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| **LAW 230A** | **BUSINESS**  **ORGANIZATIONS** | |
|  | | **Condensed**  **Annotated**  **Notes** |

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# TYPES OF BUSINESS ORGANIZATIONS

**COMPARISON OF BUSINESS ENTITIES**

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|  | **SOLE PROPRIETORSHIP** | **GENERAL PARTNERSHIP** | **LIMITED LIABILITY PARTNERSHIP** | **LIMITED PARTNERSHIP** | **CORPORATION** |
| **Owners** | Sole proprietor | Partners | Partners | General partners and limited partners | Shareholders |
| **Controlling factor in formation** | Start of business | Meeting the definition in s 2, factors in s 4, & common law (s 91) | Satisfaction of s 96 requirements | Satisfaction of s 51 requirements | Compliance with formalities |
| **Registration needed?** | If name indicates more than one owner: s 88(1) | No - unless business within s 81 | Yes - s 96 | Yes - s 51 | Yes |
| **Differentiated “owners”?** | N/A | No - subject to agreement to contrary s 27 | No, even if formerly a limited partnership (s 103) | Yes, either general or limited partner, per s 50 (or both, s 52) **\*** | Possibly, if there are different classes of shares |
| **Form of owner’s contribution** | Unrestricted | Any property - “partnership property” in ss 1.1, 23, 24 - no restriction on services | Same as for general partnership - s 95(1) (see s 112(3) for contribution of services) | As in a general partnership for GP. LP can give money/property but not services (s 55) | Fair equivalent “consideration”: money, property or past services |
| **Participation in entity decisions?** | Absolute | Yes - s 27(e) - unless agree to contrary | yes - ss 27 and 95(1) - unless agree to contrary | GP: yes, LP: no. If LP does so, they become a GP: s 64 | By voting (if eligible) at meetings (sometimes by agreement) - and through some remedies |
| **Entitlement to profits/income** | Total | Yes - in equal measure - s 27(a) - unless agree to contrary | Yes - ss 27 and 95(1) - unless agree to contrary - and subject to s 112 | Yes - and some priority for return of property to LP: s 59 – LP rights can vary – s 61 | On declaration of dividend (if entitled) - or sometimes through remedies |
| **Extent of liability for entity obligations** | Sole and unlimited | Unlimited and personal  - see s 11 | Usually limited except for negligence (s 104) and similar to director (s 105) | GP: unlimited & personal, s 56  LP: limited, s 57 | Only to extent of payment for originally-issued shares |
| **Nature of liability to non-“owner” parties** | Sole and unlimited | Joint, per ss 7, 11, 12, 13, 14, 19 | Several, except in negligence-type situations - s 104 | GP: joint - s 56  LP: several - s 57 **\*** | Limited |
| **Nature of liability among “owners”** | n/a | Joint, unless agree to contrary - s 21 | Several, with exceptions - s 104 | GP: joint - ss 21, 56  LP: limited - s 57 | Only through certain remedies (e.g. oppression) |
| **Termination of entity** | End of business or death or incapacity of proprietor | By notice of any partner, expiration of term, death or bankruptcy of partner, if unlawful business or court order - ss 29, 36, 37 | On cancellation of registration - s 129 | On bankruptcy, retirement, death, mental incompetence of **GP**: s 67 - or winding up: s 69 | Winding-up, bankruptcy or other liquidation of corporation |

**\*** If a person is both a general partner and a limited partner, that person is treated outside the partnership as a general partner but as a limited partner within the partnership, as per s 52.

## SOLE PROPRIETORSHIPS

Sole proprietorships exist where an individual starts a business and owns it entirely. As far as the law is concerned, there is no difference between the individual and the business. Benefits and liabilities are unlimited. There may be tax implications (separate filings), but aside from that the law doesn't require any further steps to be taken. There is only one statutory requirement (in BC, varies by jurisdiction): per the Partnership Act, certain sole proprietorships must register under s 88(1): sole proprietorships that have a name that indicate something other than a sole proprietorship (X and associates) must register as a sole proprietorship. This is theoretical comfort more than anything, as few people will check the registry.

When a sole proprietorship begins and ends depends on the business itself, and can be quite indefinite.

Partnership Act

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| **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. |

## PARTNERSHIPS

### DEFINITION AND LEGAL PERSONALITY

Partnership Act

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| **2** Partnership is (1) the relation which subsists between persons carrying on business (2) in common (3) with a view of profit. |

With a view to profit doesn't mean that the partnership has to actually be profitable, just that they attempted to do so. Carrying on a business involves a certain period of time. If it's a one-off venture, it's probably not a partnership, even though there might be joint ownership. There has to be some element of continuity in order to carry on a business. These two terms are generally not litigated. Whether something is in common is litigated more often.

Partnership Act, s 1 sets out key definitions. **Firm** is the name for the collection of people in a partnership. **General partnerships** are the classical common law conception of a partnership, where benefits and liabilities are entirely and personally shared within the partnership.

Partnership Act

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| **91** The rules of equity and of common law applicable to partnership continue in force, except so far as they are inconsistent with the express provisions of this Act. |

According to s 1.1 of the Partnership Act, **partnership property** is defined as all property and rights and interests in property that was:

1. originally brought into the partnership stock,
2. acquired, whether by purchase or otherwise, on account of the firm, or
3. acquired for the purposes and in the course of the partnership business.

Partnership Act

S81 states that certain businesses (trading, manufacturing, or mining) must register as partnerships unless they are LLPs, ands 82 grants 3 months to do so. Applies whether or not individuals are aware they are in a partnership.

S89(1) prohibits partnerships and sole proprietorships from registering under names that are identical or too similar to another corporations name.

S3 describes those persons who are **not** in a partnership, as well as describing the principles for interpreting s 4.

S4states that common ownership of property and sharing gross returns does not create a presumption of partnership, while a share of the profits of a business does create such a presumption.

* If somebody is getting paid a portion of the profits of a business, or if they are paid at a rate dependent on how well the business performs, then a partnership is more likely to be found.
* If somebody is getting paid as a part of an existing obligation or debt, even if the rate is tied to profits in some fashion, then it is less likely that a partnership will be found. A partnership is also less likely to be found if payments are tied to gross returns rather than profits, and if a failure to pay would cause a breach.

To avoid a partnership, it is best to avoid any remuneration based on the net profit of the enterprise. One of the ways to avoid the partnership rules from applying to you is by using a corporation or s 3 of the Partnership Act.

#### AE LEPAGE LTD v KAMEX DEVELOPMENTS LTD [1977] ONCA

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| **F** | Appellants have an interest in the trust company, which has the title to an apartment building. The trust company seeks to sell the building. One of the appellants enters into a contract with the real estate agent to give them an exclusive listing to sell the building. This was in breach of an agreement that the appellants had as to how the building was to be sold. This prevents the real estate agent from selling the building, so they claim breach of contract on the basis that the appellants are actually in a partnership and therefore all of them are personally liable. |
| **I** | Was this a partnership relationship (leading to joint and several liability,) or a co-ownership (not)? |
| **A** | Court finds that there was no intention to form a partnership. The mere fact that the property is owned in common and that the profits were to be split up does not make it a partnership, and the fact that the appellants owned shares weighs against a finding of partnership. Individuals owned separate units which were run for their own benefit, and **could sell without a collective decision**. |
| **N** | The key difference between this case and LANSING BUILDING SUPPLY (ONTARIO) LTD v IERULLO [1989] ODC was the ability of individuals to dispose of their share of the property independently. |

#### THORNE v NEW BRUNSWICK (WORKMEN'S COMPENSATION BOARD) [1962] NBCA

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| **F** | Thorne was doing work for his own partnership and got injured, wants to claim worker's compensation. |
| **I** | Is someone who is a partner is entitled to claim compensation by way of being an employee? |
| **R** | In the common law, partnerships are not independent legal entities in and of themselves. |
| **A** | Thorne was not an employee, because he did not have a contract with the partnership (as it is not a separate legal entity and it is impossible to have a contract with oneself). |
| **C** | Thorne’s WCB claim fails. |

**Q:** So a partnership has been formed – what is it?

**A: The partnership in and of itself has no separate legal existence** - it is merely that the parties involved in the partnership are treated collectively by the court. It is probably best considered as a new *relationship*, rather than as a new *entity*. That said, even though the partnership doesn't exist *per se*, we often say that a partnership owns property (ie. it is owned jointly), and there is a requirement under s 81 that certain partnerships be registered. The two basic consequences of the lack of independent existence for a partnership is (1) personal liability for the partners and (2) partners cannot have a contract with the partnership.

### RELATIONSHIPS WITH THIRD PARTIES & WITHIN THE PARTNERSHIP

**RELATIONSHIPS WITH THIRD PARTIES**

Partnership Act

S7: Partners are agents of the firm and of the other partners in the partnership and their decisions are correspondingly binding.

S11: A partner in a firm is **liable jointly** with the other partners for all debts and obligations of the firm incurred while he or she is a partner, and after his or her death his or her estate is also severally liable in a due course of administration for those debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

S12: A wrongful act or omission of any partner acting in the ordinary course of business which causes loss or injury to someone outside the partnership is attributable to the partnership as a whole. This provision sets up joint liability in a partnership. "Ordinary course of business" offers a significant amount of wiggle room, especially as a partnership (unlike a corporation) does not need to define what its business *is*. This section also makes the partnership liable, even if not in the ordinary course of business, if the act was authorized by the partnership.

S14: A partner is jointly and severally liable with his or her partners for everything for which the firm, while he or she is a partner in it, becomes liable under either section 12 or 13. This section clarifies that the liability created by s 12 is joint.

S16: If you are not actually a partner, but hold yourself out as one, then you can be held liable as a partner for anything that stems from this deception.

S19: Limits partners' liability in situations where actions stem from decisions taken while they were not a partner.

**RELATIONSHIPS WITHIN THE PARTNERSHIP**

By default, partners have equal shares of profits, property, say in the business, etc. This is often contracted differently, but a contract is required to do so.

Partnership Act

S21: Rights of partners can be varied, but requires consent of all the parties (therefore very difficult to do so after the partnership has been brought into existence). This can be done expressly or implicitly, based on the behavior of the partners.

S22: Partners must act with the utmost fairness and good faith with respect to the other partners in the course of the business. This was not originally seen as a fiduciary obligation, but would be seen as a species of fiduciary obligation now. This can include a duty to reveal info otherwise liable.

S23: All partnership property must be held and applied exclusively for the purposes of the partnership and in accordance with the partnership agreement. Often varied.

*S24*: Any property bought with money from the partnership is deemed to have been bought on the part of the firm.

S27: These are the provisions most often changed in partnership agreements. This provision says that subject to any agreement express or implied between the partners, the interests of partners in the partnership property and their rights and duties in relation to the partnership must be determined by the following rules:

1. all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm;
2. the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him or her
3. in the ordinary and proper conduct of the business of the firm, or
4. in or about anything necessarily done for the preservation of the business or property of the firm; [*presumptive several liability*]
5. a partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital that he or she has agreed to subscribe is entitled to interest at a fair rate from the date of the payment or advance;
6. a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him or her;
7. every partner **may** take part in the management of the partnership business;
8. a partner is not entitled to remuneration for acting in the partnership business;[*it's not the partnership that pays you, but the other partners*]
9. a person may not be introduced as a partner without the consent of all existing partners; [*this is rarely changed*]
10. any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners; [*valuable to define ordinary matters ahead of time*]
11. the partnership books are to be kept at the place of business of the partnership, or the principal place, if there is more than one, and every partner may, when he or she thinks fit, have access to and inspect and copy any of them;
12. a partner may refer a difference concerning the interpretation or application of the partnership agreement to arbitration for a final and binding decision under the Arbitration Act.

S28: A majority of the partners can't 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.

S29: If no set term has been agreed on for the duration of the partnership, any partner may end the partnership at any time on giving notice to all the other partners of his or her intention to do so. Most partnerships wish to persist after the loss of a single partner, and so vary this contractually.

S31: Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives.

S35: Outlines rules for partnership dissolution.

S36: Outlines rules for dissolution by bankruptcy, death, dissolution of partner or charging order.

S37: Partnership is automatically dissolved by 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.

S38(1): Outlines power of the court to dissolve partnership in certain cases.

S42: Outlines how assets are applied to debts and liabilities after the dissolution of the partnership.

**Q:** What are the upsides and downsides of a general partnership?

**A:** The upsides are that you are involved in the business and are owed a share of the partnerships. The downsides are greater - unlimited liability - and the upsides are often contracted out of existence. Because the downsides outweigh the upsides, different forms of partnerships were developed, and because partnerships can be formed unintentionally, the need to limit exposure is heightened.

### LIMITED LIABILITY PARTNERSHIPS

The **limited liability partnership** breaks down general liability, and says that with respect to the collective property of the partnership liability is shared, but there is personal liability **only if** the individual themselves did something wrong or were somehow involved in the decision that led to the claim. The partners here are called general partners as well. The LLP is designed to limit the exposure of partners for things that they did not do (though it does not do so as thoroughly as a corporation can). A LLP is much more similar to a general partnership.

The starting provisions are ss 94 & 95 of the Partnership Act, which define key terms and state that most of the rest of the statute applies to LLPs. Unlike a general partnership, which can come into existence independently, a LLP is an entirely voluntary situation and requires certain procedural steps to be taken to exist.

S96: Outlines procedural steps to create an LLP (don't need to know the steps, just that there are steps).

S97: if a LLP wants to be a professional partnership, it is only allowed if the profession is expressly allowed to under its regulatory act.

S102: a change in the partnership (i.e. new members) does not change the LLP's status as a LLP. SS 104, 105 and 106 effectively supplant ss 11 and 14 that relate to general partnership, and limit the liability in a LLP.

### LIMITED PARTNERSHIP

**Limited partnership** divides the parties involved in the business enterprise into two categories: general partners and limited partners.

**General partners** have the same sort of liability as general partners in a general partnership.

**Limited partners** are essentially investors - beyond the scope of their investment in the partnership, they are not liable in any claims against the partnership. Limited partners are also entitled to get paid first, prior to the general partner. The downside is that, unlike in the general partnership or LLP, the limited partners may not be involved in the running of the business. They are essentially silent investors. A limited partnership looks more similar to corporate law than other partnerships. These are much less common than the LLP, which have proliferated due to their use in professions, and because if you are an investor, a corporation will be a far more attractive vehicle than a LP.

Partnership Act

S49: the rest of the statute applies to LP, unless contradicted by one of the specific provisions.

S50(1): a LP can be formed for any business that a general partnership can engage in, and that an LP requires both general partners and limited partners.

S51: outlines the procedures for creating an LP. The certificate must list the general partners' names and addresses, but doesn't have to list the names or addresses of the limited partners. S51(d) seems to indicate that the LP must have a term of existence, but is generally understood to mean that you can limit the term of the LP, but if you don't it has no expiry.

S52: allows a person to be both a general and a limited partner in the same LP. The reason for this is so that a general partner can make a contribution to the business as a limited partner, and will get priority in repayment as a limited partner. With respect to the rest of the world, the individual remains a general partner, but with respect to the rest of the partnership the individual is a limited partner. Since limited partners are not supposed to have a say in the business, if a limited partner becomes involved in any business decisions they will become a general partner with respect to the outside world (though they will maintain their limited partnership priority with respect to the rest of the partnership).

S55: a limited partner can contribute money or property to the partnership, but not services. Just another way to limit the involvement of limited partners in the running of the business.

S56: places some restrictions on what general partners can in a LP (don't need to know these in any particular detail).

S57: outlines the crucial attraction of a LP. This provision does not override ss 11 and 14 entirely, only with respect to limited partners. Their liability is limited to the extent of their contribution to the LP. There's no requirement that the limited partners contribute up front.

S58: Limited partners have the same rights as general partners to get information and get a court order dissolving the partnership – but these rights can be exempted by the executive director.

S61: Limited partners have the same claim to limited partnership assets – but this can be varied.

S62: limited partners have preferential access to profits and being paid out if the partnership ends.

S64: the limited partner is not liable as a general partner unless they take part in the management of the business. This is a qualification of s 57.

#### HAUGHTON GRAPHIC LTD v ZIVOT [1986] ONHC

|  |  |
| --- | --- |
| **F** | Machine generated alternative text: Printcast (LP) GP (Lifestyle Mag) (Z) (M) OFFICERS OFA limited partnership (Printcast LP) have a claim against from Haughton Graphic. Printcast has two relevant limited partners and a general partner. The general partner is a business, Lifestyle Magazine, and the limited partners (Z and M) are both employees of the LP and of Lifestyle Magazine. The limited partners have deep pockets, while Lifestyle Magazine and Printcast are thinly capitalized - thus why the **P** wants to argue that Z and M were general partners. |
| **I** | How do we protect 3rd parties in this situation? Nash wasnʼt aware of the corporate structure and wanted personal liability by lifting the corporate veil. |
| **R** | A limited partner is not liable as a general partner unless he takes part in the management of the business. |
| **A** | Z and M held themselves out as being involved in the management of the business and were employees of the limited partnership as well of the general partner. |
| **C** | The court removes the protection of Z and M as limited partners. |

#### NORDILE HOLDINGS LTD v BRECKENRIDGE [1992] BCSC

|  |  |
| --- | --- |
| **F** | The mortgagor, Arman, is a limited partnership, and its limited partners were officers and directors of the corporation that was the general partner, Arbutus. The mortgagee, Nordile, wants to go after limited partners. |
| **I** | Can the mortgagors 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** | The court finds that the limited partners 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** | Limited partners’ liability remains limited - they only acted as directing minds of Arbutus. |

So limited partners can be involved in the running of the LP if they are careful to do so as employees of the general partner, rather than as employees of the LP. This is as much a case about corporate law as it is about partnership law.

### JOINT & SEVERAL LIABILITY

AssumeP has a claim against A-B-C “entity” - *and assume* A 75% responsible for claim; B 25%; C 0%.

**Joint Liability**: A & B & C each 100% liable to P (though P can only claim once) - A, B, C have no claim against each other (thus, for example, C could end up paying 100%). This is a very precarious position for A, B and C when they have significant assets, especially since partnership assets are not prioritized over personal ones.

**Several (or Proportionate) Liability**: P can claim 75% from A and 25% from B (thus, C has no liability to P). This is the idea behind a limited liability partnership.

**Joint and Several Liability**: With respect to parties outside the partnership, liability is joint. Within the partnership itself, liability is several contractually. So if A & B & C each 100% liable to P (though P can only claim once) - A, B, C among themselves entitled to sort out the claim so A is 75% responsible, B 25% and C 0% (so P could claim 100% from C but C can recover 75% from A and 25% from B).

The basic state of the law is presumptively several liability, based on torts. In a general partnership, liability is presumptively joint for any claims arising from actions undertaken in the course of the partnership business, but the partners can agree to make it effectively joint and several, as per s 27.

# EVOLUTION OF THE CORPORATION

## HISTORY OF CANADIAN BUSINESS CORPORATIONS LAW

Corporations have much greater differentiation of roles than do partnerships. There are different classes of owners (original shareholders, called promoters, and later shareholders for instance). There are directors and officers who manage the corporation. Unlike in the partnership, where there is little differentiation between ownership and management, there is a great deal of differentiation in terms of corporations. Creditors also play a much greater and more complex role in corporations than they do in corporations. The extent to which you can decide which law applies to you is far less with respect to corporations than with partnerships (where it is largely a question of which jurisdiction the contract exists in). The corporation only comes into existence when certain procedures are followed under a certain jurisdiction's rules, and can't come into existence through the operation of the common law.

The owners' (shareholders) of a corporation liability is extraordinarily limited, and they correspondingly have few rights as well. Ownership does not yield much control unless you are a major shareholder. Even if you hold most of the shares, you might not still be able to control what the corporation does.There are different classes of shareholders, some better than others.

There is no definition of a corporation, *per se*, it's merely a matter of complying with a number of statutory provisions which creates a corporation. Essentially, a corporation is a business entity owned by shareholders with limited liability. Corporations are creations of the legislature and statute, and not of the common law (which would never have created an entity that allows individuals to retain the benefits without the symmetrical liabilities). They emerged from the marriage of an artificial, profit-making entity with limited liability. It was not until SALOMON v SALOMON & CO [1897] UK HL that the corporation with limited liability was accepted by the common law.

It is essential to determine under which statute under which the corporation is formed, because the type of statute used will determine **how** the gaps in corporate law will be filled. Some corporations were simply created by an act of Parliament (i.e. HBC). Others were created by executive decree (letters patent corporations). As such, letters patent corporations were seen as creatures of the executive which could terminate them as easily as it created them. There was also a perception that such corporations had certain immunities as a result of their executive origin. This was the original, major method by which corporations in Canada were brought into existence. This is no longer the case, and most of these corporations no longer exist (though PEI retains this form of corporation).

Corporations can also be created by an act of Parliament, but not a specific act of Parliament - the organization simply meets the requirement of the statute. This is sometimes called the registration form of corporation. There is a sense in which this type of corporation is entitled to exist so long as the proper procedure is followed, rather than being dependent upon supplication to the legislature or the executive. There are two sub-types:

1. Purely based on registration - all questions regarding whether the corporation operates, exists, is terminated, etc. are dealt with using the statute. Even if the statute allows for contracts to affect how the corporation operates, the way in which the contract operates is determined by the statute (e.g. CBCA).
2. The contractual form of corporation: the parties make a preliminary contract amongst themselves and pursuant to that contract follow the statutory requirements to form a corporation. In this case, the underlying contract is not managed through the statute, and underlying issues rely on the contract rather than the statute (e.g. BCA, and to some extent the NS statute).

**Par value:** the bare minimum of the value for the shares. Either indicated in writing on the document or specified by charter.

**Debenture**: a promise by a corporation to pay someone in the future. Can be either secured or unsecured.

#### SALOMON v SALOMON & CO [1897] UK HL

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| --- | --- |
| **F** | Machine generated alternative text: (1) AS ‘ SALOMON & CO PROMOTER CREATES CORP. (2) SALOMON & CO —> 7 SHARES/i EACH TO: 4O$(shaes - AS Liparvalue - ASwife - AS4sons - ASldaughter OLD BUSINESS (3) AS > SALOMON & CO £39K for: - 2DKshae - Cash - L1OK in debentures floating cha rge - OtherAS sold his leather business to a company with 7 shareholders, AS and his family. When company wound down, AS held debt secured in form of floating charge, which he’d transferred to a 3rd party so there was no money left over to pay creditors. The liquidator claimed the company was alias/agent of AS and that AS should be personally liable. AS made all the decisions and did most of the work. He also entered into a **K** with the business - sold the business to the company. S found personally liable at trial and appeal then went to House of Lords. |
| **I** | Can a legitimately organized corporation be characterized as an agent of a shareholder? |
| **R** | **Recognition of limited liability corporation by the common law.** |
| **A** | The company was duly constituted in law and it was not the function of judges to read into the statute limitations they themselves considered expedient. There was **no fraud** involved in the creation of the corporation. The issue of the values exchanged in the contract was freely determined between the parties and the court refuses to look behind that. The court also decided that there is no reason that the promoter cannot have a contract with the corporation, and that such a contract cannot make the promoter a secured creditor of the corporation. The court, somewhat uncharitably, holds that the unsecured creditors only have themselves to blame for their lack of recourse (they didn't have the option to be secured creditors, most likely). |
| **C** | AS is not personally liable. |

## LIMITED LIABILITY AND CREDITOR PROTECTION

SALOMON was a slap in the face to creditors. There are some theoretical remedies for creditors, but there isn't much to them. Shareholders in corporations have limited liability, per s 45(1) of the CBCA and s 87 of the BCA.

**Corporate communication**: in incorporating the corporation and communicating to the world, you are supposed to indicate that this is a corporation. If you don't do that, personal liability might be found, as in WOLFE v MOIR [1969].

**Capital maintenance requirements**: company law can contain provisions that require corporations to maintain certain assets in order to be easily available to creditors. The original device for doing so was having par value for shares, but then there's no guarantee that money is still with the company. This has shifted from corporations statutes to securities statutes. Often theoretical at best, so often creditors place these constraints on the corporation themselves in their lending agreements rather than relying on the statutes.

**Publicity**: In addition to your name, corporations are required to make certain filings by statute. But these filings offer limited information. The filings under securities legislation are likely to be of more value.

**Officers' and Directors' Liability**: Sometimes the statute is very specific - the CBCA makes the Directors personally liable for a portion of unpaid wages. BC puts a similar provision in employment legislation. Certain remedies that are put in the statute that at first glance appear to be for shareholders (in particular the oppression remedy and the derivative action), can also be used by other stakeholders (including creditors). Employee liability will likely arise from either (a) a breach of contract or (b) from a tort. A constructive trust is another way to attach liability in this way.

1. **Tort**: the relationship between the **P** and the corporation is entirely accidental, so the **P** will likely be aggrieved when the corporation has few assets to pursue and see the corporate form as a legal fiction to protect its individual employees. The law is sympathetic to the **P** here due to the contingent nature of their relationship with the corporation.
2. **Breach of contract**: the **P** will want to pin personal liability on someone here as well, but the law will be less sympathetic because the relationship here was purely voluntary. *Caveat emptor!* Piercing the corporate veil rarely succeeds. One way is to make the corporation responsible for a claim against the shareholders, the other way is to make the shareholders responsible for a claim against the corporation. One last way is to ignore the distinctions between related corporations.

#### SAID v BUTT [1920] UK KB

Employees are not liable for economic torts when acting in the normal scope of their office.

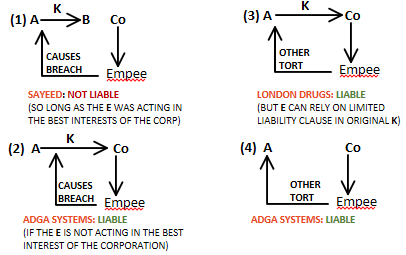
#### ADGA SYSTEMS INTERNATIONAL LTD v VALCOM [1999] OCA

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| --- | --- |
| **F** | Machine generated alternative text: K K — CII I1JIJyCC2 > employees ADGAThe **P**, ADGA,claims that the **D**, Valcom,raided its employees and caused the plaintiff economic damage. The **P** advances its claim on a personal basis against the director and two employees of Valcom for inducing breach of contract and inducing breach of fiduciary duty. |
| **I** | Can the director and employees be held personally liable, assuming those actions were genuinely directed to the best interests of their corporate employer? |
| **R** | Employees are liable in tort, except for where they are acting in the best interests of the company and the contract being breached is between the plaintiff and the company itself. |
| **A** | Court confirms that tort of inducing breach of contractual relations is not usually something for which employees are liable, as this might be the corporation itself causing the breach. But in this case, the employees are inducing breach of contract to a contract to which their corporation is not a party, and thus cannot argue that they are doing so in the best interests of the corporation. |
| **C** | The directors are held personally liable in tort for inducing breach of contract. |

#### LONDON DRUGS LTD v KUEHNE & NAGEL INTERNATIONAL LTD [1992] SCC

|  |  |
| --- | --- |
| **F** | London Drugs delivered a transformer to the respondents for storage until it was to be used. In transfer, two employees of Kuehne & Nagel (Bassart and Vanwinkel) negligently dropped the machine causing $33,000 of damage. There was a clause in the contract stating that the "warehouseman's liability was limited to $40" unless specifically stated otherwise. No further statements had been made. London Drugs and the employees had no contractual relationship. London Drugs that the employees were a stranger to the relevant contract and so could not enforce the crucial clause.  The employees were found liable in trial, but their appeal was allowed at the Court of Appeal and London Drugs appealed to the Supreme Court. |
| **I** | Are the employees personally liable? |
| **R** | **In tort law**, in general, employees are separate from the corporation and can be held personally liable. |
| **A** | This rule does not apply to all torts, but does apply to negligence. That said, if the contract between the **P** and the corporation contains a limited liability provision, the employees may rely on that clause – there was in the case, so the employees are off the hook.  **DISSENT (LAFOREST)**  Where a third party has a voluntary relationship with a corporation, they should not be able to bring any claims against the individual employees in tort. |
| **C** | The employees are not personally liable due to the operation of the limited liability clause. |

**Q**: When can you hold an employee of a corporation personally liable?



## PIERCING THE CORPORATE VEIL

BCA, s 2 & CBCA, ss 2(2)-(5): outlines when a corporation is affiliated with another corporation, a subsidiary of another corporation, or controlled by a person.

**Piercing/lifting the corporate veil**: when the courts merge back together parties who are involved, and ignore the limited liability created by the corporate entity. There are no statutory provisions regarding lifting the corporate veil – all that can be applied is caselaw. Note however that the caselaw pertains to corporations enacted under different statutes, which might affect the result (probably all applicable for the purposes of this exam though). Having the corporate veil lifted in one situation or context may not result in its being lifted in other situations/contexts.

THREE PRIMARY REASONS FOR PIERCING THE CORPORATE VEIL

* To make a shareholder responsible for a claim against the corporation
* To make a corporation responsible for a claim against a shareholder
* To ignore the distinction between a variety of corporations

### SHAM APPROACH

#### CLARKSON CO v ZHELKA [1967] OHC

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| --- | --- |
| **F** | Selkirk ran several companies, including Industrial Ltd and Fidelity Real Estate. Industrial bought land, paid for with cash advance from Selkirkʼs other company, then sold the land to Selkirkʼs sister, Zhelka, for a $120,000 promissory note. Zhelka mortgaged it, went into default, and got $9,000, which ended up in Fidelityʼs 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 Zhelkaʼs name, was held in trust for Selkirk, and Industrial was his agent. |
| **I** | Is Industrial Ltd a sham company? |
| **R** | Sham approach: “if a company is formed for 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 company are responsible to those to who liability is owed.” |
| **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. Sham approach is a question of fact, and should be applied sparsely. The agency has to be flagrant. Having a controlling or total share in a company does not make a company an agent of a controlling company or person. Present case is on the line, but not quite close enough to be a sham. There is no evidence that Industrial was ever used to defraud the creditors or as a sham and a cloak. It is a legit company, albeit questionable in some ways. |
| **C** | Despite the fact that the conveyance is found to be fraudulent, the resulting trust goes back to Industrial, as does the $9,000. There are no Canadian cases that have found a company to be an agent of the shareholders, though it could be possible. |

#### LEE v LEE'S AIR FARMING LTD [1961] UK PC

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| --- | --- |
| **F** | An individual sets up the corporation, controls the corporation and owns it. Upon creation of the corporation, he hires himself. He is killed in a plane crash, and his estate claims compensation under NZ Workmen's Compensation Act*.* |
| **I** | Can you be a director and employee of a company? |
| **A** | Estate argued that Lee was contracting with himself and the corporation was essentially a sole proprietorship. The court was open to this argument, but wanted it to be proven that the corporation was a sham. 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** | Court found Lee was acting as a worker and not a director when he was killed top dressing fields. |

### INSTRUMENTALITY APPROACH

Also known as the control approach or the free will approach, this aims to practically pierce the corporate veil. This is most commonly used in the tax context.

#### DE SALABERRY REALTIES LTD v MNR [1974] FED TAX

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| **F** | Two families had very similar and not uncommon ways of managing their wealth, which used a number of subsidiary corporations. Land held by the families were held by new corporations, subsidiary to other corporations, created purely to hold that property (nominally to develop it but really to sell it off to others). This was so that the subsidiary companies would be taxed separately. All the companies had the same directors and same officers. The companies formed a pyramid structure of increasing subsidiaries. |
| **I** | Are these COs 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 closely held family corporations. |
| **A** | Court employs the test of whether the subsidiary companies had any free will from the holding companies, or whether they were all engaged in the same ongoing business. Some factors that the court considers:   * + The people that are approached by potential customers are an indication as to the center 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” – the COs are legal individuals in the eyes of the law, but **for tax purposes**, the court looks at the whole structure. The veil is lifted. |

#### JODREY ESTATE v NOVA SCOTIA (MINISTER OF FINANCE) [1980] SCC

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| --- | --- |
| **F** | A grandfather’s original will had left shares in an investment company held by the grandfather to his grandchildren. This would have attracted succession duties. The grandfather sought advice on how to avoid these duties. He had shares in a company, WRI, and had created two other companies – JBH and JCG. The shares of JBH were owned by the grandchildren. A subsidiary company, JCG, had shares owned entirely by JBH. He then entered into a contract with WRI whereby they buy the shares from an investment company and he received a promissory note, which he left to JCG under a new will. |
| **A** | This elaborate scheme had been simply a conduit pipe to get assets to his grandchildren. As in DE SALABERRY, this was really one large enterprise, and so the veil was lifted for tax purposes. |

### JUSTICE & FAIRNESS APPROACH

Family law considerations will also generally be placed ahead of considerations regarding corporate form. The justice and fairness approach pierces the corporate veil on the basis of moral outrage.

#### LYNCH v SEGAL [2006] ONCA

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| **F** | Lynch is Segalʼs ex-wife seeking maintenance and child custody. S has set up shell corporations purporting to be held by mysterious high end foreign investors which owned his property, in fact he was the beneficial owner of the properties and capital. |
| **I** | Should the land held by the corporation be treated as part of Segal’s assets? |
| **R** | Courts will not enforce the separate entities notion where “it would yield a result too flagrantly opposed to justice, convenience or the interests of the revenue”. |
| **A** | The Court decided to ignore the corporate form and hold that the land was held by Segal himself. The test used by the court accounted for Mr. Segal’s intentions in setting up the corporation. |
| **C** | Segal was the beneficial owner of capital and land and therefore, shares aside, the interest can be vested in the wife. |

CRIMINAL LIABILITY: **See page 138**.

#### CANADIAN DREDGE & DOCK CO LTD v THE QUEEN [1985] SCC

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| **F** | Corporations charged with conspiracy to defraud - rigging bids for dredging **K**s in Hamilton harbour. Some money was diverted by senior officers, other diverted funds went to corporations. |
| **I** | How is a corporation to be found guilty of an offence with a *mens rea* component? |
| **R** | If the act can be treated as that of the company, it is criminally responsible for all such acts as it is capable of committing and for which the punishment is one it can endure. |
| **A** | If the directing mind(s) of the corporation are criminally responsible and are acting in the scope of their authority then the corporation can be held criminally responsible. |
| **C** | Guilty company. |

# JURISDICTIONAL AND CATEGORISATION CONSIDERATIONS

## INTRODUCTION & PLACE OF INCORPORATION

The two corporate statutes work somewhat differently. The BC statute sets out the presumptive “articles” in an appendix, which provides details about how a corporation will operate unless you contract out of these provisions. The federal statute assumes that there will be certain “bylaws” but does not tell you what they will be – it is up to the parties to create them via contract.

They are quite similar in many respects, however. Definitions are listed at the beginning of each (however neither list is exhaustive, various other definitions are sprinkled throughout the two statutes). Also, the two statues sometimes define the same terms differently.

BCA **GENERAL OUTLINE**

* The second part of the BCA deals with the process of incorporation in great detail.
* The third part deals with the management and structure of the corporation, once it is set up.
* Starting at s 227 we find provisions relating to remedies used by shareholders against directors and/or those in control of the corporation (of particular importance is the oppression remedy). Some of these remedial provisions can be used by outsiders as well. S235 deals with the derivative action. S237 deals with dissent.
* Part 10 – starting at s 312 – deals with the winding up of the corporation.
* Part 11 of the BCA deals with entities not governed by the BCA but which wish to do business in BC – i.e., extra-provincial corporations. The BCA therefore has some rules that do not apply to corporations created by the statute.

### JURISDICTIONAL ADVANTAGES

The first question in starting a corporation is a jurisdictional one: under whose rules will you incorporate? This decision comes down to the rules governing corporations in various jurisdictions and the creators’ familiarity with those rules. In the US, Delaware’s laws on corporations provide for very few remedial measures, and so a great deal of corporations are incorporated there.

In Canada, there is less disparity between the provinces’ and territories’ rules concerning corporations. There is an advantage federally in that federally incorporated corporations need not worry about extra-provincial rules such as those found in the BCA. There is also a slight advantage federally in terms of the name – it is easier to get and protect the desired name federally. Also the CBCA requires that least 25% of the directors of a corporation must be resident Canadians for tax purposes, and if there are less than 4 directors then there must be at least one resident Canadian (s 105(3)). **This is different from the** BCA **and is a major reason to prefer the** BCA**.** The BCA also has a general "good faith" defence provision in s 234 which has no analog in the federal statute, and might militate in favor of incorporation under the BCA rather than the CBCA. There is also a concern that preliminary voting agreements could be illegal, but the BCAsays it this is okay – **there is no equivalent provision** in the CBCA.

Ultimately the decision usually comes down to where people are located (people usually incorporate in the province in which they reside and where they will carry on their business).

## EXTRA-PROVINCIAL LICENSING & FILING REQUIREMENTS

BCA DEFINITIONS

**Company**: a corporation governed by the BCA or a previous BC statute.

**Corporation**: a company that is a BC corporation or any other corporation governed by other statutes (any corporation, basically).

**Foreign entity**: a foreign corporation, essentially.

**Extra-provincial company**: a foreign entity that is registered under the provisions allowing it to do business in BC.

Section 374 is the first section dealing with these extra-provincial companies that wish to do business in BC.

A foreign entity must register as an extra-provincial company within two months of beginning to conduct business in BC. The business is deemed to be carrying on business in BC if:

* It is listed in the telephone directory
* The business is named in an advertisement along with a BC phone number
* If the business has a resident agent, warehouse, or business in BC
* Etc. (see the section)

If there is any possibility at all that someone is carrying on business in BC, it is advisable to register. Conducting a one-off transaction or similar transactions not on a regular basis will probably not attract much attention, however.

Some other relevant provisions:

* Must apply for registration (s 376 sets out how this is done).
* The effects of registration (s 378) – allowed to conduct business, but not allowed to do anything your home jurisdiction would not permit.
* Also by virtue of s 378, if an extra-provincial corporation conducts a transaction that is prohibited in its home jurisdiction, then this will attract liability under the incorporating statute/contract. However, this may have little impact on the actual transaction itself. Third parties are not required to investigate whether the actions of a corporation are acceptable under its governing statue, contract, etc.
* Y Corp. may be prohibited from doing X. There may be problems for Y for not following the rules, but if I enter into a transaction with Y whereby it does X, then this will be valid even though such transactions were historically held to be *ultra vires*. Outside parties are generally protected from having the validity of transactions affected by corporate rules.
* S378(4): no act of a foreign entity is invalid merely because the act contravenes subsection (3) or the foreign entity was not registered as an extra-provincial company in BC. Third parties therefore do not need to inquire into whether their transaction or contract with a corporation is acceptable under BC or any other provincial corporate law.

## CONTINUANCE UNDER THE LAW OF ANOTHER JURISDICTION

It is possible that a corporation may wish to register federally rather than register provincially in a number of provinces (**continuance**). A continuance is a fairly straightforward matter, but both jurisdictions have a say – the old must let you leave and the new must let you come in. The BCA rules governing continuance are in ss 302-311.

It is also possible to **import** a corporation to another jurisdiction without having the corporation undergo major change. The CBCA rules for doing so are in ss 187 and 188. S187 has to do with what the federal law requires if you want to make yourself a federal corporation (**importing**). S188 sets out the rules that you have to comply with if you want to export yourself from the federal regime and go to another provincial regime. In order to import yourself into a new jurisdiction, you must satisfy the new jurisdiction that you have done what is necessary to export yourself from the old jurisdiction.

CBCA SECTION 188: EXPORTING RULES

Subject to s 188(10), a corporation may apply to the appropriate official or public body of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction if the corporation:

* is authorized by the shareholders in accordance with this section to make the application; and
* establishes to the satisfaction of the Director that its proposed continuance in the other jurisdiction will not adversely affect creditors or shareholders of the corporation.

It's not guaranteed that you will be able to leave the jurisdiction. You also have to apply to be exported to a specific jurisdiction. It's not so much the shareholders that are going to object, but the creditors generally. The Director could require all sorts of things in order to satisfy (b). Shareholder approval is required for exportation.

 A notice of a meeting of shareholders complying with s 135 shall be sent in accordance with that section to each shareholder and shall state that a dissenting shareholder is entitled to be paid the fair value of their shares in accordance with s 190, but failure to make that statement does not invalidate a discontinuance under this Act.

There has to be a notice of meeting sent to all shareholders. If a shareholder dissents, then they are entitled to be paid FV according to s 190 - but they have to sell **all of their shares**.

Each share of the corporation carries the right to vote in respect of a continuance whether or not it otherwise carries the right to vote. Even non-voting classes of shares still get the right to vote. This doesn't change the weighting of votes, but the presumption is that every share gets an equal vote.

An application for continuance becomes authorized when the shareholders voting thereon have approved of the continuance by a special resolution. A special resolution requires 2/3 majority, but *only* of those who do vote, not all those shareholders *entitled* to vote. In the BCA, you can change this within your corporation to be as high as 3/4 (for any special resolution).

The corresponding sections in the BCA governing exportation are ss 308-310.

CBCA **SECTION 187: IMPORTING RULES**

The statute doesn't require you to change all the terminology in the constitutional documents - so long as they aren't greatly different (and they won't be, within Canada), then they are changed automatically by statute.  The BC statute and some other provincial statutes allow for par value shares. The federal statute does not. This can cause some complication when continuing from a jurisdiction with par value statutes to the federal jurisdiction. The CBCA allows for the existence of par value shares but caps their number at however many there already are.

The corresponding BC provisions are ss 302-307.

## CLASSIFICATION OF CORPORATIONS

LEGAL NATURE OF CORPORATIONS

1. Those Involved

* promoters (original creators)
* shareholders (the “owners”) [“shhs”]
* directors and officers (the controllers and managers)
* other employees
* creditors (secured and unsecured) (incl. bonds, debentures, sec. interests, accounts (i.e. non-instrument debts), other “investment property”)
* ¿ other stakeholders: public/vulnerable communities/state/“environment” ?

1. Ownership through Shareholding

* shares originally issued by corp. then traded
* framework for potential shares in corp. legislation
* regulating issuing and trading of shares (and other investment prop.) in securities legis.
* resolution of competing claims to shares (and other investment prop.) and bundling and securitization of investment prop. in Securities Transfer Act and Personal Property Security Act

1. Separate Legal Personality

* limited liability for shareholders BCA s 87; CBCA s 45
* corp. can contract with those involved - shhs, dir’s, emp-ees, creditors
* corp. finances separate from shhs’ finances
* prob. of undercapitalisation
* shareholders have access to funds only through dividends - BCA s 70; CBCA s 42
* possible complex structure of interrelated corps with sep. legal personalities - BCA & CBCA s 2
* corp. can be sued separately - even by those involved (shhs, employees etc)
* those involved can have separate and additional legal liability (esp. in tort)

1. Gaps in or Circumvention of Separate Legal Personality

* those involved sued separately or additionally (esp. in tort)
* lift/pierce corporate “veil”
* to pin shh liab on corp.
* to pin corp. liab on shh.
* to group related corps together
* directors sometimes personally liable (e.g. for wages CBCA s 119)
* promoters can be liable for pre-incorp. contracts - BCA s 20; CBCA s 14
* corp. can be bound by agents’ actions, even if unauthorised (e.g. BCA s 146; CBCA ss 17-18)

TYPES OF CORPORATIONS

- widely-held versus closely-held (“public” versus “private”)

*Useful discussion on p 155-158 of the text on publicly held vs privately held corporations. Corporation remedies tend to be more effective against privately held than publicly held corporations (securities regulations are more useful for the latter).*

- extraterritorial/foreign corps - BCA ss 374-379

- continued (“exported”/”imported”) corps - BCA ss 302-311; CBCA ss 187-188

# THE CORPORATE CONSTITUTION

## THE CREATION OF A CORPORATION

|  |  |
| --- | --- |
| **BC** | **FEDERAL** |
| Incorporation agreement | Articles of incorporation |
| Notice of articles | Articles of incorporation |
| Articles/Memorandum | Bylaws |

Key provisions are BCA s 13 and CBCA s 9 respectively. 4 key questions:

1. reserve/register name (consider intellectual prop. and related issues) BCA ss 21-29; CBCA ss 10-13

Corporations can still do business under other names, like the number of their corporation. The corporation still needs to communicate its corporate status though. The procedure is similar provincially and federally. One advantage of the federal process is that the approval of the name is good throughout Canada. Provincially, all you’re going to get is provincial approval - applying to do business in another province could be problematic.

In BC, the relevant provisions are ss 21-30ish. S22 allows you to reserve a name for 56 days. The registrar will use that time to determine whether that name is appropriate. S22(5) allows the registrar to refuse to issue approval for a number of reasons. There are restrictions on using foreign language names, for instance - has to have some English or French element in it. You're also required to indicate in some fashion that you are a corporate entity. S27 requires conspicuous display of your name in French or English everywhere you do business (Directors can be personally liable for breach of this provision), as well as notices issued, contracts, business letters, letters of credit, bills of exchange, cheques and other key documentation in BC.

S10 of the CBCA sets out the controls on corporate names. You can't use anything in your name that suggests a connection to the government, colleges, universities, the Royal Family, etc. S10(5) states that the corporation will set out its name in legible characters on important documents, but **doesn't require it to be in English or French**. S11 of the CBCA gives you 90 days to reserve your name. S12 sets out what names you can't use.

1. decide on nature of business - BCA s 11; CBCA s 6

* restrictions, if any
* corporate share structure
* initial directors and officers
* procedural/structural rules for corp. - BCA: “articles” (s 12); CBCA***:*** “bylaws” (ss 16(1), 103)

Particularly with respect to the BC statute, you need to set out how the corporation will operate. What kind of business are you going to engage in? The presumption is any sort of business - you would only restrict for the benefit of creditors. But creditors are crucial.

What is the share structure going to be? How many? What classes? What kinds of restrictions will be placed on the shares themselves? It looks appealing at the outset to keep things simple, but these can come back to haunt you later. You can make changes down the line, but the more complex and public corporation, the more difficult it will be. You're most likely going to need the approval of affected share classes. Starting ats 52of the BCA, it outlines the share structure rules.

According to the CBCA s 6(e), you need to determine who the directors are going to be. CBCA s 6(3) allows you to make certain changes to the majorities required by the bylaws (special majority requirements). The bylaws don't have to filed at incorporation, however.

What procedural rules are going to govern the corporation? These rules are called the articles. There are presumptive articles in the BC statute. In the federal regime, they are called bylaws and are not required to be there from the start (advantage).

1. who takes filing steps:

* [BCA s 10] incorporators must enter contract for incorporation agreement in advance. Sets out how many shares they get and it must be signed. Other than that, no restrictions on the incorporators - could be another corporation (s 10).
* [CBCA s 5] Decide on “incorporators” – no contractual basis. This statute distinguishes between individuals and artificial entities. Individuals cannot be bankrupt and are subject to other restrictions in s 5(1). Restrictions on artificial entities are set out s 5(2).
* Both statutes allow for a single person to be the incorporator. Provincially, this is odd because of the contractual basis.

1. Filing brings the corporation into existence

* [BCA only] incorporation agreement and notice of articles (articles not filed) - s 10
* [CBCA] articles of incorporation (by laws not filed) – s 7

## RESTRICTIONS

* **Presumption that any business possible** - BCA ss 30-32; CBCA s 15. This is the reversal of the historical perspective. The federal statute, in 15.2 sets out that a federal corporation can carry out business throughout Canada. Both the BC and federal statutes presumptively allow for corporations to operate outside of Canada (BCA s 32, CBCA s 15(3)).
* **Restrictions to be in filed documents** BCA ss 12(2)(a), 33(1); CBCA ss 6(1)(f), 16(2). Many corporations want to restrict their business for tax reasons (the SCC has taken a dim view of this) or because the creditors demand it. It is difficult to draft language that restricts the business of the corporation in order to make sure it is as narrow as possible. The presumption extends to interpretation as broadly as possible. These will also be difficult to agree upon later on, so should be made at filing. Can also lead to litigation if the corporation exceeds these self-imposed restrictions.
* **Effect of restrictions within corporation** (*ultra vires*) - BCA s 33(1); CBCA s 16(2). Companies are prohibited from exceeding their restrictions in terms of their business. These provisions are just prohibitions, but do not provide remedies - this depends on other provisions. If a business exceeds its self-imposed restricts, in the old days this would have been an *ultra vires* act and the offending transaction would have no validity whatsoever - it would be as if it never happened, legally speaking. Nowadays, the modern statutes divides the internal contingent of the corporation (directors, employees, shareholders, etc.) from the external contingent (the rest of the world).

Within the corporation, there is a distinct regime. If a corporation exceeds its restrictions, then there are various remedies set in both statutes for aggrieved parties connected with the corporation (directors, officers, shareholders and creditors are the main ones). In the BCA, there are particular remedies for this breach in s 154: this lists situations where the directors of the corporation can be held personally liable for losses**, which includes taking the decision to have the corporation to engage in a restricted business**. This is subject to s 157, which often provides directors with a way out however. BCA s 228is peculiar to the BC statute and has no analogue in the federal statute. It exists because of the fundamentally contractual nature of the corporation, and allows for injunctions (for specific performance and so on). It allows a court to make **any order that it deems appropriate**, including an order to compensate individuals monetarily for taking actions contrary to the corporate statutes. Under s 228(3)(c), the court can make compliance orders that the corporation cease engaging in that restricted business. This personal liability is against the corporation itself.In the CBCA, there is no particular remedy specifically tailored for this breach of the constitution, but the general remedies will be available. In the CBCA, there is an analogous provision which provides for personal liability for directors in certain situations, but does not include *ultra vires*.

* **Effect of restrictions outside corp. - acts presumptively valid (“ultra vires” curtailed)** BCA ss 33(2), 146; CBCA ss 16(2), 17-18. In BCA s 33(2) and CBCA s 16(3), the rest of the world is protected from such invalidity. As far as the rest of the world is concerned, the presumed general capacity of a corporation applies - you don't have to ask, and in some cases, you *shouldn't* ask. This is because if you know or ought to know that the transaction is outside of the restrictions of the corporation, your transaction might still be found invalid.
* Changing restrictions

BCA s 259; CBCA s 173(1)(c)

Dissent remedy

## GENERAL REMEDIES

Because the corporation cannot take any actions on its own by its artificial nature, some individual must be responsible for the breach. Action against them *by the corporation* is the first recourse. Remedies will vary based on what they did - it could be for breach of fiduciary duty or breach of a duty of care.

If the corporation does not pursue a remedy, then it is probably because the directors are at fault and they are not going to sue themselves. In a **derivative action**, someone connected with the corporation (most likely a shareholder or creditor) will ask the court to allow them to take action on the part of the corporation. Once they have this, then they can pursue a remedy on behalf of the corporation for breach of a duty of care or fiduciary duty.

It might be the case that an individual or a class of individuals connected to the corporation feels more personally aggrieved. Where this is the case, that individual can pursue the **oppression remedy**, from which all forms of relief may be granted. Whoever is complaining remains presumptively connected with the corporation.

The **dissent remedy** arises where shareholders wants nothing further to do with the corporation and wants to force the corporation to buy out their shares. Found in both statutes: BCA s 260; CBCA s 190(1)(a)(b).

# PRE-INCORPORATION **CONTRACTS**

Often, contracts have to be in place prior to incorporation. Furthermore, you want to hit the ground running rather than wait for incorporation to organize credit, supplies, &c. This runs up against the problem that a corporation cannot enter into contracts if it does not exist (just like an imaginary friend). The CL and the statutes deal with this problem: what happens if a non-existent company enters into contracts with a third party before it actually exists? Because the corporation has to speak through somebody, the promoters/facilitators must purport to enter into contracts on the corporation's behalf. Does the contract's validity change over time, and if so, how does it change over time?

There are two factors to bear in mind:

1. The knowledge of the parties regarding the status of the corporation (mistaken/not mistaken). Generally the promoters will not be mistaken, while the third party will be mistaken. The general rule is so long as the third party is objectively and reasonably mistaken, then there is a presumption that the contract is valid - except when the corporation does not exist!
2. The existence of the corporation at a later date - does it ever come into existence or not? If the corporation is later brought into existence, it can either adopt or reject the contract.

Machine generated alternative text:
D€AIJNG
PROMOTER “COMPANY’ K. THIRD PARTY
- MitKen - Never eistet - Miteken
- Not Mistaken - Later ecistertce - Not Mistaken
. C adopts
. C rejects

SOURCES OF LIABILITY

1. contract law (including agency, novation)
2. tort law (including breach of warranty of authority - i.e. misrepresentation)
3. restitution
4. estoppel (est. by representation, promissory estoppel, est. by convention)

**Assignment**

Where one party to a **K** sells their position in that **K** to another party. This usually occurs where a party wants to buy only part of the original party's position in the **K**.

**Novation**

A three-sided **K** which allows one party to be substituted for another – other aspects of the **K** can be changed as well, such as the obligations.

**Ratification**

Where a principal approves a prior act of its agent where the agent lacked authority to legally bind the principal.

## THE COMMON LAW

NO MISTAKE

#### KELNER v BAXTER [1866] UK

|  |  |
| --- | --- |
| **F** | The promoters and the third party were all directors of the putative corporation, and so all knew the corporation didn't exist. The promoters for a new hotel business entered into a **K**, on behalf of the company which was not yet registered, to purchase wine. The company at first refused to honor the K, and the third party started an action to old the promoters personally liable for the **K**. Eventually the corporation ratified the **K**, but the company went into liquidation and so wasn't worth suing. The promoters argued that their liability had passed to the company, and were not personally accountable. |
| **I** | Is the agreement binding given that there was no company at the time, and the signatories signed “on behalf of” this nonexistent company? |
| **R** | Where an agent signs a **K**, but there is no principal in fact, and the **K** would be altogether inoperative unless binding on the agent, the agent is so bound (unless this is made explicit in the **K**). |
| **A** | The court found that the promoters were personally liable because there was no company in existence at the time they signed the original **K**. Furthermore, the corporation cannot adopt the **K** at a later stage by ratification because the corporation was non-existent when the **K** was formed, and so the agent didn't lack authority to legally bind the principal - for all intents and purposes, they were the principal. |
| **C** | The defendants are liable. |

COMMON MISTAKE

#### BLACK v SMALLWOOD [1966] AUS HC

|  |  |
| --- | --- |
| **F** | The promoters, Smallwood and Cooper, sign a contract for the sale of land in the mistaken belief that their company has come into legal existence and they are its directors. The company didn't exist and both the promoters and the third party were mistaken. The third parties argued for specific performance of the K for the land sale, based on KELNER. |
| **I** | Are the promoters are personally liable? |
| **R** | Where an agent signs a **K**, but there is no principal in fact, and the **K** would be altogether inoperative unless binding on the agent, the agent is so bound (unless this is made explicit in the **K**). |
| **A** | The court found that the promoters were not personally liable, because of two key factors: (1) the promoters were mistaken as to the existence of their company, and (2) their intention was that the company should be bound, not them. The **K** in this case was a nullity, because it never existed in the first place because the corporation never existed. Without any contrary intention, liability can’t be imputed to them. For a corporation to take over a pre-incorporation contract, it must (1) exist, (2) enter another contract, and (3) show evidence that both parties intended the new contract. |
| **C** | Claim for specific performance fails, no personal liability. |

This is an important case because it deals with situations where the corporation **never** comes into existence. **This is an area where the common law still applies**. If both parties are not mistaken, then the promoters will be held personally liable. If both parties are mistaken, then no liability will be found.

UNILATERAL MISTAKE

#### WICKBERG v SHATSKY [1969] BCSC

|  |  |
| --- | --- |
| **F** | A new company was proposed by directors of an old company. The NC would take over the OC’s assets etc. Although the NC was never formed, business was conducted under its name. A director of the OC signed an employment **K** with the **P** under the letterhead of the NC. Then **P** was fired. **P** tried to sue the promoters on two bases: (1) personal liability based on **K** and the promoters' knowledge that the company was not existent; (2) in tort for breach of warranty of authority (akin to fraudulent misrepresentation). |
| **I** | Are the promoters are personally liable? |
| **R** | KELNER: the writing disclosed an intention to be bound. BLACK: no such intention = no liability. |
| **A** | With respect to the claim in **K**, the court finds **no personal liability** because of BLACK: if the parties make it clear that the **K** is with the company, then the **K**, if it exists at all, is with the company, and there is no personal liability. **This is problematic because it allows the promoters to use the third party's mistake which they induced to escape personal liability!**  With respect to the tort claim, the court finds that there was a breach of warranty of authority. However, the damages sustained weren't because of the misrepresentation, but because of the lack of a real contract and the poor running of the company and its failure, and were therefore too remote to award damages. |
| **C** | **P** is only entitled for nominal damages for the breach of warranty of authority. |

There's lots of possible arguments you can make using the law of mistake, as well as estoppel (holding somebody to an untruth as if it were true). WICKBERGostensibly relies on BLACK, but the two deal with separate situations and can't truly be reconciled.

BOTTOM LINE

The common law distinguishes between mistaken and non-mistaken situations, and allows for actions under both contract and tort. If the company comes into existence, it can later adopt the contract. If the company never comes into existence, the contract is a nullity. All of the cases pay close attention to what the parties **intended** to do in the contract (this depends largely on interpretation of the language of the contract).*The common law is pretty hard on the third party!*

## POSSIBLE STATUTORY SOLUTIONS:

There are none if new company is not created. Still need the common law for situations where the corporation is never brought into existence. Furthermore, the federal rules only apply where the **K** is in writing.

The two statutory regimes are different when it comes to pre-incorporation contracts. This is noteworthy, but it is unlikely that the governing statute would be chosen according to this consideration. At common law it was possible for there to be no contract at all – if a third party wanted a contract with the company and nobody else, then no contract existed (i.e., if the company was later created it could not adopt the contract). It was also possible at common law for there to be a contract between the third party and a promoter.

Who was mistaken and about what was crucial. The possibility of tort liability (i.e., breach of warranty from WICKBERG) was also available at common law. With the introduction of the statutes, things changed somewhat (it is never entirely clear how much of the common law remains in such situations).

In interpreting both the provincial and federal statutes, use the last provision to guide interpretation. The purpose of both provisions is to make the promoters personally liable when they would **not** be liable under the common law, and to allow corporations to adopt prior contracts without relying on assignment or novation.

BCA

(most applicable to written and oral contracts) [promoter called “facilitator”]

S20(8): Facilitator can expressly in writing contract out of liability.

S20(2): Facilitator who enters into a **K** on behalf of a non-existent corporation is liable in tort for breach of warranty of authority, and measure of damages is the same as if the **K** were real. The **K** is not brought into existence, and the facilitator is not made a party to the **K**. This means the facilitator only gets the liabilities from the **K**, and none of the benefits.

S20(3) & (4): The new corporation can adopt the prior **K** and then the facilitator will not be liable

S20(5): if no adoption, corporation can be liable for restitution of benefits

S20(6) & (7): Court can make orders

The BC rules are peculiar because they appear designed to party adopt WICKBERG and partly to change the result in the same case.

Section 20(8) allows a promoter to avoid personal liability, but this must be expressly provided for in the contract. Assuming there is no express contracting out, however, the corporation that is later brought into existence can adopt the contract. If it does so, then the corporation takes over responsibility from that point. The BCA does not however provide whether the facilitator is a party to the contract until that happens. Therefore, the common law presumably governs whether the promoter is a party to the contract before a corporation adopts it. The statute does provide that the promoter is responsible for the contract as a result of the tort of breach of warranty (this comes directly from WICKBERG). Without having revealed that the corporation does not exist, one breaches the tort of breach of warranty. The statute provides a fairly generous remedial package for third parties who suffer from this tort in these circumstances. The damages to which the third party is entitled through s 20 are essentially whatever losses are claimed from breach of contract – as though the contract had come into existence.

Section 20 therefore changes the result in WICKBERG *­*– if the tort of breach of warranty of authority is made out in these circumstances, there will be damages essentially similar to those of breach of contract, if there was a contract. **MacDougall**: it is unclear why the BC statute was drafted this way – presumptive tort liability and damages as if there had been a contract seems awkward in comparison to the federal statute’s solution.

CBCA

(written contracts only) [note C does not use term “promoter”]

* S14(4): Promoter can expressly contract out of liability.
* S14(1): A person who enters into a **K** on behalf of a non-existent corporation is entitled to any benefits and is also personallyliable.
* S14(2): A corporation may, in a reasonable time, expressly adopt the prior **K** and then promoter is not liable.
* S14(3): A party to the **K** can apply to the Court for any order the Court sees fit (whether written contract or not).

The CBCA is fairly elegant and occupies the field except for the peculiarity that it only deals with written contracts. The CBCA rules on pre-incorporation contracts oust the common law when there is a written contract between the parties. If the contract is oral (which is rare), then the common law presumably applies and there is no need to pay attention to s 14. Further, if the corporation never comes into existence, then the common law and not s 14 will apply.

S14 provides that the promoter is liable for the contract unless she has specifically excluded her liability under s 14(4). S14 also allows a corporation to take over a contract – which will cease the promoter’s personal liability. If the corporation does not take the contract over, the individual promoter continues to be personally liable. This can be avoided only by making it express in the contract that the promoter is contracting on behalf of a non-existent corporation and is not liable on the contract.

# MANAGEMENT AND CONTROL OF THE CORPORATION

## INTRODUCTION

Once the corporation is brought into existence a number of questions arise: who runs it? What is the point of the corporation? These questions depend in part on the size of the corporation. In **small, closely held corporations**, the owners and the directors are the same people. In **larger corporations**, or the broader the ownership within the corporation, the less connection there is between the shareholders and the actual running of the corporation. In many cases the corporation takes over entirely and ignores the wishes of certain (perhaps all) shareholders.

* How do managers decide which shareholder interests to prioritize? Some corporations have weighted voting to make the decision easier.
* If the corporation is supposed to run a profit (as the ones that we are dealing with tend to be), how does this factor into our evaluation of managers’ performance?
* How to evaluate profit, long-term or short-term?
* What happens to corporate profits? Should it be returned to shareholders or held off until a later date?
* If the corporation is supposed to run for a profit, then the shareholders are clearly supposed to profit. Is anyone else supposed to profit? If so, are the directors and officers of the corporation supposed to account for these people’s interests? How do these interests compare to those of the shareholders? What happens if they are in conflict?
* To what extent should corporate directors take into account the interests of the employees of the corporation?
* What about the corporation’s creditors?
* When is it appropriate to make the corporate directors responsible, and to whom?

The statute answers essentially all of these questions, and provides for rewards for good corporate practice and remedies for those who suffer injury as a result of poor corporate practice.

As we will see, shareholders can play a role in making decisions that redirect the corporation. While shareholders often cannot initiate changes themselves, they can in some circumstances eliminate directors, change the corporate constitution, and take over the corporation themselves (depending on the statute – the CBCA provides for unanimous shareholder agreements, about which more later, while the BCA allows shareholders to appoint someone else to take over the corporation on their behalf). Shareholders exercise influence through their voting power and the ability to make such changes.

Knowledge and access to information is central in these modern statutes. Directors are required to provide information to shareholders at certain times, and shareholders are theoretically entitled to access the corporate books for greater scrutiny at any time. Occasionally an outsider (auditor) may play an important role here as well. Securities law requires certain financial information to be revealed on an ongoing basis. Further, certain remedies require disclosure to be made before the court will make an order.

All of this is designed to place controls on those who manage and control the company – the idea being that having more information available to everyone will curb malfeasance and any resulting disputes. Before the advent of hedge funds, it was difficult to get rid of corporate directors and officers. This may be because major shareholders had relationships with these managers and were loath to try to displace them. Through hostile takeovers, however, hedge funds can pick out corporations that are ripe for the picking (i.e., can be taken over and made more profitable by displacing the directors/officers).

CBCA s 102 provides that subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the corporation. The starting proposition that the directors must manage the corporate business is subject to two immediate caveats: there may be a unanimous shareholder agreement or the directors may choose to merely supervise the management of the corporate business.

The BCA provides that directors must manage the business of the corporation, and does not immediately mention unanimous shareholder agreements. It is possible in BC for the shareholders to change the articles such that the running of the corporation is done through a particular individual (see s 137). This can be done to give the individual broad authority to manage the corporation or to manage a particular aspect of the corporation’s business.

### CASELAW

#### BUSHELL v FAITH [1970] UK HL

|  |  |
| --- | --- |
| **F** | This case involved a closely held corporation. The Court held that a majority vote by the shareholders could allow a director to be removed. Two of three shareholders voted to remove the director. The problem, however, was that the rules of the corporation had been set up with this in mind. Article 9 allowed any shareholder who was a director and who was the subject of such a resolution to have a weighted vote (worth three times the director’s number of shares). Thus, after the shareholders vote two-to-one to remove the director, the director asked for a poll, where his votes outweighed those of the other shareholders. |
| **I** | Is it possible to remove the director or does 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** | “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…” So the statute does not prohibit special weighting of votes as in Article 9, and the rule is upheld. |
| **C** | Article 9 protects the director. Be careful what rules you create to govern the corporation – they may be difficult to change. These days, the oppression remedy would still be available. |

#### AUTOMATIC SELF-CLEANSING FILTER SYNDICATE CO LTD v CUNNINGHAME [1906] UK CA

|  |  |
| --- | --- |
| **F** | The directors refused to carry out the order of a majority of the corporate shareholders (to sell certain assets) on the basis that the order was not in the best interests of the corporation. This case raised the question of who was to determine what was in the best interests of the corporation. |
| **I** | Are the directors bound to do it, or are they protected by the articles which require a special resolution to override the directors “management 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** | The Court held quite clearly that corporate directors are best placed to make this determination, and that by refusing to follow the shareholders’ order the directors had done nothing wrong. A simple majority is not enough to compel the directors to do something, though depending on the corporate structure a certain amount of votes will suffice. |
| **C** | Once they are in place, it is the directors that make decisions about the management and control. Shareholders have at best only a supervisory role. |

### RELEVANT STATUTORY PROVISIONS

BCA, ss 1(1), 1(3), 128(3), 135-138, 143, Part V

CBCA, ss 2(1), 102, 103, 109, 116, Part X

BCA

|  |
| --- |
| **1(3)** An individual is appointed as a director of a company if the individual is   1. appointed as a director of the company in accordance with 2. this Act, or 3. the memorandum or articles of the company, 4. 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 5. declared by the court to be a director of the company. |

S128(3): When directors cease to hold office.

S135: If no directors are in office.

S136: Powers and functions of directors.

S137: Allows shareholders to change the articles such that the running of the corporation is done through a particular individual. This can be done to give the individual broad authority to manage the corporation or to manage a particular aspect of the corporation’s business.

S138: Application of this Act to persons performing functions of a director.

S143: Acts of a director or officer are not invalid merely because of a defect in their election, appointment or qualifications. Subject to the overarching proposition that this is not applicable to third parties who are not aware that ultra vires as in s 421 – no one is deemed to have knowledge just because it is public.

## INDOOR MANAGEMENT RULE

Both statutes have the **indoor management rule**, whereby outsiders are entitled to assume that their dealings with a person holding themselves out as a corporate director are valid, unless the outsider has notice or ought reasonably to suspect that the person with whom they are dealing does not have the authority they purport to have. SS 17 and 18 of the CBCA and s 146 of the BCA are relevant here.

Historically, once a corporation is brought into existence, the corporation can “escape” from shareholder influence. Directors can take decisions contrary to the interests or opinions of even majority shareholders without breaching their obligations as directors.

#### SHERWOOD DESIGN SERVICES INC v 872935 ONTARIO LTD

|  |  |
| --- | --- |
| **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 incorporate 872935 to purchase assets, but did not purchase on closing date. S sold assets for $125 k to others. 872935 reassigned by purchaser’s law firm to other clients. |
| **I** | Can S claim against 87935 for the promissory note? |
| **R** | Indoor management rule: a company may not assert that a person held out as agent of the company does not have authority to exercise the powers that are usual for such an agent. |
| **A** | The corporation, and those connected with it, had allowed a lawyer to hold himself out as competent to speak on behalf of the corporation. There may be consequences internally as a result of this, but it does not prevent the contract from coming into existence. The third party was entitled to rely on the **K**. |
| **D** | How could the **K** come into existence when it is not known who is going to form the corporation – there is little for the statutes to latch onto. The dissenting judge also had a problem with the indoor management rule. Without knowing which corporation is supposed to enter into the contract, how can anyone have authority to act on their behalf? The unsigned documents put S on notice that the company had not adopted the **K** (p 228). |

This is a fairly generous interpretation of the pre-incorporation provisions – as you can still use them when the corporation is not specifically identified. Also a generous view of what constitutes someone being held out as speaking for the corporation, as far as third parties are concerned.

## CORPORATE RESPONSIBILITY

**Q:** To what extent is it appropriate for those running a corporation to take outsider interests into account, or even prioritize them?

**A:** The law in Canada has shifted from seeing the corporate world as solely the shareholders and directors as the relevant interests. Now the interests of outsiders are considered relevant as well, and the corporation is run not for the benefit of the shareholders themselves, but for the benefit of the corporation itself, while taking into account all the relevant interests (shareholders, creditors, employees, outsiders). This gives the directors a more difficult job, but also provides more basis for directors to escape liability - the law is now very director-friendly.

#### DODGE v FORD MOTOR COMPANY [1953] US-MI SC

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| **F** | The Dodge brothers were shareholders in the Ford Motor Company (FMC). They wanted dividends. FMC had massive profits, but plowed them back into the company by enhancing the production facilities and by increasing the wages and benefits of the employees. These profits were therefore not declared as dividends. The Dodge brothers were setting up their own company, and thought it would be extremely useful to enhance their financial resources to receive significant dividends. |
| **I** | Can Ford and the directors add jobs and decrease the price of cars, rather than maximize profits for shareholders? |
| **R** | A corporation is organized primarily for the profit of the stockholders, as opposed to the community or its employees. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself. |
| **A** | The Court held Ford should not reduce of profits or the non-distribution of profits among stockholders in order to benefit the public, making the profits of the stockholders incidental. Ford had some philanthropic ideas but also wanted to increase the size of the market for their products by increasing the disposable income of its employees.  The court took the shareholders at their word on their interests (i.e. dividends). As long as the shareholders could show that there was money that could be distributed through dividends, and had been distributed elsewhere, then the shareholders have fulfilled their burden. Because this company was in business for profit, Ford could not turn it into a charity. |
| **C** | The court therefore upheld the order of the trial court requiring that directors declare an extra dividend of $19.3 million. This was not a complete distribution of money to the shareholders - some new equipment and increased wages were allowed. |

#### PARKE v DAILY NEWS LTD [1962] AUS

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| **F** | DNL owned 2 papers, and 2 subsidiaries owned the company but the papers werenʼt 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.) Daily News were paying generous compensation to fired employees and the shareholders got mad. |
| **I** | Can a minority of shareholders object to this scheme and insist it is *ultra vires* and illegal? |
| **R** | “The 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 directors are required to act in the best interests of the corporation, which is identified with the shareholders. The interests of the shareholders is to maximize their profits. That means that as long as it can be shown that payments to other parties enhance the profits of the company, then that can be defended as in the best interests of the shareholders. But in this case, the corporation was in financial difficulty and making generous payments to employees they were letting go - this cannot be justified as being in the best interests of the shareholders. |
| **T** | The court outlined the following test:   1. Is the transaction reasonably incidental to the carrying on of the company business? 2. Is it a bona fide transaction? 3. Is it done for the benefit and to promote the prosperity of the company? [QUESTION BEGGING] 4. A company's funds cannot be applied in making voluntary payments as such 5. The court will investigate the motives and objectives of any payments 6. The court will uphold the validity of a payment if this test is satisfied, and the burden is on the directors to defend the payments. |

**Leveraged Buyout**

Where a company buys an asset using money borrowed using the corporation's assets as collateral.

#### RE PEOPLES DEPARTMENT STORES LTD (1992) INC [2003] SCC

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| **F** | Wise Stores Inc. (owned by 3 brothers) purchased Peoples store chain from Marks & Spencer in a leveraged buyout. Their original company started facing financial difficulties. The Wise brothers shifted the Wise Stores Inc. debt to Peoples, and made the latter responsible for most of the new debt that was incurred by **both companies.** They developed a scheme where certain inventory would be purchased through Peoples and then given to Wise on credit. Soon, Wise owed more than 18 million dollars to Peoples. By 1995, both Wise and Peoples declared bankruptcy.  In bankruptcy, the trustee acts as the new director. The trustee argued that the Wise brothers had breached their fiduciary duty to Peoples and their obligations to the creditors as directors under section 122(1) of the ***CBCA*** by implementing the credit scheme and not paying sufficient attention to the creditors. At trial the Quebec Superior Court found that the Wise brothers breached their fiduciary duty, but this was overturned by the Quebec Court of Appeal. |
| **I** | Do directors owe a fiduciary duty to the company’s creditors comparable to the statutory duty owed to the company? |
| **R** | Because shareholders and creditors transfer their money to the care of directors, they owe a statutory fiduciary duty to the company to manage its assets and make reasonable business decisions to the company’s advantage. |
| **A** | The court holds that the directors of a corporation owe their fiduciary duty to the corporation and nobody else. "The best interests of the corporation" are not equated with the interests of the shareholders. Instead, the best interests of the corporation are the maximization of the value of the corporation itself. In determining the best interests of the corporation, the directors should consider various stakeholders (e.g. shareholders, employees, suppliers, creditors, consumers, governments and the environment).  But how to prioritize these interests? Here the court gets fuzzy. When a corporation is in the vicinity of insolvency, this can lead the residual interests of the shareholders to be entirely negated. The court outlines the following test:  "In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of the statutory fiduciary duty…  In using their skills for the benefits of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders. If the stakeholders cannot avail themselves of the statutory fiduciary duty to sue the directors for failing to take care of their interests, they have other means at their disposal (the oppression remedy)" |
| **C** | Based on these facts, the court found that the directors, while they had failed, had acted in good faith in their attempts to build a better company. Their duty to the creditors/shareholders is only a duty of care, not a fiduciary duty. |

#### RE BCE INC [2008] SCC

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| **F** | Leveraged buyout involving adding significant debt to Bell Canada, a subsidiary of BCE. Bellʼs  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 company and a duty of care to the shareholders, and a duty of fairness in weighing the interests of various stakeholders. |
| **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 groupʼs interest at the expense of other stakeholders.” The question is whether “in all the circumstances, the directors acted in the best interests of the company, 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 Bellʼs debt could have been avoided. |
| **C** | Debenture holders failed to establish oppression. As long as the directors can establish that they have been fair, they cannot be held liable for a breach of their duty. |

While in theory, there are other parties whose interests must be taken into account, in practice it is hard for them to have a say beyond the directors' say or to challenge their decisions. The corporation is very much a director-focused organization. Shareholders, creditors and the public at large can have interests that the director is supposed to take into account, but there's really not a lot to it. The indoor management rule is designed to protect third parties who are implicated in decisions made within the corporation.

## THE AUDIT COMMITTEE

BCA CBCA

S223: Application S171

S224: Appointment and procedures of audit committee

S225: Duties of audit committee

S226: Provision of financial statements to audit committee

The audit committee is composed of directors. Previously, we've spoken about the directors as a homogeneous group with equal control, authority, etc. In reality, some directors have more power than others. Some are heavily involved in the corporation, while others may be only notionally involved. The larger the corporation, the larger the board of directors, and the more likely that there will be significant differences between the involvement of directors.

Both statutes, in addition to making directors explicitly liable for decisions the corporations made (stick), set up a carrot in the form of an audit committee. The audit committee is set up so that outside directors (who don't have ongoing roles in the corporation) are required to have access to reports as to how the corporation is faring. **MD** doesn't want us to know the details of how audit committees function, just that they exist (). The audit committee is separate from an auditor (someone external to the corporation who reviews the books), and is an internal committee.

According to the CBCA, the audit committee must be composed of not less than 3 directors, the majority of whom must not be officers of the corporation. The audit committee must report to the rest of the directors. The provisions in the BCA are very similar. **MD** says this is a false comfort in a way, because no matter how well intentioned the auditor is, there are limits to how much information their presentation can communicate.

## SALE OF THE UNDERTAKING

BCA

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| *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   1. it does so in the ordinary course of its business, or 2. it has been authorized to do so by a special resolution. |

If the directors are proposing the corporation make a drastic change in the disposition of its property, both statutes say that the shareholders can veto this decision. These provisions are found at BCA, s 301 and CBCA, s 189(3). The two provisions are somewhat differently worded.

According to the BCA, a company **must not** dispose of property unless it is in the normal course of business or have shareholder approval. According to the BCA s 301(2), the disposition is not invalid simply because it contravenes s 301(1) if it is for valuable consideration to a person dealing with the corporation in good faith (protects BFP). S301(6) takes certain transactions out from needing this approval, significantly if a creditor secured transaction (LOOK THIS UP).

The provisions in the CBCA is similar, except that the provision applies to "sale, leases or exchanges" and does not apply to other dispositions. Furthermore, the CBCA does not said anything about third parties, though probably the indoor management rule would protect third parties.

In both cases, if a disposition is not authorized by a special resolution, then it is invalid. If it is approved, then the shareholders who dissented are entitled to have their shares bought out. This is purely a veto power - the shareholders cannot initiate their own dispositions, only veto those proposed by the directors.

This is a fairly commonly litigated issue, due to built-in ambiguities (what is "all or substantially all" of an undertaking?). There is no lower limit on the size of an asset that could trigger this rule for this reason. If a corporation is preparing to dispose of property in another way aside from sale (like leasing), then s 301 can still be triggered.

These are bare minimum protections, so if you want to have greater control over the directors, then you should put more restrictions in the articles of incorporation.

# DUTIES OF DIRECTORS AND OFFICERS

This portion of the course is the main reason why this course is required. This part of the course is structured as follows:

* How directors are appointed
* What the duties and liabilities of the directors are
* Duty of competence
* Fiduciary obligations
* Act on behalf and contract with the corporation (conflict of interest)
* Take advantage of opportunities on behalf of themselves or others
* Act as director for more than one corporation
* Hostile takeovers

## DIRECTORS & OFFICERS

### DIRECTORS

**Directors** is a defined term in s 1 of BCA. The BCA does not, however define an officer. The basic duties of the director as outlined in s 136 are to manage or supervise the management of the affairs of the company. Starting at s 120 of the BCA, there are a number of a provisions outlining how directors function.

120: A company must have at least one director, 3 for public companies.

121: First directors.

122: Details regarding succeeding directors. Normally directors are elected by the shareholders, but in some cases the directors can appoint short-term replacements.

124: Sets out who cannot become a director - must be an individual who is qualified to do so.

124(2): An individual is not qualified to be a director if they are under 18, found by a court to be incapable to manage their own affairs, an undischarged bankrupt, convicted in or out of BC of an offence connected with business or fraud (not present in the federal statute!).

124(3): A director who ceases to be qualified must resign.

125: A director is not required to be a shareholder as well.

126: Companies must keep registers of their directors including specific information.

128: A director ceases to hold office when they are removed, their term expires, they die or they resign.

128(3): A director can be removed by special resolution.

130: Vacancies among directors are to be filled according to ss 131 to 135 unless the memorandum or articles provide otherwise.

131: Vacancies among directors.

134: Loss of quorum.

135: If there are no directors in office, an individual may be empowered by the shareholders to call a meeting of shareholders to select a new director.

136: Directors powers and functions are set out in this provision.

137(1): Allows the shareholders to decide to transfer director's powers to a particular individual (managing director).

137(1.1): Sets out requirements for transferring director’s powers (included in the articles/bylaws at incorporation or by special resolution, clearly indicates intention that the powers be transferred).

137(2): If the powers of the directors is transferred, then the transfer is effective and the directors are relieved to that same extent.

137(3): If powers of directors are transferred, the rules governing directors apply to the transferee.

137(4): Transfers can be changed back.

140(1): Directors are entitled to participate in meetings.

140(3): An act of a director or officer is not invalid because of a defect in the appointment of the director/officer.

145: Authorization of corporate representatives.

146: Indoor management rule.

The CBCA defines what a director is in s 2, and s 102 describes the basic duties of the director.

102(1): subject to unanimous shareholder agreement, the director manages the corporation's affairs.

102(2): Minimum number of directors required.

103: Directors will come up with the bylaws.

104: After the issue of the certificate of incorporation, the directors will meet to determine bylaws and other key details.

105: Qualification of directors - similar to provincial requirements except for conviction provision.

105(2): Director is not required to be a shareholder.

105(3): At least 25% of the directors of a corporation must be resident Canadians for tax purposes, and if there are less than 4 directors then there must be at least one resident Canadian. **This is different from the provincial statute and is a major reason to prefer it.**

106: It is up to the corporation how long the directors remain in office.

108: Directors cease to hold office when they die, are removed or become disqualified.

109: Directors can be removed by shareholders by an ordinary resolution.

110: Any director is entitled to receive a notice of and be heard at any meeting of shareholders.

111: Filling vacancies in the directors.

114: In meetings of directors themselves, the directors may meet at any place and at such frequency as the bylaws require. Canadian directors must be present at meetings (?).

114(8): You can have one director meetings and can participate by distance.

115: The directors may appoint a managing director (must be a resident Canadian) or committee of directors to manage the corporation. This does not exist in the BC statute in the same way - there is no provision forcing the directors to be relieved of responsibility.

116: An act of a director is valid despite any problem or irregularity in their appointment or the act itself.

117: Unanimous directors' resolutions are possible.

Despite all these provisions, directors don't necessarily **do** all that much. Directors have to meet at least once a year, but might not need to meet much more than that if there aren't big decisions to be made.

### OFFICERS

These are individuals who carry out the big decisions and carry out the day to day business of the corporation. They do the hands-on, day to day operation of the corporation. Therefore, it is fairly surprising that the statutes don't say much about them. They have the same duties in many cases as the directors.

CBCA

121: Directors may appoint officers to manage the operations of the corporation. Directors may be appointed to any office of the corporation, and two or more offices may be occupied by the same officer (this is how power gets concentrated).

BCA

141(1)(2): Directors may appoint officers to manage the operations of the corporation. Directors may be appointed to any office of the corporation, and two or more offices may be occupied by the same officer

141(3): Not qualified to be an officer, not qualified to be a director.

141(4): Unless the articles or memorandum provide otherwise, directors may remove any officer.

141(5): Removal of an officer is without prejudice to the officer's contractual rights or rights under law, but the appointment of an officer does not of itself create any contractual rights.

Officers' duties only apply to senior officers (explicitly in BCA, implicitly in CBCA because the definition of officer only captures senior officers). Senior officers are defined by their "policy-making" function in the BCA. Officers’ duties are usually bound up in the employment contract. It is much more difficult for officers to escape liability, as the statutory defenses are not available to them.

## PERSONAL LIABILITY OF DIRECTORS

**Q:** What remedies are associated with the directors' duties (competence, fiduciary, etc.)?

**A:** It depends upon *to whom* the duty is owed. Most of the directors' duties are owed to the corporation itself. If the corporation brings a claim against the director, then they will be personally liable. If the breach of the duty is against another entity, then the corporation will be liable.

**PAYMENTS**

Directors are liable for decisions on payments to be made (BCA s 154, CBCA s 118. Directors are also jointly and severally liable for employee wages (CBCA s 119, not in BCA but in the employment legislation). Generally this liability will be to the corporation. Where the payment was to a specific person, they can bring a claim against the directors. Directors' liability on this front applies regardless of whether they were really involved in the decision or not. There is a bit of protection for stupid directors in the statutes (BCA s 154(8), CBCA s 123). The presumption is that if a director is present, then they consented to the decision.

The BCA creates a specific procedure for directors to dissent with respect to payments. The CBCA creates a general procedure for directors to dissent in s 123(1), (2) and (3). Directors can also avoid personal liability using BCA, s 157 or CBCA, s 123(4) and (5).

CBCA, s 123(4): A director is not liable if they were "reasonable" and relied in good faith on financial reports or on an expert's report (i.e. shift the blame).

BCA, s 157(1): A director is not liable under s 142 or s 157 if they relied in good faith on financial statements or written reports.

BCA, s 157(2): A director is not liable under s 154 if they did not know and could not reasonably have known that the act in issue was contrary to the Act.

BCA, s 150: Powers of court.

BCA, s 156: Legal proceedings on liability.

BCA, s 158: Directors or officers who knowingly permit the company to contravene the name display requirements in s 27 are personally liable.

## THE OVERARCHING DUTIES & DISSENTING

The directors are responsible for managing the corporation, and their core obligations are two-fold: a fiduciary obligation and a duty of care obligation. It is not possible to contract out of either of these obligations.

BCA, s 142(1): A director or officer (any officer!), when exercising their powers and functions, must

1. Act honestly and in good faith with a view to the best interests of the company (**fiduciary duty**)
2. Exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances (**duty of care**)

The BCA does not provide a general procedure for dissenting and thereby escaping liability, but the procedures in ss 154 and 157 can be used - but only by directors, since this provision does not apply to officers.

PEOPLESheld that "comparable" in s 142(b) has an objective element to it and cannot be begged off by simply "doing your best". There has to be a basic level of skill, time expended and care.

CBCA, s 122(1): Every director and officer (***only senior!***) of a corporation in exercising their powers and discharging their duties shall

1. act honestly and in good faith with a view to the best interests of the corporation; (**fiduciary duty**)
2. exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (**duty of care**)

The CBCAprovides general dissent provisions in s 123 which can be used with respect to any of the directors' decisions, and thereby to escape liability. This offers more protection than the BCA, as it applies to officers as well.

The CBCAalso has a **"good faith" defence** in

123(5): A director has complied with his or her duties under subsection 122(1) if the director relied in good faith on:

1. financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
2. a report of a person whose profession lends credibility to a statement made by the professional person.

## THE DUTY OF CARE & SKILL

### COMMON LAW

#### RE CITY EQUITABLE FIRE INSURANCE CO LTD [1925] UK

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| **F** | The company lost £1,200,000 in failure of investments and the large scale fraud of the chairman, Mr. Bevan, ‘a daring and unprincipled scoundrel’. The liquidator sued the other directors for negligence. The auditors were sued too, but the Court of Appeal held they were honest and exonerated by provisions in the company’s articles. |
| **I** | Are the directors liable for not stopping the scoundrel? |
| **R** | Directors owe a duty of care and skill in the performance of his duties – but this standard is lower in the common law. |
| **A** | Honesty is not sufficient to escape liability. Contents of the duty of care:   * 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 * directors are not liable for mere errors of judgment * the duty of care does not require continual attendance/attention to the company * the duty of care does not require directors to test the accuracy or completeness of info given by managers. |
| **C** | There was some negligence but short of wilful misconduct, no liability. |

### STATUTORY REFORM

BCA

142(1)(b): Limits the broad scope of the common law defence by tying the standard to an objective basis – instead of ordinary degree, need reasonable degree of prudence.

142(1)(c): Duty to comply with the BCA is part of the duty of care.

142(2): Rules of common law and equity are in addition to these duties.

142(3): Can’t contract out from duty of care.

154: Directors’ liability.

157: Limitations on liability.

CBCA

118: Directors’ liability.

122(1)(b): Limits the broad scope of the common law defence by tying the standard to an objective basis – instead of ordinary degree, need reasonable degree of prudence.

122(2): Duty to comply with the CBCA is part of the duty of care.

122(3): Can’t contract out from duty of care.

123(4): Defence of reasonable diligence.

123(5): Defence of good faith.

#### RE PEOPLES DEPARTMENT STORES LTD (1992) INC [2003] SCC

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| **F** | Clement, Wiseʼs VP of admin/fin came up with purchasing scheme, everyone agreed to it – some suppliers had reservations and thought it was a way to put Peoples in debt to benefit Wise – which it did. When 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. |

### THE BUSINESS JUDGMENT RULE

If there is a breach of the duty of care, how does that work procedurally? How difficult is it to persuade a court? There have been some arguments (particularly in the USA) that the burden should be on the directors. PEOPLESand REPAP (aka UPM)show that this is not how it works in Canada – the burden lies on the plaintiff. The court does tend to defer to the decisions of directors and it takes quite a bit to convince the court that the directors have derelicted their duty. In REPAP, the directors argued they were just doing what the lawyers and other experts advised them to do, but the court held that this was not sufficient, that they needed to go behind the reports from experts.

#### UPM-KYMMENE CORP v UPM-KYMMENE MIRAMICHI INC [2002] ON SC

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| **F** | Huge payout if new exec let go – if the golden parachute were to happen it would bankrupt the company. 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** | Was the duty of care breached? |
| **R** | Business judgment rule: burden is on the **P** to demonstrate that there has been a dereliction in directors’ duties. |
| **A** | While normally the court will defer to business judgment 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. “BJ rule protects those that might second guess… make reasonable not perfect decision. However… decisions actually evidence their judgment… subject to examination of fact. 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 had broken their duty of care. **Reliance on an expert’s opinion is insufficient to escape liability –** the reliance has to be based on reasonable judgment. |

#### PENTE INVESTMENT MANAGEMENT LITD v SCHNEIDER CORP [1998] ON CA

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| **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** | Is the burden of proof on the directors to justify their actions as being in the best interests of the company or on the shareholders challenging the actions of the company? |
| **R** | Business judgment rule: burden is on the **P** to demonstrate that there has been a dereliction in directors’ duties. |
| **A** | The burden of proof may not always rest on the same party when a change of control transaction is challenged: question is whether the directors of the target company 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. |

## THE FIDUCIARY DUTY

### INTRODUCTION

This is a much more nuanced duty than the duty of care in the case law, because the content of the fiduciary duty functions differently in different contexts. Contained in BCA, s 142(1)(a) and CBCA, s 122(1)(a), but this is only the **starting point**. Important to consider when fulfilling statutory duties, whether or not there are further fiduciary obligations in play. 4 common scenarios which breach the fiduciary obligation:

1. **Self-dealing**: Where an individual puts their own interests ahead of the corporation's in a contract. Because the director is on both sides of the contract, there is the possibility for abuse. Not common for the K to be between the director and the company. It is much more common in practice that the director is a director or officer for another corporation. This is a conflict of interest. The BCA provisions with respect to how to avoid this scenario are exhaustive, while the CBCA provisions are ***not***.
2. **Corporate opportunities**: director prevents the corporation from taking advantage of an opportunity, then takes advantage of that opportunity themselves or a party with whom they are connected. There is no overlap with the self-dealing situation because there is no contract here. This is a conflict of interest.
3. **Competition**: Usually, means the director on two boards uses information to advantage one company over another (potential conflict of interest).
4. **Hostile takeovers**: Third party seeks to take over company and replace the directors, the directors and officers have an obligation to provide information to assist those dealing with the corporation. However, doing so may not be in the best interests of the corporation as a whole.

**Q:** Who can bring claims based on breach of the fiduciary duty?

**A:** The corporation itself can bring a claim against a director based solely on this duty, but this is not common. Generally, the BoD is replaced and new BoD brings claim against the old one. Alternately, some outside party (probably a shareholder, or possibly a creditor) brings a claim. Outside parties can bring a claim against directors in two ways: (1) in the name of the corporation; (2) in the context of the oppression remedy.

Unless the statute says it is exhaustive, it is supplemented by the common law.

### SELF-DEALING

**Self-dealing**: Where an individual puts their own interests ahead of the corporation's in a contract.

BCA

153: Stipulates when a director or senior officers must disclose a conflict, and how. **Doesn't explicitly exist in the** CBCA.

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| 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. |
| 1. The disclosure required from a director or senior officer under subsection (1) 2. must be made to the directors promptly 3. after that individual becomes a director or senior officer of the company, or 4. 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 5. must be evidenced in one of the ways referred to in section 148 (3). |

This provision creates the duty, but doesn't provide any remedy if this duty is breached. The presumption is that the usual remedies for breach of a fiduciary obligation apply here. **This is a very broad requirement and disclosing variour interests takes up a lot of time in BoD meetings.**

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| **152** Except as is provided in this Division, a director or senior officer of a company has no obligation to   * 1. disclose any direct or indirect interest that the director or senior officer has in a contract or transaction, or   2. subject to section 192, account 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 has a disclosable interest. |

Only need to disclose if you fall into ss 147-153 - they cover the field. No analogous provision in the CBCA, so there could be some other disclosures required by the common law.

148(1): 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. Two ways out: interests may not be disclosable (s 147), or interest may be disclosable but you are not required to account for it (ss 148-149).

DISCLOSABLE INTERESTS

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| **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   1. the contract or transaction is material to the company, 2. the company has entered, or proposes to enter, into the contract or transaction, and 3. either of the following applies to the director or senior officer: 4. the director or senior officer has a material interest in the contract or transaction; 5. 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. |

There is no statutory definition of materiality - this is subject of considerable case law.

147(2): Outlines situations where there is no disclosable interest.

147(4): **Unique to BC.** Outlines situations when there **may** not be a disclosable interest.

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| **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. |

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| **148(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:   1. 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); [**Transition**] 2. 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; [**Disclose to board then approval**] 3. 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; [**Disclose to shareholders then approval via special resolution**] 4. whether or not the contract or transaction is approved in accordance with section 149, 5. the company entered into the contract or transaction before the director or senior officer became a director or senior officer of the company, 6. the disclosable interest is disclosed to the directors or the shareholders, and 7. 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. |

The statute is silent on the nature and extent of the disclosure necessary under s 148(2). If this regime is triggered because you hold a position in another company, then s 148(4) says a general statement is sufficient disclosure (less information revealed, just that you have that position and not the contract itself).

HOW DO THESE PROCEDURES WORK

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| **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. [**Can't vote on it**]   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.   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. [**Allowed to be at the meeting**] |

This does not prevent you from voting as a shareholder to approve the contract in which you've entered in a personal capacity! If your contract is approved under these provisions, you have done all that is required. The BoD needs to ensure they are not in breach of the duty of care or their fiduciary obligations by approving this contract. For these reasons, it can be the case that this gets shunted over to the shareholders, despite the fact that this is more time-consuming.

If you haven't done what is necessary to disclose your interests, you will have to account for your profits.

**Account for profits**: an action taken against a defendant to recover the profits taken as a result of the breach of duty, in order to prevent unjust enrichment.

BCA, s 150: Provides the court with broad powers to make orders with respect to both the director and the corporation.

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| **151** A contract or transaction with a company is not invalid merely because   1. a director or senior officer of the company has an interest, direct or indirect, in the contract or transaction, 2. a director or senior officer of the company has not disclosed an interest he or she has in the contract or transaction, or 3. 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. |

**Presumption is that the contract is valid - but the court can still invalidate a contract because of a conflict of interest. This is the opposite approach to that taken in the** CBCA**.**

This particular regime is imposed only on senior officers, despite the fact that all officers possess a fiduciary duty.

CBCA

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| **120(1)** A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer   1. is a party to the contract or transaction; 2. is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or 3. has a material interest in a party to the contract or transaction. |

120(5): Directors can't vote.

120(6): General disclosure can be sufficient.

120(7): Contract must be confirmed by either the directors or the shareholders. Without approval, the presumption is that the contract is invalid (opposite to BCAapproach).

120(7.1): The contract must also be "reasonable and fair to the corporation when it was approved or confirmed." This duty applies to shareholders as well as directors (very unusual).

120(8): Can apply to court set aside the contract or transaction or require the director or officer to account for profits.

The CBCAdoesn't define "disclosable interest", as the BCAdoes. In the BCA, the disclosable interest has to be material from the perspective of the director/officer **and** from the perspective of the corporation. In the CBCA, the disclosable interest merely has to be material - presumably only from one end.

Nor does the CBCA outline the specific consequences if you don't disclose a disclosable interest - the general remedies for the breach of fiduciary duties are available, but there is no focus on accounting of profits. There is also the reverse presumption regarding contractual validity than in the BCA. As a result, under the CBCAthe contract can both be invalid and you can still be forced to account for profits as well.

The CBCA also doesn't have an analogous provision to BCA s 152, and so the CBCAprovisions are not exhaustive on the scope of the fiduciary duty in terms of self-dealing.

### CORPORATE OPPORTUNITIES

**Corporate opportunities**: director prevents the corporation from taking advantage of an opportunity, then takes advantage of that opportunity themselves or a party with whom they are connected. There is no overlap with the self-dealing situation because there is no contract here. This is a conflict of interest.

This looks like trust law because it is a fairly onerous duty on directors and officers. It is not necessary for the corporation to show that they would have taken advantage of the opportunity otherwise, and so there is no corollary defence for the director/officer. It is also no defence for the director/officer to argue that they extracted unique profits from the opportunity that the corporation would not have realized, so they will still have to disgorge all the profits.

It is possible that BCA s 153 could be triggered in this context, but it doesn't outline consequences for not doing so, unlike in the self-dealing context. Thus, the common law is the primary regulator.

#### REGAL (HASTINGS) LTD v GULLIVER [1942] UK HL

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| **F** | Directors and lawyers were trying to drum up business for the subsidiary. They find a third party to deal with the subsidiary to benefit the overarching company. The third party insists on greater capitalization in the subsidiary, so the directors raise money by buying shares in the subsidiary themselves (the impugned transaction). One director, Gulliver, buys the shares in the subsidiary, but not himself, but for a fourth party. This transaction goes through and the company is eventually sold, bringing in a new board of directors. The new board brings the action against the directors, saying that this profit was in breach of their fiduciary duty to the company. |
| **I** | Was this a breach of the fiduciary obligation? |
| **R** | A fiduciary cannot profit by using their fiduciary position.  “The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon questions or considerations as whether the property would or should otherwise have gone to the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having in the stated circumstances been made.” |
| **A** | The court accepts that there was no intent to breach the fiduciary obligation and the transaction was in good faith. This is not irrelevant, but does not obviate the fact that the directors took for themselves a benefit, as a result of taking advantage of an opportunity which they took from the corporation.  The lawyer was allowed to keep his profits because he was not a director and therefore not in breach of any fiduciary duty. Similar behavior today would not break corporate law, but would break securities law as well as professional obligations to the Law Society.  Gulliver was also not found to be accountable because he did not himself personally benefit, the fourth party did. It is unclear whether or not this is still a breach of the fiduciary duty - this might constitute a divided loyalty. |
| **C** | High water mark of “you can’t take any opportunity even if the company couldn’t take it itself.” |

**Q:** What if the corporation can be said to have made an informed decision not to pursue an opportunity?

#### PESO SILVER MINES LTD v CROPPER [1966] SCC

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| **F** | Directors bought mining claims, because company couldnʼt afford to. Directors formed new company, Cross Bow, to take them up and did well. Peso taken over by Charter Oil who donʼt 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 the fiduciary obligation? |
| **A** | The court agreed with REGAL (HASTINGS), but latched onto an implicit exception. Because the first corporation decided not to pursue the opportunity, Cropper had exhausted his fiduciary duty as a director with respect to that opportunity, and was free to pursue it independently. |
| **C** | If a corporation makes a clear decision not to pursue an opportunity, that can offer a defence for directors who later pursue that opportunity. The clearer that decision, the better. The more good faith, the better - best to recuse yourself from that decision. Still have to defend from the charge that the director's position in the corporation gave them the inside information which made them pursue the opportunity. |

#### CANAERO v O'MALLEY [1974] SCC

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| **F** | Canaero was a company whose main business was topographical mapping and geophysical exploration. O'Malley and Zarzycki were either officers or directors (doesn't matter, fiduciary duty still applies) of Canaero. After the acquisition of Canaero's parent by Litton Industries in 1961, Wells resigned as director in February 1965. O'Malley and Zarzycki resigned from their positions in August 1966.  Prior to their resignation, at the suggestion of Wells, the three decided to form a business venture in the same fields as Canaero – Terra Surveys Limited. Terra was chosen to receive a contract to perform a topographical survey and related mapping for the Government of Guyana, and the agreement was executed in November 1966. The proposal upon which the contract was granted was based on preparatory work that had been performed by O'Malley and Zarzycki for Canaero prior to their resignations.  Canaero filed a claim against the three (together with Terra) on the basis that the defendants had improperly taken the fruits of a corporate opportunity in which Canaero had a prior and continuing interest. |
| **I** | Was this a breach of the fiduciary obligation? |
| **R** | A fiduciary (director or officer of the corporation) cannot use opportunities acquired from their position as a fiduciary to compete with the corporation. |
| **A** | The fiduciary duty applies to officers, as well as directors. It doesn't matter if you leave your position, the fiduciary duty is ongoing. Furthermore, the court rejected the argument that the opportunity was different enough and but for the actions of the defendants, the corporation still wouldn't have taken advantage of the opportunity. The court says this doesn't matter, the defendants' venture was similar enough that it was a variation on the original corporate opportunity. The court appears to approve of PESO, but attempts to limit it to the situation where there was a clear decision by the corporation not to pursue the opportunity. Relevant factors:   1. The position or office held 2. The nature of the corporate opportunity 3. Its ripeness 4. Its specificity 5. The director or officer's relation to the opportunity 6. The amount of knowledge possessed 7. The circumstances in which it was obtained 8. Whether the knowledge was special or private 9. The factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company 10. The circumstances under which the relationship was terminated (retirement, resignation, firing, etc.)" |
| **C** | The court has no difficulty finding that the defendants were in breach of their fiduciary duties by pursuing the opportunity acquired from their fiduciary position to compete with the corporation. This is an exception to the general rule that Directors and Officers can leave a corporation and subsequently do competing business (METROPOLITAN COMMERCIAL CARPET CENTRE v DONOVAN). |

You can still make arguments based on the viability of the original corporate opportunity or that the taken opportunity is sufficiently different than the original one. That said, the fiduciary duty is still operative and you need to make sure that you're not using the information gained from your fiduciary position to take advantage of the opportunity, as that will be problematic.

The law with respect to partnerships is essentially the same. That said, you could argue that you did it for the benefit of the partnership because there is not the clear delineation between personal and corporate capacity.

### COMPETITION

This situation is different from the previous two because the director is not personally benefitting. Rather, they are caught in a conflict of interest because they have fiduciary duties to two competing parties. Often this means a director on two boards uses information to advantage one company over another (potential conflict of interest). This is far more common with respect to directors than it is with officers. Many directors are directors of many corporations without paying particularly close attention. Information gained from one context is not supposed to intrude upon the other.

The corporation has to prove some sort of loss on their part or gain on the part of the director. The usual remedy would be accounting for profits, or possibly an injunction to prevent the director from continuing a particular activity. An oppression claim by a shareholder is possible, but rare.

BCA, s 153**:** If the position can result in conflict of interest, then you have a duty to disclose the nature and extent of the conflict. This is an ongoing duty.

#### LONDON & MASHONALAND v NEW MASHONALAND [1891] UK

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| **F** | Court refrains from issuing an injunction against director becoming director of 2nd CO because in and of itself there is nothing wrong with it. |
| **R** | Being the director of more than one entity is not inherently a conflict of interest. There must be an actual conflict of interest at common law. |
| **C** | A conflict of interest may ARISE but isn’t held to be inherently problematic. To be of MUCH concern it has to fit into another scenario. |

#### CRANEWOOD FINANCIAL CORP v NORISAWA [2001] BC SC

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| **F** | The facts here approach a business opportunity breach. |
| **T** | 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**. |

In *Corporate Law in Canada,* Welling outlines the following six propositions as the current law on fiduciaries’ liability in Canada.

* 1. Where there is an actual conflict of duty and interest and the information or opportunity is acquired by virtue of the fiduciary’s position, **the fiduciary is clearly liable** to account for any profit.
  2. Where there is a potential conflict of duty and interest and the information is acquired by virtue of the fiduciary’s position, **the fiduciary is accountable for any profit.**
  3. Where there is no conflict of duty and interest, real or potential, and the information or opportunity is acquired independently, **the fiduciary is clearly not accountable.**
  4. Where there is a potential conflict of duty and interest, but the information or opportunity is acquired independently, **the fiduciary is not accountable.**
  5. Where there is an actual conflict of duty and interest, but the information or opportunity is acquired independently, **the fiduciary is accountable.**
  6. Where there is no conflict of duty and interest, but the information is acquired by virtue of the fiduciary position, **the fiduciary is accountable.**

NOTE

The interest disclosure provisions have no application here unless there is a contract between the competing corporations – which is unlikely due to the competition between them.

TWO COMPETING LEGAL THREADS

1. In **CANAERO**, the court distinguishes **PESO** in such a way as to suggest that there is a line between the illegal appropriation of a corporate opportunity and permissible competition, based on whether the opportunity was “essential to the success of the company”.
2. But the rest of **CANAERO** suggests agreement with **REGAL HASTINGS** – fiduciaries should not take any competing opportunity even if the company couldn’t take it itself.

POLICY

“While, from a policy point of view, there is much to recommend the stricter common law approach, there is nonetheless a tention between the expression of legislative will in CBCA s 122(1)(a) and a fair and/or efficient resolution of these cases.” The CBCA provision could be read to be subtractive from the common law standard, and thereby set a lower standard in and of themselves.

### HOSTILE TAKEOVERS

This is conceptually different from the prior three situations where a director took an improper action (the usual context of a fiduciary duty). In this context, the directors are trying to remain in place. The claim can be brought that the duty of loyalty and good faith is broken when they don't consider what is in the best interests of the corporation (the takeover) because they don't want to be replaced. Existing directors may be resistant to being replaced because it is quite likely that their replacement may bring other actions against them - their resistance has a defensive quality as well. This is even a business model for some investment vehicles (BAIN CAPITAL).

 These claims against the directors/officers are usually made when the takeover is unsuccessful. If the takeover is successful, then the new management will come in and bring claims against the old management for one of the prior three situations. In this context, usually there was a failed takeover bid and the unsuccessful parties (who are now shareholders) bring a claim (probably a derivative action) against the original management for breach of their fiduciary duty.

**There are no specific statutory provisions in play aside from the general ones providing for duties of care and fiduciary obligations.**

#### TECK CORP v MILLAR [1972] BCSC

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| **F** | There were two bidders for a junior mining property. The directors made a decision favoring the acceptance of one of the bids. The loser, Teck Corp, went ahead and got enough votes to hold a shareholders vote for the acceptance of their own bid, which they won. The Teck bid was slightly better in monetary terms. The directors went ahead and accepted the other bid anyway, based in part *on the advice of their lawyer*. Teck argued that it was clear that if their bid had been accepted, the directors would have been replaced and so their decision was based on the preservation of their own interests rather than the best interests of the corporation. |
| **I** | Is it a breach of the fiduciary duty for a director to act against a takeover by a major shareholder? |
| **R** | Impropriety depends upon proof that the directors were actuated by a collateral purpose. |
| **A** | The court focuses in on the purpose. Teck's claim was that the directors acted for an improper purpose (their own preservation). Directors are only supposed to act in the furtherance of the corporation's interests. In this case, there was sufficient evidence to find that a presumption that the directors had acted for an improper purpose.  How can the directors defend themselves? Good faith is not sufficient to disprove that you were acting for a proper purpose. You must also establish that you had reasonable grounds for your decision. The court finds that there were reasonable grounds for the directors' decision in this case (their consultation with their lawyer helps here). The business judgment rule enters here to assist the directors as well, and the court finds no breach of the fiduciary duty. |
| **T** | For directors to defend themselves against claims they acted for an improper purpose, they must show:   1. They acted in good faith, and 2. There were reasonable grounds for their belief that their decision is in the corporation's best interests |

One of the well-recognized procedural steps that you can take to protect your decision in this context is a special committee.

#### PENTE INVESTMENT v SCHNEIDER CORP [1998] ONSC

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| **F** | Family was prepared to sell out their interests in a corporation – Maple Leaf was one bidder and Smithfield was the other. Smithfield was preferred by the directors and the Schneider family. Maple Leaf argued that this was not in the best interests of the corporation as their bid was slightly higher. |
| **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** | Certain directors and officers are too closely involved in the corporation as it exists to make decisions in the best interests of the corporation in the long run. There must be an independent process to make such decisions – a special committee. The special committee gathers information separately from the affected directors or officers, and then present the information or even make a decision separate from the  The court thought that this was a perfectly defensible method for making such a decision. **How** the special committee operates was key to the court’s decision. While the special committee’s information came from the CEO who was closely connected to the Schneider family and therefore not at arm’s length, lots of this information was publicly available. Furthermore, Maple Leaf did not meet the Schneider family’s expressed concern about the effect of a change of control on the continuity of employment for Schneider’s employees, the welfare of suppliers, and the relationship with its customers – Smithfield did.  The court also discussed whether an auction would be preferable when there are competing bids. The court says that this is a possible approach, but it is not required and an internal process is perfectly valid. |
| **C** | Nothing improper – an auction is not required. If you do have a special committee insiders can still be allowed. |

It is possible that a claim could be made for breach of duty of care if directors were to set up too complicated a process for choosing between bids.

### TO WHOM IS THE FIDUCIARY DUTY OWED?

The fiduciary duty is owed to the corporation. If the corporation isn't complaining, individuals can start a derivative action to start a claim in the name of the corporation.

#### RE BCE INC [2008] SCC

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| **F** | Group of security holders claimed that their interests were negatively impacted by the directors' decisions. They brought a derivative action to take the place of the corporation to make a claim against the directors for breach of the fiduciary duty. |
| **I** | To whom is the fiduciary duty owed? |
| **R** | The court approved of PEOPLES and found that the fiduciary obligation per se is owed to the corporation. |
| **A** | Simply having a detrimental impact on an interested party is not, in and of itself, sufficient to show that there has been a breach of the fiduciary obligation. As long as the directors can justify their decision, even if it was sub-optimal, then the business judgment rule kicks in and generally the court will defer to that. |
| **N** | In practice, it is not difficult for directors to defend their decisions using the business judgment rule and therefore avoid a breach of their fiduciary obligation. |

**POLICY**

The SCC decisions in PEOPLES and BCE are much criticized because they require that all interests must be taken into account, no particular interests must be taken into account, etc., and this is practically allows directors too much leeway to defend themselves. For this reason, aggrieved parties will often not try to bring a claim on the basis of a breach of the fiduciary duty. Instead, they will favor the oppression remedy because it can be founded on damage to particular interest. There has been a corresponding explosion in oppression claims as a result of how easy the courts have made it for directors to satisfy the fiduciary duty.

## RELIEF FROM LIABILITY

### COMMON LAW

SHAREHOLDER VALIDATION

Can the shareholders validate a breach such that it is of no legal consequence? Historically, yes as shareholders were equated with the corporation and if they validated any action at all it was of no consequence.

#### NORTH-WEST TRANSPORTATION v BEATTY [1887] UK PC

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| **F** | Director had a sweetheart deal from the corporation to buy his boat. Successfully defended himself because the shareholders approved the transaction - even though he was one of the main shareholders! |
| **N** | **NOT GOOD LAW** – overridden by s 233(6). |

### STATUTES

What do the statutes say on this point? They are surprisingly coy – while they don't say you can't do this, they suggest it shouldn't matter that much.

BCA

142: Sets out the main duties of the director.

142(3): No provision in a contract relieves a director of liability based on their duties.

157: Limitations on liability.

These provisions seems to remove possibility of shareholder validation… But if there is a claim brought against the director, it will in many cases be in the form of a derivative action. Derivative actions require a *prima facie* case that there was a breach of a duty that is the subject matter of a valid complaint. The provision that deals with derivative actions is s 233.

233(6): No application made under this provision can be stayed or dismissed merely because it is shown that an alleged breach has been or might be approved by shareholders. Evidence of such approval **can be taken into account** by the court.

It is not entirely clear how to square these provisions – if there was a breach of duty, there was a shareholder vote, and the shareholders approved it, it is possible that the court will not allow a derivative action to proceed.

CBCA

These provisions are similar. Provisions prohibiting contracting out of duties is found in s 122(3). In s 242(1) outlines how the court can take shareholder approval into account when deciding whether or not to allow an action to proceed.

**BOTTOM LINE:** it is valuable to get shareholder approval, but it is by no means the last word, and the court may still allow an action to proceed. It is also plausible, particularly under the BC statute, to change the articles of the corporation in advance to head off a breach by doing so in advance.

There are various ways in which directors and officers can defend their decisions. There are a number of defences specific to each duty. In the BCA, s 157, and in the CBCA, s 123(4) & (5) give general defences of good faith dependence on reports.

**BC GENERAL GOOD FAITH DEFENCE**

BC has a general "good faith" defence provision in s 234 which has no analog in the federal statute, and might militate in favor of incorporation under the BCA rather than the CBCA.

234: If in a legal proceeding against a director/officer, the court finds that the person is liable, the court must take into consideration all circumstances involved in the case, including the circumstances of their election or appointment, and may relieve them of liability if the court finds that the director/officer acted **honestly and reasonably** and **ought fairly to be excused**.

This is a sweeping defence provision because it allows the court to grant relief across a number of situations (negligence, default, breach of duty and breach of trust. This provision also allows receivers and liquidators to take advantage of it. Furthermore, the court can pick and choose how it wants to relieve liability. Another advantage is that this provision applies in any legal proceeding, not only where the corporation brings an action.

This is separate from self-dealing provisions, which cover the field, and *do* allow for shareholder approval.

**Q**: What recourse do directors have in case of a breach?

**A:** They can have someone else assume liability on their behalf in case of a breach!

### INDEMNIFICATION & INSURANCE

Three situations:

1. the corporation chooses to indemnify you;
2. the corporation is forced to indemnify you;
3. the corporation is prevented from indemnifying you.

There are provisions in both the BCA and CBCA which allow this. There are slight differences between the two, but nothing major. The BCA provisions are somewhat wordier, to a beneficial degree in this case.

BCA

159: Various definitions. Distinction between penalties and expenses. Eligible party generally means a director or an officer, but it can also include someone acting in that capacity at the request of the company. Eligible proceeding is defined more broadly than in the federal CBCA.

160: Permissive provision - a company may indemnify an eligible party in advance.

161: Sets out situations where the corporation is required to indemnify. A corporation must, after the final disposition of an eligible proceeding, pay the expenses actually and reasonably incurred by the eligible party in respect of that proceeding if the eligible party

1. Has not been reimbursed for those expenses, and
2. Is wholly successful, on the merits or otherwise, in the outcome of the proceeding or is substantially successful on the merits in the outcome of the proceeding

162: Company may pay expenses in advance. Requires a written undertaken that if the payment is prohibited by s 163, the eligible party will repay the amounts advanced.

163(1): The corporation cannot indemnify if

1. it is prohibited by its memorandum or articles at the time of the agreement,
2. it is prohibited by its memorandum or articles at the time the indemnity is made,
3. the eligible party did not act in honestly and in good faith (***civil proceedings***), or
4. the eligible party is in in a non-civil proceeding and did not have reasonable grounds for believing their conduct was lawful (***criminal/administrative proceedings***).

164: Court can order indemnification.

165: Companies can purchase and maintain insurance for the purpose of indemnification.

CBCA

124: More or less the same, but leaves some things up in the air.

124(1): Permissive provision - a company may indemnify an eligible party in advance.

124(3): A corporation may not indemnify unless the individual acted honestly and in good faith. In a criminal or administrative action, they must have had reasonable grounds to believe their conduct was lawful.

124(5): Similar right to indemnify as in the BCA.

124(6): Allows insurance contracts.

124(7): Allows courts to make various orders.

STATUTORY DIFFERENCES

The BCA has some definitions the CBCA lacks. Where a corporation is prohibited from indemnification, this trumps everything else. The BCA specifically mentions the corporate constitution in this regard. The CBCA does not make this explicit, but it is likely they intended to refer to the corporate constitution as well.

In both statutes, if the corporation is bringing the action against the director, they cannot indemnify them (except pursuant to a court order). In the CBCA, the court appears to be bound by the restrictions of when indemnification is possible.

In the BCA, you are required to indemnify expenses if they were wholly successful for any reason or substantially successful on the merits. In the CBCA, expenses can be paid **only** if the director did not commit any breach.

# SHAREHOLDERS

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| --- | --- | --- |
| BCA | **TOPIC** | CBCA |
| **SHARE STRUCTURE AND DEFINITIONS** | | |
| Personal estate - s. 56 | What is a share? | -- |
| * defined in s 1(1) * set out in articles - s 11(g) * further elaboration (including max number) - s 53 | Authorized share structure | * set out authorized share structure (including max number) in articles of incorporation – s 6(1)(c) |
| -- | Basic presumptive rights | * voting/dividends/property s 24(3) |
| * can be par or no-par, 1 or more classes, or series - *s 52* * class matters - *s 59*: * *(2)* presumption of 1 class * *(3)* all presumptively equal * *(4)(6)* within class generally same unless special series rights * *(5)* no guarantee able to use special rights * series matters - *s 60*: * can be special rights for series - but no differences within series *(4)* * *(6)* - no differences within class as to dividends or return of capital * *(5)* - no guarantee able to use special rights | Types/classes/series | * no par - *s 24(1)* [non-assessable - *s 25(2)*] * can be classes - *s 24(4)* * can be series - *s 27* * no special rights within class as to dividends or return of capital - *s 27(3)* |
| * *s 54* | Changes in share structure | * *s 173(1)* |
| **ISSUE OF SHARES** | | |
| * Incorporators must have minimum of 1 share each per s 10 | Promoters | -- |
| * Directors decide per s 62 | When to issue | * Directors decide per s 25(1) |
| * **No par value**: as per articles or directors resolution - s 63(1) * **Par value**: (a) by directors’ resolution and (b) at least at par - s 63(2) | Price (issue price *only*) | * Directors decide per s 25(1) |
| * Must be fully paid with money, past services or property – no IOUs allowed per s 64(2)(3) * Directors must ensure fair market value per s 64(4) | Payment | * Must be fully paid, can include past services or property at fair equivalent value – no IOUs allowed per s 25(3)(4) |
| * To corporation or shareholders for losses from breach of *s 63(2)(b)* or *s 64* – *s 154(2)* | Directors’ joint & several liability | * To account to corporation for breach of *s 25* – *s 118* |
| * **Permitted** per *s 70* | Issue of shares as dividend | * **Permitted** per *s 43* |
| **RECORD OF SHAREHOLDERS** | | |
| * any person can apply for names, addresses and numbers - s 49(1) * affidavit identifying applicant and promising not to abuse - s 49(2) * how can use - to influence votes, to try to buy shares, to reorg corp., to org. meeting - s 49(3) | Access to shareholder list | * any person can apply for names, addresses and numbers - s 21(3)(4) * affidavit identifying applicant and promising not to abuse - s 21(7) * how can use - to influence votes, to try to buy shares, for any other matter related to the corporation - s 21(9) |

## THE STRUCTURE OF SHARE OWNERSHIP

In the past, the CBCA and BCA were the only rules that applied to share ownership, but now securities regulations apply in certain contexts as well. If corporations are of a particular size, and have sufficient dispersion of shareholders, securities regulations will apply. In Canada, securities laws are provincially based. They regulate information that has to be provided, sale to the first shareholder, and later trading of shares. That said, Securities Acts only apply to widely held corporations. These provincial acts govern information and trading for public corporations.

The Securities Transfer Acts govern what is the best way to hold shares when various people have claims to those same pieces of property – in other words, the nature of that property interest. The Securities Transfer Acts also govern mechanics of transfer, direct and indirect methods of holding investment property and priorities among claimants. A mistake is sometimes made that the same restrictive coverage of the various securities acts apply to the Securities Transfer Act - this is not the case, and the Securities Transfer Act applies in all situations. The Securities Transfer Actworks in concordance with thePersonal Property Security Acts.

BCA

**Authorized share structure**: the kinds, classes and series of shares, and the limits, if any, on the number of shares of those kinds, classes and series of shares, that a company is authorized, by its articles, notice of articles or memorandum to issue.

**Shareholder**: a person whose name is entered in a securities register of a company as a registered owner of a share of the company or until such an entry is made for the company (subscriber, incorporator or held shares).

11(g): The notice of articles must describe the share structure.

49**:** Sets out the ability of various individuals to access the list of shareholders. There are limited purposes for the use of that list. Just because someone is the listed owner of the share, doesn't mean they are the beneficiary or the even the decision-maker wrt the share.

52: Sets out the requirements for share structure. There must be either shares without par value, shares with par value or both. Each class of shares must consist of shares of the same kind. The par value of shares must be expressed in reference to a currency.

*Differences between kinds of shares generally don't relate to value, but the legal rights and interests they entail. Shares are a type of intangible property.*

53: Authorized share structure must be set out in company's notice of articles.

54: Procedures for changing the authorized share structure.

56: A share in a company is personal estate.

59 & 60: Outline the ability to issue shares in different classes. 59(2) sets out the default, shares are all of the same type. 59(4) mandates that each share or class of share must have the same sorts of rights. That said s 60 allows for a series of shares within a class to have slightly different rights, but not

62: Subject s 64 and the corporation’s articles, shares of the company may be issued at the times and to the persons that the directors may determine.

63: Sets out how issue prices for shares are set.

64(2): A share must not be issued until it is fully paid.

64(3): Shares can be paid for with past services, property or money. Can't pay for shares with future services.

CBCA

6: Articles of incorporation.

21(3): Shareholder lists.

21(7): Contents of affidavit required to access shareholder list.

21(9): Acceptable uses of information or shareholder list.

24: Allows for various classes and series of shares to exist (no par value shares).

25: Shares must be paid for when purchased (non-assessable), and sets out what the consideration may be.

27: Rules governing series of shares.

42: Corporations shall not pay dividends if there are reasonable grounds to believe that this would make the corporation unable to pay its liabilities as they come due or that the realizable value of the corporation’s assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

43: Corporations can pay dividends in money or property.

The basic presumptive rights are set out in the CBCA s 24(3): (1) vote, (2) dividends, (3) share of corporation when it is wound up. These are not set out exhaustively in the BCA (where they are set out piecemeal in other sections). Not every share needs to have all of these rights, but must have at least one of them.

The presumption under both statutes is that there is only one class of shares, so corporations must actively create different classes. It is also possible to have different series within a class. The classes of shares typically different attendant rights. Furthermore, these rights are generally permissive: you can have a right to dividends, but if no dividends are declared you are not entitled to any.

### ISSUE OF SHARES

Under both statutes, the directors decide when to issue shares. The price of shares is set by the directors under the CBCA, as is the method of payment.

The directors are required under both regimes to ensure that they get paid fair market value for the shares. The directors are personally liable if they cannot justify why they are issuing shares for a particular value or taking whatever as compensation. In the BCA, directors are also liable for losses to the corporation or to a shareholder.

The CBCA provides that the complainant must be the corporation itself. Shareholders cannot claim compensation for these types of decisions, except indirectly through the oppression remedy. There are provisions in both statutes that allow shares to be part of the dividends paid.

## VOTING RIGHTS

The presumptive situation is that all shares have a right to vote, and all votes are equal. But it is entirely possible for corporations to create non-voting classes of shares. **There are certain decisions that the corporation can make (e.g. change in the restrictions, sale of the undertaking, etc.) that can entitle non-voting shares to have a vote.**

It is possible to reach agreements in advance (generally through unanimous resolutions) whereby the shareholders to make decisions of a certain kind. These agreements can preclude the need for a meeting, but this must be explicitly stated in the agreement. This is quite common, especially in closely held corporations with few shareholders. If there is unanimity but the proper procedure is not followed, it is not entirely clear what the result will be if there is not a meeting.

STATUTORY PROVISIONS

|  |  |
| --- | --- |
| BCA | CBCA |
| 173: Subject to various other provisions, a shareholder has one vote for each share and is entitled to vote in person or by proxy. This is often changed in the authorized share structure, and non-voting shares are quite common. | 141: Subject to various other provisions, a shareholder has one vote for each share and is entitled to vote in person or by proxy. This is often changed in the authorized share structure, and non-voting shares are quite common. |
| 174: Participation at meetings of shareholders. | 140: Right to vote. |
| 175: Shareholders can use written agreements to pool their votes. | 145.1: Shareholders can use written agreements to pool their votes. |

## SHAREHOLDERS’ MEETINGS

BCA

166: Rules regarding meetings of shareholders. There are different types of meetings: meetings that have to be held, meetings that can be requested, and meetings that are ordered by the court. Depending on the type of meeting, how it proceeds and how voting occurs will differ. There must be an annual meeting of shareholders, and certain information must be provided and shareholders must vote to approve financial statements. Annual meetings will be called by the directors. Non-annual meetings called by the directors are called general meetings (BC) or special meetings.

Decisions are taken at a meeting by vote. In the BCA, s 173 sets out how shareholders can vote: in person, by proxy, in certain cases electronically or remotely (s 174). In most meetings, if there is a vote called, there is a show of hands. This is problematic because number of hands =/= number of shares. For that reason, anyone in the room can call for a poll (which is also a secret vote) to make this clear. This can be very unwieldy for a widely held corporation. Unless otherwise stated, votes will result in an ordinary resolution.

In the CBCA, the voting provisions are found in ss 140 and 141. The structure is very similar to those in the BCA. Shareholders can vote in person, by proxy, in certain cases electronically or remotely. In most meetings, if there is a vote called, there is a show of hands. This is problematic because number of hands =/= number of shares. For that reason, anyone in the room can call for a poll (which is also a secret vote) to make this clear. Unless otherwise stated, votes will result in an ordinary resolution.

Both statutes set out certain procedures that must be followed at meetings as well. The BCA contains a "wonderful complexity" both in terms of the detail of the procedures and the definitions of voting and resolution types.

BCA

166: The presumption is that the meeting is going to be held in BC, but doesn't have to be. This provision sets out the circumstances in which you can hold it elsewhere.

169**:** Notices for the meetings are required to be sent out.

170: These notices can be waived in certain circumstances.

172: Sets out quorum for shareholders' meetings - by presumption is two people, but can be changed in the articles.

173**&**174: Set out certain rules with respect to voting and participation in the meeting. Shareholders are entitled to be heard at meetings. If the matter is contentious, there will be some information that will have been sent out in advance. If something is on the agenda, then shareholders are entitled to speak to the matter. Generally speaking, nominations are the only context where shareholders speak spontaneously.

173(8): Normally things will be decided by an ordinary resolution.

1: Defines an ordinary resolution as one of two things: (a) passed at a general meeting by a simple majority, or (b) passed after being submitted to *all of the shareholders* in writing and a special majority agree to it in advance of a general meeting, negating the need for an actual vote. A **special majority** is at least two thirds (by presumption), as high as three quarters (by constitution).

175**:** 2 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.

CONCERN THAT PRELIMINARY VOTING AGREEMENTS COULD BE ILLEGAL - BCAsays it this is okay. No equivalent provision in the CBCA.

178: Calls for the election of a chair for the meeting.

179: Requires that minutes be kept.

181**:** Rules applicable to general meetings apply to other shareholders' meetings.

182: Outlines requirements for **annual general meetings**. This meeting can be postponed by a unanimous resolution - this is extremely useful particularly for closely held corporations.

186: The court can order a meeting. Not common, but courts have a wide scope of powers with respect to calling meetings.

CBCA

132: Presumption that meeting will be held in Canada, but outlines method for holding it elsewhere.

135**:** Requires notice to be sent out in advance of the meeting. There will also be information contained in the notice regarding what will be covered at the meeting.

13?: Requires that a list be made of the people allowed to vote at the meeting. There is a particular record date set prior to the meeting when this list must be set, and only those shareholders may vote at the meeting.

137: Deals with shareholder proposals at the annual or general meeting.

139: Outlines quorum requirements. Dealt with differently than in BCAbecause CBCAexpects that the bylaws will define quorum.

140**&**141: Outlines rules regarding voting and participation. Voting can be done in person through a show of hands, electronically.

142: Can have a resolution in lieu of the meeting by prior unanimous written agreement. The CBCA does not have the consent resolution rules that the BCAhas, which require only 2/3.

143**:** Allows shareholders to ask for a meeting to be called if 5% of voting shares. Essentially the same procedure follows as in the BCA- directors have to consider this, if they decide against it, then **any shareholder** who feels that the meeting should be held nonetheless can proceed on their own and possibly get the expenses back. In the CBCA, the reasons why the directors might not go ahead with the requisition meeting are not in s 143, but in s 137(5), and are essentially the same as those in the BCAbut in slightly different order and wording (slightly more room to maneuver than in the BCA). There are 3 reasons that are in the BCAthat **are not** in the CBCA: already been done; cause company to commit an offence, or beyond the corporation's powers to implement. **BUT** the directors would be well within their business judgment to refuse to call a meeting for any of these 3 reasons.

### UNANIMOUS AND CONSENT SHAREHOLDERS’ RESOLUTIONS

BCADEFINITIONS IN S 1

**Consent resolution**

**Ordinary resolution**

**Unanimous resolution**

BCA

180: Consent resolutions of shareholders are deemed to be a proceeding at a meeting of shareholders and as valid as if it had been passed at a meeting of shareholders.

182: Annual general meetings requirements.

CBCA

142: Resolutions in lieu of meetings.

Other decisions need to be made by a special resolution, which requires a special majority. Such decisions can also be decided by a consent resolution, where everyone who is entitled to vote on a resolution consents *unanimously* to something in advance.

Exceptional resolution is a defined term, but there are no decisions which are statutorily required to be made in this manner. Only the corporation can impose this requirement on itself.

This case considers what constitutes a meeting of a closely held corporation which went bankrupt.

#### EISENBERG v BANK OF NS [1965] SCC

|  |  |
| --- | --- |
| **F** | Appeal from ON CA action by E as trustee in bankruptcy of Ridout Real Estate 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 directorʼs meeting nor shareholder ratification, or because the person who made the deal had no authority? |
| **R** | The inside management rule protects innocent third 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. |
| **N** | GR as sole beneficial owner, binds the company with whatever he does. |

### THE CONDUCT OF MEETINGS

4 CATEGORIES

1. **Annual meetings**

Every year, there must be an **annual meeting** where certain business must be transacted. The CBCA s 135(5) outlines three requirements for this meeting: (1) electing new directors, (2) financial information must be presented and approved by the shareholders, (3) the appointment or reappointment of an auditor. The CBCA operates on the assumption that this is all that you do at the annual meeting, and anything else must be dealt with at a special meeting. In practice, these are often held concurrently.

The BCA s 185 also requires that there be an **annual general meeting**, but the only thing that must be done is the presentation and approval of the financial information. That said, other business can be conducted at the annual meeting. The BCA also contemplates that other general meetings could be held to conduct special business.

Both the annual meeting and other (special CBCA, general BCA) are called by the directors. When the directors call those meetings, they have to send out notice. You cannot attend a meeting without notice, and both statutes set out the record date for attending a meeting at which the shareholder list is set (BCA s 171, CBCA ss 134-135).

1. **Special or general meetings**

These tend to be called by directors, and can be held at any time. BCA s 169 requires notice to call a meeting. BCA s 166 mandates rules regarding the location of meetings and s 181 rules apply to all meetings of shareholders.

1. **Requisition meetings**

These arecalled by the shareholders themselves. This is usually because the directors have refused, or will refuse to call a particular meeting, or have refused to put a particular item on the agenda. Where a requisition meeting happens, the directors can either agree to call a meeting, in which case the corporation takes over the conduct and costs of the meeting, or refuse, in which case the shareholders will have to take over conduct and costs of the meeting themselves (and will likely not be reimbursed). Generally speaking, requisition meetings occur where the shareholders want something to be done which isn't being done, or if there is concern that a director has breached their duty. This is not common, and is generally indicates conflict between the directors and the shareholders. Just because a shareholder wants to hold a meeting, doesn't mean that a meeting will be held.

1. **Court-ordered meetings**

If you want to call a meeting but want to circumvent some of the procedural requirements, the court can order a meeting based on these directions.

#### WALL v LONDON AND NORTHERN ASSETS CORP [1898] UK

|  |  |
| --- | --- |
| **F** | LNAC 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 court 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 chairman 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.” |

1. **SHAREHOLDERS’ PROPOSALS**

BCA, s 167: Requisition meetings.

1. Requisition meetings can be held for the purpose of transacting any business that may be transacted at a general meeting.
2. Need at least 1/20 of the issued voting shares to make a requisition.
3. Requisition meetings must have certain requirements.

(7) Sets out situations where directors don't have to agree to call a requisition meeting (if there is already a meeting called on that issue, if the same issue has already been dealt with at earlier meeting, if the business has already been substantially implemented, if the requisition would cause the company to commit an offence, or if the requisition deals with matters beyond the company's power to implement, etc.). The usual reasons are in (c) and (d).

1. It ***clearly*** appears that the business stated in the requisition does not relate in a significant way to the business or affairs of the company.

#### VARITY CORP v JESUIT FATHERS OF UPPER CANADA [1999] ON SJC

|  |  |
| --- | --- |
| **F** | Dealt with a proposal made by the shareholders to condemn the apartheid system in South Africa and withdraw investments therefrom. |
| **I** | Can the court interfere with how a meeting is run and dissenting shareholders are dealt with? |
| **A** | The court is simply considering whether or not the proposal fell within the prohibited grounds. Within the context of the statute, the court found that the proposal was for political grounds and outside the scope in the business. MacDougall thinks it's not clear the right decision was made here, given the nature of the company's business. |
| **C** | Held for Varity. |

1. It ***clearly*** appears that the ***primary purpose*** for the requisition is
2. Securing publicity, or
3. Enforcing a personal claim or redressing a personal grievance against the company or any of its directors, officers or security holders.
4. If the directors do not call a requisition meeting within a given time, then the requisitioning shareholders can proceed to call the meeting themselves, so long as they hold at least 1/40 of the voting shares.
5. If the shareholders call the meeting themselves, it is expected they will conduct the meeting in accordance with the usual rules.
6. Unless the shareholders resolve otherwise by an ordinary resolution, the company must reimburse the requisitioning shareholders for the actual and reasonable expenses for requisitioning, calling and holding the meeting.

187: Applies when the company involved is a public company. It is one of the provisions so restricted.

189: Sets out the rights and obligations of the company to circulate the proposal in advance. They can choose not to, if the proposal falls within certain categories (5). These are similar to the reasons to legitimately reject a requisition meeting.

190&191: Covers the consequences of the corporation's refusal to process the proposal.

The CBCA provisions are essentially the same. We are not required to know anything about the proxy process for the purposes of the exam. The CBCA does the same thing (applying to a public company) but indirectly through the way it governs proxy rules. The shareholder proposal mechanism is only really available for a widely held public company. Private companies may choose to follow the procedure but are not required. The requirement for 1% is found within regulations.

### REQUISITIONED AND COURT-ORDERED MEETINGS

#### AIR INDUSTRY REVITILIZATION CO v AIR CANADA [1999] ONSC

|  |  |
| --- | --- |
| **F** | Air Industry Revitilization Co 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 requisition. |
| **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** | There was no guarantee the issue would be raised at the general meeting, so the court found that the directors had acted inappropriately by rejecting the shareholders' request for a requisition meeting. The shareholders asked the court to call a meeting on their behalf, but the court declined on the basis that they could simply call a meeting themselves. |
| **C** | The court won’t make an order under 144, because AirCo can call the meeting itself under s 167(8) given that it was a legit requisition and the board didn’t call one within 21 days per s 14(4). |

It is simpler for a shareholder to present a motion at an already established meeting rather than call their own meeting. But if it is controversial or requires a lot of informational background then it may be better to requisition.

BCA

168:

CBCA

143:

### REMOVAL OF DIRECTORS

This can be remedial in nature. New directors can bring actions against past directors. If you leave the old directors in place, it is very unlikely they will bring an action on behalf of the company against themselves.

CBCA

109: Allows shareholders at a meeting to vote on removing the directors. This is done by ordinary resolution at a special meeting. Annual meetings can become special meeting if the removal of directors becomes part of the agenda.

BCA

128: Removal of directors can be done at any meeting so long as it is on the agenda. The default position is that to remove a director requires a special resolution. This makes it more difficult to remove directors in BC than federally. This can be changed per s 128(3).

131(a): Vacancies that occur by the removal of a director can be filled by the shareholders at the meeting or by any of the other shareholders or remaining directors.

Notice is never needed to be given, any resolution can be adopted at a meeting.

# SHAREHOLDERS' REMEDIES AND RELIEF

## INTRODUCTION

There are an array of remedies available. It is possible to bring more than one of these claims at the same time. The **derivative action** allows individuals to bring a claim in the name of the corporation, and then the remedy is granted to corporation. This is generally brought to get the directors or officers to do something they ought to be doing to benefit the corporation. The **personal action** allows individual shareholders with a particular grievance to seek an individual remedy. The **oppression remedy** straddles this distinction, and the authority is divided on whether shareholders can start either a derivative or personal action under the oppression remedy. There is a view that the common law personal remedies have been supplanted by the oppression remedy. Some tort claims, or breaches of contract, would be not be extinguished even in this analysis. The **compliance remedy** has a similar purpose to the derivative action. The **dissent or appraisal remedy** is used when a shareholder does not agree with some major change and wishes to be bought out.

All the remedies can result in monetary awards, but injunctive claims can also be advanced. The appraisal and dissent remedies requires the corporation to buy a shareholder out. This applies only to private corporations. Some more drastic remedies, like winding up a corporation, may also be brought. Class action remedies may be advanced, especially oppression and derivative (which by its very nature is class action). The contractual nature of corporations in the BCA might

## THE DERIVATIVE ACTION

The **derivative action** allows individuals to bring a claim in the name of the corporation, and then the remedy is granted to corporation. This is generally brought to get the directors or officers to do something they ought to be doing to benefit the corporation or on the basis that there is a conflict of interest. The purpose isn't to benefit shareholders, and they may receive no compensation at all. Within the derivative action itself is a rationale for that action. It is not to be decided on in advance, but if it is clear that it will fail a judge may not let it proceed. If the court is satisfied that there is a *prima facie* case, there it will allow the derivative action. It is more difficult for that person who initiated to manage it later. It is more difficult to stop afterward, they do not have the ability to settle of their own accord. Derivative actions may sometimes be dressed up as a personal claim.

### THE COMMON LAW – THE RULE IN **FOSS v HARBOTTLE**

#### FOSS v HARBOTTLE

Shareholder alleged sale by directors of their own property at inflated values to the corporation.

The alleged wrong was to the corporation – it is the only valid **P**.

The court found the shareholder 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 corporation.

#### MOZLEY v ALSTON

2 shareholders brought a personal action for declaration that board was holding office illegally in contravention of the terms of incorporation.

Court held to FOSS rule, refused argument that the **P**s were asserting a personal right to have the internal government of the corporation conducted in accordance with terms: “irregularity” branch of the rule.

#### MACDONALD v GARDINER

Articles provided for taking of poll on demand of 5 members. But when 5 demanded poll on motion to adjourn, the 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 corporation and the intention of the majority of shareholders is clear.” **Articles are not contract between owners, allowing personal actions.** An informality/irregularity which can be remedied by majority does not give action to minority.

#### NW TRANSPORTATION CO v BEATTY

SCC held that Beatty could not use his own shareholder votes to confirm his own dodgy **K** as director selling his own property to the corporation, but the JCPC upheld it.

#### EDWARDS v HALLIWELL

provided exceptions for minority shareholders to sue

* + ultra vires act - cannot be confirmed by majority
  + fraud on minority - perpetrated by majority
    - was applied very narrow
  + special majorities - if action requires addition to regualar majority
  + personal rights

So in the common law, the derivative action was very limited. The corporation itself was required to bring an action, but only directors can direct the corporation to do so. The statutory derivative action was instituted to address this specific problem, and to address other issues.

### THE STATUTORY DERIVATIVE ACTION

The procedure is fairly similar in both statutes.

BCA

232: (1) Complainant is shareholder or director of corporation. Shareholder includes beneficial owner, any other appropriate person – so this includes creditors, government, public interest group [BCE, PEOPLES].

1. requires leave of court - must be complainant, who may ask court to pursue damages, or other things.
2. may take over action in name of corporation, if obligation is under statute or otherwise - includes common law.
3. With leave from the court, complainants can also defend against a legal proceeding brought against the company.

233: This provision outlines what the court must consider and what the court can do in response.

1. Court can grant leave on appropriate terms if
   1. reasonable efforts to ask directors to take action. You have to alert the company to what it is that you feel the company has done badly. It has to be indicated what specifically you want them to do (NORTHWEST FOREST). The derivative action is not a rapid means to get things resolved.
   2. notice must be given to company
   3. the complainant is acting in good faith - not essentially personal action, AND
   4. it is in best interest of corporation to pursue action. This is where the *prima facie* case is presented and they must make some determination as to the merits of the case. The complainant is required to bring forth all the evidence on his own. Not enough effort had been made to get the corporation to bring the action on its own (NORTH WEST). Directors were acting in their own interests in trying to squeeze out shareholder in trying to get positions as directors. Directors disclosed certain information to a lender. Was what the directors did in that case was sufficiently detached from their self-interest? This was established. The main claim was not adjudicated (BELLMAN). Special committees can avoid this kind of derivative action claims (ala PENTE)

(3)(4)(5) The court can appoint an individual to helm the derivative proceeding. If the litigation is started, then no settlement, dismissal can be obtained without the approval of the court. The court is allowed to make various orders with respect to derivative action with respect to the final disposition of the legal proceeding (costs, remedies).

(6) Court may consider shareholder approval of an issue that forms the substance of the complaint.

CBCA

238: definition of complainant includes directors, officers, registered holder/beneficial owner of securities and any other person in discretion of court. BCA is limited to shareholders - who are securities owners of shares, only equity obligations. Securities is broader - includes creditors, debenture holders - other debt holders. But they must be **registered**.

239: Must have court approval to bring a derivative action. The mandatory conditions precedent are:

* + 1. must give notice - 14 days
    2. must act in good faith
    3. must establish *prima facie* case in corporation’s best interest

Difference from BCA – there is no prerequisite to make reasonable efforts.

240: Powers of court to make various orders.

242: Evidence of shareholder approval is not decisive, but the court may consider that shareholders have approved action. This is also shared with oppression remedy. Complainants must get court’s approval to stop action in both derivative and oppression action as well.

COSTS

In the BCA, costs awards presumptively go to the corporation, so the individual who brought action is out of pocket. Both statutes allow interim orders, and other orders for costs – but complainants are not entitled, and this is in the discretion of the court. In the CBCA, if the complainant is successful in action, it is expressly stated that the court may order money be paid to shareholders – slightly more generous.

#### RE NORTH WEST FOREST PRODUCTS LTD [1975] BCSC

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| --- | --- |
| **F** | Northwest had 51% of subsidiary Fraser Valley, and sold FV assets for $200,000 which appeared to be an undervaluation (maybe 50% below). Northwest shareholders petitioned directors to vote on bringing a derivative action, but they declined, claiming that the shareholders ratified the sale. |
| **I** | Did shareholder ratification automatically disentitle shareholders to get leave to bring the action? Is it prima facie in the best interests of the company that action be brought? |
| **R** | Shareholder ratification won't be overly persuasive to the court where the alleged misdeed is taken out at the bequest of the majority shareholders. |
| **A** | Here, reasons for granting leave:   * + - * Statute not a bar: the statute only stated that shareholder ratification was a factor to take into account to granting leave, not a bar to bringing a derivative action       * Best interests: the interests of the company and the interests of the shareholders are not synonymous (ie: differences between majority and minority shareholders). Thus ratification not a true reflection of what were the best interests of the company.       * FOSS exception: fraud upon the minority by the majority. The statute was designed to overcome this rule. |
| **C** | Held for the shareholders, as there was enough evidence to show it was in the best interests of the company to bring the action. |

#### RE BELLMAN AND WESTERN APPROACHES [1981] BCCA

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| --- | --- |
| **F** | Bellman are minority shareholders - 3 directors- and Duke group majority shareholders - 5 directors. Duke group got a loan to purchase all common shares thereby gaining all control over directors. The loan agreement contained a provision requiring that directors cause the corporation to go public. Directors disclosed certain information to a lender. |
| **I** | Was it in the best interests of the corporation to allow the derivative action to be brought against the directors? |
| **R** | CBCA has 3 requirements for an action: notice, good faith, and interests of the company. In order to satisfy the CBCA requirement that a derivative action "appears to be in the best interests of the corporation", a *prima facie* case must be made. |
| **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” (FOSS). 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 judgment. |
| **C** | It is in the interest of the corporation that the action be brought. |

#### TURNER v MAILHOT [1985] ON HC

Dispute arose between directors (two couples) in a closely held company. The directors with the controlling portion of the shares locked the others out of the corporation’s premises and terminated their employment and position as directors. They sought and obtained leave to bring a derivative action seeking the return to the company of lost income. They then sought indemnification for costs.

### COMMENTS AND **RE BCE INC**

The excerpt on **pages 718-179** suggests it is possible for creditors to bring 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 interests of **STAKEHOLDERS**, and these remedies have been affirmed, modified and supplemented by the CBCA.
  + The derivative action 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.

**Q:** Is the common law derivative action still available despite the existence of the statutory derivative action?

**A:** The ONCA in FARNHAM v FINGOLD said no, but the SCC in BCE Inc. recently considered the status of the derivative action and concluded that the duty of care under s 122(1)(b) of the CBCA did not ground a private right of action, suggesting that perhaps the common law derivative action may still be available, in which case:

* The shareholder 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 extra-contractual liability: PEOPLES.

## THE PERSONAL ACTION

The **personal action**: where somebody feels personally aggrieved, they can claim against the company or against whoever owed that person the duty at issue. Shareholders often join their personal actions in class actions. Successful personal actions are often the basis for derivative actions as well. Most often now brought under oppression remedy.

ADVANTAGES

The advantage of the personal action is the ease with which you can bring them. You can see this in both GOLDEXand HERCULES, where personal actions were brought *in addition* to more complicated derivative actions. Because it is a common law action, personal actions are not directly dependent on a particular corporations statute as well.

DISADVANTAGES

Much of what shareholders have to complain about have to do with the decisions of the director with respect to the company, and thus the duties at issue are owed to the corporation and not to the prospective whiner babies. Even if you are able to bring a personal action, you will only receive damages as a remedy, not any court orders, as it is a creature of the common law. It is difficult to make personal claims - particularly for breach of fiduciary duties. A successful personal action has to show specific loss.

Many acts prejudice shareholders, but do not breach duties to corporation. Here, a personal action will be possible. Possible sources of prejudice include:

**Common law/equity**

* tort claims
* breach of contract claims
* possible constructive trust
* fraud on minority - e.g. payment to others when funds should have benefitted shareholders
* *ultra vires*/illegal act
* failure to provide information/notices
* failure to allow exercise of voting rights (including on special votes)

**Other statutes**

* e.g. securities law, employment law, consumer law

CONDEC CORP v LUNKENHEIMER CO [1967] US

The **D** issued shares outvoting **P**'s majority. The corporation was not injured, but the **P**'s interests were, as issuing shares interferes with **P**'s contractual voting right. Thus, the court prevented the **D** from issuing new shares.

#### GOLDEX MINES LTD v REVILL [1975] ONCA

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| **F** | Goldex was a shareholder of Probe Ltd. Dispute among Probe’s directors over proposed purchase of mines from a corporation controlled by former Probe director. Goldex alleged breach of duties. |
| **I** | Are the relevant owed to the corporation or to the shareholders (Goldex)? |
| **R** | Where the statute requires things that have to be fairly and accurately done to benefit the persons/shareholders in target company, those people have standing to sue for non-compliance if they are not complied with. |
| **A** | Court suggested that the majority owe a FD to the minority (this was a new idea for Canada); have to exercise powers in a way that respects minority shareholders; have some kind of good faith obligation, but not sure if it as strict as a FD. Also went on to say (more controversially) that if the majority of SHs are acting ‘poorly’, the minority ought to have a remedy against them. Suggestion that SHs can’t get damages, but can get non-pecuniary relief (injunctions, declarations). |
| **N** | **Decided before Ontario had oppression remedy**. ON Courts trying to ‘invent’ a CL remedy. The need for these kinds of arguments has reduced due to the existence of the oppression remedy. |

#### HERCULES MANAGEMENT LTD v ERNST & YOUNG [1997] SCC

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| **F** | Accountants have statutory obligation to audit 2 companies. The **P**s are shareholders who argue negligence in the accountants’ preparation of financial statements causing losses. |
| **I** | Does E&Y owe a duty to individual shareholders 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 accountants’ financial statements used to give individual shareholders advice. **The duty is to the corporation** to give accurate info and any other duty to individuals (who look only to maximize their personal profits) conflicts. |
| **C** | “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.” |

## THE STATUTORY OPPRESSION REMEDY

### INTRODUCTION

This is a form of personal action, as it is brought in the name of the shareholder and not the corporation. The oppression remedy has, in the eyes of some, overwhelmed other actions, including personal actions (intentional) and derivative claims (unintentional). The remedies available under this action are very broad - there is very little that can be accomplished with a derivative claim that cannot be done with an oppression claim. The saving grace for the derivative action used to be that certain things had to be claimed in this way (such as breach of a fiduciary duty). But the shift in the jurisprudence requiring the consideration of shareholder interests within the fiduciary duty has undermined this barrier. The derivative action will not completely disappear as it still has some advantages, but it has been displaced to some extent.

Theoretically there is no limitation period, though the common law doctrine of *laches* could limit application. Individual behavior might be taken into account through the use of "clean hands" doctrine.

Oppression claims are generally brought with respect to private, closely held corporations where one person is being targeted. They can be brought against public corporations, but are generally unsuccessfully due to the leeway granted to directors.

The oppression remedy allows shareholders (mainly) equitable complaint (mainly) that something was unfair - that they were singled out for inequitable treatment by the corporation and there should be some response. This has broadened so that oppression is no longer just for shareholders against corporations – it could be a third party that has been “unfair”. Possible applications include:

* 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”

The substantive ground for invocation of the oppression remedy is "unfairness", and this substantive trigger almost always broader than for the invocation of fiduciary duties. In practice courts routinely characterize directorial conduct in breach of fiduciary duty as oppressive. Courts have also allowed actions of a derivative character to go forward under the oppression remedy, which further confounds action for breach of fiduciary duty and action alleging oppression.

It is 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 are broader than in action for fiduciary breach, and
4. courts have allowed derivative-type actions to proceed under the oppression provision.

This is why the oppression remedy is, little by little, swallowing up the law of fiduciary duties. The 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.

CBCA

More of a representative quality than the BCA, because more people can complain.

238: “complainant” means

* 1. a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
  2. a director or an officer or a former director or officer of a corporation or any of its affiliates,
  3. the Director, or
  4. any other person who, in the discretion of a court, is a proper person to make an application under this Part.

241(1)**:** Complainants don't have to have a personal connection to whatever act is the basis of the claim. Different than in the BCA, where you must show that you are one of the people who was affected by whatever act is the basis of the claim.

241(2): Oppression requires that the acts of the company or its affiliates (business in general or act/omission in particular - doesn't have to be intentional), or the powers of the directors have been used in a way that was "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of." There is a hierarchy in these terms: "unfairly disregards" doesn't exist in the BCA. The remedies are also a bit narrower than in the BCA.

242: Parallel considerations from derivative actions. No equivalent in the BCA. (1) Evidence of shareholder approval is something the court can consider. (2) Once you start an oppression claim, you need the court's approval to end the claim or settle.

BCA

Who is the complainant?

227(1): Limits claims to "shareholders" (who can be anyone, given a court order).

227(2): You must show that you are one of the people who was affected by whatever act is the basis of the claim. Sets out two grounds:

* 1. 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
  2. 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.

The BCA is generally narrower on this point than in the CBCA, except for the allowance of shareholders resolutions as the basis for oppression actions.

227(3): Sets out range of court orders. The BCA allows has a broader universe of possible remedies (ex: CBCA doesn't contemplate director removal in this context, while the BCA does). (g) is by far the most common order courts make, to force company to buy the complainant's shares out. But the breadth of remedies is vast.

### CASELAW

Generally, the jurisprudence has slowly expanded the application of the oppression remedy.

#### RE BCE INC [2008] SCC

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| **F** | Leveraged buyout involving adding significant debt to Bell Canada, a subsidiary of BCE. Bellʼs  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? |
| **A** | 760: oppression is an equitable remedy (not technically correct - it is statutory) that seeks to enforce a fair resolution. Sets out a test for finding oppression, effectively transforming a remedy into a corresponding duty for the directors with respect to other parties. This is a very controversial shift.  Oppression is fact-specific - what is reasonable and equitable depends on the parties and their reasonable expectations are similarly defined. This is not a set standard. Based on the facts, the court found there was no oppression. |
| **T** | 1. Does the evidence support the reasonable expectation asserted by the claimant? 2. Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest? |

#### FIRST EDMONTON PLACE LTD v 315888 ALBERTA LTD [1988] AB QB

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| **F** | A prospective lessor lent money to the company in hopes of getting some renovations and to entice the corporation to come in as a lessee. The directors distributed the money instead. |
| **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** | Court finds that the lessor could fall under definition of "shareholder", as they have a ground for complaint, but took a dim view of the complainant's particular argument. They gave the corporation money with no strings attached, and were upset that it got used differently than expected. **The oppression remedy is not meant to be used to save a party from a bad bargain that could have been avoided earlier - it's not a mulligan button.** |
| **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

|  |  |
| --- | --- |
| **F** | Five shareholders conspired to squeeze one ex-wife out of the corporation by withholding dividends. The corporation was being run in order to effect an exclusion of one of the shareholders for personal reasons. |
| **I** | Is the oppression remedy available in such a closely held company? |
| **R** | In assessing an application for an oppression remedy in a closely-held corporation, the court may consider the relationship between the shareholders and the bona fides of the corporate transaction in question. |
| **A** | The CO has not acted *bona fide* 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** | Ex-wife is entitled to have an order preventing the oppressive resolution from being implemented. |

#### NANEFF v CON-CRETE HOLDINGS LTD [1995] ONCA

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| --- | --- |
| **F** | Father set up a corporation to benefit his children. One child was sidelined from participation in the corporation because the father did not approve of his lifestyle. Court easily found oppression - that is not even appealed. The remedy was appealed because the original court order was the liquidation of the corporation and the distribution of its assets. |
| **I** | Is the liquidation of the corporation an appropriate remedy? |
| **R** | * When dealing with a closely-held corporation the court may consider the relationship between the shareholders, not just simply their legal rights. * A family business being involved is a relevant consideration when fashioning an appropriate remedy, to the extent that it relates to the reasonable expectations of the parties. |
| **A** | ONCA says this is going too far. Reasonable expectations of the parties have to be borne in mind both when finding oppression **AND** when determining a remedy. The son's reasonable expectations were not to have control or decision-making power in the corporation, but to benefit from it while the father maintained control over the corporation. To wind the company up would put the son in charge effectively. |
| **C** | The court set aside the liquidation order and ordered that the corporation buy out the son's shares without any minority discount (due to lack of control attached to the shares). |

## COMPLIANCE AND RESTRAINING ORDERS

BCA, ss 19(3), 228, 229

CBCA, s 238, 247

The person whose actions generate the complaint:

* director, officer, employee, agent, auditor, receiver, trustee, liquidator - BCA s 228(2); CBCA s 247
* shareholder - BCA s 228(2); CBCA **n/a**

Temporal considerations:

* existing actions - BCA s 228(2); CBCA s 247
* future actions - BCA s 228(2); CBCA [prob. implicit in s 247]

Breach of:

* statute, regulations, articles, by-laws etc. - BCA s 228(2); CBCA s 247
* unanimous shareholder agreement - BCA **n/a**; CBCA s 247

Possible relevance of shareholder vote - BCA **n/a**; CBCA s 242(1)

Court can order:

* any appropriate order - BCA s 228(3); CBCA s 247
* declaration of contravention - BCA s 228(2); CBCA [**not set out**]
* restraint order - BCA s 228(2),(3)(a); CBCA s 247
* compliance order - BCA s 228(3)(a); CBCA s 247
* prohibitory injunction - BCA s 228(3)(b); CBCA s 247
* compensation paid in ultra vires contract context - BCA s 228(3)(c); CBCA **n/a**

#### GOLDHAR v QUEBEC MANITOU MINES LTD [1975]

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| --- | --- |
| **F** | The court is considering a claim made here which could have been made another section (derivative action). However, that way is unduly cumbersome. |
| **I** | Is a compliance order appropriate? |
| **R** | If what you’re complaining about is really in essence one of the other methods, than compliance shouldn't be used. Injunctions then are supplementary or complementary in nature most of the time. |
| **A** | The court is trying to assess the limits of the remedy. They provide a narrow interpretation of this provision. Court refused to accept the **P**’s argument because it would undermine the framework for derivative actions in s 142. Rationalized this by saying s 228 was intended for ‘housekeeping’: notice periods, timing; not intended to deal with something as fundamental as s 142. |

## THE APPRAISAL REMEDY (DISSENT PROCEEDINGS)

BCA, ss 237-247

CBCA, s 190

This remedy is specific to shareholders only, and allows them to get bought out. 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. This is not a right but a power.

The appraisal remedy applies where there are specified corporate decisions, actions, or proceedings: BCA ss 237(2), 238(1); CBCA s 190(1).

There is no possibility of partial dissent: BCA s 238(3); CBCA s. 190(4).

There is no dissent if you vote in favor of matter: BCA s 246(g); CBCA s 190(6).

PROCEDURE

BCA:

* notice sent about matter giving rise to right to dissent - s 240
* shareholders intending to dissent must send notice of dissent - s 242
* co. sends notice that it has proceeded notwithstanding - s 243
* dissenting shareholder gives notice of completion of dissent - s 244
* co. and dissenter agree on payment - s 245(1)

**- or -**

* application to court to determine value - s 245(2)
* corporation must pay promptly - s 245(3)
* exception if corporation is insolvent - s 245(5)

CBCA:

* shareholder sends notice objecting to resolution - s 190(5)
* corporation sends notice that resolution has been adopted notwithstanding - s 190(6)
* shareholder demands payment for shares - s 190(7)
* corporation sends offer - s 190(12)
* shareholder accepts and corp. pays - s 190(14)

**- or -**

* if no offer sent or no acceptance, court application - s 190(15)(16)(20)
* exception if solvency concerns for corp. - s 190(26)