TYPES OF BUSINESS ORGANIZATIONS

- if enterprise is set up to make a profit then it is a business. You don't have to make one, or expect to make one right away but the expectation is there.
- Many organizations are not set up with a view to profit - clubs or societies eg - we don't deal with them.

1. Sole Proprietorships

- sole proprietorship = no distinction between person and business.
- Not a lot to say about the law in this area - there may be statutes that apply to me, sale of goods acts or municipal bylaw - but proprietor totally responsible for debt, liability claims in tort etc.
- **s. 88 of *Partnership Act*** might apply if you must register a name: if my business name might lead you to believe you are more than a sole proprietorship:

*Partnership Ac*t [RSBC 1996] CH 348

> **88 (1)** A person who is engaged in business for trading, manufacturing or mining purposes and who is not associated in partnership with any other person or persons but who uses as his or her business name some name or designation other than his or her own name or who in his or her business name uses his or her own name with the addition of "and Company" or some other word or phrase indicating a plurality of members in the business, must file with the registrar within 3 months after the day when the business name is first used, a registration statement in the prescribed form.

2. Partnerships

a. Definition

Partnership defined

2 Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

- Key aspects:
  - carry on - how often or how long is undefined, as is when it begins
  - in common - you might just be an investor and not a partner if you have no mgmt role
  - with a view to profit - might just be a co-owner for eg.

- two crucial rel'ps
  - between partners
    - fair degree of flexibility under the act
    - too little entitlement may make partner an investor or creditor and not a partner
    - have to be dissolved and made afresh with each change of partners
    - purposes must be made clear
  - between rest of world
    - not much upside: no control over liability to rest of world: everyone is responsible to everyone
    - you may even be held out as a partner before or after you became one!

A.E. LePage Ltd. v. Kamex Developments Ltd. p 5 - 9

F: trust set up for property, units owned separately, owners weren't entitled to deal independently: had to get permission to sell and give right of first refusal to other owners. Co-owners had joint responsibility for the operation of the business. One owner hired a real estate agent as exclusive agent, and the agent wasn't paid. Question was whether the agent was entitled to bring claim agains any or all of the owners, or only the person the agent dealt with directly (important: owner listed without consent of other owners.)
I: was this a partnership relationship (leading to joint and several liability,) or a co-ownership (not)
A: Ct considers and concludes that the key element was that the operation was run in a collective sense, the individuals owned separate units, and were run for their own benefit. Therefore co-ownership!

- DOESN"T take much to tip this over into a partnership. Raises the problem and gives a solution, but doesn't definitively answer question.

*Partnership Ac*t
s 3 *Persons who are not a partnership*
s 4 *Rules for determining partnership*

b. Legal Personality of Partnership

- LEGAL REQUIREMENTS TO ESTABLISH?
  - legally recognized but no formal requirements
  - can happen accidentally
  - not regulated by statute - should have a detailed k btwn partners
- LEGAL PERSONHOOD?
  - None - cannot be an employee AND partner - cannot have k with partnership
  - difficult to continue in perpetuity
  - Unlimited liability - not just to extent of ownership of shares as with corporation
    - no distinction between self and business - joint and several liability
    - complainant can sue any partner or all
- LEGAL REL'P OF PARTNERS?
  - owe fiduciary duty to one another
  - presumption is equal partners but any percentage can be agreed on
  - best suited to people who know each other well

Thorne v NB (Workmen's Compensation Board p 21 - 29

F: Thorne and R started partnership , R would have charge of the woods operation and T of the milling operations. Both would collect wages of $75/week. Notified WCB, filed etc. then was injured at work. Applied to the Board for compensation.
I: whether someone who is a partner is entitled to claim compensation by way of being an employee:
had little trouble saying you can't be a partner (employer) and employee at the same time. had been set out as a partnership
R: 22: "partnerships are an emanation of the CL"
A: 25: law... knows nothing of the firm as an artificial person though the firm is so treated by the universal practice of merchants and by the law of scotland..."
C: no WCB claim for poor Mr. Thorne

c. Relationship of Partners to Each Other

Variation of rights and duties by consent
21 The mutual rights and duties of partners, whether ascertained by agreement or defined by this Part, may be varied by the consent of all the partners and the consent may be either express or inferred from a course of dealing

- extent to which this can actually be done is limited in some areas: can't k out of fiduciary rel'p

Fairness and good faith
22 (1) A partner must act with the utmost fairness and good faith towards the other members of the firm in the business of the firm.
(2) The duties imposed by this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of partners.

- decisions must be in best interest of partners and business. Duty to reveal info - liable if does not

s 23 *Application of partnership property*
- This section often varied because then my ppty becomes everyone else's too and I can't use it for myself anymore.

Property bought with firm money

24 Unless the contrary intention appears, property bought with money belonging to a firm is deemed to have been bought on account of the firm.

s 27 *Rules for determining rights and duties of partners in relation to partnership*

Majority cannot expel partner

28 A majority of the partners can not expel any partner unless a power to do so has been conferred by express agreement between the partners and the power is exercised in good faith.

s 35 *Dissolution of partnership*

Dissolution by event making business unlawful

37 A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on, in partnership.

s 38 *Power of court to decree dissolution in certain cases*

d. and Third Parties

- can agree to contract out of to very limited extent

s 11 *Liability of partners for firm debts*
s 12 *Liability of firm*
s 13 *Liability for misapplication*
s 14 *Liability under 2 preceding sections*

3. Limited Partnerships

Limited partnership

50 (1) Subject to this Part, a limited partnership may be formed to carry on any business that a partnership without limited partners may carry on.

(2) A limited partnership consists of

(a) one or more persons who are general partners, and

(b) one or more persons who are limited partners.

Liability of limited partner:

57 Except as provided in this Part, a limited partner is not liable for the obligations of the limited partnership except in respect of the amount of property he or she contributes or agrees to contribute to the capital of the limited partnership.

- tends to be one general and a number of limited partners (must be at least one of each type)
- entire creature of statute, cannot happen accidentally
  - general partner has usual exposure (total) to liability
  - limited partner invests but does not manage and has no liability as an owner/partner
- possible to find that your limited partner isn't limited (because of too big a mgmt role) and is liable
- advantages? tax, don't need to be involved, not governed by Securities Act

s 51 *Formation of limited partnership*
s 53 *Name of partnership*

Contribution of limited partner

55 (1) A limited partner may contribute money and other property to the limited partnership, but not services.

(2) A limited partner's interest in the limited partnership is personal property.

s 56 *Rights of general partners*
s 57 *Liability of limited partner*
s 59 *Share of profits*

- Ltd. partner better positioned than a G P because as long as the money's there you get it

s 62 *Return of limited partner's contribution*

General and limited partners

52 (1) A person may be a general partner and a limited partner at the same time in the same limited partnership.

(2) A person who is at the same time a general partner and a limited partner has the same rights and powers and is subject to the same restrictions as a general partner but in respect of the person's contribution as a limited partner, the person has the rights against the other partners that the person would have had if he or she were not also a general partner.

- **so CAN BE BOTH a general partner and a limited partner (as long as theres' another general or limited partner)**
- GP might be a poorly capitalized corporation, the LPs are who you want to sue so you want to be able to find that the limited partners aren't, and are liable.

Haughton Graphic Ltd. v. Zivot p 37 - 41

F: a LP - Printcast - the GP was Lifestyle Magazine (a CO.) and the LPs were Zivot and Marshall. Zivot was known as the "president" of Printcast. In fact, Zivot and Marshall were in complete control of the limited partnership – circular structure
I: How do we protect 3rd parties in this situation? Nash wasn't aware of the corporate structure and wanted personal liability by lifting the corporate veil
R: LP liable for made / agreed contribution only if he takes part in controlling the business (ie: when he no longer behaves like an LP); 3rd parties must be aware of which partners are limited
A: Zivot and Marshall represented to Nash that they were management - ie not just RUNNING the general partnership, but also as limited partners representing themselves to be managers and executives to the third party.
C: Zivot is liable

Nordile Holdings Ltd. v. Breckenridge p 42 - 44

F: N - vendor - gave mortgage to Aman - purchaser (mortgagor) Arman = Arbutus (CO.) and B & R (ltd. partners) Arman fell into default under the mortgages - N couldn't get their money back from the COs - N argues that B&R are directing minds and therefore general partners
I: can they been found liable as GPs and not LPs?
R: A limited partner is not liable as a general partner unless he takes part in the management of the business.
A: ct. says they were officers and directors of Arbutus, but not in their persons as limited partners so didn't exercise control in the same way as in Haughton.
C: B&R's liability remains limited - they acted as directing minds of Arbutus, not of Aman.

4. Limited Liability Partnerships

- recent development- pressure from lawyers eg barred from incorporating - to give adv. of CO. t
- Eliminates exposure to outside world. Extant in BC for 10 yrs, not a lot of case law. Some differences jurisdictionally. ON makes a LLP more generally liable than BC to the general world. SO LOOK BEHIND THE CASE TO THE STATUTE - in limited partnership statutes there is less variability.
- Significant definitions

Definitions

94 In this Part:

"limited liability partnership" means a partnership registered as a limited liability partnership under this Part;

"partnership obligation" means any debt, obligation or liability of a partnership, other than debts, obligations or liabilities of partners as among themselves or as among themselves and the partnership

s 104 *Limited liability for partners*

- relieved of liability, similar to a shareholder merged with a director or officer

- Doesn't exclude the possibility that you could be found liable, but looks like there's a presumption that that isn't the case

s 105 *Partners subject to same obligations as corporate directors*
- By corporate statute, various reasons why individuals might be liable in addition to CO., maybe employees, officers, shareholders etc. eg *London Drugs*, where employees sued in negligence
- directors are personally liable for certain things eg. wages
- under corporate statute, certain parties can claim to be oppressed for eg., and **s 105** is piggybacking on that: negligent or oppressive directors might be liable directly

5. Joint Ventures

- Joint Venture in US is separate entity, not so in Canada.
- Here when parties come together for a limited purpose, usually partnership-like rel'p where in US there are specific consequences
- SCC has recently said some unkind things about sole-purpose corporations but they might make sense in this context.

6. Business Corporations

What is the Corporation
- In theory all corps set up to make a profit. Others may be set up as non-profits and are regulated by other statutes (societies acts etc.)
- separate legal entity
- artificial person
- same rights and responsibilities as a natural person
- can own things
- must be owned (see **shareholders**)
- subject to negligence and criminal claims
- complex registration procedure, and ongoing reporting such that the public can be apprised of things.

Who Are the Stakeholders?

A	**B**	**C**
Shareholders (investors) owners	Government	Lawyers
Directors (board)	Creditors (investors)	
Officers (management)	Co-Contractors	
Employees		

- theoretically shareholders involved in management (participate in mtgs eg.)
- Shareholders elect directors - can get rid of them - meet on a regular basis - not usually involved in running but may be held responsible.
- Officers implement in detail decisions of directors - responsible for actually running - usually most important. Directors usually get small salaries, but Officers often get whopping great salaries.
- shareholders may get no real money in dividends, main value often in resale value of shares not shares
- employees have no statutory right to decision making process (although they might thru k)
- In practise these roles merge together: individual might be director, officer and employee.

- Govt' can be a shareholder in certain types of corporations
- Creditors provide capital, can be had to distinguish between shareholder or creditor in terms of investment (as in partnership questions - whether someone is a creditor or a partner in a partnership.)
- No reason someone can't be both or multiple, such as employee & creditor.
- Creditors can often dictate policy, too, in practise, because it's their money - they can put it out of existence, for eg (put into bankruptcy or receivership, and thereby take it over)
- Co-contractors such as suppliers, landlords, tenants, etc. who have rel'ps with Corporation

Who owns it? shareholders.
- shares might be bought directly from corporations
- transfer/trade from another shareholder

- now in practise ppl often own indirectly: a percentage of an investors' pool which owns shares
- shareholder can be another corporation

Who runs it? directors and managers
- Because it's artificial person, hard to figure out who acts on behalf of it (directing mind)
  - who can enter into k
  - who is liable for breach of k?
  - tort and criminal responsibility?
- someone ultimately has to be responsible, so one of the problems (or advantages!) is it can be hard to determine who is permitted or liable for responsibility

THE EVOLUTION OF CORPORATIONS LAW & THE NATURE OF CORPORATE PERSONALITY

Theories of the Corporation

1. Fiction
- entirely beholden to legislature eg still in PEI
- v suspicious, treated as something that needs tight regulation and scrutiny
- how it started off, and opened up slightly by Salomon - modern theory trying to bring it back such that it is appropriate to regulate tightly

2. Natural Person
- although it was created thru legislation, it is a kind of individual
- should be less subject to regulation: once created, laissez faire!
- CO.s became so large that free rein resulted in loss of control - *ultra vires* doctrine largely eliminated
- because of capacity to grow and live forever, could become enormously complicated unlike a person
- idea started to come back that they needed to be better controlled because of their enormous influence
  - initial concern for shareholders, and advantage taken by big shareholders
  - nexus of **contract theory**: CO is focal point for series of ks - employees, shareholders, directors and officers - and although k's are real also notional.
    - some of these k's by being imposed, thought to contain protective implied terms
    - pay attention to this theory because BC C Act is rooted in this idea!

3. Organism
- should be analyzed as an entity that is not just ktual but also involves human nature, psychology, ethics and moral conduct etc.
- microcosm of society in a way (large corporations particularly)

4. Modern
- Going back to Fiction Theory really:
  - people beyond those directly involved have a stake and that society should control them because of their important impacts on society outside of the shareholders and directors/employees etc,
  - jurisdictional impacts - older way looked at it locally, but many cross boundaries, and jurisdictions will be deliberately chosen for advantage - has qualities of a separate jurisdiction altogether.

1. History of Canadian Business Corporations Law

Constitutional basis:
- Fed gov't allowed to have jurisdiction because of POGG Fed statute quite a bit like Ontario
- BC is a bit different, shareholders have more liberty to k in and out of certain things (NS too)
- advantages to fed:
  - some rules of prov. won't apply because of paramountcy (not of much practical sig)
  - greater control over name (protection nationally)
- compare with US where there is greater choice between the states (Delaware) fewer protections for shareholders/ partic minority shareholders.
  - There was a time when NS was trying to position itself in this way but that never came about
- Charter as applied to corporation - number of cases has involved corporations who've tried to get protection under the Charter - have not been allowed to use for s. 7 (life and liberty) but freedom of expression

***Business Corporations Act* [SBC 2002] CH 57**

Recognition of corporation as a separate entity under BC statute

3 (1) A company is recognized under this Act

(a) when it is incorporated under this Act,

(b) if the company results from the conversion, under this or any other Act, of a corporation into a company after the coming into force of this Act, when the conversion occurs,

(c) if the company results from an amalgamation of corporations under this Act, when the amalgamation occurs, or

(d) if the company results from the continuation into British Columbia of a foreign corporation under this Act, when the continuation occurs.

- Amalgamation is when 2 artificial entities are brought together and continue as a new corporate entity.
- Extraterritorial that operates in BC - doesn't become directly regulated but does have an existence

s 10 *Formation of company*
s 17 *Effect of incorporation*

Capacity and powers of company

30 A company has the capacity and the rights, powers and privileges of an individual of full capacity

Salomon v. Salomon & Co. Ltd. 1897 p 61

F: S sold his leather business to a ltd. co. with 7 shareholders, Salomon and his family. When Co. wound down, S held debt secured in form of floating charge, which he'd trsfrd to a 3rd party so there was no money left over to pay creditors: liquidator claimed Co. was alias/agent of Salomon and that S should be liable. Found so at trial and appeal then went to H of L. S made all the decisions and did most of the work. He also entered into a k with the business - sold the business to the Co.
I: Can a legitimately organized corporation be characterized as an agent of a shareholder?
R: p 62 "when the memorandum is duly signed and registered... the subscribers are a body corporate "capable forthwith...of exercising all the functions of an incorporated company" Those are strong words. The company attains maturity on its birth... it is at law a different person altogether from the subscribers..." This is true even if after incorporation the co. is the same as it was before. It is not an agent or a trustee, nor are the subscribers liable except as provided by the statute.
A: There was nothing in the evidence to indicate fraud, the Co. is legit and not an agent for S, who cannot therefore be held liable personally
C: for Mr Salomon

2. Limited Liability and Creditor Protection

3. Piercing the Corporate Veil

what forms does this take? 3 manifestations Claimant - - Corporation - - Someone behind the corporation (shareholder -which could also be a corporation) or director exec. etc. or could be employee (or all)

1. Sometimes wealthy shareholder (individual) that the claimant wants to get at.
2. Sometimes they want to get through the individual to the corporate assets.
3. Grandfather corporation, father corp and then subsidiaries

and why would you do it? Cases.

- **Tort**! Should be responsibility of co.
- **debt** owing - promised to be paid and corp doesn't have assets
- **tax** liability - particularly in context of scenario 3 where setup is to avoid paying taxes.
- **Employee** seeking protection or **gov't** trying to deny protection (WCB eg)
- **Criminal** responsibility -
- **family** law assets - on distribution after dissolution of marriage they are inaccessible to the spouse/children
- **partnerships** (ltd. partner can be a corporation)

Tort context

- argument: liability is not the CO.'s it's someone else's
- usual parties are employees (difficult to pin liability on shareholders who don't usually do anything)
- CDN law quite generous (*London Drugs* liability limited to $40 so LD sued employees) in that case k law was changed to allow for extension of liability exclusion to employees)
- generally tort allows liability of employees and shareholders / directors etc.
  - In order to be liable, can be on a frolic of their own OR in scope of work.
  - If employee directed by employer to act in a particular way, may NOT be personally responsible.

ADGA Systems Int'l Ltd v Valcom 1999 p. 78-86

F: ADGA suing directors of Valcom for stealing employees
I: can the directors be held personally liable, or or they protected by incorporation?
R: Is this an independent cause of action against the directors in which case they are liable, or an attempt to pierce the corporate veil, in which case they are not?
A: line of authority in Canada holds that "in all events, officers directors and employees are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company" Ct confirms that tort of inducing breach of k relations is not usually something employees are liable. THis might be the corporation itself doing something. Aside from that it is open season on employees for tort liability
C: no principled basis for protecting the director.. from liability on the basis that such conduct was in pursuance of the the interests of the corporation..." p 85 Not really lifting the veil, because tort law says it is a responsible individual, not a co.

Debt context

Clarkson Co. v. Zhelka 1967 p 90-ish

F: Selkirk ran several COs, including Industrial Ltd. and Fidelity Real Estate. Industrial bought land, paid for with cash advance from Selkirk's other CO. Then sold land to Selkirk's sister, Zhelka, for a $120,000 promissory note. Zhelka mortgaged it, went into default, and got $9,000, which ended up in Fidelity's account. Selkirk went bankrupt and trustee Clarkson tried to sell the assets to pay the debts. The trustee wanted to claim the $9,000, saying that the land, registered in Zhelka's name, was held in trust for Selkirk, that Industrial was a mere agent and alter ego for Selkirk.
I: Is the conveyance fraudulent and should the veil be lifted, and land sold back to pay the creditors?
A: Gift to Zhelka is reversible because it was fraudulent: no consideration, with intention of hiding asset from creditors. Land and $9,000 belong to Industrial. If it can be shown that the CO is a mere agent of a controlling corporator, it may be said that the CO is a sham: This is a question of fact, and should be done sparsely. The agency has to be flagrant. • Having a controlling or total share in a CO does not make a CO an agent of a controlling company or person • Present case is on the line, but not quite close enough to flagrancy. • There is no evidence that the Industrial was ever used to defraud the creditors or as a sham and a cloak. It is a legit CO, albeit it questionable in some ways. • Despite the fact that the conveyance is found to be fraudulent, the resulting trust goes back to Industrial Ltd.. So does the $9,000. • There are no Canadian cases that have found a CO to be an agent of the SHs, though it could be possible.
C: Money stays with Industrial

- REVERSE of Salomon: here going after the corporation thru the individual.
- useful summary on p 92 of when the veil can be lifted:
  - "if a CO. is formed fo the express purpose of doing a wrongful or unlawful act, or, if when formed those in control expressly direct a wrongful thing to be done, the individuals as well as the CO are responsible to those to who liability is legally owed....

Employment Context

- *Thorne*: to be an employee, you have to have a k with yourself (and you can't if you're a partner)
- *Lee*: corporation has separate legal personhood and so CAN have k with self.

Lee v. Lee's Air Farming Ltd. 1961 NZ p 114

F: appellants husband was major shareholder in Co doing aerial top dressing, who was killed flying a plane as an employee of that co - widow wants compensation under WCB act
I: can you be a director and employee of a company?
R: if he is a worker under the WCB then yes
A: he was clearly acting as a worker and not a director when he was killed top dressing fields. A person can make a k with another legal person even if they are the same person technically - there is no reason to preclude a k of employment
C: yes, he was an employee as well as a director.

Tax Context

De Salaberry Realties Ltd. v. M.N.R. 1974 Fed Tax p 117

F: Tax Appeal Board: PL profits selling land alleged to be purchased for shopping centre development. COs in question form a pyramid structure, with a grandparent CO managing parent COs, + network of sub-subsidiary land-holding COs. New sub-subsidiary incorporated for every few purchases.
I: Are these CO really just agents of the larger CO, and so should the corporate veil be lifted?
R: Complete examination of the CO as a whole is needed to determine if the corporate veil should be lifted - especially in the case of grandparent, parent and multiple sister COs
A: Some factors that the court considers:

- The people that are approached by potential customers are an indication as to the centre of policy and decision-making in each CO. Here the buyers went to the parent and grandparent COs instead of the actual land-holders.
- Despite the fact that shares of the sub-subsidiaries were only valued at $10, these COs were making purchases of land in the millions of dollars which indicates strongly that the COs are merely an instrument of its grandparent.
- The individual COs did not have the money to operate on their own, without having to rely on each other. Because of this they had no free will and had no commercial viability.
- There was no horizontal interaction between lowest COs: all of their dealings were vertical with the parent COs.
- All of the boards of directors of the COs were appointed by the parent COs.
- They were not engaged on daily basis in commercial operations, but were simply engaged in holding property.

C: The court finds this to be a "group enterprise" - legal individuals in the eyes of the law, but for tax purposes, the court looks at the whole structure. Ruling: The veil is lifted.

- tax officials want to ignore corporate form and tax accordingly (treat them as a unit.)
- could use as authority for lifting veil in similar circumstances but realistically this is more to do with taxation than anything else.
- p 124-5 SCC divided on point: *Stubart Investments* etc *bona fide* "Business Purposes Test" from US - not adopted in Canada
- complexity: probably the more complex the structure the more suspicious it looks to the cts. particularly but not exclusively to tax context.

Family Law context

Lynch v. Segal 2006 ON CA p 131

F: L is S's ex, seeking maintenance and child custody. S has set up shell corporations purporting to be held by 'mysterious high end foreign investors" which owned his ppty, in fact he was the beneficial owner of the pptys and capital
I: Is it appropriate in this case to go behind the corporate veil?
R: cts 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"
A: Here "the corporations are completely controlled by one spouse for that spouse's benefit and no third parties are involved." S is "using the corporate structure for the sole purpose of disguising his property so that his spouse and children would have no claim against him"
R: beneficial owner of capital and land and therefore, shares aside, the interest can be vested in the wife

- Ct might look at statutes, family law or fraudulent transactions, there are sometimes other mechanisms besides lifting corp veil but here that's what they used.

4. Theorising Corporate Personality

Criminal law context

- In CO. tort, question is usually to what extent should individual be responsible for CO's offence, in criminal law, other way around: historically the individual is responsible and it is harder to make a corporation responsible
- Estey: 3 situations p 138 for crimes with MR:
  1. total vicarious liability - as long as criminal action in course of employment - any employee, no matter how insignificant
  2. No criminal liability unless action in question was at the request of the corporation - highly unlikely that CO. would be liable
  3. **median rule**: criminal conduct is attributed to the CO so long as the emp / agent is of such a position that he or she represents its de facto directing mind, so that the corporation is id'd with the act of that individual.

Canadian Dredge & Dock Co. Ltd. v. The Queen 1985 ON CA p 136

F: Corporations charged with conspiracy to defraud - rigging bids for dredging k's in Hamilton harbour. Some moneys diverted by senior officers, others went to corporations
I: how is a corporation to be found guilty of a MR offence?
R: "if the act complained of can be treated as that of the co/ the corp is criminally responsible for all such acts as t is capable of committing and for which the prescribed punishment is one which it can be made to endure"
A: If the directing mind(s) of the corp are criminally responsible and are acting in the scope of their authority then the corp can be criminally responsible
C: GUILTY AS CHARGED

THE PROCESS OF INCORPORATION

1. Introduction and Place of Incorporation

Parts of *BC BCA*

- **2** - not important but be aware of unlimited liability companies - only in NS
- **4** we look at **issuing** but not trading and dealing in shares
- **5** managing corporations - complicated area
- **6,7** keeping and monitoring records
- **8** what if something goes wrong? This is the source of a lot of **litigation**
  - eg **s 227** complaints by a shareholder = **oppression remedy**
  - sometimes the structure has to be changed or even dismantled altogether
- **9** changes, could be 'friendly'
- **10**, often are changes imposed from without
- **11** Extra provincial companies
- **12** bureaucracies (provincial agencies) which administer co.s

2. Extra-Provincial Licensing and Filing Requirements

a. *BCA*, s. 1 definitions of "company", "extra-provincial company", "foreign entity", "foreign corporation" and "limited liability company"

"corporation" means
a company, a body corporate, a body politic and corporate, an incorporated association or a society, however and wherever incorporated, but does not include a municipality or a corporation sole;

"limited liability company" means a business entity that
(a) was organized in a jurisdiction other than British Columbia,
(b) is recognized as a legal entity in the jurisdiction in which it was organized,

(c) is not a corporation, and
(d) is not a partnership, including, without limitation, a limited partnership or a limited liability partnership;

- So ^ ^ couldn't be a sole proprietorship either - seems to be there to capture certain perhaps US statutory creations.

"public company" means a company that
(a) is a reporting issuer,
(b) is a reporting issuer equivalent,
(c) has registered its securities under the Securities Exchange Act of 1934 of the United States of America,
(d) has any of its securities, within the meaning of the Securities Act, traded on or through the facilities of a securities exchange, or
(e) has any of its securities, within the meaning of the Securities Act, reported through the facilities of a quotation and trade reporting system;

- this is as contrasted with a private company, which is a very old term, as is public company - resurrected by BC Legislature, most places you'll run across widely-held company (freely traded by large number) vs. closely held company. Distinction in BC remains public/private. not defined in s 1 but in 192

b. *BCA*, ss. 374 to 379 Extraprovincial Companies

- If it wants recognition in BC it is going to have to become "extraprovincial" part 11 starting at s 374 deals with this:

s 375 *Foreign entities required to be registered*

3. Continuance Under the Law of Another Jurisdiction

- What if you want to be a BC company even if you're doing business elsewhere? (usually because of a change of business making it is better to be located in a different jurisdiction.
- Rules aren't that different from jurisdiction to jurisdiction so it isn't common to move around - like US.
- CDN CO's usual reason is there is going to be an amalgamation. In BC they both have to be located here so might have to migrate. Rules in s 302 are how to start going about it

s **302** *Application for continuation into British Columbia*

a. *BCA*, ss. 303-311

s 303 *Continuation*
s 305 *Effect of continuation*
s 308 *Application for continuation out of British Columbia*
- nb: special resolution = 2/3 usually

s 310 *When continuation out of British Columbia prohibited*
s 309 *Shareholders may dissent*
- if shareholders object, but sp resolution passes, SH allowed to send notice of dissent - CO. has to buy your shares back (procedure that is followed unless they win a court order to not have to)

4. Classification of Corporations

decisions have to be made about
- who else might be involved, now and in the future
- what type of business, and whether you want to restrict to that in your constitution
- where you want to do it (we're going to assume BC)
    - largely it's just that we're in BC
    - decision between Fed and BC, mainly: do they allow restrictions?
        - what do they allow the shareholders/directors to do
        - protection for name and intell prop
        - liability?

- how easy/hard to leave jurisdiction?

- Will want to determine the share structure, and management structure
- in practice the first thing is to deal with is the NAME. This is a process that takes some time so you start early.
  - provisions starting in s 21 dealing with name

a. "Widely-held" (public) "closely-held" (private) corporations

b. BCA, s. 1 def. of "public company", "reporting issuer" and "reporting issuer equivalent"

"reporting issuer" has the same meaning as in the Securities Act; ie:

"reporting issuer" means an issuer that

(a) has issued securities in respect of which

(i) a prospectus was filed and a receipt was issued,

(ii) a statement of material facts was filed and accepted, or

(iii) a securities exchange take over bid circular was filed,

under a former enactment,

(b) has filed a prospectus or statement of material facts and the executive director has issued a receipt for it under this Act,

(c) has any securities that have been at any time listed and posted for trading on any exchange in British Columbia, regardless of when the listing and posting for trading began,

(d) is an issuer that has exchanged its securities with another issuer or with the holders of the securities of that other issuer in connection with an amalgamation, merger, reorganization, arrangement or similar transaction if one of the parties to the amalgamation, merger, reorganization, arrangement or similar transaction was a reporting issuer at the time of the amalgamation, merger, reorganization, arrangement or similar transaction,

(e) is designated as a reporting issuer in an order made under section 3.2,

(e.1) is a person that is within a prescribed class of persons, or

(f) has filed a securities exchange take over bid circular under this Act for the acquisition of securities of a reporting issuer and has taken up and paid for securities subject to the bid in accordance with the circular, unless the commission orders under section 88 that the issuer has ceased to be a reporting issuer;

c. One-Person Corporations

d. Constrained Share Corporations

e. Professional Corporations

f. Unlimited Liability Companies

g. Special Act Corporations

BCA, s. 1 definition and s. 4(1)

"special Act corporation" means a corporation, incorporated by an Act, that has not been recognized as a company;

Special Act corporations

4 (1) Unless the Act by which a special Act corporation was incorporated provides otherwise, a special Act corporation incorporated after September 30, 1973, a prescribed special Act corporation and a special Act corporation to which the Company Clauses Act applied before its repeal is subject to the following:

(a) the provisions of this Act other than sections 10 to 41, 52, 53, 228, 269 to 300 and 302 to 311 and Parts 11 and 14;

(b) the regulations made under this Act other than

(i) regulations made in respect of sections 10 to 41, 52, 53, 228, 269 to 300 and 302 to 311 and Parts 11 and 14, and

(ii) regulations that expressly indicate that they do not apply to special Act corporations.

h. Corporate Names

BCA, ss. 21 to 29

- **21 (1) b**: these numbered companies are often holding companies, or don't deal with the public, or they are set up as in Salaberry or whatever
- generally though you want a name and you need to register it, or you want to incorporate your patent or ™ products into your name.
- It is possible that to do business in another jurisdiction that your BC name won't work (similar name? Name not allowed?)
- OR the name might contravene another's IP. Even though BC registrar allows you to use it, you might still get sued. If the registrar knows about it, they might refuse, but if they don't you aren't protected from liability.

i. Incorporation Techniques

- In BC, the basic creational action is a k (not a letters patent or whatever.)
- need three documents besides permission to use name
  1. **incorporation agreement** - public doc
     - this doesn't exist in (all) other jurisdictions)
  2. **notice of articles** - public doc
     - used to be called the 'memorandum' of articles
     - which is why we are referred to as a memorandum jurisdiction
     - other jurisdictions this is called the - not public/filed
  3. **articles themselves** (laws governing your corporation)
     - historically these were foundational
     - now these supplement the statute: most governing rules are in the statute. Only in some cases can the articles supplant the statute
     - in other jurisdictions you don't have the contract, and instead you will have articles and bylaws.

- starting at **s 10** FORMATION OF CO. - when in doubt, governed by k law.
- individuals behind CO. = **Promoters** subset in BC = **Facilitators** (where entering into a k on behalf of CO which doesn't exist yet.)
  - **incorporators** = wanting an equity stake
  - **creditors** = no equity
  - could be **both** eg. Salomon promoter/creditor/shareholder/ facilitator made k's with 3rd parties.
- Not all promoters are facilitators but all facilitators are promoters.
- other promoters may have different motive

ss 11, 12 *Notice of articles / Articles*
s 19 *Effect of notice of articles and articles*

- In the old days, you had to have a limit as provided for in s 12 (2) (a)
- now, **s 30** says a CO has the rights etc. of an individual of full capacity, and presumptively this means no need for description of what you could do.
- old days you had to change docs of company.
- what arises is contrary problem: you have to set out what it can't do.
  - Model set of articles in the Regulations, look at it fyi, but not on exam.
  - As a solicitor you will have to make articles. There are things in the format that done't make sense for a small co and things that need more detail in a large co.

pt 3 on shares:

Kinds, classes and series of shares

52 (1) The authorized share structure of a company

(a) must consist of

(i) one or both of the following kinds of shares:

(A) shares without par value;

(B) shares with par value, and

(ii) one or more classes of shares, and

(b) may, on or after the recognition of the company, include one or more series of shares in any class of shares if the special rights or restrictions attached to the shares of that class provide for that inclusion.

(2) Each class of shares must consist of shares of the same kind and, in the case of a class of shares consisting of shares with par value, shares having the same par value.

(3) The par value of shares with par value must be expressed in reference to a currency and, if the currency is not Canadian currency, the type of currency must be stated.

What does being a shareholder mean?

1. Shares = equity stake = 'share' in whatever profit the CO generates, via dividend
2. Role in decision making process
3. If CO is wound up, we take our share back out.

- Unissued shares? CO. issue, distribute/sell them off.
  - Shareholders might have some say depending on agreement - disclosed in initial document.
  - CO might later create or split shares. But if you don't have those details in orig docs then you have to go through a process, and it may become difficult.
- statute does allow for fairly complicated setup

- Problem with replacement of CL with statute: how much remains to be covered?
- CL largely displaced eg Statute distinguishes between external and internal relations: under statute 3rd parties ktual rel'ps unaffected by flaws that would have rendered the k's invalid under CL

No constructive notice

421 No person is affected by or is deemed to have notice or knowledge of the contents of a record concerning a corporation or limited liability company merely because the record has been filed with the registrar or is available for examination at an office of the corporation or limited liability company.

Restricted businesses and powers

33 (1) A company must not

(a) carry on any business or exercise any power that it is restricted by its memorandum or articles from carrying on or exercising, or

(b) exercise any of its powers in a manner inconsistent with those restrictions in its memorandum or articles.

(2) No act of a company, including a transfer of property, rights or interests to or by the company, is invalid merely because the act contravenes subsection (1)

- these 2 provisions mean that a 3rd party is not faced with a void k when made without knowledge of inability of person or CO to make it.
- k maybe contrary to law, but can still be enforced by 3rd party (although shareholder may bring suit eg.)

THE NATURE OF THE CORPORATE CONSTITUTION

4. Generally 161-163

BCA ss 10-19 and s 1 definition of "articles"

- **historically**: a letters patent corporation was deemed to have the capacity and powers of a natural person; a memo- randum company, on the other hand, was subject to the doctrine of ultra vires
- **historically**: In memorandum jurisdictions, the articles of association constituted a public document and outsiders were deemed to have constructive notice of its contents (unlike bylaws!)
- In the memorandum jurisdictions, memorandum / articles constitute a k between shareholders. As construed by cts, a mutually enforceable k between SHs and CO. No corresponding provision in the letters patent Acts. Letters patent and by-laws still binding on the CO and its members, but source of their binding character, and its extent, depended on the express or implied terms of the statute.

- deemed consensual character of the constitution of a memo- randum company brought important resulting consequences which have survived to some extent to the present day
  - First, the allocation of powers between the directors and shareholders was regarded as an internal question to be resolved by the company' s constitution.
  - Second, although its scope remains unclear, there is ample authority for the proposition that residual authority remains with the shareholders in a general meeting to break a deadlock among directors
- **currently**: ultra vires, so far as it affects the position of third parties, and the doctrine of constructive notice with respect to the contents of public corporate documents, have been abolished in the CBCA, the OBCA and the BCBCA.
- The entrenched nature of the directors' power is confirmed: subject to any unanimous shareholder agreement to the contrary, it is the duty of the directors, not the SHs who elected them, to manage the company

5. Note on Scope of the Contract in the Memorandum and Articles (Articles and Notice of Articles)

- CL held that the memorandum and articles do not constitute a contract between the company and a non- member.
- Statutory exception in BC:. BCBCA s. 19(3) does not expressly provide that each member is deemed to contract with the company, though this has been held to be its effect ALSO CO. bound to members ALSO members to each other
- it is now recognized, both in the memorandum and letters patent jurisdictions, that there may be a concurrent breach of duty to the shareholders and to the company.

6. The Concept of Restrictions

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

- Ultra vires doctrine held that a corporation, particularly one in a memorandum jurisdiction, had no legal capacity to act in any way that was not specifically authorized by its incorporating documents
  - The doctrine has been dramatically limited, indeed virtually eliminated, by modern corporate law statutes: unless corporate powers are explicitly restricted, it is assumed that the corporation has the powers of a natural person

- A natural principal is liable for the acts of an agent if the agent had **actual, usual, apparent or ostensible authority** to commit the acts from the principal.
  - "Usual" authority means authority ascribed to the agent by common or trade understanding by virtue of the particular office held by him.
  - "Apparent" or "ostensible" authority means the authority with which the agent has been clothed as a result of the principal's express or implied representations. Such representations may be implied from the principal's conduct or acquiescence as well as from his spoken or written words
- These basic agency rules also apply to corporations, but they are greatly complicated here by a number of factors.
  - The first is that many corporations have complex organizations so not always determinable who has what authority
  - A second complication is that the courts superimposed special corporate rules on the normal agency rules. eg constructive notice
    - qualified by “indoor management rule”
    - constructive notice doctrine was confined to actual restrictions on a corporate agent's authority; it did not require an outsider to satisfy himself that the internal regulations of the corporation had actually been complied with.

Directors' liability

154 (1) Subject to section 157, directors of a company who vote for or consent to a resolution that authorizes the company to do any of the following are jointly and severally liable to restore to the company any amount paid or distributed as a result and not otherwise recovered by the company:

(a) to do an act contrary to section 33 (1) as a result of which the company has paid compensation to any person

Compliance or restraining orders

228 (3) On an application under this section, the court may make any order it considers appropriate, including an order

(c) requiring, in respect of a contract made contrary to section 33 (1), that compensation be paid to the company or to any other party to the contract.

s 259 *Alteration to articles*

Shareholders may dissent

260 Any shareholder of a company may send a notice of dissent, under Division 2 of Part 8, to the company in respect of any resolution under section 259 (1) to alter any restrictions on the powers of the company or on the business it is permitted to carry on.

Effect of registration

378 (2) Subject to the provisions of this Act, to the laws of British Columbia and to the laws of any other jurisdiction that are or may be applicable to it, an extraprovincial company may, for the purpose of carrying on business in British Columbia, exercise in British Columbia the powers contained in or permitted by its charter or similar record.

...

(**4)** No act of a foreign entity that carries on business in British Columbia, including a transfer of property, rights or interests to it or by it, is invalid merely because

(a) the act contravenes subsection (3) or section 422 (7), or

(b) the foreign entity was not, at the time of that act, registered as an extraprovincial company.

PRE-INCORPORATION CONTRACTS

- what happens if there isn't a person? Not just incapacity - no person. Typically in this kind of 'mistake' which involves a CO that doesn't exist your starting CL proposition is there is no k. THIS IS INCONVENIENT IN THE CO. CONTEXT
  - there are lots of reasons why k's might be entered into before the formation of the CO. So the statute has changed this.
- what does the CL do? two things apart from ratification
  - RATIFICATION - Doesn't operate if the person doesn't exist. If the person doesn't have CAPACITY, the person can ratify. But if the person doesn't EXIST this doesn't work.
  - ASSIGN the rights: CO takes over ktual position of someone else.
    - I enter into a k with you, then the CO comes into existence, and I assign my rights to the CO.
    - Problem? inconvenient - you probably want to engage in a k with the CO rather than you - no guarantee that you will do it.
    - What if the CO won't take the assignment? What if the CO only wants to take certain parts of the k and not others.
    - I don't need your permission to assign it, so for that reason you will probably put in your k that it CAN'T be assigned if you have a concern.
  - NOVATION where all 3 parties are involved in the agreement in the 1st place.
- ***BCA* s 20** sets out statutory regime, which is not comprehensive, so you STILL need to know what the CL says.
  - logical problem that only says what happens WHEN THE CO. comes into existence
  - so if it doesn't come to fruition, s 20 can't operate and you have to fall back on the CL.

1. Common Law

What happens if the parties both know there is no K?

Agency

- important in CO. law.

- principal is liable for the action of an agent. Whatever agent does binds principal and 3rd party in a true agency situation. How this is binding has to do with authority which can be of 3 kinds
  - **ACTUAL AUTHORITY** (express authority - principal and agent have agency k) Can't work in this context since there's no principal
  - **USUAL AUTHORITY** (capacity, usually by virtue of some kind of employment k - as an officer of the CO eg - which may not explicitly reference agency, but it follows by necessary implication that the employee has that authority.
  - **OSTENSIBLE AUTHORITY** (operates through estoppel - principal has allowed a situation to give the impression to 3rd party that agency rel'p exists)

Kelner v. Baxter 1866 Eng. Common Pleas p. 167

F: pl wine merchant, joined with others and decided to create co. for a joint stock hotel, self and others as directors. Pl to be mgr. Prior to incorp, pl sold wine to co. to the other directors "on behalf of the proposed Gravesend etc." Thereafter the co. collapsed and pl wanted his £900
I: is the agreement binding given that there was no Co. at the time, and the signatories signed "on behalf of" this non-existent co.
R: "where a k is signed by one who professes to be signing as agent but who has no principal and the k would be inoperative unless binding upon the person who signed it, he is bound thereby…
A: the pl signed on the faith of the promise to pay, this was not contingent on the formation of the Co. Parol evidence rule holds that any oral agreement can't supersede this written one. k was facilitating acquisition of booze for future CO., documents made it clear there was as yet no CO. Ct says where you have a k naming a CO which is not in existence and the parties are aware, then the k can only be between the parties in their personal capacities, even though they describe themselves as agents or reps for the CO. CO can't be liable, only the ppl are liable - all parties know they are not agents.
C: "putting in the words 'on behalf of the GRAHC' would operate no more than if a person should k for a qty of corn 'on behalf of my horse'" The defendants are liable.

Black v. Smallwood 1966 Aus HC p 171

F: S agreed to sell property to B as "Western Suburbs Holding Pty. Ltd." both thinking it had been incorporated when it hadn't. B sued for specific performance
I: is S bound by the k as an individual despite k'ing on behalf of a (non-existent) Co?
R: hmmm.
A: there is no principle that where a person k's on behalf of a nonexistent principal he is himself liable on the k. *Kelner* says that there was clear knowledge that the Co. did not exist and it was not a term of the k that payment be made out of that co's funds therefore the d's k'd as principals not as agents. Here the Co. was held to exist, the parties intended/knew of limited liability and now, with no Co. "the k was a nullity for the supposed purchaser did not exist when it was made.
C: the suit for specific p fails.

Wickberg v. Shatsky

F: S&S became directors/s-holders in Rapid Addessing Co. and decided to operated under name Rapid Data Western Ltd. despite not being a Co. and hired W to be their manager, siging k on RDW Ltd. stationary. d's later advised W to drop "Ltd" and continue as RDW - Co. not successful and W was given notice after refusing to work on commission. W sued S&S for damages for non-performance etc. of k
I: Can S&S be held liable?
R: *Kelner*: the writing disclosed an intention that the d should be bound. *Black*: no such intention = no liability.
A: D's acted as to warrant to the pl that RDW Ltd. was a legal entity however the pl knew very shortly after that the business was not being carried on by an incorporated C. his loss resulted from the fact that the business was not a success, not from the breach of warranty of authority
C: pl only entitled to nominal damages for breach

2. Statutory Reform

- both *Black* and *Wickberg* say that when the 3rd party is led to believe that the CO is in existence, and the facilitator is negotiating on behalf of the CO., the facilitator is not liable, because the 3rd party intended to k with the CO.
- ON THE OTHER HAND if, when these negotiations take place, it is clear the the CO is not in existence, then *Kelner* says the presumption is that the facilitator enters in their own capacity.
- *Wickberg* - 3rd party thought it had k with CO., so facilitator cannot be sued for breach - no k with the facilitator. Is there another source of liability?
  - yes - CL's next development - idea that there is a claim possible for **"breach of warranty of authority"**
  - when facilitator leads other party to believe there is a CO when that isn't, this should lead to some responsibility on the facilitator.
  - problem in k law because of privity (facilitator isn't really a party). Tort of deceit or negligent/fraudulent misrep? this is very hard to establish.
  - source of liability kind of halfway between tort and k
  - if you can show you entered into k on basis of misrep and can show losses (ie you didn't take another job) that directly relate to the breach of the promise. If as in *W* the source of your complaint is not the lack of CO but the fact that the CO didn't perform as you expected then: no recourse!

Pre-incorporation contracts [warranty of auth]

20 (2) Subject to subsections (4) (b) and (8), if, before a company is incorporated, a person purports to enter into a contract in the name of or on behalf of the company,

(a) the person is deemed to warrant to the other parties to the purported contract that the company will

(i) come into existence within a reasonable time, and

(ii) adopt, under subsection (3), the purported contract within a reasonable time after the company comes into existence,

(b) the person is liable to the other parties to the purported contract for damages for any breach of that warranty, and

(c) the measure of damages for that breach of warranty is the same as if

(i) the company existed when the purported contract was entered into,

(ii) the person who entered into the purported contract in the name of or on behalf of the company had no authority to do so, and

(iii) the company refused to ratify the purported contract.

THIS CODIFIES THE CL

You can get out of it in ss 8:

(8) A facilitator is not liable under subsection (2) in respect of the pre-incorporation contract if the parties to the pre-incorporation contract have, in writing, expressly so agreed.

- if ppl ACT like there's a k, there's a k. This modifies the CL on adoption of a k (where if there wasn't a person you couldn't ratify it) see s 3

(3) If, after a pre-incorporation contract is entered into, the company in the name of which or on behalf of which the pre-incorporation contract was purportedly entered into by the facilitator is incorporated, the new company may, within a reasonable time after its incorporation, adopt that pre-incorporation contract by any act or conduct signifying its intention to be bound by it.

- if you do adopt the k, then there are 2 consequences:

(4) On the adoption of a pre-incorporation contract under subsection (3),

(a) the new company is bound by and is entitled to the benefits of the pre-incorporation contract as if the new company had been incorporated at the date of the pre-incorporation contract and had been a party to it, and

(b) the facilitator ceases, except as provided in subsections (6) and (7), to be liable under subsection (2) in respect of the pre-incorporation contract.

- this gets ppl off the hook if the CO does adopt the k - this CHANGES the CL

- If the CO does not adopt the k later on, and the facilitator stays on the hook, they can apply under s 5

  (5) If the new company does not adopt the pre-incorporation contract under subsection (3) within a reasonable time after the new company is incorporated, the facilitator or any party to that pre-incorporation contract may apply to the court for an order directing the new company to restore to the applicant any benefit received by the new company under the pre-incorporation contract.

- But ss 6-7 :

  (6) Whether or not the new company adopts the pre-incorporation contract under subsection (3), the new company, the facilitator or any party to the pre-incorporation contract may apply to the court for an order

  (a) setting the obligations of the new company and the facilitator under the pre-incorporation contract as joint or joint and several, or

  (b) apportioning liability between the new company and the facilitator.

  (7) On an application under subsection (6), the court may, subject to subsection (8), make any order it considers appropriate.

  (8) A facilitator is not liable under subsection (2) in respect of the pre-incorporation contract if the parties to the pre-incorporation contract have, in writing, expressly so agreed.

- which sort of recreates s 228 where anyone can apply for remedies - you can have the ct divvy up liability however it sees fit! Eq: ct can do whatever it pleases, really: it invites parties to claim that despite what the rest of the statute says the ct should decide.
- if someone is liable it will be the CO. or the Facilitator - or both under s 6
- or go under s 7 and get some creative order
- tough from facilitator's perspective: historically unless it was clear that s/he was acting for a CO. they did not have liability. CL developed and created this quasi tort of breach of warranty of authority and that position has been carried over into statue in s 20
  - you can get out of your liability if you put it in writing that you aren't liable (ss 8) but you may still be on the hook because
  - ss 6-7 allows the ct to make an order

- Generally speaking now, to a 3rd party a pre-incorp k is fine - modified CL position which said there was simply no k.
- Could be that facilitator is personally liable per Kelner
- Could be some quasi-tort liability under cause of breach of warranty of authority
- But generally - we will look to s 20. Which adopts warranty of authority but also changes law to allow CO to adopt k and gives sweeping authority to ct to make both parties liable particularly under s 20 (7)

MANAGEMENT AND CONTROL OF THE CORPORATION

1. Introduction

Bushell v. Faith 1970 EN HL p 200

F: Article 9 of family-owned CO allowed for director, in a poll to remove him, to have 3 votes per share. Since F had 100 shares, he had 300 votes against sisters Bushell and Bayne's 100 (ea) but they won an injunction to restrain him from acting as director.
I: Is it possible to remove F as a director or does special article 9 protect him.
R: canon of construction that provisions must be construed in the light of the mischief they were designed to meet, in this case to allow a director to be removable by virtue of an ordinary resolution, or making it necessary to alter the articles.
A: Upjohn: HOWEVER "Parliament has never sought to fetter the right of the CO to issue a share with such rights or restrictions as it may think fit… Had parliament desired to go further and enact that every share entitled to vote should be deprived of its special rights… it should have said so in plain terms by making the vote on a poll one vote one share…" statute does not prohibit special weighting of votes\
dissent: Morris said it basically undoes the statute.
C: article 9 upheld, Faith remains a director.

- "article gives the CO unfettered rights to attach to any share or class of shares special voting rights on a poll or to restrict those rights…"
- still the law but oppression remedy available.

Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame 1906 (CA) p 208

F: shareholders voted by simple majority to sell assets of CO, directors said it wasn't for the benefit of the CO and refused to do it
I: Are the directors bound to do it, or are they protected by the articles which require a special resolution to override the directors "mgmt and control" of the business?
R: "there are provisions by which the majority may be overborne but that can only be done by special machinery"
A: ct confirms it is for mgmt to decide whether decisions are int he best interests of the CO.If the mandate of the directors is to be altered it can only be under the machinery of the memorandum and articles themselves
C: for the directors: Once they are in place, it is the directors that make decisions about the management and control: at best only a supervisory role

- Masters 209: "for some purposes, directors are agents… it is by the consensus of all that they became agents… a majority is not the principle to alter the mandate the minority must also be taken into account… the mandate which must be obeyed is not that of the majority - it is that of the whole entity made up of all the shareholders"
- see below for Sale of the Undertaking s 301

BCA, ss. 1(3), 128(3), 135, 136, 138, and 143

1 (3) An individual is appointed as a director of a company if the individual is
(a) appointed as a director of the company in accordance with
(i) this Act, or
(ii) the memorandum or articles of the company,
(b) designated as a director of the company on the notice of articles that applies to the company when it is recognized under this Act, or
(c) declared by the court to be a director of the company.

When directors cease to hold office
128 (3) Subject to subsection (4), a company may remove a director before the expiration of the director's term of office
(a) by a special resolution, or
(b) if the memorandum or articles provide that a director may be removed by a resolution of the shareholders entitled to vote at general meetings passed by less than a special majority or may be removed by some other method, by the resolution or method specified.

s 135 *If no directors in office*

Division 2 — Powers and Duties of Directors, Officers, Attorneys, Representatives and Agents
s 136 *Powers and functions of directors*
s 138 *Application of this Act to persons performing functions of a director*

Validity of acts of directors and officers
143 An act of a director or officer is not invalid merely because of an irregularity in the election or appointment or a defect in the qualification of that director or officer.

- subject to overarching proposition that this is not applicable to 3rd party who is not aware that director is acting *UV* (as in s 421) - no one is deemed to have knowledge just because it is public

2. The Indoor Management Rule

BCA, s. 146

Persons may rely on authority of companies and their directors, officers and agents

146 (1) Subject to subsection (2), a company, a guarantor of an obligation of a company or a person claiming through a company may not assert against a person dealing with the company, or dealing with any person who has acquired rights from the company, that

(a) the company's memorandum or notice of articles, as the case may be, or articles have not been complied with,

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

(c) a person held out by the company as a director, officer or agent

(i) is not, in fact, a director, officer or agent of the company, as the case may be, or

(ii) has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent,

(d) a record issued by any director, officer or agent of the company with actual or usual authority to issue the record is not valid or genuine, or

(e) a record kept by or for the company under section 42 is not accurate or complete.

(2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.

Sherwood Design Services Inc. v. 872935 Ontario Ltd 1998 ON CA p. 228

F: agreement to buy assets of Sherwood signed by KM and P in trust for a to-be-incorporated CO. $300k plus $45k promissory note should the deal fall through. KMP incorp 872935 to purchase assets, but did not purchase on closing date. S sold assets for $125 k to others. 872935 reassigned by purchasers law firm to other clients.
I: Can S claim against 87935 for the promissory note
R: indoor management, "a CO may not assert that a person held out as agent of the CO does not have authority to exercise the powers that are usual for such an agent
A: the letter from the lawyer binds 872 to the agreement to 'purchase from Sherwood'
DISSENT: the unsigned documents put S on notice that the CO had not adopted the kp 228

3. Corporate Responsibility

Dodge v. Ford Motor Company 1919 Michigan p 232

F: minority stockholders brought suit to demand dividends instead of the expansion and reinvestment of accumulated profits
I: Can Ford and the directors add jobs and decrease the price of cars, rather than maximize profits for shareholders?
R: A business CO is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end
A: Ultimately the judges are not business experts and cannot say that the actions of the directors menace the interests of the shareholders. Ford had some philanthropic ideas but also wanted to increase market (pay workers enough and drive down price so that they could buy cars!
C: court confirms smaller amount of dividend, not what shareholders wanted

Parke v Daily News Ltd. 1962 Eng p 237

F: DNL owned 2 papers, and 2 subsidiaries owned the © but the papers weren't profitable and the DNL was looking for a buyer. AN Ltd. agreed to buy them for £1.9 million plus a small amt. Directors of DNL had determined to spend balance for benefit of employees and pensioners (payment in lieu of notice, etc.)
I: can a minority of shareholders object to this scheme and insist it is ultra vires and illegal?
R: p 240 "The law law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company"
A: The ultimate test is what is necessary for carrying on business. There is no authority to support the proposition (as a proposition in law) that boards of directors must take into consideration their duties to employees.
C: It is an application of the company's funds which the law will not allow to give a large part of its funds to its former employees to benefit them rather than the company.

Re: Peoples Dept. Stores Ltd 1992 SCC p 247

F: Wise (owned by 3 brothers) purchased Peoples from Marks&S in a leveraged buyout but had trouble merging inventory. Deal was struck such that Wise would purchase from international suppliers and People's domestically and they would trade. Both went bankrupt, and Peoples' trustee filed against Wise brothers claiming they favoured the interest of Wise Stores over Peoples to the detriment of Peoples creditors
I: whether directors owe a fiduciary duty to the CO's creditors comparable to the statutory duty owed to the CO.
R: because shareholders and creditors transfer their money to the care of directors, they owe a statutory fiduciary duty to the CO to manage its assets and make reasonable business decisions to the CO's advantage
A: the interests of the shareholders are not necessarily consistent with the interests of the CO. particularly as it nears insolvency. In general, directors legitimately consider interests of Gov't, enviro, employees, creditors, shareholders, consumers. In this case there was no evidence of a breach of fiduciary duty to the corp, and the shareholders have oppression remedy available to them
C: there is a duty of care but not a fiduciary or statutory duty to creditors or shareholders.

Re: BCE Inc (2008) SCC p 252

F: leveraged buyout involving adding significant debt to Bell Canada, a subsidiary of BCE. Bell's debenture-holders sought relief under oppression remedy on basis that their debentures would decline in value by 20%
I: is this arrangement fair, or is it oppressive such that the court should withhold approval?
R: Directors owe a fiduciary duty to the CO. and a duty of care to the shareholders.
A: Fair treatment can be reasonably expected by shareholders and is a component of the fiduciary duty. Directors evaluation of the "best interests" of the corporation may negatively impact shareholders in the short term but not "in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders." the question is whether "in all the circumstances, the directors acted in the best interests of the CO, having regard to all relevant considerations, including but not confined to, the need to treat affected stakeholders in a fair manner…" IN this case there is no evidence the increase to Bell's debt could have been avoided
C: debenture holders failed to establish oppression.

- confirming *Peoples*: directors duties are owned to the CO and only meed to "take into account" other parties The fiduciary duty is "broad, conceptual" not confined to short term profit-looks to the long term.
- p 255 conflicts may arise - falls to the directors to resolve in the best interests of the CO: viewed as a good corporate citizen. But it is unclear what this means

4. The Audit Committee

BCA, ss. 223-226

Division 5 — Audit Committee
s 223 *Application*
s 224 *Appointment and procedures of audit committee*
s 225 *Duties of audit committee*
s 226 *Provision of financial statements to audit committee*

5. Sale of the Undertaking

- Gives shareholders VETO over directors, but still couldn't make directors do something on their own.
- ref. back to Automatic Self Cleaning for limited powers of shareholders

BCA, s. 301

Power to dispose of undertaking
301 (1) A company must not sell, lease or otherwise dispose of all or substantially all of its undertaking unless
(a) it does so in the ordinary course of its business, or
(b) it has been authorized to do so by a special resolution.

DUTIES OF DIRECTORS AND OFFICERS

BCA ss. 120-22, 124-8, 130-1, 134-8, 140-6

Division 1 — Directors
s 120 *Number of directors*
s 121 *First directors*
s 122 *Succeeding directors*
s 124 *Persons disqualified as directors*
s 125 *Share qualification*
s 126 *Register of directors*
s 127 *Companies to file notices as to directors*
s 128 *When directors cease to hold office*
s 130 *Memorandum or articles may apply to vacancies among directors*
s 131 *Vacancies among directors*
s 134 *Loss of quorum*
s 135 *If no directors in office*

Division 2 — Powers and Duties of Directors, Officers, Attorneys, Representatives and Agents
s 136 *Powers and functions of directors*
s 137 *Powers of directors may be transferred*
s 138 *Application of this Act to persons performing functions of a director*
s 140 *Proceedings of directors*
s 141 *Officers*

Duties of directors and officers
142 see below under FIDUCIARY DUTY

TWO MAIN PROVISIONS:
- 142 (1) (a) is the fiduciary duty owed to the corporation
- 142 (1) (b) is the duty of care
- not always easy to square CL with statutory duties
- non-derogable by k or articles, etc.

Validity of acts of directors and officers

143 An act of a director or officer is not invalid merely because of an irregularity in the election or appointment or a defect in the qualification of that director or officer.

Persons may rely on authority of companies and their directors, officers and agents

146 (1) Subject to subsection (2), a company, a guarantor of an obligation of a company or a person claiming through a company may not assert against a person dealing with the company, or dealing with any person who has acquired rights from the company, that

(a) the company's memorandum or notice of articles, as the case may be, or articles have not been complied with,

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

(c) a person held out by the company as a director, officer or agent

(i) is not, in fact, a director, officer or agent of the company, as the case may be, or

(ii) has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent,

(d) a record issued by any director, officer or agent of the company with actual or usual authority to issue the record is not valid or genuine, or

(e) a record kept by or for the company under section 42 is not accurate or complete.

(2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.

agency principle: assumption that principle is bound because of actual, usual and ostensible authority

- 146 (1) (c) (i) is USUAL authority and
- 146 (1) c) (ii) is OSTENSIBLE authority

3rd parties: changes CL such that they cannot get out of ktual liability by claiming that a director had no authority

- 143 = good faith and no notice and not required to investigate
- 146 = "indoor management rule

1. Care and Skill

a. Common Law

Re City Equitable Fire Insurance Co. Ltd. 1925 p 269

F: once-profitable insurance Co. ordered to wind down: huge deficit of £1.2 mill when there were lg trading profits: managing director had been investing in depreciating securities and diverting funds into another Co. Jailed for fraud and liquidator brought action against directors and auditors
I: can the directors be found liable for not stopping him?
R: directors stand in a trust-like position and there is some duty of care owed
A: **businesses must be run with an ordinary degree of prudence and degree of skill that may reasonably be expected from someone with his knowledge/experience - not liable for mere errors of judgement. - not requiring continual attendance/attention to the CO - not required to test the accuracy or completeness of info given by managers.**
C: there was some negligence but short of wilful misconduct, no liability.

b. Statutory Reform

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

- statutory reform: 142 (1) (b) of BCCA limits scope of this broad defence, requires subj/obj duty of care (see above for statute)

- *director's liability*

154 (1) Subject to section 157, directors of a company who vote for or consent to a resolution that authorizes the company to do any of the following are **jointly and severally liable to restore to the company** any amount paid or distributed as a result and not otherwise recovered by the company:

(a) to do an act contrary to section 33 (1) as a result of which the company has paid compensation to any person;
(b) to pay a commission or allow a discount contrary to section 67;
(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) to make a payment or give an indemnity contrary to section 163.

(2) Subject to subsection (4) of this section and section 157, directors of a company who vote for or consent to a resolution that authorizes the issue of a share in contravention of section 63 (2) (b) or 64 **are jointly and severally liable to compensate the company**, or any shareholder or beneficial owner of shares of the c ompany, for any losses, damages and costs sustained or incurred as a result by the company, the shareholder or the beneficial owner, as the case may be.

(3) The liability imposed by subsections (1) and (2) of this section is i**n addition to and not in derogation of any liability** imposed on a director by this Act or any other enactment or by any rule of law or equity.

(4) ...

(5) For the purposes of this section, a director of a company who is **present at a meeting of the directors or of a committee of directors is deemed to have consented to a resolution** referred to in subsection (1) or (2) of this section that is passed at the meeting **unless that director's dissent**

(a) is recorded in the minutes of the meeting,
(b) is put in writing by the director and is provided to the secretary of the meeting before the end of the meeting, or
(c) is, promptly after the end of the meeting, put in writing and delivered to the delivery address of, or mailed by registered mail to the mailing address of, the company's registered office.

(6) A director who votes in favour of a resolution referred to in subsection (1) or (2) is not entitled to dissent under subsection (5).

(7) ...

(8) ...

Limitations on liability

157 (1) A director of a company is **not liable** under section 154 and **has complied with his or her duties under section 142 (1)** if the director **relied, in good faith, on**

(a) financial statements of the company represented to the director by an officer of the company or in a written report of the auditor of the company to fairly reflect the financial position of the company,
(b) a **written report of a lawyer, accountant, engineer, appraiser or other person** whose profession lends credibility to a statement made by that person,
(c) a **statement of fact represented to the director by an office**r of the company to be correct, or
(d) a**ny record, information or representation that the court considers provides reasonable grounds** for the actions of the director, whether or not

(i) the record was forged, fraudulently made or inaccurate, or
(ii) the information or representation was fraudulently made or inaccurate.

(2) A director of a company is not liable under section 154 if the director did not know and could not reasonably have known that the act done by the director or authorized by the resolution voted for or consented to by the director was contrary to this Act.

Summary

- as director / officer, statutorily required to exercise some skill in carrying out your duties.
  - But that is not all you need. (140 1 b)
  - you have a fiduciary duty (140 1 a)
- your actions can be challenged directly or indirectly
  - first thing to establish that YOU have taken the action. If you are a director, you normally acted by taking part in a meeting. If the director is not there then it is unlikely they are in breach of care or fiduciary
    - but it is possible that if you've missed too many meetings or missed an important one for no reason, that might be a breach of fiduciary obligation.
  - joint and severally liable if involved, any aggrieved party can make you personally responsible totally for any and all losses sustained under 154
- how to avoid? Use s 157! If you are trying to avoid joint and several liability under 154
  - "I didn't know!" - might get you off the hook but you might still be in breach of 142
  - THere is a way to escape liability for both, 157 (1) "rely on statements made by other parties."
    - hire people who are required to provide all kinds of representations that purport to be true, then you are not responsible!
  - 154/157 applies only to DIRECTORS. 142 is for both directors and officers. No way to make officers liable personally as in 154
  - officers have fiduciary etc. but no exculpatory provisions.

Re Peoples Department Stores Ltd. (QC CA) p 284-290

F: D Clement, Wise's VP of admin/fin came up with purchasing scheme, everyone agreed to it - some suppliers had reservations and though tit was a way to put Peoples in debt to benefit Wise - which it did. Wen they both went bankrupt, Wise owed peoples over 4 mill.
I: was the duty of care breached?
R: objective/subjective standard of care.
A: Initial decision to adopt buying system met the new standard of care.

c. The Business Judgment Rule

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc 2002 ON SCp 322-324

F: Huge payout if new exec let go - if it were to happen and the golden parachute had to happen it would bankrupt the CO. Directors argued they relied on a report, which was generated by an expert based on little data, lack of awareness of the contention etc.
I: care
R: Normally, business judgement rule applies.
A: ct says while normally ct will defer to business judgement of directors and officers, who can rest assured that reports are ok, in some cases it is incompetence to do so. p 323: "board is entitled/encouraged to retain advisors… but must exercise reasonable diligence. "BR rule protects those that might second guess… make reasonable not perfect decision. However… decisions actually evidence their judgement… subject to examination o fct. Cannot apply when uninformed recommendation made. Although it was not unreasonable for the Board to assume the 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.
C: directors were wrong: JUST BECAUSE YOU RELY ON AN EXPERT'S OPINION DOESN'T GET YOU OFF THE HOOK, it has to have been reasonable judgement to rely on the opinion.

Pente Investment Management Ltd. v. Schneider Corp p 334

F: Maple Leaf made a takeover bid for Schneider, which directors of Schneider thwarted by entering into a lock-up arrangement with another bidder (with the express approval of the company' s controlling shareholders).
I: whether the burden of proof is on the directors to justify their actions as being in the best interests of the company or on the shareholders chal- lenging the actions of the company
R: Business Judgement Rule
A: BOP may not always rest on the same party when a change of control transaction is challenged: question is whether the directors of the target CO. successfully took steps to avoid a conflict of interest. If so, no rationale for shifting the burden of proof to the directors. If board of directors acted on advice of committee composed of persons having no conflict of interest, which has acted independently, in good faith, and made informed recommendation as to the best available transaction for the shareholders in the circumstances, the business judgment rule applies
C: The burden of proof is not an issue in such circumstances.

- Fiduciary duty came out of trust law: may not actually be trustees but very much in the position of trustees, originally conceptualized as for shareholders, now seen as being only to "the company" but other stakeholders must be kept in mind.
- Trustee has 3 duties relevant to CO

1. loyalty: not to have divided loyalty - not to split between CO and self or CO and other (CO or individual) CONFLICT OF INTEREST
2. information: duty to actively find and relate information that beneficiary (CO) needs to know
3. disgorgement/accounting: that beneficiary GETS ALL THE BENEFITs and you don't keep them for yourself.

- now not seen as trustee so much - plays out in 4 different contexts

1. SELF-DEALING contracting with beneficiary
2. CORPORATE OPPORTUNITIES (chances CO had to make money that you made instead)
3. COMPETITION - actual conflict of interest (with another CO. for eg.)
4. HOSTILE TAKEOVER BID

- statute silent on some of these, lots on 1 and NOTHING on being a director for a competitor (3) Look at the CL then see if the statute says anything else.

2. Fiduciary Duties

BCA, s. 142

Duties of directors and officers

142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

(a) act honestly and in good faith with a view to the best interests of the company,
(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,
(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.

(2) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a company.

(3) No provision in a contract, the memorandum or the articles relieves a director or officer from

(a) the duty to act in accordance with this Act and the regulations, or
(b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.

- 142 1 (a) if other statutes provides SPECIFIC RULES they won't necessarily oust this GENERAL rule.
- rules in **ss 147-152** deal ONLY WITH THIS GENERALIZED ASPECT OF THE FIDUCIARY OBLIGATION Four usual contexts as above: **s 153** MIGHT apply to all
- STRICTEST WITH RESPECT TO THE TAKEOVER (Hardest to show you've had the appropriate level of care.)

- LOWEST with respect to CONFLICT OF INTEREST.
- all are manifestations of fiduciary so if you need to challenge, re-characterize from conflict to 1 or 2 eg

a. Introduction

b. Self-Dealing (Contracting with the Corporation)

i. The Common Law

The provisions that statute has are concerns that the law has already set out/addressed
eg. in fiduciary:

- disclosure
- disgorgement / duty to account
- duty not to have conflict of interest.

all represented/recreated in the statute - just sets out how

ii. Legislation

BCA, ss. 147 to 153

ORDER OF PROVISIONS:

s 142: The big picture is (inherent to fiduciary duty is the need to disclose).
s 153: Explains when you have to disclose. One of the main situations where you have to disclose would be when Dir or Officer has a k with CO. within this:
s 152: says there is no need for disclosure except as within **147-152** -
but none of these override 142. PROBABLY but not NECESSARILY if you conform with 147-152 you will not have breached your fiduciary duties.

Disclosable interests

147 (1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if

(a) the contract or transaction is material to the company,

(b) the company has entered, or proposes to enter, into the contract or transaction, and

(c) either of the following applies to the director or senior officer:

(i) the director or senior officer has a material interest in the contract or transaction;

(ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.

(2) For the purposes of subsection (1) and this Division, a director or senior officer of a company **does not hold a disclosable interest** in a contract or transaction if

(a) the situation that would otherwise constitute a disclosable interest under subsection (1) arose before the coming into force of this Act or, if the company was recognized under this Act, before that recognition, and was disclosed and approved under, or was not required to be disclosed under, the legislation that

(i) applied to the corporation on or after the date on which the situation arose, and

(ii) is comparable in scope and intent to the provisions of this Division,

(b) both the company and the other party to the contract or transaction are wholly owned subsidiaries of the same corporation,

(c) the company is a wholly owned subsidiary of the other party to the contract or transaction,

(d) the other party to the contract or transaction is a wholly owned subsidiary of the company, or

(e) the director or senior officer is the sole shareholder of the company or of a corporation of which the company is a wholly owned subsidiary.

(3) In subsection (2), "other party" means a person of which the director or senior officer is a director or senior officer or in which the director or senior officer has a material interest.

(4) For the purposes of subsection (1) and this Division, a director or senior officer of a company **does not hold a disclosable interest in a contract or transaction merely because** a) **the contract or transaction is an arrangement by way of security** granted by the company for money loaned to, or obligations undertaken by, the director or senior officer, or a person in whom the director or senior officer has a material interest, for the benefit of the company or an affiliate of the company,

(b) the contract or transaction relates to an **indemnity or insurance** under Division 5,

(c) the contract or transaction relates to the **remuneration of the director or senior officer in that person's capacity as director**, officer, employee or agent of the company or of an affiliate of the company,

(d) the contract or transaction relates to a loan to the company, and the director or senior officer, or a person in whom the director or senior officer has a material interest, is or is to be a guarantor of some or all of the loan, or

(e) the contract or transaction has been or will be made with or for the benefit of a corporation that is affiliated with the company and the director or senior officer is also a director or senior officer of that corporation or an affiliate of that corporation.

- so to be disclosable, needs to BE in (1) and NOT BE in (4)

148 (1) Subject to subsection (2) and unless the court orders otherwise under section 150 (1) (a), a director or senior officer of a company is liable to account to the company for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer holds a disclosable interest.

- So this says if you have a DI you have to disgorge. Unless you fall under…

(2) A director or senior officer of a company is not liable to account for and may retain the profit referred to in subsection (1) of this section in any of the following circumstances:

(a) the disclosable interest was disclosed before the coming into force of this Act under the former Companies Act that was in force at the time of the disclosure, and, after that disclosure, the contract or transaction is approved in accordance with section 149 of this Act, other than section 149 (3);

(b) the contract or transaction is approved by the directors in accordance with section 149, other than section 149 (3), after the nature and extent of the disclosable interest has been disclosed to the directors;

(c) the contract or transaction is approved by a special resolution in accordance with section 149, after the nature and extent of the disclosable interest has been disclosed to the shareholders entitled to vote on that resolution;

(d) whether or not the contract or transaction is approved in accordance with section 149,

(i) the company entered into the contract or transaction before the director or senior officer became a director or senior officer of the company,

(ii) the disclosable interest is disclosed to the directors or the shareholders, and

(iii) the director or senior officer **does not participate in, and, in the case of a director, does not vote as a director on, any decision or resolution touching on the contract or transaction.**

(3) The disclosure referred to in subsection (2) (b), (c) or (d) of this section must be evidenced in a consent resolution, the minutes of a meeting or any other record deposited in the company's records office.

- SO THIS INFO WILL GO IN THE MINUTES AND BE SEEN BY SHAREHOLDERS
- Normally it's b and c you deal with and the process you use for that is in 149:

Approval of contracts and transactions

149 (1) A contract or transaction in respect of which disclosure has been made in accordance with section 148 may be approved by the directors or by a special resolution.

(2) Subject to subsection (3), a director who has a disclosable interest in a contract or transaction is not entitled to vote on any directors' resolution referred to in subsection (1) to approve that contract or transaction.

- Unless, weirdly:

(3) If all of the directors have a disclosable interest in a contract or transaction, any or all of those directors may vote on a directors' resolution to approve the contract or transaction.

- And also,

(4) Unless the memorandum or articles provide otherwise, a director who has a disclosable interest in a contract or transaction and who is present at the meeting of directors at which the contract or transaction is considered for approval may be counted in the quorum at the meeting whether or not the director votes on any or all of the resolutions considered at the meeting.

- Which is something you might want to put in the articles that you DON'T want.

- No detail on what exactly has to be disclosed, is a summary enough? No guidance, but perhaps the more the better, certainly everything 'material'. Some guidance back to 148 (4)

> **148 (4)** A general statement in writing provided to a company by a director or senior officer of the company is a sufficient disclosure of a disclosable interest for the purpose of this Division in relation to any contract or transaction that the company has entered into or proposes to enter into with a person if the statement declares that the director or senior officer is a director or senior officer of, or has a material interest in, the person with whom the company has entered, or proposes to enter, into the contract or transaction.

- COURT MIGHT STILL FIND YOU WERE IN BREACH OF FIDUCIARY DUTY UNDER 142 EVEN IF YOU COMPLY WITH ALL OF THESE. CONVERSELY UNDER S 150, EVEN I FYOU FAIL TO COMPLY, COURT MIGHT STILL FIND THE K/TRANSACTION "FAIR AND REASONABLE":

> **150 (1)** On an application by a company or by a director, senior officer, shareholder or beneficial owner of shares of the company, the court may, if it determines that a contract or transaction in which a director or senior officer has a disclosable interest was fair and reasonable to the company,
>
> (a) order that the director or senior officer is not liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction, and
>
> (b) make any other order that the court considers appropriate.

- BUT ct could prevent the k from being entered into:

> **150 (2)** Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148 (2), the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:
>
> (a) enjoin the company from entering into the proposed contract or transaction;
>
> (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
>
> (c) make any other order that the court considers appropriate.

- What happens to the k itself? It isn't rendered invalid automatically but isn't necessarily valid

Validity of contracts and transactions

151 A contract or transaction with a company is not invalid merely because

(a) a director or senior officer of the company has an interest, direct or indirect, in the contract or transaction,

(b) a director or senior officer of the company has not disclosed an interest he or she has in the contract or transaction, or

(c) the directors or shareholders of the company have not approved the contract or transaction in which a director or senior officer of the company has an interest.

Disclosure of conflict of office or property

153 (1) If a director or senior officer of a company holds any office or possesses any property, right or interest that could result, directly or indirectly, in the creation of a duty or interest that materially conflicts with that individual's duty or interest as a director or senior officer of the company, the director or senior officer must disclose, in accordance with this section, the nature and extent of the conflict.

(2) The disclosure required from a director or senior officer under subsection (1)

(a) must be made to the directors promptly

(i) after that individual becomes a director or senior officer of the company, or

(ii) if that individual is already a director or senior officer of the company, after that individual begins to hold the office or possess the property, right or interest for which disclosure is required, and

(b) must be evidenced in one of the ways referred to in section 148.3

This is a VERY BROAD swath and takes up a lot of time in directors meetings disclosing various interests. Again, more info the better as far as disclosure. THIS IS AN IMPORTANT PROVISION FOR LAWYERS TO BE AWARE OF.

c. Corporate Opportunities

i. Introduction

- This is when someone closely connected to the CO. takes a business opportunity instead (personally or thru another CO.) When is it allowed? When isn't it?
- Cases aren't really directly comparable, so hard to say whether they are "better" or "worse" but there is a sense that the law/standard has changed. AMBIGUOUS. At some point there'll be a detailed statutory code, no doubt.

Regal (Hastings) Ltd. v. Gulliver [1942] all ER HL p 358-366

F: wants to acquire cinemas, landlord happy to do so but not with capital of CO: unpaid-up shares. so the CO. is poorly capitalized, because of unissued or unpaid for shares. Landlord wants CO to show certain amount of $ in hand. So directors agreed to themselves buy a certain number of shares in subsidiary CO created to facilitate this transaction. BUT NOT ALL OF THEM DO: Gulliver gets them for other ppl/CO.s and Garton the lawyer gets some too. Shares increase in value! Changed hands and suit brought against these directors and lawyer for the profits accrued
I: was this a breach of their fiduciary duties?
R: a fiduciary cannot profit by using their fiduciary position
A: no need for bad faith, fraud, or for CO. to be able to take advantage of the opportunity. Didn't matter per se that there had been a windfall, and they had to account except for Gulliver (because of 3rd party - he didn't personally benefit) and Garton who was not a director and therefore had no fiduciary duty to the CO. so didn't fall under the same considerations.
C: high water mark of "you can't take any opportunity even if the CO couldn't take it itself.

Peso Silver Mines v. Cropper 1966 SCC p 366-373

F: directors bought Dickson claims, because CO. couldn't afford to. Directors formed new CO. Cross Bow and took them up and did well. Peso taken over by Charter Oil who don't like that CB has the claim and sued to have interest in Dickson claims handed over to Peso. 2 directors handed over but Cropper refuses.
I: was this a breach of fiduciary obligation not to take up CO opportunity?

R:
A: Ct says not done in bad faith, which is maybe too ready. If there had been a finding of bad faith, maybe different result (In CDA burden of proof is on pl: who would have to show the bad faith.)
C:

Canadian Aero Services Ltd. v O'Malley (Canaero) 1973 SCCp 373

F: O'Malley and Z supposed to set up bid for mapping in Guyana, they resign, start their own CO and compete (and win) bid.
I: breach of fid duty not to take up business opportunity?
R:
A: used information acquired in course of direction of CA. Not necessarily relevant: bona fides v male fides, Laskin sets out last word: 377-8: among them are:

1. position of office held
2. its ripeness and specificness
3. director or managerial officers relation to it
4. amount of knowledge possessed
5. circumstances under which it was obtained
6. whether it was special or private
7. factor of time - where breach occurs after termination of the rel'p with the CO
8. whether terminated by retirement, resignation or discharge.

C: doesn't matter on k basis of deprivation but on restitutionary basis of what other party gained!

ii. U.S. Cases

d. Competition

- aka CONFLICT OF INTEREST. Most basic but rarely litigated
- CL doesn't ask much of you, depends what you've done while wearing both hats

BCA s 153

- **s 153** (SEE ABOVE) best suited to this basic concern: where you have 2 hats, **disclose** it.

London and Mashonaland Expl. Co. Ltd. v. New Mashonaland p 385-387

- **F/A:** ct says they won't issue an injunction against director becoming director of 2nd CO because in and of itself nothing wrong with it.
- **C:** Conflict of interest may ARISE but isn't held to be inherently problematic. To be of MUCH concern it has to fit into other scenario

Cranewood Financial Corp. v Norisawa 2001 BCSC p 391

- moves into business opportunity breach

1. Was there either an actual or potential conflict of interest by virtue of the director or officer taking the opportunity?
2. Were the opportunities acquired by the director or officer acquired by virtue of his or her position as such?

If so, liability attaches

Notes

e. To Whom the Fiduciary Duty is Owed

Re: BCE Inc. SCC p 395

- owed to the COMPANY and not the shareholders. Others may be able to claim in derivative or personal/oppression remedies
- On the facts of the case, the court ruled in favour of BCE, on the basis that the debenture holders had failed to establish a reasonable expectation that the directors would protect either the investment grade rating or the market value of the debentures

f. Hostile Take-Overs and Defensive Tactics by Target Management

i. Introduction

- Existing directors in possible conflict of interest because if they exercise their power/ votes can raise fiduciary concerns - ie. acting in own interest (personal - keeping job) not CO's. But not much statutorily aside from 142 1 (a) and (b).
- More relevant in securities law - things you might be doing to (unethically/illegally) prevent takeover . But there is case law on the books.

ii. The Common Law

Teck Corp. v. Millar 1972 BCSC p 425

F: directors might be acting in interests of CO in fending off hostile takeover, Miller = director of Afton which was to be taken over. Miller thought Canex was better, and was favouring it. Teck becomes majority shareholder and directs director not to accept Canex transaction but they go ahead with it.
I: Is it a breach of fid. for a director to act against a takeover by a maj shareholder
R: Impropriety depends upon proof that the directors were actuated by a collateral purpose
A: no evidence of a 'crass desire merely to retain their directorships…' Even though Teck is a majority shareholder and Millar is ating against them, it can still be in the best interests of the CO. per BCE. Directors ought to able to consider the takeover and work against it. "If they decide on reasonable grounds a takeover will cause substantial damage to to CO's interests, they are entitled to use their powers to protect the CO.
C: the directors must act in good faith and there must be reasonable grounds for that belief which must be substantiated.

Pente Investment Mgment. Ltd. v. Schneider Corp 1998 **ONCA** p 450

F: Schneider family wanted to avoid takeover by Maple Leaf and preferred Smithfield - because they controlled voting they were able to do so. Special committee set up to make recommendation about how S should go about managing the takeover. Maple Leaf's and Smithfields' offers were effectively the same, except for tax advantages to the S family.
I: did the directors and officers avoid a conflict of interest
R: The mandate of the directors is to manage the company according to their best judgment; that judgment must be an informed judgment; it must have a reasonable basis. If there are no reasonable grounds to support an assertion by the directors that they have acted in the best interests of the company, a court will be justified in finding that the directors acted for an improper purpose:
A: Special committee's information came from Dodds (CEO) who was closely connected to the S family and therefore not really arm's length, but gathered lots if info (needed a whole special room) that was publicly available. But not done through an auction - so that bids are tendered in a transparent fashion. Maple Leaf did not meet the Family's expressed concern about the effect of a change of control on the continuity of employment for S's employees, the welfare of suppliers, and the relationship with its customers, whereas Smithfield did
C: nothing improper - no need to have an auction. If you do have a special committee insiders can still be allowed.

3. Relief From Liability

a. Common Law

North-West Transportation v. Beatty (1877) (ON) JCPC 485

F: Beatty director caused CO to his old steamship - conflict of interest - he organized a shareholders meeting and had shareholders approve it - held lg # shares and voted himself
I: is he relieved of liability for the breach of fiduciary
R: the resolution of a majority of the shareholders is binding upon the minority, and the CO; every shareholder has a right to vote despite a personal interest in the subject-matter. On the other hand, a director is precluded from dealing, on behalf of the CO, with himself, and from entering into engagements in which he has a conflict of interest with the those whom he is bound by fiduciary duty to protect
A: The shareholders can ratify things that would otherwise be ktual breach. Although Beatty's votes made the majority, there was nothing fraudulent and they needed a ship and the price was ok so...
C: the defendant was acting within his rights in voting as he did

- statute takes a different view: BCA influenced by CL but also recognition that SH are not the CO. Not determinative that shareholders can ratify.
- following overrules NW Transport: SH ratification no longer determinative:

BCA s. 233 (6)

233 (6) No application made or legal proceeding prosecuted or defended under section 232 or this section **may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.**

b. Statute

- Group of provisions controlling circumstances wherein directors improper actions can or can't be ratified.

BCA ss 142 (3), 157, 234

s 142 (3) No provision in a contract, the memorandum or the articles relieves a director or officer from
(a) the duty to act in accordance with this Act and the regulations, or
(b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.

Division 4 — Liability of Directors ss. 154-158

s. 157 *Limitations on liability*

- One context is where CO. is proceeding against director where shareholders have ratified. Other context is where the CO is not proceeding against directors and a shareholder goes to ct in a derivative action.
- BUT WHAT HAPPENS IF THERE'S NOTHING IN THE K OR THE ARTICLES BUT THE CO. IS PROPOSING TO TAKE AN ACTION AGAINST THE DIRECTORS? before that can occur some shareholder has held a mtg and ratified the directors breach. not covered by 142 or 233

Relief in legal proceedings

234 If, in a legal proceeding against a director, officer, receiver, receiver manager or liquidator of a company, the court finds that that person is or may be liable in respect of negligence, default, breach of duty or breach of trust, the court must take into consideration all of the circumstances of the case, including those circumstances connected with the person's election or appointment, and may relieve the person, either wholly or partly, from liability, on the terms the court considers necessary, if it appears to the court that, despite the finding of liability, the person has acted honestly and reasonably and ought fairly to be excused.

- not much used in practise, but can be k'd out of so ct has this discretion - if found LIABLE may bnot have to pay all costs or even penalty because of:

c. Indemnification and Insurance

BCA ss 159-165

s 159 definitions

"eligible party", in relation to a company, means an individual who

(a) is or was a director or officer of the company,

(b) is or was a director or officer of another corporation

(i) at a time when the corporation is or was an affiliate of the company, or

(ii) at the request of the company, or

(c) at the request of the company, is or was, or holds or held a position equivalent to that of, a director or officer of a partnership, trust, joint venture or other unincorporated entity,

and includes, except in the definition of "eligible proceeding" and except in sections 163 (1) (c) and (d) and 165, the heirs and personal or other legal representatives of that individual;

"eligible penalty" means a judgment, penalty or fine awarded or imposed in, or an amount paid in settlement of, an eligible proceeding;

"eligible proceeding" means a proceeding in which an eligible party or any of the heirs and personal or other legal representatives of the eligible party, by reason of the eligible party being or having been a director or officer of, or holding or having held a position equivalent to that of a director or officer of, the company or an associated corporation

(a) is or may be joined as a party, or

(b) is or may be liable for or in respect of a judgment, penalty or fine in, or expenses related to, the proceeding;

s 160 *Indemnification and payment permitted*
s 161 *Mandatory payment of expenses*

s 163 *Indemnification prohibited*

(1) A company must not indemnify an eligible party under section 160 (a) or pay the expenses of an eligible party under section 160 (b), 161 or 162 if any of the following circumstances apply:

(a) if the indemnity or payment is made under an earlier agreement to indemnify or pay expenses and, at the time that the agreement to indemnify or pay expenses was made, the company was prohibited from giving the indemnity or paying the expenses by its **memorandum or articles**;

(b) if the indemnity or payment is made otherwise than under an earlier agreement to indemnify or pay expenses and, at the time that the indemnity or payment is made, the company is prohibited from giving the indemnity or paying the expenses by its **memorandum or articles**;

(c) if, in relation to the subject matter of the eligible proceeding, the eligible party did not act honestly and in good faith with a view to the best interests of the company or the associated corporation, as the case may be;

(d) in the case of an eligible proceeding other than a civil proceeding, if the eligible party did not have reasonable grounds for believing that the eligible party's conduct in respect of which the proceeding was brought was lawful.

(2) If an eligible proceeding is brought against an eligible party by or on behalf of the company or by or on behalf of an associated corporation, the company must not do either of the following:

(a) indemnify the eligible party under section 160 (a) in respect of the proceeding;

(b) pay the expenses of the eligible party under section 160 (b), 161 or 162 in respect of the proceeding.

- (a), (b) are if articles disallow or regulate
- (c) curious: HOW THE CO. IS TO DECIDE rather begs the question
- (d) Criminal? Puts CO. in same awkward position as (c): judging in advance the outcome of the proceeding?

s 164 *Court ordered indemnification*

- ct could override articles (e) make any other order - could override **s 163 (a)** and **(b)** above

Insurance

165 A company may purchase and maintain insurance for the benefit of an eligible party or the heirs and personal or other legal representatives of the eligible party against any liability that may be incurred by reason of the eligible party being or having been a director or officer of, or holding or having held a position equivalent to that of a director or officer of, the company or an associated corporation.

- underscores possibility CO might have insurance, is subject to articles

SOURCE OF ALL THIS RESPONSIBILITY:

Powers and functions of directors

136 (1) The directors of a company must, subject to this Act, the regulations and the memorandum and articles of the company, manage or supervise the management of the business and affairs of the company.
(2) Without limiting section 146, a limitation or restriction on the powers or functions of the directors is not effective against a person who does not have knowledge of the limitation or restriction.

HOWEVER THIS AUTHORITY CAN BE MOVED:

s 137 *Powers of directors may be transferred*

137 (1) Subject to subsection (1.1) but despite any other provision of this Act, the articles of a company may transfer, in whole or in part, the powers of the directors to manage or supervise the management of the business and affairs of the company to one or more other persons.
(2) If the whole or any part of the powers of the directors is transferred in the manner contemplated by subsection (1),

(a) the persons to whom those powers are transferred have all the rights, powers, duties and liabilities of the directors of the company, whether arising under this Act or otherwise, in relation to and to the extent of the transfer, including any defences available to the directors, and

(b) the directors are relieved of their rights, powers, duties and liabilities to the same extent.

- = total transfer of rights and responsibilities. This provision is PECULIAR TO BC. In other jurisdictions there is unanimous SH decisionmaking that could/must be used for this.

(3) If and to the extent that the articles transfer to a person a right, power, duty or liability that is, under this Act, given to or imposed on a director or directors, the reference in this Act or the regulations to a director or directors in relation to that right, power, duty or liability is deemed to be a reference to the person.

when can this happen? This is momentous and rare:

(1.1) A provision of the articles transferring powers of the directors to manage or supervise the management of the business and affairs of the company is effective

(a) if the provision is **included in the articles** at the time of the company's recognition or if the company resolved, by special resolution, to add that provision to the articles, and
(b) if the provision **clearly indicates, by express reference to this section or otherwise**, the intention that the powers be transferred to the proposed transferee.

- provision in articles must be clear and express

SHAREHOLDER'S RIGHTS

BCA ss 11, 52-54

Notice of articles

11 Unless this Act provides otherwise, the notice of articles of a company must

(g) **describe the authorized share structure** of the company in accordance with section 53, and
(h) set out, in respect of each class and series of shares, whether there are **special rights or restrictions attached** to the shares of that class or series of shares and, if there are or were special rights or restrictions, set out the date of each resolution altering those special rights or restrictions that was passed on or after, and the date of each court order altering those special rights or restrictions that was made on or after,

(i) if the company is a pre-existing company, the day on which this Act comes into force, or
(ii) if the company is not a pre-existing company, the date on which the company is recognized under this Act.

s 52 *Kinds, classes and series of shares*
s 53 *Description of authorized share structure*
s 54 *Change in authorized share structure*

1. Introduction

setup of CO crucial because SH may not be able to do much LATER ON once Dir and Mgrs in charge

- CAN change things later, it is DIFFICULT because the people you put in place to run the CO DO RUN THE CO.
  - for SH the control/structure one of the main areas of concern and why you want detailed instructions is to do with management and control
  - 2 groups: owners and managers. We've been looking at the managers: those who run it.
  material coming up, SH rights and remedies allowed for changes
  - NOWADAYS (post-*Peoples* and *BCE*) managers may be less answerable to SH in many ways - allowed to ignore SH to greater degree.

2. Voting Rights

Division 6 — Meetings of Shareholders

BCA SS 166-186

Voting

173 (1) Subject to sections 69 (2), 82 (6) and 177 and subsection (9) (a) of this section and unless the memorandum or articles provide otherwise, a shareholder has one vote in respect of each share held by that shareholder and is entitled to vote in person or by proxy.

- one vote per SHARE not per SH

(2) Unless the memorandum or articles provide otherwise, voting at a meeting of shareholders must,

(a) if one or more shareholders vote at the meeting in a manner contemplated by section 174 (1), be by poll or be conducted in any other manner that adequately discloses the intentions of the shareholders,
(b) if a poll is demanded by a shareholder or proxy holder entitled to vote at the meeting or is directed by the chair, be by poll, or
(c) in any other case, be by show of hands.

this is important:

(8) Unless otherwise provided under this Act or in the memorandum or articles, any action that must or may be taken or authorized by the shareholders under this Act may be taken or authorized by an ordinary resolution.

- majority rule of Shares, not SH - voting shares only! often there are a small numbers of SH that control voting shares.
- important for SH if they want to be involved, to use veto to prevent things from happening rather than to try and change things afterward.

s 174 *Participation at meetings of shareholders*
- UNLESS articles prohibit, can vote by telephone etc. and not necessarily in person.

Pooling agreements
175 Two or more shareholders may, in a written agreement, agree that when exercising voting rights in relation to the shares held by them, they will vote those shares in accordance with the terms of the agreement.

- allows agreement in advance for how to vote - unlike for political elections which forbid collusion

s 180 *Consent resolutions of shareholders*
- allows for advance voting

s 182
- AGM must be no more than 18 months after formation, once per calendar year and not more than 15 months apart.
- by unanimous vote, (2) allows SH tp defer or consent to everything on agenda
  - different from 180
  - requires writing in BC so Eisenberg scenario might not work here!
  - occurs in context where everyone is happy and there's no dissent

a. Unanimous Shareholders' Resolution

Eisenberg v Bank of Nova Scotia 1965 ON SCC p 593-596

F: appeal from ON CA action by E as trustee in bankruptcy of Ridout Real Estated to recover from bank sums realized from assets which RREL had pledged as security for loan to Ridout bros. GR was director, press and sole beneficial owner of shares in RREL after his brother transferred him all his shares. Brother arranged loan from BNS to pay off guarantee of bonds in default, BNS given 11 promissory notes from Irmac CCL and an assignment of the interest. In fact there was no directors meeting and the secretary had no authority
I: can the trustee gain access to these sums on the grounds that there was no director's meeting nor shareholder ratification, or because the person who made the deal had no authority?
R: inside management rule protects innocent 3rd parties when they deal with someone who misrepresents themselves as an authority.
A: the directors and shareholders were all basically the same person and it is a foregone conclusion that they would have ratified the decision.
C: GR as sole beneficial owner, binds the CO. whatever he does.

b. The Conduct of Meetings

4 CATEGORIES:

1. AGM (mandatory)
   - closely held CO.'s may think they don't need to do this but THEY DO and have minutes etc.!
   - various issues must and any CAN be discussed
   - financial statement
   - s 198 directors must on or before reference date produce and publish financial statements for perusal prior to AGM
   - appointment of auditor under **s 203**
   - COULD ALL BE DONE BY UNANIMOUS RESOLUTION to facilitate as above s 182
2. Special or Extra GM
   - both GMs tend to be called by directors
   - other GM's can be held at any time
   - **s 169** notice required to call meeting
   - location of meeting 166
   - **s 181** rules apply to all meetings of SH's
3. SH requisitioned meeting
   - deal with whatever the subject matter of the requisition
   - s **167** - mtg that gives SH's some power, others must be called by directors who will set the agenda - they might not put certain issues to a vote. Statute facilitates ways the SH's can put things to a vote.
   - OR SH's can be allowed to have issues raised to put to a vote (SH Proposal)
4. Court-Ordered Meeting

Wall v London & Northern Assets Corp 1898 En CA p 599-601

F: L&NAC convened a meeting to approve sale of assets, Wall, minority shareholder, disagreed but vote called and meeting terminated before Wall could speak.
I: can the ct interfere with how a meeting is run and dissenting shareholders are dealt with?
R: provided all are consulted and the majority are acting BF, meeting… for the purpose of negativing after due consideration what they think proper to negative, this is acceptable
A: the chairman supported by a majority can terminated the speeches of those who wish to address the meeting where there is nothing arbitrary or vexatious on the part of the chariman or the majority.
C: sorry Wall, LNAC didn't do anything wrong. Lindley after quoting Eldon "does not mean that a minority bent on talking forever should not be put down but… that the majority must not be tyrannical."

c. Shareholders' Proposals

BCA ss 187-191

Rights and obligations arising from proposal

189 (5) Subject to section 191 (3), the company need not process a proposal in accordance with subsections (1) to (4) of this section if any of the following circumstances applies:
(a) the directors have called an annual general meeting to be held after the date on which the proposal is received by the company and have sent notice of that meeting in accordance with section 169;
(b) the proposal is not valid within the meaning of section 188 (1) or exceeds the maximum length established by section 188 (3);
(c) substantially the same proposal was submitted to shareholders in a notice of meeting, or an information circular or equivalent, relating to a general meeting that was held not more than the prescribed period before the receipt of the proposal, and did not receive the prescribed amount of support at the meeting;
(d) it clearly appears that the proposal **does not relate in a significant way** to the business or affairs of the company;
(e) it **clearly appears** that the **primary purpose** for the proposal is
   (i) securing publicity, or
   (ii) enforcing a personal claim or redressing a personal grievance against the company or any of its directors, officers or security holders;
(f) the proposal has already been substantially implemented;

(g) the proposal, if implemented, would cause the company to commit an offence;
(h) the proposal deals with matters beyond the company's power to implement.

- Lots of wiggle room for litigation in here
- (d) might have to get restrictions lifted/changed in order to get proposal to be considered if it is significantly not related!
- (e) clearly isn't always clear

Varity Corp v Jesuit Fathers of Upper Canada 1999 ON SJC p 630-637

F: Varity Corp didn't want to include a proposal to end their involvement in South Africa in the mailing about their AGM (apartheid)
I: is this an instance of a shareholder submitting a proposal on the basis of a personal claim or grievance or for the promotion of general economic political, racial, religious, social causes?
R: s 131 (5) (b)
A: the purpose is to cause Varity to withdraw in furtherance of the goal of eliminating Apartheid, which although specific to terminating Varity's involvement is a general goal therefore Verity doesn't have to include the proposal.
C: for Varity.

- p 617: "primary purpose is the abolition of apartheid… the fact that there may be a more specific aim… however commendable, the CO cannot be compelled to pay…"
- in BC it would have to be argued more carefully, because the statute is a little bit different.
- Probably argue as (h) "deals with matters beyond the CO.s powers" or (d) does not relate in a significant way"

Refusal to process proposal

191 (1) A company that does not intend to process a proposal in accordance with section 189 (1) to (4) on the basis that subsection (5) of that section applies to the proposal or on the basis that the proposal is one referred to in subsection (4) (b) of that section must, within 21 days after the proposal is received by its registered office, send to the submitter
(a) written notice of the company's decision in relation to the proposal, and
(b) a written explanation as to the company's reasons for its decision, including a specific reference to the provision of section 189 that the company is relying on in refusing to process the proposal and the reasons why the company believes that that provision applies.

d. Requisitioned Meetings

BCA s 167-168

s 167 *Requisitioned Meetings*

No liability

168 No company or person acting on behalf of a company incurs any liability merely because the company or person complies with section 167 (5) (b) or (6).

Airline Industry Revitalization Co. v Air Canada 1999 ON SC p 630

F: Airco wanted to take over and merge air canada and Canadian, bought some shares, called a special SH meeting to try and make changes to the articles to facilitate the takeover. Board rejected the requesision.
I: must the board call a meeting as requested by the Airco requisition?
R: 143 (3) of the CBCA or 143 (4) or 144
A: it was open to Airco to call the meeting, and the Board should have done so - there was a record date fixed but this did not qualify as an exception under 143 (3) a. THe provision allows for the board to refuse a meeting if there's already a meeting planned to discuss the issue. It must mean that the specific resolution is going to be discussed, not just that oh there's going to be a meeting [but we aren't going to address your issue]
C: the court won't make an order under 144, because Airco can call the meeting itself under 167 (8) given that it was a legit requisition and the board didn't call one within 21 days per s 14(4).

e. Removal of Directors

BCA ss 128 (3) and (4) 131 (a)

When directors cease to hold office

128 (3) Subject to subsection (4), a company may remove a director before the expiration of the director's term of office

(a) by a special resolution, or

(b) if the memorandum or articles provide that a director may be removed by a resolution of the shareholders entitled to vote at general meetings passed by less than a special majority or may be removed by some other method, by the resolution or method specified.

(4) If the shareholders holding shares of a class or series of shares of a company have the exclusive right to elect or appoint one or more directors, a director so elected or appointed may only be removed

(a) by a special separate resolution of those shareholders, or

(b) if the memorandum or articles provide that such a director may be removed by a separate resolution of those shareholders passed by a majority of votes that is less than the majority of votes required to pass a special separate resolution or may be removed by some other method, by the resolution or method specified.

Vacancies among directors

131 Subject to sections 132 and 133, a vacancy that occurs among the directors

(a) may, if the vacancy occurs as a result of the removal of a director under section 128 (3), be filled

(i) by the shareholders at the shareholders' meeting, if any, at which the director is removed, or

(ii) if not filled in the manner contemplated by subparagraph (i) of this paragraph, by the shareholders or by the remaining directors, or

(b) may, in the case of a casual vacancy, be filled by the remaining directors.

SHAREHOLDERS REMEDIES:

1. Introduction

- personal action
  - individual SH(s) with grievance particular to them
  - remedy granted to individual(s)
- derivative action
  - where all shareholders affected
  - in the name of the CO.
  - remedy granted to CO
- oppression action
  - straddles line - divided authority on whether SH can start either a derivative or a personal action under oppression remedy.

GENERAL statutory remedies:

1. derivative: for director or mgr to do something they ought to be doing to benefit the CO
2. oppression: personal action but based on what was done in terms of CO positions
3. compliance: as with derivative
4. dissent and appraisal: don't agree with some major change and you want to be bought out..

SPECiFIC Statutory Remedies:

- within the statute itself, eg: SH proposal - specific remedy **191 (3)** if CO. doesn't process your request for a proposal. Some question of how they might work together with the CL:

COMMON LAW

- is it preserved or replaced?
- Eq remedy of injunction eg.

- fundamental ktual nature in BC - might allow for argument of DAMAGES for breach? Unorthodox, but most other statutes not ktual! Ours is! Exam!
- not clear whether and when CL avail in addition to statute. Some provisions say that CL is supplanted (derivative and oppression)

- Business judgement rule seems to set tone for court's analysis - *Peoples*' / *BCE*
- *BCE* in particular: derivative claim in name of CO and oppression claim running alongside (debenture-holders) but CT doesn't clearly differentiate between why/how you are allowed to claim on either basis.

2. The Derivative Action

a. Introduction

- going to Ct to get authority to take action in name of/on behalf of CO.

b. Common Law - The Rule in *Foss v Harbottle*

SH alleged sale by directors of their own property at inflated values to the CO. Found to be non-suited as no majority complaint: "the court was not going to be put in the position of ruling on a breach of trust that the principal might elect to confirm" and applied rule of non-interference in the internal affairs of a partnership to the incorporated CO.

Mozley v Asson
2 SHs brought personal action for declaration that board was holding office illegally in contravention of the terms of incorporation. Ct held to rule, refused argument that the pls were asserting a personal right to have the internal gov't of the CO conducted in accordance with terms: "irregularity" branch of the rule
McDonald v Gardiner
articles provided for taking of poll on demand of 5 members, when 5 demanded poll on motion to adjourn, chair refused. CA said was internal dispute and "no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the CO. and the intention of the majority of SH's is clear."

NW Transportation Co v Beatty JCPC
SCC held that Beatty could not use his own SH votes to confirm his own dodgy k as director selling his own property to the CO, but the JCPC upheld it.

Edwards v Halliwell (exceptions to the Rule in *Foss v Harbottle*)
1. *UV Act*: where the act complained of is wholly UV the CO. and cannot therefore be confirmed by a majority
2. Fraud on the Minority - can then bring a minority shareholders action
3. Special Majorities - can sue if act could only be sanctioned by a special majority
4. Personal Rights where the personal rights of membership of the pl have been invaded

c. The Statutory Derivative Action

s 232 *Derivative Actions*: Auth in BC is that it supplants the CL

BCA ss. 232-233

Derivative actions

232 (1) In this section and section 233,
"**complainant**" means, in relation to a company, a shareholder or director of the company;
"**shareholder**" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
(2) A complainant may, with leave of the court, prosecute a legal **proceeding in the name and on behalf of a company**
(a) to **enforce a right, duty or obligation** owed to the company that could be enforced by the company itself, or

(b) **to obtain damages for any breach** of a right, duty or obligation referred to in paragraph (a) of this subsection.
(3) Subsection (2) applies whether the right, duty or obligation arises **under this Act or otherwise**.
(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

- have to be a complainant which apparently could be anyone by the definition
- advantage of CL and why you might want to argue it, is you can claim it as a **RIGHT** and you don't have to go to ct and let them decide whether you qualify - you'd argue the that statute should SPECIFY that it supplants the CL
- 2 (a) (b) what the CO can get
  - have to show that it could be enforced by the CO (statute or CL)
- (**3)** supplemental - says it could arise out of CL or EQ obligation - normally it's the directors you'd be complaining about.
  - eg 3rd party has a k and CO isn't doing anything to enforce it or whatever

- ct may grant a leave if a, b, c AND d:

Powers of court in relation to derivative action
233(1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if
(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
(b) notice of the application for leave has been given to the company and to any other person the court may order,
(c) the complainant is acting in good faith, and
(d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

- it isn't clear what you have to show to go to court.
- amorphous as to what best interests of CO are - particularly from *BCE*
- other problem is that it has to be in the interests to prosecute or defend - ct has to pre-judge what the outcome would be

(5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.

- another disadvantage of the statute and why you might want to argue for CL derivative action: you could settle it without the Ct.

(6) No application made or legal proceeding prosecuted or defended under section 232 or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.

- so as in 5, the shareholders can't decide either - has to be the ct.

Re: North West Forest Products Ltd. 1975 BC SC p 707

F: directors of NW sold assets of subside at undervaluation, SH's petitioned directors to vote CO's shares to set aside the sale but wouldn't.
I: is this a prima facie case of failure of standard of care of directors?
A: the applicants have put forward sufficient evidence which discloses a failure on the part of the directors.

- CO made argument that complainant had not specifically said what the nature of the claim would be (not enough detail as to what they would claim if the derivative action would claim)

- could set up independent committee on whether CO should/could proceed in way they wanted p 713: law firm, accountant advised not to complain but now outsiders are taking action. Insiders saying we don't have to because we got expert advice
- extent to which SH who might be seeking a derivative action can be prompted by the CO having got expert opinion on whether it was the right thing to do or not.
- Ct says that still doesn't preclude someone from arguing for a derivative action - ct will take expert opinion into account but it doesn't mean an action can't be brought.

Re: Bellman and Western Approaches 1981 BC CA p 713

F: Bellman are minority SH - 3 directors- and Duke group majority - 5 directors. Duke group got a loan to purchase all common shares thereby gaining all control over directors.
I: does it "appear to be in the interests of the CO to allow the derivative action to be brought?
R: CBCA has 3 requirements to bring an action: notice, good faith, and interests of the Co.
A: there was reasonable if not express notice; there was good faith although a personal action would have been possible, the derivative is reasonable; "what is sufficient at this stage is that an arguable case be shown to subsist. This is quite different from the rules established at common law" (*F v H*)
C: "Considering the whole of the evidence before the Chambers Judge, she could have come to the conclusion that at the time directors did stand in a dual relation which prevented them from exercising an unprejudiced judgement. It appears to be in the interest of the CO that the action be brought.

d. Comments and *Re: BCE Inc.* p 718-719

- following excerpt suggests **possibility of creditor bringing a derivative action** on behalf of the corporation:
  - directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty.
  - To meet these difficulties, the common law developed a number of special remedies to protect the intereests of STAKEHOLDERS...these have been affirmed, modified and supplemented by the CBCA
  - **derivative** action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling to do so: with leave of the court, a complainant may bring an action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation.
- **Is the common law derivative action still available despite the existence of the statutory derivative action?**
  - ONCA in *Farnham v Fingold* said no, but
  - SCC in *BCE Inc.*, recently considered the status of the derivative action and concluded that the duty of care under s. 122(1)(b) did not ground a private right of action, suggesting that perhaps the common law derivative action may still be available:
    - The SH cannot act in the stead of the corporation; their only power is the right to oversee the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.
    - second remedy lies against the directors in a civil action for breach of the duty of care, which unlike the s. 122(1)(a) fiduciary duty, is not owed solely to the corporation, and thus **may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability**: *Peoples*

5. The Personal Action

- variety of cases in which directors act improperly involve not a breach of duty by the agent but a causing of the company to perform a corporate act in an improper or irregular manner to the direct detriment of the shareholders and for which they ought personally to be able to sue.

Hercules Management Ltd. v Ernst & Young 1997 SCC p 747

F: accountants with stat ob to audit 2 companies, pls are shareholders argue neg in prep of financial statements causing losses
I: Does E&Y owe a duty to individual SH's as individuals to give them good investment advice?
R: "shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder qua individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out" p 749

A: It isn't a reasonable expectation to have the accountant's financial statements used to give individual SH's advice. The duty is to the CO to give accurate info and any other duty to individuals (who look only to maximize their personal profits) conflicts. "the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover."
C:

6. The Statutory Oppression Remedy

BCE s 227

Complaints by shareholder

227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

227 (1) any person whom the ct considers appropriate
- 20-25% of claims under OR aren't SH's but tend to be creditors.
- *First Edmonton Place* - landlord lessor (creditor) ct said no reason why creditor could not bring oppression claim

(2) A shareholder may apply to the court for an order under this section on the ground

(a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

(b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

227 (2)
- 2 possible sources, **a** OR **b** - could be merged but
  - **a** - that the affairs are or have been conducted or that the powers of the directors are oppressive to the SH
    - technically, you have to argue the oppression is of the directors, but they tend to merge
  - **b** - some act of the CO has be done or is threatened, or some SH resolution is unfairly prejudicial to one or more of the SH including the applicant.
- not a big distinction between the two really.
- **a** deals with actions that ARE or HAVE gone on, but **b** deals with actions that HAVE or are PROPOSED

BE ASTONISHED AT THE BREADTH OF REMEDIES:

227 (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order *[generalized discussion for the court - conductive or disjunctive or]*
(a) directing or prohibiting any act,
(b) regulating the conduct of the company's affairs,
(c) appointing a receiver or receiver manager,
(d) directing an issue or conversion or exchange of shares,
(e) appointing directors in place of or in addition to all or any of the directors then in office,
(f) removing any director,
(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
(h) directing a shareholder to purchase some or all of the shares of any other shareholder,
(i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,

(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,
(k) varying or setting aside a resolution,
(l) requiring the company, within a time specified by the court, 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, subject to subsections (5) and (6), to compensate an aggrieved person,
(n) directing correction of the registers or other records of the company,
(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,
(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.

a. Introduction

- allows SH (mainly) equitable complaint (mainly) that something was unfair - that they were singled out for inequitable treatment by the CO and there should be some response.
- Has grown and broadened, “popular!” no longer just SH and no longer just against CO. - could be 3rd party that has been ‘unfair’
  - “oppression”, “unfairly prejudicial action”
  - **eg**: Plan or steps to squeeze out SH - often by other SH not directors etc. One of original reasons for OR
  - failure to provide info or allow access - particularly when one SH (or class) singled out
  - clear differentiation/discrimination between SH - particularly when majority are benefitting at expense of minority - WHERE THE SHARE STRUCTURE DOESN’T ALLOW FOR IT.
  - directors bad faith that has negative consequences for SH
  - in context of takeover bid: failure to set up arms length mechanism to set up particular decisions (outside committee etc.) SH might argue oppression if not done.
  - greed - someone being paid too much or taking assets “fraud on the minority”
- significant overlap between common law and statutory fiduciary duties and oppression remedy.
  - oppression provision explicitly makes actionable any conduct that results in the powers of the directors having been exercised in an oppressive manner.
  - substantive ground for invocation is "unfairness", and this substantive trigger almost always broader than for the invocation of fiduciary duties.
  - in practice cts routinely characterize directorial conduct in breach of fiduciary duty as oppressive.
  - courts have allowed actions of a derivative character to go forward under the oppression remedy
    - further confounds action for breach of fiduciary duty and action alleging oppression
- probably easiest to think of the oppression remedy as simply creating an expanded fiduciary duty (keeping in mind that the oppression remedy does in fact embrace some actions that will be purely personal in character)
- Because
  1. any fiduciary breach (by a director, officer, or even controlling shareholder) is almost certain to be characterized as oppression,
  2. oppression remedy offers broader cause of action ("fairness", no requirement for mala fides) than does the law of fiduciary duties,
  3. remedies available under the oppression remedy broader than in action for fiduciary breach
  4. courts have allowed derivative-type actions to proceed under the oppression provision,
- oppression remedy is, little by little, swallowing up the law of fiduciary duties.
- danger that this creates is that the broad fairness standard for intervention under the oppression remedy creates so much judicial discretion that it undermines the comparatively greater certainty created by fiduciary law

e. Cases

Re: BCE Inc.

F: as above
A: p 760: “best approach... combines the two approaches... One should look first to the principles underlying the oppression remedy, in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard"

- oppression is an equitable remedy. It seeks to ensure fairness —what is `just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair
- like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another
- (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

C:

First Edmonton Place Ltd. v 315888 Alberta Ltd.

F: First E is the landlord.
I: is the applicant a ‘complainant’ within the meaning of the statute? Can a creditor bring an oppression action?
R: a "complainant" must be "a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates"
A: A security is a debt obligation with a certificate which entitles the bearer to be registered in the securities register - since a mortgage includes a registered charge, a mortgagee is entitled. rationale could, however, apply equally to lessors and to creditors who have extended credit to the corporation
C: to encourage people to want to become creditors, better protect them as complainants.

- this is Alberta

Ferguson v Imax Systems Corp 1983 ON CA p 772

F: Ferguson and two other wives were class B SH’s where their husbands had common shares. After divorce, F’s husband tried to squeeze her out: discharged, Imax proposed to convert wives shares to non-voting, non-dividend shares.
I: is the OR available in such a closely held corp?
R: “a CO’s power to change its articles, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers con- ferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded.”
A: The CO has not acted bona fides and “the resolution authorizing the change in the capital of the company is the culminating event in a lengthy course of oppressive and unfairly prejudicial conduct to the appellant.”
C: she is entitled to have an order preventing the oppressive resolution from being implemented

AGAIN MOVING OPPRESSION REMEDY INTO fiduciary duty - collapsing them into the same category.
factors that are taken into account for reasonable expectations:

1. general commercial practise - evidence
2. nature of CO. - what kind (big / small? Smaller the CO. the more likely the OR will succeed simply because there are fewer conflicting interests!)
3. History: who parties are and what they did in the past (Ferguson v Imax Systems Corp)
4. Husbands and wives have different shares, ladies had no say in CO - here it was obvious that there was oppression and why)
5. again more likely in smaller CO than a bigger one
6. agreements and statements made in the past - if SH invested on basis of earlier representations for eg
7. efforts to resolve dispute
8. what complainant/claimant has done (Equitable remedy = scrutiny for clean hands) laches or delay

9. Compliance and Restraining Orders

Compliance or restraining orders

228 (1) In this section, "complainant" means, in relation to a company referred to in subsection (2), a shareholder of the company or any other person whom the court considers to be an appropriate person to make an application under this section.

(2) If a company or any director, officer, shareholder, employee, agent, auditor, trustee, receiver, receiver manager or liquidator of a company **contravenes or is about to contravene** a provision of this Act or the regulations or of the memorandum, notice of articles or articles of the company, a complainant may, **in addition to any other rights** that that person might have, apply to the court for an order that the person who has contravened or is about to contravene the provision comply with or refrain from contravening the provision.

- Some conflict as to whether you can have both kinds of remedies- Alberta approach fits better since **228** says you can ADD a complaint:
- " I can see no justification for restricting its application to the rectification of simple mechanical omissions. Furthermore, because the right conferred on a complainant by s. 240 is **in addition** *[as it is in BC]* to any other right the complainant may have, I can see no justification for restricting its application based on whatever other standing that person may have. A complainant is not precluded from relying on s. 240 merely because that complainant may have concurrent standing pursuant to other sections" -*Caleron Properties Ltd. v. 510207 Alberta Ltd.* (2000)
- Often used as an excuse for 228 - which talks about breach not just of act but because articles or something else hasn't been complied with, 229 **only references the ACT**:

  229 (2) **Despite any other provision of this Act**, the court, either on its own motion or on the application of any interested person, may make an order to correct or cause to be corrected, to negative or to modify or cause to be modified the consequences in law of a 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, and may give ancillary or consequential directions it considers necessary.
- this may mean you can get away with avoiding this by having provisions in the article or memoranda etc. SINCE THOSE ARE NOT THE ACT

  229 (3) The court must, before making an order under this section, consider the effect that the order might have on the company and on its directors, officers, creditors and shareholders and on the beneficial owners of its shares.

  (4) Unless the court orders otherwise, an order made under subsection (2) does not prejudice the rights of any third party who acquired those rights

  (a) for valuable consideration, and

  (b) without notice of the corporate mistake that is the subject of the order.
- Once you start a derivative you can't stop without the ct.'s approval

BCA ss 237 - 247

APPRAISAL REMEDY SH right to dissent

specific to SHs only - getting your shares bought back. You can always sell them, or make the court make an order, but this is available. The procedure is a little complex (particularly with regards to ascertaining the price) and rarely done. Once the right to dissent is invoked, the buyout follows. Not a right but a power.

Definitions and application

s. 237 (1) In this Division:

"dissenter" means a shareholder who, being entitled to do so, sends written notice of dissent when and as required by section 242;

"notice shares" means, in relation to a notice of dissent, the shares in respect of which dissent is being exercised under the notice of dissent;

"payout value"

- Under 238, you don't have to be able to vote. But if you were able to, you had to dissent.

s 238 *Right to dissent*
s 240 *Notice of resolution*
s 241 *Notice of court orders*
s 242 *Notice of dissent*
s 243 *Notice of intention to proceed*
s 244 *Completion of dissent*
s 245 *Payment for notice shares*
- usually not contentious but sets out how ct can decide

10. Winding-Up

- WINDING UP - getting back what you put in dependent on type of shares you got

BCA s 324

Court may order company be liquidated and dissolved

324 (1) On an application made in respect of a company that is a financial institution by the commission, or made in respect of a company, including a company that is a financial institution, by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if

(a) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or

(b) the court otherwise considers it just and equitable to do so.

- you can agree in advance to have agreements about vote in a meeting, and this may resolve a problem without recourse to the courts. Generally speaking a well informed SH will be aware of outcome, s 175 means that is not an illegal/unenforceable k (in restraint of freedom of actin of some sort)

11. Shareholder Agreements

BCA s 175

Pooling agreements

175 Two or more shareholders may, in a written agreement, agree that when exercising voting rights in relation to the shares held by them, they will vote those shares in accordance with the terms of the agreement.

Ringuet v Bergeron 1960 SCC p 682

F: Ringuet sued the appellants for a declaration that against each of them, he was entitled to certain shares of the St. Maurice Knitting Mills Ltd. registered in their names. They had formed an agreement to elect one another and vote collectively

I: whether an agreement among a group of shareholders providing for the direction and control of a company in the circumstances of this case is contrary to public order, and whether it is open to the parties to establish whatever sanction they choose for a breach of such agreement.

A: Ct. underscores that agreement to vote was not an agreement to fetter activities of further D's - they have a fiduciary duty and competency to the CO. and can't be overridden by promises to other parties.

C: One of the things you might do is try to change the future to get rid of D's making bad decisions, and replace with D's making decisions you like. HOWEVER you in making this agreement to vote, you can't make promises about what you will do when you become a director.

12. Unanimous Shareholder Agreements

s 137 Unanimous SH agreements - in other jurisdictions thses are allowed on specific issues to override directors. In BC, they can have someone else appointed to take over in a general way (broader ability)

Bury v Bell Gouinlock Ltd.

F: mandatory sale of shares if shareholder who no longer worked for the company. But USA says that Company can delay the sale for 12 months. Sneaky way of restricting employees 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.
I: Can the oppression remedy be used? Can P bring this action?
A: The use of the delay provision by the corporation was oppressive. (Mostly because the company maintained that they did not have to give any reason for using the dely provision.) Oppression remedy does give the court the power to override an USA. (section 248(2) OBCA)
Facts are consistent with a hypothesis that the respondent is trying to penalize the applicant.
C: Court can amend a USA if it is oppressive.

IN BC THIS IS NOT DIRECTLY RELEVANT, WE DON'T HAVE IT. THIS IS BETTER AS OPPRESSION REMEDY QUESTION. But really, could they have had a reasonable expectation to the contrary?