**Business Organizations CAN**

Evolution of Business Corporations Law & Nature of Corporate Personality 3

Structure of a Corporation 3

Three Major Sources of Law 3

History of Canadian Business Corporations Law 3

Two major things achieved through corporate legislation 4

Constitutional authority for corporations legislation 4

Separate Legal Personality of Corporations 4

Salomon v Salomon & Co (1897) – House of Lords 4

Limited Liability and Creditor Protection 5

Section 87(1), BC Business Corporations Act 5

Piercing the Corporate Veil 5

What does “piercing the corporate veil” mean? 5

When will a court be willing to pierce the corporate veil? 5

Clarkson Co v Zhelka (1967) – ON High Court 6

Lee v Lee’s Air Farming Ltd (1961) – Privy Council 6

De Salaberry Realities Ltd v MNR (1974) – Fed TD 6

Theorizing Corporate Personality 7

Process of Incorporation 7

Place of Incorporation 7

Extra-Provincial Licensing and Filing Requirements 7

Continuance Under the Law of Another Jurisdiction 8

Classification of Corporations 8

BCBCA sections that distinguish b/w public and private corporations 8

Corporate Names 9

Steps to Incorporation 9

Nature of the Corporate Constitution 9

The Charter = Notice of Articles + Articles 9

Scope of the Contract in the Notice of Articles and Articles 10

Restrictions on the Powers of a Company 10

Pre-Incorporation Contracts 12

Common Law Approach to Pre-Incorporation Contracts 12

Statutory Approach to Pre-Incorporation Contracts 13

Management and Control of the Corporation 13

The Power to Manage and Supervise Management is Vested in the Board of Directors 13

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame (1906) – England CA 14

The Indoor Management Rule 14

Corporate Goals and Social Responsibility: profit, or more than profit? 14

Dodge v Ford Motor Co (1919) – Michigan Court 15

Parke v Daily News (1962) – England Court 15

Re Peoples (2004) – SCC 16

Re BCE Inc (2008) – SCC 16

The Audit Committee 17

Sale of the Undertaking 17

Duties of Directors & Officers 18

Directors’ Duty of Care and Skill 19

Directors’ Fiduciary Duty 21

Shareholders’ Rights 24

Shareholders’ Voting Rights 24

Shareholders’ Meetings 25

Types of shareholders’ meetings 25

Shareholders may submit proposals (\*applies only to public companies) 25

Shareholders may requisition a shareholders’ meeting (\*applies to public and private companies) 27

Shareholders may vote to remove directors (\*applies to public and private companies) 28

Shareholders’ Remedies 28

The Derivative Action (where director has breach duty of care or fiduciary duty) 28

The Oppression Remedy (where there is some unfairness; may be in combo w/ derivative action) 29

Compliance and Restraining Orders 30

The Appraisal Remedy (where there is a fundamental change) 31

Winding-Up 32

Table of Cases 33

Definitions 37

# Evolution of Business Corporations Law & Nature of Corporate Personality

## Structure of a Corporation

|  |  |  |
| --- | --- | --- |
|

|  |  |
| --- | --- |
| MANAGEMENT**Board of Directors***Elected, vested by statute w/ the power to manage the corporation (s. 136), also fiduciaries (s. 142).* | OWNERSHIP**Shareholders***The owners of shares in the corporation. Shareholders have the power to elect directors.*  |

**The Corporation** *(has its own legal personality, per Salomon v Salomon)* |

The corporate form is characterized by **the separation of ownership and management**.

## Three Major Sources of Law

Three major sources of law when advising a corporate client:

1. The **statute** under which the corporation was incorporated, e.g. the BC *Business Corporations Act*;
2. The corporation’s **constating documents: memorandum of incorporation + articles**; and,
3. The **common law** that has developed around both of these written sources of law.

## History of Canadian Business Corporations Law

**Corporation sole:** a person who, by their stature, has corporate status, e.g. the Queen is a corporation with innate corporate powers by virtue of her office, and can confer this status on others through the exercise of the **royal prerogative** (a grant of **letters patent**). The royal prerogative was used to incorporate Canada’s oldest corporation in the 16th c, the Hudson’s Bay Company.

|  |
| --- |
| **Milestones in Business Corporations Law** |
| **1844** | ***Joint Stock Companies Act***: the first corporate legislation enacted in England, allowing for the registration of deeds of settlements.  |
| **1855** | ***Limited Liability Act****:* introduced limited liability in England, requiring limited liability companies to include the term “Limited” or “Ltd” as part of their name.  |
| **1862** | ***Companies Act*:** replaced the *Joint Stock Companies Act* and *Limited Liability Act.* A model for Canadian corporations law.  |
| **1967** | The **Lawrence Committee** published its report in Ontario, leading to the adoption of a new Ontario *Business Corporations Act* in 1970.  |
| **1970** | New **Ontario *Business Corporations Act* (OBCA)**enacted.  |
| **1975** | Federal government enacted the ***Canada Business Corporations Act* (CBCA).**  |
| **1982** | 1970 Ontario *Business Corporations Act* repealed and replaced by a newer *Business Corporations Act,* which closely modeled the federal Act. |
| **2002** | BC adopted a new *Business Corporations Act* (BCBCA), which came into force in 2004. Previously, BC had the *Companies Act,* which was enacted in 1973.  |

Canadian corporation law has gradually come to look more and more like American corporation law, moving away from English corporation law. But one major difference between Canadian and American corporate law: the US has no procedure for federal incorporation, whereas in Canada you can choose to incorporate either federally, under the *Canada Business Corporations Act*, or provincially.

### Two major things achieved through corporate legislation

1. **Corporate status:** the creation of corporations as separate legal persons.
2. **Limited liability:** limiting shareholder liability to the amount they contributed for shares (BCBCA, ss. 87(1) and (2)).

### Constitutional authority for corporations legislation

**Federal Jurisdiction:** There is no specific provision in the *Constitution Act, 1867* that gives the federal government jurisdiction to incorporate companies. However, in *Citizens Insurance v Parsons,* the Privy Council held that Parliament has the power to incorporate companies under POGG (preamble of s. 91, *Constitution Act, 1867*). Parliament can incorporate federal corporations provided they do not have provincial objectives. Sir Montague Smith said: provinces are restricted in their jurisdiction to incorporating companies with “provincial objects” so “it follows that the incorporation of companies for objects other than provincial falls within the general power of the parliament of Canada”. Federal corporations have the power to business throughout the country, without needing to register as an extra-provincial company in BC.

**Provincial Jurisdiction:** Provincial governments have the express authority to enact corporations legislation under s. 92(11), *Constitution Act, 1867* (“11. The Incorporation of Companies with Provincial Objectives”). In *Bonanza Creek,* the Privcy Council settled the meaning of “provincial objects”: these words simply mean that a province cannot endow a provincial corporation with the *right* to carry on its activities in another jurisdiction/province.However, corporations incorporated in one province must register as extra-provincial corporations to carry out business in other provinces (permission is discretionary).

**Federal Paramountcy:** Federal companies are subject to provincial laws of general application (e.g. consumer protection laws, employment standard laws). However, *in the event of a conflict* between a valid provincial law and valid federal law, the provincial law is inoperative to the extent of the conflict. As per *Multiple Access v McCutcheon*, for federal paramountcy to apply there must be an *actual* conflict b/w the federal and provincial law, not mere duplication or overlap.

## Separate Legal Personality of Corporations

#### Salomon v Salomon & Co (1897) – House of Lords

Salomon sold his leather and boot manufacturing business to a limited company Salomon & Co (seven shareholders: Salomon, his wife, and his five children). In exchange, Salomon received shares, cash, and debentures (even though Salomon overvalued the business, the Court held that it was unnecessary to analyze the adequacy of his valuation, as long as the consideration was good in law). The company was wound up one year later. As a secured creditor (debenture-holder), Salomon was paid out first. There were no funds left to pay out ordinary, unsecured creditors. The liquidator argued that Salomon was liable to indemnify the company against the claims of these other creditors b/c the company was a mere alias/agent of Salomon. *Should shareholder Salomon be personally liable for the debts of Salomon & Co?* The Court held: “The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands received the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.” ***Salomon* stands for the proposition that a corporation is a separate legal person: a corporation’s personality is separate from the legal personality of its shareholders, directors, and employees.**

## Limited Liability and Creditor Protection

From the House of Lord’s holding in *Salomon* that a corporation is a separate legal person, it follows that **shareholders are not personally liable for obligations owed by a corporation**. In *Salomon,* Salomon, as a shareholder in Salomon & Co, was not personally liable for the debts owed by the company to other creditors.

#### Section 87(1), BC Business Corporations Act

BCBCA s. 87(1) provides that **shareholders are not personally liable for obligations owed by a corporation**: “No shareholder of a company is personally liable for debts, obligations, defaults or acts of the company except as provided in Part 2.1.” Part 2.1 provides that the Notice of Articles may include a statement that shareholders are liable for the corporation’s obligation (the effect of this is to create an unlimited liability company). Equivalent section in CBCA: s. 45(1). BCBCA s. 87(2) provides shareholder liability is limited to “the lesser of (a) the unpaid portion of the [share] issue price…, and (b) the unpaid portion of the amount actually agreed to be paid for those shares.”

## Piercing the Corporate Veil

### What does “piercing the corporate veil” mean?

“Piercing the corporate veil” and “lifting the corporate veil” can refer to two distinct legal phenomena:

1. The imposition of liability upon shareholders for obligations owed by the corporation, as an exception to the *Salomon* principle; or,
2. The non-recognition of a corporation’s separate legal personality where the correct construction of a statutory or other legal standard so requires.

### When will a court be willing to pierce the corporate veil?

The authorities suggest that there are three situations when courts may be willing to depart from a literal application of the *Salomon* rule:

1. **Where the company is construed to be the agent of its principle or sole shareholder** (discussed in *Zhelka,* but the Court concluded that Industrial was not a mere agent for Selkirk).
2. **Where, for the purpose of applying the provisions of regulatory legislation, e.g. the *Income Tax Act*, courts are prepared to modify the strict rule that a corporation is a separate legal person** (the Court did this in *De Salaberry,* lifting corporate veil to reveal an “enterprise entity”/ group of companies).
3. **Where a company has been conceived to achieve some fraudulent purpose, or where the majority shareholders of a company are trying to distance themselves from fraudulent acts** (discussed in *Zhelka*; the Court in *Gildford v Horne* found that the employee of a car dealership who established a competing business within a restricted geographic boundary breached the restrictive covenant he had signed personally upon leaving his former employer, despite the fact that the competing business he established was incorporated/had separate legal personality > shows that courts may be willing to pierce the corporate veil where a corporation is established to fraudulently avoid a pre-existing legal obligation).

**\*Canadian courts have not established a cohesive approach to piercing the corporate veil.** **Piercing the corporate veil remains a speculative theory, but commentators point to cases like *Zhelka, Lee’s Air Farming,* and *De Salaberry* for examples of how corporate personality and the *Salomon* rule might be modified in some way.**

Note: US courts have been willing, in some situations, to recognize corporations as mere instruments of the persons controlling them (= instrumentalist theory). In *Cartton,* a taxicab business was structured such that each cab was owned by a separate corporation, in order to limit liability/minimize the availability of assets to pay tort claims from struck passengers.

#### Clarkson Co v Zhelka (1967) – ON High Court

Selkirk incorporated and controlled several companies, including Industrial. Industrial conveyed land to Selkirk’s sister in exchange for a promissory note. Selkirk went bankrupt, and the trustee in bankruptcy sought a declaration that the land in Selkirk’s sister’s name was held in trust for Selkirk (i.e. that the sister or Industrial were merely agents for Selkirk). *Was Industrial merely Selkirk’s alter ego/agent?* The Court referred to Salomon’s principle: “the legal persona created by incorporation is an entity distinct from its shareholders and directors… even in the case of a one man company, the company is not an alias for the owner”. **Exceptions to Salomon’s principle (disregarding a corporation’s separate legal personality, thereby piercing the corporate veil) “fall within a narrow compass”. The corporate veil should not be pierced unless failing to do so “would be flagrantly opposed to justice”.** The Court held that the corporate veil should not be pierced in this case. Industrial was not formed for the express purpose of doing a wrongful or unlawful act, Selkirk did not expressly direct any wrongful things to be done once Industrial was formed, and Industrial was not a mere agent for Selkirk. **The Court said: “In 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 whom liability is legally owed. In such cases, or where the company is the mere agent of a controlling corporator, it may be said *the company is a sham, clock, or alter ego,* but otherwise it should not be so termed.**

#### Lee v Lee’s Air Farming Ltd (1961) – Privy Council

Mr. Lee was a majority shareholder, director and employee of Lee’s Air Farming. Mr. Lee died and his widow sought compensation under NZ’s *Workmen’s Compensation Act.* The Court of Appeal held that, b/c Mr. Lee was a director, he could not also be an employee/servant of the company. *Can a single individual be both the director and an employee of the same company?* **The Privy Council held that “it is a logical consequence of the decision in *Salomon’s* case that one person may function in dual capacities” (as both an employee and a director = an “inside director”).** Mr. Lee (as an employee) had a legal personality that was distinct from the company’s legal personality, so could enter into a contract to serve the company.

#### De Salaberry Realities Ltd v MNR (1974) – Fed TD

De Salaberry was a subsidiary company, related to a number of other companies and ultimately controlled by a grandparent company. A profit was made on the sale of land, and the question was whether this income belonged to De Salaberry, for the purposes of the *Income Tax Act. Was De Salaberry a separate legal entity, distinct from its sister and parent companies?* The Court said: “I do not conceive a medical doctor having to make a diagnosis on the general state of health of a patient that would examine only his right arm”. Further, the Court said: “**the rule in *Salomon*…cannot be invoked” to prevent a court “from passing judgment on the course of conduct of the groups of the sister companies and of the parent companies”.** The Court held that De Salaberry was “the puppet” of its parent companies: “the mind and will of the parent companies reach through the façade of the appellant”. ***De Salaberry* stands for the proposition that the corporate veil will be lifted if the company in question is part of a larger group of interrelated companies, to allow a court to look at the group of companies (the “enterprise entity”) as a whole.**

## Theorizing Corporate Personality

|  |
| --- |
| **Three schools of thought that attempt to define the nature of corporate personality considered in *Salomon*** |
| **Fiction Theory** | Corporate personality is a legal creation. A corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law” (Marshall CJ of the USSC). |
| **Real Entity School** | When a group becomes sufficiently organized, has a continuity of experience and can make decisions, that group has a new “corporate” personality, whether or not the state accords that group legal recognition as a corporation. |
| **Contractarian School** | Corporate personality is a fiction. Rather than the state bringing corporations into existence (fiction theory), contracts/transactions between shareholders, creditors, employees, management and the board of directors is what brings a corporation into being. “Corporate personality is neither a special privilege nor the reflection of a metaphysical group personality, but a mere notational convenience in the context of multilateral contracting.” |

# Process of Incorporation

## Place of Incorporation

The federal government and provincial governments have **concurrent jurisdiction** to incorporate companies (POGG for Parliament, and s. 92(11) for provincial govts). Incorporators can elect to incorporate under federal, provincial, or territorial law (a choice of 14 jurisdictions/sets of incorporation laws!) – none of the corporation statutes requires that an incorporator be a resident of the province or territory of incorporation.

In the US, something called the **Delaware Phenomenon.** Shopping for favourable incorporation laws. 63% of Fortune 500 companies are incorporated in the state of Delaware. But there is no Canadian “Delaware” b/c the differences between federal, provincial and territorial incorporation laws are not as pronounced as the differences between US state incorporation laws.

General practice: incorporate provincially if a company expects to carry on business in a particular province; incorporate federally if a company expects to carry on business in several provinces.

## Extra-Provincial Licensing and Filing Requirements

Section 375(1) of the BCBCA provides that a “foreign entity must register as an extraprovincial company in accordance with this Act within 2 months after the foreign entity begins to carry on business in British Columbia”.

The licensing requirement for an extra-provincial corporation is only triggered if the corporation is **“carrying on business” in BC**. The statutory test for a foreign entity carrying on business in BC is set out in s. 375 of the BCBCA, and the common law test is set out in the *Weight Watchers* case.

1. ***Is the entity a foreign entity within the meaning of the Act?***

Section 1 defines “foreign entity” as a corporation that is not incorporated under the BCBCA. The Act does not distinguish between foreign entities > an extra-provincial corporation must comply with ss. 375, 376 and 377, whether the corporation is from Alberta, Hong Kong, or Bulgaria.

1. ***Is the entity carrying on business in BC within the meaning of the Act?***

Section 375(2) provides that a foreign entity is deemed to be carrying on business in BC if: (a) its name is listed in a telephone directory anywhere in the province, (b) its name appears in any advertisement or announcement in which an address or telephone number for BC is given for the foreign entity, or (c) it has an agent who resides in BC or a warehouse, office or place of business in BC. Section 375(3) provides that a foreign entity *does not* carry on business in BC: (a) if it is a bank, (b) if it’s only business in BC is building and operating a railway, or (c) it merely has an interest as a limited partner in a partnership carrying on business in BC.

1. ***Is the entity carrying on business in BC within the common law meaning (Weight Watchers)?***

Even if the foreign entity is not carrying on business in BC within the meaning of the Act, it may be carrying on business in BC based on the common law definition of the term. The Court in *Weight Watchers* held that the US company entering into a franchise agreement in Ontario did not amount to “carrying on business” in Ontario. Very fact-specific analysis.

## Continuance Under the Law of Another Jurisdiction

A corporation can “continue” its existence under the law of another jurisdiction. Continuation is provided for in **ss. 302-311** (Division 8) of the BCBCA. A corporation may seek continuance for a number of reasons, including: tax advantages, amalgamation with a corporation in another jurisdiction, or shifting a business to another jurisdiction.

Continuance involves two steps:

1. **Export step:** emigrating corporation must obtain consent of authorities in jurisdiction of incorp.
2. **Import step:** emigrating corporation must meet requirements of federal or provincial Act under which it seeks to be continued.

## Classification of Corporations

|  |  |
| --- | --- |
| **Publicly-traded Corporations** | aka “widely held” corporations; “offering” corporations |
| **Privately-held Corporations** | aka “closely held” corporations; “non-offering” corporations |
| **One-Person Corporations** | Only substantive issue: holding meetings because a meeting generally requires 2 or more people. However, where a corporation has only one shareholder, or only one director, he/she along may constitute a meeting.  |
| **Constrained Share Corporations** | Federal and provincial legislation permits corporations with publicly issued shares to restrict the transfer of their shares in order to comply with Cdn ownership and control requirements (\*we don’t have these provisions in BCBCA). |
| **Professional Corporations** | Professionals, e.g. lawyers, accountants, may incorporate. Tax advantages. |
| **Unlimited Liability Companies** | Where shareholders have unlimited liability for obligations, debts, etc owed by the corporation. Note: s. 87(1) of the BCBCA provides that shareholders are not liable for the debts, obligations, etc of a corporation, unless the Notice of Articles says otherwise (Part 2.1). Only possible in BC, Alberta, and Nova Scotia.  |
| **Special Act Corporations** | Definition of “special act corporation” in s. 1, Definitions: a corporation, incorporated by an Act, that has not been recognized as a company. Crown corporations, e.g. BC Ferries (*BC Ferries Act*), BC Hydro (*Hydro and Power Authority Act*). Section 4(1) of BCBCA says that the BCBCA has residual application for anything that is not inconsistent w/ the Special Act Corporation’s special act. |

### BCBCA sections that distinguish b/w public and private corporations

* **Auditors, s. 210:** public companies must have audited statements, but private companies can avoid this requirement if their shareholders agree to waive it.
* **Insider Trading, s. 192:** prohibited for public companies, but not for private companies.
* **Directors, s. 120:** public companies must have 3+ directors; private companies only need 1.
* **Financial statements, s. 197:** private companies must produce financial statements, whereas public companies need not under the Act (b/c already required to produce financial statement in compliance w/ the *Securities Act*).
* **Audit committee, s. 223:** public companies must have audit committees, whereas private companies need not.

## Corporate Names

Corporate names are regulated primarily to ensure that the public is not misled by confusingly similar corporate names (consumer protection provisions). **Sections 21-29** (Division 2)of the BCBCA deals with corporate naming.

Note: when a lawyer is advising an unsophisticated or high-risk corporate client, a failure to convey the importance of using its full corporate name (including legal element) and consequences for failing to do so will amount to breach of duty of care.

***How to change a corporate name?***A change to a company’s name must be done pursuant to **s. 263** of the BCBCA. To change its name, a company must alter its Notice of Articles in accordance with s. 257 (this amounts to a fundamental change, as per s. 238, and entitles shareholders to the appraisal remedy). This requires a special resolution (2/3 of those shareholders who are present and voting) to pass.

## Steps to Incorporation

1. **File an incorporation application, including a Notice of Articles, pursuant to s. 10 of BCBCA.** The Notice of Articles is a public document.
2. **File an application to reserve the corporate name/obtain name approval.** Provisions related to corporate names set out in ss. 21-29. The corporate name should be descriptive and distinctive, and not too similar to any other registered names. Also, the words “BC” or “Canada” cannot appear in the corporate name unless you are the subsidiary of a national company. If the registrar refuses to give you the name you want, you can challenge this decision under s. 406 of the BCBCA. You can also challenge someone else’s name being too similar to yours.
3. **Prepare the corporation’s by-laws (aka articles), but do not file them.** By-laws are not public.

# Nature of the Corporate Constitution

## The Charter = Notice of Articles + Articles

Together the Notice of Articles and By-Laws (aka Articles) make up a corporation’s Charter.

|  |
| --- |
| **The Charter** |
| **1. Notice of Articles**In other jurisdictions, the Notice of Articles is referred to as the “Memorandum”. | A public document, filed with the Registrar in BC. The Notice of Articles must contain, pursuant to **s. 11** of the BCBCA:* the name of the company;
* the names and addresses of each of the **directors**;
* the **address of the registered office** of the company;
* the **address of the records office** of the company; and,
* the **authorized share structure** of the company (setting out classes of shares, as required in ss 52-53 of the BCBCA).
 |
| **2. Articles/By-Laws** | Internal, non-public documents. The Articles must set out, pursuant to **s. 12** of the BCBCA:* Rules for the company’s conduct;
* Any restrictions on the business that may be carried out by the company or on the powers that the company may exercise; and,
* All the special rights and restrictions that are attached to each class of shares;
 |

***How to amend provisions in Notice of Articles and/or Articles?*** To make any changes to a company’s Charter, there must be a special resolution passed by shareholders pursuant to ss. 257 or 259. A special resolution requires a 2/3 of shareholders present and voting, as defined in s. 1.

***What can shareholders in closely-held companies do to protect themselves?*** Shareholders in closely-held companies may wish to enter into a (carefully drafted) Shareholder Agreement. A Shareholder Agreement is an ordinary contract, akin to a pre-nuptial agreement, that sets out what will happen in various scenarios (e.g. shareholders might have a pre-emptive right to acquire shares upon a shareholder’s death, to prevent outside parties from coming into the “close knit” circle that is a closely-held corporation). Warning: Shareholder Agreements must be *carefully drafted* because directors, in their capacity as directors, cannot be parties to the agreement (otherwise they would be in breach of their fiduciary duty owed to the company); since, in many closely-held companies directors are shareholders too, the contract must be carefully drafted to ensure that any obligations under the agreement only relate to “shareholders”.

## Scope of the Contract in the Notice of Articles and Articles

Both the Notice of Articles and Articles (together, the company’s Charter) are given **contractual effect** through **s. 19** of the BCBCA. Section 19 provides that shareholders are contractually bound, one to another and to the corporation, by the terms of the company’s Charter. However, a company’s Charter does not constitute a contract between the company and non-member third parties.

## Restrictions on the Powers of a Company

The **common law doctrine of *ultra vires***provided that a corporation (particularly one in a memorandum jurisdiction) had no legal capacity to act in any way that was not specifically authorized by its incorporating documents. But the doctrine of *ultra vires* has not been significantly limited by statutory provisions, if not altogether eliminated. Today, unless a company’s powers are expressly restricted (s. 33), it is assumed that the company has all the powers of a natural person (s. 30).

|  |
| --- |
| **Powers of a company, s. 30** |
| Section 30 of the BCBCA abolishes the requirement for a statement of powers/capacities in a company’s Notice of Articles (effectively doing away with the common law doctrine of *ultra vires*), and provides that a company, as of right, has the powers of a natural persons: “30. A company has the capacity and the rights, powers and privileges of an individual of full capacity.” |
| **Restrictions on powers of a company, s. 33** |
| Section 33 of the BCBCA allows a company to restrict the powers that it has by virtue of s. 30. Restrictions are set out in a company’s Notice of Articles or Articles. e.g. restricting the company from borrowing money over a certain threshold |
| **Abolition of the common law doctrine of constructive notice, s. 421** |
| Section 421 of the BCBCA abolishes the common law doctrine of constructive notice by providing that merely because the company’s Charter contains restrictions, the public (e.g. arms-length parties contracting with the company) are not deemed to have knowledge of these restrictions.  |
| **How to amend restrictions on powers of a company, ss. 259-360** |
| Amending the restrictions on the powers of a company involves changing the company’s Charter. To make any changes to a company’s Charter (Notice of Articles + Articles), there must be a **special resolution** passed by shareholders pursuant to ss. 257 or 259. A special resolution requires a 2/3 of shareholders present and voting, as defined in s. 1. If a special resolution is passed, it is regarded as ushering in a **fundamental change**.  |
| **Options in the event of a breach of restrictions** |
| **Compliance Order**s. 228*statutory remedy* | If a company breaches one of the restrictions on its powers, a “complainant” can apply to a court for a **compliance order** (s. 228). *Who has standing to seek a compliance order as a “complainant”?* Section 228(1) provides that shareholders have standing as of right as complainants, and other “appropriate persons” (e.g. creditors) do not have automatic standing under s. 228 but can seek leave of the court to apply. A compliance order is a personal remedy for shareholders. The effect of a compliance order can be an order that the company comply with or refrain from contravening the restriction (e.g. an injunction). e.g. a company is about to borrow a lot of money from a third party lender, and this amount exceeds the amount contained in a restriction in the company’s Charter. Shareholder w/ standing as of right under s. 228(1) can ask court to issue an injunction under s. 228(3)(a) to prevent company from entering into lending contract/loan.  |
| **Compensation to Third Party** s. 228(3)(c)*statutory remedy* | Section 228(3)(c) of the BCBCA provides that, in the event of a breach of restriction that causes a loss to a third party, the company can be ordered to pay **compensation** to that affected third party. e.g. if injunction (compliance order) is issued by a court to prevent the lending contract/loan from proceeding and the third party lender suffers any losses as a result of this deal falling apart, the court can order, pursuant to s. 228(3)(c), that the company pay compensation to this third party lender.  |
| **Liability of Directors**s. 154(1)(a)*statutory remedy* | If an order for compensation is made under s. 228(3)(c), s. 154(1)(a) provides that the directors who voted in favour of the act that breached the restriction (“an act contrary to s. 33(1) as a result of which the company has paid compensation to any person”) can be held ***personally liable***for this compensation. Holding directors personally liable is, in a sense, a lifting of the corporate veil by the statute and a modification or relaxation of the strict rule from *Salomon* that a corporation has a legal personality that is entirely separate and distinct from the legal personalities of its members. If directors were *not* personally liable and the company was required to pay compensation, this would be unfair for shareholders. **Section 154(5)** provides that a director is *deemed to have consented to a resolution if they are present at the meeting* where that resolution as passed, *unless the director enters a dissent*, which is recorded in the minutes of the meeting, put in writing by the director and provided to the secretary before the end of the meeting, or put in writing after the meeting and promptly delivered to the company’s delivery address or mailed by registered mail to the company’s registered office. **Section 154(8)** provides that, *even if a director was not present at the meeting where the resolution was passed,* they are deemed to have consented to that resolution (and will therefore be jointly and severally liable under s. 154(1)) if they fail to deliver or mail a written dissent w/in 7 days of becoming aware of passing of resolution.However, **s. 157** provides that a director is not liable under s. 154 if the director relied, in good faith, on any of the following:* Financial statements of the company, represented to the director by an officer of the company or in a written auditor’s report to “fairly reflect the financial position of the company, s. 157(1)(a);
* A written report of a lawyer, accountant, engineer, appraiser, or other person whose profession lends credibility to a statement made by that person, s. 157(1)(b);
* A statement of fact represented to the director by an officer of the company to be correct, s. 157(1)(c);
* Any record, information, or representation that the court considers provides reasonable grounds for the actions of the director, whether or not the record, information, or representation was forged/inaccurate/fraudulently made, s. 157(1)(d).
 |
| **Appraisal Remedy**ss. 237-247*statutory remedy* | If a **special resolution** is passed, ushering in a **fundamental change**, the **appraisal remedy** is triggered for those shareholders who dissent to the change. Shareholders who dissent to an amendment to the restrictions of a company’s powers, pursuant to s. 260, have a statutory right to apply for the appraisal remedy under ss. 237-247, requiring that the company buy back their shares. The appraisal remedy is an especially important remedy for closely-held companies where there is no market for shares (except other shareholders and company itself). **Shareholders who apply for the appraisal remedy may not be entitled to other shareholder remedies (e.g. the oppression remedy)****Subsection 244(6)** suggests that a shareholder who claims the appraisal remedy may not be entitled to any other shareholder remedies, e.g. the oppression remedy: “A dissenter… may not vote, or exercise or assert any rights of a shareholder, in respect of the notice shares, other than under this Division.” |
| **It is not clear whether these statutory remedies are exhaustive. If the statutory remedies are not exhaustive, there are some additional common law remedies in the event of a breach of a restriction:** |
| **Breach of Contract***common law remedy* | A shareholder may be able to **sue the company for breach of contract**, relying on s. 19 which gives the company’s Charter contractual effect. There is overlap between s. 19 and s. 228 because both provisions present remedies for when company is not complying with its Charter. Note: suing the company for breach of contract on the basis of s. 19 would only be open to shareholders.  |
| **Breach of Fiduciary Duty***common law/statutory remedy* | An *ultra vires* act (an act outside of the company’s authority/a breach of the company’s restrictions) may be regarded as a *prima facie* breach of the fiduciary duty owed by directors to the corporation, provided for in s. 142. A shareholder could apply for standing to sue the directors who voted in favour of the act that breached the condition *derivatively,* on behalf of the company. However, it is unclear whether there is any room left for common law remedies for commission of a restricted act, given the elaborate statutory provisions in ss. 228, 154, and 237. It is likely that a court would refuse to entertain a breach of contract or breach of fiduciary duty remedy for a company’s non-compliance with a restriction because the common law doctrines of constructive notice and *ultra vires* have been effectively abolished, and it may be that the statutory provisions were intended to be exhaustive.  |

# Pre-Incorporation Contracts

The law does not recognize the existence of a corporation until a certificate of incorporation has been issued by the registrar. This can create legal difficulties, especially when a facilitator/promoter (someone who promotes the incorporation of a company, like Salomon did in *Salomon v Salomon & Co*) enters into contacts with third parties on behalf of the proposed corporation.

## Common Law Approach to Pre-Incorporation Contracts

Three common scenarios that give rise to issues w/ pre-incorporation contracts:

|  |  |  |
| --- | --- | --- |
| **Scenario 1** | **Scenario 2** | **Scenario 3** |
| ***promoter knows +third party knows******= promoter personally liable***Where both parties to the pre-incorporation contract know that the company has not yet been incorporated.***Kelner v Baxter*** stands for the proposition that, where both parties to a pre-incorporation contract know that the company has not yet been incorporated, those party who contracted on behalf of the not-yet-incorporated company should be personally liable for the obligations set out in the pre-incorporation contract, even if the contract is signed “on behalf of… the proposed company”. The key, according to *Kelner,* is giving effect to the intention of the parties (whether or not they intended to be personally bound.In *Kelner,* the proposed company was a hotel. The plaintiff purchased extra wine stock and sold this wine to the proposed company. The defendants passed a resolution to reimburse the plaintiff. But the company was not yet incorporated. The Court held that the defendants should be personally liable for reimbursing the plaintiff. The Court said: “we must assume that the parties contemplated that the persons signing it would be personally liable”.  | ***promoter knows + third party doesn’t know******= promoter not personally liable***Where the promoter knows that the company has not yet been incorporated, but the contracting party does not know.***Wickberg*** stands for the proposition that where the facilitator/promoter knows that the company has not yet been incorporated, but the third party does not know, the promoter/the party who contracted on behalf of the not-yet-incorporated company should not be personally liable for the obligations set out in the pre-incorporation contract – the contract is simply void. The Court in *Wickberg* followed *Black v Smallwood,* and again emphasized the importance of giving effect to the parties’ intentions. In *Wickberg,* the defendants knew that Rapid Data was not an incorporated company. The defendants, on behalf of the company, hired the plaintiff to be the manager of the company. The plaintiff did not know that the company was not incorporated. When the company failed, the plaintiff argued that the defendants should be personally liable for his employment contract. The Court held that the defendants should not be personally liable under the employment contract, because it was not the intention of the parties that the defendants would be personally liable. The contract was held to be void. *So what could the plaintiff in Wickberg do?* The plaintiff could sue the defendants for **breach of warranty of authority** (where an agent purports to act on behalf of a non-existent principal, the agent can be personally liable for any loss suffered by the party who relied on this representation).  | ***promoter doesn’t know + third party doesn’t know******= promoter not personally liable***Where neither of the parties to the pre-incorporation contract know that that the company has not yet been incorporated (mistaken belief that that the company was incorporated). ***Black v Smallwood*** stands for the proposition that, where both parties to a pre-incorporation do not know that the company has not yet been incorporated (and are under the mistaken belief that it is), the party who contracted on behalf of the not-yet-incorporated company should not be personally liable for the obligations set out in the pre-incorporation contract – the contract is simply void. The Court distinguished this situation from the situation in *Kelner,* but still emphasized the importance of giving effect to the intention of the parties (whether or not they intended to be personally bound).In *Black v Smallwood,* the appellants entered into a contract for sale of land to Western Suburbs, which was not in fact incorporated at the time. Both the appellants and the directors of Western Suburbs believed that the company had been incorporated. The Court held that the directors should not be personally liable under the contract, because it was not the intention of the parties that the defendants be personally liable. The contract was held to be void.  |

## Statutory Approach to Pre-Incorporation Contracts

|  |
| --- |
| **What happens when a pre-incorporation contract is entered into** |
| **Subsection 20(2)** of the BCBCA provides that a promoter, in entering into a pre-incorporation contract with a third party “in the name of or on behalf of” a not-yet-incorporated company, is deemed to *warrant* to the other contracting party that (a) the company will be incorporated within a reasonable time, and (b) the newly incorporated company will adopt the pre-incorporation contract within a reasonable time. **Section 20 is exhaustive, and replaces the common law.** |
| **How can the promoter’s warranty “disappear”?** |
| There are two ways in which the promoter’s warranty can “disappear”:1. Subsection **20(8)** provides that, if the parties to a pre-incorporation contract have *expressly agreed* that there will be no warranty as provided for in s. 20(2), the warranty is **contracted out of** .
2. If the newly incorporated company adopts the pre-incorporation contract, as provided for in s. 20(3), within a reasonable time. The promoter’s warranty disappears, and the newly incorporated company assumes all of the obligations under the pre-incorporation contracts, pursuant to s. 20(4).
 |
| **Adoption of the pre-incorporation contract by the newly incorporated company** |
| **Subsection 20(3)** provides that the company, upon incorporation, can adopt the pre-incorporation contract (and assume the obligations under it) “by any act or conduct signifying its intention to be bound by it”. |
| **Remedies for the party that contracts with the promoter**  |
| **Breach of Warranty, s. 20(2)***This remedy applies even if the company is not formed.*  | **Subsection 20(2)(b)** provides that the promoter is liable to the other parties to the pre-incorporation contract “for damages for any breach of that warranty” set out in s. 20(2)(a). Therefore, if a company does not come into existence within a reasonable time and/or does not adopt the pre-incorporation contract within a reasonable time after coming into existence, the third party can sue the promoter for breach of warranty. |
| **Restitution/*quantum meruit*, s. 20(5)***This remedy only applies if company has come into existence, but does not adopt the pre-incorporation contract!* | **Subsection 20(5)** provides that, if the company comes into existence *but does not adopt the pre-incorporation contract within a reasonable time following incorporation,* any party to the pre-incorporation contract (the promoter *or* the third party!) can apply to the court for an order directing that company “restore to the applicant any benefit received by the new company under the pre-incorporation contract”. E.g. if the third party has provided some services to the new company under the pre-incorporation contract, the third party could apply for a court order that the company pay the third party for its services; or, if the promoter is out of pocket as a result of the pre-incorporation contract, the promoter can apply for a court order that the company compensate the promoter.  |
| **Order from a court, rearranging obligations, s. 20(6)***This remedy only applies if company has come into existence.* | **Subsection 20(6)** provides that any of the parties (the company, the promoter, or the third party) can apply to the court for an order *rearranging obligations* under the pre-incorporation contract. A court can order that the obligations under the pre-incorporation contract be join or joint and several as between any of the parties (s. 20(6)(a)), or apportion liability between the new company and the promoter (s. 20(6)(b)). While courts tend to try to give effect to the obligations that the parties agreed to, s. 20(6) seems to invite courts to rewrite some pre-incorporation contracts.  |
| However, if the company is never actually incorporated under the BCBCA, the language in s. 20 suggests that s. 20 may not apply (s. 20(2): “…if, before a company is incorporated, a person purports to enter into a contract in the name of or on behalf of the company...”). If this is the case, a court would need to go back to the common law rules (*what did the parties know? and what did the parties intend?)*. |

# Management and Control of the Corporation

## The Power to Manage and Supervise Management is Vested in the Board of Directors

**Subsection 1(3)** defines “control” of a corporation as having enough shares to elect or appoint a majority of the directors. Shareholders have the power to elect or appoint directors. **Subsection 128(3)** also gives shareholders the power to remove directors before the expiration of the director’s term of office, by special resolution or if the company’s Charter provides for another method (*Automatic Self-Cleaning*).

However, directors control *who* will be nominated for directorship, what will be on the agenda at general shareholder meetings, and when these general shareholder meetings will be held. So directors actually have a lot of influence over what shareholders are and are not able to achieve at general meetings, like the AGM.

**The power to manage and supervise management of a company is vested in its board of directors by virtue of s. 136(1) of the BCBCA.** This power to manage and supervise management is vested in the board collectively, whereas the duties owed by directors are owed individually. The board of directors can *delegate* the task of management to employees, like the CEO, CFO, COO.

**Section 138** provides that a person who is not a director but who performs the functions of a director of a company must also comply with a number of provisions under the Act, including ss. 142 (fiduciary duty and duty of care), “as if that person were a director of the company” (subject to some exceptions, set out in s. 138(2).

**Section 143** provides that any defect in the election/appointment of a director or officer will not render invalid their actions in their capacity as a director or officer.

#### Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame (1906) – England CA

Articles of company contained a provision that vested the power to manage the company in its board (similar to s. 136). Shareholders passed a resolution by simple majority to order the board to sell off the company’s assets. The board refused to comply with this resolution. **The Court held that the decision to sell assets was a managerial power, which was vested in the directors. The shareholders did not have the power to order the directors to sell off the assets.** The Court said: “…it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors, by the articles of association.” *[If the shareholders wanted this power, they could amend the Articles to vest the powers of management in shareholders, rather than the directors, but they would require a special resolution to do so; however, for widely-held companies, the separation of ownership and management is crucial for the successful operation of the business, and for closely-held companies, shareholders also tend to be directors (and presumably want the same thing in both capacities). As the Court in Automatic Self-Cleansing said: “It is by consensus of all the individuals in the company that these directors became agents and hold their right as agents. It is not fair to say that a majority at a meeting is… the principal so as to alter the mandate of the agent. […] If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves.”]*

## The Indoor Management Rule

The indoor management rule is codified in **s. 146** of the BCBCA, and provides that third parties can take for face value that: (a) a company’s Charter have been complied with, (b) the individuals registered as directors are *actually* directors, (c) a person who holds themselves out as a director, officer, or agent of a company is a director, officer, or agent of the company, (d) any record issued by a director, officer, or agent of a company is genuine and valid, and (e) any record kept by the company is accurate and complete. However, now that *ultra vires* and the doctrine of constructive notice have been abolished, the indoor management rule is less important.

## Corporate Goals and Social Responsibility: profit, or more than profit?

For many decades, there has been debate what the role and goal(s) of corporations should be (e.g. the Berle/Dodd debate in the Harvard Law Review), and what interests boards of directors should take into account when making decisions.

There are two schools of thought relate to corporate goals and social responsibility:

1. **Contractarian school of thought:** the Contractarian school of thought views the singular goal of a corporation as profit-making and profit maximization.
2. **Corporate Social Responsibility school of thought:** the CSR school of thought rejects the contractarian focus on profit maximization b/c it is too narrow and divorced from the realities of modern society. Rather, the view is that corporations have enormous influence on the welfare of employees, consumers, and communities, so corporate managers’ goal should be to strike a reasonable balance between the interests of shareholders and the interests of other stakeholders/constituencies affected by corporate behaviour.

|  |
| --- |
| **Summary of law related to corporate goals:** the primary goal of corporations is profit-making, and directors owe the corporation a fiduciary duty to act in its best interests; in considering what is in the best interests of the corporation, directors *may* (but are not obliged to) consider the interests of other stakeholders like shareholders, creditors, employees, etc.  |
| The Court in ***Dodge v Ford Motor Co***held that business corporations are organized and carried on “primarily for the profit of stockholders”, and that “the powers of directors are to be employed for that end”. The Court said that directors could exercise their discretion “in the choice of means to attain that end”, but could not exercise their discretion to change the end goal itself. That the singular goal of a corporation is profit-making reflects the **Contractarian school of thought**. ***Parke v Daily News*** stands for the proposition that all actions taken by the board of directors must, ultimately, be done for the benefit and to promote the prosperity of the company: “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.”The Court in *Parke v Daily News* adopted the following three-part test for determining whether a board of directors’ decision to expend a company’s money in a certain manner (e.g. giving it to former employees and pensioners) is valid: 1. Is the transaction reasonably incidental to the carrying on of the company’s business?
2. Is it a *bona fide* transaction?
3. Is the transaction done for the benefit and to promote the prosperity of the company?

***Re Peoples*** stands for the proposition that directors owe their fiduciary duty directly to the company (not to any one group of stakeholders), but that, in acting in the company’s best interests, it may be legitimate “for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment”. In ***Re Peoples,*** we begin to see the emergence of the **Corporate Social Responsibility school of thought**. However, the SCC in *Re Peoples* emphasized the importance of directors’ acting in the best interests *of the corporation*, and the importance of not favouring the interests of any one group of stakeholders.***Re BCE*** affirms the SCC’s decision in *Re Peoples* that, “in considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions”. Further, the SCC said that courts should give the business judgment of directors appropriate deference, “so long as it lies within a range of reasonable alternatives” (the business judgment rule). The SCC in *Re BCE* also reemphasized that directors “owe a fiduciary duty to the corporation, and only to the corporation”, and added that “the reasonable expectation of stakeholders [like creditors] is simply that the directors act in the best interests of the corporation”. |

#### Dodge v Ford Motor Co (1919) – Michigan Court

Ford Motor Co regularly issued special cash dividends, until 1916, when Henry Ford (who controlled the board of directors) announced that no more special dividends would be issued and the company’s extra profits would be invested back in the business in order to expand it. Henry Ford said: “My ambition is to employ still more men to spread the benefits of this industrial system to the greatest possible number, to held them build their lives and theirs homes.” Two minority shareholders (Dodge brothers) brought an action to compel Ford Motor Co to issue special dividends. The Court acknowledged that Henry Ford’s plan was not intended “to produce immediately a more profitable business but a less profitable one” (so the immediate effect of this re-investment would be a diminishment in the value of shareholders’ shares). **The Court said: “A business corporation is organized and carried on primarily for the profit of stockholders. The powers of directors are to be employed for that end. The discretion of 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…”** The Court ended up forcing the payment of the special dividends b/c it found that withholding the dividends was an arbitrary decision given the profits the company had at its disposal.

#### Parke v Daily News (1962) – England Court

Daily News owned two newspapers that were not doing well financially, so they found a purchaser to buy the newspapers. The directors of Daily News decided that the balance of the sale price of the newspapers should be used to benefit the newspapers’ staff and pensioners. A shareholder commenced an action claiming that this compensation to former employees and pensioners was *ultra vires*. **The Court said: “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.” The Court adopted the three-part test from *Re Lee, Behrens* to determine whether the directors’ decision involving expenditure of the company’s money was valid: (1) Is the transaction reasonably incidental to the carrying on of the company’s business? (2) Is it a *bona fide* transaction? (3) Is it done for the benefit and to promote the prosperity of the company?** The Court held that the directors of Daily News, through motivated by philanthropy and generosity, and “however enlightened from the point of view of industrial relations”, were not authorized to put the balance of the profits from the sale towards benefitting former employees and pensioners = breach of fiduciary duty. **All actions taken by the board of directors must, ultimately, be done for the benefit and to promote the prosperity of the company.**

#### Re Peoples (2004) – SCC

Wise Stores acquired Peoples Department Stores, and to solve some problems, the two companies’ inventory procurement policies were merged into a single “joint inventory procurement policy”. The two companies declared bankruptcy. The trustee for Peoples claimed that the decision to join the inventory systems favoured the interests of Wise Stores over Peoples, to the detriment of Peoples’ creditors. The Wise brothers were sued for breach of duty of care and breach of fiduciary duty. The Court noted the fiduciary duty owed by directors *to the corporation* (not any one group of stakeholders): “Directors and officers must serve the corporation selflessly, honestly, and loyally.” However, **the SCC held that in acting in the corporation’s best interests (in fulfilling their fiduciary duty), it is acceptable for directors to consider the interests of other stakeholders: “…in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.”** When a company is in financial trouble, the SCC emphasized the importance of directors’ acting in the best interests *of the corporation*, and the importance of not favouring the interests of any one group of stakeholders (b/c often, when a company is in financial trouble, the interests of different stakeholders will be at odds, e.g. creditors versus shareholders).

#### Re BCE Inc (2008) – SCC

There was a leverage buyout of BCE Inc, whereby Bell Canada (a subsidiary of BCE) would acquire a substantial new debt. BCE’s debenture holders opposed this arrangement (b/c would result in ~20% decrease in market price for their debentures), and sought relief under the oppression remedy. The SCC in *BCE* upheld their decision in *Peoples* that, “**in considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions**”. The SCC said that **courts should give the business judgment of directors appropriate defence, “so long as it lies within a range of reasonable alternatives” (the business judgment rule).** The SCC further reemphasized that directors “owe a fiduciary duty to the corporation, and only to the corporation”, and that “the reasonable expectation of stakeholders [like the debentureholders in this case] is simply that the directors act in the best interests of the corporation”. The Court concluded that the board of directors *had considered* the interests of the debentureholders, and having done so, made a decision that “it perceived to be” in “the best interests of the corporation”. *[Note: the SCC pointed to the directors’ establishment of a sub-committee to investigate whether the debenture holders were prejudiced by the arrangement as evidence that they had considered the interests of other stakeholders. We see the same thing with litigation committees, set up by boards to give the board some appearance of independence.* ***Setting up an “independent” committee is a proactive action by directors, which may protect board members from allegations of breach of fiduciary duty****. Courts will give deference to director’s business judgment so long as their decision “lies within a range of reasonable alternatives”.]*

## The Audit Committee

The function of an auditor is to assess the financial statements which the corporation proposes to place before shareholders, and to report on the preparation and accuracy of those statements. Auditors must be guarantee appropriate access to records, must be independent, and must be properly qualified. Audits ensure the reliability of financial statements, encourage compliance w/ statutory requirements, provide a check against corporate mismanagement, and promote standardized financial reporting.

**The audit committee provisions set out in ss. 223-226 of the BCBCA only apply to widely-held, public companies (not to closely-held companies).** Section 224 provides that directors must elect elect an “independent” audit committee, composed of at least 3 directors, the majority of which are not officers or employees of the company (the goal here is to create some distance between the audit committee and management). Under s. 225, the audit committee is responsible for reviewing and reporting to directors on the financial statements of the company and the auditor’s report prepared in relation to those financial statements. The auditor is given the right to appear before any audit committee meeting, can be required to attend an audit committee meeting, and has the independent right to call an audit committee meeting to consider any matter that the auditor’s believes should be brought to the attention of directors or shareholders.

**Ideally, the statutory requirement for audit committees for publicly-traded companies should enhance the detection of fraud and improve the overall financial soundness a corporation’s management.**

**But there are some reasons to be skeptical:**

* Auditors, though lawfully set up as independent contractors who will objectively evaluate a company’s finances, may compromise their objectivity b/c of loyalty to the people who hired them.
* The outside directors on an audit committee may not have the financial literacy to ask the kind of penetrating questions that this scheme was designed to encourage. Also, outside directors may wish to maintain their independence, and therefore avoid the quarrelsome, active, supervisory role that these provisions might provide for.

## Sale of the Undertaking

|  |
| --- |
| **Sale of undertaking is a fundamental change and triggers the board’s obligation to get shareholder approval**  |
| The board of directors’ decision to sell off most of the company’s assets in one big swoop is seen to be **a fundamental change** that shareholders have the power to veto. **Subsection 301(1)** provides that a “company must not sell, lease or otherwise dispose of all or substantially all of its undertaking unless (a) it does so in the ordinary course of its business, or (b) it has been authorized to do so by a special resolution”. To obtain authorization from shareholders, the board of directors must give 20 days notice for the special resolution meeting and at least 2/3 of shareholders present or voting by proxy (or up to 3/4 if the company’s Charter redefines the requirement for a special resolution) must vote in favour of the fundamental change/sale of the undertaking.  |
| **Test to determine if s. 301(1)(b) applies** |
| 1. **What is the undertaking of the company?**

There is no common law definition for “undertaking” but it is generally understood to be all of the company’s assets that have monetary value (including: real estate, personal property, unliquidated damages claims, contracts, licensing agreements, good will, intellectual property rights). 1. **Does the sale fall into one of the exceptions listed in s. 301(6)?**

Section 301(6) lists a number of exceptions to s. 301(1) – these are situations that are not deemed to be sales of the company’s undertaking. The exceptions include: (a) the giving of security; (b) leasing the company’s property for less than 3 years; (c) selling the undertaking to a wholly owned subsidiary of the company; (d) selling the undertaking to a parent company. 1. **Is there a proposed sale of “all or substantially all” of the company’s undertaking?**

To determine whether there is a proposed sale of “all or substantially all” of the company’s undertaking, a two-part **quantitative/qualitative test** must be applied:1. **Numerical calculation:** look at the total value of the company’s undertaking and then determine what percentage of that undertaking is being sold. Less than 50%? More than 50%
2. **Qualitative evaluation:** determine whether the sale of the undertaking “strikes at the heart of the business” or is “tantamount to a winding up of the company’s affairs”.
* **If the sale represents less than 50% of assets and the nature of the sale is such that it would redefine what the company is doing,** the sale will amount to a sale of “all or substantially all” of the company’s undertaking. Provided that the sale is not in the “ordinary course” of the company’s business, the directors would be obliged to seek shareholder approval of the sale via special resolution.
* **If the sale represents over 50% of assets and the nature of the sale is such that it would redefine what the company is doing,** the sale will amount to a sale of “all or substantially all” of the company’s undertaking. Provided that the sale is not in the “ordinary course” of the company’s business, the directors would be obliged to seek shareholder approval of the sale via special resolution.
* **If the sale represents over 50% of assets but the company will be immediately replacing those assets** (e.g. buying a new building), the sale may be quantitatively large but not qualitatively significant to amount to a sale of “all or substantially all” of a company’s undertaking. In this case, the directors could go ahead with the sale of the assets w/o needing shareholder approval (sale of assets is a managerial power, as per *Automatic Self-Cleansing*).
1. **Is this sale in the “ordinary course” of the company’s business?**

It is not clear how the “ordinary course” of business test is different from the “all or substantially all” of the company’s undertaking, given that the qualitative part of the “all or substantially all” test looks at whether the sale is “tantamount to winding up” or “strikes at the heart of the business”. If a sale is found to qualitatively meet the test in s. 301(1), it is likely that it will also *not be in the ordinary course of the company’s business.*  If the directors must obtain shareholder approval via special resolution, pursuant to s. 301(1)(b), for the sale of all or substantially all of the company’s undertaking, and **the special resolution does not pass**, the directors cannot go through with the sale. However, if at least 2/3 of the present and voting shareholders vote in favour of the sale, the directors can either (a) go through with the sale, or (b) decide *not* to carry out the sale after all, using their own business judgment, as provided for in s. 301(4). |
| **The sale of the undertaking remains valid and enforceable for a third party *bona fide* purchaser for value (s. 301(3))** |
| **Subsection 301(3)** provides that the sale of the undertaking remains valid and enforceable for a ***bona fide* third party purchaser for value** ( = the third party purchaser of the undertaking), regardless of whether the company contravenes s. 301(1). This means that the arms-length party who has agreed to buy the company’s assets is protected in the event that the sale does not go through.  |
| **If a company contravenes s. 301(1), a shareholder/director/creditor can apply to a court for an order stopping the sale** |
| **Subsection 301(2)** provides that, if a company contravenes s. 301(1) (i.e. they go ahead with the sale of all or substantially all of the company’s undertaking, without seeking shareholder approval via special resolution), a shareholder, director, or creditor can apply to a court for an order to stop the sale.  |
| **No framework to impose personal liability on directors for violation of s. 301(1)** |
| Unlike a violation of s. 33 (a breach of the restrictions on the powers of a company), a violation of s. 301(1) is not listed in s. 154 as one of the violations of the Act for which the directors involved in the commission of can be held personally liable for. This means that there is no way to hold directors personally liable for a company’s contravention of s. 301(1).  |
| **Appraisal remedy is available to dissenting shareholders**  |
| **Subsection 301(5)** gives any shareholder the right to file a notice of dissent with respect to a special resolution approving a sale of the undertaking. Upon filing their dissent, a shareholder can apply as of right for the appraisal remedy under ss. 237-247. See remedy section. **Shareholders who apply for the appraisal remedy may not be entitled to other shareholder remedies (e.g. the oppression remedy)****Subsection 244(6)** suggests that a shareholder who claims the appraisal remedy may not be entitled to any other shareholder remedies, e.g. the oppression remedy: “A dissenter… may not vote, or exercise or assert any rights of a shareholder, in respect of the notice shares, other than under this Division.” |

# Duties of Directors & Officers

**Section 142(1)** provides that the directors of a company owe two duties:

1. A **fiduciary duty** (aka a duty of loyalty), set out in s. 142(1)(a): “a director… must… act honestly and in good faith with a view to the best interests of the company”;
2. A **duty of care**, set out in s. 142(1)(b): “a director… must… exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances”.

The duty of care and fiduciary duty are owed by directors *individually*, by each of the directors(unlike the powers of management, provided for in s. 136, which are only exercisable *collectively*). Further, the duty of care and fiduciary duty are owed by directors *to the company* (not to stakeholders, like shareholders, creditors or employees). This can create standing issues (= need to sue derivatively).

## Directors’ Duty of Care and Skill

|  |
| --- |
| **Directors’ Duty of Care and Skill** |
| **Common law duty of care (the starting point for discussion about directors’ duty of care)** |
| The leading case about directors’ duty of care is ***Re City Equitable***. *Re City Equitable* is generally regarded as establishing a gross negligence standard for directors. In other words, there is a relatively high threshold necessary to allege breach of a director’s duty of care. The three elements of the common law duty of care, as set out in *Re City Equitable*, are:1. A director is only obliged to exhibit the skill and care that can be reasonably expected from a person of his knowledge or experience. [issue: there is a very wide range of skills and care required of directors]
2. A director is not bound to give continuous attention to corporate affairs, and can justifiably act only intermittently.
3. A director can rely on delegated management and is not required to second-guess managerial recommendations/recommendations from an official with delegated authority unless put on inquiry.

The very lax standard of care established in *Re City Equitable* reflects courts’ general unwillingness to second guess business decision. The common law remedy for breach of duty of care is damages.  |
| **Statutory duty of care & directors’ liability** |
| Statutory duty of care**Section 142(1)(b)** of the BCBCA provides that *a director must “exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances”*. A director’s duty of care is *owed to the company*, not to any stakeholders like shareholders, creditors, or employees. A shareholder can only allege a breach of duty of care on behalf of a director after first obtaining leave to sue derivatively. ***Re Peoples*** essentially endorsed the lax gross negligence common law standard developed in *Re City Equitable,* but considered the meaning of the phrase “in comparable circumstances” (added to the statutory duty of care)*.* The Court in *Re Peoples* held that the appropriate standard of care for directors is a **purely objective standard** that takes into consideration the context/actual circumstances in which the director acted (not a more confusing “mixed objective-subjective” standard). **Section 142(2)** suggests that the statutory duty of care (and fiduciary duty) can be supplemented by the common law, and so are not intended to be exhaustive: “this section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a company”. **Section 142(3)** provides that *a director cannot contract out of her or her duties of care or loyalty*. Directors’ liability (an extension of the duty of care)**Section 154(1)** provides that, subject to s. 157, *a director who votes in favour of a resolution that authorizes a company to do any of the following violations of the Act is jointly and severally liable (i.e. personally liable) for any amount that the company must pay as a consequence of the violation*, including: compensation paid due to the commission of a restricted act contrary to s. 33(1). Section 154 acts as a kind of extension of the duty of care set out in s. 142(1)(b). **Section 154(5)** provides that a director is *deemed to have consented to a resolution if they are present at the meeting* where that resolution as passed, *unless the director enters a dissent*, which is recorded in the minutes of the meeting, put in writing by the director and provided to the secretary before the end of the meeting, or put in writing after the meeting and promptly delivered to the company’s delivery address or mailed by registered mail to the company’s registered office. **Section 154(8)** provides that, *even if a director was not present at the meeting where the resolution was passed,* they are deemed to have consented to that resolution (and will therefore be jointly and severally liable under s. 154(1)) if they fail to deliver or mail in a written dissent within 7 days of becoming aware of the passing of the resolution.  |
| **A director is not liable for breach of duty of care or s. 154 if he/she relied in good faith on financial statements, prof report, etc** |
| **Section 157** provides that a director is not liable under s. 154 and has not breached his or her duties of care and loyalty under s. 142(1) if the director relied, in good faith, on any of the following:* Financial statements prepared by the company’s auditor, s. 157(1)(a);
* A written report of a lawyer, accountant, engineer, appraiser, or other person whose profession lends credibility to a statement made by that person, s. 157(1)(b);
* A statement of fact represented to the director by an officer of the company to be correct, s. 157(1)(c);
* Any record, information, or representation that the court considers provides reasonable grounds for the actions of the director, whether or not the record, information, or representation was forged/inaccurate/fraudulently made, s. 157(1)(d).

In ***Re Peoples****,* the Wise brothers tried to argue that they had relied in good faith on information from Clement, their right-hand man who had designed the inventory procurement policy and recommended its adoption. The Quebec CA agreed that the brothers were entitled to this defence. However, the SCC pointed out that Clement only had a BA in commerce, was not a chartered accountant, and was not a member of any professional association that purported to identify its members as qualified to prepare financial statements (but had 15 yrs of professional experience in admin and finance). \*If you are a defendant director facing allegations of breach of duty under s. 142 or a liability under s. 154, try to argue that you relied in good faith on *something*, in order to try to escape liability thanks to s. 157! Caution: if you are an inside director (director + executive/senior officer), you will have a more difficult time arguing that your reliance on another’s expertise was reasonable.  |
| **The Business Judgment Rule**  |
| In addition to the statutory defences available to directors in s. 157, the business judgment rule has made bringing a claim against a director for breach of duty of care under s. 142(1)(b) very difficult. The SCC in *Re BCE* said of the business judgment rule: “It reflects the reality that directors… are often better suited to determine what is in the best interests of the corporation.” **\*The business judgment rule fuses the duty of care and the duty of loyalty, presuming that directors acted both in good faith (fiduciary duty) and on a reasonable basis (duty of care).** Three reasons for adherence by courts to the business judgment rule in Canada:1. Judges lack the skill to evaluate business decisions and cannot get these skills from experts because there is no common, clear standard of care for directors.
2. Judges place a premium on the risk of hindsight – with hindsight you can always evaluate what went wrong, but without the advantage of hindsight, decisions must be evaluated more generously.
3. Judges want to avoid putting too many obligations and restrictions and too much risk of liability on directors because this might dissuade them from taking on these positions.

The recommendations of an independent committee can protect directors from liability, thanks to the business judgment rule:In ***Pente Investments****,* the Ontario CA held that the business judgment rule applies, even in the case of hostile takeover bids, if an independent committee, acting in good faith, has “made an informed recommendation as to the best available transaction”. In ***Re BCE****,* BCE set up a special committee, the “Special Oversight Committee”, to investigate whether the amalgamation in question was in the best interests of the company. The committee recommended to the board that it was in the company’s best interests. The Court found that BCE had given consideration to the debenture holders’ interests, and that the deal as a whole met the test for fairness (no breach of duty of care or of fiduciary duty). [note: a bit confusing whether the SCC in *Re BCE* wanted consideration of other stakeholders’ interests to be obligatory or simply optional; in *Peoples,* the SCC said considering other stakeholders’ interests was optional… but not so clear after *Re BCE,* b/c conflicting statements] Possible tightening of the standard of care owed by directors, due to “reasonable alternatives” in business judgment rule (*Re BCE*)In ***Re BCE****,* the SCC suggested that courts may be more willing to evaluate the *reasonableness* of directors’ decisions going forward. This could mean that directors will be held to a higher standard of care going forward. The Court in *Re BCE* said: “The “business judgment rule” accords deference to a business decision, so long as it lies within a range of reasonable alternatives.”  |
| **Shareholders may vote to “approve” a director’s breach of duty of care (ratification)** |
| Ratification involves **the approval by shareholders, by a simple majority in a general meeting, of an act by the board or individual directors that constitutes a breach of fiduciary duty**. Ratification has the effect of exonerating the director or officer from liability for breach of duty of care. **Subsection 233(6)** of the BCBCA provides that a court, in deciding whether to make an order under s. 232 (derivative action) or s. 227 (oppression remedy), may take into account evidence of shareholders’ approval or possible approval of the director’s breach of duty owed to the company. At common law, ratification generally precluded shareholders from being able to sue derivatively, unless they could bring the director’s breach within one of the exceptions to ***Foss v Harbottle****,* i.e. fraud on the minority, an *ultra vires* act. In ***Beatty****,* the Privy Council held that interested directors were permitted to exercise their vote as shareholders to ratify a breach of duty of care, even if they were *controlling shareholders* and fiduciaries. ***Beatty*** involved a self-dealing transaction (sale of a steamship by one of the directors to the company), where a majority of shareholders (controlled by the self-dealing director) approved the transaction/ratified his breach of fiduciary duty. Now the common law has been replaced by the statutory derivative action (ss. 232-233), but the only relevant remnant of ratification is s. 233(6), whereby courts can take into account a simple majority vote by shareholders. The issue: taking into account shareholder votes is entirely discretionary. If a breach of duty is approved only because a majority of the voting shareholders were the alleged wrongdoers, or controlled by them, a court will likely ignore this vote (as the SCC suggested in *Beatty*). However, if it appears that the vote was independent, and not “poisoned” by the self-interest of the defendant directors voting as shareholders, a court might give the vote more consideration.  |
| **A court may relieve a director from liability if it finds the director acted *in good faith* (honestly + reasonably)** |
| **Section 234** of the BCBCA provides that, if a court finds that a director or officer is or may be liable for breach of duty of care/negligence, they may relieve that director or officer from liability “if it appears to the court that, despite the finding of liability, the person has acted honestly and reasonably and ought fairly to be excused”. [note: but s. 234 is a problematic provision b/c it gives directors a “second change” when there is already a lot of leeway given to them via the business judgment rule] |

## Directors’ Fiduciary Duty

|  |
| --- |
| **Directors’ Fiduciary Duty** |
| **A director’s fiduciary duty and to whom it is owed** |
| The fiduciary duty of directors developed in the common law and is now set out in **s. 142(1)(a)** of the BCBCA, which says that a director must “act honestly and in good faith with a view to the best interests of the company”. A shareholder can only allege a breach of fiduciary duty on behalf of a director after first obtaining leave to sue derivatively. The SCC in ***Re BCE***held that this fiduciary duty is owed to the corporation: “It is the duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors’ duty is clear – it is to the corporation”.  |
| **Self-dealing = breach of a director’s fiduciary duty (\*there must be a contract or transaction for self-dealing to apply)** |
| ***director/officer makes a contract/transaction with the company!***A self-dealing transaction involves **a contract or transaction concluded between a director or officer of a corporation and the corporation itself**, either directly or through the directors’ interest in another entity. Self-dealing amounts to a breach of a director’s fiduciary duty. E.g. sale of an asset by a director to the corporation, where the price of the asset exceeds the asset’s fair market value; sale of an asset by the corporation to a director, where the price of the assets is below fair market value. The conflict of interest arises b/c the director, in one capacity, will want to get the best deal, but must, in their capacity as a fiduciary for the company, get the company the best deal. The price differential in either of these cases is an unbargained diversion of wealth from the corporation (shareholders) to the interested party (the director or officer). Originally, at common law, contracts or transactions that involved a direct or indirect conflict of interest were voidable and amounted to a breach of fiduciary duty. Statutes have modified this rigid rule to permit certain contracts/transactions between a director/officer and the corporation, provided that the contract/transaction is beneficial to the corporation and that certain. The modification recognizes that, in some cases, the best price or possibly the only source of supply is available either indirectly or directly through a related director or officer. ***Does the director or senior officer have a disclosable interest in a contract or transaction?*****Section 147** provides that a director or senior officer has a “disclosable interest in a contract or transaction” if the director/senior officer is the director or senior officer of the other company w/ whom the contract/transaction is being entered into, if the director/senior officer has a “material interest” in that company, or if the director/senior officer is a party to a material contract or material transaction. In *Zysko,* the Court found that a material interest was not just a financial interest, but anything more than a *de minis* interest. In *Exide Canada,* the Court held that a close personal relationship b/w a director and a person negotiating a contract w/ the corporation was a material interest that had to be disclosed. ***If a director or senior officer has a disclosable interest, they must disclose the “nature and extent” of that interest to directors*****Section 153** provides that a director or senior officer must disclose the “nature and extent” of the conflict of interest to the other directors “promptly’, either after the conflict of interest arises, or if the conflict of interest has already arisen, as soon as the director or senior office assumes their position w/ the company. As per s. 148(3), this disclosure must be either evidence in a consent resolution, in the minutes of a meeting, or in any other record deposit in the company’s records officer. Based on the statute’s language, it is not sufficient for a director or senior officer to merely mention that they have an interest – they must state what the interest is and how far it goes. ***A director or senior officer is liable to account to the company for any profits, unless the contract or transaction has been approved by shareholders or directors, a court has ordered otherwise, or the contract or transaction was entered into before director/officer*** **Section 148** provides that, unless a court orders otherwise, a director or senior officer is liable to account to the company for any profit that they earn as a result of contract or transaction in which that director or senior officer has a disclosable interest, *subject to these exceptions:* * **APPROVAL BY DIRECTORS: Subsection 148(2)(b)** provides that a director/senior officer is not liable to account for any profits earned as a result of the transaction if, after the director/senior officer has disclosed the nature and extent of their conflict of interest to the board, the directors have approved the contract or transaction in accordance w/ s. 149. **Section 149** provides that a contract or transaction in respect of which a director or senior officer has disclosed that they have a conflict of interest in can be approved either by directors, or by shareholders through a special resolution.
	+ **Subsection 149(2)** provides that a director who has a conflict of interest *cannot vote* to approve the contract or transaction (unless, as per s. 149(3), *all* of the directors have a disclosable interest in the contract/transaction).
* **APPROVAL BY SHAREHOLDER SPECIAL RESOLUTION: Subsection 148(2)(c)** provides that a director/senior officer is not liable to account for any profits earned as a result of the transaction if, after the director/senior officer has disclosed the nature and extent of their conflict of interest to shareholders, the shareholders have approved the contract or transaction via special resolution in accordance w/ s. 149. **Section 149** provides that a contract or transaction in respect of which a director or senior officer has disclosed that they have a conflict of interest in can be approved either by directors, or by shareholders through a special resolution.
* **CONTRACT/TRANSACTION ENTERED INTO BEFORE DIRECTOR/OFFICER BECAME DIRECTOR/OFFICER: Subsection 148(2)(d)** provides that a director/senior officer is not liable to account for any profits earned as a result of the transaction if:
	+ The company entered into the contract/transaction before the director/senior officer became a director/senior officer;
	+ The director/senior officer disclosed their conflict of interest to the directors or shareholders; and,
	+ The director/senior officer has not participated in (and in the case of a director, voted on) any decision or resolution that relates to the contract or transaction.

***If any of these statutory requirements are not met, the conflict of interest is a breach of fiduciary duty > what can a shareholder do?*** If any of the statutory requirements are not met (disclosure, failure to account for profits when required, etc), the director or senior officer’s conflict of interest amounts to a breach of the fiduciary duty that they owe the company, and the contract is voidable at the option of the corporation. If this happens, and the company refuses to sue the director or officer itself, a shareholder or other party may apply to sue the director/officer for breach of fiduciary duty derivatively, on behalf of the company. Alternatively, a shareholder, director or officer can apply to the court, under s. 150(2), for an order that the contract or transaction be set aside (or that a director/senior officer account for profits). ***If court finds K was “fair and reasonable to the company”, court may order that director/senior officer not liable to account for profits*****Subsection 150(1)** provides that, if a court finds that a contract or transaction in which a director or senior officer had a conflict of interest was “fair and reasonable to the company”, the court may order that the director or senior officer is not liable to account for any profit that they acquire as a result of the contract or transaction. Any director, senior officer or shareholder, or the company, can apply for this order. ***If court finds that K was “not fair and reasonable to the company”, court can make a variety of orders (unless K was approved!)*****Subsection 150(2)** provides that, unless a contract or transaction was approved by directors or shareholders in accordance with s. 148(2), if a court determines that the contract or transaction was “not fair and reasonable to the company”, the court had order that: (a) the company *not* enter into the proposed contract or transaction, (b) the director or senior is liable to account for any profits that have accrued to them under the contract or transaction, or (c) make any other order that the court deems appropriate. Any director, senior officer or shareholder, or the company, can apply for this type of order.***Contract or transaction is not invalid merely b/c director/officer has conflict of interest, failed to disclose, or was not approved*****Section 151** provides that a contract or transaction is not invalid merely b/c a director or senior officer has a direct or indirect interest in it, the director or senior officer has failed to disclose their conflict of interest, or if the directors or shareholders have not approved the transaction or contract.  |
| **Taking a corporate opportunity = breach of a directors’ fiduciary duty**  |
| ***director/officer independently takes advantage of an opportunity that the company also has an interest in!***A corporate opportunity arises **when a director independently invests in a contract or transaction that the corporation also has an interest in investing in**. Like self-dealing, corporate opportunity can involve the unbargained diversion of wealth from the corporation (shareholders) to the interested party (the director or officer). A director or senior officer may acquire an asset, establish a business, or enter into a contract in pursuit of their own self-interest, when they should have sought that valuable investment opportunity for the corporation. The taking of a corporate opportunity amounts to a breach of a directors’ fiduciary duty. In ***Cook v Deeks,*** three directors were negotiating with a railway to obtain a construction contract for the corporation, but then decided to obtain the contract for themselves instead. The Court found that the directors had breached their fiduciary duty to the corporation b/c they actively promoted their own interests at the expense of the corporation. The Court further held that the directors were liable to account for the profits they had obtained through the construction contract to the corporation. ***Regal*** stands for the proposition that, **if directors make a profit “by reason and only by reason of the fact that they were directors… and in the course of execution of that office,” those directors are liable to the company for those profits**.In *Regal,* the directors of a company invested in a subsidiary in order to finance the purchase of two cinemas and made a profit on the subsequent sale of shares of that subsidiary. The Court in *Regal* held that the directors should be accountable to the company for that profit. The scope of the test for corporate opportunity from *Regal* was narrowed in *Peso.* ***Peso*** stands for the proposition that, **if a corporation rejects an offer, one of its directors can, acting in his or her own capacity, accept the same offer and not be liable to the corporation to account for profits**. In *Peso,* a company refused an opportunity to buy mineral claims due to financial strain, and then one of its directors formed a company to buy those mineral claims himself. The Court in *Peso* held that the director had not breached his fiduciary duty to the company and should not be held liable to account for profits made from claims. The Court also took into consideration the fact that the company had many opportunities to buy similar claims, the company had limited funds available, and the director had forgotten that he heard about the claims in question in his capacity as a director. In *Canaero,* the SCCdeveloped a more expansive test for corporate opportunity. ***Canaero*** stands for the proposition that, **where a director or senior officer takes advantage of a corporate opportunity that a company has an ongoing interest in, that director or senior officer is liable for breach of fiduciary duty and must account to the company for any profits mad**e. The SCC distinguished the situation in *Canaero* from the situation in *Peso.* The Court said: “the fiduciary relationship goes at least this far: a director or senior officer…is precluded from obtaining for himself, either secretly or without approval of the company…,any property or business advantage either belonging to the company or for which it has been negotiating”. Further, the SCC suggested that analysis of a corporate opportunity should determine the answers to two questions:1. **Does the opportunity belong to the corporation, considering how closely it is connected to the corporation?**
* Maturity factor: Did the corporation do anything to develop the opportunity? How close was it to acquiring the opportunity?
* Specificity factor: How closely did the opportunity appropriated resemble the opportunity the corporation worked on?
* Significance factor: If acquired, would the opportunity represent a major component of the corporation’s business? Was the opportunity a unique one, or merely one of many? (*Peso*)
* Public or private factor: Was the opportunity publicly advertised or widely known? Did the director/officer only have access to the opportunity by virtue of their position? (*Regal*)
* Rejection factor: Was the opportunity rejected by the corporation in good faith, before the fiduciary acquired it? (*Peso*)
1. **What is the relationship of the fiduciaries to the opportunity?**
* Fiduciary’s position: The higher up the fiduciary in the organization of a corporation, the higher the level of fiduciary duty.
* Fiduciary’s knowledge: How much knowledge did the fiduciary acquire about the opportunity thanks to their position?
* Fiduciary’s use of position: To what extent did the fiduciary use their position to appropriate the opportunity?
* Time after termination: How long after they terminated their relationship with the corporation did the former fiduciary take the opportunity?

In *Canaero,* two senior officers left a company and started their own company, in direct competition with their former employer. The officers’ new company beat their former company in a bid for a mapping contract. The SCC found the officers liable for breach of fiduciary duty. Note: the fiduciary duty in *Canaero* derived from the common law, since the statutory fiduciary duty (s. 142) only applies while a person is a director or officer. **US Cases:**  |
| **Competition = breach of a director’s fiduciary duty** |
| ***director/officer has a (potential) conflict of interest!***It is not a breach of fiduciary duty for a director or senior officer to terminate their relationship with a company, and then go into competition with it. However, there may be a breach of fiduciary duty where a director or senior officer is competing with the company while they remain in their capacity as a fiduciary. Competition arises where a director has a conflict of interest, usually in one of the following fact patterns:* 1. A director serving on the boards of two competing corporations (see *Mashonaland* and *Abbey Glen*).
	2. A director or officer operating a business that competes with the corporation.
	3. A director or officer having a material interest in an entity that competes with the corporation.

In ***Mashonaland****,* a director served on the boards of two competing corporations. The Court found that the director had not breached his fiduciary duty to the plaintiff company. According to *Mashonaland,* a director may sit on the board of two competing companies without breaching his fiduciary duty, provided that the companies’ charters do not prohibit doing so. To establish breach of fiduciary duty, the plaintiff company must show that the director disclosed information obtained confidentially by him as a director of the company to the rival.However, in ***Abbey Glen****,* the Court disagreed w/ the proposition in *Mashonaland,* holding that, even where there is no question of a director misusing confidential information, there may be cases where a director breaches his or her fiduciary duty to Company A simply by acting as a director of Company B, especially where the companies are in the same line of business and where acting as a director of Company B might harm Company A. **Section 153** of the BCBCA modifies the common law by setting up a **mandatory disclosure obligation**. A director must disclose:* If the director is on the board of another company;
* If the director owns any property that could result in a conflict of interest;
* If the director operates another business in competition with the company; or,
* If there is any material interest in contracts between the companies.

Subsection 153(1) provides that the director must disclose “the nature and extent of the conflict”. Subsection 153(2) provides that this disclosure must be made promptly, either after the individual becomes a director/senior partner or, if they are already a director/senior partner, after the conflict of interest arises, and this disclosure must be in a consent resolution, the minutes of a meeting, or in any other record deposited at the company’s records office (as per s. 148(3)). A failure to comply with this statutory disclosure requirement would amount to a breach of a director’s fiduciary duty.  |
| **Hostile takeovers and defensive tactics by target management** |
| A hostile takeover bidinvolves **an outside acquirer obtaining control over a target corporation without the assent of target management**. This can happen when the acquirer makes a bid to target shareholders for some or all of the voting shares in the target company, and the requisite number of shares get tendered by the target shareholders to the acquirer in the required period of time. Target management tends to fiercely resists hostile takeovers b/c they fear the loss of their jobs and reputational capital. Target management can use a variety of defensive tactics to deter or prevent a hostile takeover, but these tactics are constrained by directors’ fiduciary duty.The **poison pill** is the most common defensive tactic used by target management in response to a hostile takeover bid. The poison pill involves two components: the issuance of rights to shareholders (rights = the option to buy more shares in the company), and a flip-in event (which occurs when any shareholder, i.e. the acquirer, obtains more than a stated percentage of the company’s stock; the flip-in event triggers shareholders rights, and the acquirer is the only shareholder who cannot exercise its rights). Prior to *Teck v Millar,* Canadian courts applied the “improper purpose” doctrine to the issuance of shares into friendly hands: if the issuance of shares was done with the view of defeating an intended acquisition, the issuance was found to have been made with an improper purpose and struck down; if the issuance was found to be *bona fide* and unconnected to the issue of who controlled the company, it could stand. In ***Teck v Millar****,* the BCSC held that directors could issue shares to frustrate a takeover bid **provided that they reasonably believed that it was in the best interests of the corporation to do so:** “If they decide, on reasonable grounds, a take-over will cause substantial damage to the company's interests, they are entitled to use their powers to protect the company.”If the issuance of shares was found to *not* be in the best interests of the corporation, this would amount to a breach of fiduciary duty by the directors. In *Teck v Millar,* the target company’s controlling director genuinely believed that a merger with Canex/Placer was better for the company’s development than a merger w/ Teck. |
| **A director is not liable for breach of fiduciary duty if he/she relied in good faith on financial statements, professional report, etc** |
| **Section 157** provides that a director is not liable under s. 154 and has not breached his or her duties of care and fiduciary duty under s. 142(1) if the director relied, in good faith, on any of the following:* Financial statements prepared by the company’s auditor, s. 157(1)(a);
* A written report of a lawyer, accountant, engineer, appraiser, or other person whose profession lends credibility to a statement made by that person, s. 157(1)(b);
* A statement of fact represented to the director by an officer of the company to be correct, s. 157(1)(c);
* Any record, information, or representation that the court considers provides reasonable grounds for the actions of the director, whether or not the record, information, or representation was forged/inaccurate/fraudulently made, s. 157(1)(d).

In ***Re Peoples****,* the Wise brothers tried to argue that they had relied in good faith on information from Clement, their right-hand man who had designed the inventory procurement policy and recommended its adoption. The Quebec CA agreed that the brothers were entitled to this defence. However, the SCC pointed out that Clement only had a BA in commerce, was not a chartered accountant, and was not a member of any professional association that purported to identify its members as qualified to prepare financial statements (but had 15 yrs of professional experience in admin and finance). \*If you are a defendant director facing allegations of breach of duty under s. 142, try to argue that you relied in good faith on *something*, in order to try to escape liability thanks to s. 157! Caution: if you are an inside director (director + executive/senior officer), you will have a more difficult time arguing that your reliance on another’s expertise was reasonable. |
| **Shareholders may vote to “approve” a director’s breach of fiduciary duty (ratification)** |
| Ratification involves **the approval by shareholders, by a simple majority in a general meeting, of an act by the board or individual directors that constitutes a breach of fiduciary duty**. Ratification has the effect of exonerating the director or officer from liability for breach of their fiduciary duty. **Subsection 233(6)** of the BCBCA provides that a court, in deciding whether to make an order under s. 232 (derivative action) or s. 227 (oppression remedy), may take into account evidence of shareholders’ approval or possible approval of the director’s breach of duty owed to the company. At common law, ratification generally precluded shareholders from being able to sue derivatively, unless they could bring the director’s breach within one of the exceptions to ***Foss v Harbottle****,* i.e. fraud on the minority, an *ultra vires* act. In ***Beatty****,* the Privy Council held that interested directors were permitted to exercise their vote as shareholders to ratify a breach of fiduciary duty, even if they were *controlling shareholders* and fiduciaries. ***Beatty*** involved a self-dealing transaction (sale of a steamship by one of the directors to the company), where a majority of shareholders (controlled by the self-dealing director) approved the transaction/ratified his breach of fiduciary duty. Now the common law has been replaced by the statutory derivative action (ss. 232-233), but the only relevant remnant of ratification is s. 233(6), whereby courts can take into account a simple majority vote by shareholders. The issue: taking into account shareholder votes is entirely discretionary. If a breach of duty is approved only because a majority of the voting shareholders were the alleged wrongdoers, or controlled by them, a court will likely ignore this vote (as the SCC suggested in *Beatty*). However, if it appears that the vote was independent, and not “poisoned” by the self-interest of the defendant directors voting as shareholders, a court might give the vote more consideration.  |
| **A court may relieve a director from liability if it finds the director acted *in good faith* (honestly + reasonably)** |
| **Section 234** of the BCBCA provides that, if a court finds that a director or officer is or may be liable for breach of fiduciary duty, they may relieve that director or officer from liability “if it appears to the court that, despite the finding of liability, the person has acted honestly and reasonably and ought fairly to be excused”. [note: but s. 234 is a problematic provision b/c it gives directors a “second change” when there is already a lot of leeway given to them via the business judgment rule] |
| **Minority shareholders may apply to sue derivatively (on behalf of company)**  |
| If the directors of a company refuse to bring an action against a director or officer for breach of fiduciary duty, minority shareholders can apply (as of right) to bring a derivative action under ss. 232 and 233, in the company’s name. See “derivative action” table. Directors may also apply to sue derivatively as of right; creditors (“appropriate persons”) must apply for standing before they can apply to sue derivatively.  |
| **Minority shareholders can apply for the oppression remedy (personal remedy)** |
| In addition to applying to sue derivatively, a minority shareholder can apply as of right for the personal oppression remedy under s. 227 where a director of officer has breached the fiduciary duty that they owe to the company. See “oppression remedy” table.  |

# Shareholders’ Rights

## Shareholders’ Voting Rights

The right to vote is a fundamental right of shareholders. **Section 173** of the BCBCA provides that, unless a company’s Notice of Articles or Articles provide otherwise, a shareholder is entitled to one vote for each share that they hold, and are entitled to vote either in person or by proxy. Further, **s. 174** provides that, unless the company’s Charter provides otherwise, a shareholder or proxy holder may participate in a shareholders’ meeting by telephone or other communications medium, so long as all the shareholders and proxy holders participating in the meeting are able to communicate with one another.

Shareholder voting is a device that serves two functions:

1. **Shareholder preferences.** Shareholder voting is a device through which shareholders can express their preferences related important business decisions for the company; and,
2. **Managerial accountability.** Shareholder voting is a device for controlling managerial diversion, slack, excess, ineptitude, risk-shifting. Shareholder voting provides oversight to prevent managers’ departure from assigned role to maximize corporate profits/act in corporation’s best interests.

Shareholders have the statutory power to:

1. **Vote for directors**; and,
2. **Vote in respect of transactions that constitute fundamental changes to a corporation**, including: sale of undertaking; a change to the company’s Notice of Articles or Articles.

But empirical evidence suggests that shareholder voting has little to no positive effect on corporate activity. Most shareholders are not able to attender shareholders’ meetings, so vote by proxy instead. Also, nominations for directors are put forth by management and tend to go unopposed. Finally, the problem of “rational shareholder apathy” (the cost of becoming sufficiently informed to vote effectively is not worth it for most shareholders).

## Shareholders’ Meetings

### Types of shareholders’ meetings

There are two types of shareholder meetings:

1. **Annual shareholder meetings**: A company must hold an annual meeting for shareholders every year. There must be three items of business on the agenda for this meeting: (1) election of directors, (2) appointment of auditors, and (3) the presentation of financial statements and the auditor’s report to shareholders. In addition to these three items of business, shareholders also have the right to submit proposals to be discussed at the meeting.
2. **Special shareholder meetings**: If an important business matter arises between annual meetings, directors may call a special meeting of shareholders. Special meetings are typically held when management is contemplating a fundamental change that requires shareholder approval (special resolution).

### Shareholders may submit proposals (\*applies only to public companies)

Typically, nominations for directors, proposed changes to the company’s Charters, and proposals related to the adoption of fundamental changes originate from management/the board of directors. However, **s. 188** permits shareholders to make proposals to be considered at shareholder meetings, including:

* A proposal that the company’s Notice of Articles or Articles be amended (limited to shareholders w/ at least 1% of shares, or at least 1% of a class of voting shares);
* A nomination for the election of directors (limited to shareholders w/ at least 5% of shares, or at least 5% of a class of voting shares); and,
* Other residual proposals (limited to shareholders w/ at least 1% of shares, or at least 1% of a class of voting shares).

**Subsection 187(1)** defines “proposal” as “a written notice setting out a matter that the submitter wishes to have considered at the next annual general meeting of the company”.

Under **s. 189** of the BCBCA, when a valid proposal is received, management must circulate shareholder proposals to shareholders, except in certain circumstances where they may refuse to do so (set out in s. 189(5)), including if:

* The proposal “does not relate in a significant way to the business or affairs of the company, s. 189(5)(d):
* It appears that the primary purpose of the proposal is to secure publicity, enforce a personal claim, or redress a personal grievance against the company or its directors/officers/security holders, s. 189(5)(e);
* The proposal has already been substantially implement, s. 189(5)(f);
* The proposal, if implemented, would cause the company to commit an offence, s. 189(5)(g); or,
* The proposal deals with matters beyond the company’s power to implement, s. 189(5)(h).

In ***Medical Committee for Human Rights,*** management refused to circulate a shareholder proposal on the grounds that it failed to relate to the ordinary business of the corporation. The proposal was submitted by the Medical Committee for Human Rights (a shareholder), and proposed that the company stop selling napalm to buyers who could not give reasonable assurance that the chemical would not be used on human beings.

In ***Varity Corp,*** a farm equipment company applied for an exemption from the proposal circulation requirement (the ability to apply for this type of court order is provided for in s. 191(4) of the BCBCA) on the basis that the shareholder proposal was submitted “primarily for the purpose of promoting general economic, political, racial, religious, social or similar cause”. The Court held that the primary purpose of the shareholder’s proposal was the abolition of apartheid in South Africa, and therefore found that the exemption applied in this case. **Another example of a company being exempt from the requirement to circulate a proposal b/c it promotes a general economic/political/social cause.**

In ***Michaud****,* a shareholder submitted a proposal which, among other things, proposed capping the compensation of bank executives at 20 times the average salary of bank employees and increasing the number of women nominated for election as directors. The two banks declined to circulate this proposal, on the basis that it was primarily intended to redress a personal grievance, to secure publicity, and to promote general economic, political, and social cause. The Court disagreed, and found that the banks were not exempt from the requirement to circulate the shareholder’s proposal b/c the statutory exemptions did not apply and this was the shareholder’s only way of communicating with other shareholders (preventing this communication was a prejudice to the shareholder). **An example of a court refusing to grant/uphold an exception to the statutory requirement that a company circulate to all shareholders any proposal submitted by a shareholder.**

**Subsection 191(1)** provides that, if management refuses to circulate a proposal on the basis of s. 189(5), the company must send to the submitter/shareholder, within 21 days of receiving the proposal, written notice of the company’s decision and a written explanation of the reasons for that decisions.

**Subsection 191(2)** provides that, upon receiving notice under s. 191(1), the submitter/shareholder can apply to a court for review of the company’s decision. If a court finds that the company did not have proper grounds to refuse the proposal, the court can order that the company comply with the requirement to circulate the proposal, that the company reimburse the submitter/shareholder for all reasonable expenses incurred in relation to the application, or that the company hold, at its own expense, a general meeting for the purpose of considering the proposal.

The effect of a shareholder proposal depends on the type of shareholder proposal:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Proposal to amend Charter** | **Nomination for election of directors** | **Other residual proposals** |
| **Requirements** | Shareholder must be a registered or beneficial owner, and must have at least 1% of shares, or at least 1% of a class of voting shares.  | Shareholder must be a registered or beneficial owner, and must have at least 5% of shares, or at least 5% of a class of voting shares.  | Shareholder must be a registered or beneficial owner, and must have at least 1% of shares, or at least 1% of a class of voting shares. |
| **Effect** | If proposal is adopted by shareholders at the meeting (special resolution), the proposal is binding.  | Nomination for the election of directors.  | Directors have the exclusive power to manage or supervise management of the corp so effect of proposal in residual category is circumstance-dependent. |

### Shareholders may requisition a shareholders’ meeting (\*applies to public and private companies)

Shareholders can requisition directors to call a meeting under **s. 167** of the BCBCA. This right is limited to shareholders who collectively hold 5% or more of the issued voting shares in the corporation, as per s. 167(2).

When a valid requisition is received (meaning, in the proper form, as set out in s. 167(3)), directors must, subject to certain exceptions set out in s. 167(7), call a general shareholders’ meeting within 21 days of receiving the requisition, pursuant to s. 167(8), giving at least 4 months’ notice of the meeting.

The exceptions set out in s. 167(7) include:

* The directors have already called a general meeting and have sent notice of that meeting to shareholders in accordance with the statute, s. 167(7)(a) [but for this exemption to apply, there must be a reasonable change that the business stated in the requisition will be addressed at that meeting, as per *Air Industry Revitalization* – if no reasonable chance, exception does not apply];
* If “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”, s. 167(7)(c);
* If “it clearly appears that the primary purpose for the requisition is (i) securing publicity, or (ii) enforcing a personal claim or redressing a personal grievance against the company or any of its directors, officers or security holders”, s. 167(7)(d);
* If the business stated in the requisition has already been substantially implemented, s. 167(7)(e);
* If the business stated in the requisition, if implemented, would cause the company to commit an office, s. 167(7)(f); and,
* The requisition deals with a matter beyond the company’s power to implement, s. 167(7)(g).

If directors fail to call a requisitioned meeting within 21 days (e.g. b/c it is likely that, at the meeting, shareholders will vote to remove current directors and elect new ones; or, in the context of a takeover bid where the acquirer can use its shares in the company to requisition a meeting), *any one of the requisitioning shareholders may send notice of a general meeting themselves (provided that that individual shareholder holds at least 2.5% of the issued voting shares)*, pursuant to s. 167(8).

In ***Air Industry Revitalization****,* AirCo sought to take over Air Canada. The Air Canada board called a special meeting in August 1999 for January 2000. Later in August 1999, AirCo and other shareholders (comprising 5% of the voting shares in Air Canada) requisitioned the board to call a special meeting in November 1999, in order to approve the takeover bid, implement changes to the Articles, and alter control of the board. The board rejected this requisition. AirCo brought an application for a court order requiring Air Canada’s directors to requisition this meeting. The Court found that AirCo’s requisition was in the valid form for a proper purpose, therefore Air Canada’s directors were obliged to call the meeting. The Court further found that the “we’ve already called a shareholder meeting!” exception did not apply, because the January 2000 meeting was not intended to deal with the business in AirCo’s requisition. The Court held that AirCo and the other requisitioning shareholders could call the meeting themselves, so the Court declined to make an order requiring that the board requisition the meeting. The Court said: “The bare-knuckled skirmishes of corporate restructuring warfare are best resolved by the combatants themselves to the extent possible… in the public domain, rather than in the courtroom.”

***What is the effect of a vote at a requisitioned meeting?*** If shareholders vote on a matter at the requisitioned meeting that can be reasonably construed to be within the managerial power of the board (provided for in s. 136, and in the company’s Charter), even if a resolution passes in favour, the resolution is *not binding on the board*. Think back to *Automatic Self-Cleansing,* wherein a vote passed by a simple majority of shareholders could not compel the board to sell the company’s assets, b/c the decision to do so was a managerial power. Exception: if the matter can be passed by a special resolution of shareholders, the board would be bound to implement that special resolution (e.g. change to Articles).

***If the board refuses to requisition, and you do not have the requisite percentage, 2.5%, of shares to requisition a meeting yourself, what can you do?***Apply to the court under s. 186 for an order that a meeting of the shareholders be called. However, whether a court will make such an order or not is discretionary (whereas, the right to requisition a meeting provided you have the requisite percentage of shares is *as of right*).

### Shareholders may vote to remove directors (\*applies to public and private companies)

**Subsection 128(3)** of the BCBCA provides that shareholders can remove a director before the expiration of the director’s term of office *by special resolution,* or if the company’s Charter provides that a director can be removed by shareholders via a vote passed by less than a special majority or via some other method.

**Subsection 131(a)** provides that a vacancy among directors as a result of a removal under s. 128(3) can be filled by the shareholders at the shareholders’ meeting at which the director was removed, or otherwise by the shareholders or by the remaining directors.

# Shareholders’ Remedies

## The Derivative Action (where director has breach duty of care or fiduciary duty)

|  |
| --- |
| **THE STATUTORY DERIVATIVE ACTION, ss. 232 and 233** |
| If a board of directors refuses to bring a claim in the company’s name against a director or senior officer for breach of a duty owed to the company, a minority shareholder or other party may bring an application to sue derivatively. ***The statutory derivative action provisions are exhaustive***Early on, courts determined that ss. 232 and 233 are exhaustive; in other words, the exceptions to the rule from *Foss v Harbottle* and the common law derivative claim no longer apply.  |
| **1. Is the nature of the claim such that only the corporation has standing to bring it?**  |
| Leave to sue derivatively is only sought when the minority shareholder (or the other person with standing) is alleging a breach of a duty by directors or senior officers of a corporation that the directors or senior officers *owe to the corporation*: the fiduciary duty or duty of care set out in s. 142.  |
| **2. Does my client have standing to bring a derivative action?**  |
| Section 233 provides that the following parties have standing to bring a derivative action on behalf of a corporation:* **Directors** (as of right)
* **Shareholders**, including beneficial owners of shares (as of right)
* **“Appropriate persons”** (with leave)
	+ Creditors are the most obvious and likely category of applicants who will be granted leave to sue, as in a *BCE* situation; but courts, before *BCE*, were reluctant to allow secured creditors to sue, because their rights were already so protected. Consequently, secured creditors likely to have more difficulty getting standing, compared to unsecured creditors.
 |
| **3. Has my client met the four grounds for bringing an application to sue derivatively?**  |
| Under s. 233(1), four grounds must be established in any application to bring a derivative claim: 1. **The applicant has made a “reasonable effort” to get the corporation to sue.**
* In *North West*, the Court held that the applicant’s attempt to requisition a meeting of shareholders to authorize litigation proceedings (the motion was defeated at this meeting) was sufficient “reasonable effort” to get the company to sue.
1. **The applicant has given notice to the company.**
* In *Bellman,* the Court held that, despite the applicants’ failure to include one ground of relief, the applicants’ intent to sue derivatively was clear and so the applicants gave adequate notice to the company.
1. **The applicant is bringing this derivative claim in good faith.**
* In *Bellman,* the Court held that applicants could bring both a derivative claim (on behalf of the company) and an oppression claim (in their personal capacity), and that doing both did not amount to vexatious conduct.
1. **Bringing a derivative action is in the “best interests” of corporation (\*the most important ground!).**
* In *North West* (when the words “prima facie” rather than “best interests” appeared in the statute), the Court held that “prima facie” simply meant whether brining a derivative action was *prima facie* in the company’s best interests.
* In *Bellman,* the directors set up a **litigation committee** to consider whether it was in the company’s best interests to bring an action in the company’s name, before rejecting the minority shareholders’ request. The Court in *Bellman* found that this litigation committee was flawed for two reasons: (1) there was evidence that the members of the committee were not independent of the directors who were implicated in the allegedly illegal financing, and (2) the committee did not consider all of the issues raised by the minority shareholders. However, *had the litigation committee been truly independent and considered scrupulously all of the issues raised by the minority shareholders,* it is possible that a court might defer to the business judgment of the litigation committee. One American authority suggests that, when faced w/ a squeaky clean litigation committee, courts will respect the recommendation of that committee. Another American authority suggests that, even with a squeaky clean litigation committee, courts will retain their discretion to determine whether it is in the best interests of the company to allow minority shareholders to sue derivatively.
 |
| **4. Have the majority shareholders ratified the director or senior officer’s breach of duty?**  |
| Ratification involves the approval by shareholders, by a simple majority in a general meeting, of an act by the board or individual directors that constitutes a breach of fiduciary duty. Ratification has the effect of exonerating the director or officer from liability for breach of duty of care. **Subsection 233(6)** of the BCBCA provides that a court, in deciding whether to allow an application to sue derivatively under s. 232, may take into account evidence of shareholders’ approval or possible approval of the director’s breach of duty owed to the company. The Court in *North West* suggested that, in order to be taken seriously by a court, ratification must be a vote by *independent shareholders* (not the defendant directors themselves, trying to “rubber stamp” their wrongdoing). A “rubber stamp” ratification will not be taken seriously.  |
| **5. What happens if the application to sue derivatively is successful?**  |
| If an application to sue derivatively is successful, the court will “lend” the company’s name to the applicant and a trial will proceed on the merits (the applicant must try to establish the alleged breach of fiduciary duty/duty of care). The cause of action belongs to the corporation. The court can appoint one of the applicants as a **“control person”** for the proceedings. The control person becomes the representative of the group, and can approach the court for directions wrt to how the trial will unfold, as set out in **s. 233(4).** Section **233(3)** also enables the control person to apply for the judge for interim awards of costs, including legal fees from during the conduct of the proceedings. This could be very important in making this kind of civil proceeding viable when it otherwise might not be financially viable. Section **233(5)** requires that any settlement of the matter, between the claimants and the directors, must be approved the court (this provision was copied from US law and is aimed at preventing “strike suits”). Section **236(4)** provides that the applicant may be required to provide security for costs. If unsuccessful, the applicant may have to pay.  |

## The Oppression Remedy (where there is some unfairness; may be in combo w/ derivative action)

|  |
| --- |
| **THE OPPRESSION REMEDY, s. 227**  |
| The oppression remedy represents an attempt to give the courts a broad-based equitable jurisdiction, which is accessible as of right to shareholders (and now others), to address fairness concerns and make orders. The oppression remedy is a personal remedy that does not limit an applicant’s access to other forms of relief. As per *Bellman,* a minority shareholder can bring both an application to sue derivatively and an oppression remedy application.  |
| **1. *Does my client have standing to bring an oppression remedy application?***  |
| Under s. 227, shareholders have standing as of right to bring an oppression remedy application, and a court may grant standing to other “appropriate persons” (e.g. creditors, directors, the widow of a shareholder, a trustee in bankruptcy). In *First Edmonton Place,* the Court held that a lessor was not an “proper/appropriate” person to be granted leave to seek the oppression remedy. Note: as per *Re BCE,* courts will be more willing to grant standing to unsecured creditors, rather than secured creditors. Note: There have been no cases where employees of a company have been granted the right to seek the oppression remedy. This might be b/c employees have enough protection under labour regulations and the terms of their own contract for employment.  |
| **2. *Does my client meet the substantive grounds for bringing an oppression remedy application?***  |
| **a. *What were my client’s reasonable expectations?*** |
| The SCC in *Re BCE* set out a three-part test for evaluating the substantive grounds of an oppression remedy application. First, the SCC said that a court must gauge, and the applicant must establish, what the applicant’s reasonable expectations were. This will be partly dependent on whether the company was closely-held or widely-held. In *Diligenti,* the applicant was a co-found and both a director and a shareholder of an Okanagan restaurant (= a closely-held company). The other directors/co-founders, in their capacity as shareholders, passed a special resolution to remove the applicant as a director. The applicant sought the oppression remedy. The BCCA, building on the House of Lord’s decision in *Ibrahimi* (father and son pushed other partner out of art gallery business), held that **where an applicant is both a shareholder and a director in a closely-held corporation, *the applicant has a reasonable expectation that they will always be both a shareholder and a director*.** In widely/publically-held corporations: shareholders will have no reasonable expectation to have a role in management. Excluded: bad behaviour that the applicant contributed to; economic future-looking expectations. |
| **b. *Were my client’s reasonable expectations breached?***  |
| According to *Re BCE,* the next question a court must ask is: **“**was there a breach of reasonable expectations of the applicant?” The oppression remedy focuses on “unreasonable” changes to a shareholder’s (or other appropriate person’s) reasonable expectations. In *Diligenti,* the BCCA found that the applicant’s reasonable expectation that he would always be both a shareholder and a director was breached when the other directors/shareholders ousted him from the company. The BCCA went on to find that, while the applicant was not oppressed, his dismissal as a director amounted to unfair prejudice in his capacity as a shareholder. When there is strong interrelationship between owning shares and being a manager (as is typical of closely-held companies), a director/shareholder will be unfairly prejudiced by conduct that affects them in either role.  |
| **c. *Was the breach of my client’s reasonable expectations sufficiently serious to amount to either oppression or unfair prejudice?*** |
| The breach of the applicant’s reasonable expectations must be sufficiently serious to amount to either: 1. **Oppression**; or,
2. **Unfair prejudice**.

A breach amounts to **“oppression”** if the conduct was “burdensome, harsh, and wrongful”, as per *Meyer*. This is a higher threshold than “unfair prejudice”, and suggests that the applicant must prove something pretty egregious and awful, and something more than just unfairness, though perhaps falling short of fraud. The classic case of oppression usually involves a series of events when, collectively viewed, clearly shows a lack of *bona fide*, as in *Ferguson*. In *Ferguson,* the directors of a closely-held corporation (the founders of the IMAX theatre company) turned on one of the directors, refusing to pay her dividends and refusing to involve her in decision-making. The Court noted that all of the directors shared an intimate involvement in its operation. The Court held that the other directors’ attempts to get rid of the one woman exhibited a lack of *bona fide,* and therefore amounted to oppression. A breach amounts to **“unfair prejudice”** if the conduct affects the applicant in their capacity as either a shareholder or a director where there is a high level of interrelationship between both of these roles, as in *Diligenti.*  |
| **3. *What relief can my client get under the oppression remedy?***  |
| If an applicant is successful in bringing an oppression claim, the court can grant a variety of different remedies, as set out in s. 227. This is one of the downsides to bringing an oppression claim: you don’t what the court will be prepared to give you! The remedies a court may choose to grant include: * An order that the company stop its oppressive behaviour;
* An appraisal remedy order (but only in *Diligenti­-*type situations, where shareholder had reasonable expectation to be a director! an appraisal order, requiring that the company buy back shares, would not be available if a shareholder had no reasonable expectation to be involved in the company’s management)

Finally, s. 227(4) sets out a laches-type, equitable defence. If an applicant waits to long to seek relief under the oppression remedy, they may not succeed or may have the relief granted to them diluted.  |

## Compliance and Restraining Orders

|  |
| --- |
| **Compliance** |
| **Non-Compliance with the Company’s Constitution (Articles & Notice of Articles), s. 19** |
| The company’s articles and notice of articles are a contract that binds the shareholders to one another, and to the company itself, as provided for in s. 19. This means that shareholders have standing, as of right, to apply to the court to have the terms of the company’s articles and notices of articles observed.  |
| **Non-Compliance with the Act or the company’s Charter, s. 228** |
| Section 228 provides that a “complainant” may apply to the court for an order that a company comply with a provision in its Charter (Notice of Articles and Articles), the Act, or the regulations. “Complainant” includes shareholders as of right, but other “appropriate person” (e.g. creditors, trustees n bankruptcy, employees) can also apply to the court for standing.  |
| **Non-Compliance with the company’s Charter or the Act may be excused by a court, s. 229** |
| Section 229 provides that “interested persons” can apply to a court to correct actions that have led to a breach of the Act or the company’s Charter. The court then has the discretion to grant the order excusing the breach, or not. Requirement: the interested party must “confess their error”, and then convince the court that nobody, particularly minority shareholders, suffered as a result of the error being made. E.g. requirement for notice of the AGM is 21 days… so you could probably convince a court that 19 days was sufficient. The larger the company, the more likely it is that the order will be refused. The test: the inconvenience of the company of having to, say, redo the meeting with the prejudice to those who were affected by the company’s lack of compliance.  |

## The Appraisal Remedy (where there is a fundamental change)

|  |
| --- |
| **THE APPRAISAL REMEDY, ss. 237-247 (aka “dissent proceedings”)** |
| The appraisal remedy is a substantive remedy that shareholders are entitled to as of right, which is triggered when a **fundamental change** occurs (an applicant under the appraisal remedy does need to prove any unfairness or oppression towards them). If a shareholder dissents to a fundamental change, they have an absolute right to make the company buy their shares. The appraisal remedy is especially important for minority shareholders in closely-held companies b/c there is no market for their shares except w/ other shareholders or the company.[the appraisal remedy is also available as a remedy under a s. 227 oppression application, but in that case the claimant needs to prove oppression and convince the judge that appraisal is the appropriate remedy]Section 228 lists what is deemed to be a fundamental change under the Act, triggering the appraisal remedy:* Alteration to the company’s Articles, under s. 260;
* Sale of an undertaking, under s. 301(5);
* Amalgamation, under ss. 272, 287;
* Continuation in another jurisdiction, under s. 309;
* In respect of any other resolution that authorizes dissent (catch-all).

All of these fundamental changes require special resolutions by shareholders. ***Shareholders must receive notice of the special resolution related to the fundamental change***Under s. 240, the company must provide notice to shareholders of the meeting where the special resolution related to the fundamental change will be voted upon. At this meeting, shareholders must also be advised that they have the right to dissent, and that this right to dissent can trigger the appraisal remedy. Subsection 240(3) provides that, if the company does not comply with the notice requirements, a shareholder can apply after the fact for the appraisal remedy as well. ***Shareholder must file their statement of intent to dissent***If the shareholder intends to vote against the special resolution, they must file a statement of intent to dissent. They cannot exercise their right partially – they either dissent with all their shares or nothing. The shareholder must file their statement of intent to dissent at least 2 days before the date on which the special resolution is to be passed, per s. 242. ***Company and shareholder must provide notice of their intent to proceed***If the resolution does not pass, that’s the end of it. But if it does pass, the company must get back to the shareholders who filed their intention to dissent that they intend to go forward with the subject of the special resolution, per s. 243. Then, the dissenter must send in a formal notice of intent to sell and their share certificates, per s. 244. They have a month to do this. Section 246 provides that a shareholder may lose their right to dissent in some situations, e.g. if they act inconsistently with their statement of intent (voting in favour when their statement of intent suggested that they would dissent). **Value of shares/payout value**The price that shareholders are entitled to is the fair value of the shares immediately prior to the resolution passing the fundamental change (“fair value”, under s. 237). The Court in *Domglass* outlined the three ways to value a company’s shares: (1) **market value**, (2) **asset value** [value the assets of the company, tangible and intangible, add them up and divide by number of shares… but problem is that many companies are intangible asset heavy, not tangible asset heavy]; (3) **earnings** [look at the company’s earnings and then discount the present value of a future stream of earnings… this discounted price is what the shares are deemed to be worth]. **Shareholders who apply for the appraisal remedy may not be entitled to other shareholder remedies (e.g. the oppression remedy)****Subsection 244(6)** suggests that a shareholder who claims the appraisal remedy may not be entitled to any other shareholder remedies, e.g. the oppression remedy: “A dissenter… may not vote, or exercise or assert any rights of a shareholder, in respect of the notice shares, other than under this Division.”  |

## Winding-Up

|  |
| --- |
| **WINDING UP, s. 324** |
| **Section 324** is a discretionary provision that provides for the winding up of a corporation via court order. Shareholders, directors, creditors and any other person the court deems to be an “appropriate person” may apply for winding-up. However, judges are generally reluctant to use the winding-up remedy, because it is overkill. Other appropriate remedies may exist (e.g. oppression, appraisal) that do not require terminating the company. Example of a successful application for winding-up is *Ibrahimi:* a father and son used their power under s. 128(3) [a special resolution to dismiss a director] to get rid of the original partner in the art gallery business. The original partner said: “this is an intolerable situation, I am no longer a director of this company, I am no longer involved in management, and I am now a minority shareholder… I want this company to be wound up.” The House of Lords said: “you as a founder director and shareholder of this corporation had a reasonable expectation that this relationship/your involvement in management would continue… so you have the right to order the company to be wound up”.  |

# Table of Cases

|  |  |  |  |
| --- | --- | --- | --- |
| **Topic** | **Citation** | **Facts** | **Ratio** |
| **Separate legal personality of corporations** | ***Salomon v Salomon***(1897) – House of Lords | Salomon sold his business to a closely-held corporation (7 shareholders: him, his wife, and his 5 children). As consideration for the sale, Salomon received shares, cash, and debentures. Company was wound up. As a secured creditor/debenture-holder, Salomon was paid out before other unsecured creditors. Liquidator argued that Salomon should be personally liable for the debt owed by company to other creditors. The Court disagreed.  | *Salomon* stands for the proposition that **a corporation is a separate legal person.** A corporation’s personality is separate from the legal personality of its shareholders, directors, and employees. The House of Lords said: “**The company is at law a different person altogether from the subscribers to the memorandum**; and, though it may be that after incorporation the business is precisely the same as it was before… the company is not in law the agent of the subscribers or trustee of them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.” |
| **Piercing the Corporate Veil** | ***Clarkson Co v Zhelka*** (1967) – ON High Court | Selkirk incorporated and controlled several companies, including Industrial. Industrial conveyed land to Selkirk’s sister in exchange for a promissory note. Selkirk went bankrupt. The trustee in bankruptcy sought a declaration that the land in Selkirk’s sister’s name was held in trust for Selkirk (i.e. that sister or Industrial were merely agents for Selkirk). The Court held that Industrial was not a mere agent for Selkirk, and so the corporate veil was not pierced.  | *Zhelka* stands for the proposition that **the corporate veil should not be pierced unless failing to do so “would be flagrantly opposed to justice”.** The Court in *Zhelka* upheld *Salomon*’s principle: “the legal persona created by incorporation is an entity distinct from its shareholders and directors… even in the case of a one man company, the company is not an alias for the owner”. **Exceptions to Salomon’s principle** (disregarding a corporation’s separate legal personality, thereby piercing the corporate veil) **“fall within a narrow compass”:**1. If company formed for express purpose of doing a wrongful or unlawful act;
2. If those in control of the company, once formed, expressly direct a wrongful thing to be done; or,
3. If the company is the mere agent of a controlling shareholder.
 |
| ***Lee v Lee’s Air Farming*** (1961) – Privy Council | Mr. Lee was a majority shareholder, director and employee of Lee’s Air Farming. Mr. Lee died and his widow sought compensation under NZ’s *Workmen’s Compensation Act.* The Privy Council held that Mr. Lee could be both a director and an employee, because the company enjoyed a distinct legal personality.  | *Lee’s Air Farming* stands for the proposition that **a director of a corporation can also be an employee (= an “inside director”)**. **This “is** **a logical consequence of the decision in *Salomon’s* case** that one person may function in dual capacities”: the corporation is a legal personality distinct from the legal personality of an employee.  |
| ***De Salaberry Realties v Minister of National Revenue*** (1974) – Fed TD  | De Salaberry was a subsidiary company, related to a number of other companies and ultimately controlled by a grandparent company. A profit was made on the sale of land. The question was whether this income belonged to De Salaberry, for purposes of the *Income Tax Act.* The Court determined that De Salaberry was a mere “puppet” for its parent companies, so pierced the corporate veil.  | ***De Salaberry* stands for the proposition that the corporate veil will be lifted if the company in question is part of a larger group of interrelated companies, to allow a court to look at the group of companies (the “enterprise entity”) as a whole.** The rule from *Salomon’s* case does not apply to prevent a court from passing judgment on the conduct of a company who is the mere “puppet” of/who is controlled by another parent company.  |
| **Pre-Incorporation Contracts** | ***Kelner v Baxter*** (1866) – English Court | The proposed company was a hotel. The plaintiff purchased extra wine stock and sold this wine to the proposed company. The defendants passed a resolution to reimburse the plaintiff. But the company was not yet incorporated. The Court held that the defendants should be personally liable for reimbursing the plaintiff.  | ***Kelner v Baxter*** stands for the proposition that, **where both parties to a pre-incorporation contract know that the company has not yet been incorporated, those party who contracted on behalf of the not-yet-incorporated company should be personally liable for the obligations set out in the pre-incorporation contract,** even if the contract is signed “on behalf of… the proposed company”. The key, according to *Kelner,* is giving effect to the intention of the parties (whether or not they intended to be personally bound. The Court said: “we must assume that the parties contemplated that the persons signing it would be personally liable”. |
| ***Black v Smallwood*** (1966) – High Court of Australia | Appellants entered into a contract for sale of land to Western Suburbs, which was not in fact incorporated at the time. Both the appellants and the directors of Western Suburbs believed that the company had been incorporated. The  | ***Black v Smallwood*** stands for the proposition that, **where both parties to a pre-incorporation do not know** **that the company has not yet been incorporated, the party who contracted on behalf of the not-yet-incorporated company should not be personally liable for the obligations set out in the pre-incorporation contract.** Distinguishing this situation from the situation in *Kelner.* But giving effect to the intention of the parties (whether or not they intended to be personally bound) remains paramount.  |
| ***Wickberg v Shatsky & Shatsky*** (1969) – BCSC  | Defendants knew that Rapid Data was not an incorporated company. The defendants, on behalf of the company, hired the plaintiff to be the manager of the company. The plaintiff did not know that the company was not incorporated. When the company failed, the plaintiff argued that the defendants should be personally liable for his employment contract.  | ***Wickberg*** stands for the proposition that **where the promoter knows that the company has not yet been incorporated, but the third party does not know, the promoter/the party who contracted on behalf of the not-yet-incorporated company should not be personally liable for the obligations set out in the pre-incorporation contract.** Following *Black v Smallwood.* Again, giving effect to the intention of the parties remains paramount. The Court held that the defendants should not be personally liable under the employment contract, because it was not the intention of the parties that the defendants would be personally liable.  |
| **Board of directors is vested w/ the power of management** | ***Automatic Self-Cleansing Filter Syndicate v Cuningham*** (1906) – England CA  | Shareholders passed an ordinary resolution, ordering the board of directors to sell off the company’s assets. The Court held that the decision to sell assets was a managerial power, which the shareholders did not have by virtue of the company’s Notice of Articles (which, like our s. 136, vested the power of management w/ board). [note: s. 136 power of management is subject to the Act and the Notice of Articles > so if the shareholders *wanted* the power of management, they could alter the company’s Charter by a special resolution, taking power away from the board]  | ***Automatic Self-Cleansing*** stands for the proposition that **the power to manage a company is vested in its board of directors (by virtue of s. 136 under our Act, and by virtue of the company’s Charter in this case). The decision to sell a company’s assets is a managerial power, which shareholders cannot exercise.**  |
| **Corporate goals (profit-making) & corporate social responsibility** | ***Dodge v Ford Motor Co*** (1919) – Michigan Court | Ford Motor Co regularly issued special cash dividends, until 1916, when Henry Ford (who controlled the board of directors) announced that no more special dividends would be issued and the company’s extra profits would be invested back in the business in order to expand it. Henry Ford said: “My ambition is to employ still more men to spread the benefits of this industrial system to the greatest possible number, to held them build their lives and theirs homes.” Two minority shareholders (Dodge brothers) brought an action to compel Ford Motor Co to issue special dividends. The Court ended up forcing the payment of the special dividends b/c it found that withholding the dividends was an arbitrary decision given the profits the company had at its disposal. | ***Dodge v Ford Motor Co*** stands for the proposition that **the primary goal of a corporation is profit-making, but the board of directors can exercise its discretion in choosing the means to attain that end (as long as they do not change the end itself).** *The* Court acknowledged that Henry Ford’s plan was not intended “to produce immediately a more profitable business but a less profitable one” (immediate effect would be a diminishment in the value of shares). The Court said: “A business corporation is organized and carried on primarily for the profit of stockholders. The powers of directors are to be employed for that end. The discretion of 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…”  |
| ***Parke v Daily News*** (1962) – England Court | Daily News owned two newspapers that were not doing well financially, so they found a purchaser to buy the newspapers. The directors of Daily News decided that the balance of the sale price of the newspapers should be used to benefit the newspapers’ staff and pensioners. A shareholder commenced an action claiming that this compensation to former employees and pensioners was *ultra vires*. The Court held that the directors of Daily News, through motivated by philanthropy and generosity, and “however enlightened from the point of view of industrial relations”, were not authorized to put the balance of the profits from the sale towards benefitting former employees and pensioners.  | ***Parke v Daily News*** stands for the proposition that **all actions taken by the board of directors must, ultimately, be done for the benefit and to promote the prosperity of the company: “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.”**The Court in *Parke v Daily News* adopted the following **three-part test for determining whether a board of directors’ decision to expend a company’s money in a certain manner** (e.g. giving it to former employees and pensioners) **is valid**: 1. Is the transaction reasonably incidental to the carrying on of the company’s business?
2. Is it a *bona fide* transaction?
3. Is the transaction done for the benefit and to promote the prosperity of the company?
 |
| ***Re Peoples*** (2004) – SCC  | Wise Stores acquired Peoples Department Stores, and to solve some problems, the two companies’ inventory procurement policies were merged into a single “joint inventory procurement policy”. The two companies declared bankruptcy. The trustee for Peoples claimed that the decision to join the inventory systems favoured the interests of Wise Stores over Peoples, to the detriment of Peoples’ creditors.  | ***Re Peoples*** stands for the proposition that **directors owe their fiduciary duty directly to the company (not to any one group of stakeholders)**, but that, **in acting in the company’s best interests, it may be legitimate “for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment”.** When a company is in financial trouble, the SCC emphasized the importance of directors’ acting in the best interests *of the corporation*, and the importance of not favouring the interests of any one group of stakeholders (b/c in this situation the interests of different stakeholders may be at odds, e.g. creditors versus shareholders). |
| ***Re BCE*** (2008) – SCC  | There was a leverage buyout of BCE Inc, whereby Bell Canada (a subsidiary of BCE) would acquire a substantial new debt. BCE’s debentureholders opposed this arrangement, and sought relief under the oppression remedy. The Court concluded that the board of directors *had considered* the interests of the debentureholders, and having done so, made a decision that “it perceived to be” in “the best interests of the corporation”.  | ***Re BCE*** affirms the SCC’s decision in ***Re Peoples*** that, **“in considering what is in the best interests of the corporation, directors** may **look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions**”. Further, the SCC said that **courts should give the business judgment of directors appropriate deference, “so long as it lies within a range of reasonable alternatives” (the business judgment rule).** The SCC reemphasized that directors “owe a fiduciary duty to the corporation, and only to the corporation”, and that “the reasonable expectation of stakeholders [like the debentureholders in this case] is simply that the directors act in the best interests of the corporation”. |
| **Directors’ duty of care** | ***Re City Equitable*** (1925) | An order was made for the winding-up of an insurance company. Investigation revealed a deficit of 1,200,000 pounds, a loss which was partly a result of diversion of funds by the managing director to another company. Liquidator brought an action against the directors and auditors, alleging breach of duty of care (negligence).  | ***Re City Equitable*** lays out the three-part common law duty of care owed by directors:1. A director is only obliged to exhibit the skill and care that can be reasonably expected from a person of his knowledge or experience. [issue: there is a very wide range of skills and care required of directors]
2. A director is not bound to give continuous attention to corporate affairs, and can justifiably act only intermittently.
3. A director can rely on delegated management and is not required to second-guess managerial recommendations unless put on inquiry.
 |
| ***Re Peoples*** (2003) – Quebec CA | Wise Stores acquired Peoples Department Stores, and to solve some problems, the two companies’ inventory procurement policies were merged into a single “joint inventory procurement policy”. The two companies declared bankruptcy. The trustee for Peoples claimed that the decision to join the inventory systems favoured the interests of Wise Stores over Peoples, to the detriment of Peoples’ creditors.  | The Quebec CA in *Re Peoples* held that the Wise brothers had acted “according to what they, in good faith, considered to be the pursuit of the objects of the corporation, and they showed no reckless disregard for the duty of care”. The CA also held that the Wise brothers had not breached their duty of care or fiduciary duty to the company, and could rely on defence of reliance in good faith on the report of a professional (their right-hand man, Clement). The SCC disagreed on this point.  |
| **Breach of fiduciary duty: corporate opportunity**  | ***Regal (Hastings) v Gulliver*** (1942) – House of Lords | Regal wanted to acquire two additional cinemas, and so a subsidiary was formed for this purpose. Regal’s directors invested in the subsidiary, in order to finance the purchase. Shares in the subsidiary were later sold for a profit. The issue was whether Regal’s directors should account for the profit they made on the shares.  | ***Regal*** stands for the proposition that, **if directors make a profit “by reason and only by reason of the fact that they were directors… and in the course of execution of that office,” those directors (as fiduciaries to the company) should be liable to the company for those profits.**  |
| ***Peso*** (1966) – BCCA  | Peso’s board turned down the offer to buy a set of mineral claims (“the Dickson claims”) b/c the company’s finances were already strained by its existing landholding. Cropper, one of Peso’s directors, then formed another company to buy the Dickson claims. The issue was whether Cropper should be held liable to account to Peso for the profits he made on the Dickson claims.  | ***Peso*** stands for the proposition that, **if a corporation rejects an offer, one of its directors can, acting in his or her own capacity, accept the same offer and not be liable to the corporation to account for profits.** A relaxation of the strict rule from *Regal.* The Court said: “I cannot conclude that because offers of properties are continuously put before a mining company and rejected, henceforth any personal dealing with any of them by a director raises a conflict of person interests with the interests of the company.”  |
| ***Canaero*** (1973) – SCC | Senior officers resigned from Canaero and formed their own company, which performed identical work to that of their former employer. The new company beat Canaero in a competition for a Guyana map terrain proposal. The issue was whether the former officers should be held liable to account to Canaero for their profits on the Guyana project.  | ***Canaero*** stands for the proposition that, **where a director or senior officer takes advantage of a corporate opportunity that a company has an ongoing interest in, that director or senior officer is liable for breach of fiduciary duty and must account to the company for any profits made**. The SCC found that the senior officers owed Canaero a fiduciary duty, and breached that duty when they took advantage of the corporate opportunity with their new company and the Guyana project. The SCC distinguished the situation in this case from the situation in *Peso.* The Court said: **“the fiduciary relationship goes at least this far: a director or senior officer…is precluded from obtaining for himself, either secretly or without approval of the company…, any property or business advantage either belonging to the company or for which it has been negotiating”**. |
| **Breach of fiduciary duty: competition** | ***Mashonaland*** (1891) – England Court | Lord Mayo was the director of two competing companies (but Lord Mayo never agreed expressly or through the plaintiff’s company’s Notice of Articles not to become a director of any similar company). The issue was whether serving on the board of two competing companies amounted to a breach of fiduciary duty.  | ***Mashonaland*** stands for the proposition that **a director may sit on the board of two competing companies without breaching his or her fiduciary duty, provided that the companies’ charters do not prohibit this.** To establish breach of fiduciary duty, the plaintiff must show that the director disclosed information obtained confidentially by him as a director of the one company to the other rival company.  |
| **Breach of fiduciary duty: issuance of shares in hostile takeover bid situation** | ***Teck v Millar*** (1972) – BCSC  | Teck and Canex/Placer both wanted to acquire Afton (the target company). Afton’s controlling director genuinely believed that a merger with Canex/Placer was better for the company’s development than a merger w/ Teck. The Court found that Afton’s “ultimate deal” with Canex/Placer did not amount to a breach of the controlling director’s fiduciary duty.  | In ***Teck v Millar****,* the BCSC held that directors could issue shares to frustrate a takeover bid **provided that they reasonably believed that it was in the best interests of the corporation to do so:** “If they decide, on reasonable grounds, a take-over will cause substantial damage to the company's interests, they are entitled to use their powers to protect the company.”If the issuance of shares was found to *not* be in the best interests of the corporation, this would amount to a breach of fiduciary duty by the directors.  |

# Definitions

|  |  |  |
| --- | --- | --- |
| **Term** | **Definition** | **Relevant Case Law** |
| **Articles**(*sometimes also referred to as bylaws*) | “Articles” includes “(a) the articles or articles of association of a pre-existing company, (b)the bylaws of a company…, and, (c) any other record that under this Act constitutes the articles of a company” (s. 1, Definitions). Together with the Notice of Articles, the Articles make up a company’s Charter.  |  |
| **Company** | “Company” includes corporations incorporated under the BCBCA or one of its predecessor statutes. “Companies” are subject to provisions of the Act. The Act further distinguishes between “**public companies**” (a term of art: a company whose shares are traded publicly, typically on a stock exchange) and “**companies that are not public companies**”/”private companies” (not a term of art). This distinction really matters for securities regulation. |  |
| **Corporation** | A generic term that includes any entity that is of a corporate nature. Not specific like the term “company” is under the Act.  |  |
| ***De jure* control** | Where a person/company owns more than 50% of the shares in another company = “legal” control. But a shareholder w/ *de jure* control may, in fact, have very limited control b/c of provisions like s. 136. Remember: ownership (shareholders) + control (management/directors) are separate. | *De Salaberry*: concern was who “controlled” De Salaberry, for the purpose of the *Income Tax Act.*  |
| ***De facto* control** | BCBCA s. 2 defines “control” as having the votes “sufficient, if exercised, to elect or appoint a majority of the directors of the corporation”. E.g. owning 20% of shares in General Electric might give you *de facto* control (but not *de jure* control) b/c your ownership portion/percentage is greater than other shareholders. This acknowledges the reality that *who controls the Board of Directors controls the company* (by virtue of s. 136, board is vested w/ power to manage). Remember: ownership (shareholders) and control (management/directors) are separate things.  | *De Salaberry*: concern was who “controlled” De Salaberry, for the purpose of the *Income Tax Act.* |
| **Debenture** | Debentures are a form of security that is unique to corporations. Debentures often incorporate a “floating charge”, which allows a corporation to freely buy and sell property without triggering the obligation to repay the debenture. “Debenture” includes “an instrument, secured or unsecured, issued by a corporation if that instrument is (a) in bearer form or in registered form, (b) of a kind commonly dealt in on securities exchanges or markets, or commonly recognized in any area in which it is issued or dealt in as a medium for investment, and (c) evidence of an obligation or indebtedness of the corporation” (s. 1, Definitions).  | *Salomon:* Salomon, in addition to being a director and shareholder, was also a secured creditor = debenture-holder. |
| **Director** | “Directors” means “an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position” (s. 1, Definitions). See “Inside Director” and “Outside Director” too.  |  |
| **Fundamental change** | The following actions are considered fundamental changes and require shareholder approval via special resolution:* Any change to the company’s Charter (Notice of Articles + Articles)
* A sale of all or substantially all of company’s undertaking, s. 301(1)
* A corporate name change
 |  |
| **Inside Director** | Inside directors are directors who are also employees of a company. E.g. the CEO, CFO, COO (employee roles) will also often be directors on the board.  | *Lee’s Air Farming:* the Court held that the director of a corporation can also be an employee of the corporation (thanks to separate legal personality, the *Salomon* rule).  |
| **Outside Director** | Outside directors are people ho are usually not interested in having a day job – they want the fees, but they don’t want to be involved in day-to-day management of the corporation. Simply sit on the board.  |  |
| **Ordinary Resolution** | Ordinary resolutions require a simple majority to pass (Definitions, s. 1). See also “Special Resolution”.  |  |
| **Special Resolution** | Special resolutions require 2/3 of those present and voting in order to pass, or a higher percentage (e.g. ¾) if the articles provide for this. See also “Ordinary Resolution”.  |  |
| ***Ultra vires*** | The common law doctrine of *ultra vires* provided that a corporation (particularly one in a memorandum jurisdiction) had no legal capacity to act in any way that was not specifically authorized by its incorporating documents. But the doctrine of *ultra vires* has not been significantly limited by statutory provisions, if not altogether eliminated. Today, unless a company’s powers are expressly restricted (s. 33), it is assumed that the company has all the powers of a natural person (s. 30).  |  |