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**THERE ARE 3 TYPES OF ORGANIZATIONS FOR BUSINESS: (1) SOLE PROPRIETORSHIPS, (2) PARTNERSHIPS, AND (3) BUSINESS CORPORATIONS.**

* **Assume Point in Time liability for when it is a GP, become LLP or LP, then becomes corporation.**

# Sole Proprietorship (Individual doing business)

**ONE OWNER WHO HAS THE PREROGATIVE/RESPONSIBILITY OF MAKING ALL ULTIMATE DECISIONS CONCERNING THE BUSINESS.**

* **Adv**: Commenced and dissolved easily unless there are special licensing requirements **// Dis**: None of the advantages that accrue to a business corp… they are ***fully liable*** for all the debts and other obligations incurred by the business regardless of how carefully they segregate business from personal activities
* **PA s.1** - “***Sole proprietorship***” means a person who **under section 88(1)** is required to file a registration statement

**NAMING:** Can call yourself whatever you want under the CL, but:

* **PA 88(1) – DUTY OF SOLE PROPRIETORSHIP TO FILE REGISTRATION STATEMENT -** if doing business (trading, manufacturing or mining) under a name ***other than your own***, or w/ addition of ***potentially misleading*** portion
  + E.g. “and Co.” the sole proprietorship must be registered within 3 months of the time the business name first used**;**
  + E.g. Cannot give impression that you are operating as more than one person.
* **PA 89(1) - NAME MUST NOT BE SAME/SIMILAR TO ANOTHER BUSINESS -** Registrar must **not file a registration** statement that contains a bus name that is **(a)** ***already registered or incorporated in BC***, or **(b)** ***closely resembles a name*** which would confuse or mislead ***or which the R disapproves***.

# PARTNERSHIPS (PX)

* **PA 91 –** Rules of equity and CL are applicable to partnerships, except where they are inconsistent with provisions of this Act.
* **PA 3 - IF YOU ARE A CORP YOU ARE NOT A PARTNERSHIP!**

## [a] General Partnership (PX): By Operation of Law

* **PA 1 – “GENERAL PARTNERSHIP” -** means a partnership that **(a) has BC as its governing jurisdiction**, and **(2) is neither a LP nor a LLP**
* You can opt into a Px, but a **Px agreement will not create a Px if you do not meet the definition** **//** Just because you don’t have a partnership agreement does not mean that you are not a partnership under the law.

**i) DEFINITION (PRE-REQUISITES) OF PARTNERSHIP (PA s.2)**

**ABSENCE OF ANY 1 PRE-REQUISITE MEANS YOU ARE NOT IN A PARTNERSHIP**

* **PA s.2 - PARTNERSHIPS ARE DEFINED -** as the relationship between 2+ persons (includes corps “artificial persons”):
* **[1] Have to be *carrying* on a “business”**: which is “every trade, occupation or profession” (**PA s.1**) – must categorize the biz.Likely requires ongoing, long-term activity and active participation in MGT and sharing of profits, i.e. short transactions are excluded.
* **[2] In Common (together):** argue this term if want to get out of characterization **(*Kamex*)**
  + Threshold is difficult to determine – look to **s.4** for assistance.
  + Partners carrying on business together based on some type of agreement (written, oral, or implied) probably means there is a Px.
  + Co-ownership that leads to profits alone ***not sufficient*** (***Kamex***; **PA s.4(a)** - *owners of the building maintained separate property interest*, therefore co-ownership, not Px)
  + Where parties hold different shares and profits divided in set way + can bring in a buyer w/o group consent then less likely to find partnership) **(*Kamex*)**
* **[3] With a view to profit:** no actual profit need be generated **–** but ***undertaking is not*** for charitable, social or cultural purposes.
* **PA 16 – PERSON REPRESENTING HIMSELF AS PARTNER –** a person who represents themselves or knowingly allows themselves to be represented as a partner of a firm is ***liable as a partner to anyone*** who has given credit to firm on faith of those representations (the Px has to allow the person to do this essentially).

***\*Most common situation is where someone ceases to be a partner but does not remove themselves from the name of partnership***

**RULES TO DETERMINE IF A PARTNERSHIP EXISTS (PA s.4):**

* **PA 4 – Illustrative – s.2 is more important:**
* **4(a)**: Owning ***property in common*** does **NOT** **of itself** create a partnership, even if you share profits (***Kamex -*** *each individual had a defined share of the property and was allowed to sell to an outsider, thus not a Px*).
* **4(b):** Sharing of ***gross returns*** **DOES NOT of itself** create a partnership (if you are a ***creditor*** you are not a partner – can argue to hide under this such as Driver in ***Pooley*** tried).
  + E.g. **Consignment** - Someone entitled to first cut of profit from property, then this sharing of gross returns is not a partnership.
  + **Counter Possibilities:** Could be a partnership where partner gets paid first (look to see if there are any creditors to pay)
* **4(c):** Receipt of ***share of*** ***profits*** (gross returns – expenses), **absent evidence to the contrary**, is **PROOF OF A PARTNERSHIP**
  + There is a list of 4 exemptions to this (e.g. selling on commission).

**These provisions are only examples of relationships.** Must look to the ***entire character*** of the relationship (***Pooley***).

* Cannot have the benefits of Px without being liable to the consequences (***Pooley*** *– money advanced to two partners by a “creditor”****,*** true relation of the parties was that of ***dormant and active partners***, and not of mere creditors and debtors).
* The mere fact that co-owners intend to acquire, hold and sell a building for profit does not make them partners. Determining whether there is a partnership depends on the parties’ intention, and intentions perceived by a reasonable person. However, intentions are not a determining factor (***Pooley***).

**ii) LEGAL PERSONALITY**

* **Px HAS NO SEPARATE LEGAL PERSONALITY FROM ITS PARTNERS -** Consequently, Px’s cannot employ partners (***Thorne*** - *P who worked for Px tried to get Worker’s Comp)* 🡪 Partners cannot have K w/partnership b/c partnership does not exist outside of them (***Thorne***)
* **UNLIMITED LIABILITY:** Default is both joint and several liability - each partner is ***liable to the full extent of his personal assets*** for debts and other liabilities of the partnership business as provided in the applicable statute.
* **PA 1 – “FIRM” –** is the collective term for persons who have ***entered into partnership*** with one another // Firm name is matter of convenience only, has no substantive legal consequence (***Thorne***)
* **PA 81(1) – DUTY OF GENERAL PARTNERSHIP TO FILE REGISTRATION STATEMENT –** all persons associated in partnership for trading, manufacturing or mining must, unless firm registered as a LLP, file a registration statement w/ the registrar.
* **PA 89(1) – NAMES SIMILAR TO CORPORATION –** registrar must not file a certificate or registration statement that contains a business name that ***(a) is already incorporated or registered in BC,*** or **(b)** so nearly resembles that name so that it is ***likely to confuse or mislead***, or which the R disapproves.

***Thorne v NB (Workmen’s Compensation Board),* [1962] *-*** *T and R entered into oral agreement to carry on in partnership for a combined lumbering/sawmill business. T suffered personal injuries by accident arising out of and in the course of the duties performed by him pursuant to the partnership agreement. He applied to the Board for compensation* // **Held:** T was not an EE, because he did not have a K with the Px (as it is not a separate legal entity and it is impossible to have a K with oneself).

**iii) RELATIONSHIPS OF PARTNERS TO EACH OTHER**

**BY DEFAULT, PARTNERS HAVE EQUAL SHARES OF PROFITS, PROPERTY, AND SAY IN THE BIZ. THIS CAN BE K’D OUT OF, AND OFTEN IS.**

**GENERAL RIGHTS AND DUTIES:**

* **PA 21 -** **P’s CAN VARY RIGHTS & DUTIES TO ONE ANOTHER W/ UNANIMOUS CONSENT (consent can be expressed or inferred)**
* **\*PA 22(1)** - **P’s HAVE A FIDUCIARY DUTY TO ONE ANOTHER -** act with utmost fairness & good faith to other members of the firm in firm business.
  + Duties are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liability of partners (**PA** **22(2)) //** Cannot K out of.
  + **Fiduciary Duty’s: i) Information:** Duty to be proactive in revealing info to the other partners (business opportunities, personal financial issues, etc); **ii)** **Property:** cannot keep for yourself property or benefits part of the partnership (e.g. taking up a business opportunity for yourself).

**PARTNERSHIP PROPERTY:** Special Obligations owed to this property.

* **PA 23(1) -** All “***Partnership property”*** is held/used exclusively for the Px & in accordance w/ Px agreement - often varied by the Px K (cannot take opportunities for yourself but it is possible for property to be allocated in certain ways according to the agreement).
  + **PA 1.1 – “partnership property”** means property rights and interests **(a)** originally brought into the ***partnership stock***, **(b)** acquired on ***account of the firm***, **or (c)** acquired for the purposes and in the ***course of partnership business***.
    - Does not matter how acquired, who acquired, or who paid for it (means: debts, desks, etc)
    - Partners have collected interest in partnership property but not an interests in the partner’s personal assets outside of the partnership (*inside view*), but a person from the outside world can have a claim against the partnership and any of the partner’s personal assets (*outside view*).
* **PA 24 -** property bought w/ firm money is deemed to be bought on account of firm, absent contrary intention.

**DEFAULT RULES – PA 27 – Can be contractually changed.**

* **(a)** All P’s must ***share equally in capital & profits*** // contribute ***equally to losses***
* **(b)** Firm must ***indemnify P for payments & personal liabilities*** incurred in:
  + i) ordinary & proper course of biz; ii) done for preservation of business/property of the firm
* **(c)** P making any payment beyond amount of capital he/she agreed to subscribe entitled to interest at fair rate
* **(d)** P not entitled before ascertainment of profits to interest on capital subscribed by him/her
* **(e)** Every P **MAY** take part in ***management* –** no breach of fiduciary per say if you don’t take part (may be a breach if you do not reveal important information to Px) 🡪 **K out of this:** Often a Managing Partner or committee.
* **(f)** P ***not entitled to remuneration*** for acting in Px business (i.e. other partners have to agree to pay that partner not the firm)
* **(g)** Cannot introduce person as Partner ***w/o consent*** of all existing Partners
* **(h)** Any difference re: ordinary ***matters connected w/business*** may be decided by majority of partner but no change as ***to nature of business*** w/o consent of all existing partners
  + Argue ordinary v nature of the business

**EXPEL PARTNER: PA 28 -** majority cannot EXPEL Partner ***unless*** agreement allowing that is in place & exercised in good faith.

* Could not K out of “good faith” requirement (Fiduciary nature of relationship).

**END/DISSOLUTION:** Px ends when:

* **NOTICE**: if no set term for Px, any P can end Px by giving notice to all other P’s (**PA 29(1))**
* **EXPIRATION OF SET TERM (if entered into for a set term) OR END OF SINGLE ADVENTURE OR UNDERTAKING** (**PA 35(1)(a)&(b))**
  + **“carrying on”:** is a requirement for a Px, thus you may not have a Px if it is going to end after a single event (fine line) (**PA 2)**
* **NOTICE OF DISSOLUTION**: if entered into for undefined time by any P giving notice to others of his/her intention to dissolve partnership (**PA 35(1)(c))**
* **BANKRUPTCY / DEATH**: ***2-person Px*** 🡪 dissolves // ***Multiple P’s*** 🡪 dissolves, subject to PA **(PA 36(1))**
* **EVENT MAKING BIZ UNLAWFUL** – Px automatically dissolved (**PA** **37)**
* **COURT ORDER TO DISSOLVE:** Power of the ***court to dissolve partnerships*** if **(a)(b)** partner found mentally incapable; **(c)** other partner guilty of conduct that prejudicially affects the business; **(d)** willful or persistent breach of partnership agreement or conduct that makes it impracticable to carry on business in partnership; **(e)** when business is at a loss; and **(f)** when just and equitable to dissolve partnership **(PA 38(1))**

**UPON DISSOLUTION:** PROPERTY: Every partner entitled to apply property to debts & liabilities + get surplus assets (**PA** **42)**

**iv) RELATIONSHIP OF PARTNERS TO 3P’s**

**WRONGFUL ACTIONS/OMISSIONS (tort liability):** Firm liable for loss to the same extent as the P who caused the loss while acting in the ordinary course of business (**PA** **12)** - since the firm is liable and partners are not legally separate from the firm they are also liable (**see s.14**)

* ***Way around***: Wrongful act was not done in ordinary course of business (i.e. define the business after the fact); or it was not the business of the partnership; person had no authority from partners (yet, constructive notice is enough)

**LIABILITY AS A PARTNER:**

* **P’s ARE JOINTLY & SEVERALLY LIABILITY (tort liability):** for firm liabilities under **12** and **13** while a P (**PA 14)**
* **DEBTS (K’l Liability):** P’s jointly liable for all debts + obligations incurred while member of Px (and severally liable after death) (**PA** **11).**
  + **\*Outsider w/ debt claim:** Can bring claim against any or all P’s personally.
  + **“Jointly”:** Each partner liable for entire debt personally // No claim against other P’s unless agreement (K’ing into joint and several liability within the Px) that this can happen.
* **P’s ARE AGENTS OF FIRM & OTHER P’s - P’s ACTS BINDING:** For purpose of Px business (**PA 7(1))**. Where P carrying on in the usual way business of the kind carried on by firm (**PA 7(2))**
  + **EXCEPTION (not binding when):** P had no authority to act **AND** 3rd party knew OR didn’t know or believe person to be a Partner (**PA 7(2)(a)&(b))**
* **HOLDING OUT LIABILITY:** if you represent yourself as a P, you’ll be liable as one (**PA** **16).**
* **PRE-PARTNERSHIP LIABILITIES:** not liable for ***previous acts/obligations before were a partner*** (**PA s. 19(1)**) but if die/retire still liable for debts/obligations incurred prior thereto (**PA s. 19(2)**)

**LIMITING EXPOSURE TO OUTSIDE WORLD**

## [b] Limited Liability Partnerships

Unlike GP, **these are specifically chosen**. Usually selected for some professionals that are able to create LLP’s (Lawyers, etc).

* **Benefit:** limited liability except for situations in which partner him/herself is responsible for the negligent wrongful act/omission (**PA 104**) and those similar to payment obligations (not fiduciary) a corporate director **(PA 105).**
* **Detriment**: wrongdoer still has unlimited personal liability w/respect to own wrongdoing and to the extent a partner has contributed to general partnership property, that interest is also at risk (**PA 104(3)**)
* **PA 100** – **NAME “LLP” -** LLP must use at end of Px name (e.g. Brownlee LLP)
* **PA 94 – “limited liability partnership”** means a partner registered as an LLP under this Part.
* **PA 95** **- LIABILITY PROVISIONS OF PA DO NOT APPLY TO LLP’s** (i.e. Joint Liability for firm debts under s. **11** & Joint & Several Liability for wrongful act, omissions & loss under s. **14)**
  + **SECTIONS THAT APPLY TO LLP -** **parts 1 (definitions), 2 (nature of the partnership), 4 and 5 apply to LLP’s** (except that they’re required to register) (**PA 95)**

**FORMATION:** **PA 96 - UNLIKE GPs**, **NO IMPLIED LLP’s - *REGISTRATION REQUIRED*** - i.e. registration statement in form established by registrar (**s. 96(2)**) setting out the business name, mailing address of RO, indicating whether Px is a professional partnership, containing statement that person has approval of all partners to file registration statement (**s. 96(4)**)

* + **PA 97 - PROFESSIONAL LLP’s:** must be expressly authorized to form LLP under governing statute & meet any pre-req’s
  + **PA 102 - CHANGE IN Px DOES NOT AFFECT LLP’s STATUS:** change of P’s doesn’t require re-registration
  + **PA 95 -** until satisfy these requirements to form an LLP, partners are liable as though it was a general partnership

**PARTNERSHIP PROPERTY:** understand “partnership property” since there can be unlimited liability for Px property (**s.104(3)(below))**.

* **LLP SHOULD TRY TO MAKE AS MUCH PROPERTY AS POSSIBLE NOT Px PROPERTY (limits liability):** e.g. not buying property with income; make sure property cannot be said to be acquired or used on account of the partnership.
  + **PA 1.1 – “*partnership property”*** means property and rights and interests in property **(a)** originally brought into the ***partnership stock***, **(b)** acquired on ***account of the firm***, **or (c)** acquired for the purposes and in the ***course of partnership business***

**LLP PARTNER LIABILITY:**

* **PA 104(3)** – **GENERAL PARTNERSHIP PROPERTY STILL SUBJECT TO 3P CLAIM - Outsider can go after Px property but personal liability of P depends on the situation:**
* **PA 104(1) - P NOT PERSONALLY LIABLE** **FOR 🡪** **(a)** Px obligation merely b/c you’re a P; **(b)** obligation under agreement b/w Px & 3rd party; **(c)** to the Px or another partner for an obligation to which (a)(b) applies
* **PA 104(2) - P ARE PERSONALLY LIABLE FOR 🡪** **(a)** Ps ***own negligent or wrongful act/omissions*; (b)** the negligent or wrongful act or omission of ***another P or EE*** if Partner seeking relief (1) knew of the act of omission, AND (2) did not take the actions that a reasonable person would to prevent it.
  + Given every P’s duty to a “***act with the utmost fairness and good faith*** towards other members of the firm in the business of the firm” (**s. 22(1)**), which includes keeping people informed, very difficult to argue any given partner did not have notice – **constructive knowledge.**
  + Also the express obligation in **s. 31** that “partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives.”
* **PA 105 - P’s SUBJECT TO SAME OBLIGATIONS AS CORPORATE DIRs WRT PERSONAL LIABILITY FOR PAYMENTS** 
  + Does not apply to main duties (FD, DOC (142 of BCA excluded)) - rather makes P’s liable for things like unpaid wages, name not displayed, etc.
* **\*PA 106 - CAN’T FORM LLP TO ESCAPE OBLIGATION**: P still personally responsible for ***pre-existing liability before Px became LLP***.
  + (a) arose before the partnership became a LLP, or
  + (b) arose out of a K entered into before the Px became a LLP.

## [c] Limited Partnerships (General Partners + Limited Partners) – A way to raise capital for company

**INVESTMENT DEVICE** 🡪 **Use where someone wants to invest/contribute as creditors** – though still likely far better just to incorporate. Takes all of the law applying generally to partnerships and modifies according to the below provisions (**PA 49**).

* **Adv**: **LP’s** are entitled to be ***paid first*** upon dissolution, prior to the GP’s; does not make you a preferred creditor w/ respect to the rest of the world, but internally you get preferential treatment regarding your contributing at dissolution of the partnerships
* **Dis**: Unlike general partners, limited partners ***may not be*** involved in the running of the business

**YOU CAN BE BOTH A GP & LP** 🡪 a person may be a GP and LP at same time (**PA 52(1)**); done if person wants ***priority as against other general partners*** to profits and property upon dissolution of Px (**PA 52(2)**) and would like to be involved in ***running of the business*** – but would still have the unlimited personal liability of general partners (need at least 2 ppl).

* + **If all LP’s are also GP’s –** essentially a general Px w/ certain arrangements internally (thus one LP must stay exclusively a LP for this type of Px to exist).

**FORMATION:**

* **PA 50(2)** – **LPx consists of**: (a) 1+ “persons” who are ***general partners***, and (b) 1+ “persons” who are ***limited partners.***
  + **“Persons”:** need not be natural; can be a corporation (common for GP to be corp).
* **PA 51(1)** - **NO IMPLIED LPx’s** - must comply with **requirements in s. 51,** including registration.
  + **51(2) - Provide**: **(a)** business name; **(b)** general nature of business; **(c)** name and residential address of each GP; **(d)** term LP exists; **(e)** property and monetary contributions by LP’s; **(g)** what preferential treatment LP’s have to profits.
  + **51(3) -** Not entitled to know who LP’s are, just their contributions (“May state” full name).
* **PA 55(1)** – **LP NO SERVICES –** LP MAY ***contribute money and other property***, but not services – not allowed to do work as a contribution to the business (but can for corps (e.g. get shares from corp by working for the corp)) // **(2)** **PERSONAL PROPERTY INTEREST -** LP’s interests in the Px is personal property (Reminder that the LP’s interests are personal property ones instead of land).

**TWO CATEGORIES OF P’s:** ***GENERAL*** (of which there must be at least one) and ***LIMITED*** (of which there must be at least one) (**PA 50**)

**[1] GENERAL PARTNER** - has all the powers & rights of a P in a general Px (**PA 56**)

* + ***Benefits to GP***: can run business but NO AUTHORITY DO THE FOLLOWING ***w/o written consent by limited partners*** (**PA 56**):
    - (a) do an act making ***it impossible to carry on business*** of LP,
    - (b) consent to ***judgment against*** limited partnership,
    - (c) \****possess limited Px property*** or dispose of any rights in limited partnership property other than for partnership purpose,
    - (d) ***admit person as GP or as LP***,
    - (e) continue business of limited partnership on ***bankruptcy, death, retirement, incompetence or dissolution of a GP***, unless that right is given in the certificate
  + ***Detriments to GP***: Unlimited personal liability (if does any of the above) (I.e. Creditor could come after partner personally) (**PA 56**)
    - **Way around**: Interposit a corporation between the individual and the LPx and have that corp be the general partner such that would ONLY be personally liable if the court was ***willing to lift the corporate veil*** (see below)

**[2] LIMITED PARTNER** - can contribute **MONEY & PROPERTY** - but not services // Interest limited to personal property (**PA 55(1)&(2**))

**RIGHTS:**

* **PA 58(1)** – (a) ***inspect & make copies*** of or take extracts from LPx books, (b) ***be given true & full info of things affecting LP***; (c) to obtain ***dissolution by court order***
* **PA 59(1)** – **PROFITS –** LP right to a) ***share of profits*** and b) to ***have his/her contribution returned***, but cannot withdraw unless there are sufficient partnership assets to cover all partnership liabilities 🡪 **Changes:** Px can change this.
* **PA 59(2) - PRIORITY ON DISSOLUTION/WINDING UP**

**DISTRIBUTING PARTNERSHIP ASSETS:**

**RELATIONSHIP B/W LP’s** - share capital & profits in proportion to their claims (**PA 61(a)**); if there’s greater than 1 limited partner, Px agreement may provide 1+ limited partners have greater rights than other LP’s (**PA 61(2)(c)):** including **re** return of contributions (**PA 61(2)(a**)) and profits or compensation by way of income on their contributions (**PA 61(2)(b)**).

* + **But** - **PROPERTY** - can’t receive contribution ***until all liabilities of LP paid*** (**PA 62(1)**)

**DETRIMENT FOR LP:** cannot be involved in running/control of business (can contribute money & other property but not services **s. 55**) unless keep roles distinct as in ***Nordile***.

**LIABILITY OF LIMITED PARTNER:**

* **PA 57 - LIMIT ON LIABILITY** - LP’s liable up to **AMOUNT OF PROPERTY CONTRIBUTED** to Px (or agreed to be contributed).
* **PA 64** - A LP is **NOT LIABLE AS A GENERAL PARTNER** **UNLESS** he or she ***takes part in the management of the business*** (***Haughton Graphic*** – **Held: LP’s** **liable as GP’s** - *were directing minds and made managerial decisions; held selves out as “president” and “exec VP”)*
* **Liability is based on the particular situation as can have GP liability for one situation and not another.**
* ***Way around***: do not hold selves out as making decisions for the Px and insulate as EE’S of the GP (making decisions in this capacity and stating this fact to creditors/3rd parties) (***Nordile Holdings*** – **LP’s not liable as GP’s**; *did not hold themselves out as management & weren’t EE’s of the LP; distinct roles)*.
* **2 FACTORS to determine whether limited partner will be liable as a general partner**:
  1. To what extent is the person making ***it abundantly clear to rest of world*** that he/she is not involved in decisions of partnership? (made clear in ***Nordile*** but not ***Haughton Graphic***)
  2. What is the ***manner in which decisions made by limited partners*** (who may be simultaneously EEs of general partner) conveyed to the general partner and ultimately put into effect by partnership? (***Nordile***).
* **CONSEQUENCES IF LIABLE AS A GENERAL PARTNER**: unlimited personal liability (***Haughton***)

***Haughton Graphic Ltd v Zivot,* 1986 *-*** *Printcast was a LP with 1 corp general partner (Lifestyle Mag) and 2 LP’s (Z and M). Z and M were also EEs of Printcast and the corporate general partner. Z presented himself as the president of the limited partnership, M as vice-president. Z, in his capacity as president of the corporate GP (Lifestyle), acted as the manager of the LP (Printcast)* // **Held:** LP’s found liable as GP’s because they were the directing minds and represented themselves as management of the limited Px.

### Nordile Holdings Ltd v Breckenridge, 1992 - Where individual LP’s act only in their capacities as DIRs and OFRs of a corporate GP, they are not liable as GP’s // Held: Where a person is both a limited partner and involved in mgmt. of corp which is general partner, clear and express delineation between those roles, with communications processed through proper channels, will prevent exposure to liability in accordance with s 64 of PA (liable as GP).

# BUSINESS CORPORATIONS

**A CORPORATION IS A SEPARATE LEGAL ENTITY FROM SH’s (*Salomon***)

* **ADV:** SH may also be a creditor or even a secured creditor of the corp // A corp owns its own property // Insulates SHs from liability & can sue and be sued in own name and enter own K’s (**CBCA 15, BCA 30**) // D’s & O’s can enter K’s with corp (***Salomon***)
* **DIS:** For unsecured creditors: if the corp is thinly capitalized its unlimited liability is of little comfort. Can look only to corp not SHs (***Salomon***)

**LIABILITY**

* **BCA 87(1) & CBCA 45(1) - LIABILITY –** SH’s ***are NOT personally liable*** for corp liabilities (debts, obligations, etc) (affirmed in ***Salomon*).** 
  + **Exceptions:** Only initial SHs personally liable ***to the extent they have to pay any outstanding amount*** for initial purchase of shares (**s. 87(2) *BCA***, **s. 45(1) *CBCA, Salomon***). **ALSO SEE 🡪** Piercing Corporate Veil.
* **Part 2.1 *BCA*** **– POTENTIAL UNLIMITED SH LIABILITY –** It is possible the corporation’s articles of incorporation provide that SH’s will be liable for obligations of company (thereby establish unlimited liability company).

***Salomon v Salomon & Co. Ltd -* The Corporation is a separate legal personality from its SHs //** *AS (Salomon) transferred a business carried on by him as a sole proprietor to a corp in which he and 6 of his family members were SHs. At the 1st meeting of the co. DIRs, it was decided that AS should be paid only $6k and be issued $10k debentures, and secured upon the assets of the company. As a result, after the transfer, he held the vast majority of the shares and was in effective control of the corp as well as being a secured creditor. Company ran into financial trouble. If the secured claim of AS were paid first, as it normally would be, there would have been no assets left out of which to pay the other creditors who were unsecured* // **Held:** AS owes nothing personally to unsecured creditors.

**Alternative Sources of Creditor Protection: How Creditors Protect themselves from loss**

Pertains to **those creditors who are outside corp** and dealing with it as a separate legal entity. Very little can be done when dealing with thinly capitalized corp (as illustrated in ***Salomon***) – will be used by someone loaning company money or providing services/assets in expectation of being paid later.

**[1] CONTRACTUAL DEVICES**: **(1)** Demand a ***security interest*** in the corp’s assets as collateral (e.g. ***Salomon***); **(2)** insist upon ***guarantee*** from SH; **(3) *higher interest rate*** as compensation for risk; and **(4)** ***refuse to lend***.

**[2] DEVICES PROVIDED BY LAW**:

* **Cautionary suffix** 🡪must add “Corp”, “Ltd” or “Inc” to ***warn creditors dealing w/limited liability*** entity (**s. 23 BCA, s. 10(1) CBCA)**
  + Failure to include such a suffix may expose managers/DIR’s **to personal liability** - ***Wolfe v Moir*** (AB) - *DIR found personally liable for injury suffered by P b/c advertised event under own name not that of corp.*
* **Pierce the corporate veil** 🡪 disregard separate legal personality and merge parties back together to create a Px-like situation (below).
* **Capital maintenance requirements** 🡪 ensure that corps maintain a ***certain liquidity for creditors*** to use in the event of indebtedness. Provision to ensure corp receives cash or equivalent for issued shares & prohibition on corp declaring dividend/redeeming or purchasing corp’s shares when insolvent or would make insolvent.
  + ***Note*:** Statute does not do a good job of this so well-advised lenders use K’al devices to effect this as a term of financing.
* **Publicity** 🡪 Corporate filings – Home Office/RO, names of DIRs (**BCA** **ss. 10-11**, **CBCA** **ss. 19, 263**), prescribed records at HO and made accessible to creditors and SHs (**s. 42 BCA**, **s. 21 CBCA**)
* **D&O Liability** 🡪 Liability of Officers or DIRs for their own acts or omissions: unremitted taxes (due diligence defence), unpaid wages, tort committed by D&O or EE (***ADGA Systems***, ONCA), damages under environmental protection legislation.
* **Oppression remedy** 🡪 **s. 227 BCA & s. 241 CBCA** broad enough to include general creditors & other stakeholders
* **Duties in vicinity of insolvency** 🡪 DIR’s duties shift towards creditor protection as a corp nears insolvency ***(People’s Dep’t Store)***

## [1] DIR/OFR/EE PERSONAL LIABILITY IN TORT (Liability for separate breaches of duty)

**B/c Corp and individual have separate existence (*Salomon***)**, they can be separately liable in certain situations (e.g. misrepresentation). While DIRs/OFR are not generally liable for the corps torts, they can be liable for the torts that they commit individually.**

**WHO:** Anyone who is able to bring a claim (person suffered as a result of the tort).

**WHEN:** Someone other than the corp has deeper pockets or P has a limitation clause in a K with the corporation.

* In all events, OFRs, DIRS and EEs of corps are **responsible for their tortious conduct (statements & actions)** even though that conduct was directed in *a bona fide* manner to the best interests of the company (***ADGA***)
  + **Subject to** ***Said v Butt* defense:** If individual (e.g. EE, SH, DIR, etc) **induces a** **breach of K between a 3P and the corp for which the individual works** – **Result:** **CANNOT** bring action against individual for inducing breach of K if were performing their duties, acting in best interest of corporation & the company is a party to the K in question (it is the corp itself inducing the breach – only corp is liable).
    - ***Way around:*** Argue EE/DIR/OFR was acting *fraudulently.*
    - ***Defense Inapplicable:*** If the tort is to person or property (***assault, trespass, nuisance***) then will be personally liable even if performing duties (***Said***)

**Examples where CAN bring action:**

1. **EE (i.e. Dir or OFR) of Corp A induces breach of K between 3P and Corp B, but Corp B is not one with whom the tortfeaser EEs of Corp A have K’ed with** – Result: may be held liable in individual capacity (***ADGA Systems*** – *Valcom DIR and 2 EE’s poaching EE’s from ADGA – Valcom competitor of ADGA* **// *Said*** *not applicable*).
2. **EE commits a tort against a 3P or their property (e.g. Negligence) (presumably K between 3P and Corp or EE) and that 3P goes after the EEs instead of the corp that employs them** – Result: EE’s can be held liable in individual capacity (even if doing something in course of what they are hired to do) and must look for a defense in the K their ER has with the 3P (***London Drugs*** *– Exclusion of Liability Clause in K allowed EE’s and corporate ER to escape liability****)*** (restated in ***ADGA***)
3. **EE’s commits a tort against a 3P who has no K’al relationship with either the EE or the Corp that employs them** – Result: EE’s can be held individually liable but the ER will likely be added as a D if the EE committed the tort while performing duties of employment (***ADGA***)

### ADGA System Int’l Ltd v Valcom 🡪 inducing breach of K and Negligence torts

**A DIR/OFF can be held directly liable for torts when acting in the course of their duties//***P claimed that a competitor, D, raided its EEs and caused P economic damage. There was no K between ADGA (P) and Valcom (D)* // **Held:** Director & EE’s liable for inducing breach of K b/c they were not party to K // In this case, the alleged conduct was intentional and the only relationship between the corp parties was as competitors – there is no principled basis for protecting the DIR and EMP of Valcom from liability from their conduct on the basis that such conduct was in pursuance of the interests of the corp.

## [2] Piercing (Lifting) the Corporate Veil (Merged Liability)

* Means going contrary to **s. 45 CBCA** & **s. 87(1) BCA** and ***Salomon* 🡪 Situation where courts put aside limited liability and hold a corps SH’s, DIRs, or others effectively in control of the corp personally liable for the CORPS ACTIONS OR DEBTS.**
* The courts disregard the separate existence of the corp in relation to some specific claim, **usually the claim of a creditor of the corp** whose claim would not be paid because the corp has insufficient assets to satisfy it. Disregarding the corp in this way does not destroy its separate existence for all purposes, but only for the limited purpose of granting relief to the creditor directly against the SH.

**PIERCE CORP VAIL**: **(1)** Make ***corp responsible*** for what the SH/DIR/OFR has done (***Lynch v Segal*)**; **(2)** Make ***SH/DIR/OFR responsible*** for claim against Corp; **(3) *join closely-related corporations* (**ignore distinction between corps)**(*De Salaberry***) (see **BCA 2(1)-(3)**).

* Typically involves attempting to make a **SH liable, BUT can include DIRs or Officers.**

|  |
| --- |
| **BCA - Corporate Relationships**  **2(1)** – Corp is **AFFILIATED** w/ another corp if **(a)** one of ***them is a subsidiary of the other***, **(b)** ***both are subsidiaries of the same corp***, **OR** **(c)** each is ***controlled by the same person***.  **2(2)** - Corp is a **SUBSIDIARY** if **(a)** it is controlled by that other corp, that other corp and one or more corps controlled by that other corp, or 2 or more corps controlled by that other corp, **OR** **(b)** it is a subsidiary of a subsidiary of that other corp.  **2(3)** – Corp is **CONTROLLED BY A PERSON** if (a) shares of the corp are ***held by the person other than by security***, **AND** (b) the votes carried by the shares are ***sufficient to elect/appoint a majority of DIRs*** of the corp |

### TESTS

**A. Sham Test**- **IS THE COMPANY THE MERE AGENT OF THE CONTROLLING PROMOTER/SH** **SUCH THAT IT MIGHT BE SAID THE COMPANY IS A SHAM OR MERE EGO OF THE CREATOR? Look at the specific transaction to see if fraud/sham and should merge multiple entities together** (***Clarkson*** - no lifting, not a sham transaction - *attempt to get at the corp the individual is involved with - no intent to defraud his creditors even though transfer w/o consideration*)

* If the promoter/SH has transferred own assets to corp to avoid existing personal liabilities or made a secret profit on such a transfer or company formed for purpose of doing otherwise wrongful act, then it will be found a sham (***Clarkson***)
* **Context:**

1. **Bankruptcy/debt context** - attempt to hold SH/DIR liable for corporation’s debts (***Clarkson***).

* **Factors to see if sham:** If bring entities into existence when on the verge of bankruptcy **//** If an individual is causing assets to be transferred to a corp **//** Corp formed for the express purpose of doing wrongful/unlawful acts or when those who control it expressly direct wrongful/unlawful acts to be done, and individuals can be held liable as well as corp.

1. **Government trying to deny statutory benefits to controlling SH on basis that SH cannot also be an EE** (***Lee v Lee’s***: **Held:** no lifting;husband could be both SH and EE of company provided the corp was not brought into existence for employee/SH to get the statutory benefits in question (Workers Comp). Clear the EE did not incorporate to cover benefits in death) – will not lift veil, unless can show Sham transaction).

* **Another example:** DIR leaves job at corp and signs a K not to compete w/ the company. If he sets up a new company which competes with his former company, technically it would be the company and not the person competing. But could pierce the corp veil, saying new company is a “sham,” which would allow the old company to sue the new for breach of K.

**B. Tax Content** - **MULTIPLE CORPS MAY BE TREATED AS ONE ENTITY. VEIL LIFTED FOR TAX CONTEXT** (***De Salaberry*** - *business of corp and its subsidiaries treated as one; money received by parent corp from subsidiaries treated as income from business, not as capital gains which would not have been taxed* 🡪 these fact sets will look at ignoring a complex corporate structure in favor of treating it as a single corp. Look to see if subsidiaries are set up for isolated but related purposes // **Held:** for tax purposes, taxed collectively)

**FACTORS TO LOOK AT:**

a) Instrumentality: for practical purposes entities are essentially one (direct instruments of parent corp).

b) Control: one entity is entirely under the control of the others – second company is puppet of the first.

c) Free will: no free will that differentiates one from the other.

* ***Smith Stone and Knight*** **factors** (if subsidiary was carrying on business of parent co): profits treated as those of parent co, persons conducting business of corp were appointments made by parent and same people who act in parent, parent is head & brain of trading venture, parent governed the venture & brought necessary capital, skill & direction of parent company responsible for profit, parent company in constant and & effectual control since same D & O.

**C. Conduit Pipe Approach (another tax case)**: **CONDUIT IS SIMPLY THE MEANS BY WHICH ASSETS/LIABILITIES MOVE FROM ONE CORP TO ANOTHER, THEN CAN IGNORE THAT CONDUIT CORPORATION** **(*Jodrey Estate*).**

* **Context**: Succession – SCC held that JCG (corp) was a mere conduit, linking parent corp to the assets left in the estate and thus lifting of the corp veil was justified -pierced and estate liable to pay succession duties (***Jodrey Estate –*** *Instead of giving grandchildren shares he held, gave a promissory note and had a corp (JBH) with a subsidiary (JCG) set up. Each grandchild bought 100 shares in JBH at $1 each. Transferred his interests to a third company (WRI) in exchange for a promissory note which was then left to JCG in a new will* **// Held:** Corp veil lifted).

**D. Justice and Fairness Approach - PIERCES CORP VEIL ON THE BASIS OF MORAL OUTRAGE. Courts are more likely to ignore corporate structures in the family law context (more flexible), particularly where there are children involved. Will pierce corp veil and attribute assets to the spouse attempting to hide assets to achieve purposes of matrimonial legislation (*Lynch v Segal –*** *husband transferred his house and personal assets to the corp to shield from wife and children in matrimonial proceedings. Corp looked as if the husband had nothing to do w/ it, nonetheless, structure was created at his direction (Not SH or MGT)***).**

* It’s simply not right that inds are allowed to have a separate existence; will require very sympathetic facts & likely the family law context (***Lynch***)
* Court may require the corp to make the property available for matrimonial purposes.
  + ***Lynch*** **standard**: **Courts will not enforce the separate entities notion where “it would yield a result too flagrantly opposed to justice, convenience or the interests of the revenue”**

**CRIMINAL LIABILITY**

**Levels of Corporate Liability** (***Canadian Dredge*** – *4 D’s charged w/conspiracy to defraud arising out of rigging bid for dredging K under CC* **// Held:** Corp found guilty) – difficult to hold corp.’s responsible b/c of required *mens rea* for most criminal offences.

**3 TYPES OF CRIMINAL OFFENCES:**

1. **Absolute Liability (**liability upon breach**) -** Corp liability for an absolute liability offence arises when a person who engages in the behavior does so on behalf of the corp. All acts of EEs in the course of their employment will give rise to corporate liability for such offences.
2. **Strict Liability (**only need *AR***) –** sufficient to impose liability on corp if a person was acting on behalf of the corp **// NB:** Due-Diligence Defense applies.
3. **Offences requiring MR (*Canadian Dredge***) - there are 3 approaches ***whereby intent could be said to reside in the corp entity***:
4. Total ***vicarious liability*** for conduct of agents (“senior OFR” in CC), as long as they are acting within scope of their employment
5. Criminal acts have been directed or requested ***expressly or clearly implied by corp board of DIR’s***
6. Median rule, the criminal conduct including state of mind, of EEs and agents of the corp is attributed to the corp so that the corp is criminally liable so long as the ***employee/agent represents the de facto operating mind of the corp***
   * In order for a corp to be “thinking” have to ID who it is that is thinking for the corp in that particular context. Certain people are the “directing mind” (tends to be the DIR’s, OFC’s, Managers, etc. BUT just because you are in this position does not mean you are a directing mind 🡪 Must look into how the corporation is structured) (***Canadian Dredge***).

**Under new CC: Corporate Liability for fault-based offences is now triggered in 3 circumstances (*Criminal Code,*****s.22.2):**

* A Sr. OFR, acting within the scope of their authority, is a party to an offence;
* A Sr. OFR, having the mental state required to be a party to an offence and acting within the scope of their authority, directs the work of other representatives of the corporation so that they commit the act or omission specified in the offence; and
* A Sr. OFR, knowing that a representative is or is about to be party to an offence, does not take all reasonable measures to stop them from being a party to the offence.
* **A “Sr. OFR” of the corp, need not be a “directing mind”** as defined under the CL. “Senior officer” means any person who either plays an important role in setting the corp’s policies or is responsible for managing an important aspect of the corporation’s activities.
* **Corps may be treated as natural persons:** where charged with criminal offence which requires no MR, such as strict or absolute liability offences **(*Canadian Dredge***).

## [3] Representation Liability (and Capacity)

**[a] Agency and Contract Claims (see Pre-Incorp K’s (below))**

**[b] Vicarious Liability for Tort -** Total ***vicarious liability*** for conduct of agents, as long as they are acting within scope of their employment.

# Classification of Corporations

* **WIDELY-HELD “PUBLIC”: over 50 SH’s + at least 3 D’s** // Securities traded through stock exchange; comes w/ disclosure req’s; must file prospectus.
* **BCAs.1:** 
  + **“Public Co”:** a public company for the purposes of the *BCA* is a company that is considered a “public” company anywhere in CND or the US, or has its securities traded or quoted on a securities exchange or quotation system in CND, the US or any other country.
  + **“Reporting issuer”:** has the same meaning as in the *Securities Act*
  + **“Reporting issuer equivalent”:** means a corp that, under the laws of any Canadian jurisdiction other than BC, is a reporting issuer or an equivalent of a reporting issuer.
* **CBCAs.2(1) “distributing corporation”:** a corp that is a “reporter issue” under provincial securities legislation that provide that definition (which BC does).
* **CLOSELY-HELD “PRIVATE**”: less than 50 SH’s + 1 or more D’s // **PROS**: no limit on share transfer; no prospectus required // **CONS**: can’t sell shares to general public.
* **ONE PERSON CORPS:** Single SH & Director // **Obvious issue** = Can one person constitute “meeting” (where meeting requires 2+ ppl (***Cowichan***)) 🡪 Statute provides exemption that when there is 1 SH, he/she alone may constitute a meeting (same for 1 director corps).
* **\*COMMUNITY CONTRIBUTIONS CO. “CCC”:** a new, hybrid corporate model that permits entrepreneurs to pursue social goals, but still make some profit. The goals of the CCC model are to encourage private investment in social enterprise and to create a framework for corps wanting to entrench objectives beyond maximizing shareholder profits // Must ***have at least 3 directors*** **(*BCA* 51.93(1))**
* **BCA**[**51.911**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33)**(**[**1(1)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33)**) - NOTICE OF ARTICLE -** A co is a [***community contribution company***](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33) if its notice of articles contains the statement: “This company is a [CCC], and, as such, has purposes beneficial to society. This [co] is restricted, in accordance with [Part 2.2](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33) of the BCA, in its ability to pay dividends and to distribute its assets on dissolution or otherwise.”
* **BCA51.91 *-* 1 OR MORE OF THE PRIMARY PURPOSES OF CO MUST BE “COMMUNITY PURPOSES” -** beneficial to:
  + **(a) *Society at large***, or **(b)** a ***segment of society that is broader than the group of persons*** who are related to the CCC 🡪 and includes a purpose of providing health, social, environmental, cultural, educational or other services, but does not include any prescribed purpose
* **BCA51.92** - **COMMUNITY PURPOSES (above)** **MUST BE SET OUT IN ARTICLES.**
* **BCA51.921 - NAME -** must have the words “Community Contribution Company” or (“CCC”) as part of its name.
* **RESTRICTIONS: on transfer of assets,** including profits (**s. 51.931**) and **payment of dividends and interest** **(s.** **51.94), on assets distribution on dissolution (51.95)** 
  + Max amount of profits that can be distributed to shareholders = 40% // Other 60% used to further process of corp.
  + Same w/ assets (40% to shareholders // 60% to further purpose)
* **BCA 51.97** - **BECOMING CCC -** The adoption of “community purposes” to become a community contribution company requires a unanimous resolution of all shareholders, whether or not their shares otherwise carry the right to vote.

# JURISDICTIONAL AND CATEGORIZATION CONSIDERATIONS

* **JURISDICTION SHOPPING:** Companies are governed by the laws of their place of incorporation. Typically incorporate in the jurisdiction in which plan to conduct business & federally if plan to conduct business in several provinces.
* Mandatory registration regime will be triggered if the extra-provincial corp. is “carrying on business” in the province (**BCA 375**)
* **FEDERAL CORPS -** Federally incorporated corps can operate across Canada more easily, but are not exempt from registration or other requirements of prov leg schemes. Prov leg cannot impair the status or essential powers conferred on a federal corp. However, even though its status or powers cannot be impaired, a **federal corp that fails to register when required to do so by the**[***BCA***](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33)**still commits an offence** (in contravention **of BCA 375**).
* **PROVINCIAL CORPS –** must register to do biz in other provinces.

## [a] Extra-Provincial Licensing and Filing Requirements

**DEFINITIONS**

* Domestic corporations are called **“companies” (BCA s.1)**
* **Extra-provincial corps** are “foreign entities” **((a)** “**foreign corporation**” – being corp that has issued shares but incorporated other than under the BCA w/in definition in s. 1) that have registered under s. 377 or 379 (amalgamated **EP company) (BCA s. 1)**
* **“Limited liability company” -** business entity organized outside BC - not a corporation or Px **(BCA s. 1)**

**EXTRA PROVINCIAL CO. REGISTRATION REQUIREMENTS**

In certain cases, where you have a foreign co. operating in BC, the ***BC BCA*** may apply.

* **FEDERAL CORPS HAVE TO REGISTER TO DO BUSINESS IN BC (unless fall under exemption), BUT see BCA 376(2) 🡪 Do not have to register their name**
* **“FOREIGN ENTITIES” MUST REGISTER AS “EXTRA-PROVINCIAL CO” W/IN 2 MONTHS OF “CARRYING ON BUSINESS IN BC”** (**BCA 375(1))**
  + **DEEMED TO BE CARRYING ON BUS** - **(a)** name listed in BC telephone directory **AND** BC address or number is given; **(b)** ad which lists corp name + BC address/number; **(c)** resident agent, warehouse, or place of biz in BC; **OR** **(d)** otherwise carries on biz in BC (**BCA 375(2))**
    - There’s an aspect of CONTINUITY and INTENTION to determining if a company is “doing business”
    - Ambiguous as to what constitutes “carrying on business” in BC.
* **EXCLUDED (exemption):** Banking & railroads - essentially business activities governed by federal law (**BCA 375(3))**
* **BASIC EP REGISTRATION REQUIREMENTS**: Reserve name or assumed name, appoint an attorney if required and submit a registration statement (including information listed in s. 376(3)) or any other records registrar may require (**BCA 376(1)) 🡪** This process is to ensure an EP co. is not operating under a confusing name (or a name someone already has)
  + **FEDERAL CORP’s DO NOT HAVE TO REGISTER THEIR NAME** – rules of names do not apply (**BCA 376(2))**
    - \*One of the reasons to incorporate under CBCA is due to name – you don’t have to have it approved by any provincial authorities so it is easier to move around from jurisdiction to jurisdiction
  + Registrar will then file the statement and register foreign entity as an EP company **(BCA 377(1));** and will issue certificate and furnish to company, and to each attorney of record & publish it **(BCA 377(2))**
  + **EP NAME NOT AVAILABLE -** as per **BCA 26(1)** might have to reserve an ***assumed name*** if its current name violates the rules though the registrar can still register under own name if corp. provides undertaking it will carry on business under assumed name (**BCA 26(2)).**
    - Must conduct business under assumed name (**BCA 26(3)**)
    - Protects 3P’s in that no act of the EP company will be invalid merely b/c it doesn’t use its assumed name (**BCA 26(4)**).
    - **Fed corps. are exempt** **(BCA 26(5))**
  + **POST-REGISTRATION** - ***must display assumed name*** at every place it carries on business in a conspicuous place; in publications; orders, invoices, cheques, etc. (**BCA** **27(1)**).
    - If a director or officer of EP that knowingly permits EP to contravene rules of name (s.27(1)), they are personally liable to indemnify individuals who suffer loss or damage for being misled **(BCA s.384)**
* **EFFECT OF REGISTRATION:** 
  + Conclusive evidence if you register, that you have registered correctly and are permitted to operate in BC from the date of registration forward (**BCA 378)**
  + **LAW OF HOME JURISDICTION STILL APPLIES**: Extra-Prov Co may do any action permitted in its charter, subject to BCA, the laws of BC generally, and the laws of any other jurisdiction which may apply to it (i.e. ***cannot do anything not permitted by laws of home jurisdiction***) (**BCA 378(2))**
  + **MUST STILL COMPLY W/ CORP’s GOVERNING DOCUMENTS** (**BCA 378(3))**
  + **3P PARTY PROTECTION**: No act of a foreign entity carrying on business in BC (including transfer of property) is invalid merely b/c registration defective (not registered in BC), or corp in contravention of laws of home jurisdiction (**BCA 378(4))**
    - **While not allowed to do something this does NOT make the transaction itself invalid.**
    - *Ultra vires* doctrine is altered by **s. 378(4)** which states that 3Ps don’t need to investigate internal compliance of corp with its articles because acts won’t be invalid solely because of that nor will it be invalid because it failed to register as an EP company.
    - While something is still valid, this does not mean there are no consequences (i.e. may not be a proper transaction).
* **AMALGAMATION:** must register any amalgamation of EP company in accordance with **BCA 379**

## [b] Amalgamation

2 corps governed by different jurisdictions is possible but must be governed by laws of the same jurisdiction at time of amalgamation.

* **AMALGAMATION -** a BC company may amalgamate with one or more foreign corps (non-bc corps) (**269 BCA).**
* **TO EFFECT AN AMALGAMATION INTO FOREIGN CO -** must be provided to the registrar proof regarding standing of the foreign corp in their jurisdiction, and any records including **authorization for the amalgamation from the foreign corp’s jurisdiction** (**275(1)(b) BCA**)
* **BC CO. AMALGAMATION IN FOREIGN J** - **284(1) BCA -** sets out requirements for a BC company to amalgamate into a corp of foreign jurisdiction where it is allowed: **(a)** By the foreign jurisdictions’ law; **(b)** In accordance with each foreign corp’s charter; **(c)** By shareholders/registrar

## [c] Continuance under the Law of Another Jurisdiction

**WHY: (a)** Tax advantages, (**b)** It has shifted its business operations to the new jurisdiction**; (c)** Desire to amalgamate with a corp in the other jurisdiction; or **(d)** Corporate climate is more hospitable in the second jurisdiction.

* Continuance under the law of another jurisdiction does not affect the migrating corp’s prior obligations, property rights and involvement in civil, criminal and administrative proceedings pending before continuance.

### Step 1: Get authorization under laws of jurisdiction in which corporation currently incorporated

* As per **s. 308 of BC *BCA*** and **s. 188** of the ***CBCA***

### Step 2: go to the Export step of whichever jurisdiction corporation is leaving

**To leave Federal Registration (Export):** **s. 188 *CBCA***

* **REQUIREMENTS -** must satisfy to satisfaction of Director ***that proposed continuance will not adversely affect creditors or SH’s of corp*** (**s. 188(1)(b));** provide ***notice of meeting*** to each SH **(188(3))** at ***which each share carries a right to vote*** (regardless if it is a voting or non-voting share) in relation to continuance even if doesn’t have voting rights attached to it **(188(4)).**
* **SH APPROVAL -** the vote must pass by a **special resolution** **(188(5))** as defined in s. 2 as 2/3 of votes. Each dissenting SH is entitled to have their shares bought out at fair value **(188(3))** in accordance with **s. 190.**
* **PROHIBITIONS –** federal DIR will not approve export unless issues in **s.188(10)** satisfied.
* **EFFECT -** Act ceases to apply to corporation on date shown in certificate of discontinuance (**s. 188(9))**

**To leave BC (Export)**: **ss. 308-311 BC BCA**

* **APPLICATION TO CONTINUE UNDER ANOTHER JURISDICTION -** May apply to another jurisdiction (outside bc) if permission from: 1) SH’s (see 308(2)), and 2) registrar in BC (see 308(5)) (**BCA 308(1)**)
* **SH APPROVAL -** obtain authorization of the SH (who have right to vote) which must be by “**special resolution,”** defined as passing by special majority (s. 1) meaning presumptive percentage is 2/3 but through agreement in articles can make it ¾ (**s. 308(2)**).
* Shareholders can say “No” to this happening. In theory involves a meeting where someone proposes that something be done.
* Even if SHs and registrar approve, this does not mean MGT has to do this, can change their mind.
* **Different than CBCA:** under BC BCA only voting shares can vote, but under CBCA any SH can vote.
* **APPROVAL OF R -** Must then apply to the registrar for an authorization (**BCA 308(4)**), which it will provide if it’s satisfied company has filed all records required (**BCA 308(5)**).
* **SH DISSENT -** Any SH (whether have vote or not) **can send a notice of dissent** to authorize continuation of company and ***have shares bought out*** (**BCA 309**).
* Must notify the corp in advance of the decision that you will Dissent, but can change your mind after the fact. Gives corp the idea of what is in store if they go through w/ the special resolution.
* If ***continuation occurs*** and the corp did not go through this procedure (of allowing SH to dissent in advanced), can give notice to corp that has already moved to the corp in the new jurisdiction to buy you out (**BCA 309)**
* **AFTER SUCCESSFUL CONTINUANCE -** company must file record issued to it by the other jurisdiction (**BCA 311**).
* **PROHIBITIONS - BCA 310 -** situations in which continuation will be prohibited – similar to federal, where the property, obligations and involvement of judicial proceedings inside of BC will not be respected by the other jurisdiction

### Step 3: comply with the Import rules of the jurisdiction into which the corporation is continuing

**To enter federal (Import)**: **s. 187 CBCA**

* **PROCEDURE -** apply to the DIR (**CBCA 187(1)**), amend/send its articles of continuance (**CBCA 187(3));** and on receipt Director will issue certificate of continuance (**CBCA 187(4))**
* **EFFECT -** becomes a body corporate on date shown in certificate (**CBCA 187(5))** but obligations and rights of the continued corporation continue (**CBCA 187(7)**), issued shares deemed to have been issued in compliance w/act (**CBCA 187(8)). \*Possible to accept par value shares (**even though traditionally CBCA only allows for no-par value shares (as oppose to BCA)) (**CBCA 187(11)**)

**To enter BC (Import):** **ss. 302-307 BCA**

* **APPLICATION -** must **(a) *file a continuation application*** [i.e. must have appropriate name and notice of articles setting out info that will apply to the continued company on its recognition], **(b) *must provide proof required by the registrar*** (authorization to leave home jurisdiction) and **(c) *have 1+ of its directors sign the articles the foreign corp***. will have once it’s continued into BC (**302(1) BCA**)
* **CONTINUATION -** Will be ***recognized as company on date and time in continuation application filed w/registrar* (303(1) BCA**) registrar must issue the certificate and publish it (**303(2) BCA**), and once continued the company must register shares held by SH’s immediately before continuation in the central securities register of the company (**303(3) BC BCA**).
* **OBLIGATIONS -** cannot escape obligations you owed under your previous existence (**305(1)(c) BCA).**
* **EFFECT** – notation in corp register is conclusive evidence of effective continuation, regardless of procedural defect (**305(2) BCA**); SH’s maintain rights (**306 BCA**) and company has same articles if they have any (**307(a) BCA**) or if they don’t are deemed to have adopted those in Table 1 (**307(b) BCA).**
* **WITHDRAW APPLICATION -** At any time after application but before continued foreign corp. can withdraw the application by filing a notice of withdrawal (**304 BCA**)

# CORPORATE STRUCTURE

## Corporate Names

**NAMING COMPANY IN BC**

* **APPLICATION** - name must be reserved & in effect at time of company recognition (**BCA 21)**
* **PROCESS -** first apply to reserve the name (**BCA 22(1)**), which if successful will be reserved for **56 days** (**BCA 22(2)).**
* **DISAPPROVAL** - The registrar cannot reserve the name unless it conforms to the prescribed requirements (e.g. include Ltd, Inc, or Corp as per **s. 23(1)**) (**BCA 22(4)**) and **can refuse to register for good and valid reasons** (e.g. it could be confusing) (**BCA 22(5)**) // English and/or French only (**BCA 25)** company can translate its name into another language if translation is set out in memorandum or NOA’s (**BCA 25(3)).**
* **“LIMITED”** - must use if a ltd liability corp (**BCA 23)** // but must not use if not (**BCA 24)**
  + **S.23** gives a selection that you must indicate to the world what you are by the modifier (Ltd, Ltee, Inc, Corp, etc)
* **EXTRA-PROVINCIAL (EP) COMPANY -** as per **BCA 26(1)** might have to reserve an ***assumed name*** if its current name violates the rules though the R can still register under own name if corp. provides undertaking it will carry on business under assumed name (**BCA 26(2)).**
  + Must conduct business under assumed name (**BCA 26(3)**)
  + Protects 3P’s in that no act of the EP company will be invalid merely b/c it doesn’t use its assumed name (**BCA 26(4)**).
  + Fed corps. are exempt **(BCA 26(5))**
* **POST-REGISTRATION** - in legible English or French characters ***must display name*** or ***assumed name*** at every place it carries on business in a conspicuous place; in publications; orders, invoices, cheques, etc., (**BCA** **27(1)**).
* **R ORDERS CHANGE -** Registrar has ability to order change of name even if the named was approved (**BCA 28(1))** and for EP companies (**BCA** **28(2))** but not for federal corporations (**BCA 28(3))**
* **NAME CHANGE -** to later change the name must comply w/approval rules in **s. 257** as indicated in **s. 263.** i.e. if nothing specified in articles must get a SH resolution and then file that notice with the registrar.

**FEDERAL NAMING**

* **“LIMITED”** - or other indicator of ltd liability must be part of the name (**CBCA 10(1))**
* **CONTRACTS -** corp name must be set out in legible character on all K’s, invoices, negotiable instruments, orders (**CBCA 10(5))**
* **RESERVATION** - after application and approval of **name it is reserved for 90 days** (**CBCA 11(1))**
* **LANGUAGE -** Can be in English or French name (**CBCA 10(3))**
* **PROHIBITED** **NAMES** - can’t be ***prescribed, prohibited or deceptively misdescriptive*** (**CBCA 12(1)(a)**); nor can it be ***reserved for another corporation*** (**12(2)(b)**) and the Director can order the corporation to change its name if it doesn’t comply with this section (**CBCA 12(2))**
  + If corp fails to comply w/order to change the name then Director may revoke the corp and assign it a name (**CBCA 12(5)**), in which case Director will issue certificate of amendment (**CBCA 13(1))**
* **OTHER NAME -** a corp can identify itself by name other than a corporate name if it doesn’t contain a corporate suffix – i.e. use a trade name (**CBCA 10(6)**)

## Creating the Corporation

**CORP’s COME INTO EXISTENCE ON DATE OF INCORPORATION – BCA 3(1)(a) & CBCA 9**

**INCORPORATION IN BC**

**BCA** requires an **incorporation agreement and NOAs in creating a company**

* **FORMATION 🡪** Corp is formed when 1+ people **(a)** enter an incorporation agreement, **(b)** file the incorporation application **AND** **(c)** comply with Part 2 of the Act **(BCA 10(1))**
  + ***Incorporation agreement*:** must have the name of **each incorporator** & their agreement to take at least 1 share of the company (incorporators must be SH’s), their names, signatures and # of shares of each class taken (**BCA 10(2)**).
  + ***Incorporation application*:** include name reserved or say it will have the name given, have a completing part statement, names & addresses of incorporators (**BCA 10(3)**); and ***must contain a notice of articles*** (**BCA 10(3)(e)**)
* **NOTICE OF ARTICLES (NOA)** - bare bones info, filled w/ Registrar (part of incorporation application) **(BCA 11)**
  + ***MUST set out***: **(b)** name, **(c)** the full name of, and prescribed address for, each of the DIRs, **(d)** ID the registered office of the company by its mailing address and its delivery address, **(e)** records office, **(g) authorized share structure in accordance w/** **BCA s.53** (below), **(h)** special rights attaching to shares.
    - **BCA 53**: NOAs must set out **(a)** name of each class or series of shares, **(b)** max # of shares or state there is no max number, **(c)** set out par value of any share with a par value, and **(d)** ID any shares w/o a par value.
    - “**Par Value”** – shares cannot be issued or sold below this amount (there is a floor) // **“No Par Value” –** no floor on price, only issued at fair market value.
    - **3 Rights that must be associated between all the classes/series of shares: 1)** Voting rights (presumptively 1 vote); **2)** Dividend (right to the profits); **3)** Right to distribution of assets on dissolution of the corporation.
      * Assuming you have this, can have as complicated as structure as you want (e.g. preferred shares, special access to dividends but no voting rights; other shares may have voting rights but no right to assets).
* **ARTICLES (not the same as NOA)** - company must actually have articles and there are specific requirements **(BCA 12)**
  + Articles set out the rules for the ***company’s conduct*** (**BCA 12(1))** and ***every restriction upon its business* (BCA 12(2)(a))**, if any, as well as which powers company will exercise
  + **A BC company is required to have:** a name, SH’s, share structure, contents of articles, and identities of DIRs from the outset of incorporation.
  + **Table 1 Articles:** if co. does not have articles, deemed to have “Table 1” articles. If want to change this have to go through the procedure (see below 🡪 ss. 257 & 259).
    - If financial difficulties, can open past D&O’s to liability as may display an improper running of corp.
* **TIME INCORPORATED -** corp incorporated on date and time application filed **(BCA 13)**
* **EFFECT OF INCORPORATION -** once these actions are completed, the entity is brought into existence **(BCA 17)**
* **EVIDENCE OF INCORP -** notation in corporate register of incorporation is conclusive evidence for the purposes of the act that incorporation was done appropriately and the entity may conduct themselves as a company (**BCA 18)**
* **\*CONTRACTUAL EFFECT (Incorporation agreement)** - corp & SH’s are ***bound by articles + NOAs*** from time of recognition **(BCA 19)**
  + Very little for SH to agree up currently, therefore usually little scope for you in the K to change how the corp is run.
  + ***Possible advantages:*** possibility to make claims for damages if corp does something wrong if have incorporation agreement which is a binding K.
* **CHANGE?** fundamental change to NOAs or articles requires **special resolution** **(BCA 257 & 259)** // Name change req’s change to notice of articles **(BCA 263)**

**INCORPORATION FEDERALLY**

* **CBCA** ***does not require incorporators to be SHs***, but does require articles of incorporation (NOAs) and corporate by-laws (articles).
* Use CBCA if want “shelf” corp w/o SHs as **BCA** requires the corporation to have SHs and be ready to go before incorporation.
* Under CBCA, by-laws do not have to be in existence from the outset of incorporation, though they usually will be
* **BYLAWS (detailed)** - **SS 101-103 of CBCA** set out after incorporation, that it is duty of corp’s DIRs to create these by-laws
* **FORMATION: REGISTRATION** - 1 or more ***incorporators*** sign articles of incorporation & send them to Director **(CBCA 5)**
  + **WHO CAN FORM: “Incorporators”**
    - **[1]** **INDIVIDUAL -** incorporators may be 1+ individuals who are NOT **(a)** Less than 18 years of age**, (b)** Found to be of unsound mind by a Canadian court or elsewhere, **(c)** bankrupt (**CBCA 5(1)).**
    - **[2] BODIES CORPORATE –** 1 or more “bodies corporate” may incorporate a corp **(CBCA 5(2)).**
* **ARTICLES OF INCORPORATION** - information includes: share structure (all shares are of no par value) + ***business restriction*** + number of D’s + province of registered office (don’t need address though) **(CBCA 6)**
* **NOAs -** the incorporator will send articles of incorporation and other necessary docs to a DIR appointed by minister (s 260) **(CBCA 7)** 
  + The director shall then issue a certification of incorporation in accordance with s 262 **(CBCA 8)**
* **CHANGE?** amendment of articles requires special resolution of shareholders after the fact **(CBCA 173(1)(a-o))**

## Restrictions – How you want the Corporation to Operate

* **CORPS PRESUMED TO BE ABLE TO ENTER INTO ANY ACTIVITIES A NATURAL PERSON CAN – BCA 30, CBCA 15**
* **RESTRICTIONS TO BE FILED IN DOCUMENTS:**
  + **Provincial:** must be set out in articles (**BCA 12(2)(a))**
  + **Federal:** must be set out in articles of incorporation (**CBCA 6(1)(f))**
* **RESTRICTIONS -** Presumptively corporation has no restrictions on business and are allowed to carry on business outside of home jurisdiction (***BCA*** **32** and ***CBCA* 15(2)**) but **CANNOT** enter transactions contrary to restrictions in articles (**BCA 33(1)**, **CBCA 16(2)**), although ***no act is invalid merely because it is done outside restrictions*** (**BCA 33(2),** **CBCA 16(3)**)

**REMEDIES**

**EFFECT OUTSIDE CORPORATION (e.g. Buyers):**

* **CORPORATE ACTS (EVEN CONTRARY TO RESTRICTIONS) ARE PRESUMPTIVELY VALID**
* **PROVINCIAL -** no corp act invalid ***merely b/c it was contrary to articles*** (**BCA** **33(2))** // Outsiders can trust authority of persons held out as D, O, and agents (indoor management rule) **(BCA 146)**
  + It is possible that a transaction is flawed b/c a corp is in breach of a restriction (given the language of “merely”).
* **FEDERAL -** no corp act invalid ***merely b/c it was contrary to articles or Act*** **(CBCA 16(3))** // No person has constructive knowledge of corpdocs simply b/c they’re filed or available for inspection (**CBCA 17)** // Outsiders can trust authority of persons held out as D, O, and agents (indoor management rule) **(CBCA 18)**

**REMEDIES FOR BREACH “INSIDE” CORPORATION:**

* **PROVINCIAL:**
  + **ACTION AGAINST D&O -** corp can bring action against DIRs for losses occurring from allowing corp to engage in restricted business (**BCA 154(1)(a)) -** though likely DIRs will get rid of personal liability under s. 157.
    - D&O of co must exercise care, skill, and prudence of a reasonable individual **(BCA 142)**.
  + **COMPLIANCE ORDER - BCA 228** - obtain a compliance of restraining order: ***allow injunction & specific performance*** to either stop or compel action. Court can make any order for the corp to pay compensation to a contractor who entered into a K which the corporation, which the corp shouldn’t have contrary to BCA 33(1) **(BCA 228(3)(c))**
    - **To be Cautious**: If making K w/ corporation look @ restrictions in articles (no one does this though).
  + **EXTRA**-**PROVINCIAL CORP –** cannot evade restrictions in home jurisdiction or its Charter by registering in BC (**BCA 378(2)&(4))**
* **FEDERAL –** no particular remedy, general remedies must be used 🡪 Breach of FD or DOC, DA, or OR (below)
* **GENERAL REMEDIES (for either Prov or Fed Corps)**

1. Corp takes action against person who caused it to do something contrary to statute – won’t work if DIRs decide not to do this
2. **Derivative Action**: SH or creditor asks court to take over action on behalf of the corporation; if derivative action approved court has right to take action on behalf of corp
3. **Oppression Remedy**: individual/class takes action on basis that the breach peculiarly affected them
4. **Dissent**: SH demand corp buy their shares out

**CHANGING RESTRICTIONS**

* **PROVINCIAL** - Via **special resolution** - 2/3 present & voting must approve, unless articles say otherwise **(BCA 259)** // SH’s can dissent on special res that changes restricted business or powers **(BCA 260)**
* **FEDERAL** - Must be done via **special resolution** to change, add, or remove **(CBCA 173(1)(c))** (**NB:** may make any # of changes **per 173(a-o))** // SH’s have right to dissent on resolutions that change restrictions on share ownership or biz restrictions **(CBCA 190(1)(a)&(b))**

# PRE-INCORPORATION CONTRACTS

## [A] The Corporation Eventually Comes into Existence: Which Jurisdiction governs?

If Corporation is brought into existence, ***see if under Provincial or Federal Statute*** to determine which governs:

* **Summary:** both BC and CBCA make the promoter personally liable (reversing ***Wickberg***) and obviate the need for assignment or novation by enabling the corporation to adopt the K after the fact.
* If a corp comes into existence and adopts the K, the corp is bound by and is entitled to the benefits of the K and the agent is no longer bound by or entitled to the benefits of the K

**PROVINCIAL**

* **WRITTEN & ORAL K’s**
* **A Corp is not bound by a K made before its incorporation purportedly on its behalf (thus cannot claim benefits from such a K).**
* **CONSEQUENCES:Rather than being liable under the K itself, the promoter is liable for breach of warranty of authority if the corp does *not come into existence* AND *adopt the K* w/in a reasonable time.** 
  + The promoter (defined as facilitator in **s. 20(1)** “someone who purports to enter into K on behalf of corp. before it’s incorporated”) is deemed to have warranted to the other parties that the company will come into existence ***and*** adopt the K w/in a reasonable time (thus if this does not occur it is a breach of deemed warranty) (**BCA 20(2)(a)**) 🡪 The measure of those damages is set out in **BCA 20(2)(c).**
  + **BREACH OF WARRANTY OF AUTHORITY -** If damages result from ***breaching the warranty of authority*** then the facilitator is personally liable to the other parties (**BCA 20(2)(b))**
  + **MEASURES OF DAMAGES FOR BREACH OF WARRANTY** (**BCA 20(2)(c)**): the same as if the facilitator entered into a K that did exist but for which the agent didn’t have authority to do so and the company doesn’t ratify – i.e. everything that flows from that K not being valid (fixes the nominal damage award problem flowing from breach in ***Wickberg*** while preserving that tort claim). i.e. Pins damages for breach of the pre-incorp K on the tort of breach of warranty of authority and makes facilitator/promoter personally liable for them.
    - ***Way around for promoter***: not liable b/c the parties to the pre-incorporation K agreed, in writing, to his/her exemption from personal liability (**BCA 20(8)).**
* **SUBSEQUENT ADOPTION: The statutory scheme seems to want to avoid the issues with the CL approach, thus do not need to ask if there is a valid K under the CL (as seen below) to apply the statutory scheme. Can adopt K’s in the name of or on behalf of the corp.** 
  + Corp may w/in reasonable time after its incorporation, ***adopt the pre-incorp K by action or conduct***, signal intention to be bound (**BCA 20(3)) 🡪** Simply have to behave as if bound by the K.
  + On that adoption the company is **bound and is entitled to the benefits** (**BCA 20(4)(a),** changing result in ***Kelner***) and the facilitator ceases to be liable with respect to the K (facilitator ceases to be liable in certain ways (**BCA 20(4)(b)**).
  + **NB: passing a formal resolution adopting such a pre-incorporation contract is a good practice.**
* **NO ADOPTION?** 🡪 a facilitator can apply to court for an order that the new ***corp restore to it any benefit obtained* (BCA 20(5))**
* **SETTLE OBLIGATIONS -** if the new company or facilitator wants to dispute its liability it can apply to court under **s. 20(6)** asking it to set the obligations as joint or joint and several or otherwise apportioning liability between the facilitator and new company
* **\*CONTRACT REMEDY:** Still open to argue for a K’al remedy ***in the interval between when the K is entered into and when the corp is incorporated & it adopts the K*** on the basis of ***Kelner*** because statute only gives tort remedy 🡪GO TO CL (BELOW) such that if both parties were aware corp. wasn’t in existence at time of K, promoter/facilitator is personally liable.

**FEDERAL**

* **WRITTEN K’s ONLY 🡪 If Oral go to the CL**
* **INDIVIDUAL AGENT LIABLE IN MOST CIRCUMSTANCES -** Promoter who enters into a written K on in the name of or on behalf of the corp, before it is in existence**, is personally bound** to perform the K and is entitled to its benefits 🡪 K is deemed to always exist, even though the corp doesn’t **(CBCA 14(1))** (**This means that ANY promoter who enters into any K (whether they know or not that the corp is in existence) are bound** 🡪 **changes the CL entirely** **as always liable, whereas CL looks at the K to determine liability**)
  + BUT - ***promoter can expressly K out of liability*** **(CBCA 14(4)).** THUS, agents have all liability prior to adoption.
* **SUBSEQUENT ADOPTION? The statutory scheme seems to want to avoid the issues with the CL approach, thus do not need to ask if there is a valid K under the CL (as seen below) to apply the statutory scheme.**
  + Corp may w/in reasonable time after coming into existence, by action or conduct, signal intention to be bound and adopt a written K **(CBCA 14(2)(a))**
  + Promoter is then off the hook and ***no longer liable under 14(1)*** **(CBCA 14(2)(b))**
* **NO MATTER WHAT HAPPENS** - A party to the K can apply for court order wrt obligations & liabilities of the promoter or corp **(CBCA 14(3))**
* **NOTE:** Generally thought there is no K for breach of warranty of authority (as nothing in ***CBCA*** says that that K continues to come into existence in these circumstances).
  + **But** nothing says tort actions do not apply.

## [B] Common Law Approach: The Corporation never comes into Existence or it’s a Federal Oral K

**THERE ARE 3 POTENTIAL SCENARIOS:**

1. **Both parties know the corp is not yet in existence** 🡪 Agent personally liable if there’s clear intention to be bound ***(Kelner)***
2. **Agent knows but other party does not** 🡪 Agent likely not liable for K, but for breach of warranty of authority ***(Wickberg)***
3. **Agent mistakenly believes corp exists and other party relies on representation** 🡪 K VOID if result of mutual mistake ***(Black)***

**NB:** Think about how the parties are presenting themselves (e.g. Claiming K is with Macdougall versus with Macdougall Ltd).

* Can also use indoor mgt rule to adopt pre-incorporation Ks (see ***Sherwood Design*** below).
* Under the CL, it was clear that the corporation was not liable for contracts purported to be entered into on its behalf before it came into existence and could not be made so by any unilateral act of adoption or acceptance afterwards.

**Possible Liabilities in:**

* **Contract**: argue agency, assignment or novation (if company later adopts the K)
* **Tort**: Breach of warranty of authority (***Wickberg***) – this breach occurs as separate from the “main” K that would be between the corp and the 3P. Instead, an agent who enters into a K with a 3P (for and on behalf of a principal) by implication warrants that he or she has the authority to do so. If this is not the case, the 3P has the right to sue the agent for breach of warranty of authority.
* **Restitution**: K never comes into existence but parties are behaving as though it’s there and have changed their position accordingly
* **Estoppel**: bind people to untruths.

**1) Both parties (Promoter and 3P) KNOW that the corp has not come into existence:**

* **K is VALID as between the promoter (agent) personally and the 3rd party**: those who sign on behalf of a company prior to its existence are personally liable if both parties know it does not yet exist (***Kelner***, **UK**) – constructive notice seems to be enough to make promoter personal liable (***Kelner***).
* Promoter’s personal liability is retained as the ostensible agent for a non-existent principal even if the corp later ratifies it b/c it ***cannot ratify something for which it was not in existence*** – had no capacity to later fix (***Kelner v Baxter***)
* **Way around:** Promoter gets company to buy out position (assignment) though may still have issues w/names & dates promised, argue novation (must show all parties agreed the corp would be substituted for the promoter); or argue parties never intended there would be personal liability for the promoter based on construction of agreement (this was implied intention of parties in ***Black v Smallwood*** from their common mistake); or get the other side to complete a new K with the corporation and release promoter from obligations under the old.

***Kelner, UK -*** *K that once corp comes into existence it will buy wine stock – provision in K required immediate delivery – signed “on behalf of corp” and not as D’s/agent of corporation – Corp later comes into existence and purports to adopt K, but corporation fails before wine transaction complete* **// Issue:** is there a main K in existence (if there is it is clearly broke), if there is who is liable for breach of the K?**// Held:** Personal liability for DIR as both parties must have intended that DIRs enter K personally, since they both knew corp was not yet in existence.

**2) Promoter “agent” is aware the company doesn’t yet exist but the other is mistaken (i.e. unilateral mistake)**

* **The K (main K) MAY be a NULLITY and no personal liability for the promoter if parties made it clear that the K was between the company and the 3rd party (i.e. if there is a K at all it’s with the company)** (***Wickberg v Shatsky*, BCSC**)
* **Counterargument:** Argue estoppel: the promoter should not be able to escape personal liability for a K’al breach by causing someone else to be mistaken about who they were contracting with – with facts like those in ***Wickberg*** that 3P party may be estopped if he later acquired knowledge of the true state of facts – court would then just weigh each estoppel.
* However, possible to have ***breach of warranty of authority*** (of other K, i.e. not the main one) if the promoters knowingly entered the K w/understanding corp did not exist – but problem is with damages: 3P will only get damages related to that breach of authority, as damages flowing from breach of the K are too remote (***Wickberg*** – *l*o*ss was from lack of business success that resulted in his wrongful termination; not from entering K in first place*) **(BC statute changes damages result: BCA 20(2)(c)).**

**3) Promoter “agent” mistakenly believes corp exists and other party (3P) relies on representation (common mistake)**:

* **The K is VOID and NO personal liability for the promoter** (***Black v Smallwood*, Aus. HC**)
  + Both parties were mistaken here // **There is no main K in existence, instead it is a common mistake and the K is VOID**.
* Must be quite apparent the promoters truly think they’re acting on behalf of the corp and that there was no intention they incur personal liability (e.g. actually using the corporate name as in ***Black***).
* Person could claim negligent misrepresentation (as an argument).
* Company (under the CL) cannot adopt later because there’s nothing there to adopt!

***Black v Smallwood, Aus HC -*** *Black entered into a K with Smallwood who purported to act on behalf of Company. Both believed that the corp was incorporated. S signed the K as director of the corp. In fact, the corp had not been incorporated. When B sued S alleging that S was personally liable, the court held that he was not* **//****Held:** Since the parties both believed that the corp was in existence, they had not intended Smallwood to be personally liable.

# MANAGEMENT AND CONTROL OF THE CORPORATION

## Structure

**PROVINCIAL**

* **“DIRECTOR”** - ***appointed*** (see below) OR ***elected*** member of the board **//** **“FIRST DIRECTOR”** - person designated D when first registered (**BCA 1(1))**
  + **APPOINTMENT** - in accordance w/ Act or articles; designated under NOA upon registration; by court order (**BCA 1(3))**
* **DIRs POWERS & FUNCTION** – D’s MUST directly/indirectly manage corp’s business & affairs (not SH’s); almost unlimited power; only subject to articles, act, regulations and memorandum (**BCA 136) (*DIRs are at the heart of managing the corp*)**
  + **Protection for 3rd parties:** a limitation/restriction on powers or functions of directors is ***not effective against a person*** who does not have knowledge of the restriction (**BCA 136(2));** and an act of a DIR or OFR ***is not invalid merely b/c of an irregularity in the election or appointment or defect in qualification*** of the D (**BCA 143**).
* **\*REMOVAL OF D** – prior to expiration of term by special resolution (**128(3)(a)**) **OR** by less than special majority or other method detailed in memorandum/article (**BCA 128(3)(b))**
* **NO D’s?** - If there are no D’s in office an individual may be empowered by SH’s or incorporators to call a meeting of SH’s or incorporators for election of D’s an appoint D’s to hold office until vacancies are filled (**BCA** **135(1))**
* **\*CAN SHIFT POWERS TO SOMEONE ELSE (IND not a DIR) –** SHs can ***amend articles via special resolution*** of a co such that may transfer powers of D’s to manage or supervise mgmt. business & affairs to 1+ persons or include that transfer in articles from the outset (**BCA 137(1); (1.1)**) 🡪 **Makes BCA easier to deal with than CBCA which requires unanimous shareholder agreement.** 
  + **I.e.** Some or all of the SH’s of a company can act as DIR if the SH’s want them to.
  + **Effect of transfer**: person has **all rights, duties and liabilities of the DIR’s** in relation and to extent of transfer (including any defenses), and D’s are relieved to same extent (**BCA 137(2))**
  + If ***person who is not a DIR performs functions of a D*** then ss. 142 (duties of care & fiduciary), and Divisions 3-5 (including personal liability in s. 154, obligation to disclose conflicts of interest ss. 147-152, 153 and indemnification/insurance provisions in ss. 160-165) apply to that person as if he/she were a DIR of the company and in relation to the extent of those functions (**BCA 138**)
    - **BUT NOT IF** that person participates in mgmt. under direction of control of SH, D or senior O, is a professional providing professional services, trustee in bankruptcy or a receiver (**BCA 138(2)**)

**FEDERAL**

* **“DIRECTOR”** - person occupying position of D // “**OFFICER”** - senior management (e.g. Pres, VP, GM, general counsel) (**CBCA 2(1))**
  + **Number:** must have at least 1 D **//** if are a distributing corporation (“public”) at least 3 (**CBCA 102(2))**
* **STARTING PROPOSITION FOR THE ROLE OF DIRs**: D’s SHALL manage or supervise management of the biz and affairs of a corp (**CBCA 102(1)).** The word “supervise” necessarily means DIRs can delegate day-to-day operation to officers.
  + ***Unless prohibited D’s may make, amend or repeal any bylaws*** (**CBCA 103(1)**) but they must submit it to the SH’s at the next SH meeting who can confirm, reject or amend it by ordinary resolution (**CBCA 103(2)**).
  + The amendment, repeal or additional bylaw is effective from the time the directors pass resolution until submit it to SH’s at which time either continues in effect or ceases depending on outcome of SH resolution (**CBCA 103(3)).** SH entitled to vote at an annual meeting may make a proposal to make, amend or repeal a bylaw (**CBCA 103(5)** – go to **CBCA 137** for procedure)
  + SHs with voting rights can make a proposal to make, amend or repeal a bylaw (**CBCA 103(5))**
* **REMOVAL OF DIRs**: SH’s may by ordinary resolution at special meeting remove any DIR (**CBCA 109(1))** 
  + **BUT IF** ***holders of a class of shares have exclusive right to elect DIR***, DIR elected in that manner can only be removed by ordinary resolution of those SH’s (**CBCA 109(2)**).
  + Someone can be ***substituted as director at the time the DIR is removed*** (**CBCA 109(3)).**
  + If ***no one is put in as DIR*** whoever manages the business & affairs is deemed to be a D **(CBCA 109(4)**) **UNLESS** it’s an officer under the control of someone else, a lawyer/other professional in course of providing professional services or trustee in bankruptcy/receiver (**CBCA 109(5))**
* **PROTECTION FOR 3RD PARTIES**: act of D or O is valid notwithstanding irregularity in their election or appointment/defect in qualification (**CBCA 116**).

## Corporate Responsibility

**FIDUCIARY DUTY (see section below):**

* **HISTORIC APPROACH: *Dodge*** and ***Parke*** illustrate that corps are intended to generate profits for their owners (i.e. SHs) – SH interests are satisfied when they receive as much profit as possible, as quickly as possible (DIR’s accountable if decisions do not directly benefit Corp/SH’s)
* **MODERN APPROACH: *Peoples*** and ***BCE*** illustrate that the previous statement of law is no longer conclusive, and that a Fiduciary Duty is owed to the corporation only, but consideration of extra-corp interests can be legitimate.

**TEST: whether DIR payments/distributions made by to persons other than SH are valid** (***Parke v Daily News***, Eng; applying ***Re Lee*** test)

1. Is the transaction ***reasonably incidental*** to the carrying on of company’s business (i.e. it has to relate to the business)?
2. Is it a ***bona fide*** transaction (i.e. nothing corrupt or self-serving by the DIR 🡪 Can argue it is not self-serving as long as profitable)?
3. Is it done for the ***benefit & to promote the prosperity of the company (SH’s)***? (i.e. throws back the Q of whether something is done in the best interests of the corp at you – likely will satisfy if show some eventual profit will accrue b/c of payments)

Conclusions based on Test (***Parke***):

1. Company’s ***funds cannot be applied in making ex gratia payments*** (payments out of kindness);
2. DIRs cannot simply make the payment & expect it to defend itself
3. Court will ***inquire into motives actuating the gratuitous payment*** & motive it’s intended to achieve (e.g. ***Parke*** – *cannot only be effected by a motive to be generous to departing EEs*)
4. Court will uphold ***validity only after test (set out above) is satisfied*** & onus lies on DIR’s to satisfy that what they did was for benefit of company (today in Canada likely that a court will assume DIRs probably act in best interests and SH will have to provide some proof to the contrary).

**Action:** In ***Parke*** SH’s brought a Personal Action.

## Shareholder Input

**SH’s in practice often have difficulty in exercising right to remove DIRs or argue something is in best interests of the corp**:

* If there are special constraints/powers attached to shares by virtue of the articles/bylaws then these will override the statute (e.g. *weighted shares* in ***Bushell v Faith***, *DIR able to prevent his own removal b/c articles said that in a meeting to remove D that D’s shares entitled to 3 votes each*)
  + There is ***no statutory fetter on company’s ability to attach special* rights & restrictions** to classes of shares which override statutory provisions in specified circumstances (***Bushell***)
* DIRs are ***responsible for deciding what is in the best interests of the corp*** and even though a majority of SHs feel something (e.g. sale of assets) is in the best interest of the corp the DIR’s are not compelled to follow that opinion unless they pass a resolution as stipulated in the articles (***Automatic Self-Cleansing Filter Syndicate v Cuninghame*, Eng CA** – *Passed ordinary resolution but failed to get ¾ vote needed for extraordinary resolution as required under bylaws*)
  + Unless have a USA (unanimous SH agreement) it is the DIRs alone who decide what is in best interests.

### Bushell v Faith,1970 HL

*SH structure of closely-held corp was set up in a way that made mgmt. impossible to remove. Were 300 total shares which each had 1 vote attached, but in the instance of a resolution to remove a DIR, if DIR was a SH, articles of corp provided that his/her shares were worth 3:1 votes. Director had 100 shares, other shareholders had 200, and thus could vote down resolution to remove him, winning 300-200* **// Issue:** was this situation one that could be remedied through operation of corp statute? **// Held:** statute did not prevent giving votes special weight in certain circumstances – articles and share structure were perfectly valid and court would not remedy situation. Must be careful what rules are created to govern corp as they may be difficult to alter after the fact.

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

**DIR’s cannot be overborne by simple majority//** *Articles of corp dictated that power to make mgmt. decisions would be vested in DIRs, subject to decision by “extraordinary resolution” of SHs (75%). If a decision by such extraordinary resolution were made, mgmt. would have to implement it. SH’s resolved by simple majority to divest of certain corp assets – directors refused and shareholders sued* **// Issue:** Are DIRs bound by the decisions of SH’s, despite what is required in corp articles? **// Held:** the DIRs were perfectly within their right to make and implement decisions in ignoring the resolution; without extraordinary resolution as specified in articles, resolutions of SHs were merely suggestion. Once they are in place, DIRs make decisions about mgmt. and control. SH’s have at best only a supervisory role

**[1] Sale of the Undertaking**

SH have a ***veto power*** if DIRs are proposing to make a drastic change in how property is being used b/c of the concern property being disposed of for D’s personal benefit or someone other than corporation itself.

**Provincial**

* **CORP MUST NOT SELL, LEASE OR OTHERWISE DISPOSE OF ALL OR SUBSTANTIALLY ALL OF UNDERTAKING (“PROPERTY” UNLESS - BCA 301(1)**

(1) It does so in ***ordinary course of its business***; or

(2) It has been authorized to do so by ***special resolution***

* “All or substantially all of its undertaking” must be interpreted in a qualitative (how important) as well as a quantitative (what proportion) manner. For instance, the court should look at whether the disposition in question was an unusual transaction.
* **SH’s** requirement to seek special resolution also triggered by a lease or “otherwise” disposal; dissent right also triggered (**BCA 301(5)**)
* **EXEMPT TRANSACTIONS -** doesn’t apply if it’s a disposition by way of ***security interest*** (**BCA 301(6)(a)**) or by lease if term doesn’t exceed 3 years including any opt. for renewal (**BCA 301(6)(b)**); or if ***sale is to a person*** who holds all shares of company (**BCA 301(6)(f)(i))**.
* **CONSEQUENCES OF FAILURE TO GET SPECIAL RESOLUTION AND DIRs STILL PROCEED -** court can **(a)** enjoin the proposed disposition, **(b)** set it aside; or **(c)** make any other order it considers appropriate (**BCA 301(2))**
* **3P PROTECTION -** Disposition of undertaking not invalid merely b/c company contravened initial requirements IF disposition

(1) For ***valuable consideration*** to person dealing in good faith; **OR**

(2) Subsequently ***ratified by special resolution*** (unique to BC that SH’s can subsequently ratify) (**BCA 301(3))**

**RESULTS:**

* **IF NOT APPROVED -** invalid to proceed 🡪 can try to get *ex post facto* SH approval in BC (**301(3))** or ask the court to approve it (**301(2)(c));** if proceed anyways may be liable under fiduciary duty, duty of care, oppression, or CL personal action
* **IF APPROVED** - can proceed but SH’s are entitled to dissent 🡪 may ask for appraisal remedy.

**Federal**

**CORP MUST NOT SELL, LEASE OR OTHERWISE DISPOSE OF ALL OR SUBSTANTIALLY ALL OF CORP PROPERTY - CBCA 189(3)**

* Other than ***in the ordinary course of business*** [way around if done in ordinary course of bus], ***requires:***
* Approval of SHs in accordance with following process:

a) ***sent notice of meeting to SH’s*** that includes copy/summary of agreement, and state dissenting SH entitled to be paid fair value of shares (**CBCA 189(4)**) – i.e. notice of meeting must advise of dissent rights

b) At meeting ***SH’s may authorize*** the sale/lease/exchange & fix/authorize directors to fix terms and conditions (**(5)**)

c) ***Each share carries right to vote whether or not otherwise has voting rights*** (whereas BCA only requires 2/3 vote of SH who can and do vote (“special resolution”))(**(6)**)

d) Disposition adopted when holders have **approved sale by special resolution** (**(8)**)

**Note**: this presumably means DIRs must proceed by special resolution if pledge undertaking via security interest as it lacks s. 301(6)(a) of *BCA*.

**[2] Unanimous Shareholder Agreements (and Equivalent) 🡪 Shifting DIR’s Power**

**Provincial – Special Resolution**

* **CCC** - Section 137 does not apply to a community contribution company (**BCA 51.93(3))**
* **CAN SHIFT POWERS TO SOMEONE ELSE (IND not a DIR) –** SHs can ***amend articles via special resolution***(2/3 of vote) of a co such that may transfer powers of D’s to manage or supervise mgmt. business & affairs to 1+ persons or include that transfer in articles from the outset (**BCA 137(1); (1.1)**) 🡪 **Makes BCA easier to transfer power than CBCA which requires USA.** 
  + **Effect of transfer**: person has all rights, duties and liabilities of the D’s in relation and to extent of transfer (including any defenses), and D’s are relieved to same extent (**BCA 137(2))**
  + If ***person who is not a DIR performs functions of a D*** then ss. 142 (duties of care & fiduciary), and Divisions 3 to 5 (including personal liability in s. 154, obligation to disclose conflicts of interest ss. 147-152, 153 and indemnification/insurance provisions in ss. 160-165) apply to that person as if he/she were a D of the company and in relation to the extent of those functions (**BCA 138(1)**)
    - **BUT NOT IF** that person participates in mgmt. under direction of control of SH, DIR or senior OFR, is a professional providing professional services, trustee in bankruptcy or a receiver (**BCA 138(2)**)

**Federal**

* **SH CAN TAKE OVER MGT OF CORP THROUGH USA (UNANIMOUS SHAREHOLDER AGREEMENT) (CBCA 146)**
* **USA VALID -** an otherwise lawful written agreement among all SHs of a corp, or among all SHs and one or more non-shareholders, which restricts mgmt. wholly or in part, is valid (**CBCA 146(1)**)
  + Makes this possible if there is only 1 SH (that owns all shares) as well, if recorded (declaration = USA) (**CBCA 146(2)**)
* **TRANSFEREE DEEMED A PARTY -** Purchaser/transferee of shares subject to USA deemed to be party to the USA (**CBCA 146(3)**)
  + **NOTICE TO PURCHASER REQUIRED -** USAs are not effective against a transferee of security (shares) ***unless they are made aware of its existence*** or it is noted on the share certificate (**CBCA 49(8)**)
    - **But** do NOT have to agree to USA
  + **NO NOTICE** – if notice is not given pursuant to 49(8), purchaser/transferee may rescind the transaction ***within 30 days*** of becoming aware of existence of the USA (**CBCA 146(4))**
* **TRANSFER OF POWERS AND LIABILITY TO SH** – If a USA restricts powers of DIRs to manage or supervise business of corp, the ***SHs who are given these powers take on all the rights***, powers, duties, and LIABILITIES of the DIRs; DIRs are relieved of their rights, powers, duties and liabilities (**CBCA 146(5)**)
* **DISCRETION OF SHAREHOLDERS** – DIRs CANNOT bind themselves to make certain decisions in the future. BUT if SH is put in place for certain purposes pursuant to USA, can guarantee that person put in place will follow directions put in USA. Technique to ensure MGT carries out purpose of USA (**CBCA 146(6)**)

**ENFORCEMENT OF USA UNDER CBCA:**

* **INJUNCTION FROM COURT** – if a DIR/OFF/Employee/Agent/Auditor/Trustee, etc does not comply w/ the USA, complainant or creditor may apply to court, ***and court may order compliance*** (i.e. DIR and OFR statutorily obliged to comply with a USA)(**CBCA 247**)

**OPPRESSION (see Oppressive Remedy below):**

* A USA can be found to be oppressive under **s. 241** of the **CBCA** (e.g. *Delay Provision found oppressive against SH in* ***Bury***)
* SH can be oppressed by the USA (to which they signed on to). The actions of a SH that are technically consistent with the provisions of the shareholders’ agreement, but that are engaged in for the purpose of improperly removing the other shareholder from the corp, have been found to be oppressive (***Bury –*** *exercise of right under agreement found oppressive*).
  + **COURT MAY AMEND USA (Way around by claiming it is oppressive)** – court may make any order it thinks fit, including creating or amending a USA (**CBCA 241(3)(c); *Bury –*** *Court accepted that a SH can complain about a USA which they are a party.* This is a far-reaching power which also gives the court the authority to set limits on the exercise of power given by a USA**)**

### Bury v Bell Gouinlock, 1984 [ONHC]

**Court can amend USA if oppressive. The existence of a K’al buy-out procedure did not preclude reliance on the oppression remedy //** *Mandatory sale of shares of SH (P) who no longer worked for the company. But USA says that Company can delay the sale for 12 months. Sneaky way of restricting EEs from working for another competing company because in the circumstances of stockbrokers (which this is) a stockbroker cannot hold shares in 2 different stock brokerages at once. Since stock brokers routinely take dividends as part of their remuneration, this meant that the P could not effectively work anywhere else for a whole year* **// Issue:** can the oppression remedy be used? Can P bring this action? **// Held:** use of delay provision was oppressive. Judgement for P.

* The 12-month provision had the effect of preventing A from becoming a SH in his new ER, and thus prevents him from obtaining divided income or other income accruing only to a SH
* At the same time, A is deprived of his SH status in the R corp and is further deprived of his dividends there as well
* Result of the R corp’s action is oppressive – unexplained decision to avail itself of the 12-month extension

## Indoor Management Rule (Protecting 3P Interests)

Parties dealing with a corp, acting in good faith and without knowledge of any irregularity, are entitled to assume that a corp’s internal policies and proceedings have been followed and complied with (***Sherwood Design***) **E.g. “Estoppel rule” 🡪 If you reasonably rely on someone’s statement or appearance that they authority to bind the corp, but even though they don’t have that authority, the corp is bound to the extent they allowed that person to make that statement.**

* What it means to hold someone out as authority: essentially so long as the person communicating/transacting w/the 3P occupies a senior position w/respect to the corp or otherwise has ostensible authority on the basis of express/implied representations (e.g. *the lawyer in* ***Sherwood Design***).
* ***Way Around*:** Borins in ***Sherwood*** dissent would’ve thought it takes something more than just having a sr. position (particularly if the seller should’ve been put on notice such as by resolutions that were in draft form and unsigned).
* ***Adopting a K in the Future:*** Can use indoor management rule to adopt pre-incorporation K’s (Majority in ***Sherwood***).
  + ***Way Around -*** Dissent in ***Sherwood*** thought a pre-incorporation K ***should not be adopted by a corp*** by virtual of the indoor management rule.
* **TRANSACTION REMAINS VALID – 3P PROTECTION:** So long as 3P is not on notice, or reasonably suspicious, that wrong person is acting for corp, or bylaw/articles not complied with, they are entitled to rely on the authority of person representing the corp (**BCA 146; CBCA 17 & 18)**

**Provincial:** **BCA 146(1)** provides that a person claiming through a company ***may not assert against a person dealing w/the company*** that

(a) the **memorandum or notice of articles** or articles have not been complied with,

(b) the individuals shown as DIRs in corporate register are not directors of the company,

**(c) a person held out by company as D, O or agent**

**(i) is not in fact that, or**

**(ii) has no authority to exercise the powers and perform duties customary in business or usual for such a D, O or A; - in *Sherwood Design*, ONCA if someone occupies a senior position or otherwise has ostensible authority through express or implied representations**

(d) record issued by any D, O or agent of company w/actual or usual authority to issue it is not valid, …

**UNLESS** that ***person had knowledge*** or ***ought to have knowledge of the situation*** described in (a)-(e) (**BCA 146(2)**) e.g. documents it has seen (Dissent in ***Sherwood***).

**Federal:**

* **NO CONSTRUCTIVE NOTICE** - no person is ***affected by*** OR ***is deemed to have notice or knowledge*** of contents of document concerning a corp by reason only that it’s been filed or is available for inspection at the office of the corp (**CBCA 17)**
* **AUTHORITY OF D’S, O’S AND AGENTS -** no corp. or guarantor of obligation of corp may assert against person dealing w/corp that (**CBCA 18):**

(a) the articles, bylaws and USA haven’t been complied w/

(b) persons named in most recent notice filed are not directors

(c) place named in most recent filing not RO of corporation

(d) person held out as D, O, agent of corp has not been duly appointed or has no authority to exercise powers & perform duties customary in business of corp or usual for D, O or agent 🡪 if someone occupies a senior position or otherwise has ostensible authority through express or implied representations (***Sherwood Design***)

(e) doc issued by any D, O, agent w/actual or usual authority to issue it is not genuine

(f) sale, lease or exchange in **s. 189(3)** [i.e. sale of the undertaking] was not authorized

* ***Way around***: person seeking to challenge the transaction should argue that the rule does ***not apply where someone has or ought to have knowledge of the internal situation by virtue of their relationship to the corp*** (**CBCA 18(2))** – e.g. documents it has seen (Dissent in ***Sherwood***)

### Sherwood Design Services, 1998 ONCA

*K in question was to have future corp buy a particular property, and P knew that corp did not yet exist. Lawyer for D told P that D would adopt K when it came into existence, but corp never did – D instead took over a different property* **// Issue:** Can someone who does not have status/authorization to adopt pre-incorporation K do so and bind corp to K? **// Held:** the indoor management rule could be applied in this context to protect P. Corp may not assert that a person held out as its agent does not have authority to exercise the powers that are usual for such an agent; or that agent ostensibly exercised.

## The Audit Committee (Protecting Outside DIRs) 🡪 Only applies to Public Company.

Certain amount of deference is paid to ***DIRs who are also officers*** – known as “inside directors,” while there is sometimes certain disadvantage in being an “outside director”. BCA provides a statutory mechanism to remedy this disadvantage. **E.g. If have 3 DIR’s, only 1 can be an officer “inside director” given the need to have a majority outside DIRs (could have ALL outside DIR’s 🡪 usually good option).**

* **AC WAY TO ENSURE THE D’s WHO ARE NOT INVOLVED IN DAY-TO-DAY OPERATIONS STAY INFORMED**
* **ONLY APPLIES TO PUBLIC CORP’s THAT ARE REQUIRED TO HAVE 3+ D’s** (**BCA 223**, **CBCA 171(1))**
  + Fed: can apply for exemption from requirement of committee under **CBCA 171(2)**
* **STRUCTURE – BCA 223-226 & CBCA 171**
  + Must select after each annual reference date (**BCA 224(1**)) at least 3 DIRs, a ***majority of whom are outside DIRs*** (**BCA 224(2),** **CBCA 171(1))**
  + **Role**: Review and report to DIRs on financial statements and auditor’s report (**BCA 225**, **CBCA 171(3))** in sufficient time to allow audit committee to review and report on statements and auditor’s report (**BCA 226**)
* **AUDITOR’S RIGHTS** - be given reasonable notice & right to appear before & be heard at each meeting (**BCA 224(5),** **CBCA 171(4))**
  + Member of audit committee or auditor can call a meeting (**CBCA 171(5))** or in BC auditor can request chair to call a meeting (**BCA 224(6))**
  + Dispense with appointment of auditor: SH can waive the appointment of an auditor by unanimous resolution (**BCA 203(2)** in BC; federally, can dispense w/requirement of auditor by unanimous resolution *provided it’s not a distributing corporation* under **CBCA 163** and implicitly if not a public co. in **BCA 203(2)(a)**.
* **DUTY OF DIRECTORS UNDER FEDERAL LAW -** if informed of error/mis-statement in financial statement shall prepare and issue revised financial statements or otherwise inform SH’s (**CBCA 171(8))**
  + Stricter requirements under securities law (NI 52-110)

# DUTIES OF DIRECTORS AND OFFICERS

## Appointment and Terms (Structure)

**PROVINCIAL**

* **NUMBER OF DIRs** - at least 1 for company. At least 3 for public company (partly b/c audit committee requirement since a maj of DIR’s must be outside DIR’s) **(BCA 120)**
* **“FIRST DIRECTORS”** - set out upon incorporation; to be a first director, they have to either have been an incorporator who signed the articles or consent under s. 123 (**BCA 121(2)(a));** or if it’s a continued company that individual was a D immediately prior to recognition or consents (**BCA 121(2)(c))** // Hold office until cease under s.128 **(BCA 121)**
* **SUBSEQUENT D’s** - Succeeding DIRs must be appointed in accordance with the act, memorandum or articles **(BCA 122)**
  + Usually elected into this position.
* **QUALIFICATIONS** - person not qualified to be DIR if: **(a)** under 18; **(b)** found by court (CND or elsewhere) to be incapable of managing their own affairs; **(c)** undischarged bankrupt; **(d)** convicted of fraud and served sentence within last 5 years, unless discharged or pardoned **(BCA 124(2))**
  + **DIR NEED NOT HOLD SHARES TO THE COMPANY** **(BCA 125)**
  + **MUST CONSENT TO BE DIR.**
  + **NB:** CBCA does not have restriction on DIR if they committed fraud.
* **REGISTER OF DIR -** Company must register DIRs and record: **(a)** name and address, **(b)** date became DIR, **(c)** date former DIRs ceased to be DIR, and **(d)** any other office they held in company **(BCA 126)**
* **DIR CEASE TO HOLD OFFICE** 🡪 **(a)** term expires, **(b)** dies or resigns**, (c)** ***removed in accordance w/ below*** **(BCA 128(1))**
  + **REMOVAL BEFORE EXPIRATION** - by **(a) *special resolution*** (which in BC is b/w 2/3 and 3/4 vote of people who can and do vote) or **(b)** by other method in articles **(BCA 128(3))**
* **DIR VACANCY:** vacancy among DIR to be filled in accordance with 131-135, unless articles say otherwise (**BCA 130)**
  + ***If due to removal under 128*** 🡪 may be filled by SH at same SH meeting where DIR is removed **(BCA 131(a))**
  + ***If number of DIR in office falls below number required by quorum due to vacancies***, remaining DIRs may (**a)** appoint DIR to make up quorum, or **(b)** call a SH meeting to fill any/all vacancies – they **CANNOT** take any other action until quorum is obtained **(BCA 134)**
  + ***If there are no DIRs in office:*** 
    - **OPTION 1:** (**BCA 135(1))** individual empowered by SH’s, incorporators or subscribers by instrument in writing signed by majority (**BCA 135(2**)) may call a meeting for election/appointment and in the meantime appoint DIRs until vacancies filled at meeting.
    - **OPTION 2:** appoint by unanimous resolution of SH’s who carry right to vote in election of directors at general meeting (**BCA 135(3)).**
* **IRREGULARITY IN APPOINTMENT OK -** Act of ***DIR or OFR is valid notwithstanding an irregularity*** in their election/appointment or defect in qualification **(BCA 143)**

**FEDERAL**

* **NUMBERS** - at least 1 for company & at least 3 for public company **(CBCA 102(2)) //** When send articles of incorporation incorporators also send notice of directors (**CBCA 106(1)**)
* **FIRST DIRs –** Holds office until first meeting of SH’s for a term of no greater than 3 years **(CBCA 106(2))**
* **BYLAWS** - DIRs may make/amend/repeal by-laws that regulate affairs of corp unless articles/by-laws or USA provide otherwise; must submit at next SH meeting for SHs to pass by ordinary resolution **(CBCA 103)**
* **QUALIFICATIONS** - not qualified to be DIR of a corp if you are **(a)** <18**, (b)** not of sound mind, **(c)** not an individual, **OR** (**d)** bankrupt **(CBCA 105(1))**
  + **RESIDENCY REQ** - If >4 DIRs, at least 25% of DIR must be Canadian residents; if <4 DIR, at least 1 DIR must be Canadian resident (**NOTE** - **BC lacks this requirement**) **(CBCA 105(3))**
  + **D NOT REQUIRED TO BE SH** **(CBCA 105(2))**
* **CEASE TO HOLD OFFICE** 🡪 DIR ceases to hold office when they **(a) *die or resign*, (b) *removed in accordance w/ 109***, or **(c) *become disqualified under 105* (CBCA 108)**
  + **REMOVA**L - by ***ordinary resolution*** (50% +1) at special meeting **(CBCA 109)**
* **DIR VACANCY?** b/c of removal under 109 🡪 SH can appoint/elect new D at same removal meeting **(CBCA 109(3))**
* **IRREGULARITY IN APPOINTMENT OK -** Act of ***DIR or OFR is valid notwithstanding an irregularity*** in their election/appointment or defect in qualification **(CBCA 116)**

## Powers – Meetings – Decisions

* **GENERAL DUTY –** DIRs must manage, or supervise management, of corp’s business and affairs (**BCA 136** & **CBCA 102(1))**
* **BCA 142(1)/CBCA** [**122(1)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=44) sets out that in exercising their responsibility and duty to corp, DIR/OFR must:
  + **(a) *act honestly and in good faith*** with a view to the best interests of the company **[Fiduciary Duty]**,
  + **(b)** exercise the ***care, diligence and skill*** that a reasonably prudent individual would exercise in comparable circumstances **[Duty of Care]**
* Under **BCA 142(1),** the director or officer must also:
  + **(c)** act in accordance with [the] Act and the regulations, and
  + **(d)** subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.

**PROVINCIAL**

* **DIR MEETINGS** - DIR entitled to participate, including vote, at meetings (**BCA 140(1))**
* **RESOLUTION** - resolution may be held in lieu of DIR meeting (not actual meeting needed) (**BCA 140(3))**
* **APPOINT REPS -** Resolution of DIRs may authorize person to act as rep of the corp if they hold shares in or are a creditor to another corp (**BCA 145)**

**FEDERAL**

* **DIR MEETINGS** - DIR may meet at any place/time they want, subject to articles or by-laws (**CBCA 114)**
  + **114(8) –** Corp’s w/ one DIR, 1 DIR constitutes a meeting
  + **114(9) –** DIR may attend meetings in person, over telephone, or other communication facility
* **UNANIMOUS RESOLUTION** - DIRs may have written resolution signed by all DIRs entitled to vote instead of a meeting of DIRs (**CBCA 117)**
* **SH MEETINGS –** DIR is to receive notice, attend & be heard at every SH meeting (**CBCA 110).**
* **DELEGATING TO MANAGING DIR** - DIRs can appoint from themselves a managing DIR or committee of DIRs and delegate powers to them (**CBCA 115(1))**
  + **CBCA 115(2)** – limits on the powers that can be delegated to managing DIR or committee

## Officers – Procedural Issues

* **BOTH STATUTES RELATIVELY SILENT WRT OFR’s** - mainly left to the corp to decide
* **DIR’s CAN DELEGATE POWER TO MANAGE CORP’s BUSINESS + AFFAIRS TO OFFICERS** (**BCA 141** & **CBCA 121)**
* **TITLE NOT DETERMINATE 🡪** difference b/w top management vs mere employee determined by factors such as: degree of control within corp // degree of control over transactions // supervisory powers // power to give instructions and orders (***CanAero***)

**PROVINCIAL**

* **“Senior Officer”** - **(a)** chair/vice-chair of board if full-time**; (b)** president; **(c)** VP of principal business unit including sales, finance, production; **(d)** ORF who performs policy-making function & has capacity to influence direction of corp **(BCA 1(1))**
* **QUALIFICATION** - Person not qualified to be DIR under 124 is not qualified to become OFR **(BCA 141(3))**
* **APPOINTMENT/REMOVAL** - ***D’s may remove any ORF*** // Removal w/out prejudice to OFR’s right under K law but appointment of officer does not create any K’al rights (do not have to have employment K to be an officer but can have one (but should usually have a K as offers protection)) **(BCA 141(4)&(5))**

**FEDERAL**

* Assumed that DIR may remove any OFR, but not directly set out as seen in BCA.
* **“Officer”** - chair of board // president & VP’s // secretary & treasurer // comptroller // general counsel // managing D // any other person who performs functions similar to those offices **(CBCA 2(1))**
* DIRs may designate and appoint OFFs, specify their duties, and delegate them powers to manage business and affairs; DIRs may be appointed to any office; same OFF can have 2+ offices (**CBCA 121)**
* **ISSUE =** concentration of power & knowledge if one person holds multiple O’s 🡪 that’s why Audit Committees are needed

# DIRECTOR LIABILITY

**NO ABILITY TO K OUT OF OR DRAFT ARTICLES TO AVOID STATUTORY LIABILITY UNDER THE *BCA* NOR ACTIONS AT LAW FOR NEGLIGENCE OR BREACH OF TRUST** (**BCA 142(3),** **CBCA 122(3))**

* Liability has to be structured around the remedy the person wants around the DIR (i.e breach of K, tort, etc)
* **MUST SEE IF DUTY IS OWED BY JUST DIRs OR ALSO BY OFRs**

**STATUTORY DUTIES: BCA 142(1)/CBCA** [**122(1)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=44) sets out that in exercising their responsibility and duty to corp, **DIR/OFR** must:

* **(a) *act honestly and in good faith*** with a view to the best interests of the company **[Fiduciary Duty]**,
* **(b)** exercise the ***care, diligence and skill*** that a reasonably prudent individual would exercise in comparable circumstances **[Duty of Care]**
* **BCA 142(1): (c)** act in accordance with this Act and the regulations, and **(d)** subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.
* **CBCA 122(2): Duty to comply -** Every DIR and OFR of a corporation shall comply with this Act, the regulations, articles, by-laws and any USA.

**Management (DIR’s (either those who voted for or all) and OFR’s)**

* **Duties owed to**: Corp, SH, EE’s, Creditors, Others
* **How**: Statute, CL, and Equity (confidence, Loyalty).

**Remedies:**

* **Statutory:**
  + **Direct:** Debt, damages, Account of profit, oppression, injunction, winding up and dissent
  + **Indirect:** Derivative action
* **CL/Equity:** Debt, damages, inj, accounting of profits, waiver of tort, Constructive trust, and restitution of property.

## DIRs – Personal Liability (Quantified Duties 🡪 How much money is indicated (debt duty))

Directors can be responsible for paying for certain amounts of money.

**BCA 158 Company’s Name Not Displayed – DIR’s and OFR’s**

* **CORP DISPLAY NAME** – **DIR or OFR** personally liable to indemnify to purchaser, suppliers, security holders (3P) for loss from ***knowingly failing to display corp name*** **(BCA 158)**
  + There is limited in terms of defense, except to argue that the DIR or OFR did not “knowingly” not display name.

**Prohibited Resolutions**

**PROVINCIAL**

**PERSONAL LIABILITY** – **DIR (not OFR’s)** who vote in favor of the resolution are J&SL to corp to restore ***any amount paid or distributed as a result and not otherwise recovered from an unlawful act***: **(a)** allowing company to carry on a business it’s restricted from in articles as result of which it’s paid someone compensation **(b)** to pay a commission**; (c)** to pay a dividend contrary to section 70(2) **(d**) to purchase, redeem or otherwise acquire shares contrary to section 78 or 79**; (e)** make payment or give indemnity contrary to s. 163 (i.e. indemnify where are prohibited from doing so) **(BCA 154(1))**

* + ***BC Defense***: **DIR (not OFR’s)** is not liable under 154 if the ***relied in good faith*** on**:** 
    - **(a)** ***financial statements*** or auditors report, **(b)** ***written professional report***, **(c)** ***OFRs statements of facts*, (d)** any other record or representation court considers reasonable grounds for DIRs actions **(BCA 157(1))**, **and/or**
    - DIR not liable if didn’t know & couldn’t reasonably have known that was contrary to the Act **(BCA 157(2))**
  + ***Record Dissent:*** If a DIR is present at a meeting then DIR has deemed to consented to the resolution, ***unless that DIR registers their dissent*** (**BCA 154(5)).** If DIR is not at the meeting then they are deemed to consent to resolution (**154(7)),** UNLESS that DIR dissents w/in 7 days of when they OUGHT to have been aware of the meeting (**154(8)).** Dissenting DIR’s won’t be J&SL.
* **SHARED LIABILITY (“way around”)** – DIRs found liable under 154 are entitled to contribution from ***other DIRs who also voted in favour*** (**BCA 156(1)**, and/or secure an order from the court that person deliver to the company any property, rights, and interest improperly paid/distributed or may any other order it thinks appropriate (**BCA 156(2))**

**FEDERAL**

* **PERSONAL LIABILITY** - DIRs who vote in favor of resolution are J&SL to restore to corp monetary payments as result of unlawful acts (**118)**
* **SHARED LIABILITY** – DIRs who satisfies judgment entitled to contribution from other D’s who also voted in favor or consented (**CBCA 118(3))**
* ***Defense* -** DIR ***not liable under 119*** if they ***exercised care, diligence, skill*** that a reasonably prudent person would have exercised in comparable circumstances (see: Care & Skill, below), including reliance in good faith on:
  + (a) ***financial statements of the corporation represented*** to the director 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 **(CBCA 123(4))**

**Liability for Unpaid Wages (EE Remedy)**

**Provincial:** Each DIR and OFR may be liable for up to two months’ wages and salaries of certain employees under *Employment Standards Act.*

**Federal (119 CBCA)**

* **UNPAID WAGES** - DIRs are J&SL for six month unpaid wages (**CBCA 119). Duty owed to EE’s.**
* ***Defenses* -** DIR ***not liable under 118*** if they ***exercised care, diligence, skill*** that a reasonably prudent person would have exercised in comparable circumstances (see: Care & Skill, below), including reliance in good faith on:
  + (a) ***financial statements of the corporation represented*** to the director 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 **(CBCA 123(4))**
* ***Way Around*:** No liability in some cases of lawsuits, liquidation and dissolution proceedings, or bankruptcy order against corp (**CBCA 119(2))**

## Duty of Care (Can claim Damages for breach of certain duties of care “tort”) 🡪 Owed to Company, SH’s Others

**Civil action for Breach of Duty of Care.** Comes in the form of a tort claim (i.e. Negligence). **Breaching DofC ≠ Breaching FD**

**CANNOT K OUT OF DUTY:**

* K provisions, the memorandum, nor articles can relieve a DIR or OFR from this duty (**BCA 142(3)**)
* Provisions, articles, by-laws, or a resolution cannot relieve DIR or OFR from duty to act in accordance with this Act or from liability for breach thereof (**CBCA 122(3))**
* **Comparison: CBCA** more encompassing, cannot through K, bylaw, or resolutions escape liability. Whereas, in BC cannot have K or articles excusing you. BUT under BC can have a resolution that cures the problem (more MGT friendly).

**(i) Common Law**

**3 ELEMENTS OF THE DUTY OF CARE OWED BY THE DIRs (*City Equitable*)**

1. DIR need not exhibit in performance of duties a greater degree of skill than may be reasonably expected of a person of his knowledge or experience - ***altered by statute (std of reasonably prudent ind)***
2. DIR is not bound to give continuous attention to the affairs of company, i.e. need not attend all meetings, but must meet certain level of attendance (cannot miss too many meetings now) - ***incorporated into statute***
3. DIR’s may delegate, according to articles, and is entitled to trust the delegate

**(ii) Statutory Reform: Duty of Care**

**BCA 142(1)(b)/CBCA 122(1)(b)** DIR or OFR must exercise ***the care, diligence and skill*** that a reasonably prudent individual would exercise in comparable circumstances – note: applies to both DIRs and all officers 🡪 **Refer to Business Judgment Rule below for defense (or see Statutory Defenses)**

* Duty of Care concerned with the ***quality of decisions*** (***Re Peoples Dept Stores,* QBCA**)
* Court found that the “duty of care” created under **CBCA**[**122(1)(b)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=44) (**BCA**[**142(1)(b)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33)) ***may extend to stakeholders and creditors as well***; owed by MGT (***Peoples; BCE***).
* **Must Show Care (both obj and subj whether Duty Breached):** DIR/OFR must demonstrate degree of skill that may reasonably be expected from person of his/her knowledge and expertise (no longer purely subjective as stated in ***Re******City Equitable Fire Insurance***) – it’s not enough to say a DIR did his/her best – neither is it a professional standard (***Re Peoples Dept,* QBCA**).
  + **Factors to consider** (***City Equitable***): size of corporation, decision in question, how decision was made, how information is supplied, and nature of business.
* **Attention:** Need ***basic attention to detail in terms of tailoring actions*** to object of company and a certain level of skill to comply with duty under statute but there is a subjective element involved in looking at who the DIR is (***Re Peoples,* QBCA**)
  + **Difficult to predict success given subjective elements being present.**
* **Diligence:** a DIR is not bound to give continuous attention to affairs of company; duties are intermittent (***Re City Equitable Fire Insurance***)
  + **Examples of requisite standard of diligence:** i) Attending Meetings; ii) Relying on other DIRs (general rule is a DIR is not liable for the mis-deeds of co DIRS if he/she did not participate in the Act. BUT some American cases have found DIRs equally liable for misinformation in a prospectus even though not all were active participants in misstatements) iii) DIRs can rely on officers and professional (see: **BCA 157(1)).**
* Can delegate to officers **(BCA 141**, **CBCA 121**) and are justified in trusting officials to perform honestly **(*Re City Equitable*)**

**STATUTORY DEFENSES:**

**PROV:** DIR (not OFR’s) has complied with ***duties under 142(1) if D relied, in good faith***, on**:**

* **(a)** financial statements or auditors report, **(b)** written professional report, **(c)** OFFs statements of facts**, (d)** any other record or representation court considers reasonable grounds for DIRs actions **(BCA 157(1))**
* D not liable under 154 if didn’t know & couldn’t reasonably have known that was contrary to the Act **(BCA 157(2))**

**FED:** A DIR (not OFR’s) has complied with his ***or her duties under 122(1)*** if the DIR relied in good faith on:

* **(a)** financial statements of the corporation represented to the director 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 (**CBCA 123(5)(a)**); or
* **(b)** a report of a person whose profession lends credibility to a statement made by the professional person (**CBCA 123(5)(b))**

### Re City Equitable Fire Insurance Co, 1925

*Managing director of CE had diverted funds into another corp, defrauding CE. During winding up of CE, liquidator brought action against other directors and auditors for negligence and breach of duty in allowing this to happen* **// Issue:** Are the other directors liable for failing to stop defrauding of corp? **// Held:** DIRs must exercise some measure of skill and diligence – listed three propositions by which directors’ performance can be measured against standard of care: In this instance, conduct of directors fell short of willful misconduct and met standard of care – no liability

### Re Peoples Department Store, QB CA

*Joint inventory procurement policy was recommended to directors by corps’ vice-president of administration and finance, implemented by directors, caused both corps to go bankrupt* // **Issue:** Were DIRs in breach of their “care and skill” duty by implementing this scheme? **// Held:** In the modern view the duty of DIRs is neither objective nor subjective. Implies that a basic level of competence is required to act as mgmt., and it is a breach to have taken position in first place without being able to reach that level. Directors could rely on **s 123(4)(b) of CBCA**, has they had acted in reliance on the advice of an officer.

**(iii) Invoke Business Judgment Rule in Response to Allegations of Breach of Duty of Care and FIDUCIARY DUTY**

* **COURTS WILL NORMALLY DEFER TO BUSINESS DECISION IF WITHIN A RANGE OF REASONABLE OUTCOMES:** Where there is no evidence of fraud, illegality or conflict of interest re: given corp action involving business judgment, DIRs are presumed to have acted in good faith and on a reasonable basis.
* **BURDEN ON P – BUT D/O MAY HAVE TO SHOW THEY ACTED W/ BASIC LEVEL OF SKILL AND ATTENTION**
* **Rationale:** Judicial second-guessing with benefit of hindsight re: substantive merits of judgments made by directors not conducive to effective decision-making
* Essentially concerned with the **procedural integrity** of the decision-making process
* **Effect of rule:** it’s enough if DIRs made a reasonable decision *that evidences their business judgment* but not a perfect one (***UPM-Kymmene Corp***, ***Pente Investment***)
* **Inquiry:** look at content of decision, extent of information on which it was based & measure against facts as they existed at time of impugned decision (***UPM-Kymmene Corp***) 🡪 Was the decision within a range of reasonableness? (***Pente Investment***)
* Will not apply ***where DIRs act on advice of committee that makes an uninformed recommendation*** (***UPM-Kymmene Corp***)
  + **E.g.** Appropriate to rely on an independent committee whose process was in best interests of the corp and its SH’s in context of takeover bid (***Pente Investment***) but not ok to blindly rely on a report w/o considering particular circumstances of corp (***UPM-Kymmene Corp***)
* While the business judgment rule provides DIRs with insulation from liability under their statutory duties of care, one must keep in mind that the oppression remedy is available. Its focus is on result and need not involve any bad faith.

### UPM-Kymmene Corp

*Board of DIRs approved a compensation K for a new chairman which was obscenely lucrative and could potentially bankrupt corp if its clauses were activated (golden parachute). Had relied on opinion of compensation committee, who had in turn relied on compensation consultant* **// Issue:** To what extent does BJR protect directors? Can it prevent court from finding a breach of duty of care? **// Held:** that BJR ***will not protect DIRs*** where their decision evinces no care or prudence whatsoever. Although it was not unreasonable for the Board to assume committee had done a careful job, this did not relieve the directors of their independent obligation to make an informed decision on a reasonable basis. **Reliance on an expert’s opinion is insufficient to escape liability –** the reliance has to be based on reasonable judgment

## Fiduciary Duty (Duty of Loyalty and Good Faith) (BCA 142(1)(a), CBCA 122(1)(a)) 🡪 Owed only to the Corp

**BCA 142(1)(a)/CBCA 122(1)(a)** must ***act honestly and in good faith*** with a view to the best interests of the company – **NB**: applies to both directors and all officers (in addition to any CL or Equity Duty).

* Focus is on the ***integrity and good faith of action*** which means looking at the reasons for acting not the results of actions (***Re Peoples Dept Stores***)
* **There is no general rule to apply to determine if there is a breach of this duty (but can see 4 examples below) (*CanAero).***
* **Contents:** loyalty, good faith and avoidance of conflict of duty and self-interest (***CanAero***)

**To Whom the Duty is Owed**: at all times it is ***owed ONLY to the corporation*** NOT to any particular group of stakeholders (but indirect reference to these stakeholders MAY make DIR’s somewhat responsible for these different groups **(*Peoples, BCE*).**

* Important to be clear ***that the DIRs owe their duty to the corp, not to stakeholders***, and that the reasonable expectation of stakeholders is simply that the DIRs act in the best interests of the corp (***BCE***)
* Duty is not ***confined to short term profit or share value*** – looks to long term interests (***BCE***)
* **What are the best interests:** ***MAY*** look to interests of SH’s, EEs, creditors, consumers, govt’s and the env to inform decisions (***BCE***) – should be satisfied provided consideration lies ***w/in range of reasonable alternatives according to business judgment rule*** (***BCE*)**
* Whether and how much interests of different stakeholders need be considered depends on context (e.g. on eve of insolvency interests of corp become more or less synonymous with those of creditors) (***BCE*)**

**Elements of FD:** In almost all cases in which a breach of FD occurs, the fiduciary has made some profit or received some advantage at the expense of the corporation.

**PROCEDURE FOR REMEDY:**

* Often new MGT is brought in place then a claim is brought against the old MGT for breach in their duty.
* **Most likely**: Bring action **VIA DERIVATIVE ACTION** (go to section) which would mean damages go to corp, improving its finances and indirectly improving position of stakeholders; person who brings action will get costs (maybe) – probably really should be brought derivatively as per guidance in ***Goldex***
* **Possibly traditional personal claim** (if can prove individual damages) or oppression (some unique prejudice to a stakeholder, ***BCE*)**
* Tend to **get equitable relief** through **accounting profits, rescission, and property reallocation**.
* **NB:** the legislation assists the CL, so if situation fits w/in legislation can use the legislation but can also argue the rest of the fiduciary law and claim ***that even though the breach in the situation is not elaborated on in the statute, there was a breach of the FD per the CL.***

**4 *Common Scenarios* of Claims of Breach of FD: 1) Self-Dealing; 2) Opportunities; 3) Competition; 4) Defensive Tactics (see below).**

**[1] SELF DEALING (CONTRACTING WITH THE CORPORATION)**

* **CORP HAS A K WITH A DIR 🡪** Possible conflict of interest b/c DIR could be making corp’s decision in their own best interest (not supposed to have K’s with the fiduciary).
* **ONLY APPLIES TO DIR’s AND Sr. OFR’s –** for both statutes, as feds define “officer” as senior management.
* **Claim: Breach of Fiduciary Duty**
* **SH CAN MAKE SELF-DEALING K’S ENFORCEABLE.**

**PROVINCIAL**

**BC HAS FAIRLY COMPLETE CODE - COMPLY WITH PROCEDURE & DIR WILL LIKELY BE RELIEVED OF LIABILITY (“Easier than CBCA”)**

* **VALIDITY OF K -** K is not invalid *merely* b/c the D/Sr OFR has an interest, failed to disclose it, or there hasn’t been approval (**BCA 151**) 🡪 **BC protects validity v. federal which invalidates** (though still possible to exploit word “merely” and argue something else is wrong w/the K in addition to possible self-dealing)
* **APPLIES TO DIRs AND Sr. OFR’S ONLY -** Disclosure of a personal interest in a K or transaction is required of all DIRs, but only of “senior officers” (**defined in s. 1(1) – chair or vice chair of board, president of company, vice president, and OFR that performs policy-making functions),** with the result that OFRs who are not “senior” officers, and who have an interest in a K or transaction, have no safe harbor under the Act to relieve them from liability.
* **“Account for Profits”:** Providing claimant what the other person gained (subject to equitable constraints i.e. clean hands).
* **OTHER REMEDIES: BCA 233(6)** - While proof of approval or potential approval by SH’s does not justify staying or dismissing action it “may be taken into account by the court”. i.e. **ability to make derivative claim will be impacted by the SH vote** (exception to the usual case in BC that SH approval makes liability goes away).
  + Statute creates an exception for a derivative action even if approval of below occurs.

**ROUTE 1: BCA 147-152 “DISCLOSABLE INTEREST”:**

* **SHELTER TO BREACH:** DIR’s and Sr. OFR’s ***have no obligation to disclose any direct or indirect interest*** NOR ***to account for any profit*** except when have disclosable interest (see: ss 147-153) (**BCA 152**) … **BUT** broad requirement to reveal under **BCA 153.**
  + If have a K where you do not have a “disclosable interest,” may not fall under this part of the statute. May go to common law.

If the DIR/SR. OFR has a “**disclosable interest”** he/she should be revealing it otherwise ***will have to account for profit from the transaction*** (**BCA 148(1)**) and cannot be voting in the DIR’s meeting to approve it (**BCA 140(3), 149(2))** though can probably vote own shares in SH capacity to approve.

* **Must have a “disclosable interest”**: (essentially: a material K between DIR/Sr. OFR and Corp) (**BCA 147(1))**

**(a)** K/transaction is “**material” to the company** [i.e. has to be material on both ends – K is of some importance]

**(b)** company **has entered, or proposes to enter**, into the K or transaction; and

**(c)** the **D or Sr. OFR either has a material interest in the K** or in a person who has a material interest in the K or transaction; and

**EXCEPTIONS TO DISCLOSABLE INTEREST:**

* DIR/Sr. OFR ***DOES NOT have a disclosable interest*** if **(a)** the situation arose before the company was recognized under this Act (see pre-incorp K’s); **(b-d)** the other party is a wholly owned subsidiary of the company or both are subsidiaries of same corp; and **(e)** the DIR/Sr.OFR is the sole SH of the company (**BCA 147(2))**
* ***Other scenarios MIGHT NOT give rise to disclosable interest*** (a DIR or senior officer is not required to disclose his or her interest in a K or transaction merely b/c falls under these categories) thus do not have a conflict.
* **2 scenarios:** 1) Compensation to DIR or Sr. OFR; or 2) Indemnity or insurance (i.e. DIR has a guarantee to a lender, and have K with corp where if the DIR has to pay out to the creditor the corp will indemnify “pay creditor for DIR”).
* K is ***for security granted by company*** for money loaned to the DIR or OFR for the benefit of the company (**BCA 147(4)(a))**
* K is ***indemnity or insurance*** for the DIR/Sr. OFR (**BCA 147(4)(b))**
* K ***relates to remuneration* (payment)** of that DIR or Sr. OFR (**BCA 147(4)(c))**
* K is a ***loan to the company*** that the D/Sr. OFR has guaranteed (**BCA 147(4)(d))**
* K is for the ***benefit of a corp. affiliated w/the company*** and D/Sr. OFR is also a DIR/Sr. OFR of that corp. (**BCA 147(4)(e))**

**PROCEDURES FOR DISCLOSURE (to have profits validated for DIR/Sr. OFR so don’t have to account for profits, go to 149 for approval):**

**(a)** **Disclose the nature and extent** of the interest to DIRs (**BCA 148(2)(b)), OR**

**(b)** Disclose **nature and extent to SH’s** (**BCA 148(2)(c))**

* No liability where the company entered into the K before ind. became a DIR or Sr.O of co, the disclosable interest is disclosed to DIRs or SH’s and the director or Sr. O does not participate in or vote on any decision or resolution on it (**BCA 148(2)(d))**
* **Ways out:**

1. Argue do not have a disclosable interest as it’s defined in s. 147 or say have an exception in s. 147(4)
2. Even if he/she has a disclosable interest do not have a type of profit for which liable to account (**BCA 148(2))**

**APPROVAL PROCEDURES:** Once the appropriate disclosure (**148**) has been made by the interested party, can be approved either by **special resolution** OR **DIR’s resolution** (**BCA 149(1))** but the DIR is not entitled to vote in any DIR’s resolution (**BCA 149(2))** unless all DIRs have the disclosable interest (**BCA 149(3)).**

* For 149(3), if all DIR’s have a disclosable interest (thus are conflicted), their vote cannot in and of itself approve the K, but voting on it sets the tone for the SH’s vote under s.148(2)(c). SH’s can approve almost anything.

**POWER OF COURT:** The court may, on application (by DIR, Sr. OFR, SH), **if it determines that the K or transaction is not reasonable and fair** to the company: enjoin company from entering into it, order liable to account for any profit, or make any other order (**BCA 150(2))**

* Or, on application, **if the court finds it was fair and reasonable** it can order that the D/Sr O is not liable to account for any profit and make any other order it sees fit (**BCA 150(1))** – **i.e. court has discretion to provide escape from personal liability**

**ROUTE 2: GENERAL DUTY TO DISCLOSE S. 153 (EITHER FOR SELF-DEALING OR COMPETITION (see below))**

* **BCA 153 (which is similar to CL)** is isolated and seems to stand alone and the effect of it is not at all clear. ***Ss. 147 to 150 (discussed above) do not seem to apply to it.*** Even if disclosure has been made under s. 153, when a specific transaction or contract comes along in which a DIR or Sr. OFR has an interest, that DIR/Sr. OFR officer must still comply with ss. 148 and 149.

**Requirement to Disclose is Triggered:** DIR or Sr. OFR (**BCA 153**)

* + - 1. Holds any office or any property, right or interest that;
      2. Could (need only potential conflict) ***result directly or indirectly*** in the creation of a duty or interest that materially conflicts with that individual’s duty/interest as a director/sr officer of company.
      3. RESULT: **must** disclose the **nature and extent** of that conflict: disclosure must be made to directors promptly after becoming a D/Sr O [i.e. where interest is pre-existing] or promptly after that D/Sr. O begins to hold the other office or possess the property, right or interest for which disclosure is required.
  + **Consequences of failure to disclose**: not indicated in section but likely requires D/Sr OFR to disgorge what was gained/compensate company for what it was deprived of.
  + More sweeping language than federally – could argue D’s in BC have to disclose even potential conflicts v. **federally only actual conflicts b/c no equivalent provision** – though federally doesn’t say **CBCA 120** is exhaustive as **BCA 152** says.

**FEDERAL**

* **FEDERAL PROVISIONS LESS COMPREHENSIVE – D/O MAY STILL HAVE TO ACCOUNT FOR PROFITS & K MAY BE INVALID]**
  + **CBCA is opposite of BCA where usually SH’s cannot make liability go away by resolution, but s.120 allows SH vote to make problem go away (except for s.242 which still allows for a derivative action even if there is a SH vote (below)).**
* **DISCLOSURE -** obligation to disclose nature and extent of any interest is triggered when a D/O (**defined in s. 2**) (**CBCA 120(1)**):
  + K/transaction is material (**CBCA 120(1));** and
  + the D/O is a party to the K or transaction (**CBCA 120(1)(a));** OR is a D or O of a party to the K or transaction; OR has a material interest in a party to the K or transaction.
  + **NB**: *CBCA does not define “disclosures” nor require materiality on both sides of K – best to err on side of more disclosure*
* **TIME OF DISCLOSURE -** DIR must disclose ***at the meeting*** at which the K or transaction is first considered or at the first meeting after becoming so interested (**CBCA 120(2));** while OFFICERS disclose immediately when becoming aware (**CBCA 120(3)).** If it’s a transaction that, in the ordinary course of the corporation’s business, would not require approval by directors or SH’s then individual should disclose in writing or request to have it entered into minutes of meeting immediately on becoming aware of it (**CBCA 120(4).**
* **CONTENTS OF DISCLOSURE -** “nature and extent of interest” that he/she has in material K or material trans (**CBCA 120(1))**
* **APPROVAL –** DIR cannot vote on any resolution to approve the K (**CBCA 120(5)**) unless the K relates to his/her own remuneration, is for indemnity or insurance or is with an affiliate.

**(1) DIR APPROVAL: The following is required in order to validate the K/transaction through director approval (CBCA 120(7)(a)-(c)):**

* + **(a)** Disclosure of interest made in accordance with the above;
  + **(b)** Directors approved it; AND
  + **(c)** K or transaction was ***reasonable and fair*** to the corp. when it was approved. **i.e. directors must be able to defend the K along these lines (must examine content of K, and DIRs who approve K may be in breach of duty of care if they cannot ensure that the K they are approving is reasonable and fair to the corp when it was approved).**

**- OR -**

**(2) SH APPROVAL:** D/O ***acting honestly and in good faith*** can get rid of liability for profits & validate the K/transaction via SH approval (**CBCA 120(7.1)), if K or trans:**

* + (a) Approved or confirmed by special resolution at meeting of SH’s, AND
  + (c) K or transaction was reasonable and fair to corp when it was approved/confirmed [i.e. SH ability to approve what was otherwise a breach by the DIR/OFR is extremely limited and problematic given the good faith and fairness requirements. This is quite different than BC]
* **CONSEQUENCES OF FAILURE TO COMPLY**: corp or any SH ***may apply to court to set aside K on terms it thinks fit*** AND/OR ***require D/O to disgorge profit to corporation*** (**CBCA 120(8))**
* **EVEN IF SH OR DIR APPROVAL - 242 CBCA** - While there is a procedure to get SH or DIR approval to make problem go away (in terms of corp making action against DIR) still have to be concerned that a derivative action or oppression remedy claim made by brought against you 🡪 This is a reestablishment of the starting proposition of the CBCA and simply counters the carve out in CBCA 120.

**[2] Corporate Opportunities 🡪 DIR/OFR Has K, not the Corp**

**When:** 3P and **DIR or Sr. OFR** enter a K that might have instead advantaged the DIR’s corp; e.g. DIR independently invests in a project that might have been done by corp (***CanAero***)

* **Claim: Breach of Fiduciary Duty**
* **REMEDY:** **LIKELY DISGORGEMENT OF ANY PROFIT MADE**; but a finding of breach of fiduciary duty not actually dependent on any profit having been made.
* **Onerous view of obligation:** Person complaining doesn’t have to show that the corp. would’ve been able to take the opportunity (Lord Wright in ***Regal*; *CanAero***) and it doesn’t matter if the DIRs were acting in good faith (***Regal (Hastings)***) + it’s no defence to say D/O had particularly high level of skill to develop project into profitable operation as a means of reducing compensation payable (***Regal*)**
* **DEFENSES:**

1. Corp definitely made decision not to pursue the opportunity in a well-thought out process that involved independent advice.
2. It is business that the corporation does not cover (potential but must be careful).
3. **Statute:** Could get a transaction approved by SH’s after a breach under BCA, BUT could not do this under CBCA (this is still not determinative under context of derivative action).

***Regal* Test:** Was there a breach in DIR/OFR Fiduciary Duty? (*DIR’s buying shares in subsidiary and made profit* // **Held:** disgorge benefit**)**

1. **Was profit made**?
2. **Did the D acquire the property by virtue of their office as DIRs**?

* ***Regal* versus *Peso*:** is it sufficient if D/O obtained knowledge of interest by reason of being DIRs and in course of execution of that office (***Regal***) or does it have to be by reason *and only by reason* of their office (***Peso***)
* Could argue that the opportunity at the time was just in the air and had not solidified into something concrete that the corporation could pursue.

1. **Did they stand in fiduciary relationship to company**? – always satisfied w/DIRs and sr. officers
2. **Was fiduciary duty breached**?

* ***Factors to look at in determining whether have breached fiduciary duty*** (***CanAero***): Position/office held, nature of corporate opportunity – its ripeness, specificness & D/O’s relation to it, amount of knowledge possessed, circs in which knowledge of opportunity obtained, whether that knowledge was special or private, time at which breach is assessed – after termination of relationship (has reasonable time passed?) and circumstances under which relationship terminated (did D/O quit to pursue the opportunity? as was the case in ***CanAero*)**
* **No single answer whether there was a breach, but requires a great deal of litigation.** Do not take an opportunity that could have gone to the corp unless the corp has fully decided not to take the opportunity.

***Peso Silver Mines****’* ***Way Around:*** has the corp clearly decided, ***in the best interest of the corporation, not to pursue the opportunity***?

* Ideally DIR would not be involved in that decision: should form committee of D’s independent of those who wish to pursue the opportunity & who make the final decision re: whether to pursue it
* Counterargument: fiduciary obligation continues for a time after cease to be a DIR/Sr. OFR or the transaction going away (***CanAero***)

[***Peso***: *board turned it down b/c of strained finances and the view it had enough mining claims, after obtaining professional advice, & the DIRs did not pursue until 6 weeks later – claim was brought by new mgmt*]

***Regal (Hastings) v Gulliver, 1942 HL -* D not allowed to take opportunity, even if corp couldn’t** **//** *DIRs and lawyers were trying to drum up business for the subsidiary. They find a 3P to deal with the subsidiary to benefit the overarching co. The 3P insists on greater capitalization in the subsidiary, so the DIR’s raise money by buying shares in the subsidiary themselves (the impugned transaction). One DIR, Gulliver, buys the shares in the subsidiary, but not himself, but for a fourth party. This transaction goes through and the company is eventually sold, bringing in a new board of DIRs. The new board brings the action against the DIRs, saying that taking shares in the subsidiary for themselves was in breach of their fiduciary duty to the company* **//** Both profited enormously 🡪 DIR’s required to disgorge, non-DIR and lawyer able to keep shares (as not DIR’s).

***Peso Silver Mines -* If a corp makes a clear decision not to pursue an opportunity, that can offer a defence for DIRs who later pursue that opportunity**. **This is not an opportunity WRT to the corp //** *DIR’s get wind of mining opportunity. Company (these same DIRs) refused action on silver claim (does not take opportunity). Then DIR’s form another co which takes the opportunity. Control of the original company which passed up the opportunity was put under new MGT. New MGT claimed old DIR’s were in breach of fiduciary duty* **// Held:** Former DIR can keep benefit b/c “course of duties” done (not liable).

***Can Aero -* (1) Duty applies to OFR’s too; (2) Fiduciary duty ongoing; (3) Irrelevant that opportunity taken varied from that offered to corp, still breach of FD** // *D&O left corp, started new one, & used information acquired in old position* // **Held:** Breach of Fiduciary Duty survived resignation.

**[3] Competition**

* **INVOLVES: (1) DIR/SR. OFR serving on boards of 2 competing corps; (2) DIR/SR. OFR operating a business that competes w/ the corp; and (3) DIR/SR. OFR having a material interest in an entity that competes w/ the corp.**
* **CONSEQUENCE(S):** Disgorge profit if conflict of interest & profit from it; injunction from acting; oppression claim by SH; derivative action on behalf of corp.
* **WHY IT’S PROBLEMATIC**: Forces DIR to choose which interest to put first & makes it more difficult to determine which information entitled to communicate to which side (need to know where the information came from otherwise risk breach confidence).
* **STATUTE**: Must disclose the ***nature and extent of interest*** that could materially conflict with interest as DIR/Sr. OFR (**BCA 153 (see above),** **for Fed use CL below or possibly under CBCA 120(6))**
  + **DISCLOSURE MUST BE PROMPT (BCA 153(2)) // MAY REQUIRE DISCLOSURE OF ONGOING INFORMATION**
* **CL:** Being a DIR of more than 1 entity is not in and of itself a conflict of interest. If a DIR can show no improper use of information, then likely no remedy available to the person who complains (***London and Mashonaland***). If there is a conflict, DIR should disclose it, which implies being aware of conflict, revealing it and avoid profiting from it or get it approved by DIRs or SH’s.
  + ***Harsh view:*** liable to account if there is **(1)** an actual or potential conflict of interest w/company; **(2)** and where information/opportunity was acquired by virtue of his/her position as a director (***Cranewood Financial Corp***)
  + ***More permissive:*** Not liable to account if it’s merely a potential conflict of interest and D didn’t acquire knowledge of opportunity via his/her position w/the company (***Peso*)**
* **Summary of Liability about the use of information that comes into the hands of a fiduciary** (Welling as cited in ***Slate,* SCC**):
* **Actual conflict of duty (w/ company) and interest + information/opportunity acquired by virtue of fiduciary’s position** = Clear liability to account
* **Potential conflict of duty and interest + information acquired by virtue of fiduciary’s position** = Accountable for any profit
* **No conflict whether real or potential + info/opportunity not acquired in position** = Clearly no liability to account
* **Potential conflict of duty/interest + information or opportunity acquired independently** = Fiduciary is not accountable.
* **Actual conflict of interest + acquiring information or opportunity independently =** liable for profits
* **No conflict of duty and interest + information/opportunity is acquired by virtue of position** = Fiduciary is accountable if information is used for any other purpose.

E.g. Information obtained “internally” from the business will put you in a position of liability; but information obtained “externally” will usually not leave you liable. If possible corporation will use the information, even if it comes from the outside, fiduciary should be cautious to not use that information.

**[4] Hostile Takeovers and Defensive Tactics by Target MGT 🡪 Bidder offers to purchase controlling interest of company.**

* **CONCERN = DIR/OFR’s WANT TO KEEP JOB, THEREFORE WILL FIGHT HOSTILE TAKEOVER, EVEN IF HT IS IN THE CORP’s BEST INTEREST.**
* **PROBLEM:** in context of takeover mgmt. needs to provide information to potential acquirer yet they have a huge incentive to keep their jobs – no statutory provisions on point except general one of fiduciary duty.
* **DEFENSE TACTICS:** ***Poison Pill // Issue shares into friendly hands*** – **CBCA 25** **// *Sale of Crown Jewels***: though may require SH vote – **CBCA 189(3) – sale of undertaking // *Scorched earth***: liquidate crown jewels, ensure debt becomes immediately due and payable on change in control (poison put) **// *Pac-man***: turn around and try to acquire bidder **// *White Knight***: alternative bidder sought by target mgmt.

**Assessing Whether DIR/OFR acted improperly in Defensive Actions:**

DIRs are entitled to take defensive tactics (thus frustrate control attempts, not accept certain bids, etc) where they (***Teck Corp***):

* + - * 1. **Act in good faith** [subjective purposes acting for], AND
        2. **Establish with some proof that there were reasonable grounds for taking the decision they did** (e.g. that a takeover will cause substantial damage to company’s interests) [objective measure]
* In ***Teck*** could’ve argued there was potential for bias even in information gathering phase
* ***E.g. Gatekeeper Procedure*** (***Pente Investment***): Show they took steps to avoid a conflict of interest by acting on advice of an independent special committee made up of outside DIRs who carefully considered reports of experts.
* Where mgmt. is involved they should be reporting only to special committee who in turn negotiates – balance out their expertise w/their potential conflict of interest in wanting to keep job (could also do something as in ***Pente*** where mgmt. had compensation packages that kicked in in event of takeover which lessened conflict)

**Factors mgmt. can consider:** Reputation, experience and policies of anyone seeking to take over the company (***Teck Corp***)

* Likely justification met if show DIRs considered it and found it lacking based on economic circumstances
* ***BCE*** argument: both long and short term interests are relevant so D’s are justified in saying no to an offer solely because we think it will offer only short term value.
* No requirement in law to hold an auction but there is a duty to canvass the market though it is a good process (an auction can be a good process though) (***Pente***)

### Teck Corp v Millar, 1972

*There were 2 bidders for a junior mining property. The DIRs made a decision favoring the acceptance of one of the bids. The loser, Teck Corp, went ahead and got enough votes to hold a SHs vote for the acceptance of their own bid, which they won. The Teck bid was slightly better in monetary terms. The DIRs went ahead and accepted the other bid anyway. Teck argued that it was clear that if their bid had been accepted, the DIRs would have been replaced and so their decision was based on the preservation of their own interests rather than the best interests of the corp* **// Held:** No breach of FD **//** DIRs ought to be allowed to consider who is seeking control and why – if they believe that there will be substantial damage to the company’s interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper.

# RELIEF FROM LIABILITY

* **CAN’T ESCAPE LIABILITY VIA K, ARTICLES, BYLAWS, (For Feds this includes resolutions (below)), ETC (BCA 142(3), CBCA 122(3)).**
  + **CBCA:** starting proposition is no resolution can correct a breach. CBCA creates modifications in certain contexts, such as “self-dealing” (where corp party to K) where a DIR or SH resolution can be used to remove liability.
  + **BCA:** resolution can correct a breach but that resolution must be a SH resolution (see in ***North-West***). BCA will allow a DIR’s resolution to get rid of a breach (that is the add on since the SH resolution is the starting proposition).
* **NB:** another specific statutory defence is in BCA 157 and CBCA 123(4) (see above).

**Claims:**

* Corporation can bring the claim themselves (direct);
* **Derivative Action:** Corp is suing someone (e.g. the MGT) but the action was not initiated by the corp itself but some other interested party (such as the SH) (indirect);
* **Oppression Remedy:** someone suing the corp for the corp having “oppressed” them. Oppression claims generally involve a scrutiny of what the management was doing (indirect).

#### **[a] Option 1 in BC: Unique BC General Defence in BCA 234**

**BCA 234** – **GENERAL DEFENCE (\*Unique to BC) -** if DIR/OFR is or may be liable re: negligence, default (i.e. contract), breach of duty or breach of trust, the court MUST take into consideration all circumstances & may relieve the person ***either wholly or partly*** ***from liability*** on the terms considered necessary if that person **acted honestly and reasonably and ought fairly to be excused.**

* Can be pre-emptive: “is or may be”
* Provides relief for **OFFICERS,** receivers & liquidators too
* **Can be defense against ANY claim brought by ANY PERSON**
* **OFR’s 🡪 argue s.234 in place of 157 seeing as 157 is limited to DIR’s (e.g.** Use when officer relied on reports someone else prepared, breached duty, and has no other defence).

**[b] SH Approval if claim is brought by Derivative Action (Option 2 in BC); Option 1 Federally for any of Derivative or Oppression claims**

**PROVINCIAL**

Under CL could get SH approval of actions to relieve from liability (***North-West Transport***).

* **UNLESS action is brought via derivative action**. To make derivative action person must go to court w/prima facie case of breach and show corp is doing nothing about it.
* **BUT BCA 233(6)** indicates that while proof of approval or potential approval by SH’s does not justify staying or dismissing a derivative action it “may be taken into account by the court.” i.e. **ability to make derivative claim will be impacted by the SH vote (BCA 233(6))**
  + **This is the exception to BCA allowing SH resolution to make the duty go away, as SH resolution is only taken into account by the court here.**
* Hold SH vote to approve breach of fiduciary duty but actually have the meeting and don’t go by way of consent resolution b/c could be construed as a “contract” w/in meaning of **BCA 142(3).**
* BC statute does not say anything one way or another about Oppression remedy.

**FEDERAL**

* **DERIVATIVE/OPPRESSION ACTION –** no stay or dismissal b/c of SH approval – but court ***can take this into account*** (**CBCA 242(1)).**
* **CBCA 242(1)** provides that ***evidence of approval by SH’s*** “may be taken into account by the court” [note: doesn’t include “potential SH approval” so federally might argue that the vote will have to have been held before advancing evidence of it in court] (**this is consistent w/ the CBCA starting proposition that SH vote cannot make a duty go away).** 
  + i.e. Hold the vote as it may help relieve from liability but won’t insulate from liability. Ideally would’ve had a vote to change the articles to permit the action in the first place if possible.

**[c] Statutory Indemnification provided by the Corporation**

* **LIABILITY INSURANCE – DON’T TAKE JOB AS DIR UNLESS YOU GET THIS AS PART OF THE PACKAGE** (**BCA 165; CBCA 124(6))**
  + **Insurance permitted**: company *may* purchase insurance for benefit of eligible party against any liability incurred by reason of or having been D/O or holding/having held position equivalent thereto (**BCA 165**)/(**CBCA 124(6))**

**PROVINCIAL**

* **Covers “eligible party”** - D/O, former D/O, individual who acts as D/O at corp’s request (**BCA 159**) in eligible proceedings.
* **“Eligible proceeding”** - where eligible party may be joined to action, or liable for judgement, penalty, fine, expense (**BCA 159**)
* **MAY INDEMNIFY** - corp may **(a)** ***indemnify against penalties***; and/or **(b)** ***pay expenses actually & reasonably incurred*** (**BCA 160**)
* **MUST INDEMNIFY** - for expenses not yet reimbursed – **BCA 161**
  + Where party was ***wholly successful, on merits or otherwise,*** in outcome; **OR**
  + Where party was ***substantially successful, on merits, in outcome of proceedings***
    - i.e. winning on a ***technicality would not be enough to trigger obligation***. Company has authority to advance payments in advance (**BCA 162(1))** on eligible party’s undertaking to return if unsuccessful) – i.e. must pay if wholly successful for any reason or substantially successful on merits (more generous language than federal)
* **PROHIBITED INDEMNIFICATION** – **BCA 163(1)** 
  + **(a)/(b)** governing documents prohibit such payment (thus made contrary to memorandum or articles);
  + **(c)** **All types of proceedings**: if eligible party did not act honestly + in good faith with a view to the best interests of the company
  + **(d) Criminal/admin proceedings:** party did not have reasonable grounds to believe action was lawful.
* **DERIVATIVE ACTIONS -** If the action is ***brought by or on behalf of the corp***. then it cannot indemnify for eligible penalties nor pay the expenses (**BCA 163(2))** – can’t indemnify for derivative actions unless get the court to order it under s. 164.
  + **If corporation is suing you then the corporation cannot indemnify you UNLESS court order**. Could use court order if a derivative action was allowed to proceed but later it was found there was no substance to the claim. DIR’s and OFR’s may incur expenses and may want the corp to compensate for the expenses.
* **PRE-PAYMENT OF EXPENSES** - ***corp may reimburse*** expenses actually & reasonably incurred ahead of final disposition (**BCA 162**)
* **COURT ORDERS** - on application, court can make various orders wrt indemnification (**BCA 164**)

**FEDERAL**

* **ELIGIBILITY** - D/O, former D/O, individual who acts as D/O at corp’s request (**CBCA 124(1))**
* **INDEMNIFY WHAT?** all costs, charges, & expenses - including judgments - reasonably incurred in respect of any proceedings person involved with b/c of their association with corp (**CBCA 124(1))**
  + Corporation can advance the money but the individual must repay if fails to act in good faith with a view to the best interests of the corporation or if individual did not have reasonable grounds for believing conduct was lawful (**CBCA 124(2)).**
* **REQUIREMENTS** **(Prohibited Indemnification)** – Corp MAY NOT indemnify under 124(1) unless: **CBCA 124(3)**
  + **(a)** Acted honestly + in good faith + with view to best interests of corp (or other entity at corp’s request)
  + **(b)** **Criminal or administrative proceedings** - must’ve been reasonable grounds to believe conduct was lawful
* **RIGHT TO INDEMNITY** – individual entitled to indemnity b/c no fault or omission found + acted honestly + in good faith + with view to best interests of corp **(CBCA 124(5) -** essentially equivalent of individual being substantially successful on merits – i.e. required indemnification only if the DIR did not commit any breach (more absolute in terms than the BC provision) (i.e. doesn’t have to indemnify if win on a technicality)).
* **APPLICATION TO COURT** - to approve indemnity **(CBCA 124(7))**

# SHAREHOLDERS AND SHAREHOLDERS RIGHTS

* **LEGISLATION:** SH’s and shares are governed by provincial & federal BCA’s + SECURITIES ACT (governs all shares) + ***SECURITIES TRANSFER ACT*** (deals w/ nature of property interest and how it ranks against other parties; used in conjunction with PPSA)
* **SH OVERSIGHT**: market mechanism - forces encourage managers to profit-maximize; legal restraint - managerial duties such as DoC & FD; statutory mechanism - SH voting rights (SH’s can vote controlling blocks, support hostile takeover bids, proxy battles)

## [A] Shares

* **Core:** ability to vote (**BCA 173(1),** **CBCA 140(1)**) and receive dividends (**BCA 70(1),** **CBCA 43(1)**)
* **SHARE ISSUANCE AND PRICE –** DIRs responsible for ensuring shares issued at fair equivalent (Feds) or fair market value (BC)
* **\*DIR’s LIABILITY –** Personally liable if they can’t explain why shares issued at certain value **//** Responsibility can be to corp or SH

**Provincial**

* **“Shareholder” (s. 1):** registered owner of share or can be an incorporator.
* **“Authorized share structure”:** kind + class + series of shares authorized by NOA.
* **INCORPORATORS -** have to be SH’s (hold 1+ shares) (**BCA 10(2)**).
* **MUST DESCRIBE FROM OUTSET -** The NOA must describe authorized share structure (defined in s. 1(1)) (**BCA 11(g))** and set out whether there are ***special rights/restrictions attaching to each class/series*** (**BCA 11(h)).**
* **RECORDS –** list of SH’s to be maintained (names, addresses, # of shares, class or series) - **any person** can apply to get access to SH list under **s. 49(1)** but must give affidavit (saying list won’t be used unless as permitted).
  + **Restrictions: *Cannot use list to*** influence voting, acquire or sell securities of the company or effect a reorganization (**49(3)**).
  + **Many shares are held in trust so likely difficult to get too much SH information.**
* **AUTHORIZED SHARE STRUCTURE (ASS) – Possible Share structure in corp:** Can have shares in different classes with different series within those classes, **must consist of** (**BCA 52**):
  + - **(a)(i)** Shares with OR w/o **par value**;
    - **(a)(ii)** One or more **classes**: may involve preferential voting rights (see below) and/or preferential access to money (**NB:** if corp only has one class of shares the rights of the SH are equal in all respects, **logically includes*: 1) right to vote, b) right to receive dividends, and c) right to receive property upon dissolution***);
    - **(b)** May include one or more **series** in any class of shares if special rights/restrictions attached to the shares of that class provide for that inclusion
  + **\*MOST BC COMPANIES ARE INCORPORATED HAVING COMMON SHARES W/O PAR VALUE.**
  + **NOTICE OF ARTICLES -** must set out the name of each class or series; the ***maximum # for each class and series*** (or say there’s no max.); any par value and identify any shares w/o par value as being that (**BCA 53**)
  + **CHANGES TO ASS – company can change share structure -** may create 1+ classes or series, increase, reduce or eliminate the maximum authorized to issue or establish a maximum, etc. (**BCA 54(1)**); but must **amend notice of articles and articles accordingly** (both of which require special resolution); or effect the change through special resolution (**BCA 54(3))**
* **NATURE OF SHARE INTEREST -** share is a personal estate (**BCA 56**) also intangible even if takes a written form – even if corp only owns land a share would not be an interest in land.
* **CLASSES (*Category of shares w/ particular characteristics, differentiating the three basic rights the shares must have (particularly dividend or voting rights)***) **-** Default position = one class (**BCA 59(2)**) **//** Can have one or more classes (**BCA 59(1))** & w/in class presumption that every share is equal to the other (**BCA 59(3))** **//** Each share of a class must have same rights or restrictions as every other share in class (**BCA 59(4))** ***unless there are rights/restrictions*** applicable to one or more series of shares (**BCA 59(6))** 🡪 put in different classes/series if want to alter ability to make decisions or entitlement to profits – **mechanism for enabling a certain class to retain control – s. 59(5) it’s not inconsistent to have these special rights attaching provided they attach to every share in that class.**
  + Make different classes if want different access to dividends/capital
  + Preferred Shares – often have no voting rights (but preferred for dividends).
* **SERIES** (***The only circumstance in which shares within a class may be given different rights is when shares in that class are subdivided into different series***) - there is the ability to issue shares in different series (**BCA 60(1)(a))**.
  + **DIRs (not the SH’s) can determine:** The character, number and alter articles/notice of articles (**BCA 60(1)(b)).**
  + Any subsequent amendment to shares already issued must be done via SH resolution specified in articles or, if none, special resolution.
  + All shares in series ***must have same special rights or restrictions attached*** (**BCA 60(4)**) and there should be no special rights of access to dividends conferring priority (**BCA 60(6)**). – **i.e. diff. voting rights but shouldn’t have different access to dividends/returns of capital.**
* **ISSUANCE OF SHARES –** Subject to articles **DIRs** can determine when and who to issue shares (most basic decision made by DIR’s and can be subject to breach of duty of care or competency that shares should not have been issued) (**BCA 62**). Shares must be bought in some way. BC corp cannot come into existence first w/o SH’s, who usually get shares at nominal amount.
  + **[1] Price:** must get fair market value in issuance (nothing to do with resale). DIR can be personally liable for amount not fetched on the sale of the shares.
    - **Non-Par value shares:** should be set price in manner indicated by memo/articles (**63(1)(a))** or via DIR’s resolution (**63(1)(b)**).
    - **Par value shares**: issue price set by DIR’s resolution and must be equal to or greater than par value (**63(2)).**
  + **[2] *SH’s must pay for shares:*** share must not be issued until it is fully paid (**BCA 64(2)**). Can pay in in the form of past services performed for the company (but not future), property, money (**BCA 64(3))**
    - **E.g.** Shares could be issued to EE but for a bonus of what was done and not incentive for the future.
* **DIVIDEND (**DIR’s may distribute profits to SH’s by declaring dividend seeing as profits belong to the corp and not its SH’s) **-** a company may declare and provide dividends in shares or property (including money) (**BCA 70(1)**).
  + **Prevented from declaring dividend -** if reasonable grounds for ***believing company is insolvent or payment would render it insolvent*** (**BCA 70(2)**) but a dividend is not invalid merely b/c it is declared/paid in contravention of that rule (**BCA 70(4)**)
    - **Corp can decide to issue shares by way of dividend instead of money. But DIR’s must ensure its appropriate to issue these shares.**

**Federal**

* **MUST DESCRIBE FROM OUTSET IN ARTICLES OF INCORP -** classes and max. # shares corp authorized to issue; and rights, privileges, ***restrictions and conditions*** attaching to each class and/or series of shares (**CBCA 6(1)(c)**); any restrictions on issue, transfer or ownership of shares (**CBCA 6(1)(d)**); if they set out any majority of votes different from the act then those in the articles/USA prevail (**CBCA 6(3)**) other than to remove directors (**CBCA 6(4)**)
  + **ONE CLASS -** if corp only has one class of shares the rights of the SH are equal in all respects, ***includes: 1) right to vote, b) right to receive dividends, and c) right to receive property upon dissolution*** (**CBCA 24(3)**)
    - Critical that some shares have some of those rights.
  + **SERIES –** number, rights, restrictions and conditions (**CBCA 27(1)**)
* **CBCA only allows for no-par value shares (as oppose to BCA) (CBCA 24(1))**
* **RECORDS -** list of SH’s to be maintained - names, addresses, number of shares **(CBCA 21(3))**
* **ACCESS TO LIST -** must be requested by affidavit **(CBCA 21(7)) // ltd use = effort to influence vote; acquire securities; other corp affairs (CBCA 29(9))**
* **ISSUANCE -** subject to articles, by-laws & any USA, ***shares may be issued and DIRs may determine price*** (**CBCA 25(1)**).
  + **PAYMENT -** SH’s ***must pay for shares:*** shares **must not be issued until consideration fully paid** in (**CBCA 25(3)**) past services performed for the company (but not future), property, or money.
  + Price of shares (either not received or unreasonably low price allocated) is something DIRs may be held personally liable for under s. 118(2))
  + In determining fair equivalent of property or past services D”s may consider reasonable charges and expenses of organization and payments for property & past services reasonably expected to benefit the corporation (**CBCA 25(4)**)
* **DIVIDEND -** corp. shall not declare or pay dividend if reasonable grounds for believing that corp is or would after payment be unable to pay liabilities as they become due; or realizable value of assets would be less than aggregate of liabilities and stated capital of all classes (**CBCA 42**). Can pay it either by issuing shares or money/property (**CBCA 43(1)**) but if shares are issued then have to adjust stated capital account (**CBCA 43(2)**)

## [B] Restrictions on Transfer of Share

* **TRANSFER = voluntary change of ownership of shares // TRANSMISSION = non-voluntary change of ownership by operation of law (e.g. bankruptcy, receivership, death).**
* **BCA RESTRICTIONS –** can put in share itself certain restrictions such that it must be sold for a particular amount of money, or sold to the company, etc. As long as restrictions there in advanced, they are binding.
  + **SET OUT RESTRICTIONS** – NOA of a company ***must set out whether there are special rights or restrictions*** attached to the shares of each class or series of shares (**NB:** this includes restrictions on transfer) (**BCA 11(h))**
  + **CONTAIN FULL TEXT -** Certificates for shares that ***have special rights or restrictions*** must contain or have attached the full text of those special rights or restrictions (NB: this includes restrictions on transfer) (**BCA 57(3)**)
  + **RIGHTS + RESTRICTION -** Company may by resolution (as set out in articles) create special rights or restrictions and attach them to the shares of any class or series of shares, whether or not they have been issued, or vary the rights and restrictions attached to shares in a class or series (**BCA 58**)
* **CBCA RESTRICTIONS -** SH bound by USA if have notice of it in terms of being able to transfer the share to anyone else.
  + **ARTICLE OF INCORP –** must set out classes and max. # shares corp authorized to issue; and rights, privileges, ***restrictions and conditions*** attaching to each class and/or series of shares (**CBCA 6(1)(c)**); any restrictions on issue, transfer or ownership of shares (**CBCA 6(1)(d)**);
  + **RESTRICTION NOT EFFECTIVE** – No restriction on transfer is effective against a transferee who has no actual knowledge of the restriction unless it is noted on the security certificate (**CBCA 49(8))**
  + **RESTRICTIONS** – restrictions on classes or series of shares are only permitted in accordance with s 174 (**CBCA 49(9)**)

### Re Smith & Fawcett Ltd (1942) [UKCA]

**Where articles give discretion to DIR with regard to acceptance of transfer of shares, DIR must exercise their discretion *bona fide* in what they consider to be in the best interests of the company, and not for any collateral purpose //***Articles provided that the DIRs may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares. A, as executor to F, claimed to be registered for 4001 shares. DIR’s refused to register a transfer unless he was willing to sell 2000 of the shares to a named DIR at a certain price* **//** Was this restriction on transfer a bona fide exercise of director’s discretion? **// Held: Judgement for DIR.**

* DIRs are given quite a bit of le-way in deciding whether or not they will allow a particular transfer (private companies). But public will be subject to *Securities Act*.

### Case v Edmonton Country Club Ltd (1974) [SCC]

**SH’s do not have an absolute right to transfer shares //** *Private club whereby you had to be a SH in order to have certain access to club facilities. Articles stated that if you wanted to sell or transfer your shares you had to get approval from DIR* **//** The annual fee provisions were found *ultra vires* by SCC, but court split on whether an article submitting all share transfers to DIRs’ consent, with unfettered discretion.

* **Majority of the court**: as long it says that the DIRs can be shown to be acting in good faith in imposing these restrictions, then it is a perfectly valid exercise of their restrictions and they do not have to explain the restrictions to the SHs any further.
* Important that the person knew what the restrictions were when they got involved in the corporation – it wasn't a change made later.

## [C] Voting Rights

Not ALL shares have this right associated with them, so must figure out if this right exists. If only 1 class of share, then do have this as cannot differentiate rights if only one class but often shares are issued without particular voting rights.

* **Can be any number of classes of shares with different rights attached to them, but equality is necessary within class (*Jacobsen*).**
* **Rights attach to the share not the SH. Rights that are attached to a class of shares must be provided equally to all shares of that class (*Bowater***).
  + ***Potential Counterargument in BC*: ss.**[**59(5)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33)**and**[**60(5)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33) of the ***BCA***, provide that ***special rights or restrictions*** attached to shares of a class or series can be binding on or accessible to only **some of the SH’s** of the class or series (no case law yet).
    - Presumption is that shares w/in same class have all same rights, but does not mean that all who hold shares of that class can use those rights at any particular time. E.g. If shares have access to dividends does not mean that there will be dividends.
    - **Macdougall:** Not sure this ***Bowater*** is correct. Voting rights are the same but depends on the circumstances of the amount of votes you get. These shares are the same and no differentiation among the shares and this is simply how the shares work.
* **NON-VOTING SHARES (CBCA)** - Statute empowers individuals to vote for fundamental changes even if would not otherwise have voting rights (**only under CBCA, not BCA**):
  + **CBCA:** Amalgamation (**CBCA 183**), sale of undertaking (**CBCA 189(3)-(8)**), continuance (**CBCA 188**) and changes to articles of incorporation (**CBCA 173**).
* **2 CATEGORIES OF VOTES:** 
  + **[1]** Approval of SH’s needed - in response to actions of proposal of D’s
  + **[2]** SH’s want something done that isn’t being done (rare & usually hostile – suggesting the Dir that certain things should be done)

**PROVINCIAL**

* **PRESUMPTIVE RIGHT TO VOTE** - one share = one vote & entitled to vote in person or by proxy (unless otherwise indicated in memorandum or articles) (**BCA 173(1))**
* **RECORD DATE** - to determine who’s entitled to vote (**BCA 171**)
* **METHODS** – (for voting at meetings) by **poll (secret) or show of hands** (only problem w/show of hands is that a single hand represents only one vote regardless of the number of shares the person holds, so poll fixes this; if participation is done electronically then it must be done by poll or “any other manner that adequately discloses the intentions of the SH’s”)) (**BCA 173(2)**) // **BUT** - SH can demand poll after hand vote (**BCA 173(4))**
* **PARTICIPATION METHOD** - in person, by phone, or other communication medium (**BCA 174(1)**) // Deemed to be present at meeting (**BCA 174(3)**)
* **POOL VOTES?** 🡪 sure! - two or more SH’s can ***have written agreement*** to vote shares a certain way (**BCA 175**)

**FEDERAL**

* **PRESUMPTIVE RIGHT TO VOTE** - one share = one vote & entitled to vote in person or by proxy (unless otherwise indicated in articles) (**CBCA 140(1))**
* **RECORD DATE** - to determine who’s entitled to vote (**CBCA 134**)
* **METHOD** - default is show of hands (**CBCA 141(1)**) // SH entitled to call for ballot before OR after hand vote (**CBCA 141(2)**)
* **ELECTRONIC VOTING** - vote by phone, electronic, or other communication device (**CBCA 141(4)**)
* **POOL VOTES?** 🡪 sure! - two or more SH’s can have ***written agreement*** to vote shares a certain way (**CBCA 145.1**)

***Jacobsen v United Canso,* [1980]**:

**Cannot deprive shares from having votes based on how many shares a person owns. Shares within a series must have the same rights //** *AB corp enacted a by-law which provided no SH was allowed to vote with more than 1,000 shares notwithstanding number of shares actually held***// Held:** restriction of voting rights contravened the statute **//** Within a class of shares there is a presumption of egalitarianism – rights within a class of shares must be equal and various voting rights within a particular class is discriminatory.

***Bowater v RL Crain and Craisec,* [1987]:**

**Rights attach to the share not the SH. Rights that are attached to a class of shares must be provided equally to all shares of that class //** *Under the CBCA: the rights attached to some special common shares entitled the original holders to ten votes per share but restricted subsequent holders (transferee’s) to only one vote per share (designed to prevent transfers)* **// Held:** Improper differentiation. Provision was struck down on the basis of the principle of equality of rights within a class.

## [D] Shareholder Agreements

**SH right to join with other SH to combine voting rights. These combinations can be effected by separate agreements which may also contain other provisions (e.g. Right of first refusal or transfer restriction); these agreements are usually found in closely held companies or large corps with 1-2 dominant SH.**

* **Pooling agreements are allowed**: 2 or more SH’s can have written agreement ahead of time that in exercising their votes will do so in accordance w/terms of the agreement (**BCA 175**, **CBCA 145.1**) – though no indication of any consequences if one party breaches that agreement
* **SH have the right to combine their interests and voting powers to secure control of a company and ensure that the company will be managed by certain persons in a certain manner (*Ringuet*).** 
  + Possibility for deleterious effect on minority SH’s is not grounds for illegality – minority SHs have remedies available to them.

# SHAREHOLDER MEETINGS

**POSSIBLE STRATEGY –** If have not called annual general meeting, can call (look at requirements) and remove DIR through this process. As generally, DIRs retire at the AGM and are eligible for re-election.

## [A] Basics

Presumption in **BCA 173(1)** and **CBCA 140(1)** is that all **shares have right to vote** and equally so. Meetings are instrument to hold management accountable.

* If meeting was improper any decision at the meeting may be invalid or an injunction could be granted.
* **In general, if the consequences are significant to a company, the requirements to gain approval via meetings is more stringent.**

**CONDUCT OF MEETINGS (BCA and CBCA companies):** SH’s are generally entitled to be heard at meetings; but does not give everyone who wants to speak the right to do so, nor does it guarantee they’ll get to speak as long as they want (***Wall***).

* At a certain point Chair can call the vote (***Wall***); failure to allow a chair supported by the majority to terminate speeches would allow minority to tyrannize majority
* Chair is only obliged to put to the meeting that which it was convened for – look to notice (***Wall***)

### Wall v London and Northern Assets Corp, 1898

**While majority “must not be tyrannical” court felt it would be ridiculous to impose requirements that every SH be able to speak until they were content. Provided all are consulted and the majority is acting in a *bona fide* manner, court will not interfere with workings of meetings** **//** *Corp convened a meeting to approve sale of assets, majority made motion to vote on sale before all SHs had an opportunity to speak their piece.*

## [B] Definitions

* **“Meeting of SH’s”** includes a general meeting, class meeting, series meeting, etc. (**BCA 1**).
* **“Consent Resolution” (under Ordinary or Special Resolutions):** often used by closely held corps where there is no point in holding a meeting. But note below, special voting requirements for consent resolutions under CBCA and BCA. If using a consent resolution proves difficult, might have to hold a general meeting (which has easier voting requirements).

**Depending on what voting for will determine the type of resolution:**

* “**Ordinary resolution**” **(Presumption):** resolution passed **(a)** at ***general meeting by simple majority*** (simply need a majority of shares who did vote to vote in favor) **(same definition in CBCA 2(1))** **OR (b)** Passed after being consented to in writing by SH’s carrying the right to vote at general meetings by **special majority of votes** entitled to be cast on resolution (vs. **federally all resolutions passed w/o meeting must be unanimous)** (it is a “special majority” under (b) since it is a consent resolution where SH don’t have to physically be at the meeting) **(s.1)**
  + **“Special Majority”** = 2/3 – 3/4 of the votes **THAT COULD VOTE** (versus that did vote) approve of the matter (thus a powerful SH could withhold from voting and prevent the resolution from passing).
  + **Any action that must or may be taken or authorized by SH’s may be done by ordinary resolution UNLESS otherwise indicated in the act, memorandum or articles (BCA 173(8)) 🡪 Usually involves matters that do not significantly affect the company or its value.**
* “**Special resolution**”: Resolution passed at ***general meeting*** where **(a)** notice of special resolution + at least **special majority** (2/3 if articles don’t specify, but can be between 2/3 and ¾) of SH’s votes in favor; **OR (b)** resolution consented to in writing of ***ALL SH’s entitled to vote at meetings*** (i.e. to pass special resolution through paper vote (“consent resolution”) need unanimous consent resolution) (**BCA 1)**
  + **Usually required to approve matters with significant consequences to a company.**

## [C] General (another other) Meetings Rules

**NB 🡪** These rules **apply to other SH meetings also, not just general** **(BCA 181**)

* Corp will have to pay costs of holding meeting and MGT being at the meeting. Hence, consent resolutions can eliminate these costs and expenses (see above).

**Provincial**

* **LOCATION -** ***must be held in BC,*** unless articles provide otherwise or ordinary or necessary resolution approves in advanced of location outside BC (e.g. Florida) (**BCA 166**)
* **NOTICE** – of time, date, location of general meeting ***no more than 2-months in advance*** ***of meeting*** to each D & each SH entitled to attend (**BCA 169(1)**) // SH or DIR can ***WAIVE*** entitlement to notice or reduce period of notice either in writing or otherwise (**BCA 170(1)(2))** including by attending the meeting and not objecting (**BCA 170(3)**) 🡪 **Check articles for notice provisions**.
* **QUORUM** (the minimum number of SH’s of a co that must be present to transact the business of a company at a meeting) - **Quorum can be (a) *established by the articles* or (b)** if no quorum established in articles, ***2 SH’s entitled to vote at the meeting is quorum* (whether present in person or proxy),** (**BCA 172(1)**). If no quorum present can adjourn but do nothing else (**BCA 172(2)**). If it’s only a 1 SH corporation, then that’s enough to constitute a meeting (**BCA 172(3)**).
* **ELECTION OF CHAIR -** by SH or proxy holder entitled to vote and elect chair at meeting unless articles specify otherwise (**BCA 178**)
* **MINUTES** - must be kept of all proceedings at meetings of SH’s (**BCA 179**)

**Federal**

* **LOCATION -** in Canada, place determined by by-laws or D’s (**CBCA 132(1))** **//** Can be outside Can if articles provide or all SH’s agree (**CBCA 132(2))** and can participate electronically or otherwise (**CBCA 132(4)**).
* **NOTICE** - time & place of meeting must be sent to w/ ***prescribed period,*** each SH entitled to vote; each D; auditor (**CBCA 135(1)**);
  + If it’s a ***special meeting*** state nature of business in sufficient detail to permit SH to form reasoned judgment and provide text of any special resolution to be submitted (**CBCA 135(6**))
* **QUORUM -** unless by-laws provide otherwise, quorum of SHs is present at a meeting of SH’s, irrespective of number of persons actually present at the meeting, if the holders of a majority of the shares entitled to vote at the meeting are present in person or represented by proxy (**CBCA 139**)

## [D] Calling the Meeting

**2 TYPES OF MEETINGS: [1] ANNUAL; AND [2] SPECIAL**

**1. ANNUAL MEETINGS**

**PROVINCIAL - “ANNUAL GENERAL MEETING”**

* **TIMING** - Must hold first annual general meeting within ***18 months of incorporation,*** and thereafter at least one ***once every 15 months*** (**BCA 182(1)**). DIRs must place annual financial statements (only if a reporting issuer), auditor’s report (**BCA 185(1**))
  + ***Way Around*** - SHs may through unanimous resolution of SH entitled to vote: **(a)** delay the meeting until later date**, (b)** consent to all required business at AGM, or **(c)** waive the AGM (**BCA 182(2))** in which case the company doesn’t have to hold it (**BCA 182(5)**) // **OR,** by court order (**BCA 186**)
  + **\*Required information**: Financial statements and potentially auditor’s report are to be presented (**BCA 185(1))**
    - **Potential to argue breach in FD (or other) if this is not done.**
  + Court has widespread power to order a meeting to be held on terms and for reasons it sees fit (**BCA 186**)

**FEDERAL - “ANNUAL MEETING”**

* **TIMING** - D’s shall call no more than 18 months after formation & once per calendar year, ***no more than 15 months apart***, but no later than 6 months after end of financial year (**CBCA 133(1)**) // may delay by court order (**CBCA 133(3)**)
* **NOTICE** - time & place of meeting must be sent to: each SH entitled to vote; each D; auditor **(CBCA 135(1))**
* **BUSINESS** - 3 things must be taken care of: financial statements, auditor’s report, election of directors and reappointment of incumbent auditor (**CBCA 135(5))**

**2. SPECIAL MEETINGS**

* **Fed/Prov DIR requirements:** must send out notice of meetings to SH’s (**BCA 169(1)**, **CBCA 135(1)**); record date may be set by DIRs for purpose of determining SH’s (c) entitled to receive notice of a meeting of SH’s; (d) entitled to vote at a meeting of SH’s (**BCA 171(1)**, **CBCA 134(1)**)

**PROVINCIAL (Particular Meeting)**

* Are just a version of general meeting that too may be called at any time (a SH meeting that is not a general meeting i.e. a “extraordinary general meeting”) – the same rules apply to these meetings as apply to general meetings (see above) (**BCA 181**)
  + An extraordinary general meeting of SHs may be called at any time for the transaction of any business the general nature of which is specified in the notice calling the meeting.

**FEDERAL (Special Meeting)**

* Special meetings for important business matters that arise **between annual meetings** can be called under **CBCA 133(2)** to consider special business (**CBCA 135(5))**; notice required under **CBCA 135(6).**

**Other Ways for Meetings to be Called (below):**

1. **By SH Requisition**
2. **By Court Order.**

**Ways to circumvent having a SH meeting:**

* **Unanimous SHs Resolution** – required for both ordinary & special resolutions federally; but “***consent resolutions”*** in BC require unanimous approval only for ***special resolutions*** and a special majority approval (usually 2/3) for ***ordinary resolutions*** (consent resolutions are deemed to be a proceeding at the meeting and as valid as if it had passed at one, **BCA 180**)
* **Ex Post Facto SH Approval**: Probable that even if don’t use the statutory procedure but hold a vote afterward to approve what was done and it gets unanimous SH approval will provide defence (***Eisenberg***; was enough to validate an otherwise invalid transaction where the DIRs secured a loan from a bank by pledging the corporation’s interest in a Development).
* This assent can be through formal resolution or informal manner/conduct given that in ***Eisenberg*** it was implicit approval since the sole beneficial SH was the one to instigate the transactions so was presumed to have assented to it.
* **Unanimous SH’s Agreement (USA)** – Federal only.

**Note:** a meeting is not invalid merely b/c registrant is in contravention of securities laws, provisions of the act or company’s articles (**BCA 184**)

### Eisenberg v Bank of Nova Scotia (1965) SCC

*Corp went bankrupt and trustee in bankruptcy wants to sue the old mgt that is a breach of FD. When the corp took an action to only benefit 1 SH* **// However:** the rule is that SH’s can vote to approve a breach of DIR’s duty // **Issue:** was there such a vote seeing as no meeting was called? **// Held:** There is only 1 SH and he sent a note to the secretary saying what would happen, so this note was sufficient to constitute a unanimous SH agreement (only need some type of writing, not a particular form to approve a particular transaction).

## [E] SH Proposals

* **SH PROPOSAL EASIER TO GET THAN REQUISITIONED MEETING – BUT, NO MECHANISM TO ENFORCE, SHORT OF COURT ORDER.**
* **WHY:** The concept is to provide a mechanism whereby individual SHs can have specific matters submitted for consideration at the next annual general meeting of the company, rather than relying on the DIRs or MGT to put the matter before the SHs.

**PROVINCIAL 🡪 Only Applies to Public Companies**

* **Only applies to a Public Company (BCA 187(3))**
* **WHO CAN MAKE? – “qualified SH” -** owner of at least 1 share and who has been that for an uninterrupted period of at least 2 years before signing proposal (**BCA 187(1)**).
* **CANNOT MAKE PROPOSAL -** A person is not qualified if they’ve previously submitted a proposal w/in last 2 years and failed to be present in person or by proxy at the AGM.

**REQUIREMENTS FOR VALID PROPOSALS:**

1. Signed by the submitter who is a qualified SH (**BCA 188(1)(a)**) + other qualified SH’s who together hold at **least 1% (1/100)** of issued shares of the company carrying right to vote at general meetings (**BCA 188(1)(b)(i)).**
2. Proposal is received ***at least 3 months*** before anniversary of previous year’s annual reference date (**188(1)(c)**), and
3. Declaration from submitter and each supporter.
4. Optional: Proposal can be accompanied by a max 1000-word written statement (**BCA 188(2)(3))**

**EFFECT IF VALIDLY DONE:** Must send to SH’s: subject to mgmt. being able to validly reject proposal (**see BCA 189(5)**), company must send ***proposal and statement to all persons entitled to notice of the AGM*** (**BCA 189(1)**). This circulation must be done in time set for sending of notice of AGM or along with the company’s information circular (**BCA 189(2)**).

**REASONS COMPANY CAN REFUSE TO PROCESS (Exceptions):** allows for the mgt to not add something to the agenda if any para applies (**BCA 189(5))**

* **(a)** notice of AGM already sent after date on which proposal received & have sent notice of meeting;
* (b) Proposal is not valid or it exceeds maximum length (i.e. 1000 words);
* **(c)** **substantially same proposal recently failed** (**NB:** DIR’s can keep putting something on the agenda, but SH’s cannot**)**;
* **(d) It clearly appears the proposal doesn’t relate in significant way to business or affairs of company** (possible argue ***Varity***).
* **(e) Clearly appears** that primary purpose for proposal is (i) ***securing publicity***, or (ii) ***enforcing a personal claim or redressing personal grievance against company or its DIR’s, O’s or security holders*** (**e.g.** ***Varity*, ONCA** – *proposal to cease operations in South Africa, Corp refused.* **Held:** Corp (DIR’s) able to use exception 🡪 proposal didn’t relate to corp’s business or affairs, was instead effort to gain publicity and awareness of apartheid);
* (f) Proposal already been substantially implemented;
* **(g) If implemented, would cause company to commit an offence;**
* **(h) Proposal deals w/matters beyond co’s power to implement (e.g. no co could implement the proposal)**

**COURT (A submitters response to a refusal under 189):** The submitter who receives the notice from the company of the refusal may apply to the court for a review of the company’s decision (**BCA**[**191(2)**](http://pm.cle.bc.ca/clebc-pm-web/manual/42819/reference/legislationPopup.do?id=33)). But courts are reluctant to intervene substantially unless there is NO other way to remedy a situation

* **Court Order could include (BCA 191(3)):** 
  + That the co process the proposal in the ***manner and within the time ordered by the court***;
  + If no time before the AGM, that the company hold, at the company’s sole expense, ***a general meeting***; and
  + That the ***company reimburse the submitter for all its reasonable legal expenses*** incurred in the application.

**FEDERAL**

* **INDIRECTLY APPLIES ONLY TO PUBLIC COMPANIES**: if the proposal is successful then the effect is that the company must include it in the proxy materials, i.e. by including in information circular (**CBCA 137(2)**), which are only required to be sent by widely-held corps – **s.150**
* **WHO CAN MAKE?** SH for prescribed period & alone holds prescribed amount of shares OR has support of persons who together hold prescribed number of shares (being at least 1%) for prescribed period (**CBCA 137**).

**VALID PROPOSAL REQUIREMENTS:**

1. Must include name + address of the person and person’s supporters as well as the number of shares held by them (**CBCA 137(1.2)**)
2. **Optional:** attach a statement in support of proposal in that person’s name and the statement (no more than 500 words) (**137(3))**
3. **Required if the proposal is a nomination for election of DIRs**: proposal must be signed by 1+ holders of shares representing in the aggregate at ***least 5% of shares*** entitled to vote at the meeting (**137(4)**).

**EFFECT IF VALIDLY DONE**:

* **Must send to SH’s:** subject to mgmt. being able to validly reject proposal (**see CBCA 137(5)**), company must send proposal and statement to all persons entitled to notice of the annual meeting (**CBCA 137(2)**).
* **Must let submitter present**: must allow submitter in person or proxy to present proposal at AGM (provided continues to be a qualified SH) (**CBCA 137(1)(b)**)

**REASONS COMPANY CAN REFUSE TO PROCESS (Exceptions):** (**CBCA 137(5)** – note these are the same as requisitioned meeting)

* **(a)** Proposal is not submitted to corporation in time;
* **(b)** **Clearly appears** that the primary purpose of the proposal is ***a personal grievance*** against the corp or its D’s, O’s or security holders (**e.g**. ***Varity*** – *proposal to cease operations in South Africa, Corp refused.* **Held:** Corp (D’s) able to use exception 🡪 proposal didn’t relate to corp’s business or affairs, was instead effort to gain publicity and awareness of apartheid);
* **(b.1)** It clearly appears that the proposal does not relate in any significant way to business or affairs of the corp;
* **(c)** No show at previous meeting;
* **(d)** Substantially the same proposal recently failed;
* **(e)** Rights conferred by this section are being abused to secure publicity (v BC language of primary purpose to secure publicity)
* **NB:** Also if person fails to continue to hold necessary shares/support (**CBCA 137(5.1))**

**CORP (DIR) REFUSED TO ACT -** it must notify the person submitting it of its intention to do so and the reasons for its refusal (**CBCA 137(7)**) **// COURT -** That person can then ***apply to court who can make any order it sees fit*** (**CBCA 137(8)**). A person or the corp itself who feels aggrieved can also apply to court to have the proposal omitted from mgmt. proxy circular (**CBCA 137(9))**.

**DIFFERENCES B/W BC & FEDERAL**

* *BC - proposal to be considered at next AGM // Federal - proposal considered at special meeting, as AGM only deals w/ 3 issues (likely proposal could be held at AGM if was dealing with 1 of the 3 issues).*
* *BC - has a few additional reasons to refuse - see above*

## [F] Requisition Meetings: Applies to Private and Public Companies (whereas SH proposal is only public meetings)

**PROVINCIAL**

* **WHO CAN CALL? SHs may requisition an entire meeting** (can be if there is an issue the SH’s want to deal with but could not previously get it on the agenda of other meetings). **Need: 5% (1/20) support of issued voting shares to requisition** (whereas to get an item on agenda only need 1%) (**BCA 167(2)**).
  + The right of a SH to requisition a meeting does not entitle a SH to call a meeting to deal with a matter that cannot be validly transacted at a general meeting under the Act or under the articles (***Automatic Self-Cleansing***)
* **FORM –** state business in 1000 words or less; signed by requisitioning SH; delivered to corp’s registered office (**BCA 167(3))**
* **TIMING (if general meeting properly requisitioned) –** D must call general meeting ***within 4 months*** of receiving requisition (**BCA 167(5)).**

**GROUNDS FOR DIR’s TO REFUSE (Exceptions to the requirement that DIR’s call a properly requisitioned general meeting) (BCA 167(7)):**

* (a) D’s have ***already called general meeting*** to be held after date on which requisition received and have sent notice of meeting;
  + Fed equivalent in **CBCA 143(3)(b)**
  + This already scheduled general meeting must consider the business stated in the requisition for the exemption to apply (***Air Industry Revitalization***)
* (b) substantially same proposal rejected within certain amount of time past;
* (c) clearly appears business doesn’t relate in significant way to corp’s business or affairs (possibly ***Varity*, ONCA**);
* (d) clearly appears primary purpose is to secure publicity OR is personal grievance (e.g. ***Varity,* ONCA** – *speak out against apartheid*);
  + ***Way around***: make a business case for what the SH is proposing – e.g. the political or social issue makes it a bad business environment and threatens the company’s bottom line

**E-f are found in BC only (not reflected Federally):**

* **(e)** Business stated in requisition already substantially implemented;
* **(f)** Business stated, if implemented, would cause company to commit and offence;
* **(g)** Requisition matters beyond powers of corp.

**CO (D) REFUSE -** if the DIRs do not call the meeting (within 21 days), then if you can get 1/40th of issued shares, then you can call the meeting yourselves) (**BCA 167(8))** 🡪 Need 1/20th to ask, but only need 1/40th to go ahead with meeting on own if DIR’s refuse. If the SH’s call it then the requisitioning SH’s must call it in accordance with **BCA 167(5)** and hold it w/in 4 months of date requisition received by company, and conduct in same way as general meeting called by directors (**BCA 167(9)**).

**COSTS OF MEETING (Prov/Fed) -** costs are to be borne by ***the requisitioning SH’s*** but company MUST REIMBURSE unless SH’s resolve otherwise by ordinary resolution at meeting called (**BCA 167(10), CBCA 143(6))** 🡪 huge risk that will be on the hook for costs (b/c SH’s will likely resolve if they originally did not think meeting had merit (seeing the difficulty in getting the meeting in the first place)).

**FEDERAL**

* **WHO CAN CALL?** 🡪 SH with at least 5% of vote (**CBCA 143(1)**)
* **FORM** - signed by SH; states business of requisition; sent to D & registered corp office (**CBCA 143(2))**
* **GROUNDS FOR DIR’s TO REFUSE** (**CBCA 137(5)**) - **(a)** not submitted in time**; (b)** clearly appears primary purpose is personal grievance; **(b.1)** clearly appears proposal doesn’t relate in significant way to corp’s business or affairs; **(c)** no show at previous meeting; **(d)** substantially same proposal recently failed (repeat business); **(e)** rights conferred by section **are being** abused to **secure publicity** [less room for D’s to refuse than BC’s publicity provision].
  + **Another ground to refuse:** The DIRs have set a record date for a meeting already ***when receive the requisition* (CBCA 143(3)(a))**. Only applies if the record date relates to a meeting that will transact the business set out in the requisition (***Air Industry Revitalization***)
* **DIR’s REFUSE?** 🡪 any SH who signed requisition can go ahead & call meeting if DIRs do not call meeting w/in 21 days of requisition (**CBCA 143(4**)) // Cost reimbursed by corp, unless SH’s resolve against (**CBCA 143(6)**)

### Airline Industry Revitalization v Air Canada

*AirCo seeking to take over and merge AC and Canadian Airlines. Having purchased shares, AirCo and other SHs comprising over 5% called a special SH meeting to try and make changes to the articles to facilitate the takeover. Board of directors rejected the requisition* **//** Is the Board of DIR’s obligated to call the requisitioned meeting? **//** Corp statute provided that corp is not required to comply with SH’s request where, among other grounds, proposal’s primary purpose was promoting general economic, political, racial, religious, social, or similar causes. Within the context of the statute, the court found that the proposal was for political grounds and outside the scope in the business.

## [G] Court Ordered 🡪 General Meeting

On application by a SH, DIR or someone else, courts have ***wide scope*** to make an order compelling meeting to be held and to fashion flexible rules for that meeting (**BCA 186**, **CBCA 144(1)**) e.g. can dispense with quorum requirements (**CBCA 144(2)**).

* **Courts should be very hesitant** about exercising their power to call SH meetings under **CBCA 144**, and **BCA 186**. It is an exception to the primary role of doing this and will likely be done only if it’s impracticable for the SH to call it or the DIRs to do so.
  + Courts are reluctant to intervene in a substantive way (**e.g. *Air Industry –* court reluctant to use powers -** *court would not call a meeting, even though one should have been called, b/c corp statute itself could have been used to call the meeting*).
* **WHERE WOULD HAPPEN –** Private company, where requisition meeting not possible // In conjunction w/ other relief // emergencies.

## [H] Removal of DIR’s

* **SH (instead of removing) COULD LEAVE THE DIRs IN PLACE AND TRANSFER THEIR POWER FOR CERTAIN PURPOSES TO SOMEONE ELSE**
  + This may be a situation where DIR has a certain number of votes which would prevent the SH from removing them.

**Strategy:** Might be a first step before asking the corp to take other action. i.e. keeping old DIRs in place might mean they would be highly unlikely to take any action.

* **REMOVAL OF DIRS IS FAR EASIER UNDER FEDERAL LAW – THOUGH BC ARTICLES CAN BE CHANGES TO FACILITATE REMOVAL.**
* **PROVINCIAL -** A company may remove a DIR before expiration of term of office by ***special resolution*** (**BCA 128(3)(a))** or the stated method/resolution in the memorandum or articles (**BCA 128(3)(b)).** UNLESS SH’s of certain class have the exclusive right to elect/appoint D’s, in which case a special resolution of those SH’s (**BCA 128(4)(a))** or the method stated in the articles (**BCA 128(4)(b)**) is required.
  + **VACANCY –** SH can appoint/elect a new DIR at same removal meeting (**BCA 131(a)**)
* **FEDERAL –** SH’s may by **ordinary resolution** at a ***special meeting*** remove any D’s or O’s from office (**CBCA 109(1)),** UNLESS a particular class/series holds the exclusive right to elect D’s in which case they are the ones who must pass the ordinary resolution (**CBCA 109(2)**).
  + That vacancy can be filled at the same meeting it was created (**CBCA 109(3)**).

# SHAREHOLDERS’ REMEDIES AND RELIEF

* **NB:** these remedies are not just for SH’s, other can use these.Also, be cognizant of the other remedies seen before.
  + **Think:** lifting corporate veil, agency relationships, and other remedies of that sort.
  + **SH:** can sue in tort, can have K’s and certain actions may be a breach of K, and other possibilities that in certain cases one SH owes a fiduciary duty to another (e.g. 1 SH holds the keys to the well-being of another).
    - Breach of FD does not allow for damages but can take this breach and turn it into an oppression remedy to get damages.
  + **Examples of SH problems: 1)** Equal “partners” in a business may reach a deadlock on the future of the venture, **(2)** “Partners” may develop a lack of confidence in their colleagues but be unable or unwilling to finance their “buy-out” under a SH agreement.

**Step 1: Who is the aggrieved party/the one who has suffered harm/loss?**

* **If it’s the corporation** 🡪 Derivative action (necessarily a class action) [likely scenario is that all SH’s are equally affected & the real P is the corporation]
* **If it’s an individual** 🡪 Personal action or Oppression remedy (can be either an individual action or a class action)
* **Can bring both a Derivative and Personal** (traditional or oppression) claim but do risk the court saying this really should be a derivative claim.

**Step 2: Go to each discussion below according to appropriate action. With a derivative claim it will be a preliminary step after which will proceed with the action in the name of the corp for the particular claimed wrongdoing and then return to the derivative proceeding provisions**.

## Derivative Action: Simply gives a person standing to bring an action

**Action where the SH is not personally involved (privy) but nonetheless can derive standing to bring the claim or standing to get relief through the claim of someone else. Where a corp has been injured by some wrongdoing, a SH of the corp arguable also has been injured through the diminution of their shares that is traceable to the corp injury.**

* DA allows ***SH to seek the courts permission*** to initiate a lawsuit on behalf of the corp to rectify a wrong committed against the corp for which MGT did not seek redress, often because they were the alleged wrongdoers. Under DA, a SH on behalf of the corp brings an action which derives from the corp’s cause of action**.**

**Goal**: Get the right to sue in the name of the corporation for a wrong likely to be committed by the DIR’s.

**Example root claims include (but can be any type of claim in theory)**:

* **Failure to exercise business judgment** and/or **breach of fiduciary duty** (***Re North West Forest Products***, *BCA* decision)
* **Breach of fiduciary duty**: putting own interests *qua* SH above those of corp. in breach of duty as a DIR by entering into a financing arrangement that allowed confidential information about the corp to be revealed and undertook to take company public (involve ongoing information disclosure) (***Re Bellman*** – *CBCA decision*)
* **NB**: Civil action for breached duty of care commenced under **CBCA 122(1)(b)** as indicated in *BCE* [or equivalent **BCA 142(1)(b)**] in BC; for breached fiduciary duty it’s **CBCA 122(1)(a)** and **BCA 142(1)(a),** respectively.

**Cons**: Typically, a last resort option b/c require court approval to both start and stop, and ***less likely to get personal compensation*** (just indirect benefits through damages going to corporation).

* ***Ways around using the mechanism:*** remove the DIRs (**BCA 128**, **CBCA 109**) and get them to bring the action in the name of the corporation; or dress it up as an oppression remedy.

**Situation at CL:** Consequence if don’t meet the statutory requirements: encounter the rule in ***Foss v Harbottle*** – if the corp is the one harmed it’s the **only party that can bring the action (thus likely a complaint could not be brought against MGT)**. Exceptions to the rule in ***Foss*: (*Edwards v Halliwell*) (where if majority SH’s don’t bring an action (or even approve MGT acts), minority SH could):**

1. ***Ultra vires* act:** In cases where impugned act wholly *ultra vires* the co. or association the rule has no application b/c no question of transaction being confirmed by any majority
2. **Fraud on the minority**: where what is done amounts to fraud on minority and wrongdoers are themselves in control of company rules in relaxed in favour of aggrieved minority who are allowed to bring action on behalf of themselves
3. **Special majorities:** ind. member not prevented from bringing suit if matter is one that could be validly done/sanctioned only by a special majority (i.e. not an ordinary resolution)
4. **Personal rights:** where personal and individual rights of membership of corp. have been invaded the rule has no application.

**PROVINCIAL PROCEDURE** [more difficult to satisfy than CBCA so more director-friendly]

* **WHO CAN BRING THE ACTION**: A “complainant” defined as a **SH** or **DIR** of the company (**BCA 232(1)**), and a SH is in turn defined as a beneficial or registered owner and ***any other person whom the court considers to be an appropriate person*** (**BCA 232(1))**
  + BC Statute makes it difficult to call mgt to account as you are required to go to court to determine if you have standing as a **“complainant”** to bring derivative action.
  + **“Appropriate person” -** Likely parties are those outlined in ***Peoples*** and ***BCE*:** creditors, government, public interest group, etc.
* **WHAT IS REQUIRED:** get leave of the court to prosecute a legal proceeding in name of corporation to: (**BCA 232(2)**)

**(a)** Enforce a ***right, duty or obligation owed to company***, or

**(b)** Obtain ***damages for breach of such a right, duty or obligation***

* Note the cause of action can be at statute or common law (right or duty can arise under the act or otherwise) (**BCA 232(3)**).
* **REQUIREMENTS TO GET LEAVE:** (**BCA 233(1)**) 🡪 ***Must satisfy ALL 4*** but language of “may” means granting leave is discretionary.
  + **(a)** Complainant must have made **reasonable efforts** to cause DIR’s to prosecute or defend the legal proceeding (will likely cause period of delay longer than that under *CBCA*)
    - i.e. **Negotiate with DIRs** & must be precise about what action the complainant wishes them to take. DIRs must have knowledge of the specific cause of action sufficient to found an endorsement on a filed claim (***Re North West***)
  + **(b)** Must give ***notice of application*** of leave to the company
    - The applicant must specify the precise nature of the action (at least sufficient to found an endorsement on a writ) when requesting the DIRs to commence the action (***Re Northwest Forest Products***).
  + **(c)** Complainant must have ***acted in good faith*** [tied to (d) ***Discovery Enterprises*]**
    - ***Discovery Enterprises***: if there’s an arguable case cannot be said to be acting in bad faith; evidence of bad faith = attempt to extract some advantage from company. Acting in self-interest doesn’t automatically mean acting in bad faith.
  + **(d)** **It appears to the court that the legal proceeding is in the best interest of the corporation**
    - *Usually* setting up an independent committee prevents a SH from being able to successfully obtain leave to commence a derivative claim (***Pente Investment***)
    - ***Re North West*, BCSC**: has the applicant adduced ***sufficient evidence which on the face of that evidence discloses*** that it is in the interests of the company to pursue the action – i.e. there must be a basic argument that something has gone wrong that harmed the corporation and the corporation is not doing anything about it. Sometimes getting witnesses and disclosure of E can be difficult.
* **Court can *take into account* any SH approval of the alleged breach as permitted by** **BCA 233(6)**, though it’s clear that’s not determinative (In a derivative action a vote does not make the action go away entirely).
* **POWERS OF THE COURT** - in relation to the legal proceeding:
* **…while it is ongoing: (BCA 233(3))**
  + (a) Can say the derivative action should be **brought by someone else** (i.e. “authorize any person to control conduct of legal proceeding”)
  + (b) On application, can order company to **pay interim costs** of complainant
  + Court can also require complainant to give ***security for costs*** (**BCA 233(2)**), which it cannot do federally (**CBCA 242(3))**
* **…on its FINAL DISPOSITION of the matter (not final disposition of the application for the derivative action) (BCA 233(4))** **“court may make any order it considers appropriate”** including:
  + (a) can order a complainant to whom they awarded interim costs repay those costs
  + (b) order the company to indemnify the complainant for costs incurred in the legal proceeding
  + (c) order that complainant indemnify the company, D or O for their expenses incurred as result of legal proceeding
* **STOPPING DERIVATIVE ACTION - court approval is required in order to stop the legal proceeding (BCA 233(5)). This is to prevent a settlement from occurring outside of court (thus need approval to bring and end a derivative action).**
* **COSTS (below)**

**FEDERAL PROCEDURE**

* **WHO CAN BRING THE ACTION?** [far broader than in BC and it’s the same group that can bring an oppression remedy] (**CBCA 238)**
* **(a)** Current or former registered or beneficial owner ***of a security*** (broadens it immensely as not just a share, includes bonds or debentures) of a corp or its affiliates;
* **(b)** Current or former DIR or OFR of corp of an affiliates;
* **(c)** The Director;
* **(d)** *any other proper person* in court’s discretion (e.g. creditor that is not bond or debenture holder). **This requires a preliminary step of going to court to determine if “proper person.”**
  + ***BCE***suggests stakeholder such as SH’s, creditors, suppliers, consumers, EEs, public interest groups on behalf of env, govt.
  + ***First Edmonton*** **in relation to creditor**: whether a person could reasonably be entrusted w/advancing interest of corp by seeking a remedy to right a wrong allegedly done to the corporation (*landlord could bring a derivative action and NOT a oppression remedy*).
  + **Note**: it’s possible under the federal and BC statutes that someone could “buy in” to a derivative action in the sense that they did not fit definition of complainant at time of wrongdoing but bought shares later (***Richardson Greenshields***, ONCA: there’s no requirement of ownership contemporaneous with acts complained of)
* **REQUIRED TO GET LEAVE OF COURT –** to bring action in corp name **(CBCA 239(1))**.
* **PREREQUISITES TO GET LEAVE (CBCA 239(2)): Must satisfy all 3 (a-c).** 
  + - **(a)** Give ***14 days’ notice to the DIR of the corp*** prior to bringing application to court – likely still have to be specific about why you’re bringing the action (***Re*** ***North West***)
      * What’s required is **“reasonable notice”** of the complainant’s intention to commence the derivative action but ***even failing to specify every cause of action*** intended to pursue will not invalidate notice as a whole (***Re Bellman*** dealing with CBCA corporation – note that there was no analysis of steps the complainant took to negotiate as req’d in BC)
    - **(b)** Complainant ***must act in good faith***; and [good faith is tied to sub (c) ***Discovery Enterprises***]
      * Seeking both a personal and derivative action is not vexacious, particularly if relief sought in personal action is different from that in derivative action (***Re Bellman –*** *minority SH also had personal action in oppression when sought derivative action*)
      * ***Discovery Enterprises*:** if there’s an arguable case cannot be said to be acting in bad faith; evidence of bad faith = attempt to extract some advantage from company. Acting in self-interest doesn’t automatically mean acting in bad faith
    - **(c)** It ***appears to be in the interests of the corp or its subsidiaries that the action be brought*** [NOTE: it just says “interests of the corporation” not “best interests” so can argue less is required v that in BC]
      * Must show an “arguable case” subsists (***Re Bellman***);
      * Court has wide discretion in determining whether “it appears to be in the interests of the corp to allow the DA to be brought” (***Re Bellman***);
      * Despite breadth of discretion, Court must first look to the decision of the DIRs who, having been given reasonable notice by a complainant in good faith, decide not to assert a corporate right of action (***Re Bellman***).
* **SH APPROVAL NOT DETERMINATIVE (CBCA 242(1))**: but can be taken into account when considering whether to exercise powers under **CBCA 240** or what is in the interests of the corp. e.g. ***Schadegg v Alaska*** – 80% approval of financing scheme + scant support for derivative petition meant it was not in the company’s interests.
* **COURT POWERS DURING/AFTER LEGAL PROCEEDING: CBCA 240** - very broad “at any time make any order it thinks fit including, w/o limiting the generality of the foregoing,”
  + - * **(a)** authorize any person to control conduct of action – e.g. thinks someone else other than complainant is more appropriate
      * **(b)** give directions for conduct of action
      * **\*(c)** **Order directing any amount adjudged payable by a defendant shall be paid in whole or in part directly to former and present security holders of corporation instead of to the corp (**was sought in ***Bellman***) – not present in BC though could ask the court to exercise its discretion under s. 233(4), just presumably would be more difficult.
      * **(d)** order requiring corporation to pay complainant’s legal fees

Court approval is required to discontinue the action (**CBCA 242(2)**)

**Court can also order interim costs** paid to complainant, w/caveat that the complainant may be held accountable for those costs on final disposition (**CBCA 242(4)**).

**Remedy Under both Statutes**

* **REMEDY:** Goal is compensatory for the corporation and not punitive – must show the corporation suffered some loss.
* **\*Federally, it appears easier for complaining SH’s to get PERSONAL COMPENSATION under CBCA 240(c) but possible to get in BC too under BCA 233(4) b/c court can make “any order” (more difficult and not the presumption in BC).**
* **COSTS (NB: could be Corp or DIR sued that is responsible for costs)**: Important b/c unlikely to get any real personal benefit out of derivative action, really doing a derivative action for the good of the company. **Obtaining leave** establishes a *prima facie* right to an indemnity but there is no guarantee. **The following circumstances dictate whether that *prima facie* right to costs will stand or be displaced:** (***Turner v Mailhot –*** *minority SH’s, but court thought should get half of expenses reimbursed. Also DIR who was sued had to pay expenses, NOT the corp*)
  + - * (a) Financial inability to carry on – weighs heavily in favour of costs granted.
      * (b) If the benefit to be obtained is more for benefit of corporation then more likely to get costs than if it is more for the benefit of the plaintiff (such as an individual bringing a claim).
      * (c) If the defendant can show that success in the derivative action left the plaintiff(s) better off than they were before (either b/c stake in the corporation is more valuable or obtained some personal compensation) then unlikely to get costs award.
* **E.g.** Group of SH’s who benefit from the damages that go to the corp, thus would not need expenses covered.

## Personal Action

* **SH SUFFERED AS A RESULT OF CORP ACTION // CAN BE BROUGHT ALONGSIDE DA** (as in ***Bellman***) **// REMEDY – DAMAGES.**
* **NB: SH’s can claim that if something was supposed to be done for your benefit or property issued to you, and that is not done, then do not always need to go to statutory remedies, can simply bring a claim (**e.g. Extent to right to vote or right to information is a statutory right and can claim breach of this duty BUT could also just sue for a tort that occurred).

**Why**: Something has been done to this particular SH. Often by a DIR or OFR causing a corp to do something prejudicial such that often a successful personal action will lead to a derivative action on behalf of the corp against that wrongdoer.

* SHs cannot raise individual claims in ***respect of a wrong done to the corp***. Where, however, a separate and distinct claim can be raised with respect to a wrong done to a SH qua individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out (***Hercules Management*)**

**Types**:

* ***Ultra vires*/illegal action**: company does something it’s not supposed to (against articles or bylaws for instance).
* **Information provision**: did not receive information about meetings or not given in required way (may be difficult to prove loss)
* **Voting:** failure to have voting rights respected.
* **Fraud on the minority**: corporation allocated a monetary or capital benefit that you, as a SH, should have gotten:
  + ***Parke*:** *D’s made decision to give money to EEs when in dire financial straits so SH’s brought personal action*
  + ***Ford*:** *overly generous w/employees*
  + Typical beneficiaries are D’s allocating company property to their own benefit (i.e. self-dealing).
* **Tort, contract, restitutionary claims**
* **Breach of Duty of Care –** can lead to both personal action and derivative claim (***Goldex***).

**Is the claim Personal or Derivative in nature**? **Rule:** the individual wrong necessary to support a personal action need not be unique to the plaintiff but can affect a substantial number of SH’s, provided ***the injury is not incidental to an injury to the corporation***…meaning it does not arise simply because the corporation itself has been damaged and as a consequence of that damage the SH’s have been injured (***Goldex***, ONCA)

* e.g. in ***Goldex*:** the false and misleading annual report circulated to SH’s was personal but the agreement to sell assets to probe and the underwriting agreement were derivative.
* SH must be careful to show what he/she personally lost! (***Goldex***) – whereas do not need to show this under either oppression or derivative action.
* Breach of a duty of care can lead to both a corporation derivative and personal SH claim (***Goldex –*** *SH alleged DIR’s approved commercially unreasonable deal //* **Held:** Breach of DOC can found personal action)
* With something like the ***negligent performance of an audit and preparation of auditor report, which the SH relied on to their detriment***, relates to the ability to supervise mgmt. of company’s affairs 🡪 the interest of SH’s in this are indistinguishable from the interest of the company and must accordingly be brought derivatively (could not be basis for personal action) (***Hercules MGT –*** *duty owed by auditors. SH’s get the benefit of audited statements (whole purposes of annual general meeting where SH approve/disapprove of these). EVERY YEAR SH’s must vote to approve financial statements as audited.* **Held:** there was a breach of a duty but the duty of the auditors is owed to the corp)
  + ***Way around:*** show the negligently prepared report was knowingly provided to SH’s for a special purpose (***Hercules Management***)
  + **BM:** thinks that auditors could have a duty directly to the SH’s.

## Oppression Remedy

**WHY:** Person (or someone they wish to represent) feels aggrieved/that they’ve been treated unfairly.

* Benefit of remedial breadth (vs. damages only for personal action) & “fairness” trigger (far broader than breach of FD claim)
* Leads to incentive to dress up derivative claims as oppression remedy claims: e.g. something like breach of FD would think only brought by way of derivative action because duty is owed to the corp (***Peoples, BCE***), yet where there has been a breach quite likely some stakeholder is affected in particular give the range of groups DIRs are supposed to consider in fulfilling duty (***Peoples, BCE***) therefore in any case where can find FD will almost certainly also find cause of action for oppression remedy.
* **Captures actions of OFRs b/c their actions become the oppressive acts of the corp. Also captures breaches of companies’ obligations under *BCA* or its articles. Also unanimous shareholder agreements can be found oppressive.**
* **Benefit over derivative action**: easier to commence and provides a broader substantive cause of action on the basis of “fairness” (***BCE***) as opposed to showing something done in bad faith involved in satisfying a breach of fiduciary duty claim.
* **Use oppression remedy when issues getting remedy under dissent proceedings.**

**Jurisdictional differences:** Fed, it’s easier to argue for an oppression remedy but the remedies are not as explicitly sweeping. In BC it’s harder to get in and argue for but once complainant is in there are sweeping remedies and no procedural restraints.

* *Easier under* ***CBCA*** *to dress up a derivative claim as an oppression claim b/c of representative aspect, particularly after* ***BCE***
* *Feds do not require complainant themselves be harmed, whereas BC does*
* *Feds do not include SH Resolutions*
* *Language in CBCA is* ***more encompassing.***

**PROVINCIAL (also procedure which applies to feds)**

* **WHO:** SH (as defined in s. 1 registered holder of shares) and includes beneficial owner and “any other person whom court considers to be an appropriate person” to make an application under this section (**BCA 227(1)**).
  + Usually Minority SH’s but could be DIRs, maybe landlord, creditors, etc.
* **GROUNDS FOR OPPRESSION:** SH may apply to court for an order on the ground that (**BCA 227(2))**
  + **(a)** Affairs of company are being or have been conducted, or that the powers of D’s are being or have been exercised, in a manner oppressive to one or more of the SHs, **including the applicant**, 🡪 *the applicant must be one of the ones oppressed;* **OR**
  + **(b)** That some ***act of the company*** has been done or is threatened or ***some resolution of SH’s*** has been passed or is proposed that is unfairly prejudicial to one or more of SH’s, **including the applicant** 🡪 *the company’s act/SH resolution must be unfairly prejudicial to the applicant too.* 
    - **Must find something oppressive or unfairly prejudicial to applicant** (does NOT have the “unfairly disregards” which is the lowest threshold, so could argue it’s narrower/more difficult to bring in BC)
    - **Advantage to BC claimants**: Can claim directly under **BCA 227(2)(b)** **for the acts of other SH’s** – though probably still possible under fed statute as is illustrated by the result in ***Ferguson*** where the court ruled in favor of claimant for oppressive conduct of fellow SH’s (**E.g. can claim SH Resolution approving duty broken by MGT is oppressive)**
* **PROCEDURE: for determining whether something is oppressive: (*BCE****,* CBCA case**) APPLY TO BOTH BC AND FED CLAIMS**

1. **What was the reasonable expectations of the claimant (person or group) at the time that the decision complained of was taken?**

* ***Subjective piece***: Actual expectation of claimant is relevant but not conclusive.
* ***Objective piece***: What is reasonable considering the relationships at issue, why those relationships were set up in the first place, company’s size and who else might be affected, where you are in life of corporation.
* **E.g**. **Reasonable expectation**: Not to be squeezed out as a D/O and SH because of personal relationships w/someone heavily involved in the company (expectation to be fully involved and her position preserved) (***Ferguson –*** *3 couples held corp between them, husbands had voting rights and wives w/ preferential dividends. One relationship fell apart, wife had no voting rights and dividends were not declared (was shut out of corp)* **// Held:** Interests prejudiced **-** only reasons wife squeezed out was a final solution of the “problem of the ex-wife SH,” thus nothing to do w/ corp rationale)
* **E.g.** in a **family company clearly run by 1 person (father)** and meant to be a one-man show, it’s nevertheless a reasonable expectation that the applicant (son) not be thrown out as an OFR and excluded from participation and income solely b/c of father’s disagreement with son’s lifestyle (***Naneff –*** *Father and 2 sons had stake in corp, sons had small roles but father made essentially all the decisions. Father disapproved of son’s lifestyles and shut him out of the corp* **// Held:** oppressive)
* **E.g.** the **existence of a contractual buy-out procedure does not preclude reliance on the oppression remedy** (***Bury v Bell –*** *Investors required to be SH’s of the company and could only invest in one company at a time. Provision for 6 months buy-out period, but could be extended to 12* **// Held:** Expectation was that this option would not be used in such a way from preventing investor from leaving).
* **Did the creditor have an expectation that, assuming fair dealing, chances of repayment would not be frustrated by kind of conduct subsequently engaged in by MGT**; Was this an objectively reasonable expectation because the circumstances leading up to the granting of credit included an element which prevented the creditor from taking adequate steps when entering the agreement to protect his or its interests against the occurrence it’s now complaining of? **(*First Edmonton –*** *Corp of 3 lawyers became tenant of complainant landlord – were given 3 months free rent and $150K to make reno's, but divided the cash and left***//** **Issue**: Who is the proper complainant in oppression remedy? **// Held:** Landlord (P) was not a “proper person” or security holder)

1. **Were those reasonable expectations violated?** i.e. identify the precise corporate act (decision) that violated the expectations

* E.g. Passing resolutions changing capital structure and refusing applicant continued participation in company growth was a violation of expectations (***Ferguson***)

1. **If so, does the conduct complained of amount to oppression or unfair prejudice? or unfair disregard under *CBCA***

* Don’t get hung up on individual meanings of “oppression”, “unfair prejudice” and “unfair disregard” ***because overarching principle is fairness:*** gives court broad equitable jurisdiction to look not only at what is legal but what is fair – look at the business reality of the situation too (***BCE***).
* A corp is similar to a Px and there are certain expectations with the arrangement. The role of the court is to take action to sustain those reasonable expectations of the party. These expectations depend on who the party is (e.g. DIR versus OFR)(***Ebrahimi***).
* **Oppression:** Conduct that is coercive and abusive – unfairly disregarding the interests of claimant (***Ferguson* -** *Squeezing out ex-wife found oppressive, court issued injunction*)
* **Unfair prejudice**: Less culpable state of mind but nevertheless has unfair consequences (broader in scope than oppressive conduct)
  + - **Unfair disregard**: ignored an interest as being of no importance contrary to the reasonable expectations of stakeholder - **note: this one is not in BC statute (Only CBCA)**
    - **Problematic Part of *BCE*:** converts the oppression remedy into a non-oppression *duty* owed to the various groups of stakeholders such that if don’t fulfill or at least consider their reasonable expectations then can be held liable
* **REMEDIES:** Court MAY, ***in addition to remedies below, make any interim or final order it sees fit*** **(BCA 227(3))**. BUT establishing oppression does NOT guarantee a remedy. Order can be made against ANYONE.
* Should aim to rectify the oppressive conduct as corrective justice and NOT seek to go further than protecting their initial interest from the outset (***Naneff*** – *order of wind up* (at trial) *went too far b/c would give son complete say over company which he never had, nor did he expect to have, instead a share purchase rectifies squeezing him out*).
  + **BCA 227(3): (a) Directing/prohibiting any act** **//** (b) Regulating co conduct **//** (c) Appointing a receiver or receiver manager (but company may have already agreed in K to do this);
  + (d) Directing an issue or conversion or exchange of **shares - note this order can be w/respect to any shares, doesn’t have to be those of the complainant**
  + (e) Appointing DIRs in place of or in addition to all or any of the directors then in office,
  + (f) Removing any DIR **- not present in CBCA**
  + **(g)** **\***Directing the company to purchase some or all of the shares of a SH - **by far the most common order: buy out someone (see in *Naneff*)**
  + (h) Directing a SH to purchase some or all of the shares of any other SH **- illustrates can have orders affecting parties beyond the corporation itself in BC**
  + (i) Directing the company, or any other person, to pay to a SH all or any part of the money paid by that SH for shares,
  + (j) Varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction **- i.e. can interfere in K’s in which the company is involved**
  + (k) Varying or setting aside a resolution **- court able to change decision of vote (odd and unique to BC)**
  + (l) Requiring the company to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
  + **(m) \*Directing the company to compensate an aggrieved person**,
  + (n) Directing correction of the registers or other records of the company **- can correct records of the co.**
  + (o) **Directing that the company be liquidated and dissolved** **- is occasionally used [perhaps if the company can’t make the share purchase but means the termination of existence of company]**
  + (p) Directing that an investigation be made under Division 3 of this Part **//** (q) Requiring the trial of any issue, or **//** (r) Authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

**Note**: the application must be brought **in a timely manner** (**BCA 227(4)**). Company must pay amount ordered unless there are reasonable grounds for believing the company is insolvent or they payment would render it insolvent (**BCA 227(5)**).

**FEDERAL**

* **WHO:** the same as those who can apply under a derivative action under **CBCA 238.**
  + **(a)** a **registered holder or beneficial owner**, and a former registered holder or beneficial owner, of a **security** of a corp or any of its affiliates
    - “Affiliates” not present in BC statute, so could argue SH’s of affiliates couldn’t sue the main corp 🡪 though could be a “proper person” and court might find a way to enable to sue for affiliate actions in BC.
    - “Security” includes debt obligation of corp therefore can refer to creditors, but those creditors must have some type of registrable interest (***First Edmonton –*** *Landlord did not have standing as security holder as no “registrable interest”*)
* **(b)** a **DIR or OFR** or a former director or officer of a corp or any of its affiliates
* **(c)** the DIR, or
* **(d)** any other person who is a **proper person** to make an application
* **POSSIBLE FOR SOMEONE NOT OPPRESSED TO MAKE THE CLAIM ON BEHALF OF AN OPPRESSED PARTY**! Contrary to BC
* Someone like a lessor or other similar creditor may very well be a “proper person” unless they are only claiming oppression because they entered into a bad bargain (***First Edmonton*** – *found on facts the lessor was in a position to obtain some guarantee from corp and failed to do so. Did not grant standing*)
* Court will be skeptical re: creditors b/c of view they are in a position to bargain ahead of time (***First Edmonton***)
* **GROUNDS FOR OPPRESSION:** **CBCA 241(2)** – **APPLY *BCE* ANALYSIS (above) TO DETERMINE WHETHER SOMETHING IS OPPRESSIVE**
  + **(a)** any ***act or omission*** of the corp or any of its affiliates
  + **(b)** the ***business or affairs*** of the corp or any of its affiliates are or have been carried on or conducted in a manner
  + **(c)** the powers of the DIRs of the corp or any of its affiliates are or have been exercised in a manner

🡪 that is **OPPRESSIVE** or **UNFAIRLY PREJUDICIAL** to or **UNFAIRLY DISREGARDS** the interests of any security holder, creditor, DIR/OFR

* + - e.g. using the corp as a vehicle for committing fraud on the creditor (***First Edmonton***) or the act/conduct of DIRs or MGT of the corp constituted a breach of the underlying expectation of the applicant arising from the circumstances in which the applicant’s relationship with the corp arose (***First Edmonton*** – fit into the *BCE* test above)
* **ENDING THE ACTION:** requires court approval (**CBCA 242(2)**).
* **SH APPROVAL**: **CBCA 242(1)** not determinative but court may consider SH approval of the impugned act either in determining whether something is oppressive under **CBCA 241(1)** or in giving a remedy under **CBCA 241(3)**).
* **REMEDIES:** Court may make ***any interim or final order*** it thinks fit including, w/o limiting the generality of the foregoing (**CBCA 241(3)**):
  + (*a*) an order restraining the conduct complained of;
  + (*b*) an order ***appointing a receiver or receiver-manager;***
  + (*c*) an order to regulate a corporation’s affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
  + (*d*) an order ***directing an issue or exchange of securities***;
  + (*e*) an order appointing DIRs in place of or in addition to all or any of the DIRs then in office **- note it says “appoint” a director but doesn’t say “remove” which is directly listed in BC**
  + (*f*) an order directing a corporation, or any other person, to purchase securities of a security holder; (***Naneff***)
  + (*g*) an order directing a corp, or any other person, to pay a security holder any part of the monies that the security holder paid for securities;
  + (*h*) an order varying or setting aside a transaction or contract to which a corp is a party and compensating the corp or any other party to the transaction or contract;
  + (*i*) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
  + (*j*) an order compensating an aggrieved person;
  + (*k*) an order directing rectification of the registers or other records of a corporation under section 243;
  + (*l*) an order liquidating and dissolving the corporation;
  + (*m*) an order directing an investigation under Part XIX to be made; and
  + (*n*) an order requiring the trial of any issue.

**COSTS:** Court can also, at any time order the corporation or its subsidiary to pay interim costs to the complainant (**CBCA 242(4)**).

**NB:** A corp can’t make payment to SH if there are reasonable grounds for believing that the corporation is or would after that be insolvent (**CBCA 241(3))**

## Appraisal Remedy (Dissent Proceedings) 🡪 Rarely used, complicated and slow.

* **DISSENT PROCEEDINGS 🡪 REMEDY = CORP WILL BUYOUT SHARES FOR FAIR VALUE**
* **Can dissent regardless if have voting shares or not. BUT if you having voting shares and vote in favor, cannot then dissent afterwards.**
* **APPLICATION:** \***use this remedy only in connection with smaller, closely-held corporations**, as large public corps will have a ready market for shares.

**PROVINCIAL**

* **GROUNDS TO DISSENT:** **Fundamental changes** incl: 🡪 an ***alteration in the articles*** of a company by altering the restrictions on the biz carried on or to be carried on (see: s.260); a ***proposed amalgamation*** (ss 272, 287), approval of an arrangement, a proposed disposition of all or substantially all of its undertakings (s.301(5)), a proposed ***continuance outside of BC*** (s.309), OR in respect of any resolution or court order or ***arrangement permitting dissent*** (**BCA 238(2)**)
* **WAIVER –** A company can obtain waivers ahead of time from SH’s that waive their dissent rights in respect of particular corporate actions **(BCA 239(1))**, which has effect of terminating that right to dissent w/respect to the particular corporate action (**BCA 239(3)**)
* **PROCEDURE**
  + Notice of vote // Corp should tell SH if they’re entitle to dissent (**BCA 240(1)**)
  + SH gives notice of dissent - in advance of vote. Notice must specify the shares in respect of which the SH is dissenting (**BCA 242(1)). If the notice does not comply with s.242, the SH’s right to dissent terminated (BCA 242(5))**
  + If a company that receives a notice of dissent intends to continue with the corp action (which it does not have to, may get enough Dissents to dissuade them), it must send dissenting SH a notice of intention to proceeding and advising how dissent is to be completed (**BCA 243**)
  + Resolution passes? 🡪 SH must **confirm dissent** within 1 month (**BCA 244**)
  + Corp must make buy-out offer & “promptly” pay the fair market value (**BCA 245**)
  + **Problems?** apply to court
* **MUST VOTE ALL YOUR SHARES ONE WAY & MUST VOTE AGAINST RESOLUTION TO DISSENT**

**FEDERAL**

* **DIFFERENCE?** 🡪 Procedure only initiated once decision made - no advance notice required
* **GROUNDS:** same type of thing; fundamental change etc // but court cannot add grounds, as in BC
* **PROCEDURE:**
  + Decision made - SH must send notice within 20 days (**CBCA 190(7))**
  + Corp must send SH offer to pay within 7 days (**CBCA 190(12))**
  + **Problems?** apply to court // corp must apply within 50 days of resolution & SH within 70 days or as court allows (**190(15)&(16)**)
* **REQUIRED TO SELL ALL YOUR HOLDINGS THAT \*COULD\* HAVE VOTED ON ISSUE**

## Compliance and Restraining Orders

* **UNDER BOTH STATUTES CAN GO TO COURT AND SEEK AN INJUNCTION WITH RESPECT TO ANYTHING THAT DOES OCCUR.**

**COMPLIANCE OR RETRAINING ORDER ADJUNCT TO OTHER REMEDIES** (***Goldhar***)

* The provision is not meant to be used for addressing things like breach of fiduciary duty or duty of competence (***Goldbar***, Ont – *Parties were trying to bring a derivative action, but SH’s should not try and get a derivative action in the claim for an injunction (even though the legislation appears to allow this*))
* If the essence of the claim is something that should be proceeded with via a different action (derivative or otherwise) then should go that direction not use this as a shortcut (***Goldbar***) – will likely be non-suited if try to pursue a substantive claim
* Counterargument (at least in AB): no reason why cannot rely on it merely because would have concurrent standing pursuant to other sections (***Caleron Properties***, ABCA)

**PROVINCIAL**

* **WHO CAN BRING?** 🡪 SH or anyone court thinks is “appropriate person” (**BCA 228(1)**)
* **SCOPE:** Can complain about actions of just about everyone! 🡪 D/O/SH/employee/agent/auditor/Trustee/Receiver/Rec. Manager/liquidator (**BCA 228(2)**)
* **ISSUANCE: Court** can order compliance OR enjoin breach of Act & corporate constitution // Enjoin corp from disposing or receiving property, rights, and interests // Require compensation be paid to company or any other party to K from breach of permissible business & powers (unique to BC) (**BCA 228(3))**
* BC explicitly enumerates more options court has, so may be easier to convince a court to do them!

**FEDERAL**

* **WHO CAN BRING?** Broader than BC - same definition of “complainant” as Derivative action & Oppression Remedy 🡪 current & former registered or beneficial owner; current & former D/O’s; any “proper person” as decided by court (**CBCA 238**)
* **ISSUANCE:** Court can make orders directing compliance or prevent person from acting in breach of Act & corporate constitution (**CBCA 247)**

## Correcting Corporate Mistakes (BCA Only) – Very Broad

**WHY:** Potentially as a preliminary step prior to facing a derivative action or oppression remedy to fix what went wrong (e.g. breach of fiduciary duty) or as a preemptive step to head off any future claim. **Courts have been skeptical using this (BC courts not generous in using this provision).**

* **PREEMPTIVE MEASURE**: DESPITE any other provision in this statute, the court can by its own motion or any person at all make an order to correct, negative or modify consequences of the corporate mistake or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the corporate mistake (**BCA 229(2)**).
* **“CORPORATE MISTAKE”** – meaning an omission, defect, error or irregularity that has occurred in conduct of biz or affairs of company as result of which the *BCA* has been breached **//** a default in compliance with the memorandum/notice of articles or articles of company; **OR //** Proceedings in connection with a SH meeting, DIR’s meeting; or a consent resolution has been rendered ineffective (**BCA 229(1)**).
* **COURT MUST CONSIDER EFFECT OF ORDER ON**: company, D/O’s, creditors, SH’s, and beneficial owners (**BCA 229(3)**)
* **PROTECTION FOR 3RD PARTIES:** unless the court orders otherwise, a rectification order ***doesn’t prejudice the rights of any 3P*** who acquired rights for valuable consideration and w/o notice of the corporate mistake (**BCA 229(4))**
* Only comparable federal provision is **CBCA 243,** which refers only to rectifying an error in the shareholder register of the corporation

## Investigations

**COURT ORDERED INVESTIGATIONS WHEN SHs CAN SHOW CIRCUMSTANCES THAT WARRANT SUCH AN ORDER (TO ALLOW SH TO GET ACCESS TO RELEVANT AND NECESSARY INFO THAT DS WON’T GIVE (E.G.).**

* Can be used on their own, but typically used in conjunction w/ DA or OR **//** Used to get information you can use in another claim (Minutes of meetings are not publically available, but they can be made available). Might need access to this information in order to see if you would bring a claim.
* Court can get inspector appointed, inspector will investigate matter and make report to the court and that report will be made available to the corporation or probably to other people (person seeking to have investigation made is not guaranteed this information).

**PROVINCIAL**

* **STANDING FOR INVESTIGATION –** 1+ SH’s that hold (in aggregate) at least 1/5 of issued shares of a company (but they don’t have to be voting shares). The court may order an investigation of company and determine manner and extent of investigation (**BCA** **248) 🡪 Must be a SH or group of SH’s (cannot be any other person given the language).**
* **WHY?** Court may make an order if it appears to the court that there are reasonable grounds to believe that: **(a)** ***there is oppression*** (within meaning of s.227 (above)); **(b)** the business of the company is being or has been carried ***on with intent to defraud any person***; **(c)** the company was formed or is to be dissolved for ***a fraudulent or unlawful purpose***; **(d)** persons concerned with the formation, business or affairs of the company have, in connection with it, acted fraudulently or dishonestly, **OR (e)** In the case of a CCC, the affairs of the company are being or have been conducted in a manner that is contrary to (i) the company's community purposes, or (ii)   the restrictions or requirements imposed on community contribution companies under this Act.

**FEDERAL**

* **MUCH EASIER UNDER CBCA**
* Security holder or DIR may apply, *ex parte* or on notice as required, to have an investigation if it appears that there has been **(a)** fraud, **(b)** oppressive or unfairly prejudicial or unfairly disregarded interests, **(c)** fraudulent purpose, **(d)** more fraud (**CBCA** **229).**

## Winding-Up

**GENERALLY, COURTS ORDER WIND-UP IN CONTEXT OF INSOLVENCY, BUT THE COURT CAN MAKE THE ORDER EVEN IF THEY ARE SOLVENT AND DON’T CHOOSE TO WIND THEMSELVES UP. WOUND UP = LIQUIDATED AND DISSOLVED. THIS IS USUALLY DONE IN THE CONTEXT OF THE OPPRESSION REMEDY.**

* Corp may be wound up as a result of the order made under the oppression remedy (see in ***Naneff*** lower court decision).
* This remedy is closely associated with financial difficulties – e.g. insolvency, bankruptcy, etc are involuntary winding up.
* Corp in advanced can anticipate windup if their own purpose has disappeared (e.g. buy certain property).

**DIFFERENCES:** BC is MORE generous. CBCA is only on application of SH whereas BCA is very broad as to who can bring an order.

**PROVINCIAL**

* In BC could try to argue that something that is “oppressive,” which does not fit well under the oppression remedy, under this claim to wind up the corporation. Claiming that it is “just and equitable” that the corp be wound up.
* **One Essential Factor:** That relationship b/w the company’s SH’s has deteriorated to such an extent that they have neither trust nor confidence in each other’s ability to manage the company’s affairs.
* “Just and Equitable” – Primarily used during a stalemate of DIR’s and corp cannot do anything as frozen (E.g. ***Self-Cleansing–*** *DIRs could vote that they can never be removed.* Here, a person may argue that it is just and equitable to have the corp wound up).
* **COURT ORDERED CO. DISSOLVED** – Upon application by SH/DIR/Creditor/the company or anyone appropriate, the ***court can order that the company be liquidated and dissolved*** if: (a) the articles say that the company is supposed to be liquidated (usually because they have a restricted purpose), or (b) the court considers it just and equitable to do so (**BCA 324**)

**FEDERAL**

* **COURT ORDERED CO. DISSOLVED** – Upon **application of a SH**, court may order liquidation and dissolution if (A) satisfied that (i) acts or omissions, (ii) business conducted in a manner, OR (iii) DIRs have exercised power, in a way that is oppressive, unfairly prejudicial, or unfairly disregards interests (essentially oppression remedy), **OR** (B) court is satisfied that a USA entitle SH to demand dissolution, or it is ***just and equitable*** (**CBCA 214**)