Incorporation- main incentives:

- 1) **Limited Liability**- s.87: shareholders' liability is limited to purchase price of shares; note that corporations themselves don't enjoy limited liability, are fully liable to their creditors
- 2) **Perpetual succession-** s.115: personal reps of deceased have all rights of deceased members, may elect replacements
- 3) **Transferability**- shares can be bought/sold, but directors are maintained until voted in or out at AGM (CL rule: shares are prima facie transferable)
- 4) **Distinction btwn ownership and control**- shareholders = owners, attend AGMs; board of directors manage co (broad collective powers vested in the board under s.136)

s.3: co is recognized when incorporated under the Act
s.10: co may be formed by 1 or more persons, agreement must be in proper form
s.13: date of filing = date of incorp
s.30: co has capacity and rights/powers/privileges of an individ w/ full capacity

Salomon v Salomon & Co Ltd: (S incorporated business; on wind-up, liquidator claimed that co = mere alias of S/he was liable to indemnify co against claims of ordinary creditors) **Corp is a separate legal entity** from its shareholders, creditors can only look to corp and not SH Salomon for payments owed.

- Assets to be applied to debenture-holders (secured creditors) over ordinary creditors
- Protection of personal assets from liability = major advantage of incorp
- Embodied in s.87: SH not liable for obligations of co (unless notice of articles clearly state otherwise)

s.19: co and SHs are bound by co's articles and notice of articles
s.52: authorized share structure of co
s.120: co must have at least 1 director (at least 3 in a public co)
s.121: names of first directors must be included in articles upon incorp
s.136: **powers and functions of directors** = extremely broad

- (2): restriction on powers ineffective if person has no knowledge

Piercing the Corp Veil = judge willing, on the facts of a case, to **modify strict application of Salomon principle**

3 potential situations:

- 1) **agency:** where corp is construed to be an agent of its principal SH (*Clarkson Co*)
- 2) **avoidance:** where activities of the co are a mech to avoid regulatory legislation- i.e. tax liability (*De Salaberry*)
- 3) **fraud:** corp is being used for a fraudulent purpose (*Gilford Motor*, p. 117)

Clarkson Co v Zhelka: (Industrial Ltd conveyed prop to Zhelka for no consideration, trustee in bankruptcy alleged that Industrial acted as agent for Selkirk to avoid obligations to creditors) Zhelka **held land in trust** for Selkirk; however, Industrial was not Selkirk's agent- although he dominated and controlled it, **could not be construed as a preconceived deliberate attempt to defeat creditors.**

- If incorp for the purpose of agency (i.e. co structured to avoid financial problems after bankruptcy), veil likely would have been lifted

Lee v Lee's Air Farming Ltd: (Mr. Lee = director and employee of co, problem of collection under life insurance policy as a "worker") **It is possible to be both a controlling member (director) and an employee of a co.** Insurance policy considered valid.

- Inside directors = also employees
- Nothing to suggest a sham in this case

De Salaberry Realities Ltd v MNR: (subsidiaries of parent co buying/selling land = question of capital gains vs. income, possible tax evasion scheme) **Corp veil lifted, clear stat purpose being circumvented by incorp.**

- Court looked at enterprise as a whole to determine its true purpose- subsidiaries did not have indep boards, were not self-suff; simply used as vehicles for transactions
    - = mere instruments, rather than sep legal persons

Gilford Motors v Horne: (non-compete clause in employment K, Horne set up incorp co to sell within prohibited radius) **Corp veil lifted, co being used for a fraudulent purpose-** to avoid employee's contractual responsibilities.

s.422: registrar may dissolve co if it fails to file annual report or fails to comply w/ an order of the registrar (i.e. order to change its name)
s.423: GIC may cancel incorp of a co and declare it dissolved

Theorizing Corp Personality

- **Fiction theory:** corp personality is a legal creation; the state and its laws permit corps to exist and operate
- **Real entity view:** when a group reaches suff organization (i.e. can make decisions), then a new personality has actually come into existence
- **Contractarian view:** corp personality is a fiction; corps = webs of contracts among shareholders, creditors, employees and management/board

Place of Incorp

- Canadian law fairly uniform, not much forum shopping
- If extra-prov operations are expected → then federal incorp
- General rule: **co will be governed by the law of its incorp** (physical presence of directors in jurisdiction may be required)
    - Factors to consider = geographical convenience, type of business, more name protection for fed cos, national presence
- Fed = **articles of incorp + bylaws** // prov = **notice of articles + articles**
- If conflicts btwn laws exist → paramountcy (*Multiple Access v McCutcheon*)

Extra-prov Licensing

- **Corporation** = any entity of a corporate nature
- **Company** = corp recognized as a company under this Act
- **Extra-prov co** = foreign entity registered under s.377 or s.379
- **Foreign corp** = not a company, has issued shares (could be continued under s.308 or the result of an amalgamation)
- **Limited liability co** = legal entity organized outside BC, not a corp or partnership

s.375: foreign entities "**deemed to carry on business**" in BC must be registered
s.376: basic registration requirements- i.e. attorney to rep corp in the province, mailing address in the province
s.378(4): no act of a foreign entity is invalid merely because it is not registered

Continuance = co incorporated in 1 jurisdiction can apply to "continue" its incorp in another jurisdiction (provided it obtains consent of both jurisdictions)

- 1) **export step:** emigrating co must obtain consent of authorities in the jurisdiction of its incorporation
- 2) **import step:** must meet requirements of Act under which it seeks to be continued

ss.302-311: provisions governing continuation/applications for continuance

Reasons for continuance = tax advantages, amalgamation w/ another corp, shift in business operations, better corp climate in 2nd jurisdiction

- most useful for **mergers (facilitation of friendly takeover):** AB co can become a BC co via ss.302-311 and then can use merger provisions under part 9- ss.269-287
- Alternatives: could dissolve AB co and reincorporate in BC; could sell all assets to a BC co, wind up AB co and re-purchase shares in BC
- Act is territorial; can never have dual corp citizenship, but can have sep cos in diff jurisdictions

Classification of Cos

Widely held (public) = publicly trading reporting issuer, 3 or more directors

- co has its securities registered/traded through stock exchange, must meet certain disclosure requirements
- "reporting issuer" (BC Securities Act): has issued securities in respect of which a prospectus was filed and a receipt was issued
- **prospectus requirement** (*Rolston* test): auditing required when the public "needs to know" info in order to make informed investment decisions
    - Exceptions for cos knowledgeable enough/rich enough to take risk

Closely held (private) = less than 50 shareholders, 1 or more directors

- co constit limits transfer of shares, cannot sell any shares to general public
- no prospectus requirement- if all shareholders agree, can waive any auditing

s.192: insider trading liability- only applies to private cos
s.197: financial statement requirements- more onerous for public cos
s.120: private co can have 1 director, public co must have at least 3

- s.172(3): directors meetings // s.140(4): shareholders meetings

s.210: change of auditor in public co- stringent requirements
s.223: audit committee requirements- only apply to public cos

Unlimited liability co- SHs/owners have unlimited liability

- facilitates American investment, tax advantages under US law

Special Act Corp- arises through a separate Act/political process; not a company (i.e. Crown corp such as ICBC, BC Ferries); own Act = constit

- s.4(2): If conflict w/BCA, special Act of incorp prevails

Corp Names = regulated by ss.21-29, 263

- **protection of public against deception**, confusion within province
- Factors considered = nature of business, class of persons likely to be affected, visual and auditory impact of names, use of descriptive and generic terms, time and mode of use
- Legal grounds of protection:
    - 1) sue for damages under tort of passing off
    - 2) claim TM infringement (requires name to be registered TM)
    - 3) s.406: can challenge registrar's decision to incorp a name

s.22: name can be reserved for 56 days; (5): detailed criteria for naming
s.23: name must include "Ltd, Inc, or Co"
s.263: name change requires amendment to notice of articles = **special resolution** of SHs (s.257)

Incorp Techniques/Nature of Corps

Letters Patent Jurisdictions (CBCA, Ont, Que)- idea that only Crown can incorp

- Articles of incorp + bylaws

Registration Jurisdictions (BC, AB, Maritimes)- incorp = right of citizens, easy to get

- **Notice of Articles** (s.11)- formerly memorandum
  - Public, must be filed in Vic
  - Contains co name (preapproved), names/addresses of directors, address of corp, authorized capital
- **Articles** (s.12) = co constitution
  - Not public, though must be available to SHs
  - Contains rules of conduct, restrictions on business or powers of directors
  - SHs can sue if co violates its articles

s.10: incorp agreement- names incorporators, outlines how shares will be divided

- Not considered part of co constit

s.19: co and SHs are bound by articles and notice of articles (= contractual effect)
s.30: cos have powers of individuals (but are able to self-restrict powers under s.33)
s.33: co must not exercise any power restricted by its memorandum or articles
s.421: no constructive notice- person is not deemed to know contents of notice of articles merely because they have been filed
ss.257, 259: amendment to notice of articles or articles- requires **special resolution**

- = **fundamental change**; 2/3 of those present and voting must approve it

Doctrine of *ultra vires*- has been abolished (idea that acts/Ks beyond co powers = automatically void)-- now voidable ?

Remedies

- s.260: SH may dissent to amendments → appraisal remedy under s.238
- **s.228:** personal remedy- SHs/creditors may apply to court for a compliance or restraining order (i.e. requiring compliance w/ Act or articles, enjoining co from selling property/rights/interests, requiring compensation to be paid)
- **s.154:** directors can be held personally liable for stat infractions (s.157 defences)
  - note s.228(3) and s.154 can be applied simultaneously- directors personally liable to pay compensation (= lifting of veil by statute)

Pre-Incorp Contracts = K btwn A and T, where (a) corp does not yet exist, or (b) corp exists but it is unclear whether A is acting in personal capacity or as agent of co

- A = facilitator, promoter; T = contracting party, 3rd party, supplier

3 possibilities:

- Both parties (A and T) know that co has not yet been incorp (***Kelner***)
- A knows that co has not yet been incorp, but T does not (***Wickberg***)
- Neither party knows that co has not yet been incorp; A mistakenly believes that co has been incorp and T relies on A's rep (***Black***)

Kelner v Boxter: (A ordered beer from T in prep for hotel opening, co collapsed and T sued A in personal capacity) A held personally liable. **Agents contracting on behalf of a principal not yet in existence are bound, if there is clear intention to be bound.**

- Narrow interp: where it is known by both parties that corp does not exist, there is assumed intention that A be held personally liable
- Wide interp: where A acts as an agent, must be held personally liable. For new corp to be liable, there must be a new K btwn co and T
  - Co not capable of ratifying the K later and relieving A of responsibilities, must enter new K

Black v Smallwood: (A and T entered K for sale of land, mistakenly believing that co was incorp) K void b/c parties had no intention to be bound. **Where there is mutual mistake about co's existence, cannot presume intention/liability.**

Wickberg v Shatsky & Shatsky: (T entered employment K w/ A under name of co that never existed; business unsuccessful, claim for damages) Not the intention of either party to hold A personally liable for K; therefore A not liable. **Breach of warranty of authority established-** misrep that co was a legal entity.

- Only nominal damages awarded- since loss resulted from the fact that business was unsuccessful, not from the breach of warranty
- Warranty = that co will be incorp, and that it will adopt K within a reasonable time

s.20: if **breach of warranty**- possible to get damages (A personally liable to T)

- new co may adopt pre-incorp K by any act or conduct signifying its intention to be bound by it (3); facilitator ceases to be liable (4)
- Facilitator also not liable if parties have expressly agreed that no warranty exists (8)

If company forms → then s.20 applies
If company never forms → s.20 does not apply, must rely on CL rules

3 possible approaches:

- 1) presumption that BC case will be subject to BC laws
- 2) presumption that BC co or contract will be governed by BC laws
- 3) statute does not apply unless co is incorp

Management and Control of Corp

- Natural propensity for board to maximize own welfare, problem of accountability to goals of co
- Sep of ownership and control- can give rise to agency conflict
- Power of co lies within board- s.136; however, election to the board is by SHs- s.135 (= some ability to control conflict)
- Senior management/inside directors- have most control
- Auditing committees- oversee finances and management to some extent

SH voting is used in 2 ways:

- 1) to determine membership of board- by simple majority vote (50%)
- 2) to vote on fundamental corp changes- by **special resolution** (2/3 or ¾)

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame: (sale of co assets approved by simple majority of SHs; board refused to sell b/c it was not in co's best interests) **Impossible for mere majority to override directors' powers.**

- SHs could have: amended articles under s.259, or voted directors out under s.128(3) → both require special resolution

s.136: almost unlimited powers of board to act on co's behalf

- Not vested in each member individually, but in the board as a collective
- Powers are subject to co articles and the statute itself

Statutory constraints = s.301 sale of the undertaking, and s.223-226 audit committees

Audit Committee = "indep" committee to review financial statements before signed by directors and presented to SHs; purpose to minimize fraud

s.223: audit committee only required for public cos

- 203(2): unanimous resolution can waive auditing requirement

s.224: 3 or more directors (elected by board), majority of members must be outside directors (not employees, officers or affiliates of co)
s.225: committee must report to directors on financial statements (lack of indep?)
s.226: must prepare report in suff time for review

Sale of the Undertaking (s.301) = sale of **all or substantially all** of co assets
(1) In the ordinary course of business, or approved by **special resolution**

- If resolution passes → directors have discretion to sell or not sell (4), cannot be held personally liable?
- If it does not pass → cannot sell

- Test for "all or substantially all" = quantitative and qualitative
  - **Quantitative:** if >50%, presumption that it is not ordinary
  - **Qualitative:** must look at type of business, type of assets, whether in line w/ co's normal business activities

(2) Remedies:

- SHs, directors, and creditors have standing to apply for **personal remedy** (enjoin/stop sale, set aside sale, or other approp court order)

(3) Sale may still be valid if it is:

- For valuable consideration to a person who is dealing w/ the co in good faith
- Ratified by **special resolution**

(5) Any SH may send notice of dissent → **appraisal remedy** s.238

Indoor Management Rule (s.146): 3rd parties may rely on the authority of cos and their directors, officers, agents

- Person dealing with corp has no obligation to ensure that corp has followed procedures required by its articles, bylaws, etc.
  - Compliance with such procedures is matter of internal management
- However, need to prove "apparent authority" if claiming against corp
- Rule does not apply if person had knowledge or ought to have had knowledge- i.e. explicit restrictions on authority of agents were included in public documents
  - Limits constructive notice rule

Corp Goals and Social Responsibility
If business has made significant profits, directors can:

- 1) **invest it back into the business** (buy equipment, etc.)
- 2) **declare dividends and share it amongst SHs**- not necessarily required, unless withholding is perceived as abuse (could claim oppression s.227)

Dodge v Ford Motor Co: (Ford management suspended special dividend, in order to give back to employees/consumers; Dodge bros argued entitlement to share of profits) Withholding dividend could not be justified, Ford was forced to pay. **Cos can do things to benefit employees/others, but those things cannot be their primary purpose.** Primary purpose = making profits

Parke v Daily News: (sale of undertaking, directors proposed using proceeds to pay existing staff and retired employees more money) Giving extra money to employees not permitted- not beneficial to SHs. **Decisions must be beneficial to SHs/co.**

- Test: is the action reasonable in the course of business?
  - Giving some money to charity is reasonable- will bolster co's reputation in the community
  - Giving away huge portions of assets is not reasonable

Re Peoples: (alleged breach of fid duty by prioritizing creditors' interests above SHs) Court not willing to conclude breach of duty, creditors have enough protection in existing law. **Best interest of co does not necessarily = best interest of SHs, may be imp for co to consider other factors-** i.e. stakeholder interests.

- Business judgment rule- accords deference to a bus decision, so long as it lies within a range of reasonable alts

Re BCE: (friendly takeover of Bell, group of debenture holders challenged arrangement/sought oppression remedy) No breach of fid duty, directors not required to ensure value of debentures. **Directors' duty is to corp, but stakeholder interests must/may be considered**; business judgment rule protects directors in most instances.

- Unclear whether consideration of interests is mandatory or discretionary
- Interests to consider = stakeholders such as SHs, employees, creditors, consumers, gov't and env.
- Committee set up in this case- to determine whether debenture holders were prejudiced by arrangement. Enormous amount of pre-existing contractual protection + directors' due diligence = no breach of duty.

****Dodge/Parke*: directors will be held accountable if decisions do not directly benefit the co/SHs.**
****Peoples/BCE*: consideration of extra-corp interests is perfectly legitimate**

Duties of Directors/Officers = **owed to the co individually, not to SHs** (*Foss v Harbottle, BCE*)

- 1) fid duty
- 2) CL duty of care (negligence)
- *only co has standing to sue // if unwilling to sue → **derivative action** to enforce duty (ss.232, 233)

Remedies for Breach:

- **Oppression remedy** under ss.227 (SHs have standing as of right) *preferred option- see p.12
- **CL damages or equitable remedies** for breached duties under s.142 → derivative action

Defences:

- **Business judgment rule:**
  - 1) courts should not second-guess business decision-making
  - 2) presumption of reasonableness in the absence of evidence to the contrary
- **s.157:** not liable if director **relied on professional advice**, **in good faith**
  - only applies to directors, not officers

CL DUTY OF CARE: difficult to prove- no common std for directors (*Re Peoples*)

- **std of care** = **reasonable person w/ same knowledge and experience**; subj std (*Re City Equitable*)
  - therefore, higher std for inside directors than outside directors
  - must consider particular skills of person, role of director, functioning of particular board
- Directors are only expected to provide supervision, not expected to give continuous attention on day-to-day affairs (*City Equitable*)
- Entitled to rely on management to run co = **business judgment rule**

Re City Equitable Fire Insurance Co Ltd: (fraud by director, alleged negligence) Directors and auditors not found liable- although may be diff under current statute.

- Case defined std of care, role of directors- **gross negligence std**

FID DUTY (and stat duty of care)
s.142: Directors and officers must act honestly, in good faith, in best interests of co (fid duty); must exercise care, diligence and skills that a reasonably prudent individ would exercise in comparable circumstances (stat duty of care)

Re Peoples Dept Stores Ltd: (alleged negligence and breach of fid duty by Wise bros- favoring interests of Wise Stores/creditors over Peoples/SHs) No breach, new policy (although unsuccessful) was a **reasonable business decision/honest and good faith attempt** to redress co's financial problems = "**best interests of co**". Liability of directors is fairly limited.

- Some reliance on reports from VP, auditors = s.157 defence

Re BCE Inc: (debenture holders argued that takeover bid was oppressive) Arrangement not prejudicial, directors acted in **best interests of co** = no breach of duty. Courts should defer to **business judgment rule**.

- Duty to treat individ stakeholders equitably and fairly, but no principle that one set of interests should prevail over another
- If interests conflict- **director's duty is clearly to the corp**

Pente Investment Management Ltd v Schneider Corp: (special committee of outside directors accepted takeover bid, although not highest bid) Committee acted in best interests of the co, **business judgment rule applies.**

Self-Dealing = contract btwn directors/officers and corp itself

- ss.147-153: complete code
- **must disclose material interest** within ss.147, 153
  - material = to co and to director/officer
- **liable to account for profits** under s.148, unless K was approved by directors or special resolution under s.149
- director w/ disclosable interest **not entitled to vote**- s.149(2)
- Bring action, get remedies under **s.150**
  - Director not liable/can keep profit if fair and reasonable
  - **Personal remedies** for co, directors, senior officers, SHs and beneficial SHs = injunction, account for profits, other approp order
- K is **not prima facie void** b/c of conflict, non-disclosure, or non-approval- s.151

Corp Opportunities = exploiting info as a board member, for own benefit rather than for benefit of co

Regal (Hastings) Ltd v Gulliver: (directors invested money and realized profits from sale of subsidiary; alleged breach of fid duty) **Directors liable/accountable for profits** even though K otherwise unobtainable, acted in good faith.

- Continued interest by board in the opportunity = imp factor
- Directors could have protected themselves by SH ratification

Peso Silver Mines v Cropper: (board rejected offer, then directors formed own co and took advantage of opportunity; alleged breach of fid duty) Not a breach of duty. **Where directors have bona fide rejected business opportunity for the co, any later transaction w/ opportunity not against co interests.**

- If co ceases to have an interest, cannot prohibit director from taking opportunity merely because he learned of it in his capacity as a director

Canaero Aero Services Ltd v O'Malley: (Ds assigned to Guyana for profitable mapping K, formed own co to perform identical work; alleged breach of fid duty) Despite resignation, Ds continued to be under fid duty in respect of project. **Directors can be liable for breach even when info is public.**

- Situation-based test: open approach, consideration of various factors
  - position of office held (more senior = more duties)
  - nature of corp opportunity (how specific, how ripe for exploitation, rejected or not)
  - D's relationship to opportunity (scope of knowledge, how it was obtained)

- If breach after D's relationship w/ corp has ended (how long after, how was it terminated = retirement, resignation or discharge)
- Public or private (how widely known)

General conflict test: at the time of profit, was the director in a situation where personal interest and duty to co to obtain those profits were in conflict?

- Yes → profits must be given to co // No → director can keep profits

Canaero = more American approach, shifting **onus of proof onto directors** that they did not misuse/profit from the opportunity (rather than proving that they did)

Competition = conflict when directors sit on boards of related, competing cos (lowest form of fid duty)

- s.153: conflict must be disclosed
- possible to seek oppression remedy (s.227), tough to prove breach of fid duty

London and Mashonaland Expl Co Ltd v New Mashonaland: (director of rival cos, challenged by one of the cos) It is possible to hold multiple directorships.

Hostile Takeovers and Defensive Tactics = goal to replace management, directors will try to prevent bid from being successful (want to save their jobs)

- 1) **circular bid**- outside stock exchange, offeror directly contacts SHs
- 2) **stock exchange bid**- through facilities of stock exchange
- 3) **issuer bid**- co (majority SHs) making bid for itself; could be getting rid of min SHs, directors must pass resolution to do so

***Hostile takeovers are inherently in the best interests of co- b/c of premiums.** Directors have a high threshold to meet- must show evidence that takeover is not in best interests, otherwise bad faith.

Defensive tactics: subject to reg by Securities commission, fid duty- must be in best interests of co

- **poison pill**- preemptive constit tactic that prevents takeover (i.e. makes takeover unfavourable by automatically increasing votes of shares)
- **issuance of additional shares**- can dilute and defeat takeover; however- must be in good faith/for proper purpose

Teck Corp v Millar: (board used power to issue additional shares- in order to defeat Teck's attempt for control) Director acted w/ proper purpose, no breach of fid duty. **If reasonable belief that takeover will cause substantial damage to co interests, directors are entitled to use powers to protect co.**

- Factors to consider: reputation, experience, politics of bidder
- Primary purpose to defeat takeover bid- may be valid if there are reasonable grounds to support belief that co interests will be harmed

*Once established that issuance of shares was to defeat takeover, **onus shifts to Ds to prove that it was in best interests of co** (American approach)

Remedies: fid derivative claim, oppression remedy

Relief from Liability- can always argue against breach of fid duty (b/c acted in good faith), and against breach of duty of care (b/c exercised the care, diligence and skill of a prudent person in the circumstances)

s.142(3): waiver of liability is virtually impossible; directors cannot contract out of fid duty/negligence or the Act's provisions
s.157: defence to director's acts under s.154 and s.142

s.234: fairness test- court may relieve liability (wholly or partly) if person acted honestly and reasonably and ought to be "fairly excused"
s.233(6): Ratification by SHs for a breach of duty- does not automatically dismiss derivative action. However, **may be taken into account** by the court.

NW Transportation v Beatty: (directors who were also SHs- tried to ratify own breach of fid duty) **Directors are entitled to vote in capacity as SHs, to ratify own conduct**.

- However, not entitled to vote in capacity as director under s.149(2)
  - director who has a disclosable interest in a K is not entitled to vote on any director's resolution to approve that K

SH Rights = automatically attach to SHs

- i.e. Right to vote at SH meetings, right to receive dividends, right to repayment of capital (assets) upon winding up
- Rights come from: co's constitution, CL (fid duty), statute (remedies), SHs agreements (clarifying rights in a closely held co, like a pre-nup)

Voting Rights- imp if you are a significant investor, if a takeover bid is occurring, or a new nominee is seeking election to the board
s.173: 1 vote/share unless constit states otherwise; right to vote by proxy
s.174: basic rules of SH meetings

SH Meetings (ss.166-186)
s.182: **AGM required** (for election/re-election of directors, appointment of auditors, review of financial statements)

- (2) unanimous resolution can waive AGM requirement

s.181: **special/extraordinary meetings** = any meetings outside AGM, same rules apply
s.186: **court ordered meeting** (if min SHs have issue w/ management or there are practical problems w/ how co is running)

- Tends to be used by private cos, when requisitioned meeting not possible
- Used in conjunction w/ other forms of relief (i.e. breach of fid duty, oppression remedy), or in emergency situations (i.e. all directors die in a plane crash and court assistance is necessary)
- Otherwise, court is reluctant to interfere (*AirCo* case)

ss.167, 168: **requisitioned meetings** = need 5% of SHs to force board meeting (w/o court order), co pays for costs of meeting
s.167(7): exceptions that may prevent meeting, onus on directors to prove
s.167(8): if directors do not respond- 2.5% of SHs can hold meeting themselves, SHs pay for meeting

SH Proposals (ss.187-191) → only apply to public cos- 187(3); used mainly w/ regard to social justice issues

- 1) proposal to amend articles
- 2) proposal that a bylaw be made, amended or repealed
- 3) SHs holding at least 5% of shares may nominate directors
- 4) residual category- proposals "not relating to the business/affairs of co"

187(1), 188(1)(a)(b): standing- must be a SH for 2 years, w/ ≥ 1% of voting shares
189(5): exceptions that may allow co to prevent proposal
s.191: onus on directors to prove that exception applies

Note that **requisitioned meetings and SH proposals** are designed to give powerless SHs an opportunity to address management about concerns = some SH democracy

- Problem- even if voted and approved, a matter within the board's power is not binding (due to s.136)

    - Would need to amend articles first by special resolution, then pass resolution
- provisions tend to be used by takeover bidders to get themselves elected, or by SHs to raise awareness/gain publicity about certain issues

Varity Corp v Jesuit Fathers of Upper Canada: (corp sold its products in S Africa during apartheid, SH proposal to stop the work/abolish apartheid) Exception available to proposal; **co not obliged to distribute proposal that has as its primary purpose a political or social goal.**

Air Industry Revitalization Co v Air Canada: (SHs requisitioned board to call a meeting- wanted to approve takeover bid, change articles, and alter control of board; board rejected requisition) Reasonable chance that subject matter of requisition would not be considered at general meeting; therefore exception did not apply, **requisitioned meeting ordered.**

- SHs have right to amend articles at a requisitioned meeting
- SHs have an absolute right under s.167(8) to call a meeting w/ 2.5% support (even if an exception applies)
- Discretion under s.186 should be exercised cautiously- court should be reluctant to impose a solution when a "corporate" remedy is available under the Act

Removal of Directors
128(3): director can be dismissed at any time by **special resolution**, or as provided in memorandum/articles
131(a): director vacancy can be filled by SHs at SH meeting

SH Remedies- relief through SH agreement, CL (derivative action), stat provisions (oppression remedy, other personal remedies)

- **Derivative action**- when all SHs are affected equally by impugned conduct and the real P is corp
- **Personal action**- when SH has some grievance specific to himself or herself, not shared equally by all other SHs

Derivative Action (ss.232, 233 complete code) = corp right of action; SH permitted to bring action on behalf of co, for which management is not willing to seek redress

- Tends to be used by min SHs, although directors and approp persons also have standing

Foss v Harbottle: (Directors sold own property at inflated values to co, SHs alleged wrongdoing) **No standing for SHs to bring action**; separate legal personality of corp means that **proper claimant is the co itself.**

- Exceptions = ultra vires act, special majority action, fraud on the minority (theft, negligence, breach of fid duty), personal rights of action (i.e. oppression remedy)
    - At CL- only SHs can bring application (not directors, creditors, etc.)

s.232: SHs and directors have standing as of right; approp person may have standing = creditors/liquidators, employees, customers (at court's discretion)

- complainant may, w/ leave of court, bring action on behalf of co

s.233: Criteria to commence derivative action:

- 1) **reasonable efforts** to cause directors to commence action
- 2) **formal notice** to co that complainant is seeking leave to sue derivatively
- 3) must be acting in **good faith**
- 4) must appear to the court to be in the **best interests of the co** (does the application have merit?)

s.233(4): court can make any order it deems approp (i.e. damages to be paid to SHs rather than to co?)
s.233(6): **ratification** (approval by SHs) may be taken into account

Re NW Forest Products Ltd: (Assets sold at low valuation, directors ignored SHs request to set aside sale; SHs sought leave to commence derivative action, alleged negligence/breach of s.142) Leave granted- applicants had acted reasonably, it was **"prima facie" in best interests of co for action to be brought.**

- **Notice-** does not need to be specific, just needs to outline general nature of claim

Re Bellman and Western Approaches: (Maj SHs planned takeover bid, took out a loan to purchase shares in exchange for promise to go public; min SHs sought leave to commence derivative action) Leave granted. **Merit test = whether a claim, if it could be proven, would be in the best interests of the co to allow.**

- Notice- does not need to specify each and every cause of action
- Good faith- not invalidated by the fact that Bellman was also seeking oppression remedy in personal capacity
- **Litigation committee:** process was flawed, not binding on court
    - Should not include a person against whom allegations have been made (conflict of interest w/ purpose of committee), must investigate all allegations

Re BCE: Derivative action allows stakeholders to enforce director's duty to co (fid duty and duty of care). Oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of corp or directors.

Personal Actions = SH enforcing own rights as distinct from co

- Stat remedy (s.227, 228), CL/equitable remedy, or remedy based on constit/SH agreement (s.19)

Stat Oppression Remedy (s.227) = personal remedy, standing as a right to SHs, beneficial SHs, and approp persons (i.e. creditors, former SHs, employees, customers)

- Directors have no standing; ratification does not apply

s.227(2): grounds for relief = oppression, unfair prejudice (oppression = higher threshold)
s.227(3): forms of relief/orders

*any breach of fid duty is likely to be categorized as oppression
Oppression remedy preferable to ordinary derivative action/civil action for breach of fid duty b/c:

- More expedient, commenced by application w/o pleadings or discovery
- Relief from court is broader and more flexible
- S.227 easier to get than s.223, esp in private cos

Re BCE: 2 part test for oppression remedy:

- 1) reasonable expectation asserted by applicant (obj)
- 2) conduct not only failed to meet expectation, it rose to the level of oppression or unfair prejudice (v fact-specific)
    - **oppressive conduct** = "burdensome, harsh and wrongful"; "a visible departure from stds of fair dealing"; "abuse of power"
    - **unfair prejudice** = less offensive conduct (i.e. squeezing out a min SH, failing to disclose related party transactions, changing corp structure to drastically alter debt ratios, paying dividends w/o formal declaration, preferring some SHs w/ management fees, paying director fees higher than industry norm)
- imp to remember that directors owe duty to the co, not to stakeholders; reasonable expectation of stakeholders is simply that directors act in best interests of co
- **not a reasonable expectation that could give rise to a claim for oppression** in this case- arrangement should have been contemplated by debenture-holders, best interests of co favored acceptance of offer

First Edmonton Place Ltd v 315888 Alberta Ltd: (P leased a building to co, sought oppression remedy for unknown reasons- related to payment of rent?) No remedy granted.

- Just and equitable test: creditor = approp person where directors have committed fraud, or directors' conduct has breached P's **reasonable expectations** (sounds like derivative action?)
- not a breach in this case, since tenant did not owe rent at the time/landlord not technically creditor

Ferguson v Imax Systems Corp: (Co tried to squeeze out ex-wife SH by limiting the shares and refusing to pay dividends beyond required) SH was unfairly treated, oppression remedy applies.

- When dealing w/ a close corp, court may consider relationship btwn SHs and not simply legal rights
- **Oppression remedy should be interpreted broadly to protect min SHs; focus is on fairness**

Compliance and Restraining Orders = personal remedies
s.19(3): co constit = binding K btwn co and SHs, can argue that SHs have general contractual rights to ensure that co follows constit/articles
228: standing to SHs or approp persons to force directors to comply w/ Act, stop non-compliance, or order compensation for restricted acts → expansion of s.19, used for general housekeeping
229: remedying corp mistakes (retroactive)- court may order for an omission or error to be corrected → "negligent articling student provision"

Appraisal Remedy (Dissent Proceedings) = personal remedy (ss.237-247)

- Dissenting SHs able to sell shares back to co at appraised price, premised on a sig change in co's nature
- Alt for public cos to sell stock on available market

s.238(1): SH entitled to dissent to **fundamental changes:**

- alteration of articles to alter restrictions on co powers (s.33)
- amalgamations and arrangements
- sale of the undertaking (s.301)
- continuation in another prov (s.309)
- any other situation that the court permits

ss.240-245: **procedural aspects/timelines**- notice of resolution, right to vote/dissent, must send notice of dissent, must dissent with all shares, notice of intent to proceed, payout value of shares to be negotiated

Share valuation:

- **market value approach**- for public cos
- **assets value approach**- take co's undertaking and divide by shares
- **earnings/investment value approach**- look at anticipated future earnings and extrapolate, discount to present value

s.246: SH loses right to dissent: if co abandons resolution, resolution fails, or SH votes in favour of resolution
s.244(6): suggests that **appraisal = exclusive remedy**; you are estopped from seeking other remedies

Winding Up (s.324) = equitable remedy, most drastic form of SH relief

- **court can liquidate and dissolve co- if just and equitable**/applicant = approp person
- Factors to consider: reasonableness of lack of confidence in management, lack of fairness and good faith by directors (somewhere btwn oppression and fraud), business judgment rule
- Remedy has been granted in the following circumstances:
  - **Loss of substratum**- complete failure of corp objects, inability to carry on business as originally contemplated
  - **Justifiable loss of confidence**- serious misbehavior of management (i.e. fraud, deliberate violations of corp policy) after which management cannot be truted
  - **Deadlock**- disagreement and deadlock making it impossible for co to function
  - **Partnership analogy**- co is a guise for a partnership, where partners disagree fundamentally on how business should operate
- Defences = laches, unclean hands