

LAW 230 – BUSINESS ORGANIZATIONS – SPRING 2014 MACDOUGALL

TYPES OF BUSINESS ORGANIZATIONS

MISCELLANEOUS

SOLE PROPRIETORSHIP	<ul style="list-style-type: none"> • Individual engaged in business for themselves – no difference b/w two in eyes of the law // sole & unlimited liability • REGISTRATION OF SP: if doing business under a name <u>other</u> than your own, or w/ addition of potentially misleading portion ex/ “and Co.” the sole proprietorship must be registered within 3 months of the time the biz name first used – PA 88(1) • NAME MUST NOT BE SAME/SIMILAR TO ANOTHER BUSINESS: registrar also has discretion to refuse name – PA 89(1)
JOINT VENTURE	<ul style="list-style-type: none"> • Agreement b/w two parties to carry on biz, usually for a defined project

PARTNERSHIPS (PX)

- **PARTNERSHIP ACT:** codification of common law wrt partnership -- **PA 91** stipulates that the rules of CL and equity continue to the extent they don't conflict
- **PX's GENERALLY A CREATURE OF CONTRACT – BUT THEY CAN BE IMPLIED** ---> so be careful, particularly when profit-sharing!

DEFINITION	<ul style="list-style-type: none"> • PX IS THE RELATION B/W PERSONS (1) CARRYING ON BUSINESS (2) IN COMMON (3) W/ VIEW TO PROFIT – 2 <ul style="list-style-type: none"> • relation b/w persons: person includes a corporation • carrying on business: likely requires <u>ongoing</u> activity, ie/ one-off consignments are excluded; co-ownership that leads to profits alone not sufficient (Kamex – owners of the building maintained separate property interest, therefore co-ownership, not Px) • in common: person may be only an investor, not a P • view to profit: no actual profit need be generated
FACTORS TO DETERMINE IF PX EXISTS PA 4	<ul style="list-style-type: none"> • (a) owning property in common does not itself create a Px, even if you share profits • (b) sharing of gross returns doesn't itself create a Px (ex/ consignment) • (c) <u>receipt of share of profits – absent E to the contrary – is proof of a Px</u> <ul style="list-style-type: none"> • goes on to list exceptions -- payment that's the result of an <u>existing obligation</u> (even if based on revenues) ameliorates the risk of an implied Px
LEGAL PERSONALITY	<ul style="list-style-type: none"> • Px HAS NO SEPARATE LEGAL PERSONALITY: <ul style="list-style-type: none"> • Consequently, <u>partnerships cannot employ partners</u> (Thorne – P who worked for Px tried to get Worker's Comp) • UNLIMITED LIABILITY: default is both <u>joint</u> and <u>several</u> liability • “FIRM” – collective term for persons who've entered into Px with one another – PA 1 // firm name is matter of convenience only, has no substantive legal consequence (Thorne) • REGISTRATION: trading, mining, or manufacturing Px's must be registered – 81(1) // name mustn't be same/similar to corp – 89(1)
RELATIONS B/W PARTNERS	<ul style="list-style-type: none"> • P's CAN VARY RIGHTS & DUTIES TO ONE ANOTHER W/ UNANIMOUS CONSENT (consent can be <u>implied</u>) – 21 • DEFAULT RULES – 27 <ul style="list-style-type: none"> • (a) – all P's must share equally in capital & profits // contribute equally to losses • (b) – firm must indemnify P for payments & personal L incurred in ordinary & proper course of biz – presumptive several liability • (e) – every P can take part in management • (h) – ordinary matter decided by P majority // change to nature of biz requires unanimous consent • P's ARE AGENTS OF FIRM & OTHER P's: acts of a P <u>carried out in the usual business</u> of the firm bind the firm & other P's – 7(1)&(2) <ul style="list-style-type: none"> • EXCEPTION: P had <u>no authority to act</u> AND 3rd party <u>knew that</u> or didn't <u>know or believe that person to be a P</u> – 7(2)(a)&(b) • P's HAVE A FIDUCIARY DUTY TO ONE ANOTHER: must act with <u>utmost fairness & good faith</u> in firm business – 22(1) • PARTNERSHIP PROPERTY: <ul style="list-style-type: none"> • all Px property is held/used <u>exclusively</u> for the Px & in accordance w Px agreement -- often varied by the Px contract – 23(1) • property bought w/ firm money is deemed to be bought on account of firm, absent contrary intention – 24 • EXPEL P? majority cannot expel P unless agreement allowing that is in place & exercised in good faith – 28 • END/DISSOLUTION <ul style="list-style-type: none"> • NOTICE: if no set term, any P can end Px by giving notice to other P's – 29(1) • END OF SET TERM // END OF SINGLE ADVENTURE OR UNDERTAKING – 35(1)(a)&(b) • NOTICE OF DISSOLUTION: if no set term, P can dissolve by giving notice to other P's – 35(1)(c) • BANKRUPTCY / DEATH: 2-person Px --> dissolves // multiple P's --> dissolves, subject to PA – 36(1) • EVENT MAKING BIZ UNLAWFUL – 37 • COURT ORDER TO DISSOLVE: P can apply --> incapacity; permanently incapable of performing duties; conduct that would prejudice biz; willful or persistent breach of PA; biz can only produce loss; where <u>just & equitable</u> – 38(1) • PROPERTY: P entitled to apply property to debts & liabilities + get surplus assets – 42

RELATIONS B/W P's & 3rd PARTIES	<ul style="list-style-type: none"> • P's ARE AGENTS OF FIRM & OTHER P's -- P's ACTS BINDING: for purpose of Px business - 7(1) // where P carrying on in the usual way <u>business of the kind carried on by firm</u> - 7(2) <ul style="list-style-type: none"> • EXCEPTION: P had no authority to act AND 3rd party <u>knew</u> OR didn't know or believe person to be a P - 7(2)(a)&(b) • DEBTS: P's <u>jointly</u> liable for debts incurred while member (and <u>severally</u> liable after death) - 11 • WRONGFUL ACTS / OMISSIONS: firm liable for loss to the <u>same extent</u> as the P who caused the loss while acting in the <u>ordinary course of business</u>; some wiggle room, in the the Px can try to define what's "ordinary" = 12 • P's ARE JOINTLY & SEVERALLY LIABILITY: for firm's liabilities under 12 and 13 while a P - 14 <ul style="list-style-type: none"> • HOLDING OUT: if you represent yourself as a P, you'll be liable as one - 16 • LIMITS ON LIABILITY: <ul style="list-style-type: none"> • <u>joining</u> a firm doesn't make P liable for prior obligations // <u>retiring</u> from firm doesn't discharge P from existing liabilities - 19
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TYPES OF PARTNERSHIPS

GENERAL PX	<ul style="list-style-type: none"> • "GENERAL PX" - Px governed by BC law that's neither an LP or LLP - PA 1
LIMITED LIABILITY PX	<ul style="list-style-type: none"> • LIABILITY PROVISIONS OF PA DO NOT APPLY TO LLP's - PA 95 (JL for firm debts - 11 & J&SL for wrongful act, omissions & loss - 14) • NO IMPLIED LLP's - REGISTRATION REQUIRED - 96 • PROFESSIONAL LLP's: must be expressly authorized to form LLP under governing statute & meet any pre-req's - 97 • CHANGE IN Px DOES NOT AFFECT LLP's STATUS: change of P's doesn't require re-registration - 102 • PARTNER LIABILITY (**can be changed under PA***) - 104(1)&(2) <ul style="list-style-type: none"> • NOT PERSONALLY LIABLE --> (a) Px obligation merely b/c you're a P; (b) obligation b/w Px & 3rd party; (c) to another P's if they happen to be personally liable (NOTE: Px property still fair game!) • ARE PERSONALLY LIABLE --> (a) P's <u>own</u> negligent or wrongful act/omissions; (b) same acts of <u>others</u> if P <u>knew & failed to take reasonable steps to prevent</u>; • P's SUBJECT TO SAME OBLIGATIONS AS CORPORATE DIRECTORS WRT PERSONAL LIABILITY FOR PAYMENTS - 105 <ul style="list-style-type: none"> • does not apply to main duties (FD, DOC) - rather makes P's liable for things like unpaid wages • CAN'T FORM LLP TO ESCAPE OBLIGATION: P still personally responsible for pre-existing liability - 106
LIMITED PX	<ul style="list-style-type: none"> • INVESTMENT DEVICE --> can carry on any biz regular Px could - 50 // rest of Act applies, so long as no conflict w/ this Part - 49 • TWO CATEGORIES OF P's: <u>GENERAL</u> (of which there must be at least one) and <u>LIMITED</u> (of which there must be at least one) - 50 <ol style="list-style-type: none"> GENERAL P- has all the powers & rights of a regular P - 56 LIMITED P - can contribute MONEY & PROPERTY - but not services // interest limited to <u>personal property</u> - 55(1)&(2) <ul style="list-style-type: none"> • KEY - LP's liability limited to AMOUNT OF PROPERTY CONTRIBUTED to Px (or agreed to be contributed) - 57 • RIGHTS - inspect Px books + information & formal account of Px affairs + dissolve/windup by court order - 58 • PROPERTY - can't receive contribution until all liabilities of LP paid - 62 • LIABILITY - LP not liable as GP unless they take part in management of business - 64 <ul style="list-style-type: none"> • LIMIT ON LIABILITY - LP's liable up to AMOUNT OF PROPERTY CONTRIBUTED to Px (or agreed to be contributed) - 57 • Haughton Graphics - LP's found liable as GP's b/c they were directing minds & represented themselves as management • Nordile Holdings - LP's not liable; didn't hold themselves out as management & weren't employees of LP; roles distinct • YOU CAN BE BOTH! --> will have rights/powers/restrictions as GP (+) LP's rights against other P's - 52 (need at least 2 people) • NO IMPLIED LP's - NEED TO FILE CERTIFICATE W/ REGISTRAR - 51 • RELATIONSHIP B/W LP's - share capital & profits in proportion to their claims - 61(1)

CORPORATIONS

LEGAL PERSONALITY & LTD LIABILITY & CREDITOR PROTECTION	<ul style="list-style-type: none"> • CORP IS SEPARATE LEGAL PERSONALITY FROM SHAREHOLDERS (SALOMON) <ul style="list-style-type: none"> • LIABILITY – SH's are not personally liable for corp's liabilities --> 87 and 45(1) • ASSETS – corp's assets are separate // creditors can only look to corporate assets // potential problem = <u>undercapitalization</u> • SH's only have access via DIVIDENDS – 70 and 42 • corps can K with those involved (SH's, D/O's, employees, etc) // and can also be sued by those same people • ALTERNATIVE WAYS TO PROTECT CREDITORS <ol style="list-style-type: none"> 1. CAUTIONARY SUFFIX – make it clear you're dealing with a limited liability corp 2. CAPITAL MAINTENANCE REQUIREMENTS – require corps to maintain certain level of assets; dealt w/ primarily in securities law 3. PUBLICITY – public corporate & securities filings 4. D/O LIABILITY – allow liability to attach to individuals rather than the corp (see below) • TORT & CONTRACT RESPONSIBILITY? direct action --> individuals may have deeper pockets or corp may have LLC <ul style="list-style-type: none"> • London Drugs – employees liable for negligence, even while performing duties of job, but allowed to avail themselves of corp's LLC • ADGA – corporate raiders; D's liable for inducing breach of K b/c corp was <u>not party</u> to the K – not protected by incorporation! • AGENT LIABILITY – corp can be bound by actions of agents, even if unauthorized – 146 and 18 • CRIMINAL RESPONSIBILITY? --> corps lack ability to form MR // strict liability offences less problematic, but punishment often tailored for natural persons // corp may be found guilty based on actions of <u>directing mind</u> (Canadian Dredge)
PIERCING THE CORPORATE VEIL	<ul style="list-style-type: none"> • MODIFICATION OF STRICT APPLICATION OF SOLOMON PRINCIPLE – COURT IGNORE'S CORPORATE'S SEPARATE PERSONALITY • WHY? (1) make corporation responsible for SH; (2) make SH responsible for corp; (3) join closely-related corporations --> “affiliated companies” “affiliated bodies corporate” = one sub of other; both subs of corp; controlled by same person – 2 & 2(2)-(5) • TESTS <ol style="list-style-type: none"> 1. SHAM/FRAUD – corp is <u>mere agent</u> of principle SH <ul style="list-style-type: none"> • Clarkson Co – no lifting; agency relationship was not preconceived w/ intent to defraud creditors • Lee – L set up, worked for & controlled corp // dies & estate claims workers comp // no lifting; corp est for legit biz reasons 2. CONTROL – separate corps controlled by same directing mind; no substantial separation <ul style="list-style-type: none"> • De Salaberry – cascading corp entities // veil lifted for tax purposes & court assessed tax as unit 3. JUSTICE & FAIRNESS <ul style="list-style-type: none"> • Lynch – family law context more flexible test // veil lifted & corp's land included in ex's assets b/c corp designed to conceal
THEORIZING CORPORATE PERSONALITY	<ul style="list-style-type: none"> • FICTION THEORY: corp personality is a <u>legal creation</u>; state & law enable & permit corporate existence <ul style="list-style-type: none"> • MODERN --> corp impact society as a whole & as such should be regulated • CONTRACTUAL = BC version; underlying basis is contract b/w parties; this K is not regulated by statute • PURELY REGISTRATION = federal version; brought into existence by registration alone • REAL ENTITY VIEW: once sufficient level of <u>organization</u> is reached, a new personality comes into existence • CONTRACTARIAN VIEW: corp = web of contracts amongst individuals (D/O, SH, employees, creditors, etc) • ORGANISM: analyze corp's not just with contract lens, but also human nature + psychology + ethics & morality + game theory, etc

TYPES OF CORPORATIONS

WIDELY-HELD “PUBLIC”	<ul style="list-style-type: none"> • over 50 SH's + at least 3 D's – 120 • securities traded through stock exchange; comes w/ disclosure req's; must file prospectus
CLOSELY-HELD “PRIVATE”	<ul style="list-style-type: none"> • less than 50 SH's + 1 or more D's – 120 • PROS: no limit on share transfer; no prospectus required // CONS: can't sell shares to general public
ONE PERSON CORPS	<ul style="list-style-type: none"> • single SH & D • obvious issue = can one person constitute “meeting”? --> statutes provide exception
CONSTRAINED SHARE CORPS	<ul style="list-style-type: none"> • corp where share transfer is restricted to comply with Canadian ownership & control requirements
PROFESSIONAL CORPORATIONS	<ul style="list-style-type: none"> • allows certain professions to incorporate, where permitted by their governing statute • WHY? usually tax advantages
UNLIMITED LIABILITY CORPS	<ul style="list-style-type: none"> • SH/owners have <u>unlimited liability</u> • WHY? facilitates American investment + US tax advantages
SPECIAL ACT CORPORATIONS	<ul style="list-style-type: none"> • Arises through a separate act or political process; <u>not a company</u> • Ex/ Crown Corporation such as BC Ferries, ICBC • In case of conflict b/w BCBCA and special Act, the latter prevails – 4(2)

JURISDICTIONAL CONSIDERATIONS

- **JURISDICTION SHOPPING:** Companies are governed by the laws of their place of incorporation. Don't see a lot of this in Canada b/c laws fairly uniform.
- **FEDERAL CORPS** – do not have to register to operate across Canada // **PROVINCIAL CORPS** – must register to do biz in other provinces.

JURISDICTIONAL CONSIDERATIONS

DEFINITIONS PROVINCIAL	<ul style="list-style-type: none"> • “company” – a corporation, recognized as a company by the BCBCA • “extra-provincial company” – foreign entity registered under 377 – <i>need not be a corporation! could be a Px</i> • “foreign entity” – foreign corporation, limited liability company, or an extraprovincial society • “foreign corporation” – <u>not</u> a company (corporation) recognized by BCBCA; has issued shares; and was incorporated elsewhere • “limited liability company” – business entity organized outside BC – <u>not</u> a corporation or Px
EXTRA- PROVINCIAL LICENSING	<ul style="list-style-type: none"> • FOREIGN ENTITIES MUST REGISTER AS “EXTRAPROVINCIAL CO” W/IN 2 MONTHS OF “CARRYING ON BUSINESS IN BC” – 375 • FEDERAL CORP's DO NOT HAVE TO REGISTER – 376(2) • DEEMED TO COB: (a) name listed in BC telephone directory and BC address or number is given; (b) ad which lists corp name + BC address/number; (c) resident agent, warehouse, or place of biz in BC; (d) otherwise carries on biz – 375(2) <ul style="list-style-type: none"> • BWM says: there's an aspect of <u>CONTINUITY</u> and <u>INTENTION</u> to determining if a company is “doing business” • EXCLUDED: banking & railroads – essentially business activities governed by federal law – 375(2) • BASIC REGISTRATION REQUIREMENTS: ex/ reserve name & make required filings with R – 376(1) • FOREIGN ENTITY --> EXTRAPROVINCIAL COMPANY: once application process complete to satisfaction of R – 377 • EFFECT OF REGISTRATION <ul style="list-style-type: none"> • LAW OF HOME JURISDICTION STILL APPLIES: registration in BC doesn't exempt corp from laws that govern it at home – 378(2) • MUST STILL COMPLY W/ CORP's GOVERNING DOCUMENTS – 378(3) • 3rd PARTY PROTECTION: no act of foreign entity COB in BC is invalid merely b/c registration defective, or corp in contravention of laws of home jurisdiction – 378(4)
CONTINUANCE	<ul style="list-style-type: none"> • EXPORT CORPORATION: both federal & provincial statutes allow ---> effect is to make corp subject to law of receiving jurisdiction • 2-STEP PROCESS: (1) EXPORT – requires consent of initial J --> (2) IMPORT – meet requirement of Act of receiving J • WHY? tax advantages; change in business operations; better corporate climate; amalgamation & very useful for friendly takeovers <div style="background-color: #fce4ec; padding: 5px;"> <ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • IMPORT <ul style="list-style-type: none"> • APPLICATION – various requirements to apply for continuance in BC; ex/ req filings, forms, articles signed by D's – 302 • CONTINUATION – 303 • EFFECT – notation in corp register is conclusive evidence of effective continuation, regardless of any procedural defect – 305(2) • EXPORT <ul style="list-style-type: none"> • APPROVAL OF R – need BC registrar to approve continuance in foreign J prior to application – 308(4) • SH APPROVAL – must be by <u>special resolution</u> – 308(2) <ul style="list-style-type: none"> • NOTE: BC special res can be anywhere from 2/3 to 3/4 of vote, depending on articles --> possible to make corp harder to export! • DISSENT – SH may dissent wrt continuance – 309 </div> <div style="background-color: #e1bee7; padding: 5px;"> <ul style="list-style-type: none"> • FEDERAL <ul style="list-style-type: none"> • IMPORT <ul style="list-style-type: none"> • APPROVAL OF HOME J – need to get this first, then apply for certificate of continuance – 187(1) • GOVERNING DOCS – provides automatic statutory change to terminology – handy! don't have to go through & change – 187(2) • EXPORT <ul style="list-style-type: none"> • REQUIREMENTS – show that export is (a) authorized by SH's; and (b) move won't adversely affect SH's or creditors – 188(1) • SH APPROVAL – must be by <u>special resolution</u> – 188(5) </div>

THE CORPORATE STRUCTURE

CORPORATE CONSTITUTION

CORPORATE NAMES	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • APPLICATION – name must be reserved & in effect at time of company recognition – 21 • RESERVATION – can reserve name for 56 days; during time R will decide if it's appropriate – 22 • DISAPPROVAL – R can reject a name for “good and valid reasons” (ex/ offensive, too lengthy) – 22(5) // english or french only – 25 • “LIMITED” – must use if a ltd liability corp – 23 // but must not use if not – 24 DISPLAY – name must be conspicuous – 27 • ASSUMED NAME – foreign entity must adopt <u>assumed name</u> to become extraprovincial corp, if its name contravenes Act – 26 • NAME CHANGE? --> requires amendment to NOA by <u>special resolution</u> of SH's under 257 – 263 • FEDERAL <ul style="list-style-type: none"> • “LIMITED” – or other indicator of ltd liability must be part of the name – 10(1) • CONTRACTS – corp name must be set out in legible character – 10(5) • RESERVATION – can reserve name for 90 days – 11 • PROHIBITED – prescribed, prohibited, deeply misdescriptive, or reserved for corp or intended corp under 11 – 12
CREATION	<ul style="list-style-type: none"> • CORP's COME INTO EXISTENCE ON DATE OF INCORPORATION – 3 & 9 • PROVINCIAL • FORMATION --> CONTRACT – 1 or more “incorporators” enter into <u>incorporation agreement</u> & <u>file with registrar</u> – 10 <ul style="list-style-type: none"> • INCORPORATION AGREEMENT – names incorporator, corp name & outlines share structure – not part of governing docs – 10 • NOTICE OF ARTICLES – bare bones info, filed w/ R – 11 <ul style="list-style-type: none"> • corp name; authorized share structure; special rights & restrictions attached to shares; names & addresses of D's • ARTICLES – detailed, kept by corp, sets rules for conduct & restrictions – 12 • CHANGE? fundamental change to NOA or articles requires <u>special resolution</u> – 257 & 259 // name change req's change to NOA – 263 • CONTRACTUAL EFFECT ---> corp & SH's are <u>bound by articles + NOA</u> from time of recognition – 19 • FEDERAL • FORMATION --> REGISTRATION – 1 or more incorporators sign <u>articles of incorporation</u> & <u>send them to Director</u> – 5 <ul style="list-style-type: none"> • ARTICLES (basic) – share structure + biz restriction + number of D's + province of registered office – 6 • CHANGE? amendment of articles requires <u>special resolution</u> – 173 • BYLAWS (detailed) – will be worked out after incorporation – D's create – 103 • WHO CAN FORM – “incorporators” – <u>individuals</u> must be > 18 + sound mind + not bankrupt – 5(1) // “bodies corporate” – 5(2)
SCOPE OF K – ARTICLES	<ul style="list-style-type: none"> • AT CL, ARTICLES DO NOT CONSTITUTE K BETWEEN CORP & NON-MEMBERS • STATUTORY MODIFICATION <ul style="list-style-type: none"> • BCBCA – 19(3) – judicial interpretation = each member is <u>deemed</u> to contract w/ corp; members are bound to corp & visa versa (though interpretation has limited to contractual rights + imposition of burdens)

RESTRICTIONS

BASICS	<ul style="list-style-type: none"> • CORPS PRESUMED TO BE ABLE TO ENTER INTO ANY ACTIVITIES A NATURAL PERSON CAN – 30 and 15 • RESTRICTIONS TO BE FILED IN DOCUMENTS <ul style="list-style-type: none"> • PROVINCIAL – must be set out in articles – 12(2)(a) // corp can't carry out biz or exercise powers contrary to articles – 33(1) • FEDERAL – must be set out in articles of incorporation – 6(1)(f) // can't carry out biz/exercise powers contrary to articles – 16(2)
REMEDIES FOR BREACH *INSIDE* CORPORATION	<ul style="list-style-type: none"> • PROVINCIAL – D can be <u>personally liable</u> to the corp if corp paid compensation as result of engaging in restricted biz – 154(1)(a) // COMPLIANCE ORDER – 228(3)(c) // EXTRA-PROVINCIAL CORP – can't evade restrictions in home jurisdiction or its charter by registering in BC – 378(2)&(4) • FEDERAL – no particular remedy, general remedies must be used --> breach of FD or DOC, DA, or OR
EFFECT *OUTSIDE* CORPORATION	<ul style="list-style-type: none"> • CORPORATE ACTS (EVEN CONTRARY TO RESTRICTIONS) ARE PRESUMPTIVELY VALID <ul style="list-style-type: none"> • PROVINCIAL – no corp act invalid merely b/c it was contrary to articles – 33(2) // outsiders can trust authority of persons held out as D, O, and agents (indoor management rule) – 146 • FEDERAL – no corp act invalid merely b/c it was contrary to articles or Act – 16(3) // no person has constructive knowledge of corp docs simply b/c they're filed or available for inspection – 17 // outsiders can trust authority of persons held out as D, O, and agents (indoor management rule) – 18
CHANGING RESTRICTIONS	<ul style="list-style-type: none"> • PROVINCIAL – via <u>special resolution</u> – 2/3 present & voting must approve, unless articles say otherwise – 259 // SH's can dissent on special res that changes restricted business or powers – 260 • FEDERAL – must be done via <u>special resolution</u> to change, add, or remove – 173(1)(c) // SH's have right to dissent on resolutions that change restrictions on share ownership or biz restrictions – 190(1)(a)&(b)

PRE-INCORPORATION CONTRACTS

COMMON LAW	<ul style="list-style-type: none"> • 3 POSSIBILITIES 1. both parties know corp not yet in existence --> agent will be personally liable if there's clear intention to be bound (Kelner) 2. agent knows, but other party does not --> agent not liable for K, but for breach of warranty of authority (Wickberg) 3. agent mistakenly believes corp exists & other party relies on representation --> K <u>void</u> if result of mutual mistake (Black) • IF CORP NEVER COMES INTO EXISTENCE, BLACK STILL APPLIES - NO STATUTORY SOLUTION
STATUTORY REFORM	<ul style="list-style-type: none"> • PROVINCIAL • WRITTEN & ORAL K's • "facilitator" liable for breach of warranty of authority; but only to extent as if <u>they</u> were party to K - 20(2) • but - facilitator can expressly <u>K_out</u> of liability - 20(8) • SUBSEQUENT ADOPTION? <ul style="list-style-type: none"> • corp may w/in <u>reasonable time</u> after coming into existence, by action or conduct, signal intention to be bound - 20(3) • corp is then bound & facilitator ceases to be liable - 20(4)(a)&(b) • NO ADOPTION? --> corp can be liable for restitution of benefits - 20(5) • <i>NOTE: BC approach preserves Wickberg, but changes the quantum // unlike federal statute, does NOT deem the K into existence</i> • FEDERAL • WRITTEN K's ONLY • promoter who enters into K is bound --> K is <u>deemed</u> to exist, even though the corp doesn't - 14(1) • but - promoter can expressly <u>K_out</u> of liability - 14(4) • SUBSEQUENT ADOPTION? <ul style="list-style-type: none"> • corp may w/in <u>reasonable time</u> after coming into existence, by action or conduct, signal intention to be bound - 14(2)(a) • promoter is then off the hook - 14(2)(b) • NO MATTER WHAT HAPPENS - a party to the K can apply for court order wrt obligations & liabilities of the promoter or corp - 14(3) • <i>NOTE: promoter may still be liable under tort as well, ex/ breach of warranty of authority</i>

MANAGEMENT & CONTROL

STRUCTURE	<ul style="list-style-type: none"> • PROVINCIAL • "DIRECTOR" - appointed or elected member of the board // "FIRST DIRECTOR" - person designated D when first registered - 1(1) • APPOINTMENT - in accordance w/ Act or articles; designated under NOA upon registration; by court order - 1(3) • REMOVAL - by <u>special resolution</u> OR by less than special majority or other method detailed in memorandum/article - 128(3) • NO D's? - SH or incorporator may designate person to call meeting to elect/appoint D's; and can appoint interim D's - 135 • POWERS & FUNCTION - directly/indirectly manage corp's biz & affairs; almost unlimited; only subject to articles & statute - 136 • MANAGING D - corp articles may designate a person to undertake certain activities on behalf of other D's // provision can be added by <u>special res</u> and must <u>clearly indicate</u> that powers to be transferred - 137 • PERFORMING AS D? - Act applies as if person were a D; exception = management working under D supervision, lawyer, etc - 138 • IRREGULARITY? act of D/O's not invalid merely b/c of election/appointment irregularity OR defect in qualification - 143 • FEDERAL • "DIRECTOR" - person occupying position of D // "OFFICER" - senior management (ex/ Pres, VP, GM, general counsel) - 2(1) • FUNCTION - directly/indirectly manage corp's biz & affairs; subject to unanimous SH agreement - 102 • BYLAWS - D's create corp's bylaws - 103 • REMOVAL - SH may remove D by <u>ordinary resolution</u> at a special meeting - 109 • IRREGULARITY? act of D/O valid notwithstanding a defect in election/appointment or qualification - 116 • Bushell - closely-help corp w/ weighted share structure // 2 SH's try to remove third SH as D // failed - SH/D's votes worth 3 times when voting on a removal resolution, so the SH/D was able to save himself // court upheld - corp's able to draft articles to its liking • Automatic - D's declined to sell assets, as voted by a simple majority of SH's, b/c felt not in corp's best interests // court - to override D's decisions, special resolution required // <i>options? SH's could have amended articles under 259; OR voted D's out under 128(3)</i>
INDOOR MANAGEMENT RULE	<ul style="list-style-type: none"> • TRANSACTION REMAINS VALID - 3rd PARTY PROTECTION: so long as 3rd party is not on notice, or reasonably suspicious, that wrong person is acting for corp, or bylaws/articles not complied with, they are entitled to <u>rely on the authority</u> of person representing the corp - 146 & 17 & 18 • Sherwood - S entered into K w/ lawyer for a (not-yet-existing) numbered corp // <u>unsigned docs</u> should've put S on notice

<p>CORPORATE RESPONSIBILITY</p>	<ul style="list-style-type: none"> • HISTORIC APPROACH ---> D's HELD ACCOUNTABLE IF DECISIONS DO NOT DIRECTLY BENEFIT CORP/SH's <ul style="list-style-type: none"> • Ford Motor – corp organized & carried on primarily for <u>SH profit</u> // D's discretion to be focused on maximizing gains for SH's; not to be altruistic // Ford wanted more jobs + lower price of cars, SH's wanted dividend // court – confirmed dividend, but for less \$\$ • Parke – sale of undertaking // D's proposed using proceeds to pay existing staff & retired employees more money <ul style="list-style-type: none"> • TEST = is transaction (1) bona fide; (2) reasonably connected to carrying on of business; (3) promote prosperity of company? • GRATUITOUS PAYMENTS? (1) must be defensible; (2) court inquiry into motive/objective; (3) onus on party asserting validity • MODERN APPROACH ---> FD TO CORP ONLY, BUT CONSIDERATION OF EXTRA-CORP INTERESTS CAN BE LEGITIMATE <ul style="list-style-type: none"> • Peoples – <u>corp owes FD to corp only & DOC to SH's</u> // merger of 2 stores – creditors of one alleged breach of FD, as debt was transferred to that store // court – corp interest does not necessarily equal profit-max of SH's // D's should consider various stakeholders such as creditors, employees, consumers, govnt, etc • BCE – <u>duty to be fair to other stakeholders</u> // friendly takeover of Bell; debenture-holders challenged arrangement & sought OR // court – no breach of FD; D's not required to ensure debenture value
<p>AUDIT COMMITTEE</p>	<ul style="list-style-type: none"> • AC WAY TO ENSURE THE D's WHO ARE NOT INVOLVED IN DAY-TO-DAY OPERATIONS STAY INFORMED • ONLY APPLIES TO PUBLIC CORP's THAT ARE REQUIRED TO HAVE 3+ D's • STRUCTURE – 2223-226 & 171 <ul style="list-style-type: none"> • AC must have at least 3 D's • AC will review <u>financial statements & auditor's report</u>
<p>SALE OF THE UNDERTAKING</p>	<ul style="list-style-type: none"> • CORP MUST NOT SELL, LEASE, OR DISPOSE OF ALL/SUBSTANTIALLY ALL OF CORP's PROPERTY UNLESS – 301(1) & 189(3) <ul style="list-style-type: none"> • in ordinary course of business; or • approved by special resolution of SH's • PROTECTION FOR 3rd PARTIES – UNIQUE TO BC – disposition not invalid if 3rd party dealt in <u>good faith</u> and for <u>valuable consideration</u>; OR if disposition ratified by special resolution after the fact – 301(3) • SH's CAN ONLY VETO – CANNOT COMPEL D ACTION (<u>Automatic</u> – simple majority of SH's voted to sell assets; D's declined) • EXEMPT TRANSACTIONS: security interest; lease for < 3 years; to parent or sub corp; 100% SH of corp or sub – 301(6) • DISSSENT? ---> SH must vote <u>against</u> special resolution

DUTIES OF DIRECTORS & OFFICERS

STRUCTURAL STUFF	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • NUMBERS: at least 1 for company & at least 3 for public company - 120 • "FIRST DIRECTORS" - set out upon incorporation; FD's must be incorporators who signed articles - 121 • SUBSEQUENT D's - elected/appointed as per articles - 122 • <u>QUALIFICATIONS</u>- under 18, undischarged bankrupt; can't manage own affairs; undischarged/pardoned fraud conviction - 124 <ul style="list-style-type: none"> • D NEED NOT BE SH - 125 • CEASE TO HOLD OFFICE --> term expires; D dies or resigns; D is removed - 128(1) <ul style="list-style-type: none"> • REMOVAL - by <u>special resolution</u> (which in BC can be b/w 2/3 and 3/4 of voting SH's) or by other method in articles - 128(3) • VACANCY? <ul style="list-style-type: none"> • b/c of removal under 123 --> SH can appoint/elect new D at same removal meeting (ouch.) - 131(a) • loss of <u>quorum</u> due to vacancy? --> remaining D's may appoint OR call SH's meeting to appoint - 134 • NO D's? --> incorporators or SH's can appoint individual to call SH meeting & to appoint temp D's to meet quorum - 135 • FEDERAL <ul style="list-style-type: none"> • NUMBERS - at least 1 for company & at least 3 for public company - 102(2) // TIME OF TERM - 106 • BYLAWS - D's can make, amend, or repeal any bylaws that regulate corp biz & affairs // SH's then confirm, amend, reject - 103 • <u>QUALIFICATIONS</u> - natural person who is > 18 + sound mind + not bankrupt- 105(1) <ul style="list-style-type: none"> • RESIDENCY REQ - 25% or at least 1 D must be <u>Canadian resident</u> (NOTE - BC lacks this requirement) - 105(3) • D NOT REQUIRED TO BE SH - 105(2) • CEASE TO HOLD OFFICE --> D fails to meet req's of 105; D dies or resigns; D is removed - 108 <ul style="list-style-type: none"> • REMOVAL - by <u>ordinary resolution</u> at special meeting - 109 • VACANCY? b/c of removal under 109--> SH can appoint/elect new D at same removal meeting - 109(3)
GENERAL DUTIES	<ul style="list-style-type: none"> • GENERAL DUTY: manage, or supervise management, of corp's business and affairs - 136 & 102(1) • D/O HAVE FIDUCIARY DUTY - act honestly & in good faith, in best interests of company - 142(1)(a) & 122(1)(a) • D/O HAVE DUTY OF CARE - exercise care + skill + diligence of reasonable person in comparable circumstances - 142(1)(b) & 122(1)(b) • 3rd PARTY PROTECTION: <ul style="list-style-type: none"> • ACTS OF A D VALID NOTWITHSTANDING DEFECT IN ELECTION OR QUALIFICATION - 143 & 116 • INDOOR MANAGEMENT RULE - 3rd parties entitled to <u>rely on the authority</u> of person representing the corp - 146 & 17 & 18 • PROVINCIAL <ul style="list-style-type: none"> • D MEETINGS - D entitled to participate, including vote, at meetings - 140(1) • RESOLUTION - in lieu of D meeting - 140(3) • FEDERAL <ul style="list-style-type: none"> • D MEETINGS - can meet any place, though Can D's must be present at certain meetings - 114 <ul style="list-style-type: none"> • UNANIMOUS RESOLUTION - in lieu of D meeting - 117 • SH MEETINGS - D is receive notice, attend, & be heard at every SH meeting - 110 • MANAGING D - other D's can appoint & delegate responsibility to MD - 115
OFFICERS	<ul style="list-style-type: none"> • BOTH STATUTES RELATIVELY SILENT WRT O's - mainly left to the corp to decide • D's CAN DELEGATE POWER TO MANAGE CORP'S BUSINESS + AFFAIRS - 141 & 121 • TITLE NOT DETERMINATIVE --> difference b/w <u>top management</u> vs <u>mere employee</u> determined by factors such as : degree of control within corp // degree of control over transactions // supervisory powers // power to give instructions & orders (Can Aero) • PROVINCIAL <ul style="list-style-type: none"> • "senior officer" - (a) chair/vice-chair of board if full-time; (b) president; (c) VP of principal business unit including sales, finance, production; (d) O who performs <u>policy-making</u> function & has capacity to influence <u>direction</u> of corp - 1(1) • QUALIFICATION - O must meet requirements to be D - 141(3) • APPOINTMENT/REMOVAL - D's may remove any O // removal w/out prejudice to right under K law - 141(4)&(5) • FEDERAL <ul style="list-style-type: none"> • "officer" - chair of board // president & VP's // secretary & treasurer // comptroller // general counsel // managing D // any other person who performs functions similar to those offices - 2(1) • D's appoint O's // D can be O // one person can hold multiple offices - 121 • ISSUE = concentration of power & knowledge if one person holds multiple O's --> that's why Audit Committees are needed

PERSONAL LIABILITY	<ul style="list-style-type: none"> • PROVINCIAL • DISCLOSABLE INTERESTS – if court determines K entered into was “fair & reasonable” to corp, D may be relieved of liability to AFP – 150 • PERSONAL LIABILITY – D who vote in <u>favor</u> of resolution are J&SL for corp’s <u>monetary payments</u> as result of unlawful act – 154 • SHARED LIABILITY – D found liable under 154 entitled to contribution from other D’s who also voted in favor – 156 • DISPLAY OF NAME – D personally liable to purchaser, suppliers, security holders for loss from knowing failure to display corp name – 158 • STATUTORY DEFENCE --> <u>D not liable if relied in good faith on</u> – 157(1) ---> NOTE: O’s are excluded from benefits of this provision <ul style="list-style-type: none"> • (a) financial statements or auditor’s report; (b) written professional report; (c) O’s statement of facts; (d) any other record or representation court considers provides reasonable grounds for the D’s actions • D <u>didn’t know & couldn’t reasonably have known</u> that act under 154 was contrary to Act – 157(2)
	<ul style="list-style-type: none"> • FEDERAL • PERSONAL LIABILITY – D who vote in <u>favor</u> of resolution are J&SL to restore to corp <u>monetary payments</u> as result of unlawful acts – 118 • SHARED LIABILITY – D who satisfies judgment entitled to contribution from other D’s who also voted in favor or consented – 118(3) • WAGES – D’S are J&SL for <u>six month</u> unpaid wages – 119

CARE & SKILL

COMMON LAW	<ul style="list-style-type: none"> • 3 ELEMENTS (<u>City Equitable</u>) 1. no special skill required; std person of similar knowledge & experience; not liable for mere errors of judgment – <u>altered by statute</u> 2. D needn’t give continuous attention to affairs – should be at meetings when reasonable to attend – <u>incorporated into statute</u> 3. D’s may delegate, according to articles, and is entitled to trust the delegatee
STATUTORY REFORM	<ul style="list-style-type: none"> • PROVINCIAL • STANDARD – D must exercise skill, care, diligence of <u>reasonably prudent individual</u> in comparable circumstances – 142(1)(b) <ul style="list-style-type: none"> • CAN’T K OUT – nothing in K, articles, memorandum relieve duties of Act – 142(3) • DEFENCE? --> good faith reliance on..... see above – 157 // NOTE: O’s are excluded from benefits of this provision • FEDERAL • STANDARD – D must exercise skill, care, diligence of <u>reasonably prudent individual</u> in comparable circumstances – 122(1)(b) <ul style="list-style-type: none"> • CAN’T K OUT – nothing in K, articles, bylaws OR unanimous SH resolution relieves DOC – 122(3) • DEFENCE? --> <u>good faith reliance</u> on financial statements, auditors reports, and professional reports – 122(5) • Peoples – business decision made using reliance on reports from VP & auditors – successful 157 defence // (1) SUBJECTIVE + OBJECTIVE component to DOC // (2) court suggests <u>DOC</u>, in substance, is owed to creditors (and possibly other stakeholders)
BC SUMMARY	<ol style="list-style-type: none"> 1. D/O’s must exercise care, diligence & skill of reasonably prudent person in comparable circumstances – 142(1)(b) 2. Challenged action must actually be action of D/O --> must vote for or consent to action 3. If D/O missed the meeting where decision happened, they probably won’t be liable for breach DOC – maybe of FD, if they miss lots 4. If involved, D/O may be personally jointly & severally liable for certain actions – liable for all loss – 154 5. to avoid --> (1) rely in good faith on professional reports – 157 6. both D & O’s subject to DOC -- but 154 & 157 apply only to D’s -- O’s still have duties, but w/ no exculpatory provisions
BUSINESS JUDGMENT RULE	<ul style="list-style-type: none"> • COURT WILL NORMALLY DEFER TO BUSINESS DECISION IF WITHIN RANGE OF REASONABLE ALTERNATIVES • BURDEN ON PLAINTIFF – BUT D/O MAY HAVE TO SHOW THEY ACTED W/ BASIC LEVEL OF SKILL AND ATTENTION <ul style="list-style-type: none"> • UPM-Kymmene – “golden parachute” would bankrupt corp; D’s argued reliance on report issued by expert but based on little data; court – can’t simply rely on expert – D’s must still exercise <u>reasonable judgment</u> • Pente Investment – special committee of outside D’s approved takeover bid from bidder who did not have highest bid; SH’s challenged; committee had no conflict of interest, so D’s entitled to rely on their judgment; burden to show otherwise on SH’s

FIDUCIARY DUTIES

GENERAL	<ul style="list-style-type: none"> • D/O SHALL ACT IN GOOD FAITH WITH A VIEW TO THE BEST INTERESTS OF THE CORPORATION - 142(1)(a) & 122(1)(a) • FIDUCIARY DUTY IS OWED TO CORPORATION ALONE (BCE - debenture holders could claim under DA or OR) • STATUTE IS NOT COMPREHENSIVE OF THE FIDUCIARY DUTIES OWED --> will often need to refer to CL • FD GREW OUT OF TRUST LAW - (1) duty of loyalty // avoid conflicts; (2) duty to convey important information; (3) disgorgement / AFP
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SELF-DEALING

GENERAL	<ul style="list-style-type: none"> • CORP HAS K WITH A D --> possible conflict of interest b/c D could be making corp's decision in their <u>own</u> best interest • ONLY APPLIES TO D's & SENIOR OFFICERS - for both statutes, as feds define "officer" as senior management
STATUTE PROVINCIAL	<ul style="list-style-type: none"> • BC HAS FAIRLY COMPLETE CODE - COMPLY WITH PROCEDURE & D WILL LIKELY BE RELIEVED OF LIABILITY • DISCLOSURE: D & Sr O's must disclose nature & extent of interests that <u>**could** materially conflict</u> with their duty as D/O - 153(1) • DISCLOSURE MUST BE PROMPT - 153(2) • PROCEDURE <ul style="list-style-type: none"> • D/O has no obligation to disclose or AFP, except as provided by this part - 152 • "disclosable interest" - material to <u>both</u> corp & D/O (either directly or indirectly) - 147(1) • some exceptions - ex/ close corp relations b/w parties - 147(2) // not DI merely a DI because ex/ loan, security, remuneration - 147(4) • OBLIGATION TO AFP - unless K approved by D's or by SH's, or D/O had K <u>prior</u> to taking office - 148 • D APPROVAL - D with DI not entitled to vote - 149 • SH APPROVAL - must be by <u>special resolution</u> - 149 • COURT APPROVAL - can excuse D/O from need to AFP if K was <u>fair & reasonable</u> to corp // if not, court can enjoin corp from entering into K, order D/O to AFP, make any other order it thinks appropriate - 150(1)&(2) • VALIDITY OF K: not invalid merely b/c interest of D/O undisclosed & SH's have not approved - <u>presumption of validity</u> - 151 • AFP? includes profit of D/O <u>and</u> loss to the corp
STATUTE FEDERAL	<ul style="list-style-type: none"> • FEDERAL PROVISION LESS COMPREHENSIVE - D/O MAY STILL HAVE TO AFP & K MAY BE INVALID • DISCLOSURE: D/O must disclose interest in material K w/ corp if: (a) party to K; (b) D/O of party to K; (c) material interest in party to K - 120 <ul style="list-style-type: none"> • <i>NOTE --> CBCA does not define "disclosures" nor require materiality on <u>both</u> sides of the K - best to err on side of more disclosure</i> • VALIDITY OF K/Tx - not invalid, despite non-disclosure, if D's approve + K/Tx <u>fair & reasonable to corp</u> when approved - 120(7) <ul style="list-style-type: none"> • <i>NOTE --> this implies that a K could be found INVALID if those req's are not met!</i> • SH CONFIRMATION - D/O not liable to AFP & K/Tx not invalid, despite lack of compliance with 120(1) & (7) if - 120(7.1) <ul style="list-style-type: none"> • D/O acted in good faith • SH approve by <u>special resolution</u>, and did so having disclosure of interest; and • K/Tx was fair & reasonable to corp when approved/confirmed • LACK OF COMPLIANCE? --> court may <u>set aside</u> K on terms it sees fit and/or require the D/O to account for profit - 120(8)

CORPORATE OPPORTUNITIES

GENERAL	<ul style="list-style-type: none"> • CORP DOES NOT HAVE K --> D/O HAS THE K INSTEAD • REMEDY? DISGORGEMENT • MAINLY REGULATED BY CASE LAW - RANGE OF SCENARIOS <ul style="list-style-type: none"> • Regal (Hastings) Ltd - <u>D not allowed to take opportunity, even if corp couldn't</u> // here, D and lawyer entered into transaction the corp wasn't able - but for benefit of company // both profited enormously --> D required to disgorge, lawyer able to keep shares • Peso Silver Mines - <u>D can take opportunity where corp made informed choice NO</u> // here, company refused action on silver claim // D left company, formed a new one, & took opportunity // court - former-D can keep benefit b/c "course of duties" done • Can Aero - (1) <u>duty applies to O's too</u>; (2) <u>fiduciary duty ongoing</u>; (3) <u>irrelevant that opportunity taken varied from that offered to corp</u> // here, D&O left corp, started new one, & used information acquired in old position <ul style="list-style-type: none"> • FACTORS: position held; ripeness & specificity of opportunity; relation of D/O to opportunity; amount of knowledge possessed; circumstances under which knowledge obtained; time; method of termination - resign, retire, discharge, etc; info public or private?
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COMPETITION

GENERAL	<ul style="list-style-type: none"> • D/O HOLDS OFFICE IN TWO CORPS THAT COME INTO COMPETITION --> CONFLICT OF INTEREST
STATUTE	<ul style="list-style-type: none"> • D's & SENIOR O's MUST DISCLOSE NATURE & EXTENT OF INTERESTS THAT COULD MATERIALLY CONFLICT W/ INTEREST AS D/O - 153(1) • DISCLOSURE MUST BE PROMPT - 153(2) • MAY REQUIRE DISCLOSURE OF ONGOING INFORMATION, says BWM
COMMON LAW	<ul style="list-style-type: none"> • <i>London & Mashonaland</i> - okay to hold multiple D positions; to be of concern, there must be <u>actual misuse</u> of position • <i>Cranewood</i> - two step process // (1) actual or potential conflict from D/O taking opportunity? (2) was the opportunity obtained by the D/O by virtue of their position? --> yes to both, liability attaches

HOSTILE TAKEOVERS

GENERAL	<ul style="list-style-type: none"> • CONCERN = D/O's WANT TO KEEP JOB, THEREFORE WILL FIGHT HT, EVEN IF IN CORP's BEST INTERESTS • DEFENSIVE TACTICS: poison pill (automatically increase votes of shares upon takeover); OR issuance of additional shares
COMMON LAW	<ul style="list-style-type: none"> • D MUST ACT IN GOOD FAITH + HAVE REASONABLE GROUNDS FOR THEIR ACTIONS <ul style="list-style-type: none"> • <i>Teck Corp</i> - BD's favored another bidder // issued additional shares to defeat HT by Teck, who was previously majority SH // court - no breach of FD - acted in good faith & had reasonable grounds to believe takeover would cause corp substantial damage • NO REASONABLE GROUNDS? COURT MAY BE JUSTIFIED IN FINDING D's ACTED FOR IMPROPER PURPOSE <ul style="list-style-type: none"> • <i>Pente Investment</i> - controlling SH preferred one takeover bid over another, though one was higher // court - no breach of FD as decision made by special committee of outsiders, gathered lots of information & made it available publicly

RELIEF FROM LIABILITY

COMMON LAW	<ul style="list-style-type: none"> • MAJORITY OF SH's CAN RATIFY ACTION & RELIEVE D FROM LIABILITY (<i>North-West</i> – D voted his shares to ratify his own action)
STATUTORY REFORM	<ul style="list-style-type: none"> • CAN'T ESCAPE LIABILITY VIA K, ARTICLES, BYLAWS, ETC – 142(3) & 122(3) • PROVINCIAL <ul style="list-style-type: none"> • FD / DOC / DUTY TO ACT IN ACCORDANCE as per 142(1) <ul style="list-style-type: none"> • D not liable if actions based on <u>good faith reliance</u> on (a) financial statements or auditor's report; (b) written professional report; (c) O's statement of facts; (d) any other record/rep court considers gives reasonable grounds for D's actions – 157(1) • PERSONAL LIABILITY FOR LOSS as per 154 <ul style="list-style-type: none"> • D not liable if they <u>didn't know or couldn't reasonably have known</u> actions or resolution was contrary to Act – 157(2) • DERIVATIVE ACTION <ul style="list-style-type: none"> • no stay or dismissal solely b/c of actual or potential SH approval – but court can take this into account – 233(6) • GENERAL DEFENCE (**unique to BC) <ul style="list-style-type: none"> • if D/O liable, court <u>must</u> take into consideration all circumstances & <u>may relieve wholly or partly</u> if court finds that person acted <u>honestly and reasonably and ought fairly to be excused</u> – 234 • FEDERAL <ul style="list-style-type: none"> • DOC / FD as per 122(1) <ul style="list-style-type: none"> • <u>good faith reliance</u> on (a) financial statements & auditor's report; (b) professional report – 123(5) <ul style="list-style-type: none"> • NOTE: <i>under federal law, not entitled to rely on O's statement of facts, nor anything else designated by court</i> • PAYMENTS FOR UNLAWFUL ACTS (118) or UNPAID WAGES (119) <ul style="list-style-type: none"> • D not liable if D exercised <u>care, skill, diligence of a reasonably prudent person</u> in comparable circumstances – 123(4) • including <u>good faith reliance</u> on (a) financial statements & auditor's report; (b) professional report <ul style="list-style-type: none"> • NOTE: <i>under federal law, not entitled to rely on O's statement of facts, nor anything else designated by court</i> • DERIVATIVE ACTION <ul style="list-style-type: none"> • no stay or dismissal solely b/c of actual or potential SH approval – but court can take this into account – 242(1)
INDEMNIFICATION & INSURANCE	<ul style="list-style-type: none"> • LIABILITY INSURANCE – DON'T TAKE A JOB AS A DIRECTOR UNLESS YOU GET THIS AS PART OF PACKAGE! – 165 & 124(6) • FEDERAL LAW MORE OPEN-ENDED, BUT ACCORDING TO BWM, RESULT WILL LIKELY BE SAME AS BC VERSION • PROVINCIAL <ul style="list-style-type: none"> • “eligible party” – D/O, former D/O, individual who acts as D/O at corp's request – 159 • “eligible proceeding” – where eligible party may be joined to action, or liable for judgement, penalty, fine, expense – 159 • MAY INDEMNIFY – corp may (a) indemnify against penalties; and/or (b) pay expenses actually & reasonably incurred – 160 • MUST INDEMNIFY – for expenses not yet reimbursed – 161 <ul style="list-style-type: none"> • (a) where party was <u>wholly successful</u>, on merits or otherwise, in outcome • (b) where party <u>substantially successful</u>, on merits, in outcome of proceedings • NO INDEMNIFICATION – 163 <ul style="list-style-type: none"> • (a)/(b) governing documents prohibit such payment • (c) failure to act in good faith & in best interests of corp • (d) party did not have reasonable grounds to believe action was lawful • PRE-PAYMENT OF EXPENSES – corp may reimburse expenses actually & reasonably incurred ahead of final disposition – 162 • COURT ORDERS – on application, court can make various orders wrt indemnification – 164 • FEDERAL <ul style="list-style-type: none"> • ELIGIBILITY – D/O, former D/O, individual who acts as D/O at corp's request – 124(1) • INDEMNIFY WHAT? all costs, charges, & expenses – including judgments – <u>reasonably incurred</u> in respect of <u>any</u> proceedings person involved with b/c of their association with corp – 124(1) • REQUIREMENTS – 124(3) <ul style="list-style-type: none"> • (a) acted honestly + in good faith + with view to best interests of corp (or other entity at corp's request) • (b) criminal or administrative proceedings – must've been reasonable grounds to believe conduct was <u>lawful</u> • RIGHT TO INDEMNITY – no fault or omission found + acted honestly + in good faith + with view to best interests of corp – 124(5) • APPLICATION TO COURT – to approve indemnity – 124(7) • DIFFERENCES <ul style="list-style-type: none"> • <i>cannot indemnify for breach of FD under federal law, as per 124(3) // whereas in BC this may be possible, as per 163</i> • <i>expenses --> BC req'd to indemnify if D wholly successful, or substantially so on merits // feds – more restrictive – if no breach</i>

SHAREHOLDERS, SHARES, & SHAREHOLDER RIGHTS

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

SHARES

SHARE STRUCTURE	<ul style="list-style-type: none"> • SHARE ISSUANCE & PRICE – D's responsible for ensuring shares issued at <u>fair equivalent</u> (feds) or <u>fair market value</u> (BC) • D LIABILITY – <u>personally liable</u> if they can't explain why shares issued at certain value // responsibility can be to corp or SH <ul style="list-style-type: none"> • BC – complainant is SH, action for loss of value of <u>their</u> shares • FED – complainant is corp & remedy is AFP <p style="background-color: #FFDAB9; margin-top: 10px;">• PROVINCIAL</p> <ul style="list-style-type: none"> • “authorized share structure” – kind + class + series of shares authorized by NOA • “shareholder” – registered owner of share + incorporator • MUST DESCRIBE FROM OUTSET – NOA must describe authorized share structure + special rights or restrictions – 11 • INCORPORATOR – must hold one or more shares – 10 • RECORDS – list of SH's to be maintained – names, addresses, number of shares – list can be requested for limited use – 49 • AUTHORIZED SHARE STRUCTURE <ul style="list-style-type: none"> • one or both of par value & non-par value shares; class of shares must have shares of similar characteristics – 52 • NOA must set out: names of class or series; maximum number allowed; par value, if any; identify non-PV shares as such – 53 • change to ASS can be made later (though in practice, very difficult) – 54 • NATURE OF INTEREST --> shares are <u>personal estate</u> (ie/ not land interest, just b/c corp owns land) – 56 • CLASSES – default = single class – 59(2) // each class must have same special rights & restrictions amongst shares in class – 59(4) • SERIES – allows for differentiated rights within a class // but – no differentiation on basis of dividends OR asset distribution – 60 • ISSUANCE – subject to articles, D's may determine when & to who to issue shares – 62 • ISSUE PRICE – non-PV share price must be set by: (a) manner set out in articles; or (b) D's resolution – 63(1) // PV set by D's – 63(2) • PAYMENT – shares must not be issued until fully paid – 64(2) // consideration = past services, property, or money – 64(3) <p style="background-color: #D8BFD8; margin-top: 10px;">• FEDERAL</p> <ul style="list-style-type: none"> • MUST DESCRIBE FROM OUTSET – classes (and series), max number of shares, and any transfer restrictions in articles of incorp – 6(1) <ul style="list-style-type: none"> • CLASSES – if none, all SH rights equal (wrt voting, dividends, asset distribution) – 24(3) // but classes allowed – 24(4) • SERIES – number, rights, restrictions and conditions – 27(1) • NO PAR VALUE SHARES • RECORDS – list of SH's to be maintained – names, addresses, number of shares – 21(3) • ACCESS TO LIST – must be requested by affidavit – 21(7) // ltd use = effort to influence vote; acquire securities; other corp affairs – 29(9) • ISSUANCE – subject to articles or bylaws, D's may determine when, for how much & to who to issue shares – 25(1) • PRICE – set by D's – 25(1) • PAYMENT – shares must not be issued until fully paid by --> past services, property, or money – 25(3) • DIVIDENDS – must not issue if payment would render corp unable to pay debts – 42 // can pay by issuing shares, money, or property – 43
VOTING RIGHTS	<ul style="list-style-type: none"> • NON-VOTING SHARES – could still have vote on important issues <ul style="list-style-type: none"> • CBCA – can vote on disposition of all/substantially all corp property – 189(6) – NOTE – BC does not have this provision • 2 CATEGORIES OF VOTES <ol style="list-style-type: none"> 1. approval of SH's needed – in response to actions of proposal of D's 2. SH's want something done that isn't being done (rare & usually hostile) <p style="background-color: #FFDAB9; margin-top: 10px;">• PROVINCIAL</p> <ul style="list-style-type: none"> • PRESUMPTIVE RIGHT TO VOTE – one share = one vote & entitled to vote in person or by proxy – 173(1) • RECORD DATE – to determine who's entitled to vote – 171 • METHODS – by poll (secret) or show of hands (difficult if vote is weighted) – 173(2) // but – SH can demand poll after hand vote – 173(4) • PARTICIPATION METHOD – in person, by phone, or other communication medium – 174(1) // deemed to be present at meeting – 174(3) • POOL VOTES? --> sure! – two or more SH's can have written agreement to vote shares a certain way – 175 <p style="background-color: #D8BFD8; margin-top: 10px;">• FEDERAL</p> <ul style="list-style-type: none"> • PRESUMPTIVE RIGHT TO VOTE – one share = one vote & entitled to vote in person or by proxy – 140(1) • RECORD DATE – to determine who's entitled to vote – 134 • METHOD – default is show of hands – 141(1) // SH entitled to call for ballot before OR after hand vote – 141(2) • ELECTRONIC VOTING – vote by phone, electronic, or other communication device – 141(4) • POOL VOTES? --> sure! – two or more SH's can have written agreement to vote shares a certain way – 145.1

SHAREHOLDERS' MEETINGS

BASICS	<ul style="list-style-type: none"> • CONDUCT OF MEETINGS: SH's are generally entitled to be heard at meetings; but does not give everyone who wants to speak the right to do so, nor does it guarantee they'll get to speak as long as they want <ul style="list-style-type: none"> • Wall – minority SH didn't get to speak against resolution before vote called // court – chairman, supported by majority, can terminate speeches or call to end the meeting // but majority should not exercise power tyrannically • TYPES OF MEETINGS <ol style="list-style-type: none"> 1. ANNUAL (GENERAL) MEETING – mandatory – called by D's 2. SPECIAL (fed) / GENERAL MEETING – called by D; can be called any time; notice required (169) 3. SH REQUISITIONED MEETING – deals with whatever is subject matter of requisition; see below (167) 4. COURT-ORDERED MEETING – likely result of SH action; court can make orders
DEFINITIONS	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • “meeting of SH's” – general meeting, class meeting, • “ordinary resolution” – (a) – passed at general meeting with simple majority OR (b) – passed by special majority of aggregate votes of --> SH's at general meeting + votes consented to in writing by SH's • “special majority” – if articles specify, between 2/3 and 3/4 of vote (if articles don't specify, it's 2/3) • “special resolution” – (a) notice + at least special majority of SH votes in favor; OR (b) consent in writing of <u>all</u> SH's entitled to vote at general meetings • FEDERAL <ul style="list-style-type: none"> • “ordinary resolution” – resolution passed by simple majority of SH's voting • “special resolution” – resolution passed by at least 2/3 of SH's voting or signed by SH's entitled to vote
SPECIAL / GENERAL MEETING	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • NOTE --> these rules apply to other SH meetings also – 181 • LOCATION – must be held in BC, unless articles provide otherwise or R approves in advance – 166 • NOTICE – at least 2 month in advance to each D & each SH entitled to attend – 169 // SH can waive notice – 170 • QUORUM – set by articles; if not specified – 2 SH's entitled to vote; or if less, then <u>all</u> SH's entitled to vote – 172 • MINUTES – must be kept – 179 • FEDERAL <ul style="list-style-type: none"> • LOCATION – in Canada, place determined by by-laws or D's – 132(1) // can be outside C if articles provide or all SH's agree – 132(2) • TIMING – D can call special meeting at any time – 133(2) • NOTICE OF MEETING – time & place of meeting must be sent to: each SH entitled to vote; each D; auditor – 135(1) • NOTICE OF BUSINESS – must state <u>nature of business & text of any special resolution</u> – 135(6)
ANNUAL (GENERAL) MEETINGS	<ul style="list-style-type: none"> • PROVINCIAL – “ANNUAL GENERAL MEETING” <ul style="list-style-type: none"> • TIMING – D's shall call no more than 18 months after formation & once per calendar year, no more than 15 months apart – 182(1) • DELAY/WAIVE – by unanimous resolution of SH's entitled to vote – 182(2) // OR, by court order – 186 • BUSINESS – present financial statement, as per 198(2); and auditor's report as per 212(1)(a) – 185 • FEDERAL – “ANNUAL MEETING” <ul style="list-style-type: none"> • TIMING – D's shall call no more than 18 months after formation & once per calendar year, no more than 15 months apart, but no later than 6 months after end of financial year – 133(1) // may <u>delay</u> by court order – 133(3) • NOTICE – time & place of meeting must be sent to: each SH entitled to vote; each D; auditor – 135(1) • BUSINESS – 3 things must be taken care of – 135(5) <ol style="list-style-type: none"> 1. election of D's 2. appointment or re-appointment of auditor 3. presentation & approval of financial statements & auditor's report

<p>UNANIMOUS & CONSENT RESOLUTIONS</p>	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • “consent resolution” – resolution passed by consent in writing – <u>allows advance voting</u> – two definitions <ul style="list-style-type: none"> • (a) – if resolution could’ve been passed as OR, then special majority of aggregate votes of --> SH’s at general meeting + votes consented to in writing by SH’s • (b) – for any other resolution, a unanimous resolution (ie/ pass a special resolution by consent) • “unanimous resolution” – consented to, in writing, by <u>all SH’s</u> entitled to vote • CONSENT RESOLUTION --> <u>deemed</u> to be a SH proceeding + valid & effective as if passes at a meeting – 180 • <u>ANNUAL GENERAL MTG</u>: SH’s may, by <u>unanimous resolution</u>, <u>defer</u> the AGM, or consent to all business & <u>waive</u> holding AGM – 182 <ul style="list-style-type: none"> • FEDERAL <ul style="list-style-type: none"> • RESOLUTION IN LIEU OF MEETING – written resolution signed by all SH’s eligible to vote is valid as if passed at SH meeting – 142(1) • Eisenberg – unanimity – person was D, president, & sole beneficial share owner // decision challenged on basis that D didn’t follow proper procedure // court – as D & all SH’s were the same person, foregone conclusion that he would’ve ratified the decision – no meeting required
<p>SHAREHOLDER PROPOSALS</p>	<ul style="list-style-type: none"> • SH PROPOSALS EASIER TO GET THAN REQUISITIONED MEETING – BUT, NO MECHANISM TO ENFORCE, SHORT OF COURT ORDER • PURPOSE: get corp to circulate information on the proposal ahead of time; often used to bring awareness to social justice issues • PROVINCIAL <ul style="list-style-type: none"> • ONLY APPLIES TO PUBLIC CORP’s – 187(3) • WHO CAN MAKE? – “qualified SH” – owner of at least one share for at least 2 years (uninterrupted) prior to signing – 187(1) • CANNOT MAKE PROPOSAL – if within 2 years before signing, a SH attempted a proposal & failed – 187(2) • REQ’S FOR VALID PROPOSAL – 188 <ol style="list-style-type: none"> 1. signed by submitter + qualified SH’s who together hold at least 1/100 of issued shares OR value over certain amount 2. received at least 3 months before annual reference date 3. declaration from submitter & supporters 4. may include 1000 word written statement • INFO DISTRIBUTION & MEETING – corp must send out proposal in advance & allow submitter to present at AGM – 189(1)-(3) • NO LIABILITY – for complying with the above – 190 • EXCEPTIONS – 189(5) <ul style="list-style-type: none"> • (a) notice of AGM already sent; (b) proposal invalid; (c) substantially same proposal recently failed; (d) clearly appears proposal doesn’t significantly relate to corp’s biz or affairs; (e) clearly appears primary purpose is to secure publicity OR is personal grievance; (f) <u>already substantially implemented</u>; (g) <u>proposal would be an offence</u>; (h) <u>beyond powers of corp</u> <ul style="list-style-type: none"> • NOTE – last 3 are not in federal statute • D’s REFUSE TO ACT? --> court can order corp to send info & put proposal on agenda // insufficient time? court can order general meeting at corp expense – 191 • FEDERAL <ul style="list-style-type: none"> • WHO CAN MAKE? – SH for prescribed period & amount of shares OR has support of persons who together hold prescribed number of shares for prescribed period – 137 • D NOMINATION – requires signatures of at least 5% of qualified SH’s – 137(4) • VALID PROPOSAL <ol style="list-style-type: none"> 1. name & address of submitter & supporters – 137(1.2) 2. supporting statement – no more than 500 words – 137(3) • EXCEPTIONS – 137(5) <ul style="list-style-type: none"> • (a) not submitted in time; (b) clearly appears primary purpose is personal grievance; (b.1) clearly appears proposal doesn’t relate in <u>significant</u> way to corp’s biz or affairs; (c) no show at previous meeting; (d) substantially same proposal recently failed; (e) rights being abused to secure publicity • D’s REFUSE TO ACT? --> must send notice to submitter – 137(7) // can then apply to court – 137(8) • Varity Corp – corp doing biz in South Africa during apartheid // SH proposal to cease SA operations // D refused // court – D’s able to use exception --> proposal didn’t relate to corp’s biz or affairs, was instead effort to gain publicity & raise awareness • DIFFERENCES B/W BC & FEDERAL <ul style="list-style-type: none"> • BC – proposal to be considered at next AGM // Federal – proposal considered at special meeting, as AGM only deals w/ 3 issues • BC – has a few additional reasons to refuse – see above

REQUISITIONED MEETINGS	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • WHO CAN CALL? --> SH with at least 1/20 of shares entitled to vote at general meeting - 167(2) • FORM - state business in 100 words or less; signed by requisitioning SH's; delivered to corp's registered office - 167(3) • TIMING - D must call general meeting within 4 months of receiving requisition - 167(5) • GROUNDS TO REFUSE - (a) notice of general meeting already sent; (b) substantially same proposal rejected within certain amount of time past; (c) clearly appears business doesn't relate in significant way to corp's biz or affairs; (d) clearly appears primary purpose is to secure publicity OR is personal grievance; (e) <u>already substantially implemented</u>; (f) <u>proposal would be an offence</u>; (g) <u>beyond powers of corp</u> - 167(7) • D's REFUSE? --> any requisitioning SH, or group, holding at least 1/40 of issues shares can call general meeting - 167(8) // corp will reimburse reasonable costs of that meeting, unless SH's resolve against - 167(10) • FEDERAL <ul style="list-style-type: none"> • WHO CAN CALL? --> SH with at least 5% of vote - 143(1) • FORM - signed by SH; states business of requisition; sent to D & registered corp office - 143(2) • EXCEPTIONS - 137(5) <ul style="list-style-type: none"> • (a) not submitted in time; (b) clearly appears primary purpose is personal grievance; (b.1) clearly appears proposal doesn't relate in <u>significant</u> way to corp's biz or affairs; (c) no show at previous meeting; (d) substantially same proposal recently failed; (e) rights being abused to secure publicity • D's REFUSE? --> <u>any</u> SH who signed requisition can go ahead & call meeting - 143(4) // cost reimbursed by corp, unless SH's resolve against - 143(6) • TIMING - meeting should be called "as nearly as possible" - 143(5) • Air Industry - meeting already scheduled - takeover proposal for Air Canada // group of SH's wanted meeting called - D's claimed they didn't have to call meeting b/c one was already scheduled & SH's issue <u>might</u> be put on agenda // court - D's acted inappropriately; no guarantee issue would come up - in fact, it probably wouldn't! // however, court did <u>not</u> order meeting, as SH could do so themselves
COURT-ORDERED	<ul style="list-style-type: none"> • PROVINCIAL - corp/D/SH can apply to court for order wrt manner meeting is called, held & conducted if: <ul style="list-style-type: none"> • (a) impracticable for corp to call for any reason; (b) corp fails to hold SH meeting in accordance with Act & articles; (c) any other reason court thinks appropriate - 186(2) • FEDERAL - D/SH can apply to court & court can order meeting to be called if: <ul style="list-style-type: none"> • (a) impracticable to call meeting w/in regular time; (b) impracticable to conduct meeting in usual manner; or (c) court thinks meeting should be called, held, & conducted in a manner it orders for some other reason - 144(1) • WHEN WOULD THIS HAPPEN? <ul style="list-style-type: none"> • private company, where requisition meeting not possible // in conjunction with other relief // emergency situations • NOTE - courts very reluctant to call meetings, particularly when a SH or D is able to do so (Air Industry)
REMOVAL OF DIRECTORS	<ul style="list-style-type: none"> • REMOVAL OF DIRECTORS IS FAR EASIER UNDER FEDERAL LAW - THOUGH BC ARTICLES CAN BE CHANGED TO FACILITATE REMOVAL <ul style="list-style-type: none"> • FEDERAL - removal via <u>ordinary resolution</u> at special meeting - 109 • PROVINCIAL - default is removal via <u>special resolution</u> - 128(3) // but if certain class of SH's have exclusive right to appoint D, then removal via <u>special separate resolution</u> of those SH's - 128(4) <ul style="list-style-type: none"> • VACANCY from 128(3)? ----> SH can appoint/elect new D at same removal meeting (ouch.) - 131(a)

SHAREHOLDERS' REMEDIES & RELIEF

- **NOTE --> UNLESS SUPPLANTED BY STATUTE (AS IN DA & OR), CL STILL APPLIES --> BC SYSTEM IS FUNDAMENTALLY CONTRACTUAL IN NATURE**
- **DAMAGES?** CONTRACTUAL NATURE (of BC corp constitution) MIGHT ALLOW FOR ARGUMENT FOR DAMAGES UPON BREACH - unconventional

DERIVATIVE ACTION

INTRODUCTION & COMMON LAW	<ul style="list-style-type: none"> • CLASS ACTION - ON BEHALF OF ALL SH's - BROUGHT IN NAME OF CORPORATION TO ENFORCE D's DUTY TO CORP WHERE THE D's THEMSELVES ARE UNWILLING TO DO SO (for obvious reasons) • FOSS & HARBOTLE - SH unable to bring action on behalf of corp due to separate legal personality - proper claimant is corp itself • 2-STEP PROCESS <ol style="list-style-type: none"> 1. apply to court to be allowed to bring action in corp's name - ISSUE - to what extent does cause of action need to be demonstrated? 2. bring action // note: once started, a DA requires court approval to <u>stop</u>
STATUTORY DERIVATIVE ACTION	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • WHO CAN BRING? must be D or SH, but SH includes beneficial owner + any other <u>appropriate person</u> - 232(1) • LEAVE OF COURT - req to enforce right, duty, or obligation (or get damages b/c breach) that corp could've brought itself - 232(2) • PREREQUISITES - 233(1) <ol style="list-style-type: none"> (a) reasonable efforts to get D's to initiate action (b) notice of application for leave has been given to corp (c) complainant acting in good faith (d) legal proceeding is in corp's best interest (DA's often fail on this one) • court can appoint person to direct proceedings - 233(3) • STOPPING DA? --> requires approval of court - 233(5) // SH ratification not definitive, but can be taken into account - 233(6) • POST-DA - in theory, can come back after DA to get order wrt costs - 233(4) • FEDERAL <ul style="list-style-type: none"> • WHO CAN BRING? must be current or former D/O; registered or beneficial security owner; other <u>proper person</u> - 238 • LEAVE OF COURT - required to bring action in corp name - 239(1) • PREREQUISITES - 239(2) <ol style="list-style-type: none"> (a) notice of application for leave has been given to D's at least 14 days in advance (b) complainant acting in good faith (c) legal proceeding is in corp's best interest • STOPPING DA? --> requires approval of court - 242(2) // SH ratification not definitive, but can be taken into account - 242(1) • COURT ORDER - who controls action; direction for action; payment to <u>security holders</u> instead of corp! - 240 • COSTS - final costs - 240(d) // interim costs - may be liable to repay if you lose - 242(4) • DIFFERENCES <ul style="list-style-type: none"> • <i>feds tie the DA together more overtly with OR - certain provisions apply to both (238 & 242)</i> • <i>owner of "security" vs SH (in BC) -- includes SI's or debentures -- both equity & debt obligations</i> • <i>federal legislation gives more room for "troublemakers" - BC more D-friendly</i> • <i>no requirement to show applicant tried to get D's to act first - PRO - saves time</i> • <i>but - CON - harder to satisfy pre-conditions b/c of stronger wording</i>
JUDICIAL INTERPRETATION	<ul style="list-style-type: none"> • Re Northwest Forest - assets sold at low valuation despite SH requests to set aside sale // sought leave for DA - D's argued that nature of claim not sufficiently specific // court - leave given; best interest of corp - not required to show prima facie case; simply that corp has basis for complaint // notice - complainants showed they tried to get D's to bring action instead • Re Bellman - majority SH's planned takeover bid, minority SH's brought OR & sought leave for DA // good faith - not invalidated b/c minority SH also had personal action in OR // notice - not necessary to specify each & every cause of action • Turner - costs - if successful, prima facie costs order // but... if DA benefits complainant <u>greatly</u>, no guarantee you'll get costs
DERIVATIVE vs PERSONAL ACTION	<ul style="list-style-type: none"> • ARGUMENT - NO LONGER POSSIBLE TO DISTINGUISH DERIVATIVE & PERSONAL ACTION • BCE- debenture holders harmed by leveraged buy-out, as increase in debt decreased debenture value // court - in determining "best interests" of the corp --> must look to interests of stakeholders, such as SH's & creditors, to inform the decision! • THRESHOLD? how much harm to constituencies is required to show harm to corp & launch a successful DA?? --> <u>unclear</u>

PERSONAL ACTION

BASICS	<ul style="list-style-type: none"> • SH SUFFERED AS RESULT OF CORP ACTION // CAN BE BROUGHT ALONGSIDE DA // PA'S OFTEN ROLLED INTO OR // REMEDY = DAMAGES • Goldex Mines - SH alleged D's approved commercially unreasonable deal // court - <u>breach of DOC</u> can found personal action • Hercules - negligently-prepared audits; yet D's failed to bring action against accountant // SH brought personal action // court - <u>distribution</u> of report to SH could found PA - but loss from <u>preparation</u> of report was matter only the corp could bring - needs DA
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STATUTORY OPPRESSION REMEDY

BASICS	<ul style="list-style-type: none"> • ESSENCE = UNFAIR TREATMENT OF A SH // SOMEONE HAS TO BE NEGATIVELY AFFECTED - BUT IT DOESN'T HAVE TO BE YOU! • PA IS FAR EASIER TO BRINGS // BUT.... OR PROVIDES GREATER ARRAY OF REMEDIES • TREND OVER TIME HAS BEEN TO MAKE OR INCREASINGLY GENEROUS
STATUTE	<ul style="list-style-type: none"> • PROVINCIAL <ul style="list-style-type: none"> • WHO CAN BRING? shareholder (including beneficial) + any other <u>appropriate person</u>, as determined by court - 227(1) • GROUNDS FOR OPPRESSION - 227(2) <ul style="list-style-type: none"> (a) affairs of corp being conducted OR powers of D being exercised in <u>manner oppressive</u> to one or more SH's, including applicant (b) act or resolution, done or threatened, is <u>unfairly prejudicial</u> to one or more SH's, including applicant • REMEDY? court can make any order it thinks fit - statute gives a long, explicit list of examples - 227(3) <ul style="list-style-type: none"> • direct/prohibit act // regulate conduct of corp affairs // appoint receiver // order dealings wrt (anyone's!) shares // appoint or remove D's // <u>direct corp to purchase shares of SH</u> // direct one SH to purchase shares of another! // vary or set aside transaction or resolution // <u>compensate aggrieved party</u> // correct record // liquidate or dissolve company • FEDERAL <ul style="list-style-type: none"> • WHO CAN BRING? must be current or former D/O; registered or beneficial security owner; other <u>proper person</u> - 238 • GROUNDS FOR OPPRESSION - 241(2) <ul style="list-style-type: none"> (a) act/omission of corp or affiliate (b) corp's business or affairs have been conducted in a manner (c) powers of D's exercised in a manner --> that's <u>OPPRESSIVE OR UNFAIRLY PREJUDICIAL OR UNFAIRLY DISREGARDS</u> interests of any security holder, D/O, or creditor • REMEDY? court can make any order it thinks fit - statute gives a long, explicit list of examples (though less than BC) - 241(3) • STOPPING OR? --> requires approval of court - 242(2) // SH approval not definitive, but can be taken into account - 242(1) • DIFFERENCES <ul style="list-style-type: none"> • <i>feds do not require the complainant themselves be harmed, whereas BC does</i> • <i>feds do not include SH resolutions</i> • <i>language of federal statute is more encompassing</i>
JUDICIAL INTERPRETATION	<ul style="list-style-type: none"> • BCE - common thread of oppression is <u>fairness</u> // oppressive conduct - "burdensome, harsh, and wrongful" - visible departure from standards of fairness // unfair prejudice - less offensive conduct // but...OR is EQ - court has broad jurisdiction & doesn't want to get obsessed w/ legal categories of oppression // court lays out 2-part test <ol style="list-style-type: none"> 1. reasonable expectation of stakeholders, in context (objective) 2. conduct failed to meet expectations + rose to level of oppression or unfair prejudice (subjective, fact-specific) <ul style="list-style-type: none"> • BWM --> case converts OR into <u>duty of non-oppression</u> - controversial - <i>right to be treated fairly in course of D's decision-making</i> • First Edmonton - standing - OR is broad, but not available to <u>everyone</u> // court - to be "security holder" party must be more than just a creditor --> must be registered/secured creditor // OR not meant to be protection for bad bargains & creditors are almost always able to take steps to protect themselves in advance • Ferguson - three couples get into business - trouble arises & 5 try to refuse one SH dividends via shareholder resolution // maligned SH brings OR // court - OR applies, even though oppression result of <u>SH action</u> (note: BC explicitly references SH resolutions) • Nanef - family corporation // father squeezed out one son b/c he disagreed with son's lifestyle // son brought OR // at trial - oppression easily found; court ordered winding-up & asset distribution // on appeal - upheld, but remedy changed // reasonable expectations of parties - son knew he'd not have control while father alive - instead, corp ordered to buy son's shares
OPPRESSION vs BREACH OF FD	<ul style="list-style-type: none"> • DERIVATIVE ACTION FOR FD BREACH COULD ALSO LIKELY FOUND OPPRESSION REMEDY • PRO'S OF OR - (1) more expedient; (2) available relief id broader & more flexible; (2) better for private companies

OTHER RELIEF

COMPLIANCE & RESTRAINING ORDERS	<ul style="list-style-type: none"> • C&RO's ADJUNCT TO OTHER REMEDIES – DON'T USE IF COMPLAINT IS REALLY ABOUT ESSENCE OF ANOTHER ACTION (Goldhar) • PROVINCIAL <ul style="list-style-type: none"> • WHO CAN BRING? --> SH or anyone court thinks is “appropriate person” – 228(1) • SCOPE: can complain about actions of just about everyone! --> D/O/SH/employee/agent/auditor/T/R/RM/liquidator – 228(2) • ISSUANCE: court can order compliance OR enjoin breach of Act & corporate constitution // enjoin corp from disposing or receiving property, rights, and interests // require <u>compensation</u> be paid to company or any other party to K from breach of permissible business & powers (<u>unique</u> to BC) – 228(3) <ul style="list-style-type: none"> • BC explicitly enumerates more options court has, so may be easier to convince a court to do them! • FEDERAL – 190 <ul style="list-style-type: none"> • WHO CAN BRING? <u>broader</u> than BC – same definition of “complainant” as DA & OR ---> current & former registered or beneficial owner; current & former D/O's; any “proper person” as decided by court – 238 • ISSUANCE: court can make orders directing compliance or prevent person from acting in breach of Act & corporate constitution – 247
CORRECTING CORPORATE MISTAKES	<ul style="list-style-type: none"> • PREEMPTIVE MEASURE: court can <u>CORRECT MISTAKES</u> or <u>MODIFY CONSEQUENCE IN LAW</u> of mistake as preemptive measure – 229(2) • “CORPORATE MISTAKE” – breach of Act // non-compliance with memorandum or articles // ineffective proceedings – 229(1) • COURT MUST CONSIDER EFFECT OF ORDER ON: company, D/O's, creditors, SH's, and beneficial owners – 229(3) • Obviously, this is very corporation-friendly
APPRAISAL REMEDY	<ul style="list-style-type: none"> • DISSENT PROCEEDINGS --> REMEDY = CORP WILL BUYOUT SHARES • APPLICATION: usually only for <u>closely-held</u> corps, as large public corps will have a ready market for shares • PROVINCIAL <ul style="list-style-type: none"> • GROUND: <u>fundamental changes</u> including --> change of articles that effects corp power or permissible business; amalgamations & arrangements; sale of undertaking; continuation in another province; any other situation court permits (<u>unique</u> to BC) – 238(2) • PROCEDURE <ol style="list-style-type: none"> 1. notice of vote // corp should tell SH if they're entitle to dissent – 240 2. SH gives notice of dissent – in advance of vote – 242(1) 3. resolution passes? --> SH must <u>confirm</u> dissent within 1 month – 244 4. corp must make buy-out offer & “promptly” pay – 245 5. problems? apply to court • MUST VOTE ALL YOUR SHARES ONE WAY & MUST VOTE AGAINST RESOLUTION TO DISSENT • FEDERAL – 190 <ul style="list-style-type: none"> • DIFFERENCE? --> procedure only initiated once decision made – no advance notice required • GROUND: same type of thing; fundamental change etc // but court cannot <u>add</u> grounds, as in BC • PROCEDURE: <ol style="list-style-type: none"> 1. decision made – SH must send notice within <u>20 days</u> – 190(7) 2. corp must send SH offer to pay within <u>7 days</u> – 190(12) 3. problems? apply to court // corp must apply within <u>50 days</u> of resolution & SH within <u>70 days</u> or as court allows – 190(15)&(16) • REQUIRED TO SELL ALL YOUR HOLDINGS THAT *COULD* HAVE VOTED ON ISSUE