC, additional reasons to refuse the proposal

#### Requisitioned and Court-Ordered Meetings

**BCA ss 167, 168, 186**

* **s 167(2):** shh with at least 1/20 of shares that are entitled to vote at general meeting can call requisition
  + (3): form must state business in 100 or words or less, signed by requisitioning shhs, delivered to company’s registered office
  + (5) directors must call meeting within 4 months of receiving requisition
  + (7) grounds to refuse
    - (a) notice of general meeting already sent
    - (b) same proposal was rejected within the past few years
    - (c) business doesn’t relate in the same way to company’s business
    - (d) primary purpose is to secure publicity
    - (e) already implemented
    - (f) proposal would be an offence
    - (g) proposal outside company’s powers

**CBCAs 143, 144**

* **s 143(1)**: shh with at least 5% of votes can call requisition

**Air Industry Revitalization Co. v. Air Canada**

F: Corporation used to merge Air Canada and Canadian Airlines—shareholders requisition a meeting to approve the takeover bid, Board rejects.

I: Required to hold the meeting?

H: No

R: CBCA entitled shareholder to vote at an annual meeting. Discretion under the statute should be exercised cautiously. Court’s role is to decide issues of a procedural or substantive nature which need to be determined to enable the process to proceed in a proper and timely fashion, but otherwise to remain apart from the battle.

#### Removal of Directors

**BCA ss 128(3)(4), 131(a)**

* **s 128(3):** director may be removed by special resolution or by any majority the memo of articles provide
  + (4) if shhs of a class or series have the exclusive right to appoint directors, a director so appointed can only be removed by
    - (a) a special separate resolution of these shhs or
    - (b) what the memo of articles specify, if they specify something

**CBCA s. 109**

* (1): shhs may remove director by ordinary resolution at special meeting
* (2) if directors were appointed by special series/class, then can only be removed at a special meeting of these shhs
* (4) if all directors have resigned, the next most powerful person in charge can take over as director, unless the person is an officer under control of a shh, a lawyer, or a TIB (5)

# What to do when the directors Fuck UP: Shareholders’ Remedies and Relief

## The Derivative Action

#### Common Law Derivative Action

* **Foss** rule: wrong done to the corporation itself is only for the corporation to sue upon, not the shhs
* **Northwest:** must be PF case of harm done to corporation
  + must try to compel the corporation to bring the claim before asking for DA—>directors must have refused to take action
* **Bellman**: if directors deciding not to bring an action are the same ones who broke the FD in the first place, court will take this into account for granting a DA
  + may be reason enough for a DA if there is no dispassionate director who said no action
* **Turner**: full recovery of costs bringing the DA is not guaranteed

At CL, the general rule was that a wrong done to a corporation itself was only for the corporation to sue upon, rather than the shhs (Foss). However, the Foss rule there are several exceptions to the Foss rule that allowed shhs to bring actions on behalf of the corporation. At CL, the shhs must show a prima facie case of harm done to the corporation, and must try to compel the corporation to bring the claim itself before bringing a DA. Accordingly, the shhs must show the directors refused to take action (Northwest). However, if the directors who are deciding whether or not to bring an action are the same directors who broke the FD in the first place, thereby giving rise to the very action, the court will take this into account when granting permission for the DA (Bellman). If there is no dispassionate director who decided against taking action, this may be reason enough to grant permission for the DA (Bellman). Even if the shhs are given leave to bring the DA, there is no guarantee they can recover their full costs (Turner).

**Re North West Forest Products Ltd (BC case)**

F: NW owned 51% of corporation, sold a great undervaluation—shhs petition directors to set aside shares, but were ignored.

I: Can shhs bring derivative action?

H: Yes

R: No evidence that director refused to commence the action from the requisition, they simply defeated the motion. Shhs showed prima facie evidence to disclose failure on the part of the directors to discharge duty of care.

**Re Bellman and Western Approaches (BC case)**

F: Dispute between shhs of CBCA corporation—majority shhs entered into loan agreement that allowed them to control election of all directors. Loan agreement required confidential information be disclosed to bank and requirement that company go public.

I: Can minority shhs bring derivative action?

H: Yes

R: Damages for breach of FD are not available in a personal action, only derivative action. Claimant must show an arguable case under CBCA.

**Turner v. Mailhot (CBCA authority)**

F: P owned 30% of shares—dispute results in P being locked out of premises and termination of employment and position as director.

I: Can P bring derivative action?

H: Yes, but cannot get full indemnity

R: It must be established that directors of the relevant company refused to bring the action, that the complaint acting in good faith, and the action is in best interests of the company. May be considerations arising out of the circumstances that might affect whether a PF right should be turned into a proven right.

#### Statutory Derivative Action (BCA)

**BCA ss 232, 233**

* **s 232: how to bring DA**
  + (1) complainant is a shh or director of company—>**include any other person whom court considers appropriate to apply for DA, definition specific to DA**
  + (3) right or duty company is failing to assert/discharge could be within or without statute
  + (4) can defend a legal proceeding against a company
* **s 233: powers of court**
  + (1) complainant has to make reasonable efforts to compel directors to pursue protection (NB VERY DIRECTOR FRIENDLY)
    - give notice to company, act in good faith, court thinks prosecution is in best of the company
  + (5) cannot settle matter outside of court without leave
  + (6) vote of shhs to ratify breach is not
* NB: nothing in BCA that gives court ability to pay money to shhs—>orders are generally directed to benefit the company

A complainant under the BCA is a shh or a director the company (s 232). Shh includes any other person whom the court considers appropriate (s 232(1)). It is crucial to not that this definition of shh ONLY applies to the BCA derivative action. A complainant can bring a DA to assert a right or duty the company has failed to discharge (3). The court has the power to make reasonable efforts to compel directors to pursue protection by requiring the complainants to give notice of the complaint, to act in good faith, and to show the prosecution is in the best interests of the company (s 233(1)) DIRECTOR FRIENDLY!! Parties cannot settle the matter outside of court without leave (5). Finally a shh ratification of the breach is not determinative (6).

#### CBCA Derivative Action

**CBCA ss 238-240, 242**

* **s 238:** definition of complainant (APPLIES TO ALL REMEDIES)
  + complainant is a registered holder/beneficial owner, former RH/BO of a security, director/officer current or former, anyone else with court discretion
* **s 239: to bring DA**
  + complainant can apply to court for leave to prosecute or defend
  + (2) cannot bring DA unless court is satisfied that
    - complainant has given notice to directors not less than 14 days within bringing the application, acting in good faith, it is in interests of the corporation that be brought, prosecuted, or discontinued
* **s 240:** orders of court—>carte blanche!!!
  + generally court can order interim costs to shhs and remedy to corporation
  + (c): court can make an order whenever directing any amount payable by D be paid directly to former and present security holders of the corporation
* **s 242(2)**: cannot settle outside court without leave

The definition of a complainant in the CBCA applies to all remedies, including the oppression remedy. A complainant is a registered holder/beneficial owner of a security or share, a current or former director/officer, and any other individual the court deems appropriate. (s 238) The complainant can apply for leave to prosecute or defend a DA. Furthermore, the complainant must show they have given notice to the directors not less than 14 days within bringing the application for DA, that they are acting in good faith, and that it is in the interests of the corporation to bring or defend the claim (2). The court retains wide discretion pursuant to s 240 to make many varied orders including an oder to make any amount payable to former and present security holders of the corporation (c). Finally, parties cannot settle outside court without leave (2).

## The Personal Action

* shhs do not have to use statute to get relief—can claim in tort or k
  + if there is a k between shhs or shh and corporation, will not get damages for breach because remedies are refined to equity (CL traditionally did not recognize corporations)
    - either put damages provision in k itself or bring an oppression claim
* **Goldex:** shh or group of shhs can claim personal action when they suffer a personal wrong due to legal wrong done by directors or other shhs
* **Hercules**: while shhs use auditor’s information to make decisions, the auditor has a duty to the corporation alone—>if auditor breaches DOC, only corporation can bring a complaint

**Goldex Mines Ltd v. Revill**

F: G shh in Probe, dispute arose due to proposed purchase of gypsum from company controlled by former Probe director.

I: Personal action?

H: No

R: Where a legal wrong is done to shhs by directors or other shhs, the injured shhs suffer a person wrong and may seek redress in personal action. Derivative action is one in which the wrong is done to the company—always a class action, brought in representative form, binding all the shhs.

**Hercules Management Ltd v. Ernst & Young**

F: EY accounting firm hired by two corporations to perform audit—HM claims negligence, lost money in reliance.

I: Personal action?

H: No

R: Derivative action would have been the proper proceeding. Audited reports provided to shhs as a group to allow them to make collective decisions. Shhs cannot raise individual claims in respect of a harm done to the corporation. However, where a separate and distinct claim (ie tort) can be raised by an individual shh, a personal action may be possible.

Shhs are not restricted to the statutes for obtaining relief because they can claim against the directors or other shhs personally through k or tort. If there is a k betweens shhs or a k between shh(s) and the corporation, the successful party cannot receive CL damages for breach of k because the CL traditionally did not recognize the corporation. Therefore, parties anticipating the need for damages should put them in the k itself or bring an oppression claim.

A shh or a group of shhs can claim a personal action when they suffer a person wrong due to legal actions undertaken by the directors or other shhs (Goldex). Shhs cannot generally claim personally against auditors because the auditor only holds a duty to the corporation. (Hercules) If the auditor breaches this duty, only the corporation can bring a complaint, unless the shhs can obtain permission for a DA, as discussed above.

## Statutory Oppression Remedy (BCA)—How to Bring it

**BCA s 227**

* complainant must be a shh, which include appropriate person (requires court approval, directors have to claim they are appropriate people)
* (2) can apply to court for an order if
  + (a) affairs are or have been conducted, powers of directors—>oppressive to shhs **including** person applying—>different from CBCA
  + (b)some act of company has been done or is threatened by resolution unfairly prejudicial to one or more shhs **including the applicant**
* (3) powers of court—>**broad array of remedies**
* (4) court must be satisfied shh brought action in timely manner

A complainant for the oppression remedy under the BCA must be a shh, which includes an appropriate person who may apply to court for permission (s 227). Therefore, unlike the DA in the BCA, directors are not complainants as of right, and must persuade the court they are an appropriate party to bring an action for OR.

A complainant can apply to court for an order against the company if the affairs are or have been conducted in manner that is oppressive to the shhs, **INCLUDING** THE PERSON WHO IS BRINGING THE ACTION (**DIFFERENCE FROM CBCA**). A complainant may also ground their application in some act of the company that has been done or is threatened by shh resolution, which is unfairly prejudicial to one or more shhs including the applicant (s 227(2)). The complainant must bring their application in a timely manner (4). The court has the discretion to award a broad array of remedies (3).

## Oppression Remedy (CBCA)—How to Bring It

**CBCA ss 238, 241, 242**

* **s 238**: complainant means the owner or former owner of a security (incl bonds/debentures), directors (past/present, officers) and person who can claim as of right
* **s 241:** grounds for oppression
  + (2) court must be satisfied in respect of corporation or ANY AFFILIATES
    - (a) oppression
    - (b) unfairly predjudicial
    - (c) unfairly disregards interests of security holder, creditor, director, or officer (doesn’t have to be the applicant themselves)
* **s 242 (1)**: court can look at shh approval, but not decisive
  + (2) need court’s approval to discontinue the claim, no approval to start it
    - NB: different from BCA where you need court approval for being an appropriate person, but do not need court’s approval to discontinue an OR
      * BCA more management friendly by permitting settlement

Under s 238 of the CBCA, a complainant for an OR is the owner or former of a security, including bonds and debentures, past and present directors/officer, and persons who can claim as of right. This definition of complainant applies to DAs in addition to ORs. A complainant must persuade the court in respect of a corporation or any of its affiliates that there was oppression, an action that was unfairly prejudicial, or an action that unfairly disregarded the interests of a security holder, creditor, director or officer (s 241). **It is crucial to note that the CBCA, unlike the BCA, does not require the complainant to be part of the harmed/oppressed group**.

The court will take into account shh approval of the impugned conduct, but this will not be decisive (s 242(1)). Parties require leave before settling the claim (2). This is another crucial difference between the CBCA and the BCA because the BCA does not require parties to obtain leave before settling an OR, which reflects the more management friendly approach in the BCA.

## CL Oppression Remedy—How to Argue It

* **BCE (CBCA case)**: conduct has to be oppressive, unfairly prejudicial, unfairly disregard interests
  + structure for bringing the OR
    - establish expectations of the complainant—must be reasonable, fact specific
      * was there an action in the context of reasonable expectations that was oppressive, unfairly prejudicial, or unfairly disregarded interests of a complainant?
* **First Edmonton**: person not in as of right must show that justice and equity require trying the claim
* **Ferguson**: oppression depends on the context of each case
* **Naneff**: reasonable expectations depend on the relationships that exist between the parties, remedy cannot be something that the complaining shh could never have reasonably expected

**Re BCE**

R: Best approach to CBCA OR is to look first to the principles underlying the OR and the concept of reasonable expectation. If breach of reasonable expectations is established, must consider whether the conduct complained of amounts to oppression, unfair prejudice, ot unfair disregard. Oppression is an equitable remedy. Courts considering oppression claims should look at at business realities, not narrow legalities. Oppression is fact specific. OR deals with expectations of affected stakeholders. Reasonable expectations of stakeholders is the cornerstone of OR. Fair treatment is what stakeholders must reasonably expect. Test for OR: (1) does the evidence support the reasonable expectation asserted by the claimant and (2) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms oppression, unfair prejudice, or unfair disregard of a relevant interest?

**First Edmonton Place Ltd. v. 315888 Alberta Ltd. (CBCA authority)**

R: Applicant for OR must show that justice and equity require him/it to have the opportunity of trying the claim—if act or conduct of corporation constituted using the corporation as a vehicle for committing a fraud upon the applicant, or if the impugned conduct constituted breach of underlying expectations.

**Ferguson v. Imax Systems Corp (CBCA authority)**

F: Three couples found company—husbands given common shares, wives given preferred (nonvoting) shares. One shh gets divorced, husband squeezes her out, she sues for OR.

I: OR?

H: Yes

R: When dealing with close corporation, court may consider relationship between shhs and bona fides of the transaction. What is oppressive in one case may not necessarily be so in the slightly different setting of another. Claimant has onus of proving oppression.

**Naneff v. Con-Crete Holdings Ltd. (CBCA authority)**

F: Guy makes family business, two sons equal holders of equity. One son gets frozen out due to “lifestyle”, son claims OR.

I: OR?

H: Yes, but remedy at trial is quashed.

R: Family business dynamics are different from normal commercial principles. Applicant must establish his interest as a shareholder has been affected. When determining whether there has been oppression of minority shh, court must determine reasonable expectations according to arrangements which existed between principles. A remedy that rectifies cannot be a remedy which gives a shh something he could have never expected.

According the SCC in the BCE case, which involved the CBCA, a complainant must show the conduct was oppressive, unfairly prejudicial, or unfairly disregards the interests of stakeholders. Therefore, a successful complainant will establish that expectations of the wrong party are reasonable based on the facts of the case. The court will then ask whether there was a corporate action in the context of these reasonable expectations that was oppressive, unfairly prejudicial, or unfairly disregarded the interests of a stakeholder. A party who cannot bring an OR as of right must convince the court that justice and equity require bringing the claim (Ferguson). The reasonable expectations of the harmed stakeholder(s) depend on the relationships that exist between the parties (Naneff). Finally, any remedy derived an OR action cannot be somewhat that the complaining shh could never have reasonably expected to receive (Naneff). It is important to note that the preceding cases, with the exception of BCE, were decided in non-BC statutes. BCE is generally binding in BC because it is a case from the SCC. However, the other cases were argued under CBCA clone statutes from AB and ON. Therefore, while they are directly relevant to an action in BC involving a CBCA corporation, they are weaker authority for cases involving the BCA.

## Compliance and Restraining Orders

**BCA s 19(3), 228, 229**

* **s 228(2):**  must identify someone in the enumerated list is doing something restricted—includes shhs
* **s 229: corporate mistakes**
  + (1) corporate mistake means omission, defect, error, or irregularity which causes
    - (a) breach of BCA
    - (b) default in compliance with memorandum, notice of articles, or articles
    - (c) proceedings of (i) shh meeting, (ii) directors meeting, (iii) assembly purporting one of the former two or
    - (d) consent resolution or something purporting to be CR that has been rendered ineffective
  + (2) court can order correction, modification anything rendered invalid by the mistake
  + (3) court must consider effect of the order on D, O, creeds, and shhs
  + (4) order made under (2) does not prejudice third party who is BFPVwithout notice of mistake

**CBCA ss 238, 247**

* **s 247:** court can order anything it sees fit in addition to an injunction action made by complainant q

**Goldhar v. Quebec Manitou Mines Ltd**

R: Complained provision does not confer any alternative, concurrent, or complimentary rights to those contained in the derivative action. **If corporation is bringing the action, compliance provision cannot be used and derivative action must be sought. Compliance remedy limited to mechanistic (procedural) provisions.**

## Appraisal Remedy

* Dissent procedure is only available for shares that are not sold on the market because assessing market value is a genuine issue
  + must dissent to be eligible for a buy out
    - if you dissent and the motion is passed, corporation must compensate for market value

**BCA ss 237-247**

* **s 237**: a dissenter is a shh entitled to dissent
* **s 238:** contexts for dissent
  + (1) a shh who doesn’t have voting shares can still dissent
  + (2) a shh who wants to dissent must prepare a notice of dissent
* **s 239(1)**: cannot waive the right to dissent generally, but can waive the right to dissent in a particular proceeding
* **s 240:** if shh is entitled to dissent, must give notice before the meeting, send notice to shhs
* required to give notice of intention to dissent to all other shhs
  + (2) if resolution is a consent resolution and the earliest possible date it can pass is in the resolution, company may at least 21 days before passing date send all shhs a copy and notice of right to dissent
  + (3): if resolution doesn’t comply with (1) or (2), company must send all shhs within 14 days after passing the resolution send all shhs who did not consent a copy of resolution, notice of right to dissent

**CBCA s 190**

* (1) contexts in which shh has the right to dissent
* required to send in objection

# Essay: Comments on BCE/Peoples

* oppression remedy
  + claim made by a group or individual that the group’s interests are unfairly disregarded
    - oppression will generally be by the corporation itself
      * whether by virtue of director’s exercise of FD and breach thereof it can be argued the corporation took a decision that constitutes an oppression of one of these groups
  + although creditors cannot directly claim breach of FD, can they investigate the issue to establish that given a breach, this in turn constitutes oppression
    - if this is true and corporation has to compensate, does this mean the corporation ipso facto has a claim against directors for breach of FD
  + SCC says although FD and duty not to oppress were very distinct, they are closely linked
    - at certain stages the directors ought to be taking into account the interests of various parties
      * if they haven’t, when the corporation implements the decision, this may well constitute oppression
        + possible to argue that interests of certain parties should be considered
  + most common context of breaking FD to corporation is usually under a claim of oppression remedy
    - conflation of the two remedial approaches
      * language the court uses is similar when talking about FD itself
  + directors acting in best interests of corporation may be obliged to consider the impact of their decision on various stakeholders
    - director required to act in best interests of corporation viewed as good corporate citizen
      * where there is a conflict, falls to director to resolve the conflict being a good corporate citizen
* outside parties do have an interest in the corporation—directors required to take into account these various interests
  + moving target that will always vary
  + must always ensure corporation is a good corporate citizen